

15-3057

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF PROVIDENCE, RHODE ISLAND, EMPLOYEES' RETIREMENT
SYSTEM OF THE GOVERNMENT OF THE VIRGIN ISLANDS, PLUMBERS
AND PIPEFITTERS NATIONAL PENSION FUND, STATE-BOSTON
RETIREMENT SYSTEM,
Plaintiffs-Appellants,

v.

BATS GLOBAL MARKETS, INC., CHICAGO STOCK EXCHANGE INC.
DIRECT EDGE ECN, LLC, NYSE ARCA, INC., NASDAQ OMX BX INC., NEW
YORK STOCK EXCHANGE LLC, THE NASDAQ STOCK MARKET, LLC,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

**BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,
*AMICUS CURIAE***

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The Securities and Exchange Commission submits this *amicus curiae* brief in response to the Court's August 25, 2016 order, asking the Commission to file a brief in this private securities fraud class action "setting forth the SEC's views on whether the district court had subject-matter jurisdiction over the case, and whether defendants-appellees have absolute immunity from suit arising from the challenged conduct." Plaintiffs, who are institutional investors, allege that the defendant national securities exchanges engaged in market manipulation, in violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5, by providing certain customers engaged in "high-frequency trading" with proprietary services that enabled those customers to

obtain and utilize market data faster than ordinary investors—thus allegedly disadvantaging ordinary market participants not engaged in high-frequency trading strategies. Specifically, plaintiffs contend that the exchanges provided their customers with co-location services, proprietary data feeds, and complex, electronic order types that, when used in combination, constituted manipulative devices, allegedly profiting high-frequency traders at plaintiffs’ expense. JA248 ¶¶65; JA280 ¶¶119. They also contend that the defendant exchanges thwarted the congressionally mandated Commission rule-approval process by failing to disclose required information in proposed rule filings for these practices, or failing to file altogether—again to the exclusive benefit of high-frequency trading firms. JA290-JA291 ¶¶139; JA293 ¶¶143.

As explained further below, the Commission takes the following positions on the Court’s questions:

First, the securities laws do not divest the district court of subject matter jurisdiction over this case. Although Congress created a detailed scheme of administrative and judicial review for challenges to certain actions of self-regulatory organizations (“SROs”) like the defendant exchanges, Congress did not authorize the Commission to adjudicate fraud lawsuits against SROs brought by private parties. As this Court recognized in *Lanier v. BATS Exchange, Inc.*, Congress’s intent to preclude district court jurisdiction must be “fairly discernible” from “the SEC’s scheme of administrative and judicial review.” 838 F.3d 139, 147 (2d Cir. 2016). That conclusion cannot be drawn about plaintiffs’ Section 10(b) claim.

Second, the defendant exchanges are not entitled to absolute immunity from suit for the challenged conduct. The Commission believes that absolute immunity is properly afforded to the exchanges when they are engaged in their traditional self-regulatory functions—in other words, when the exchanges are acting as *regulators* of their members. Immune activities include the core adjudicatory and prosecutorial functions that have traditionally been accorded absolute immunity, as well as other functions that materially relate to an exchange’s regulation of its members. For example, an exchange should be immune when it disciplines its members for misconduct or suspends from trading by its members a security listed on its market. But the Commission believes that immunity does not properly extend to functions performed by an exchange itself in the operation of its own market, or to the sale of products and services arising out of those functions—like the challenged activities at the center of the plaintiffs’ allegations. This view is consistent with the historical rationale for the immunity doctrine, as well as with this Court’s decisions applying it. And, ultimately, although protecting an exchange from the threat of retaliatory lawsuits when regulating its members is appropriate, the justifications for absolute immunity have less force when an exchange is itself engaged in offering the type of proprietary services challenged by the plaintiffs here.

Despite the inapplicability of immunity to the type of conduct plaintiffs challenge, the Commission believes that where a plaintiff’s claims conflict with, or otherwise obstruct, the Commission’s regulation of the exchanges, such claims will—

and should—fail under the doctrines of preemption and preclusion. Those doctrines would, for example, protect an SRO’s conduct when acting in accordance with rules that were subject to Commission oversight and supervision through the applicable statutory scheme. Because of the early stage of this litigation, which limits the record to the complaint, as well as prudential concerns in light of the Commission’s own enforcement activities in this area, the Commission takes no position on the outcome of such an analysis in this case.

BACKGROUND

A. The role of the national securities exchanges

1. Exchanges

An exchange under the securities laws is an “organization, association, or group of persons . . . which constitutes, maintains or provides a market place or facilities for bringing together purchasers and sellers of securities.” 15 U.S.C. 78c(a)(1). Such securities exchanges have existed for over two centuries in the United States. When Congress passed the Exchange Act in 1934, at least 21 exchanges already operated as member-owned, not-for-profit associations of brokers that coordinated their members’ trading and enforced their members’ compliance with industry norms. *See* First Annual Report of the Securities and Exchange Commission at 11-12 (1935). Congress chose in 1934 to leave those existing structures in place, while recognizing their frontline responsibility to supervise the conduct of their member brokers and oversee their members’ trading. *See generally* H.R. Rep. No. 1383, 73d Cong., 2d Sess.

15 (1934). Congress subsequently used the term “self-regulatory organization” (SRO) to refer to such entities, and noted that they were “delegated governmental power in order to enforce, at their own initiative, compliance by members of the industry with both the legal requirements laid down in the Exchange Act and ethical standards going beyond those requirements.” *See* S. Rep. No. 94-75, 94th Cong. 1st Sess., 1975 WL 12347, at *23.

An exchange becomes a “national securities exchange,” and obtains SRO status under the securities laws, by registering with the Commission. *See* 15 U.S.C. 78c(a)(26), 78e, 78f, 78s. The Commission grants registration to an exchange after determining that the exchange “is so organized and has the capacity . . . to enforce compliance by its members” with the securities laws and the exchange’s rules. Exchange Act Section 6(b)(1), 15 U.S.C. 78f(b)(1). The exchange’s rules, among other things, must be designed to (1) “prevent fraudulent and manipulative acts and practices”; (2) “promote just and equitable principles of trade”; (3) “foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities”; (4) “remove impediments to and perfect the mechanism of a free and open market and a national market system”; and (5) “in general, . . . protect investors and the public interest.” *Id.* at 78f(b)(5). The exchanges’ rules must also provide for appropriate discipline of their members. *Id.* at 78f(b)(6). Many of these rules may generally be

understood as regulating the conduct of the broker-dealers who are the exchanges' members.

In 1975, Congress enacted a comprehensive scheme to enable greater Commission oversight of the national securities exchanges. Congress augmented the SRO rule-filing process, discussed more fully below, thereby subjecting the exchanges' activities to closer Commission review and ensuring that exchanges do not operate in many areas without the Commission's approval. Exchanges thus assumed a dual identity—with their own exchange activities highly *regulated* by the Commission, while also serving as a *regulator* of their members.

2. The national market system

In amending the Exchange Act in 1975, Congress sought “to facilitate the establishment of a national market system for securities.” Exchange Act Section 11A(a)(2), 15 U.S.C. 78k-1(a)(2). Finding that information about market activity on the various exchanges had become too fragmented, Congress urged the “linking of all markets for qualified securities through communication and data processing facilities.” *Id.* at 78k-1(a)(1)(D). Pursuant to this directive, the Commission promulgated a series of regulations culminating in Regulation NMS. To facilitate an integrated national market, Regulation NMS permits “[a]ny two or more” exchanges, “acting jointly,” to submit a “national market system plan” for the Commission's approval, detailing the joint actions the exchanges wish to undertake. 17 C.F.R. 242.608(a). And to the same end, Regulation NMS specifically required the exchanges to file a plan for

consolidated reporting of core market data—*i.e.*, the “consolidated feed.” *See* 17 C.F.R. 242.601-603.

3. Changes in the equity markets and the exchanges’ evolving role

In more recent years, the equity markets and the exchanges’ roles within them have changed dramatically. Equity trading was traditionally conducted by human beings interacting with each other on the floors of the exchanges, with exchanges coordinating and monitoring the conduct of their members. But now computers often do most of that work; much of what used to be done by members—whose conduct necessitated regulation by the exchanges—is now often done electronically by the exchanges themselves. *See* Concept Release on Equity Market Structure, 75 Fed. Reg. 3594, 3598 (Jan. 21, 2010). For example, the matching of orders to buy and sell securities, and the subsequent execution of securities transactions, is now performed largely by an exchange’s computer systems (the “matching engine”), rather than by direct negotiation between human participants.

In a further change resulting from trading automation, many of the equities exchanges’ traditional functions in operating a marketplace are now also performed by competing entities that are not SROs. As the Commission explained in 1998, “[a]dvancing technology has increasingly blurred the[] distinctions” such that “alternative trading systems today are used by market participants as functional equivalents of exchanges.” Regulation of Exchanges and Alternative Trading

Systems, 63 Fed. Reg. 70844, 70847 (Dec. 22, 1998). Under Regulation ATS, alternative trading systems are permitted to perform the traditional exchange function of operating a market—but without the member-regulation function or rules required of an SRO.¹ *See* 17 C.F.R. 242.300(a). There are more than 80 such alternative trading systems. *See* SEC Alternative Trading System List (as of Oct. 1, 2016).²

Furthermore, the exchanges have transformed from not-for-profit, member-owned organizations to for-profit enterprises. In 1998, the Commission expressed its view that “registered exchanges may structure themselves as for-profit organizations.” *See* Regulation of Exchanges and Alternative Trading Systems, 63 Fed. Reg. 70844, 70848 (Dec. 22, 1998). All of the exchanges—including each of the exchange defendants in this case—subsequently reorganized as for-profit entities, and some now have publicly-traded parent companies. *See* Memorandum from SEC Division of Trading and Markets to SEC Market Structure Advisory Committee, Current Regulatory Model for Trading Venues and for Market Data Dissemination at 10 (Oct. 20, 2015).³ Thus, while the exchanges have retained some member-regulation functions, they are also now businesses that compete with each other and with

¹ Alternative trading systems must register as broker-dealers and must themselves become members of a national securities association. 17 C.F.R. 242.301(b)(1), 240.3a1-1; 15 U.S.C. 78o(b)(8).

² *Available at* <https://www.sec.gov/foia/docs/atlist.htm>.

³ *Available at* <https://www.sec.gov/spotlight/emsac/memo-regulatory-model-for-trading-venues.pdf>.

alternative trading systems to offer various products and system features for customers.⁴

B. The Commission’s oversight of the exchanges

In both their market-operation and member-regulation functions, the exchanges are subject to substantial Commission oversight. The Commission reviews and approves the rules by which each exchange operates, along with subsequent changes to those rules. Under Section 19(b) of the Exchange Act, exchanges must file proposed rule changes with the Commission. 15 U.S.C. 78s(b). This includes changes that relate to “any material aspect of the operation of the facilities” of the exchange; or “any statement made generally available to the membership” of the exchange, except those “reasonably and fairly implied by an existing rule” or “concerned solely with the administration” of the organization. 17 C.F.R. 240.19b-4(a)(6)(i), (ii), (c). Some proposed rule changes will not take effect until the Commission approves them. *See* 15 U.S.C. 78s(b)(1)-(3). Other categories of rule changes take immediate effect, although the Commission retains authority to

⁴ In 2015, in response to these and other recent developments in the equity markets, the Commission established a Market Structure Advisory Committee “to provide the Commission with diverse perspectives on the structure and operations of the U.S. equities markets, as well as advice and recommendations on matters related to equity market structure.” *See* Notice of Federal Advisory Committee Establishment, 80 Fed. Reg. 3673-02 (Jan. 23, 2015); Regulatory Model Memorandum, *supra*, at 8; Memorandum from EMSAC Trading Venues Regulation Subcommittee to Equity Market Structure Advisory Committee 1-2 (April 19, 2016), *available at* <https://www.sec.gov/spotlight/emsac/emsac-trading-venues-subcommittee-recommendations-041916.pdf>. The Committee’s work is ongoing.

subsequently suspend the changes and institute proceedings to approve or disapprove them, *id.* at 78s(b)(3), 17 C.F.R. 240.19b-4(f).

The exchanges are required to comply with their own rules, as well as with the securities laws and regulations. 15 U.S.C. 78s(g). And should an exchange fail to do so, the Commission has authority to enforce compliance. The Commission may order the exchange to cease and desist from any violation, and it may “censure or impose limitations upon the activities, functions, and operations” of an exchange, and even suspend or revoke an exchange’s registration, when an exchange violates its rules or the securities laws. 15 U.S.C. 78s(h)(1), 78u-3.

The Exchange Act also provides for Commission oversight of the exchanges’ regulation of their members. The exchanges are required to enforce their members’ compliance with the securities laws, and with their own rules. 15 U.S.C. 78s(g)(1)(A); 78s(f). Pursuant to Section 19(d), when an exchange imposes a disciplinary sanction on a member or associated person, that sanction is then subject to Commission review. 15 U.S.C. 78s(d). Any decision by an exchange to deny membership to a prospective applicant is likewise subject to Commission review. *Id.* The Exchange Act also specifies the process whereby an aggrieved individual may seek Commission review of an exchange decision that “prohibits or limits any person in respect to access to services offered” by the exchange. *Id.* at 78s(d)(1), 78k-1(b)(5)(A). And should an exchange fail to properly regulate its members, the Commission has authority to seek a court order directing the exchange “to enforce compliance by its

members and persons associated with its members with the provisions of [the Exchange Act], the rules, regulations, and orders thereunder, and the rules of such exchange.” *Id.* at 78u(e).

C. The Commission’s regulation of co-location, proprietary data feeds, and order types

In this suit, Plaintiffs challenge three aspects of the exchanges’ operation of their markets—co-location services, propriety data feeds, and certain complex order types. JA226 ¶9.

1. Co-location services

Co-location is a service offered by exchanges that operate their own data centers and by third parties that host the exchanges’ matching engines, in which the exchanges rent space to market participants to enable them to be in close physical proximity to a matching engine, thereby gaining faster electronic access to trading data. Co-location services are especially attractive to customers whose trading involves frequent buying and selling, and thus seek to minimize latency between their trading systems and the matching engine of an exchange or other trading center. *See* Concept Release on Equity Market Structure, 75 Fed. Reg. at 3610.

Because co-location and any related fees are a “material aspect of the operation of the facilities” of the exchange, 17 CFR 240.19b-4, exchanges must file proposed rule changes with the Commission before selling such services to customers. Under the Exchange Act, the terms of co-location services must not be unfairly

discriminatory, and the fees must be equitably allocated and reasonable. *See* Exchange Act Section 6(b)(4), 6(b)(5), 15 U.S.C. 78f(b)(4), (5). The Commission has approved the terms of particular co-location services as consistent with the Exchange Act. *See, e.g.,* Exchange Act Release No. 62397, 2010 WL 2589819 (June 28, 2010). Where an exchange seeks to establish or amend a fee associated with an effective co-location service, the proposed fee may be filed as an immediately effective rule change. *See, e.g.,* Exchange Act Release No. 71200, 2013 WL 6858802 (Dec. 30, 2013).

The Commission has also taken enforcement actions in its oversight of the exchanges' co-location services. In May 2014, for example, the Commission imposed a penalty on the NYSE exchanges for providing co-location services to customers from 2006 to 2010 at disparate rates and without complying with the required rule approval process, among other violations. *See In the Matter of New York Stock Exchange LLC*, Exchange Act Release No. 72065, 2014 WL 1712113 (May 1, 2014) (settled action).

2. Proprietary data feeds

As noted above, a consolidated feed of core market data—all transaction reports and the best bid and offer for each security on each exchange—must be collected and distributed by the exchanges pursuant to Regulation NMS plans approved by the Commission. *See* 17 C.F.R. 242.601-603. But many of the exchanges separately sell their own “proprietary” data feeds as a product of interest to certain customers. Such feeds include the information in the consolidated feed as well as a

variety of additional information about trading at prices inferior to the best bid and offer. Exchanges are prohibited by Commission rules from releasing data in these proprietary feeds any sooner than they release the data in the consolidated feed. *See* Regulation NMS Release, 70 Fed. Reg. 37496, 37567 (June 29, 2005); *Lanier*, 838 F.3d at 152-53. But because the data in the consolidated feed must go through the extra step of aggregation by a plan processor, proprietary feeds generally reach market participants faster than do consolidated feeds. *See id.* Proprietary feeds are another product that has become especially attractive to high-frequency traders, both to save time and to gain access to a richer array of trading data. *See* Concept Release on Equity Market Structure, 75 Fed. Reg. at 3611.

Because proprietary data feeds are a “material aspect of the operation of the facilities” of the exchange, *see* 17 CFR 240.19b-4, the exchanges must first file proposed rule changes with the Commission to offer these services, *id.* The Commission has approved as consistent with the Exchange Act particular proprietary data feeds where exchanges have sought to distribute their own trading data.⁵ Where an exchange seeks to amend a fee associated with a proprietary feed, proposes to change an existing data feed consistent with an effective rule of another exchange, or mirrors its proposed feed on an already-effective feed of another exchange, these

⁵ *See, e.g.*, Exchange Act Release No. 61885, 75 Fed. Reg. 20018 (Apr. 16, 2010) (approving new data products for BATS distributing its market data).

changes may be filed as an immediately effective rule change, *see* 15 U.S.C.

78s(b)(3)(A); 17 CFR 240.19b-4(f)(2), (f)(6).⁶

The Commission has also instituted enforcement proceedings in its oversight of the exchanges' proprietary feed products. In 2012, for example, the Commission penalized the NYSE for releasing its market data to customers through two of its proprietary feeds before that data was released to the general public through the approved consolidated feed—a practice the exchange began in 2008. *See In the Matter of New York Stock Exchange LLC*, Exchange Act Release No. 67857, 2012 WL 4044880 (Sept. 14, 2012) (settled action).

3. Complex order types

Exchanges offer a range of order types that govern the manner in which the exchanges will process orders in their trading systems, route orders to other exchanges, and execute trades. Over time, the exchanges have developed a large number of new and increasingly complex order types that are used by traders, including high-frequency trading firms, to more precisely specify the parameters for execution of orders.

⁶ *See, e.g.*, Exchange Act Release No. 72620, 79 Fed. Reg. 42572 (July 22, 2014) (amending fees for the Nasdaq Basic proprietary feed); Exchange Act Release No. 76599, 80 Fed. Reg. 77676 (Dec. 15, 2015) (making changes to an existing data feed, NYSE Trades); Exchange Act Release No. 73990, 80 Fed. Reg. 1453 (Jan. 9, 2015) (creating new top-of-book and last sale data products for EDGA, based on similar existing data products at BATS).

Like co-location services and proprietary data feeds, order types are a “material aspect of the operation of the facilities of the exchange,” *see* 17 CFR 240.19b-4, and so must be filed with the Commission as proposed rule changes, *see id.* In June 2014, in an effort to increase transparency in this area, Commission Chair Mary Jo White asked the exchanges to conduct a comprehensive review of their order types to determine how they operate in practice. *See* Speech by SEC Chair Mary Jo White, Enhancing Our Equity Market Structure (June 5, 2014).⁷ In response, many exchanges submitted proposed rule changes to provide further detail on the order types they offer. *E.g.*, Exchange Act Release No. 75444, 2015 WL 4237638 (July 13, 2015).

The Commission has also instituted enforcement proceedings in its oversight of order types. In January 2015, the Commission imposed a \$14 million penalty on two Direct Edge exchanges for providing order types that functioned differently from the descriptions included in the exchanges’ rule filing with the Commission, as well as for selectively disclosing the order type’s actual function to only certain high-frequency trading firms—a practice the exchange began in 2010. *See In the Matter of EDGA Exchange, Inc.*, Exchange Act Release No. 74032, 2015 WL 137640 (Jan. 12, 2015) (settled action). And, in May 2014, the Commission imposed a penalty on NYSE Arca for failing to operate in 2010 in accordance with order type rules. *See In the Matter of New York Stock Exchange LLC*, Exchange Act Release No. 72065, 2014 WL 1712113 (May 1, 2014) (settled action).

⁷ Available at <https://www.sec.gov/News/Speech/Detail/Speech/1370542004312>.

ARGUMENT

I. The federal securities laws do not preclude district court subject matter jurisdiction over plaintiffs' private securities fraud claims.

The Court has asked whether the district court correctly held that it had subject matter jurisdiction over plaintiffs' Section 10(b) and Rule 10b-5 claims.⁸ The Commission believes that the district court was correct. As set forth in a pair of this Court's recent decisions, the proper inquiry in determining whether the federal securities laws' exclusive review scheme precludes a district court's otherwise proper exercise of jurisdiction is "whether it is 'fairly discernible' from the 'text, structure, and purpose' of the securities laws that Congress intended the SEC's scheme of administrative and judicial review 'to preclude district court jurisdiction,'" and "whether the appellant[s] . . . claim is 'of the type Congress intended to be reviewed within th[e] statutory structure.'" *Tilton v. SEC*, 824 F.3d 276, 281 (2d Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) and *Elgin v. Dep't of the Treasury*, 132 S. Ct. 2126, 2132-33 (2012)); see also *Lanier v. Bats Exchange, Inc.*, 838 F.3d 139, 147 (2d Cir. 2016). That question is easily answered here. Although it is "fairly discernible" that Congress intended to channel certain challenges to exchange conduct through the Exchange Act's detailed scheme of administrative and judicial

⁸ With respect to subject matter jurisdiction, this brief addresses only plaintiffs' Section 10(b) and Rule 10b-5 claims because there is no private right of action under Section 6(b) of the Exchange Act. See *Spicer v. Chi. Bd. of Options Exch., Inc.*, 977 F.2d 255, 258-66 & n.2 (7th Cir. 1992) (citing cases).

review, Congress has provided no mechanism for the Commission to adjudicate private securities fraud actions like the one plaintiffs have brought—and thus we perceive no basis on which district court jurisdiction over such an action would be precluded.

The Exchange Act prescribes an administrative and judicial review process applicable to various specific types of challenges to exchange conduct. Pursuant to this statutory scheme, a person who, for instance, challenges a denial of membership, a restriction of access, a disciplinary action, or an exchange rule must do so through the exclusive review scheme Congress devised for such specific challenges, and not through an action in district court. *See, e.g.*, 15 U.S.C. 78s, 78y (providing administrative and judicial review for, *inter alia*, denial of membership, denial of access to exchange services, disciplinary sanctions, and rule challenges); *Tilton*, 824 F.3d at 281-82; *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015). But nothing in the Act reveals any intention by Congress that the Commission adjudicate lawsuits—like plaintiffs’ suit—brought by private parties against the exchanges for alleged securities fraud. There is simply no administrative scheme through which a private plaintiff may bring a Section 10(b) claim.

In dismissing a petition for review of a fee dispute between the exchanges and certain market makers, the Commission recently explained that simply because a “lawsuit involves a rule or SRO subject to Commission review does not automatically mean jurisdiction exists.” *In the Matter of the Petition of Citadel Securities LLC*, Exchange

Act Release No. 78340, 2016 WL 3853760, at *5 (July 15, 2016), *appeal pending*, 16-3423 (7th Cir.). And although the Commission itself may institute proceedings under provisions such as Section 19(h)(1) to sanction an SRO that has engaged in misconduct, that provision “does not provide for Commission jurisdiction over lawsuits initiated by and between private parties.” *Id.* at *4. Because there is no evidence that Congress intended private actions like plaintiffs’ Section 10(b) suit to be adjudicated by the Commission, the district court retains subject matter jurisdiction to hear the suit.

The defendant exchanges point (Appellees’ Br. at 20-21) to NMS Rule 608(d), 17 C.F.R. 242.608(d), as a specific review procedure that, they claim, deprives the district court of jurisdiction to hear the plaintiffs’ claims in this case. We disagree. As this Court recognized in *Lanier* (838 F.3d at 150), Rule 608(d) allows the Commission to “entertain appeals in connection with the implementation or operation of any effective national market system plan.” 17 C.F.R. § 242.608(d). This is not a means for plaintiffs to advance Section 10(b) claims. Nor could a petition under Rule 608(d) be properly brought before the Commission here, given that the specific actions challenged by the plaintiffs—provision of proprietary feeds, co-location, and complex order types—were not actions taken by the exchanges pursuant to an “effective national market system plan.” The exchanges have identified no applicable plan, and for good reason: the purpose of an NMS plan is to enable *joint* industry action by multiple exchanges, but, by defendants’ own account, the challenged proprietary

feeds, co-location, and complex order types are not joint, coordinated actions. 17 C.F.R. 242.608(a). They are independent activities of individual exchanges allegedly undertaken by each individual exchange pursuant to the rule filing and approval process of Section 19(b), not the NMS plan process. *See* Appellees’ Br. 8-14; 19-27 (citing no NMS Plan approvals or amendments in discussing challenged practices).⁹

This conclusion, moreover, accords with *Lanier*, in which this Court held that state-law contract claims regarding the exchanges’ proprietary data feeds were not subject to exclusive administrative review because “the Exchange Act demonstrates no intention to establish an administrative process for the SEC to adjudicate private contract disputes.” 838 F.3d at 148; *see also id.* (“[I]he breaches of contract that Lanier alleges are not justiciable by ‘final order[s] of the [SEC],’ *id.* § 78y(a)(1), nor are they ‘rule[s] of the [SEC],’ *id.* § 78y(b)(1).”). That reasoning is equally applicable here, where Congress has likewise given the Commission no role in adjudicating private Section 10(b) claims.

This conclusion also accords with *Tilton*, in which the Court properly found no district court jurisdiction over an Appointments Clause claim that sought to challenge

⁹ If, on the other hand, plaintiffs “believe[] that the implementation or operation of the NMS Plans is inconsistent with [their] interest,” they have “the right to seek review before the SEC of any claim that the Exchanges have failed to appropriately operate or implement their NMS Plans.” *Lanier*, 838 F.3d at 157-58; *see, e.g., In the Matter of the Application of Boston Stock Exchange, Inc.*, Exchange Act Release No. 58191 (July 18, 2008), 2008 WL 2783572, *5 (“Exchange Act Rule 608(d) governs the Commission’s authority to hear appeals from action taken pursuant to a national market system plan, such as the CTA Plan or CQ Plan.”).

an ongoing administrative enforcement proceeding. In contrast to *Lanier* and this case, *Tilton* was not a dispute between private parties. It instead fell squarely within the “mine-run of cases” where “persons responding to SEC enforcement actions are precluded from initiating lawsuits in federal courts as a means to defend against them.” *Tilton*, 824 F.3d at 282 (quoting *Jarkesy*, 803 F.3d at 16). Congress could not have intended such interference with the administrative process. *Jarkesy*, 803 F.3d at 29-30. But the prospect of Section 10(b) suits by third parties seeking redress does not pose the same problem. Rather than interfering with the administrative process, “meritorious private actions to enforce federal antifraud securities laws are an essential supplement to . . . civil enforcement actions” brought or adjudicated by the Commission. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Indeed, private plaintiffs routinely bring their own actions alleging fraud against defendants who are also subject to Commission administrative proceedings. *See, e.g., In the Matter of Timbervest, LLC*, Advisers Act Release No. 4492, 2016 WL 4426915 (Aug. 22, 2016).

II. The exchange defendants are not absolutely immune from this suit challenging aspects of the operation of their markets.

The Court also inquired whether, in the Commission’s view, defendants “have absolute immunity from suit arising from the challenged conduct.” The exchange defendants assert a broad claim of immunity that would encompass everything they do to “disseminat[e] market information and facilitate[e] trading” on their exchanges

(Appellees’ Br. at 29)—including processing orders through the exchanges’ electronic systems, selling access to locations near their servers, and selling their own “proprietary” data. Although the Commission believes that absolute immunity plays an important role in the system of self-regulation, it does not believe immunity extends so far.

Absolute immunity is the strongest form of protection from suit, stronger than the qualified immunity enjoyed by most government officials (*see* Appellees’ Br. 31-32). Because absolute immunity means that “the victim of an abuse of office may receive no recompense for the injury done,” courts have “limited this extraordinary foreclosure of remedies.” *Austin Mun. Sec., Inc. v. Nat’l Ass’n of Sec. Dealers, Inc.*, 757 F.2d 676, 687 (5th Cir. 1985). And courts “must be ‘careful not to extend the scope of the protection further than its purposes require.’” *Weissman v. Nat’l Assn of Sec. Dealers, Inc.*, 500 F.3d 1293, 1297 (11th Cir. 2007) (*en banc*) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)). Consequently, this Court has cautioned that, given the “rare and exceptional character” of absolute immunity, “courts must examine [its] invocation . . . on a case-by-case basis,” with “the party asserting immunity bear[ing] the burden of demonstrating [an] entitlement to it.” *In re NYSE Specialists Secs. Litig.*, 503 F.3d 89, 96 (2d Cir. 2007); *see also Antoine v. Byers & Anderson*, 508 U.S. 429, 432, 433 n.4 (1993) (immunity should be afforded “quite sparing[ly]”); *Butz v. Economou*, 438 U.S. 478, 508 (1978) (“a considered inquiry” is required); Regulation Systems Compliance and Integrity, Exchange Act Release No. 73639 (Nov. 19, 2014), 2014

WL 6850916, at *90 n.675 (“The Commission notes that SRO immunity applies only under certain circumstances.”).

Consistent with this Court’s pronouncements regarding SRO immunity, as well as with the doctrine’s historical precepts, the Commission is of the view that absolute immunity is properly afforded to the exchanges when engaged in their traditional self-regulatory functions—where the exchanges act as *regulators* of their members. Those include the core adjudicatory and prosecutorial functions that have traditionally been accorded absolute immunity, as well as other functions that materially relate to the exchanges’ regulation of their members. But we believe that immunity does not properly extend to functions performed by an exchange itself in the operation of its own market, or to the sale of products and services arising out of those functions.

A. Absolute immunity applies when the exchanges are acting as regulators of their members.

1. SRO immunity is rooted in the traditional common law immunity for judges and prosecutors.

Although exchanges have existed for more than two centuries in the United States, the doctrine of SRO immunity is a relatively recent development which arose in cases where SROs were acting in their prosecutorial and adjudicative capacities. It was first enunciated in *Austin Mun. Sec., Inc. v. Nat’l Ass’n of Sec. Dealers, Inc.*, 757 F.2d 676 (5th Cir. 1985), and embraced by this Court in *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49 (2d Cir. 1996). Both of those cases were lawsuits in which SRO members challenged disciplinary proceedings conducted by their SROs. This Court

observed the longstanding common-law immunity enjoyed by judges and public prosecutors, and it reasoned that this immunity applies with equal force to “private entities engaged in quasi-public adjudicatory and prosecutorial duties” when they “conduct . . . disciplinary proceedings.” *Barbara*, 99 F.3d at 58.

Such immunity makes sense for SROs for the same reasons it makes sense for judges and prosecutors: the prospect of “harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties,” and it would risk “the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.” *Imbler v. Pachtman*, 424 U.S. 409, 423 & n.20 (1976); *see also Bradley v. Fisher*, 80 U.S. 335, 347-48 (1872) (explaining absolute immunity as a “protection essential to judicial independence”); *Butz*, 438 U.S. at 513 (extending immunity to agency hearing examiners, who “share[] enough of the characteristics of the judicial process”).

Accordingly, when an SRO conducts proceedings to discipline its members, investigates violations of securities laws or other rules of conduct, and performs other duties analogous to law-enforcement and adjudicatory functions, it remains squarely within the bounds of absolute immunity.

2. The Court has expanded SRO immunity to include certain actions that materially relate to member regulation.

Consistent with the Supreme Court’s admonition to afford immunity “quite sparing[ly],” *Antoine*, 508 U.S. at 433 n.4, this Court has carefully expanded the scope

of SRO immunity beyond its initial core. Although absolute immunity has not been strictly limited to adjudicatory and prosecutorial functions narrowly understood, it has been extended only to SRO functions that remain within the realm of member regulation.

First, in *D'Alessio v. New York Stock Exchange, Inc.*, 258 F.3d 93 (2d Cir. 2001), after the Commission, the NYSE, and criminal prosecutors brought actions against an NYSE member floor broker for fraudulent trading, the broker retaliated by suing the NYSE for failing to stop him from committing his fraud. *Id.* at 96-98. Although this suit was not a direct challenge to the NYSE's disciplinary action, the Court nonetheless found immunity appropriate because the claims were predicated on the exchange's alleged failure to properly discharge its disciplinary "oversight functions." *Id.* Because "[t]he NYSE, as SRO, stands in the shoes of the SEC in interpreting the securities laws for its members and in monitoring compliance with those laws," the Court reasoned, "[i]t follows that the NYSE should be entitled to the same immunity enjoyed by the SEC when it is performing functions delegated to it under the SEC's broad oversight authority." *Id.* at 105.

Similarly, in *In re NYSE Specialists Litigation*, 503 F.3d 89 (2d Cir. 2007), the Court held that the NYSE was immune from allegations that it had failed to stop securities violations committed by its member firms that handle the exchange's trades. Just as a prosecutor is protected by absolute immunity in its "decision not to

prosecute,” the Court held, the exchanges were protected from alleged failures to investigate and discipline their members. *Id.* at 97.

Next, in *DL Capital Group, LLC v. Nasdaq Stock Market, Inc.*, 409 F.3d 93 (2d Cir. 2005), the Court held that Nasdaq was immune from liability for the manner in which it broke trades that had been entered by its members during a market malfunction. Under the applicable NASD rule, Nasdaq possessed adjudicatory authority to cancel trades, and thereby to resolve disputes between member buyers and sellers whose trades needed to be unwound. *Id.* at 95-96. Nasdaq was authorized to make a “determination” to break members’ trades by “declar[ing] any transaction null and void or modify[ing] its terms,” subject to a formal adjudicatory appeals process in which all parties had an opportunity to be heard. *See* NASD Rule 11890 (superseded by FINRA Rule 11890);¹⁰ *DL Capital*, 409 F.3d at 95. Although the plaintiff in *DL Capital* specifically challenged the timing of Nasdaq’s announcement of its trade break, rather than the break itself, the announcement was closely tied to that adjudicatory decision: “[A]nnouncing the suspension or cancellation of trades is as much a part of [the SRO’s] regulatory duties as is the actual suspension or cancellation of trades.” *DL Capital*, 409 F.3d at 98 (quotation omitted).

And most recently, in *Standard Investment Chartered, Inc. v. NASD*, 637 F.3d 112 (2d Cir. 2011), the Court addressed a claim arising out of a merger that combined

¹⁰ Available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3840

certain member-regulation functions of the NYSE and NASD into a single self-regulatory organization, FINRA, responsible for regulating the conduct of broker-dealers. The purpose of the merger was to separate NYSE's market-operating functions from many of its member-regulating functions, and to consolidate the latter into a single regulatory entity, FINRA. This Court observed that the consolidation, which was designed to improve the structure of member regulation, was "inextricable from the SRO's role as a regulator." *Id.* at 116. And although the plaintiff specifically alleged that NASD's proxy solicitation in conjunction with the merger misrepresented certain information to NASD's shareholders, absolute immunity protected the proxy solicitation because it was "a necessary prerequisite to the completion of th[e] consolidation," and thus "incident to the exercise of regulatory power" by the regulatory entities involved in the merger. *Id.*

The common denominator in each of these cases is the SROs' regulatory role with respect to the conduct of their members. Such an approach accords with the decisions of other circuits. *Compare, e.g., Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998) (accordng immunity to NASD trading suspension, which directed members to halt trading); *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110 (D.C. Cir. 2008) (accordng immunity to NASD administration of Series 7 licensing exam for member brokers); *Santos-Buch v. FINRA*, 591 Fed. Appx. 32 (2d Cir. 2015) (unpublished) (accordng immunity to FINRA's disclosure of member disciplinary records); *with Weissman v. Nat'l Assn of Sec. Dealers*,

Inc., 500 F.3d 1293 (11th Cir. 2007) (*en banc*) (declining to accord immunity to NASDAQ’s advertising “in the service of [its] own business” of attracting investors to its exchange).

3. This Court’s precedent does not support the application of immunity beyond SRO actions that relate to member regulation.

At times this Court has used broad language that could arguably be construed to extend immunity beyond the core SRO function of member discipline and related efforts to regulate members—suggesting, for example, that immunity applies when an SRO “perform[s] important governmental functions” or engages in activity that “relate[s] to the proper functioning of the regulatory system.” *NYSE Specialists*, 503 F.3d at 96 (quoting *Barbara*, 99 F.3d at 58 and *D’Alessio*, 258 F.3d at 106). But this language must be read in the particular context of those cases, which, as explained above, all involved the “governmental function” of member regulation. *Cf. Weissman*, 500 F.3d at 1298 (rejecting NASDAQ’s overly broad reading of *D’Alessio*’s language).

Use of such broad language to define the bounds of immunity in a different context would conflict with this Court’s caution that absolute immunity be extended only “on a case-by-case basis.” *NYSE Specialists*, 503 F.3d at 96. And adopting an approach to SRO immunity untethered from the function of member regulation would present substantial conceptual difficulties. Without that core function as a guide, it is exceedingly difficult (if not impossible) to determine which of a variety of functions of a quasi-governmental entity like an exchange are the “governmental”

ones, and which are not. *See, e.g.*, S. Rep. No. 94-75, 94th Cong. 1st Sess., 1975 WL 12347, at *23 (warning that “care should be exercised” to avoid the “impression that the industry and the government fulfill the same function in the regulatory framework or that they enjoy the same order of authority or deserve the same degree of deference, whether by firms, courts or the Congress”). This difficulty may explain why the district court reached the conclusion that proprietary feeds and complex order types were “governmental” in nature, while co-location services were not. SPA17-SPA23. Neither party appears to defend this distinction on appeal, and we cannot discern a principle that would justify it.

In contrast, the concept of “member regulation” is more concrete, more near to the core of the absolute immunity doctrine, and more consonant with the traditional understanding of self-regulation under the securities laws. *See* S. Rep. No. 94-75, 94th Cong. 1st Sess., 1975 WL 12347, at *23 (describing “delegated governmental power” as power “to enforce . . . compliance by members”); *id.* (emphasizing that the “concept of ‘membership’ . . . is fundamental to the self-regulatory system”).

B. Absolute immunity should not extend beyond member regulation to cover the exchanges’ operation of their own markets.

In claiming absolute immunity for their proprietary feeds, co-location services, and complex order types, the exchange defendants seek to extend the immunity doctrine well beyond its member-regulation core. Proprietary feeds and co-location

services are not a means of regulating the conduct of brokers; they are products and services created and sold by the exchanges themselves.¹¹

Nor, in today's world of electronic trading, are complex order types properly viewed as member regulation; they are better understood as functionalities of the exchanges' own electronic system of processing, routing, and matching orders. The parties in this case agree that "electronic order types . . . are 'preprogrammed commands *traders* use to tell the *Exchanges* how to handle their bids and offers'"—not regulatory commands by the exchanges compelling traders to behave in certain ways. Appellees' Br. 13 (quoting JA224 ¶4) (emphasis added). As we have explained (*supra* at 7) and as the defendants have acknowledged (Appellees' Br. 13), electronic trading "no longer relies on broker-dealers to transact trades on physical trading floors." As the exchanges emphasize, electronic order types "allow investors to replicate the flexibility and complexity that can occur in human interactions, but with the speed and efficiency of automated execution." *Id.* As a result, exchanges "typically offer a

¹¹ An exchange's status as a for-profit corporation does not deprive it of absolute immunity when it engages in its member-regulatory functions. *DL Capital*, 409 F.3d 93, 99 n.4. But this does not mean that the for-profit nature of the exchanges' conduct is "*categorically* irrelevant" (Appellees' Br. 40) when determining whether such conduct is regulatory in the first place. Where the exchanges are engaged in the business of selling their own products and services, the rationale for absolute immunity—the desire to promote independent judgment unclouded by fear of recriminatory lawsuits—may carry less force. *Cf.* Concept Release Concerning Self-Regulation, 69 Fed. Reg. 71256, 71261-62 (Dec. 8, 2004) (explaining that "business pressure can create a strong conflict between the SRO regulatory and market operations functions").

wide range of order types for trading on their automated systems.” *Id.* (quoting Concept Release on Equity Market Structure, 75 Fed. Reg. at 3598). And these offerings now bear more resemblance to products and services like co-location and proprietary feeds than to member regulation.

The exchanges do not appear to argue that propriety feeds, co-location services, or electronic order types are activities that involve regulating their members.¹² Instead, they claim (Appellees’ Br. 32) that these activities relate to the operation and “regulation” of their “markets.” But when an exchange is operating its own market and engaging in its own conduct pursuant to Commission regulation, it is acting as a *regulated* entity—not a *regulator* of others. Although the latter warrants immunity, the former does not. As the district court aptly observed in *Lanier* (while ultimately declining to rule on immunity), there is a distinction between conduct that is “truly regulatory (for example, involving the interpretation of the securities laws or

¹² The exchanges argue (Appellees’ Br. 33) that this case is similar to *NYSE Specialists* because the plaintiffs allege, in effect, that the exchanges failed to regulate high-frequency traders by allowing them to “front-run stocks.” But, unlike in *NYSE Specialists*, the plaintiffs here challenge the *exchanges’* conduct, not the conduct of the exchanges’ *members*. If anything, the plaintiffs’ allegations here are more like the issue this Court declined to reach in *NYSE Specialists*—whether the NYSE was immune for its own alleged misrepresentations. Although the Court did not reach the issue, it “point[ed] the parties’ and the district court’s attention” to *Weissman v. Nat’l Ass’n of Sec. Dealers, Inc.*, 468 F.3d 1306 (11th Cir. 2006), in which a similar issue was raised. 503 F.3d at 102-03. The *en banc* court in *Weissman* ultimately found no immunity. 500 F.3d 1293 (11th Cir. 2007) (*en banc*).

Although the Commission does not believe the exchange defendants are immune for the conduct plaintiffs challenge in this case, it takes no position on whether plaintiffs have stated a Section 10(b) claim.

the enforcement of securit[ies] rules)” and merely “regulated conduct.” *Lanier v. BATS Exchange, Inc.*, 105 F. Supp. 3d 353, 366 n.4 (S.D.N.Y. 2015). The “fact that an SRO has authority to regulate an activity does not imply that the SRO is acting as a regulator when it itself engages in that same activity.” *Id.* We agree.

The exchanges are correct, for example, that “disseminating market data” is a “critical” function (Appellees’ Br. 32) for which exchanges have various “responsibilities under Regulation NMS” (Appellees’ Br. 33), and more generally, that the exchanges have numerous obligations to ensure fair and orderly securities markets. But the fact that these functions are important and highly regulated by the Commission and the securities laws does not necessarily mean that they warrant absolute immunity. The Commission and the securities laws impose a variety of regulatory obligations on SROs and non-SROs alike—whether they are exchanges, alternative trading systems, broker-dealers, investment advisers, or others who play “gatekeeper” roles to protect investors and ensure efficient securities markets. What sets SROs apart is their authority to regulate the conduct of others (*i.e.*, their members)—not their responsibilities to conform their own conduct to regulation by the Commission.

Indeed, the similarities between exchanges and alternative trading systems are particularly instructive. Alternative trading systems perform many of the same functions as national securities exchanges in operating their own markets, yet they are not SROs with any claim to immunity; they are simply regulated entities. *See supra* at

8-9. It would be anomalous if the market-operation activities of alternative trading systems became “governmental,” and thus absolutely immune, whenever the same or similar functions were performed by an SRO. Operating a market is not a “regulatory” function that “in other circumstances, [would] be performed by a government agency.” *Barbara*, 99 F.3d at 59. It is instead a function that could be performed by a nongovernmental, regulated entity.

For the same reasons, even if the Commission “has approved all of the challenged practices,” as the defendants assert (Appellees’ Br. 29), this does not necessarily entitle the exchange to absolute immunity. Rather, as this Court has recognized, “the central question our SRO-immunity cases ask is not whether the SRO is acting (or not acting) ‘consistent with’ the laws it is supposed to apply but rather whether the plaintiff’s allegations concern the exercise of powers within the bounds of the government functions delegated to it.” *NYSE Specialists*, 503 F.3d at 98. As explained below, where an exchange is not regulating its members but is allegedly acting consistent with Commission regulation, the more appropriate doctrine to apply is preclusion or preemption, not absolute immunity.

III. Preemption and preclusion doctrines should protect the exchanges’ market operations from suit where a plaintiff’s claims conflict with Commission regulation.

Although the Commission does not believe absolute immunity protects an exchange’s conduct outside of the context of member regulation, principles of preemption and preclusion may nevertheless bar private suits challenging the

exchanges' operation of their markets. As explained above, the exchanges are highly regulated by the Commission under the securities laws, even when they are not regulating their members. Where a plaintiff's claims conflict with, or otherwise obstruct, the Commission's regulation of the exchanges, the Commission expects that such claims will—and should—be foreclosed.

The Court adopted this approach in *Lanier*, in finding that a state-law breach-of-contract claim against an exchange was preempted by Commission regulations. *See Lanier*, 838 F.3d at 151 n.10 & 152-56; *cf. Barbara*, 99 F.3d at 59 (invoking preemption doctrine); *In re Series 7*, 548 F.3d at 113-14 (same). A similar analysis would likewise preclude federal Section 10(b) claims that conflict with Commission regulation, including Commission regulation of SRO rules. *See POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014) (explaining that “principles [of preemption] are instructive” when determining whether one federal law precludes another). For example, where a plaintiff challenges actions of an exchange that are in accordance with exchange rules approved by the Commission under Section 19(b) of the Exchange Act (*supra* at 9-10), preclusion or preemption would bar the challenge because it would conflict with “Congress’s intent that the SEC, with its expertise in the operation of the securities markets, make the rules regulating those markets.” *Lanier*, 838 F.3d at 155; *see also, e.g., Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007) (holding that Commission regulation of IPO underwriters precludes federal antitrust claim); *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1128-

36 (9th Cir. 2005) (holding that SRO rules approved by the Commission preempt state law).¹³

While the Commission believes that the SRO activities in this case should be subject to a preclusion analysis, it takes no position on the outcome of such an analysis here. This case arises on a motion to dismiss and the parties, who appear to disagree in their pleadings about whether each of the challenged practices was approved by the Commission, have not briefed this precise issue. *Compare* Appellees’ Br. at 2 (“All order types are governed by the rules of the relevant exchange, and—like proprietary feeds and co-location services—have been approved by the SEC under the Exchange Act.”), *with, e.g.*, JA293 ¶ 143 (“By failing to include important information about how their order types worked in their regulatory filings, or failing to make the filings altogether, the Exchanges thwarted the SEC rule-making process.”). Finally, the Commission’s enforcement activities in this area, *see supra* at 11-15, further counsel against the Commission taking a position regarding the allegations in this case.

¹³ Absolute immunity as well as protection from suit via preemption or preclusion principles would supplement any preexisting exchange rules limiting liability. *See, e.g.*, New York Stock Exchange Rule 17(a) (Exchange Liability) & Rule 18 (Compensation in Relation to Exchange System Failure); NASDAQ Stock Market LLC Rule 4626 (Limitation of Liability).

CONCLUSION

The Commission is of the view that the district court had subject-matter jurisdiction over plaintiffs' private securities fraud action against the defendant exchanges, and that the defendants are not absolutely immune from suit for engaging in the challenged conduct. Whether and to what extent principles of preclusion would protect the defendants from liability has not been briefed by the parties, and is unclear on the limited record at this stage in the proceedings.

Respectfully submitted,

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November 28, 2016

CERTIFICATIONS

I certify that:

1. This brief contains 8,449 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.
3. On November 28, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit via the Court's CM/ECF system.
4. On November 28, 2016, I caused six paper copies of the foregoing to be mailed via overnight courier to the Clerk of the Court of Appeals for the Second Circuit.
5. On November 28, 2016, I caused two paper copies of the foregoing to be mailed via overnight courier to counsel for the parties at the following addresses:

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