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## **Bien Venue: SEC v. Johnson and the Policy for Broad Procedural Requirements in Public Securities Actions**

### **Cover Page Footnote**

J.D. Candidate, May 2013, The Catholic University of America, Columbus School of Law; B.A., 2009, University of Maryland. The author wishes to thank Professor Megan La Belle for her exceptional guidance and unwavering support throughout the writing process and beyond. The author also wishes to thank her family, friends, Catholic University Law Review staff members, and the Salty Dog for all of their encouragement and assistance throughout law school and the publication of this pursuit of proper venue.

# BIEN VENUE: *SEC V. JOHNSON* AND THE POLICY FOR BROAD PROCEDURAL REQUIREMENTS IN PUBLIC SECURITIES ACTIONS

KELLY KYLIS<sup>+</sup>

A phone rings in Washington, D.C. The caller is a corporate representative, located in Los Angeles, California, requesting a business meeting in Dallas, Texas. The meeting takes place in Dallas, where individuals from the corporation's offices in Washington, D.C., California, Texas, Arizona, and Massachusetts offices gather to discuss the corporation's annual earnings report. One attendee returns to the D.C. office and files the annual report with the Securities and Exchange Commission (SEC). That report is fraudulent and, upon a government investigation, the SEC files a lawsuit. Where can all the co-conspirators be sued for their fraudulent actions?

In the modern global economy, business arrangements and transactions involve numerous individuals located in many different places.<sup>1</sup> Although globalization benefits businesses, it complicates legal disputes. For instance, if parties to a securities transaction jointly engage in fraud, but share no ties to any single jurisdiction, where should a plaintiff bring suit against them? Judicial efficiency calls for one lawsuit against all potential defendants,<sup>2</sup> but the requirements for establishing venue against multiple defendants are fairly strict under the general federal venue statute.<sup>3</sup> Courts have interpreted section 27 of the Securities Exchange Act of 1934 (Exchange Act) to allow for an act by one defendant in a securities fraud scheme to establish venue against all defendants.<sup>4</sup> Both private plaintiffs and the SEC have used this interpretation

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1. See 5 ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG & LOWENFELS ON SECURITIES FRAUD AND COMMODITIES FRAUD, § 10:18 (2d ed. 2012) (noting that securities transactions frequently involve individuals located in many places).

2. *Sec. Inv. Prot. Corp. v. Vigman*, 764 F.2d 1309, 1318 (9th Cir. 1985) (stating that an inconvenience to one defendant is less prejudicial than litigating the same cases several times).

3. 28 U.S.C.A. § 1391 (West 2009 & Supp. 2012); see also BROMBERG & LOWENFELS, *supra* note 1, § 10:18 (recognizing that the general venue statute's requirements are increasingly burdensome in the modern world of globalized corporate transactions).

4. Securities Exchange Act of 1934, 15 U.S.C. § 78aa (2006 & Supp. IV 2010). A discussion of the concern among scholars and practitioners about whom to sue for violations of the securities laws is beyond the scope of this Note. For more information, see *10b-5 Claim for Securities Fraud: Whom to Sue?*, WALL ST. L. BLOG (July 17, 2011),

of section 27, known as the “co-conspirator theory of venue,” in civil securities enforcement actions.<sup>5</sup>

Venue is the geographic location in which a case should be heard based on the rules of convenience for the parties.<sup>6</sup> In securities fraud cases, venue is proper (1) in any jurisdiction where an “act or transaction constituting the violation occurred;” or (2) where the defendant resides or does business.<sup>7</sup> Only one act in a jurisdiction by a defendant is sufficient to establish venue under the securities laws.<sup>8</sup> Under the co-conspirator theory of venue, in a suit involving multiple defendants, an act by one defendant in a jurisdiction will deem that jurisdiction as a proper venue as to all other co-defendants who participated in the fraudulent scheme.<sup>9</sup> In effect, the co-conspirator theory of venue provides plaintiffs with great latitude to choose venue.<sup>10</sup>

In *SEC v. Johnson*, the SEC filed a civil enforcement action under section 10(b) and rule 10b-5 of the Exchange Act against six participants in an alleged securities fraud scheme in Washington, D.C.<sup>11</sup> One defendant, Christopher Benyo, argued that venue was improper as to him because he did not engage in any actions in Washington, D.C.<sup>12</sup> The United States District Court for the District of Columbia held that venue was proper under the co-conspirator

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<http://wallstreetlaw.typepad.com/sherman/2011/07/in-the-landmark-central-bank-of-denver-case-the-us-supreme-court-ruled-that-there-is-no-private-right-of-action-available-ag.html>.

5. See, e.g., *Vigman*, 764 F.2d at 1317–18 (citing *Stewart v. Fry*, 575 F. Supp. 753, 755 (E.D. Mo. 1983)); *DeMoss v. First Artists Prod. Co. Ltd.*, 571 F. Supp. 409, 411–12 (N.D. Ohio 1983); *Hill v. Turner*, 492 F. Supp. 61, 62–64 (M.D. Pa. 1980); *SEC v. Diversified Indus., Inc.*, 465 F. Supp. 104, 111 (D.D.C. 1979); *Warren v. Bokum Res. Corp.*, 433 F. Supp. 1360, 1363–65 (D.N.M. 1977); *Bertozzi v. King Louie Int’l, Inc.*, 420 F. Supp. 1166, 1169–71 (D.R.I. 1976); *Arpet, Ltd. v. Homas*, 390 F. Supp. 908, 911–12 (W.D. Pa. 1975); *SEC v. Nat’l Student Mktg. Corp.*, 360 F. Supp. 284, 291–94 (D.D.C. 1973).

6. 28 U.S.C.A. § 1391; see also CHARLES ALAN WRIGHT, *et al.*, FED. PRAC. & PROC. JURISDICTION § 3801 (3d ed. 2011) (“‘Venue’ refers to locality, the place where a lawsuit should be heard according to the applicable statutes or rules.” (footnote omitted)).

7. 15 U.S.C. § 78aa (2010) (Supp. IV 2010).

8. See *RMS Titanic, Inc. v. Geller*, No. 3199CV2401 (JCH), 2000 WL 306997, at \*3 (D. Conn. Jan. 10, 2000) (citing *Wharton v. Roth*, 263 F. Supp. 922, 923 (E.D.N.Y. 1964) (“A single act or transaction is sufficient to render venue appropriate.”)).

9. *Diversified Indus., Inc.*, 465 F. Supp. at 111 (“The co-conspirator venue theory, in essence, provides: ‘any allegation of a securities act violation is sufficient for venue purposes even as to a defendant who did not commit an act within the district if that defendant is in league with a defendant who did act within the district.’” (quoting *Levin v. Great W. Sugar Co.*, 274 F. Supp. 974, 978 (D.N.J. 1967))).

10. See *Ravenwoods Inv. Co., v. Bishop Capital Corp.*, No. 04CV926GKMK, 2005 WL 236440, at \*8 (S.D.N.Y. Feb. 1, 2005) (citing *In re AES Corp. Sec. Lit.*, 240 F. Supp. 2d 557, 559–62 (E.D. Va. 2003)); see also 6 THOMAS LEE HAZEN, *TREATISE ON THE LAW OF SECURITIES REGULATION*, § 17.3 at 395–96 (6th ed. 2009) (discussing the broad venue provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934).

11. 650 F.3d 710, 712–13 (D.C. Cir. 2011), *cert. denied*, 131 S. Ct. 956 (2011).

12. *Id.* at 713.

theory of venue.<sup>13</sup> On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the co-conspirator theory was inapplicable and venue was improper as to Benyo.<sup>14</sup>

This Note argues that the D.C. Circuit erred when it rejected the co-conspirator theory of venue. Part I of this Note discusses venue in federal courts and the special venue provision of the Exchange Act. By analyzing the language and purpose of the Exchange Act, this Note shows that the co-conspirator theory of venue, as used by the SEC in public enforcement actions, is consistent with the language and spirit of securities law. Next, this Note discusses the prior case law upholding the co-conspirator theory of venue and illustrates how the D.C. Circuit Court erred in *SEC v. Johnson*. Finally, this Note concludes by suggesting a congressional amendment to the Exchange Act to include the co-conspirator theory of venue.

## I. VENUE: THE RULES OF CONVENIENCE

### A. *Venue in Federal Courts, Generally*

At common law, venue was controlled by the doctrine of *forum non conveniens*, which allowed a court to decline to hear a case, even if it had legal authority to hear it, when the interests of justice were better served by allowing another forum to hear the case.<sup>15</sup> The U.S. Supreme Court has outlined several factors to help courts determine whether the interests of justice weigh in favor of hearing the case in that venue, including access to sources of proof, availability and cost of compulsory process for witnesses, possibility of view of premises, easy, expeditious and inexpensive trial, and public interest.<sup>16</sup>

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13. *SEC v. Johnson*, 565 F. Supp. 2d 82, 93 (D.D.C. 2008) (reasoning that the defendant “aided and abetted a scheme, a material part of which occurred in the District of Columbia”), *rev’d*, 650 F.3d 710 (D.C. Cir. 2011), *cert. denied*, 131 S. Ct. 956 (2011).

14. *Johnson*, 650 F.3d at 715–16 (finding that the “SEC failed to lay venue in the District of Columbia”).

15. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (noting that “the principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute”), *superseded by statute*, Pub. L. 104-317, 28 U.S.C. § 1404(a) (2006), *as recognized in* *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994); *see also* Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909 (1947) (discussing the origins of the doctrine of *forum non conveniens*, which is believed to have come to the United States from Scotland).

16. *Gilbert*, 330 U.S. at 508 (“It is often said that the plaintiff may not, by choice of an inconvenient forum, ‘vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”). Later cases have referred to this balancing test as the “Gilbert Analysis.” *See, e.g., Piper Aircraft v. Reyno*, 454 U.S. 235, 244 (1981); *see also* Braucher, *supra* note 15, at 930 (noting that “the principal characteristic of [the doctrine of *forum non conveniens*] is its absurd complexity”). The complexity of this doctrine led Congress to enact 28 U.S.C. § 1404, which provides for a venue transfer for the convenience of the parties and witnesses. *See* David E. Steinberg, *The Motion to*

Given the difficulty in balancing these factors, Congress defined venue for federal courts in 28 U.S.C. § 1391.<sup>17</sup> Section 1391(b) states that:

A civil action may be brought in—(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.<sup>18</sup>

Although venue is proper anywhere personal jurisdiction exists, venue is distinct from personal jurisdiction<sup>19</sup> and determined after personal jurisdiction has been established.<sup>20</sup> However, similar to personal jurisdiction, a defendant may waive venue by not objecting to it at the outset of litigation.<sup>21</sup>

A defendant has recourse if the plaintiff's choice of forum is unduly burdensome.<sup>22</sup> Defendants may either challenge venue as improper, under 28 U.S.C. § 1406,<sup>23</sup> or inconvenient, under 28 U.S.C. § 1404(a).<sup>24</sup> If venue is

*Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 450–52 (1990) (discussing the development of § 1404).

17. 28 U.S.C.A. § 1391 (West 2009 & Supp. 2012).

18. 28 U.S.C.A. § 1391(b).

19. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979) (citing WRIGHT, *supra* note 6, at § 3801) (defining personal jurisdiction as “the court’s power to exercise control over the parties”); *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005) (citing *United States ex rel. Rudick v. Laird*, 412 F.2d 16, 20 (2d Cir. 1969)) (“The concepts of personal jurisdiction and venue are closely related but nonetheless distinct.”); E. Lawrence Vincent, *Defining ‘Doing Business’ to Determine Corporate Venue*, 65 TEX. L. REV. 153, 154 (1986) (discussing the different functions served by venue and personal jurisdiction).

20. *Leroy*, 443 U.S. at 180 (noting that personal jurisdiction is generally decided before venue).

21. *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960) (acknowledging that venue is waived if an objection is not raised); *Panhandle E. Pipe Line Co. v. Fed. Power Comm’n*, 324 U.S. 635, 639 (1945) (asserting that “venue may be lost unless seasonably asserted”).

22. 28 U.S.C.A. § 1404(a) (West 2009 & Supp. 2012); 28 U.S.C. § 1406 (2006). In *Leroy*, the U.S. Supreme Court indicated that the venue statute provided protection to the defendant in addition to the protection provided by the personal jurisdiction doctrine. *Leroy*, 443 U.S. at 183–84; see Mitchell G. Page, *After the Judicial Improvements Act of 1990: Does the General Federal Venue Statute Survive as a Protection for Defendants?*, 74 U. COLO. L. REV. 1153, 1161 (2003) (discussing venue as an additional protection for defendants); see also WRIGHT, *supra* note 6, § 3801 (“[T]he laws relating to venue give added protection to defendants beyond those that are provided by the statutory and constitutional prerequisites of personal jurisdiction.”).

23. 28 U.S.C. § 1406(a) (stating that a court cannot hear a case if venue is improper and must either dismiss it or transfer it to a proper forum).

24. 28 U.S.C.A. § 1404(a) (giving courts latitude to transfer a case “in the interest of justice”).

improper under §1406, a judge must either dismiss or transfer the case to a proper forum.<sup>25</sup> By contrast, challenging venue under §1404 provides the defendant the option to seek a transfer for the convenience of the parties or witnesses, which the court has discretion to grant.<sup>26</sup> Because a plaintiff's choice of venue is given substantial weight, a defendant who objects to venue on the basis of convenience bears the difficult burden of showing that the interests of convenience and justice substantially outweigh the plaintiff's choice of venue.<sup>27</sup>

In addition to the general federal venue statute, Congress has enacted "special" venue provisions that are applied in particular cases.<sup>28</sup> Specific provisions in the Securities Act of 1933 (Securities Act) and the Exchange Act govern venue for disputes arising under the securities laws.<sup>29</sup> These provisions are considered "other law" under 28 U.S.C. § 1391, and therefore these provisions, not the §1391 general venue statute, govern venue for all cases brought under the securities laws.<sup>30</sup>

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25. 28 U.S.C. § 1406(a) (requiring dismissal or transfer for improper venue).

26. 28 U.S.C.A. § 1404(a) (providing that a court *may* transfer an action to another forum).

27. 28 U.S.C.A. § 1404(a); *see Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (discussing the balancing test that is used to decide whether a case should be transferred for the convenience of the parties and witnesses). To determine whether to transfer for forum non conveniens, the court weighs factors such as: availability of proof, compulsory process and jury view of the premises, practical problems of inexpensive and expeditious trial, public interest considerations, and the interest of the plaintiff in his choice of forum. *Id.*; *see also* David E. Pearson, *Transfer of Venue Under 28 U.S.C. § 1404(a): All Things to All People, or, Cracking Under the Weight of the Forum Selection Clause*, 75 TEMP. L. REV. 925, 952 (2002) (discussing the difficulty in achieving a transfer under § 1404(a) and its similarity to the forum non conveniens analysis); Steinberg, *supra* note 16, at 509 (discussing the development of the motion to transfer venue, concluding that the law "is in chaos" and that, although "Congress intended section 1404 to promote convenient and efficient litigation, the current multifactor balancing approach insures that transfer litigation will be neither quick nor inexpensive").

28. *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957) (declining to apply the general venue statute to a patent infringement case because a special venue provision was applicable); *Zorn v. Anderson*, 263 F. Supp. 745, 747 (S.D.N.Y. 1966) (applying the specific venue provision, 15 U.S.C. § 78aa, to a securities law case). A special venue provision also exists for litigation under antitrust laws. PHILIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROCEDURAL LAW* 201 (1983).

29. Securities Act of 1933, 15 U.S.C. § 77v (Supp. IV 2010); Securities Exchange Act of 1934, 15 U.S.C. § 78aa (Supp. IV 2010).

30. 28 U.S.C.A. § 1391 (West 2009 & Supp. 2012) (providing that "except otherwise provided by law" the venue provision of §1391 applies to federal cases) (emphasis added); *see Rhett Traband, The Case Against Applying the Co-Conspiracy Venue Theory in Private Securities Actions*, 52 RUTGERS L. REV. 227, 231–32 (1999) (citing *Zorn*, 263 F. Supp. at 747) (noting the difference between the general and specific venue statutes in the United States Code and discussing the application of the specific venue statutes in the Securities Act and the Exchange Act).

### B. *The Special Venue Provisions Under the Securities Acts*

The Securities Act and the Exchange Act's special venue provisions provide plaintiffs with a broad choice of forum in securities fraud actions.<sup>31</sup> However, when plaintiffs bring an action under both the Securities Act and the Exchange Act, the venue provision of the Exchange Act will apply to the whole action.<sup>32</sup>

#### 1. *The Securities Act and the Exchange Act*

In order to fully analyze secondary liability under the special venue provisions, it is important to first understand the intended purpose of both the Securities Act and the Exchange Act. Under the Securities Act,<sup>33</sup> any company wishing to issue securities must register with the SEC and disclose "material facts" that a reasonable investor would want to know, such as financial information about the company.<sup>34</sup> If a company fails to adhere to these requirements, it may be subject to criminal prosecution initiated by the Department of Justice (DOJ) or a civil enforcement action by the SEC.<sup>35</sup>

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31. 15 U.S.C. §§ 77v, 78aa; *see* *Ravenwoods Inv. Co. v. Bishop Capital Corp.*, No. 04CV9266KMK, 2005 WL 236440, at \*8 (S.D.N.Y. Feb. 1, 2005) (noting that 15 U.S.C. § 78aa "afford[s] broad venue options to securities fraud plaintiffs").

32. The venue provision of the Exchange Act is broader than the venue provision of the Securities Act. *See* *Allen v. Byrne*, No. 3:07-cv-060109, 2008 WL 763066, at \*3 (N.D. Tex. 2008) (citing *Hilgeman v. Nat'l Ins. Co. of Am.*, 547 F.2d 298, 301 n.7 (5th Cir. 1977)); *Ingram Indus., Inc. v. Nowicki*, 527 F. Supp. 683, 687 (E.D. Ky. 1981).

33. Congress enacted the Securities Act in the wake of the stock market crash of 1929 to accomplish two primary goals: (1) require public disclosure and (2) prohibit fraud in the sale of securities. *See The Laws that Govern the Securities Industry*, SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/about/laws.shtml> (last modified Aug. 30, 2012); *see also* *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (citing H.R. REP. NO. 73-85, at 1-5 (1933)) ("The Securities Act of 1933 . . . was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and . . . promote ethical standards of honesty and fair dealing.").

34. 15 U.S.C. § 77q provides that:

It shall be unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly (1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q (2006); *see also* THOMAS LEE HAZEN, *FEDERAL SECURITIES LAW* 35-36 (2d 2003) ("Rule 405 defines 'material' as 'matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.'").

35. HAZEN, *supra* note 34, at 11 (stating that violations of the law are subject to both civil and criminal consequences).



The Exchange Act established the SEC and governs trading securities in secondary markets.<sup>36</sup> The SEC is authorized to bring both administrative and civil enforcement actions against corporations.<sup>37</sup> Among other things, the SEC enforces section 10(b) of the Exchange Act, known as the general anti-fraud provision, which prohibits manipulative or deceptive practices in securities transactions.<sup>38</sup>

## 2. Secondary Liability and Central Bank of Denver

Although the Securities Act and the Exchange Act do not expressly include liability for secondary acts, courts previously had found secondary liability for persons who indirectly assist in the commission of securities fraud in all cases.<sup>39</sup> Despite the overwhelming acceptance of a private cause of action for aiding and abetting securities fraud by federal courts,<sup>40</sup> in *Central Bank of Denver v. First Interstate Bank of Denver*, the Supreme Court rejected such secondary liability under section 10(b).<sup>41</sup> In *Central Bank of Denver*,

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36. The Securities Act of 1933, 25 U.S.C. §§ 77 et seq. See also HAZEN, *supra* note 34, at 3 (“The 1934 Act regulates all aspects of public trading of securities.”); see also *The Investor’s Advocate: How the S.E.C. Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://www.sec.gov/about/whatwedo.shtml#create> (last modified Nov. 12, 2012) [hereinafter *The Investor’s Advocate*] (“The Act empowers the SEC with broad authority over all aspects of the securities industry. This includes the power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation’s securities self regulatory organizations (SROs).”). The SEC is an independent agency, and is often considered “a true superagency” because it “exercises most administrative powers, with one exception: It cannot adjudicate disputes between private parties.” HAZEN, *supra* note 34, at 3. The SEC was formed to “protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.” *The Investor’s Advocate, supra*, at 1.

37. 15 U.S.C. §§ 77t, 78(u), 78u-2 (2006 & Supp. IV 2010); see SEC Enforcement Actions, 17 C.F.R. § 202.5 (2011); see also HAZEN, *supra* note 34, at 17 (“The SEC has direct prosecutorial authority to enforce the 1934 Act in court with civil suits for injunctions and ancillary relief against alleged violators. Should a criminal violation exist, the SEC Division of Enforcement refers it to the Department of Justice for criminal prosecution.”).

38. 15 U.S.C. § 78(j)(b) (2006); Barbara J. Finnegan, *To Catch a Thief: The Misappropriation Theory and Securities Fraud*, 70 MARQ. L. REV. 692, 695 (1987) (noting that 10(b) is “a general fraud provision” that has provided the SEC with “general regulatory powers over securities transactions”).

39. See David J. Baum, *The Aftermath of Central Bank of Denver: Private Aiding and Abetting Liability Under Section 10(b) and Rule 10b-5*, 44 AM. U. L. REV. 1817, 1819–20 (1995). *Brennan v. Midwestern United Life Insurance Co.* was the first time a court held, using the common law of torts, that a defendant was liable for aiding and abetting under section 10(b); see also *Brennan v. Midwestern United Life Ins. Co.*, 259 F. Supp. 673, 681–81 (N.D. Ind. 1966), *aff’d*, 417 F.2d 147 (7th Cir. 1969); Carrie E. Goodwin, *Central Bank v. First Interstate Bank: Not Just the End of Aiding and Abetting Under Section 10(b)*, 52 WASH. & LEE L. REV. 1387, 1393–94 (1995) (discussing the evolution of aiding and abetting liability in securities fraud cases).

40. Goodwin, *supra* note 39, at 1395.

41. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 192 (1994), *superseded by statute*, Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat.

bondholders sued Central Bank, the trustee for the bonds, for aiding and abetting fraud after the bond issuer defaulted on the bonds.<sup>42</sup> The Supreme Court held that because the securities statute did not expressly provide for secondary liability, nor prohibit aiding and abetting, the plaintiffs could not maintain their action against Central Bank.<sup>43</sup>

*Central Bank of Denver's* limitation could have been far-reaching.<sup>44</sup> In order to avoid such a result, Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA), which, among other things, expanded the SEC's authority to include enforcement of aiding and abetting liability.<sup>45</sup>

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737 (codified as amended at 15 U.S.C. § 78t(e)), as recognized in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 522 U.S. 148, 162 (2008).

42. *Id.* at 167–68. The Court described the facts surrounding Central Bank's alleged participation in the fraud that gave rise to plaintiff's claim for aiding and abetting as:

In January 1988, [Central Bank was provided] with an updated appraisal of the land securing the 1986 bonds and of the land proposed to secure the 1988 bonds . . . . Soon afterwards, Central Bank received a letter from the senior underwriter for the 1986 bonds. Noting that property values were declining . . . the underwriter expressed concern . . . . [Central Bank's] in-house appraiser decided that the values listed in the appraisal appeared optimistic . . . . [and he] suggested that Central Bank retain an outside appraiser to conduct an independent review of the 1988 appraisal . . . . Central Bank agreed to delay independent review of the appraisal until the end of the year, six months after the June 1988 closing on the bond issue. Before the independent review was complete, however, the [bond issuer] defaulted on the 1988 bonds.

*Id.*

43. *Id.* at 191–92 (“Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).”). However, the Court permitted liability for secondary actors if the elements to establish primary liability were met. *Id.* Thus, the Supreme Court's decision in *Central Bank of Denver* left unanswered the question of whether to apply primary liability to secondary actors in securities fraud cases. See Andrew S. Gold, *Reassessing the Scope of Conduct Prohibited by Section 10(b) and the Elements of Rule 10b-5: Reflection on Securities Fraud and Secondary Actors*, 53 CATH. U. L. REV. 667, 668–70 (2004) (discussing the various tests applied by lower courts and the SEC to avoid *Central Bank of Denver's* holding).

44. Baum, *supra* note 39, at 1838 (noting that the *Central Bank of Denver* decision “eliminated a powerful weapon” to reach individuals like lawyers and accountants who were not directly involved in the securities fraud, but provided some degree of assistance).

45. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, § 104 (1995) (codified at 15 U.S.C. § 78t(e)). Several members of Congress have also argued, to no avail, for a private cause of action for aiding and abetting. See 155 CONG. REC. 8,564 (2009) (declining to provide for a private action for aiding and abetting securities fraud); Jim Hamilton, *Specter Amendment Having Last Hurrah*, JIM HAMILTON'S WORLD OF SECURITIES REGULATION (June 22, 2010), <http://jimhamiltonblog.blogspot.com/2010/06/specter-amendment-having-last-hurrah.html> (discussing the proposed amendment to include a private right of action for aiding and abetting, introduced by Senator Specter); see also GAO, *Securities Fraud Liability of Secondary Actors*, GAO-11-664, at 3–6, 30–46 (2011) [hereinafter *Securities Fraud Liability*] (reporting on the state of securities litigation involving secondary actors and discussing the arguments for and against imposing a private cause of action for secondary liability); Melissa C. Nunziato, *Aiding and Abetting, a Madoff Family Affair: Why Secondary Actors Should Be Held Accountable for Securities Fraud Through the Restoration of the Private Right of Action for Aiding and Abetting Liability Under the Federal Securities Laws*, 73 ALB. L. REV. 603, 605 (2010) (using the Bernie

### 3. *Venue Provisions Under the Securities Laws*

Section 22(a) of the Securities Act (15 U.S.C. § 77v) and section 27 of the Exchange Act (15 U.S.C. § 78aa) provide that venue is proper (1) in the district where any act or transaction constituting a violation occurred; or (2) in the district where the defendant is found, is an inhabitant, or transacts business.<sup>46</sup> These venue provisions provide plaintiffs broad choice and “home field advantage,” thus fulfilling the statutory purpose of the securities acts.<sup>47</sup> The language of the venue provision of the Exchange Act is “manifestly broad,” and therefore courts have “[a]ppropriately . . . construed the provision broadly, holding that the ‘venue-sustaining act need not constitute the core of the alleged violation, nor even be illegal, so long as it represents more than an immaterial part of the alleged violations.’”<sup>48</sup> One common example of an act that is sufficient to satisfy venue requirements is the filing of misleading or fraudulent documents.<sup>49</sup> Courts have stated that, as a matter of law, venue is proper in Washington, D.C., when fraudulent documents are filed with the

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Madoff Ponzi scheme to argue that Congress should pass legislation allowing a private right of action for secondary liability). Note, however, that the DOJ has authority to bring a criminal action against aiders and abettors. 18 U.S.C. § 2(a) (2006). Additionally, states can, and have, enacted their own securities statutes to include private liability for aiding and abetting liability. See *Securities Litigation Uniform Standards Act of 1997: Hearing on S. 1260 Before the Subcomm. On Securities, S. Comm. On Banking, Housing, and Urban Affairs*, 105th Cong. 47 (1997) (prepared statement of Arthur Levitt, Jr., Chairman, & Isaac C. Hunt, Jr., Commissioner, U.S. Securities and Exchange Commission); *Securities Fraud Liability, supra*, at 3 (“[M]any states’ ‘blue sky laws’ impose express private liability for secondary actors.”). Further, some scholars argue that regulation by the states is a more efficient and successful way to protect investors from securities fraud. See ROBERTA ROMANO, *THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION* 43 (2002).

46. Securities Act of 1933, 15 U.S.C. § 77v (Supp. IV 2010); Securities Exchange Act of 1934, 15 U.S.C. § 78aa (Supp. IV 2010).

47. See *Clapp v. Stearns & Co.*, 229 F. Supp. 305, 307 (S.D.N.Y. 1964) (stating that the Exchange Act includes a “policy to provide a forum for suits involving multi-state frauds, no matter how many states the defendants are citizens”). Opponents of the co-conspirator theory argue that the “home field advantage” is unwarranted, and that the theory makes securities laws too “plaintiff-friendly.” See Traband, *supra* note 30, at 228 (arguing that “[t]he co-conspiracy venue theory prejudices defendants, because it: (a) bases a decision on venue on the pleadings and affidavits which must be construed in a plaintiff’s favor and improperly advances discovery at an early stage in the case; (b) eliminates the foreseeability and knowledge components of venue and creates an inability to predict where suit can be brought; (c) generally affects ancillary defendants; and (d) enables individual plaintiffs to sue under favorable state securities laws”).

48. *In re AES Corp. Sec. Litig.*, 240 F. Supp. 2d 557, 559 (E.D. Va. 2003) (quoting *S-G Sec., Inc. v. Funqua Inv. Co.*, 466 F. Supp. 1114, 1121 (D. Mass. 1978)).

49. See *e.g.*, *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1154 (D.C. Cir. 1978) (stating that the defendant must concede that venue is proper because the case is governed by §78aa); *RMS Titanic, Inc. v. Geller*, No. 3199CV2401 (JCH), 2000 WL 306997, at \*4 (D. Conn. Jan. 10, 2000) (stating that the act establishing venue “need not be illegal so long as it is material”); *Bolton v. Gramlich*, 540 F. Supp. 822, 842 (S.D.N.Y. 1982) (citing *Hilgeman v. Nat’l Ins. Co.*, 547 F.2d 298, 301 (5th Cir. 1977)); *Ingram Indust., Inc. v. Nowicki*, 527 F. Supp. 683, 689 (E.D. Ky. 1981).

SEC because the filing constitutes an act sufficient to establish venue in the District.<sup>50</sup>

*C. Co-Conspirator Theory of Venue: Bringing Down All Scheming Defendants Together*

The co-conspirator theory of venue affords plaintiffs great latitude in choosing the forum for a lawsuit against all defendants.<sup>51</sup> For years, plaintiffs (including the SEC) have relied on the co-conspirator theory of venue to sue all parties in a securities fraud scheme in one forum.<sup>52</sup> The co-conspirator theory of venue provides that “[a]ny allegation of a securities act violation is sufficient for venue purposes even as to a defendant who did not commit an act within [a certain] district if that defendant is in league with a defendant who did act within [that] . . . district.”<sup>53</sup> However, the co-conspirator venue theory requires an action by at least one defendant that is sufficient to establish venue in order to extend venue to the co-conspirators.<sup>54</sup>

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50. See *John Nuveen & Co. v. N.Y.C. Hous. Dev. Corp.*, Nos. 86C2583, 86C2817, 1986 WL 5780, at \*3 (N.D. Ill. May 9, 1986) (“Venue will be sustained in a securities case where a defendant causes false or misleading information to be transmitted into a judicial district, even if the defendant never has been physically present in that district.” (quoting *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 197 (E.D. Pa. 1974)); see also *Savoy Indus., Inc.*, 587 F.2d at 1154; *In re AES Corp. Sec. Litig.*, 240 F. Supp. 2d at 559 (stating that “the case law uniformly supports the proposition that the alleged transmission of the misleading materials into the district is a venue-sustaining act under § 78aa”).

51. See *Traband*, *supra* note 30, at 266–67 (“Because the co-conspiracy venue theory permits plaintiffs to choose from a much broader choice of venue, it enables plaintiffs to pick and choose which state’s securities law claims they wish to pursue. The co-conspiracy venue theory thus greatly enhances forum shopping.”). This is in-line with the generally broad language of the venue provisions governing securities law, which are preferential to the plaintiff’s choice of venue. See Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 271 (1995) (providing examples of factors that aid a plaintiff in choosing venue).

52. See *HAZEN*, *supra* note 10, at 396–97 (“In multi-defendant and multi-forum securities fraud actions . . . any act committed, material to and in furtherance of an alleged fraudulent scheme by any defendant, will satisfy the 1934 Act venue requirement as to all defendants.”).

53. *SEC v. Diversified Indus., Inc.*, 465 F. Supp. 104, 111 (D.D.C. 1979) (quoting *Levin v. Great W. Sugar Co.*, 274 F. Supp. 974, 978 (D.N.J. 1967)).

54. See *FS Photo, Inc. v. PictureVision, Inc.*, 48 F. Supp. 2d 442, 446 (D. Del. 1999) (citing *Southmark Prime Plus, L.P. v. Falzone*, 768 F. Supp. 487, 489 (D. Del. 1991)) (stating that “the co-conspirator venue theory only applies where venue has been established over one conspirator by reason of an act or transaction performed in the district by that conspirator in furtherance of the conspiracy,” and, therefore, holding that venue in Delaware was improper when it could not be established that any defendant committed an act in Delaware).

### 1. *Acceptance of the Co-Conspirator Theory Across Jurisdictions*

The earliest courts to apply the co-conspirator theory were federal district courts in Delaware, New York, and New Jersey.<sup>55</sup> In 1955, a federal district court in New York held that venue was proper in New York for a non-New Yorker based on his participation in the securities fraud scheme, even though he had never visited New York.<sup>56</sup> Likewise, in 1980, a federal district court in Pennsylvania explicitly adopted the theory, noting that it was “widely accepted” and consistent with the language of § 78aa.<sup>57</sup> By the early 1980s, it became clear that courts around the country had embraced the theory in securities fraud cases.<sup>58</sup>

Currently, the U.S. Courts of Appeals for the Second, Fifth, Seventh, Ninth, and Tenth Circuits, as well as federal district courts around the country, endorse the co-conspirator theory of venue.<sup>59</sup> These courts recognize that the theory accomplishes the purpose of the securities laws and the broad purpose of venue generally.<sup>60</sup> The D.C. Circuit in *Johnson* became the first court to

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55. *Thiele v. Shields*, 131 F. Supp. 416, 429 n.5 (S.D.N.Y. 1955) (discussing the development of the co-conspirator theory of venue); *Traband*, *supra* note 30, at 243–44 (citing *Dauphin Corp. v. Redwall Corp.*, 201 F. Supp. 466, 469–70 (D. Del. 1962) and *Townsend Corp. of America v. Davidson*, 222 F. Supp. 1, 2–3 (D.N.J. 1963) as two of the earliest cases to apply the co-conspirator theory in securities actions).

56. *Thiele*, 131 F. Supp. at 420 n.4 (holding that “[a]part from the conspiracy allegation, his actions would not be sufficient”).

57. *Hill v. Turner*, 492 F. Supp. 61, 63–64 (M.D. Pa. 1980) (citing *Hilgeman v. Nat’l Ins. Co. of Am.*, 547 F.2d 298, 302 (5th Cir. 1977)) (adopting the co-conspirator theory of venue because “the ‘co-conspiracy’ theory of extended venue is widely accepted . . . [and because] the principle coincides well with the language and judicial interpretation of [section 78aa]”); *see also* *Sargent v. Genesco, Inc.*, 492 F.2d 750, 758–59 (5th Cir. 1974); *Wyndham Assocs. v. Bintliff*, 398 F.2d 614, 620 (2d Cir. 1968); *Texas Gulf Sulphur Co. v. Ritter*, 371 F.2d 145, 148 (10th Cir. 1967).

58. *See, e.g.*, *Sec. Inv. Prot. Corp. v. Vigman*, 764 F.2d 1309, 1317–18 (9th Cir. 1985) (citing *Stewart v. Fry*, 575 F. Supp. 753, 755 (E.D. Mo. 1983)); *DeMoss v. First Artists Prod. Co.*, 571 F. Supp. 409, 411–12 (N.D. Ohio 1983); *Hill*, 492 F. Supp. at 63–64; *SEC v. Diversified Indus., Inc.*, 465 F. Supp. 104, 111 (D.D.C. 1979); *Warren v. Bokum Res. Corp.*, 433 F. Supp. 1360, 1364 (D.N.M. 1977); *Bertozzi v. King Louie Int’l, Inc.*, 420 F. Supp. 1116, 1170–71 (D.R.I. 1976); *Arpet v. Homas*, 390 F. Supp. 908, 911 (W.D. Pa. 1975); *SEC v. Nat’l Student Mktg. Corp.*, 360 F. Supp. 284, 291–92 (D.D.C. 1973); *Levin v. Great W. Sugar Co.*, 274 F. Supp. 974, 977–78 (D.N.J. 1967); *Zorn v. Anderson*, 263 F. Supp. 745, 748 (S.D.N.Y. 1966).

59. *See Vigman*, 764 F.2d at 1316–18; *Hilgeman*, 547 F.2d at 301–02; *Bath Indus., Inc. v. Bolt*, 427 F.2d 97, 114 (7th Cir. 1970); *Wyndham Assocs.*, 398 F.2d at 620. If these Circuits continue to apply the co-conspirator theory of venue, a circuit split may arise. *See* CAHILL, GORDON, REINDELL, LLP, *D.C. Circuit Rejects “Co-Conspirator Theory of Venue” in Securities Litigation* (July 5, 2011), [http://www.cahill.com/news/memoranda/1012913/\\_res/id=sa\\_File1/CGR%20Memo%20%20D.C.%20Circuit%20Rejects%20CoConspirator%20Theory%20of%20Venue%20In%20Securities%20Litigation.pdf](http://www.cahill.com/news/memoranda/1012913/_res/id=sa_File1/CGR%20Memo%20%20D.C.%20Circuit%20Rejects%20CoConspirator%20Theory%20of%20Venue%20In%20Securities%20Litigation.pdf).

60. *See, e.g.*, *Vigman*, 764 F.2d at 1316–18 (recognizing the “strong policy favoring the litigation of related claims in the same forum”); *In re Penn Cent. Sec. Litig.*, 338 F. Supp. 438, 440 (E.D. Pa. 1972) (stating that it may be impossible “to accomplish [the] purpose [of the

reject this theory of venue.<sup>61</sup>

2. *Prior Application of the Co-Conspirator Theory of Venue in Washington, D.C.*

The U.S. District Court for the District of Columbia, similar to other federal district courts, has a longstanding history of consistently applying the co-conspirator theory of venue in securities fraud cases.<sup>62</sup> For example, in *SEC v. National Student Marketing Corp.*, the D.C. district court noted that “it is well recognized that in multi-defendant and multi-forum securities fraud actions, any act committed material to and in furtherance of an alleged fraudulent scheme will satisfy the venue requirement of the Exchange Act as to all defendants wherever the defendants are found.”<sup>63</sup> Further, in *Jarmuth v. Turetsky*, the D.C. district court emphasized that securities fraud cases are the only type of cases to which a “conspiratorial theory of venue in civil cases” applies.<sup>64</sup> Despite the D.C. district court’s adjudication of many co-conspirator cases brought by the SEC, *Johnson* is the first time that the D.C. Circuit has addressed this issue.

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Exchange Act] if, when a complex scheme is alleged involving defendants from many states, venue for a particular district would have to be established as to each alleged participant in the illegal plan by proving that his illegal acts in furtherance of the fraud were committed in that district”).

61. The co-conspirator theory of venue has not applied only in those cases where the requirements for the use of the theory are not met. *See, e.g.*, *FS Photo, Inc. v. PictureVision, Inc.*, 48 F. Supp. 2d 442, 446 (D. Del. 1999) (holding that it was not established that any of the defendants performed an act or transaction in furtherance of the conspiracy alleged in Delaware; therefore, the co-conspirator theory did not apply).

62. *See, e.g.*, *Schreiber v. W.E. Hutton & Co.*, 382 F. Supp. 297, 299 (D.D.C. 1974) (applying the co-conspirator theory of venue in a securities fraud litigation); *SEC v. Nat’l Student Mktg. Corp.*, 360 F. Supp. 284, 292 (D.D.C. 1973) (acknowledging that the co-conspirator theory applies for securities fraud involving multi-defendants and several forums).

63. *Nat’l Student Mktg. Corp.*, 360 F. Supp. at 292.

64. 815 F. Supp. 4, 6 (D.D.C. 1993) (citing CHARLES ALAN WRIGHT, *supra* note 6, § 3807 (2d ed. 1986)) (“There seems to be general acceptance of this theory in civil cases involving securities laws . . .”). The co-conspirator theory of venue has been much more widely accepted in securities fraud cases than any other specialized venue provisions. Traband, *supra* note 30, at 250–51; *see HAZEN, supra* note 10, at 395–96 (discussing how the co-conspirator theory has been so widely accepted as in securities law). For example, after *Bankers Life & Casualty Co. v. Holland*, in which the Supreme Court rejected the use of the co-conspirator theory of venue in an antitrust case, multiple courts held that the co-conspirator theory is no longer accepted in antitrust cases. *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953); Traband, *supra* note 30, at 250 (citing *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 492 (9th Cir. 1979)); *see also In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 283–84 (4th Cir. 2007) (noting that antitrust plaintiffs have no “statutory right” to try all antitrust co-conspirators in the same district); *San Antonio Tel. Co. v. AT&T*, 499 F.2d 349, 351 n.3 (5th Cir. 1974); *H.L. Moore Drug Exch., Inc. v. Smith, Kline & French Labs*, 384 F.2d 97, 98 (2d Cir. 1967).

## II. SEC V. JOHNSON: THE LAST APPEARANCE OF THE CO-CONSPIRATOR THEORY OF VENUE UNDER § 78AA?

### A. Defendant Benyo's Venue Objection

In January 2005, the SEC filed a civil enforcement action against Christopher Benyo and six other defendants in the U.S. District Court for the District of Columbia.<sup>65</sup> Two of the defendants were America Online (AOL) executives and four, including Benyo, were employees of PurchasePro, a company that made software for online “business-to-business” sales.<sup>66</sup> The alleged scheme for which the SEC brought action was based on “sham transactions” executed by PurchasePro on a series of sales made for the purpose of inflating the company’s revenue.<sup>67</sup> To effectuate the scheme, AOL referred third-parties to purchase PurchasePro software licenses, but AOL and PurchasePro financed those third-party licenses in accordance with a side agreement.<sup>68</sup> This undisclosed side agreement made each transaction appear to generate revenue for PurchasePro.<sup>69</sup> The SEC filed an enforcement action for violations under section 10(b) of the Exchange Act, including a count of aiding and abetting securities fraud against Benyo.<sup>70</sup>

Benyo, a resident of Nevada, argued that venue was improper in Washington, D.C., because he did not engage in any actions in the District to establish venue there.<sup>71</sup> The district court agreed with the SEC’s application of the co-conspirator theory of venue and held that venue was proper as to Benyo.<sup>72</sup> The district court subsequently found Benyo liable for aiding and abetting securities fraud.<sup>73</sup> Benyo appealed to the D.C. Circuit, arguing that

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65. SEC v. Johnson, 565 F. Supp. 2d 82, 84 (D.D.C. 2008), *rev’d*, 650 F.3d 710, 713 (D.C. Cir. 2011), *cert. denied*, 131 S. Ct. 956 (2011). The SEC brought the action on the same day that the Department of Justice filed a criminal action in the Eastern District of Virginia against the same defendants for the same securities fraud. *Johnson*, 650 F.3d at 713. Defendant Benyo was acquitted of the charges against him in the criminal action. *Id.*

66. *Johnson*, 565 F. Supp. 2d at 84.

67. *Johnson*, 650 F.3d at 712.

68. *Id.* (revealing that PurchasePro did not report these side agreements resulting in inflated revenue for PurchasePro).

69. *Id.* (noting that these “sham transactions” appeared “on paper to generate a substantial amount of revenue for PurchasePro”). When the fraud was uncovered by PurchasePro auditors and attorneys, PurchasePro excluded the fraudulent revenue from its SEC report and reported only \$16 million in revenue, about half of the \$30 million in revenue it had publicly reported just a month earlier. *Id.*

70. *Johnson*, 565 F. Supp. 2d at 84–85.

71. *Johnson*, 650 F.3d at 713 (noting that Benyo filed an answer, a motion for summary judgment, and a motion for judgment as a matter of law, all arguing that his alleged fraudulent actions occurred in Nevada, not Washington, D.C.).

72. *Johnson*, 565 F. Supp. 2d at 93 (holding that “[b]ecause Benyo aided and abetted a scheme, a material part of which occurred in the District of Columbia, venue . . . is proper in this District”).

73. *Id.* (holding that Benyo violated 15 U.S.C. § 78(t)(e) (2006)).

the district court erred in applying the co-conspirator theory of venue because the theory did not exist under section 10(b) of the securities laws.<sup>74</sup>

### B. *The D.C. Circuit's Fatal Blow*

The D.C. Circuit began its opinion by flatly rejecting the co-conspirator theory of venue, stating that “the co-conspirator theory of venue is but a gloss upon and an extension of § 78aa.”<sup>75</sup> The court relied on two Supreme Court cases as grounds for its rejection: *Central Bank of Denver v. First Bank of Denver* and *Bankers Life & Casualty Co. v. Holland*.<sup>76</sup> In *Central Bank of Denver*, the Supreme Court held that there was no private cause of action for aiding and abetting under section 10(b) of the Exchange Act.<sup>77</sup> The D.C. Circuit held that the co-conspirator theory of venue was inconsistent with § 78aa on the basis that if there is no action for secondary liability post *Central Bank*,<sup>78</sup> venue cannot be based on a claim of secondary liability.<sup>79</sup> The D.C. Circuit further noted that all of the circuit courts that had previously accepted the co-conspirator theory of venue “pre-date *Central Bank of Denver*.”<sup>80</sup>

Next, the D.C. Circuit noted that in *Bankers Life & Casualty Co. v. Holland*, the Supreme Court rejected the use of the co-conspirator theory of venue in antitrust cases.<sup>81</sup> Although some circuits, even after *Bankers Life*, applied the co-conspirator theory of venue in securities enforcement actions for policy reasons,<sup>82</sup> the D.C. Circuit found that “[p]olicy considerations cannot override our interpretation of the text and structure of the [Exchange] Act.”<sup>83</sup>

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74. Corrected Brief of Appellant Benyo at 43, *Johnson*, 650 F.3d 710 (No. 09-5399); see 15 U.S.C. § 78(j) (2006); *Johnson*, 650 F.3d at 714 (“[T]he question . . . is whether the extension [of § 78aa by the co-conspirator theory of venue] is consistent with the terms of § 78aa.”).

75. *Johnson*, 650 F.3d at 714.

76. *Id.* at 714–16 (citing *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 192 (1994), *superseded by statute*, Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. § 78t(e)), *as recognized in Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 522 U.S. 148, 162 (2008); and *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953)).

77. *Cent. Bank of Denver*, 511 U.S. at 191.

78. See *supra* notes 44–45 and accompanying text.

79. *Johnson*, 650 F.3d at 714–15.

80. *Id.* (citing *Sec. Inv. Prot. Corp. v. Vigman*, 764 F.2d 1309, 1317–18 (9th Cir. 1985); *Hilgeman v. Nat'l Ins. Co. of Am.*, 547 F.2d 298, 302 (5th Cir. 1977); *Wyndham Assocs. v. Bintliff*, 398 F.2d 614, 620 (2d Cir. 1968)) (questioning whether *Central Bank of Denver* precludes reliance on earlier decisions).

81. *Id.* at 715 (citing *Bankers Life*, 346 U.S. at 384) (noting that this, “as a practical matter, was the end of the co-conspirator theory of venue in antitrust”).

82. *Id.* (noting that the Second and Ninth Circuits permit the theory for securities fraud cases based upon “strong policy favoring the litigation of related claims in the same forum” (quoting *Vigman*, 764 F.2d at 1318)).

83. *Id.* (quoting *Cent. Bank of Denver*, 511 U.S. at 188) (citing *Leroy v. Great W. United Corp.*, 443 U.S. 173, 181–82, 182–83 n.14 (1979); *Radzanower v. Touche Ross & Co.*, 426 U.S.



Therefore, the court concluded that despite long-term use of the co-conspirator theory by many circuits,<sup>84</sup> the “so-called theory” was inconsistent with the “straightforward language” of the venue provision of the Exchange Act.<sup>85</sup> Accordingly, the D.C. Circuit reversed the district court and dismissed the case without prejudice.<sup>86</sup>

### III. THE D.C. CIRCUIT ERRED IN REJECTING THE CO-CONSPIRATOR THEORY OF VENUE IN *SEC v. JOHNSON*

#### *A. Important Distinctions the D.C. Circuit Failed to Recognize*

In *Johnson*, the D.C. Circuit primarily relied on *Central Bank of Denver v. First Bank of Denver* and *Bankers Life & Casualty Co. v. Holland* to conclude that the co-conspirator theory of venue was inconsistent with 15 U.S.C. § 78aa.<sup>87</sup> However, the facts of *Central Bank of Denver* and *Bankers Life* are distinguishable from *Johnson* such that these cases are not applicable in the way the court relies on them.<sup>88</sup>

#### *I. Central Bank of Denver*

*Central Bank of Denver* is not controlling for two reasons. First, unlike *Johnson*, *Central Bank of Denver* involved a private plaintiff, the First Interstate Bank of Denver, who alleged secondary liability against Central Bank under section 10(b) for aiding and abetting.<sup>89</sup> Although private actions have been viewed as a “necessary supplement” to the SEC’s enforcement

148, 156 n.12 (1976)). The Supreme Court had also expressly rejected using any policy considerations when interpreting section 78aa. *See Leroy*, 443 U.S. at 181–82.

84. *See supra* notes 58–59 and accompanying text (listing courts that have applied the co-conspirator theory of venue in securities cases).

85. *Johnson*, 650 F.3d at 715 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)).

86. *Id.* at 716.

87. *Id.* at 714–16; *Cent. Bank of Denver*, 511 U.S. at 188 (holding that a private plaintiff may not maintain an action for aiding and abetting under Exchange Act section 10(b)); *see also Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (rejecting in dictum the use of the co-conspirator theory of venue in an antitrust case as “a frivolous albeit ingenious attempt to expand the statute”).

88. *See Cent. Bank of Denver*, 511 U.S. at 168 (involving private plaintiffs bringing an action for aiding and abetting securities fraud under section 10(b) of the Exchange Act); *Bankers Life & Cas. Co.*, 346 U.S. at 380 (involving an action brought under federal antitrust laws).

89. *Cent. Bank of Denver*, 511 U.S. at 168 (alleging a primary violation of section 10(b) against AmWest and secondary liability against Central Bank under section 10(b) for aiding and abetting). In a private securities fraud action, a private investor brings suit against a corporation for personal damages resulting from securities fraud. *See* 15 U.S.C. § 78u-4(a)(1) (2006) (governing private securities litigation). Conversely, in a public securities fraud action, the SEC brings an action on behalf of investors to enforce the securities laws as a part of its regulation of the securities system. *See* 15 U.S.C. § 78u(a)(1) (2006 & Supp. IV 2010) (authorizing the SEC to bring civil suit against violators of the securities laws); *The Investor’s Advocate*, *supra* note 36.

power,<sup>90</sup> they are distinct from public actions, as evidenced by the PSLRA, which was specifically enacted to control private securities actions.<sup>91</sup> Accordingly, the interpretation and application of the securities laws in private actions should not influence public securities actions.<sup>92</sup>

Second, *Central Bank of Denver* has been superseded, in its application to SEC actions, by the PSLRA.<sup>93</sup> Given this express authority to sue individuals who aid and abet securities fraud, the SEC should be given leeway to bring such actions in the same venue in which the principal actors are sued.<sup>94</sup> The SEC has relied on the co-conspirator theory of venue as a means of preventing fraud and enforcing its rules,<sup>95</sup> and the specific grant of power to bring suit against individuals who come under secondary liability, such as aiding and abetting, justifies the use of the co-conspirator theory of venue to effectuate SEC authority.<sup>96</sup>

## 2. Bankers Life

*Bankers Life* is distinguishable from *Johnson* because in *Bankers Life*, the Supreme Court was applying the co-conspirator theory under the special venue provision of antitrust law, not securities law.<sup>97</sup> Despite similarities between

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90. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (“[I]mplied private actions provide ‘a most effective weapon in the enforcement’ of the securities laws and are ‘a necessary supplement to [SEC] action.’” (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964))).

91. See Private Sec. Litig. Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.). Congress has expressly recognized that private securities actions are “an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action” and “promote public and global confidence in our capital markets and help[s] to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers, and others properly perform their jobs.” H.R. REP. NO. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 731.

92. *SEC v. Johnson*, 650 F.3d 710, 714–15 (D.C. Cir. 2011), *cert denied*, 131 S. Ct. 956 (2011).

93. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 158 (2008) (recognizing that Congress specifically granted the SEC the power to prosecute aiders and abettors of securities fraud); Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 104, 109 Stat. 757 (codified at 15 U.S.C. § 78t(e) (2006)); see also *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 28 (D.C. Cir. 2011) (recognizing that Congress had enacted legislation allowing the SEC to pursue actions for aiding and abetting securities fraud, in response to the Supreme Court’s decision in *Central Bank of Denver*).

94. See *infra* notes 116–18 and accompanying text (discussing the waste of resources when bringing similar actions against multiple defendants of the same fraud in different jurisdictions).

95. See *Johnson*, 650 F.3d at 714.

96. See 15 U.S.C. § 78aa (Supp. IV 2010); *Stoneridge Inv. Partners, LLC*, 552 U.S. at 158.

97. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 380 (1953). The venue provision at issue in *Bankers Life*, a suit brought under the Sherman and Clayton Acts, was 15 U.S.C. § 15, which provides that suit may be brought “in any district court of the United States in the district in which the defendant resides or is found or has an agent.” *Id.* (citing 15 U.S.C. § 15) (internal quotation marks omitted).

federal antitrust laws and federal securities laws, an antitrust case that rejects the use of the co-conspirator theory of venue should not, and does not, control the outcome of securities actions.<sup>98</sup> The Supreme Court has specifically noted that “securities law and antitrust law are clearly incompatible” in certain instances.<sup>99</sup> Further, Congress’s enactment of separate venue provisions for securities cases and antitrust cases demonstrates that, with respect to venue, Congress intended securities and antitrust cases to be distinct.<sup>100</sup> Congress, recognizing the unique intricacies of securities law issues, expressly limited the procedural requirements for filing securities actions.<sup>101</sup> Accordingly, the interpretation of venue in antitrust actions should not provide any basis for the interpretation of venue in securities actions.<sup>102</sup>

*B. Co-Conspirator Theory is Consistent with 15 U.S.C. § 78aa*

Contrary to the D.C. Circuit’s analysis, the co-conspirator theory of venue is consistent with the language of 15 U.S.C. § 78aa. As discussed above, venue under section 78aa is proper “in the district wherein any act or transaction constituting the violation occurred . . . or in the district wherein the defendant is found or is an inhabitant or transacts business . . . .”<sup>103</sup> The disjunctive language used in the statute presupposes that the listed conditions are separate: venue is proper where the defendant resides *or* where any act occurred.<sup>104</sup>

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98. See BLUMBERG, *supra* note 28, at 201 (outlining and depicting the different standards applied in the venue statutes in (1) antitrust law; (2) patent law; (3) securities law; and (4) section 1391, the general venue provision).

99. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 279 (2007) (involving a complaint alleging violations of antitrust laws when they formed a business agreement that violated securities laws).

100. See 15 U.S.C. § 78aa; see also Traband, *supra* note 30, at 247–50 (discussing the difference between the use of the co-conspirator theory of venue in securities fraud cases and its use in antitrust cases). Discussing the *Bankers Life* opinion, commercial litigation attorney Rhett Traband states:

The key difference between application of the co-conspiracy venue theory under the federal antitrust laws and under the federal securities laws is in the statutory basis of each group of laws. The co-conspiracy venue theory had been used in cases alleging Clayton Act violations to satisfy the “transact[ion] of business” requirement. Under the securities laws, the co-conspiracy venue theory has normally been applied to create venue where a co-conspirator acts within the forum district and does not merely transact business there.

*Id.* at 250.

101. *Credit Suisse*, 551 U.S. at 284.

102. See *id.* at 201 (asserting that for a venue determination, “orderly analysis requires statute-by-statute examination”).

103. 15 U.S.C. § 78aa.

104. *Id.*; see *Ravenwoods Inv. Co. v. Bishop Capital Corp.*, No. 04CV9266 KHK, 2005 WL 236440, at \*3 (S.D.N.Y. Feb. 1, 2005) (advancing the presupposition that the listed conditions in section 78aa are separate conditions).

Additionally, despite the many changes to securities regulations by the PSLRA, the Sarbanes-Oxley Act, and the Dodd-Frank Act,<sup>105</sup> the language of § 78aa has remained the same.<sup>106</sup> The decision not to change the language of § 78aa implies that Congress believed that venue would be easy to establish over defendants sued for aiding and abetting fraud.<sup>107</sup> The application of the co-conspirator theory of venue is consistent with the spirit of the broad venue and service of process provisions in the Exchange Act that “evince an intent to gather complex securities litigation in a single forum.”<sup>108</sup> In order to carry out its statutory purpose and function efficiently, the SEC should be able to sue multiple defendants to a securities fraud scheme in a single forum.<sup>109</sup>

### C. Effects on SEC Enforcement Actions

The D.C. Circuit’s decision in *Johnson* has potentially far-reaching effects on SEC enforcement actions.<sup>110</sup> The SEC is headquartered in Washington, D.C., with eleven regional offices around the country.<sup>111</sup> Most SEC civil enforcement actions are filed in the U.S. District Court for the District of Columbia because defendants usually file fraudulent documents at the SEC headquarters and it is often the only available venue when there are multiple defendants involved.<sup>112</sup> Therefore, it can be inferred that the D.C. Circuit’s rejection of the co-conspirator theory is particularly troubling to the SEC.

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105. See *supra* note 45 and accompanying text; see also *The Laws that Govern the Securities Industry*, *supra* note 33, at 4 (identifying the changes made to U.S. Securities regulation).

106. See 15 U.S.C. § 78aa (demonstrating that since the passage of the PSLRA in 1995, §78aa has only been amended once, in 2010, with insignificant changes to its application).

107. See Traband, *supra* note 30, at 243–47 (describing the common law development of the co-conspirator theory of venue in aiding and abetting securities law actions and noting that courts’ interpretation of the broad purpose of 15 U.S.C. § 78aa indicated that there was little need to change the statute language to accommodate secondary liability suits).

108. *Bolton v. Gramlich*, 540 F. Supp. 822, 846 (S.D.N.Y. 1982); see *United States v. Johnson*, 510 F.3d 521, 528 (4th Cir. 2007) (stating that a clear purpose of the Exchange Act’s broad venue provision is “avoiding having related counts adjudicated in piecemeal fashion across several venues”); *Hooper v. Mountain States Sec. Corp.*, 282 F.2d 195, 205 (5th Cir. 1960).

109. Motion for Rehearing of Appellee at 13–14, *SEC v. Johnson*, 650 F.3d 710 (D.C. Cir. 2011) (No. 09-5399) (listing the reasons the SEC should be able to sue multiple defendants for securities fraud in one forum to avoid cumbersome, problematic, and duplicative cases); see also *Leroy v. Great W. United Corp.*, 443 U.S. 173, 188–89 (1979) (White, J., dissenting) (“Given the underlying policy of § 27 to confer venue in a wide variety of districts in order to ease the task of enforcement of federal securities law, it would be anomalous indeed if venue were not available in the Northern District of Texas in this case.”).

110. Motion for Rehearing, *supra* note 109, at 13 (“The effect of the panel opinion is potentially far-reaching and extremely damaging to the Commission.”).

111. *SEC Organizational Chart*, SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/images/secorg.pdf> (last visited October 20, 2012).

112. *The Investor’s Advocate*, *supra* note 36, at 2–3, 8.

A plaintiff carefully weighs many factors in choosing a forum in which to file a lawsuit.<sup>113</sup> This choice of venue is important for many reasons, including favorable laws, courts, juries, convenience, and costs.<sup>114</sup> In addition, statistics show that plaintiffs are successful in more than half of the cases when their choice of venue prevails.<sup>115</sup> Given the complexity of securities fraud schemes in today's global economy that involve "a wide spectrum of participants, contributing in various ways, from various location, at various stages,"<sup>116</sup> dismantling of the co-conspirator theory of venue will result in plaintiffs, including the SEC, bringing multiple actions in different forums for one scheme.<sup>117</sup> This result is inefficient for both the plaintiff and the judicial system as it requires multiple courts to hear the same claims, using the same evidence, for a single fraudulent scheme.<sup>118</sup>

Further, dismantling the co-conspirator theory of venue may disincentivize plaintiffs from suing potential defendants and decrease enforcement of securities laws. The SEC protects investors by: (1) regulating the securities exchange markets and imposing filing requirements or standards on companies wishing to use the exchange markets;<sup>119</sup> and (2) enforcing the securities regulations in administrative and judicial proceedings.<sup>120</sup> The use of the co-conspirator theory of venue allows for judicial economy by decreasing repetitious lawsuits and increasing efficiency for the parties and the courts.<sup>121</sup> However, without the theory, a plaintiff or the SEC may be disinclined to file lawsuits against some potential defendants, entirely defeating the statutory

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113. Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 272 (1995).

114. *Id.* at 271 (stating that "[v]enue choices are often based on: the party's geographical convenience; preference for judges in the chosen jurisdiction; preference for the substantive and/or procedural laws in a given venue; the belief that the potential jurors in a particular jurisdiction are more receptive to the filing party's position; and comparisons between the trial calendars (and/or backlogs) in the various venues").

115. See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511-12 (1995) ("[T]he plaintiff wins in 58% of the nontransferred cases that go to judgment for one side or the other, but wins in only 29% of such cases in which a transfer occurred.").

116. Motion for Rehearing, *supra* note 109, at 13.

117. *Id.* (emphasizing that if "every defendant in the case must act in the same forum for venue to lie . . . then the [SEC] would have to file suits involving overlapping facts in multiple districts, with all 'the wastefulness of time, energy and money' for the court system and litigants").

118. See *supra* note 109 and accompanying text.

119. *The Investor's Advocate*, *supra* note 36.

120. *Id.* (articulating the enforcement functions of the SEC carried out by the commission's division of enforcement).

121. *Sec. Inv. Prot. Corp. v. Vigman*, 764 F.2d 1309, 1318 (9th Cir. 1985) ("[T]he inconvenience of requiring one defendant in a multi-defendant action to litigate in a distant forum is greatly outweighed by the interest of judicial economy and bringing together in one lawsuit, all related claims and alternative theories.").

purpose and goals of securities enforcement laws.<sup>122</sup> For these reasons, it is in the public interest to allow plaintiffs, or at a minimum, the SEC, to use the co-conspirator theory of venue to bring civil enforcement actions against all defendants party to one securities fraud scheme in one forum.<sup>123</sup>

#### IV. CONCLUSION

The D.C. Circuit in *SEC v. Johnson* erred in rejecting the co-conspirator theory of venue. The co-conspirator theory of venue is consistent with the statutory purpose of the securities fraud venue provision and necessary to protect the public interest. Just as Congress addressed the SEC's authority to enforce aiding and abetting liability after *Central Bank of Denver*, Congress should amend the venue provisions to clarify that the co-conspirator theory of liability applies in such actions. With no remedial action by Congress or the Supreme Court, the D.C. Circuit's decision could mean the end of the co-conspirator theory of venue in securities fraud actions. Given the complexity of business transactions today, it is now more important than ever to maintain the protections enforced by the SEC and allow one suit to be brought against all perpetrators of a securities fraud scheme in one forum.

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122. See *In re Penn Cent. Sec. Litig.*, 338 F. Supp 438, 440 (E.D. Pa. 1972) (adopting the co-conspirator theory of venue because, without it, the result would be “[a]n unnecessary multiplicity of suits and fragmenting of the issues involved”); see also *United States v. Johnson*, 510 F.3d 521, 528 (4th Cir. 2007); *Hooper v. Mountain States Sec. Corp.*, 282 F.2d 195, 205 (5th Cir. 1960); Motion for Rehearing, *supra* note 109, at 14 (discussing the negative impact of the D.C. Circuit's decision on SEC enforcement actions and arguing that “[i]t might be necessary to forgo suit altogether against certain fraud participants based purely on their location or to skew the choice of forum for the entire case to a place inconvenient to all but one important wrongdoer. These consequences would flow not from statutory language, Supreme Court precedent, considered policy, or law enforcement judgment, but perversely from the way in which the mastermind of the fraud devised it and divided labor among those best situated to accomplish it”).

123. See *Johnson*, 510 F.3d at 528 (asserting that the abandonment of the co-conspirator theory of venue would be problematic for defendants and prosecutors, as well as other interested third parties, as it would require preparation for multiple trials).