No. 15-3057

(Docket Numbers in District Court: 14-MD-2589(JMF) & 1:14-cv-02811-JMF)

IN THE 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,
Lead Plaintiffs-Appellants,

STATE-BOSTON RETIREMENT SYSTEM
Plaintiff-Appellant,

GREAT PACIFIC SECURITIES, on Behalf of Itself and All Others Similarly Situated, FORSTA AP-FONDEN,
Plaintiffs,

[Caption continued on following page.]

Appeal from the United States District Court
for the Southern District of New York
The Honorable Jesse M. Furman

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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AMERICAN EUROPEAN INSURANCE COMPANY, JAMES J. FLYNN, HAREL INSURANCE COMPANY LTD., DOMINIC A. MORELLI,
Consolidated-Plaintiffs,

vs.

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,

BARCLAYS CAPITAL INC., BARCLAYS PLC, and Does, 1-5, inclusive,
Defendants.

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STATUTES, RULES AND REGULATIONS

I. ARGUMENT

A. The District Court Correctly Ruled that It Had Subject-Matter Jurisdiction over This Securities-Fraud Action

The district court rejected Defendants' argument that it lacked subject-matter jurisdiction over Plaintiffs' claims. SPA13. Although the Exchanges asserted that Plaintiffs' claims must be presented to the Securities and Exchange Commission ("SEC") under a rigid review process, the court deemed that assertion "unpersuasive." *Id.* Plaintiffs' claims are typically redressable in federal courts, it reasoned, and whether Exchange Act §10(b) reaches the Exchanges' conduct goes to those claims' ***merits*** – not a court's authority to hear the case. SPA13-SPA14.

The district court was correct. Plaintiffs' claims are premised on the Exchanges' manipulative behavior in rigging the public stock exchanges, which they run and operate, in favor of preferred HFT customers while furthering their own business interests. Accordingly, Plaintiffs seek relief under §10(b) of the Exchange Act and SEC Rule 10b-5.

The federal courts have subject-matter jurisdiction over such claims; indeed, Congress expressly provided as much. *See* 15 U.S.C. §78aa; *see also Gross v. Weingarten*, 217 F.3d 208, 224 (4th Cir. 2000) ("A direct action alleging violations of section 10(b) and Rule 10b-5 is subject to ***exclusively federal jurisdiction***.").[1]

1. Defendants' Attempted Rewrite of the Complaint Infects Their Entire Subject-Matter Jurisdiction Argument

The overriding theme of Defendants' subject-matter jurisdiction argument is simplistic: "Plaintiffs challenge the Exchanges' regulatory decisions." Def. Bf. 18.

But Defendants' theme is patently wrong: Plaintiffs challenge the Exchanges' ***fraudulent, manipulative conduct*** through proprietary data feeds, co-location services, and complex order types – which have the end results of affecting market activities and harming ordinary investors. *E.g.*, JA333:¶243; JA335-JA2336:¶250. Thus, Plaintiffs have alleged textbook market manipulation. *See, e.g.*, *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977) (market manipulation involves conduct "intended to mislead investors by artificially affecting market activity").

While Defendants dispute Plaintiffs' allegations, that disagreement does not allow them to rewrite the Complaint's allegations, morphing securities-fraud charges into challenges to regulatory decisions or rulemaking authority. *Cf. Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551

[1] ***Bold*** emphasis is added and citations are omitted throughout unless otherwise noted.

U.S. 308, 322-23 (2007) ("courts must … accept all factual allegations in the complaint as true").

2. Defendants' Authorities for an Administrative Review Procedure Involve Internal SRO Matters Like Member Discipline or Membership Denial that Are Inapplicable to This Securities-Fraud Action

An integral part of Defendants' rewritten "theme" of Plaintiffs' case is their hodgepodge of decisions purportedly illustrating that the SEC is the sole authority with the power to resolve the claims alleged. Def. Bf. 18-28.

While this Brief's confines do not allow a full exposition of each opinion, even a cursory glance at several reveals that the subject-matter jurisdiction pendulum had swung in an SRO's favor only when the litigation centered around aspects of the SRO's internal matters – like rules-violation discipline, or membership disputes:

- In *Altman v. United States SEC*, 687 F.3d 44 (2d Cir. 2012), this Court affirmed the district court's holding that Exchange Act §25(a) precluded an attorney facing a lifetime ban from practicing before the SEC from challenging that "debarment" in a district court. Section 25(a) expressly requires that aggrieved parties pursue review of those bans in the court of appeals. *Id*. at 46.

- In *In re Series 7 Broker Qualification Exam Scoring Litig*., 548 F.3d 110 (D.C. Cir. 2008), a putative class of test-takers victimized by a flawed Series 7 Broker exam attempted to sue the National Association of Securities Dealers ("NASD") for breach of contract, negligence, and negligent misrepresentation. Their suit shouldn't have been brought in federal district court, ruled the D.C. panel: Any individual barred from NASD membership has "statutorily guaranteed rights to appeal" the decision – indeed, they have "four potential levels of appeal" ranging from the SEC to the NASD to the federal courts of appeal. *Id.* at 112-13. Notably, the *Series 7* test-takers "concede[d] there is no federal implied private right of action" (*id.* at 113); the exact opposite is true here. *Halliburton Co. v. Erica P. John Fund, Inc.*, ___ U.S. ___, 134 S. Ct. 2398, 2407 (2014).

- *Feins v. AMEX*, 81 F.3d 1215 (2d Cir. 1996), is another denied-membership decision. There, this Court explained that Exchange Act §§19(d) and 19(f) "expressly provide for a system of administrative review of membership denials and a remedy for erroneous decisions." *Id.* at 1220.

- *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 616 F.2d 1363 (5th Cir. 1980), involved NASD member Merrill Lynch's attempt to thwart an SRO disciplinary action against it by getting a district court to enjoin the NASD from allegedly breaking its own rules. *Id.* at 1366. The Fifth Circuit rejected that attempt: "Congress has specified certain procedural safeguards for NASD disciplinary hearings," involving the hearings themselves and the NASD's "detailed rules," plus "close scrutiny by the SEC" with federal appellate review. *Id.* at 1367-68.

- Finally, in *Citadel Sec., LLC v. Chi. Bd. Options Exch., Inc.*, 808 F.3d 694 (7th Cir. 2015), the Seventh Circuit considered a suit for improper fees brought by an SRO member (Citadel) against the SRO. In affirming a subject-matter jurisdiction dismissal, the court focused on the SRO's alleged violation of ***its own rules***. *Id.* at 699 ("plaintiffs seek to enforce defendants' own rules"); *id.* at 700 ("SEC's jurisdiction covers claims against an SRO for violating 'its own rules'").[2]

These cases (and Defendants' remaining ones) do not require Plaintiffs to exhaust an administrative-review process designed to address SROs' internal rules, membership, or disciplinary matters. Rather, Plaintiffs are private actors exercising long-settled rights to pursue a private right of action for securities fraud against the various Defendants. *See Halliburton*, 134 S. Ct. at 2407 ("we have long recognized an implied private cause of action to enforce the provision and its implementing regulation").

3. Defendants' Authorities Demonstrate that Not *All* Actions Against an SRO Trigger an Administrative Review Process

In their haste to bulk up their Answering Brief with decisions ostensibly counseling bright-line administrative review, Defendants overlook that at least two of them illustrate that the internal-review process is not required for ***every*** legal claim brought against an SRO.

This Court, in *Santos-Buch v. Fin. Indus. Regulatory Auth., Inc.*, 591 F. App'x 32 (2d Cir.), *cert. denied*, ___ U.S. ___, 136 S. Ct. 43 (2015), considered an appeal by a disciplined stockbroker who unsuccessfully challenged that discipline's public airing on two internet databases

[2] Defendants' assertion that *Citadel* involved "allegedly improper market oversight" thus is mistaken. Def. Bf. 24.

maintained by SRO Financial Industry Authority, Inc. ("FINRA"). *Id.* One database (BrokerCheck) existed pursuant to FINRA rules; the other (Web File) did not. *Id.* at 33. Santos-Buch sued FINRA in federal district court for, *inter alia*, publishing the disciplinary records without FINRA rules authorization, due process violations, and invasion of privacy. *Id.* The district court dismissed him on subject-matter jurisdiction and immunity grounds. *Id.*

In affirming the lower court's judgment, this Court explained that the subject-matter jurisdiction holding applied only to Santos-Buch's rules-based challenge to the BrokerCheck database – that challenge should have been brought before the SEC. *Id.* But Santos-Buch's claims related to the Web File publication "***are not subject*** to the Exchange Act's exhaustion requirement because they challenge neither the disciplinary action taken by FINRA, nor a FINRA rule." *Id.* at 34.[3] Thus, *Santos-Buch* demonstrates that not every suit against an SRO gets automatically shuttled onto the administrative-review track.

So does *PennMont Sec. v. Frucher*, 586 F.3d 242 (3d Cir. 2009), which Defendants insist stands for the rigid premise that "SRO actions are subject to review by the SEC." Def. Bf. at 19. They're mistaken; *PennMont* instead shows that Defendants' bright-line rule is more

[3] The Court instead affirmed the Web File claims dismissal on other grounds. *Id.*

nuanced. True, the *PennMont* court held that a dispute between an SRO member (PennMont Securities) and SRO the Philadelphia Stock Exchange over legal fees owed by PennMont pursuant to Philadelphia Stock Exchange Rule 651 should have proceeded along an administrative-review track. 586 F.3d at 245-46. Because "PennMont did not avail itself of this administrative process" (*id*. at 246), the Third Circuit dismissed its appeal for lack of subject-matter jurisdiction. *Id*. at 247.

But *PennMont* also illustrates the availability of non-administrative-review proceedings against SROs when warranted – for the legal fees were incurred in an ***earlier state-court action*** by PennMont against the Philadelphia Stock Exchange, which it lost at summary judgment after years of protracted litigation. *Id*. at 243-44. Plainly, that earlier action was not dismissed for PennMont's failure to exhaust administrative remedies – rather, it was PennMont's ***later*** challenge to a specific SRO fee rule that triggered the administrative-review process.

And so it is here: Plaintiffs do not challenge the Exchanges' rule-making authority, or ask that this Court review the propriety of individual rules. Instead, Plaintiffs have brought a straightforward securities-fraud claim under §10(b), which the federal courts are well-equipped to decide.

4. Even if Administrative Review Might Be Warranted, the SEC's Inability to Provide the Significant Monetary Relief Sought Counsels Against It

Even if this Court were to hold that administrative review seems justified, the Court retains discretion to invoke a broad array of exceptions allowing the claim to be brought in district court. *See, e.g.*, *Santos-Buch v. Fin. Indus. Regulatory Auth.*, 32 F. Supp. 3d 475, 482 (S.D.N.Y. 2014) (listing exceptions) (citing *Guitard v. United States Sec'y of Navy*, 967 F.2d 737, 741 (2d Cir. 1992)), *aff'd*, 591 F. App'x 32 (2d Cir. 2015). Those exceptions include the unavailability of adequate relief. *Barbara v. NYSE*, 99 F.3d 49, 57 (2d Cir. 1996) ("exhaustion will not bar a suit when 'available [administrative] remedies provide no "genuine opportunity for adequate relief"'") (quoting *Guitard*, 967 F.2d at 741); *accord Santos-Buch*, 32 F. Supp. 3d at 481-82. Such grounds arise when plaintiffs seek monetary relief and "the administrative review provisions of the [relevant] Act do not provide for money damages." *Barbara*, 99 F.3d at 57.

That is precisely the situation at bar. The Exchange Act's administrative-review procedures "do not provide for money damages" (*id.*), and Plaintiffs seek significant monetary relief. *E.g.*, JA229:¶16 ("misconduct alleged herein has siphoned off billions of dollars from private and public pension funds and individual retirement accounts"); JA271:¶108 (co-location services "have diverted billions of dollars annually away from non-HFT market participants such as Plaintiffs and the Class"). Plaintiffs are not seeking reversal of some adverse Exchange determination; rather, they seek "compensation for past harms." *Barbara*, 99 F.3d at 57. That compensation "cannot be realized through" the Exchange Act's administrative-review procedures, and thus a dismissal for failing to attempt those procedures is unwarranted. *Id.*[4]

B. Absolute Immunity Is Inapplicable to Defendants' Business-Centric Conduct

The linchpin of Defendants' absolute-immunity argument is that they are immune from private damage suits in connection with their "'regulatory responsibilities.'" Def. Bf. 30.

As with any linchpin, however, once it's removed the attached wheel falls off – and so it is with Defendants' argument, for the three practices they use to manipulate the securities markets have nothing to with fulfilling "regulatory responsibilities." Properly exposed as extraneous, business-centric conduct that foists billions of dollars of unnecessary trading costs upon innocent securities-market participants, the Exchanges' misconduct deserves no special protection under the "'rare and exceptional'" absolute-immunity doctrine. *Barrett v. United States*, 798 F.2d 565, 571 (2d Cir. 1986).

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[4] Defendants' discounting *Barbara*'s discussion of inadequate remedies as outdated (Def. Bf. 28) is mystifying. *Barbara* makes clear that the no-genuine-relief exception is "well[-]settled." 99 F.3d at 57.

1. The District Court Recognized that Co-Location Services Are Undeserving of Immunity

Even the district court recognized that the Exchanges' co-location services warrant no immunity protection. SPA17. Those extraneous services serve no regulatory function; indeed, "it is hard to see" how they differ from "the provision of commercial products and services" that have been deemed unprotected. SPA18.

The district court's holding was correct. Co-location is nakedly commercial conduct that exists solely to generate additional revenues for the Exchanges, and has nothing to do with SROs acting as quasi-regulatory overseers.

Defendants have conceded as much elsewhere. Co-location is, by Defendant NYSE's admission to the SEC, "completely voluntary," while NASDAQ has acknowledged that co-location "'***exists to advance … competition***'" for order flow "'among exchanges and non-exchange markets.'" MDL-CD26:36 (quoting Exchanges' SEC filings). In fact, two of the Exchanges do not even maintain their own co-location centers, but provide the service through an unregulated third party. *Id.* That third party, in turn, has explained that co-location is simply an "infrastructure tool and ***is not a trading practice***."[5] Plainly, co-location is far-removed

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[5] MDL-CD26:37.

from the "performance of regulatory, adjudicatory, or prosecutorial duties in the stead of the SEC." *Weissman v. NASD*, 500 F.3d 1293, 1298 (11th Cir. 2007).

Struggling against this reality, Defendants insist that co-location services are "one critical method" they use to fulfill their "regulatory responsibility." Def. Bf. at 37. But that's not true; their core regulatory responsibilities, summed up, are to: (i) "prevent fraudulent and manipulative ... practices"; (ii) "promote just and equitable principles of trade"; (iii) "remove impediments to and perfect" the "free and open market"; and (iv) "protect investors and the public interest." 15 U.S.C. §78o-3(b)(6). And the Exchanges fulfill those responsibilities by, *inter alia*, participating in the consolidated feed – which data stream, available to ***all*** investors, Congress intended "'would form the heart of the national market system.'" JA239:¶45.

But the high-priced co-location services do the opposite – they ***promote*** manipulative practices, close off free-and-open markets, and actually hurt investors and the public interest by making ordinary traders "pay higher prices for stocks." JA272:¶109. It is absurd to suggest that, "in other circumstances," the co-location services would "be performed by a government agency" like the SEC. *Barbara*, 99 F.3d at 59.

Seeking a lifeline from the SEC's oversight of exchange ***rules*** associated with co-location services, Defendants imply that the agency has given its stamp of approval to the practice. Def. Bf. 37-38.

But Congress has cautioned against reading SEC "approval" into its oversight. *See, e.g.*, 15 U.S.C. §78z (Exchange Act §26 specifies that a filed statement or report does not mean it is "true and accurate on its face," or that the SEC has passed on the security's merits); *see also In re Facebook, Inc., IPO & Sec. & Derivative Litig.*, 986 F. Supp. 2d 428, 451 n.11 (S.D.N.Y. 2013) ("'SEC approval ... is not the sine qua non of SRO immunity; engaging in regulatory conduct is.'").

Finally, while Defendants point out that the SEC has rejected a "synchronize[d]" data delivery requirement (Def. Bf. 38), they omit that in the same release, the SEC also warned that SROs or broker-dealers are prohibited "from transmitting data to a vendor or user any sooner than [they] transmit[] the data to a Network processor." Regulation NMS, 70 Fed. Reg. 37496, at 37567 (June 29, 2005). That is precisely what occurs with co-location – as Defendant BATS implicitly acknowledged before a Senate subcommittee in 2014. JA265:¶95.

2. Proprietary Data Feeds Are Not Quasi-Regulatory Actions Deserving of Protection

Plaintiffs tabulated the district court's myriad errors in deciding that Defendants' proprietary data feeds comprised quasi-regulatory functions protected by absolute immunity. Opening Bf. 40-47. The court utilized a falsely-premised syllogism, contradicted the record, and misread Circuit precedent – none of which withstands scrutiny under this Court's *de novo* review. *Id*.

In response, Defendants stumble down the wrong path.

They first note that data dissemination through the ***consolidated*** feed is "'regulatory'" in nature – a truism with which Plaintiffs readily agree – and then repeat Congress's expectation that consolidated data would form the "'heart'" of the national market system (Def. Bf. 32) – again, agreed.

But Defendants err by pronouncing the two different data feeds completely equivalent in nature and effect. They ignore that the proprietary feeds, streamed to a discrete subset of wealthy traders, bear scant resemblance to the consolidated feeds that were meant to ensure equal access and fair-and-orderly markets for ***all*** traders. They overlook that the proprietary, direct feeds mean that ordinary market participants are forced to trade on "***stale***" information. JA282:¶124. These innocent investors are unaware that other market participants receive trade data that is both faster, and more accurate, than what comes through the consolidated feeds. *Id.*

That business-centric conduct by the Exchanges has nothing to do with "'the proper functioning of the regulatory system'" (*In re NYSE*

Specialists Sec. Litig., 503 F.3d 89, 96 (2d Cir. 2007)); the consolidated feed already accomplishes that. Nor are the proprietary feeds the sort of actions that, "in other circumstances," would "be performed by a government agency." *Barbara*, 99 F.3d at 59. Indeed, that the SEC would set up a dedicated data feed ***in addition*** to the national consolidated feeds, deliberately relegating ordinary investors to trading on stale information, is laughable. The SEC cautions that when the interests of short-term traders conflict with long-term investors, it is the agency's "'clear responsibility ... to uphold the interests of long-term investors.'" JA241:¶47.

At bottom, the enhanced proprietary data feeds are not "central" to the Exchanges' provision of data to the entire market on a nondiscriminatory basis. *NYSE*, 503 F.3d at 100. They have nothing to do with "safeguarding the integrity of market information" (*DL Capital Grp. LLC v. Nasdaq Stock Mkt., Inc.*, 409 F.3d 93, 98 (2d Cir. 2005)), but corrupt that integrity by ensuring that stale, less-accurate information reaches the majority of the market.[6]

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[6] Defendants claim that this Court has already rejected complaints that an exchange allowed third-party firms to """front-run""" innocent investors. Def. Bf. 33 (citing *NYSE*, 503 F.3d at 99). But there is a glaring distinction between the claims there and Plaintiffs': In *NYSE*, the plaintiffs complained that the NYSE itself had "abandoned" its regulatory duties in allowing third parties to front-run investors. 503 F.3d 89. This Court held that those, and similar claims of the NYSE's shirking of its own rules, "all involve the NYSE's action or inaction with respect to trading on

3. Undisclosed Complex Order Types Serve No Regulatory Function

The Exchanges' creation of hundreds of complex order types, yielding thousands of variations, serves no protected regulatory function.

The complex order types instead maximize the benefits of high-speed trading for a select few, and increase order flow (and profits) for the Exchanges – but at the expense of ordinary investors. JA289:¶136; *see also* JA289-JA290:¶138 (complex order types lead to unsuspecting investors being "jump[ed] ahead," and discriminatory order handling during sudden price movements). Notably, the complex order types are not adequately disclosed to ***all*** market participants, if at all.[7] The conduct thus injures ordinary investors by, among other things, increasing opportunity costs from unexecuted fill orders, adverse selection, and price-movement bias. JA294:¶147. The district court erred both in refusing to credit these allegations, and by re-casting the complex order types as benign exercises of the Exchanges' quasi-regulatory duties. Opening Bf. 47-49.

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the Exchange, which is indisputably within [its] regulatory powers." *Id.* Here, in contrast, Plaintiffs complain of the Exchanges' ***own creation and marketing*** of the discriminatory proprietary and enhanced data streams outside the ambit of the nondiscriminatory consolidated feeds – which creation and marketing is a purely business-centric action unnecessary to the proper functioning of the securities markets.

[7] JA266:¶98; JA289-JA290:¶¶137-138; JA291:¶140; JA294:¶¶145-146; JA324:¶226.

Defendants' response centers on one rejoinder: Because the SEC has approved certain Exchange rules regarding order types generally, the complex order types are perforce squarely within the Exchanges' regulatory duties. Def. Bf. 34-35. This simplistic argument suffers from several flaws, however.

First, Defendants' abbreviated response does not even acknowledge the damning allegation looming over the complex order types – namely, that the Exchanges only selectively disclose them, if at all. Opening Bf. 48. Selective and/or nondisclosure, in combination with the co-location services and proprietary data streams, make the complex order types especially damaging to ordinary investors.[8] Defendants never address the nondisclosure argument, and so have waived any further challenge to it. *Davis v. New York*, 316 F.3d 93, 102 (2d Cir. 2002).

Second, Defendants play fast-and-loose with their SEC authority. Citing an SEC release, they say that it reflects the SEC's approval of "complex order types [as] 'consistent with Section 6(b)(5).'" Def. Bf. 34 (citing Exchange Act Release No. 34-63777, 76 Fed. Reg. 5630, 5645 (Feb. 1, 2011)).

Not so. That internally quoted text addressed a proposed rule change concerning ***one discrete order type***, and in no way comprises an

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[8] *E.g.*, JA279-JA280:¶¶118-119; JA300-JA302:¶¶160-162; JA307-JA308:¶175.

SEC blanket approval of ***all*** "complex order types." Moreover, elsewhere in that same release the SEC notes that the rule change "does not significantly affect the protection of investors or the public interest." 76 Fed. Reg. at 5645. The same cannot be said here, where the very essence of the complex order types specified at JA289-JA330:¶¶136-236 is that they ***harm*** ordinary investors. JA289:¶136; *see also* Opening Bf. §IV.A.4.c. (describing how innumerable complex order variations comprise fraudulent and deceptive practices, and were not adequately disclosed to investors).[9]

C. Plaintiffs' Allegations Sufficiently State Securities-Fraud Claims Against the Exchanges

1. Defendants Committed Manipulative Acts

Utilizing the Complaint's allegations, Plaintiffs' Opening Brief explained at length just ***what*** manipulative acts Defendants performed, ***when*** they occurred, ***which*** Defendants performed them, and the harmful ***effects*** they had on the securities markets. Opening Bf. 61-64. Plaintiffs thus pleaded manipulation with sufficient particularity. *Cf. ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d Cir. 2007) (unlike more-stringent "misrepresentation" pleading requirements,

[9] Defendants also say that Plaintiffs are complaining of no more than that the complex order types allow front-running by third parties, which complaint this Court has already rejected in *NYSE*, 503 F.3d at 99. Def. Bf. 35. Plaintiffs have explained Defendants' misreading of *NYSE*. *Supra* n.6.

manipulation allegations suffice by setting forth "the nature, purpose, and effect of the fraudulent conduct" and defendants' roles).

Defendants disagree, but each of their attempted rebuttals fails.

Their chief argument revolves around the discrete act of securities "trading" – which, Defendants say, constitutes the "core aspect of a market manipulation claim" and requires that ***they themselves*** engaged in stock trades. Def. Bf. 44; *see also id*. 46 (pointing finger at HFT firms).

The relevant precedents are not so stingy. They speak not only of manipulative "trading" by bad actors, but more broadly of any practices that "***artificially affect[]*** market activity." *Santa Fe*, 430 U.S. at 476; *see also ATSI*, 493 F.3d at 100 (decrying "market activity" that deceives investors into believing "'that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators'"). Indeed, the *Santa Fe* Court, despite listing several practices that commonly comprise manipulative activities, explained that "Congress meant to prohibit the ***full range*** of ingenious devices that might be used to manipulate securities prices." 430 U.S. at 477; *accord Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 11 (1971); *see also* 15 U.S.C. §78j(b) (making unlawful "***any*** manipulative or deceptive device or contrivance" in contravention of SEC rules).

Those *verboten* ingenious devices surely include manipulative trading. But they also include activities "outside the 'natural interplay of supply and demand'" that send "a false pricing signal to the market." *ATSI*, 493 F.3d at 100. They include activities that cause "disruptions to the efficient pricing of a security." *Id.* The "critical question," this Court notes, is just "what activity 'artificially' affects a security's price in a deceptive manner." *Id.*

Here, those various activities, and their artificial effect upon the prices paid by the Class, have been exhaustively detailed. Opening Bf. 12-23. In combination, they describe the steps taken by the Exchanges "to rig their markets such that this manipulative conduct occurs on their trading platforms" and harms ordinary investors. JA333:¶243; *see, e.g.*, JA335-JA336:¶250 (Exchanges "cause and profit" from "'spoofing' and 'layering'" strategies that "manipulate the market").

Defendants also assert that no manipulation exists when conduct is disclosed (Def. Bf. 46-47), but that assertion's premise begs the question – presuming that the Exchanges ***did*** fully disclose the manipulative nature of their scheme to innocent Class members. They didn't: The Complaint specifies that undisclosed – or selectively disclosed – complex order types, in combination with the other fraudulent activities alleged, worked a manipulative fraud upon investors.[10] Those nondisclosure allegations must be honored. *Tellabs*, 551 U.S. at 322-23.[11]

Defendants' final refuge for their manipulative conduct requires accepting the notion that because the SEC supposedly "approved" their actions, that purported governmental imprimatur excuses every bit of misconduct alleged in the Complaint. Def. Bf. 46-48. But Defendants misconceive just what the SEC has "approved," and ignore plain allegations.

While the SEC may have generally allowed proprietary data feeds, co-location services, and order types, it certainly hasn't approved their use in a ***manipulative*** manner – which is precisely what the Complaint alleges. Opening Bf. 13-23 (detailing manipulative purpose and effect of the three practices). Indeed, just one real-life example shows the absurdity of Defendants' reasoning: Taken to its logical end, their SEC-approval argument would mean the end of §§11 and 12 liability for misleading registration statements and prospectuses under the 1933 Securities Act. In the Exchanges' world, any entity involved in those documents' preparation and issuance would nonetheless be immune from

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[10] JA289-JA290:¶¶137-138; JA294:¶¶145-146; JA324:¶226.

[11] Even "disclosed" information may still deceive. *See Operating Local 649 Annuity Tr. Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 92 (2d Cir. 2010).

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liability because those filings – like the Exchanges' actions here – are ultimately overseen and "approved" by the SEC by dint of their filing. Of course that oversight and approval does not give securities issuers (or accountants or underwriters) *carte blanche* to prepare registration statements and prospectuses with false or misleading contents; nor should it here vis-à-vis the Exchanges' manipulative acts. *See* 15 U.S.C. §77w (Securities Act §23 specifies that a filed registration statement does not mean it is "true and accurate on its face," or that the SEC has passed on the security's merits).

Moreover, Plaintiffs' allegations make clear that the SEC is ***not*** fully engaged in regulating Defendants' actions: (i) it does not regulate the pricing of alternative data feeds;[12] (ii) co-location services are not a core regulatory function of an exchange;[13] and (iii) the creation and functionality of various complex order types was not disclosed and virtually unknown to the SEC.[14] Plaintiffs' Opening Brief lists several

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[12] JA243¶52; JA281-JA282:¶123; JA356:¶293.

[13] JA272-JA274:¶¶110-111; JA278:¶116.

[14] JA267:¶99; JA289:¶137; JA293:¶143; JA294:¶146; JA300-JA301:¶160; JA316:¶203; JA318:¶210; JA320:¶214; JA324:¶225; JA326:¶229.

instances where the SEC was ***itself*** misled as to the ostensibly "approved" practices, and where it punished the violators. Opening Bf. 71-72.[15]

Defendants remain liable for their manipulative acts, which fall beneath the broad panoply of fraudulent devices and schemes forbidden by the securities laws.

2. Defendants Committed Primary Violations

The Exchange Defendants are primary violators under the securities laws. The district court's contrary conclusion required it to usurp the role of factfinder, reject well-pleaded allegations, and ignore precedent holding that even "secondary" actors may liable for primary violations. Opening Bf. 72-77.

Defendants follow the district court into error, parroting its rationales and relying upon inapposite case law while rewriting the Complaint to suit themselves.

They say that aiding-and-abetting language "pervades" Plaintiffs' Complaint and Opening Brief, cherry-picking a few verbs to support their thesis. Def. Bf. 49 & n.9. But Defendants ignore additional allegations

[15] The Exchanges candy-coat these instances as examples of the SEC's active exercise of its "jurisdiction." Def. Bf. 48. Putting aside the irony of their proffer, their logic is flawed: The SEC also prosecutes defendants for securities-fraud violations – but that doesn't mean that private investors have no recourse for the same misconduct. *Tellabs*, 551 U.S. at 313 ("meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions").

specifying the Exchanges' ***direct*** actions that both manipulated the securities prices for ordinary buying/selling investors, and damaged those market participants. *See, e.g.*, JA285:¶131 (Exchanges created "a two-tiered market" in which ordinary investors traded "at an informational disadvantage"); JA358:¶299 (Exchanges' actions caused "the trading prices of the securities purchased or sold on the Exchanges [to be] artificially manipulated and distorted during the Class Period"); JA266:¶98 (Direct Edge at times "only disclosed its unfair order types to a select group" of HFT firms). Adding insult to injury, while engaging in their manipulative conduct the Exchanges falsely reassured ordinary investors that their "fair and orderly" trading platforms provided "'transparent trading'" where all investors received market data in "'real time.'" JA259:¶85; JA261:¶89.

Defendants' misstatements, in combination with what the Exchanges were ***really*** doing, also distinguish this case from the aiding-and-abetting *Fezzani* decision relied upon by Defendants and the district court, where in a 2-1 decision this Court held that an individual ("Dweck") who merely "parked" stock for the main perpetrator ("Baron") in a "pump and dump" scheme did no more than aid-and-abet Baron's fraud. *See Fezzani v. Bear, Stearns & Co.*, 716 F.3d 18 (2d Cir. 2013). Because the "deception on which [plaintiffs] relied" for their fraudulent-scheme claim revolved around false statements by Baron (*id.* at 21), reasoned the majority, its "difficulty with regard to Dweck's [§10(b)] liability" arose "from the lack of an allegation that Dweck was involved in any communication with any of the [plaintiffs]." *Id.* at 23. Dweck simply had parked stocks for Baron – paradigmatic aiding-and-abetting: "There is no allegation that any [plaintiff] was told of Dweck's artificial trading, or purchased such securities in reliance on such trading." *Id.*[16] On its face, *Fezzani* is inapposite here, where the Exchanges made several public representations about their supposedly "fair" and "transparent" trading platforms.

Defendants attack those false reassurances as mere "'puffery'" that no reasonable investor would rely upon (Def. Bf. 51), but whether Class members bought the Exchanges' lies is an inquiry ill-suited for decision on the pleadings. *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 718 (2d Cir. 2011) ("[W]e cannot agree with the District Court at this preliminary stage of litigation that the alleged omissions and misstatements 'are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance.'"). Rather, the inquiry requires "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *TSC*

[16] The *Fezzani* dissent claimed that the majority improperly superimposed "misrepresentation" elements on a market-manipulation claim. *Id.* at 25-31 (Lohier, C.J., dissenting). Whether Judge Lohier's criticism is valid is ultimately of no moment here – for Plaintiffs have pleaded the Exchanges' myriad misstatements to ordinary investors, as well as their manipulative acts.

Indus. v. Northway, Inc., 426 U.S. 438, 450 (1976). Moreover, ***context*** matters – for what might be mere "puffery" in one context can matter greatly in another. *Casella v. Webb*, 883 F.2d 805, 808 (9th Cir. 1989) ("What might be innocuous 'puffery' or mere statement of opinion standing alone may be actionable as an integral part of a representation of material fact when used to emphasize and induce reliance upon such a representation."). Convincing investors that trading platforms are fair and non-discriminatory, in order to get them to part with billions of trading dollars, surely qualifies as material conduct.

Finally, Defendants misstate the record when they assert that "***[a]ccording to Plaintiffs***, the Exchanges' alleged actions 'merely enabled an HFT firm to execute a transaction'" that artificially affected the market. Def. Bf. 50. Plaintiffs made no such allegation; that is a quote from the district court's aiding-and-abetting holding (SPA27), and one that is challenged – and rebutted – in Plaintiffs' Opening Brief. Opening Bf. 72-77.

D. Defendants' Alternative Grounds for Affirmance Fail

1. This Court Should Decline to Reach the Alternative Grounds

Defendants urge affirmance on alternative grounds, including Plaintiffs' purported failure to adequately allege (i) scienter, (ii) loss causation, and (iii) statutory "standing" relating to securities purchases.

Def. Bf. 51-54. The district court never reached those grounds. SPA25 n.6 ("The Court need not, and does not, reach those issues.").

This Court need not reach them now. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule ... that a federal appellate court does not consider an issue not passed upon below."); *see, e.g.*, *Altvater Gessler-J.A. Baczewski Int'l (USA) Inc. v. Sobieski Destylarnia S.A.*, 572 F.3d 86, 91 (2d Cir. 2009) ("[w]e decline Sobieski's invitation to affirm the district court's dismissal on the alternative grounds"); *accord Bechhoefer v. United States DOJ*, 209 F.3d 57, 63 (2d Cir. 2000). A more prudent course would be for this Court to allow the district court to fully address the issues on remand. *Evers v. Regents of the Univ. of Colo.*, 509 F.3d 1304, 1310 (10th Cir. 2007).

Should this Court reach the issues now, however, Plaintiffs rebut the alternative grounds.

2. The Suggested Alternative Grounds Fail

a. Plaintiffs' Allegations Support a Strong Inference of Scienter

Under Exchange Act §21D(b)(2)(A), plaintiffs must plead with particularity facts raising a "strong inference" of defendants' scienter. 15 U.S.C. §78u-4(b)(2)(A). That requires allegations establishing "strong circumstantial evidence of conscious misbehavior or recklessness." *ATSI*, 493 F.3d at 99; *accord Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000).

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Direct evidence is not required, however; scienter in securities-fraud cases is typically proven by circumstantial evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983).

Importantly, this Court must consider "whether ***all*** of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Tellabs*, 551 U.S. at 323 (Supreme Court's emphasis). Moreover, this Court must ask: "When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter ***at least as strong as*** any opposing inference?" *Id.* at 326. In other words, inferential ties go to Plaintiffs.

Defendants assert that there "is no plausible argument that the Exchanges intentionally engaged in deceptive or manipulative conduct" (Def. Bf. 54), but their assertion fails in light of the Complaint's allegations – which include, *inter alia*, the following allegations going directly to the Exchanges' actual knowledge and purposeful conduct resulting in market manipulation:

- "for the purpose of, and knowing that such acts would result" in fraudulent activity, the Exchanges provided the co-location and proprietary direct data feed services, along with creating and implementing complex order types. JA330:¶238.

- the Exchanges' manipulative scheme "rig[ged] the markets" against ordinary investors who were served up to HFT firms "as prey," and their "unlawful practices were designed to and did position HFT firms to identify investors' desire to transact in securities and then enable those firms to front-run those same investors in transactions that generated almost riskless profits for HFT firms and a constant stream of revenue for Defendants." JA228:¶13.

- the Exchanges designed and implemented new complex order types for the purpose of providing HFT firms with superior positions in the Exchange's order book queue. JA289-JA330:¶¶136-236. One estimate has inferior queue positioning costing ordinary investors tens of millions of extra trading costs. JA295:¶149.

- Defendant Direct Edge "deliberately kept in the dark" the "existence and full functionality of the Hide Not Slide" complex order that "adverse[ly] impact[ed]" unknowing investors. JA302:¶162.

- in return for billions of dollars in fees – including $1.8 billion in 2010 alone – the Exchanges situated the HFT firms' servers in close proximity to the Exchanges' own matching servers, creating "informational asymmetries and otherwise rig[ging] the market." JA226:¶9 & n.5.

With allegations like these accepted as true and construed in Plaintiffs' favor (*Tellabs*, 551 U.S. at 322-23), Plaintiffs have pleaded the Exchanges' scienter with the requisite particularity.

b. Plaintiffs Satisfactorily Alleged Loss Causation

A valid securities-fraud claim requires that defendants' "misrepresentation[s] (or other fraudulent conduct) proximately caused the plaintiff[s'] economic loss." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346

(2005). Notably, while plaintiffs eventually must sort out the "tangle of factors" affecting ***proof*** of loss causation (*id*. at 343), at the pleading stage plaintiffs need only provide defendants "with notice of what the relevant economic loss might be or of what the causal connection might be between" their loss and the alleged misconduct. *Id*. at 347. This is not a difficult exercise, observed the Supreme Court: plaintiffs must allege "***some indication of the loss*** and the causal connection that the plaintiff has in mind." *Id*.

That loss and causal connection is pleaded here. Plaintiffs have alleged that, through their manipulative scheme, the Exchanges created a rigged marketplace where innocent investors purchased and/or sold securities at prices that were not as favorable as those to which they were entitled in the absence of the fraud. *See, e.g.*, JA271:¶108 ("Exchanges have diverted billions of dollars annually away from non-HFT market participants such as Plaintiffs and the Class and into the hands of the Exchanges and their preferred HFT customers."); JA336:¶251 (due to Exchanges' market designs, unwitting market participants are deceived into buying/selling stocks from/to HFT firms at artificial prices); JA330:¶¶237-238 (Exchanges' devices and manipulations damaged innocent investors via "electronic front running, latency arbitrage, spoofing, and layering"); JA358:¶299 (as a result of the Exchanges' conduct, public investors "purchased and/or sold shares at artificially distorted and manipulated prices" during the Class Period).

Defendants counter that *Dura* requires allegations that a stock's price "dropped after the alleged fraud became known" (Def. Bf. 53), but that bright-line argument misconceives both *Dura* as well as Plaintiffs' market-manipulation allegations.

First, *Dura* says nothing about requiring a specific stock "drop" to satisfy loss causation; *Dura* instead holds that plaintiffs must allege some sort of "economic loss" as a result of a defendant's conduct (544 U.S. at 347) – which economic loss is precisely what Plaintiffs allege here. *See supra*.

Second, Defendants overlook that because this is a ***manipulative-scheme*** case – as opposed to a more-prosaic "misstatement" securities fraud, with a typical stock-price rise and fall following misstatements and disclosures – different allegations suffice. *ATSI*, 493 F.3d at 102 (market-manipulation complaint must plead "'what ***effect*** the scheme had on the market for the securities at issue'"); *see also In re NYSE Specialists Sec. Litig.*, 405 F. Supp. 2d 281, 315-16 (S.D.N.Y. 2005) (distinguishing *Dura*, and accepting plaintiffs' allegation that it was "specialists' manipulative conduct at the time of the transaction that caused their losses") (footnote omitted), *aff'd in part and vacated in part*, 503 F.3d 89 (2d Cir. 2007); *see also In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 375

(S.D.N.Y. 2003) ("So long as Plaintiffs allege a coherent scheme to defraud that accounts directly for their losses, loss causation has been adequately pled.").

c. Plaintiffs Possess Statutory "Standing" Due to Their Purchases of Securities at Manipulated Prices

Defendants insist that Plaintiffs lack "statutory standing" because they failed to list each of the securities trades in question down to Defendants' preferred granular level of detail – describing every individual security traded, on which specific day. That insistence relies upon inapposite case law, ignores the record, and confounds logic.

Defendants' sole circuit-level authority offered in support of their position has nothing to do with a market-manipulation case like this. *See* Def. Bf. 52 (citing *Ont. Pub. Serv. Emps. Union Pension Tr. Fund v. Nortel Networks Corp.*, 369 F.3d 27 (2d Cir. 2004)). In *Nortel*, this Court considered whether plaintiffs had standing to prosecute a §10(b) fraud case based on alleged misstatements when they never purchased the speaker's shares; rather, they only "purchased the security of a company ***other than the one*** that made the misstatement." *Id*. at 28. Not surprisingly, the Court's answer was "No": plaintiffs' entire case revolved around Company B's representations that tangentially affected Company A's stock, which the plaintiffs had purchased at allegedly inflated prices. *Id*. at 34.

This Court thus rejected the plaintiffs' attempts to expand Rule 10b-5's "any security" language to cover any security ***conceivably*** affected by a misstatement uttered by persons with no connection to the plaintiffs' purchases. *Id*. at 32-34. Notably, however, the Court confined its holding to "these circumstances" (*id*. at 29) – namely, the discrete situation in which plaintiffs proceed under Rule 10b-5(b)'s proscription against misleading statements and omissions made in connection with the purchase or sale of a security. *Nortel* has nothing to do with a market-manipulation case like the one at bar, where the ***entire*** market was alleged to be rigged by Defendants' misconduct – thus tainting the purchases and sales by innocent investors. *Cf*. JA228:¶13 (Defendants' manipulative conduct rigged the markets against innocent, ordinary investors); JA228-JA229:¶15 (Exchanges "rigged their markets" so that fee obligations were transferred from HFT firms to "investors such as Plaintiffs and the Class"); JA357-JA358:¶¶296-299 (Plaintiffs allege illegal acts, practices, contrivances, and manipulations by Defendants).

Second, Defendants ignore that Plaintiffs ***have*** sufficiently identified specific securities purchases affected by the fraudulent conduct. *Cf. ATSI*, 493 F.3d at 102 (a satisfactory market-manipulation complaint will set forth, "to the extent possible," which acts were performed by which defendants, along with the "'effect the scheme had on the market'"). Plaintiffs identify the time period when Defendants' scheme was in place (from April 18, 2009 onward (JA223:¶1)), identify the precise stock exchanges where the misconduct occurred (JA233-JA235:¶¶27-33), and specify – in sworn certifications – that they conducted millions (and in some cases, billions) of dollars in trades on the affected exchanges at relevant times. *See, e.g.*, CD169-2/Page 5 (Plumbers and Pipefitters avers that its transactions in "the securit[ies] that [are] the subject of this action" are listed in the "attached Schedule A"); CD169-2/Page 7 (listing Plumbers and Pipefitters's $17.6 billion in domestic common stock purchases and sales, broken down by year and category).

The Plaintiffs' certifications, submitted to the district court in connection with their motion to consolidate several actions and be appointed lead plaintiffs (CD167-CD169), thus satisfied 15 U.S.C. §78u-4(a)(2)(A)(iv) – belying Defendants' complaint (Def. Bf. 52) that Plaintiffs failed to allege relevant dates, number of shares traded, or the consideration given.

II. CONCLUSION

In light of the foregoing reasons, as well as the record facts and argument contained in the Opening Brief, this Court should reverse the district court's orders challenged by this appeal.

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Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATE

The undersigned counsel certified that PLAINTIFFS-APPELLANTS' REPLY BRIEF uses a proportionally spaced Century Schoolbook typeface, 14-point, and that the text of the brief comprises 6,928 words according to the word count provided by Microsoft Word 2010 word processing software.

s/ Joseph D. Daley
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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court for the United States Court of Appeals of the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users pursuant to the attached Service List Report and that service will be accomplished by the appellate CM/ECF system.

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