



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

OFFICE OF THE  
GENERAL COUNSEL

May 12, 2006

VIA FEDEX

Janette Bloom  
Clerk of Court  
Supreme Court of Nevada  
201 South Carson Street, Suite 201  
Carson City, Nevada 89701-4702

Re: Response of Securities and Exchange Commission in *Nanopierce Technologies, Inc. v. The Depository Trust and Clearing Corp.*, No. 45364 (Nev.)

Dear Ms. Bloom:

While the *amicus curiae* brief of the North American Securities Administrators Association, Inc. argues that conflict preemption is not applicable to this case, that brief in fact brings into stark highlight why this lawsuit is in direct conflict with the federal regulatory regime, and why it is critically important that the case be dismissed on preemption grounds. The Securities and Exchange Commission therefore asks the Court to consider this short response.

The premise of NASAA's brief is that *assuming the allegations of the complaint are true*, as would be done if those allegations were being examined on a motion to dismiss for failure to state a claim, there can be no inconsistency between a state law suit and the Securities Exchange Act regulatory regime governing the nation's clearance and settlement system. See NASAA Br. at 2, 17, 23. As we explained in the *amicus* brief of the Commission, plaintiffs in essence allege that (a) the clearance and settlement system has certain "defects," and (b) defendants have violated state law by failing to disclose those defects. Comm. Br. at 22-25. If the defects do not exist, defendants cannot be liable for fraud for failing to disclose them. And without the defects, plaintiffs' allegation that operation of the system in accordance with the Commission-approved rules is a form of manipulation also fails.

Plaintiffs' claims are preempted because evaluating these claims of alleged defects has been entrusted by Congress to the Commission, not to the state courts. The Commission found that the clearance and settlement system complies with the requirements of the Exchange Act when it approved the system more than twenty years ago, and it has continued to be of that view as it has exercised oversight responsibility ever since. The essential predicate to plaintiffs' case, therefore, is a state court determination that the Commission has misunderstood how the clearance and settlement system functions. The conflict arises because before plaintiffs can attempt to prove their claim that defendants made misrepresentations or engaged in manipulation, they must first ask a state court to displace or supersede the Commission as the regulatory fact finder.

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Under plaintiffs' theory of the case, if the Nevada courts disagree with the Commission's exercise of its expert judgment, defendants can potentially be held liable for huge damages, they might be required to make "disclosures" that defendants and the Commission both believe to be false, and they could be forced, either by court order or by the desire to avoid future damage awards, into changing the way they do business, perhaps by adopting practices that the Commission believes are inconsistent with the requirements of the Exchange Act and the proper functioning of the national clearance and settlement system. On the other hand, if the Nevada courts agree with the Commission's judgment, a new set of plaintiffs in a different state may bring the exact same allegations and repeat the process, presumably until cases have been brought in all fifty states, with a win in even one state causing the undesirable consequences we have enumerated on a nationwide basis. A legal regime more antithetical to a nationally uniform regulatory system, or more likely to wreak havoc with the national clearance and settlement system, is difficult to imagine.

As noted in the Commission's brief, the Commission has adopted Regulation SHO for the purpose of preventing abusive naked short selling, and it has stated that if it concludes that further steps are required, it will take them. Comm. Br. at 28-29. The national regulatory regime should be permitted to function as Congress intended it, not disrupted and displaced by state law actions brought against key participants in the clearance and settlement process for obeying Commission-approved rules. Preemption cannot be evaded by invoking the presumption that allegations in a complaint are true for purposes of ruling on a motion to dismiss. Otherwise, any regulatory determination, by any federal regulatory agency, could be subjected to review under the law of fifty states merely by alleging that the regulator has made an incorrect determination of the operative facts, and that the regulated entity has committed fraud by failing to disclose the truth. The Court should refuse to take that path and should instead affirm the judgment of the district court.

Respectfully,



Brian G. Cartwright  
General Counsel

cc: William E. Cooper, Esq.      Bruce T. Laxalt, Esq.  
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