UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: BARCLAYS LIQUIDITY CROSS AND HIGH FREQUENCY TRADING LITIGATION *This Document Relates to City of Providence, Rhode Island, et al. v. BATS Global Markets, Inc., et al.*, 1:14-cv-02811-JMF (S.D.N.Y.) (consolidated)	14-MD-2589 (JMF) ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF THE DEFENDANTS' RENEWED MOTION TO DISMISS THE SECOND CONSOLIDATED AMENDED COMPLAINT

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GLOSSARY OF TERMS

Exchange Act	Securities Exchange Act of 1934
BATS	BATS Global Markets, Inc., n/k/a Cboe BATS, LLC
CHX	Chicago Stock Exchange, Inc.
Direct Edge	Direct Edge ECN, LLC
EMS Concept Release	Exchange Act Release No. 34-61358, 75 Fed. Reg. 3594 (Jan. 21, 2010)
Exchanges	BATS Global Markets, Inc., Chicago Stock Exchange, Inc., Direct Edge ECN, LLC, The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., New York Stock Exchange, LLC, and NYSE Arca, Inc.
HFT	High-frequency trading
Market Data Concept Release	Exchange Act Release No. 34-42208, 64 Fed. Reg. 70,613 (Dec. 17, 1999)
NASDAQ	The NASDAQ Stock Market LLC
NBBO	National Best Bid and Offer
NMS Adopting Release	Exchange Act Release No. 34-51808, 70 Fed. Reg. 37,496 (June 29, 2005)
NYSE	New York Stock Exchange, LLC
Original Decision	*In re Barclays Liquidity Cross & High Frequency Trading Litig.*, 126 F. Supp. 3d 342 (S.D.N.Y. 2015), *vacated and remanded sub nom. City of Providence v. Bats Glob. Mkts., Inc.*, 878 F.3d 36 (2d Cir. 2017)
SCAC	Second Consolidated Amended Complaint
SIP	Securities Information Processor
SRO	Self-Regulatory Organization

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PRELIMINARY STATEMENT

The Second Circuit remanded this case to allow this Court to consider other grounds for dismissal that neither it nor the Second Circuit has yet addressed. The Exchanges thus file this renewed motion to dismiss the SCAC and ask the Court to dismiss Plaintiffs' sole remaining claim, brought under Section 10(b) of the Exchange Act and Rule 10b-5.

First, the SCAC fails either to plead Article III standing or to state a claim upon which relief can be granted. The SCAC suffers from numerous fatal flaws, including flaws this Court previously called "colorable arguments for dismissal" and flaws on which this Court relied in dismissing indistinguishable claims against Barclays. *See* Original Decision, 126 F. Supp. 3d at 361 n.6, 365-66. As demonstrated below, the SCAC (i) fails to plead Article III or statutory standing, (ii) fails to comply with the PSLRA's procedural requirements, (iii) fails to plead reliance, (iv) fails to plead loss causation, (v) fails to plead scienter, and (vi) fails to adequately plead falsity of any challenged statement allegedly made by the Exchanges.

Second, Plaintiffs' claim is precluded by the Exchange Act, which gives the SEC authority to make regulatory decisions about which exchange rules, products, and services will be allowed. Plaintiffs' claim obstructs this comprehensive regulatory structure because it rests on the theory that certain products and services offered by the Exchanges in accordance with their rules constitute fraud when used by market participants. If permitted to proceed, that theory would upend the SEC's regulatory authority over the very conduct that forms the basis for Plaintiffs' claim. The SCAC should also be dismissed with prejudice for that reason.

STATEMENT OF FACTS

The Exchanges set forth the facts in their briefing on their initial motion to dismiss. *See* D.E. 8 at 5-17. This Court agreed with that factual recitation in its Original Decision, *see* Original Decision, 126 F. Supp. 3d at 348-53, and the Second Circuit did not contest that

description. The Exchanges briefly summarize below the key facts relating to this renewed motion.

Proprietary Data Feeds

As authorized by the SEC, the Exchanges transmit market information from their individual exchanges to an information processor where it is aggregated into a consolidated feed available to subscribers. *See* SCAC ¶ 121. The SEC allows exchanges also to disseminate market data through "proprietary" feeds established by exchange rules. The SEC has approved proprietary feeds because they "allow investors and vendors greater freedom to make their own decisions regarding the data they need." NMS Adopting Release, 70 Fed. Reg. at 37,566; *see also*, *e.g.*, Exchange Act Release No. 34-59039, 73 Fed. Reg. 74,770, 74,780-81 (Dec. 9, 2008) (similar). As this Court has held, "Plaintiffs do not appear to dispute that the proprietary feeds at issue in this case were approved by the SEC." Original Decision, 126 F. Supp. 3d at 351.

Co-Location Services

Some Exchanges offer co-location services that allow customers to place their computer servers in close physical proximity to the Exchanges' computer systems, which reduces the time it takes to send and receive market information. SCAC ¶ 108. Because co-location services are a material aspect of the operation of the facilities of an exchange, exchanges wishing to offer co-location services must file proposed rule changes with the SEC and "receive approval of such rule changes." *See* EMS Concept Release, 75 Fed. Reg. at 3610 & n.76. As this Court recognized, "Plaintiffs do not appear to dispute that the co-locations at issue in this case were approved by the SEC." Original Decision, 126 F. Supp. 3d at 351.

Complex Order Types

The Exchanges' regulatory responsibilities under the Exchange Act include determining how trading will be conducted on their markets. *See*, *e.g.*, 15 U.S.C. § 78k-1(a)(3)(B). In

fulfilling those responsibilities in light of the increased use of electronic exchanges that do not rely on brokers to manually transact trades on physical trading floors, the Exchanges have adopted rules providing for certain complex order types—"preprogrammed commands traders use to tell the Exchanges how to handle their bids and offers" that allow investors to replicate the flexibility and complexity that could occur in human interactions, but with the speed and efficiency of automated execution of market orders. SCAC ¶ 4.

The Exchanges' rules—which are publicly available and SEC-approved—describe the available order types on each exchange.[1] These rules are also subject to continuing SEC review (including possible amendment or abolition) at any time.[2] The Exchanges must comply with their rules or face SEC sanctions for not doing so. *See* 15 U.S.C. § 78s(h).

The Second Consolidated Amended Complaint

Plaintiffs allege that the Exchanges' provision of proprietary feeds and co-location services gave HFT firms earlier access to market information than other investors, which unnamed HFT firms utilized through complex order types to gain an advantage over ordinary investors. *See, e.g.*,

[1] *See* NASDAQ Stock Market Rule 4751(f) (defining order types available); NYSE Rule 13 ("Orders and Modifiers"); NYSE Arca Equities Rule 7.31 ("Orders and Modifiers"); BATS Exchange Rule 11.9 ("Orders and Modifiers"); EDGA and EDGX Rules 11.8 ("Orders Types"); CHX Rules Art. 1, Rule 2 ("Order Types, Modifiers, and Related Terms").

[2] *See* Exchange Act Release No. 34-67412, 77 Fed. Reg. 42,022 (July 17, 2012); Exchange Act Release No. 34-65761, 76 Fed. Reg. 72,230 (Nov. 22, 2011); Exchange Act Release No. 34-62534, 75 Fed. Reg. 43,590 (July 26, 2010); *see also* Exchange Act Release No. 34-72812, 79 Fed. Reg. 48,824 (Aug. 18, 2014); Exchange Act Release No. 34-72676, 79 Fed. Reg. 44,520 (July 31, 2014); Exchange Act Release No. 34-73333, 79 Fed. Reg. 62,223 (Oct. 16, 2014); Exchange Act Release No. 34-70637, 78 Fed. Reg. 62,745 (Oct. 22, 2013); Exchange Act Release No. 34-69538, 78 Fed. Reg. 28,671 (May 15, 2013); Exchange Act Release No. 34-67093, 77 Fed. Reg. 33,798 (June 7, 2012); Exchange Act Release No. 34-61097, 74 Fed. Reg. 64,788 (Dec. 8, 2009); *see also* 15 U.S.C. § 78s(c) (allowing SEC to change SRO rules).

SCAC ¶ 9.[3] Plaintiffs allege that the combined use of those products and services *by HFT firms* resulted in securities fraud *by the Exchanges* in violation of Section 10(b).[4] *See id.* ¶¶ 295-302. The end result, Plaintiffs claim, was that non-HFT investors were forced to "purchase and sell shares at distorted and manipulated prices." *Id.* ¶ 296.

Based on these allegations, Plaintiffs seek to impose sweeping changes on the securities markets by prohibiting practices that the SEC has approved. For example:

- Although the SEC has expressly declined to require all market participants to receive market data from the consolidated feeds and proprietary feeds at the same time, Plaintiffs ask this Court to enter an order "directing [the Exchanges] to ensure that customer bid and offer prices are provided to all investors and trading entities at the same time."[5] SCAC Prayer for Relief ¶ E.

- Although the SEC has approved co-location services, Plaintiffs ask this Court to prohibit them. *See id.* (seeking an order "prohibiting Defendants from providing an informational advantage to any HFT firm via paid-for reduced latency services").

- Although the SEC has approved the complex order types challenged here, Plaintiffs base their claim on the incompatible premise that those order types are a key "part of [a] fraudulent and deceptive scheme." SCAC ¶ 136.

The relief Plaintiffs seek is contrary to the determinations the SEC made, pursuant to its statutory authority and the presumption of regularity to which it is entitled, *see F.C.C. v. Schreiber*, 381 U.S. 279, 296 (1965), that these products and services are consistent with the Exchange Act.

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[3] The SCAC also included allegations regarding payment for order flow fees and challenged the "maker/taker" model of trade execution pricing, but Plaintiffs have abandoned any claims based on those allegations. Original Decision, 126 F. Supp. 3d at 351 n.1.

[4] SCAC ¶ 108 ("[w]hen combined with either (or both) of the enriched data feeds or complex order types … co-location results in a manipulative device under the Exchange Act"); *id.* ¶ 119 ("[w]hen combined with either the co-location services referenced above or the complex order types discussed herein, direct and enhanced data feed products constitute manipulative devices under the Exchange Act").

[5] The SEC has interpreted the applicable regulations to require exchanges to *send* data to the SIPs no later than they transmit it through proprietary feeds, but *not* to require that all subscribers receive the consolidated feed at the same time or earlier than customers who receive data through proprietary feeds. *See In re NYSE LLC*, Exchange Act Release No. 34-67857, 2012 WL 4044880, at *2, 8 (Sept. 14, 2012); NMS Adopting Release, 70 Fed. Reg. at 37,567.

This Court's Original Decision

This Court dismissed the SCAC on August 26, 2015. Original Decision, 126 F. Supp. 3d at 375-76. The Court held that the Exchanges were immune from claims involving proprietary data feeds and complex order types and that Plaintiffs' entire Complaint was "subject to dismissal for failure to state a claim." *Id.* at 355-360. Plaintiffs' Section 10(b) claim failed "at least" because (i) Plaintiffs did not "allege any manipulative acts on the part of the Exchanges" and (ii) "Plaintiffs fail[ed] to allege primary violations by the Exchanges themselves." *Id.* at 361-62. The Court deemed it unnecessary to reach "several other colorable arguments for dismissal." *Id.* at 361 n.6.

The Court also dismissed Plaintiffs' separate Section 10(b) claim against Barclays. *Id.* at 363-66. The Court held that, in addition to failing to adequately plead that Barclays committed manipulative acts, Plaintiffs failed to allege reasonable reliance. *Id.* at 365. The Court reasoned that Plaintiffs had not alleged direct reliance as to Barclays or shown they were entitled to any established presumption of reliance, and the Court declined Plaintiffs' invitation "to apply a novel presumption of reliance based on the fairness and integrity of the market." *Id.* at 366.

The Second Circuit's Decision

Plaintiffs appealed only this Court's dismissal of their Section 10(b) claim against the Exchanges. *City of Providence v. Bats Glob. Mkts., Inc.*, 878 F.3d 36, 43 n.3 (2d Cir. 2017). The Second Circuit vacated this Court's dismissal, holding that the Exchanges were not immune for the conduct alleged and that Plaintiffs had adequately pleaded manipulation and primary violations by the Exchanges. *Id.* at 45-52. The Second Circuit "decline[d] to address" the Exchanges' alternative grounds for dismissal, including that Plaintiffs "had failed to adequately allege statutory standing, loss causation, and scienter," because they "should be determined by the district court in the first instance." *Id.* at 52. The Second Circuit also recognized that Plaintiffs' claim may be precluded by federal law (as the SEC suggested in the amicus brief it filed in response to the

Second Circuit's request), but also declined to address that issue in the first instance. *Id.* at 50 n.5.

ARGUMENT

I. Plaintiffs Have Failed to Plead Article III or Statutory Standing

Plaintiffs have not alleged the purchase or sale of *any* specific security, and their PSLRA certifications set forth only gross annual numbers of shares bought and sold (*e.g.*, all "COMMON STOCKS") without identifying any particular stock, the exchange on which that particular stock was purchased or sold, the date of purchase or sale, the amount purchased or sold, the price, or how that price was supposedly affected by the alleged manipulation. *See* D.E. 169-2 in 1:14-cv-02811-JMF, at 2, 7, 10, 13, 16; *see also* SCAC ¶¶ 21-25. These omissions mean that Plaintiffs have alleged neither Article III standing nor statutory standing.

A. Plaintiffs lack Article III standing to assert their Section 10(b) claim

To plead Article III standing, a plaintiff must allege that it suffered an injury-in-fact traceable to a defendant's challenged action. *See Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003); *In re Lehman Bros. Sec. & ERISA Litig.*, 684 F. Supp. 2d 485, 490 (S.D.N.Y. 2010). But as demonstrated above, Plaintiffs have not pleaded any facts about any specific trades, let alone that any such trades were affected by the uses of the products and services Plaintiffs challenge.

Plaintiffs' claim boils down to the assertions that (i) the equity markets were manipulated by HFTs, (ii) Plaintiffs traded in those markets, and (iii) so they must have been injured. But without even basic transaction details and factual allegations that prices actually were manipulated, Plaintiffs have not shown that *anyone* was injured, much less that *they* were "among the injured," *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). Having simply alleged that they bought and sold unidentified stock, it is equally plausible that, even assuming any stocks were manipulated by HFTs, Plaintiffs were not injured at all or perhaps even benefitted from the alleged manipulation (*i.e.*, they bought at lower prices or sold at higher prices

than they otherwise might have). This means they have not pleaded Article III standing. The SCAC thus must be dismissed under Rule 12(b)(1).

B. Plaintiffs lack statutory standing to assert their Section 10(b) claim

Section 10(b) standing is limited to "purchasers or sellers" of the particular securities which are the subject of the alleged misrepresentations or manipulation. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742 (1975). "The plaintiff bears the burden of establishing … standing." *Rajamin v. Deutsche Bank Nat'l Trust Co*, 757 F.3d 79, 84 (2d Cir. 2014).

The purchaser-seller statutory standing rule "limits the class of plaintiffs to those who have at least dealt in the security *to which the … representatio[n] or omission relates*." *Ontario Pub. Serv. Employees Union Pension Trust Fund v. Nortel Networks Corp.*, 369 F.3d 27, 32 (2d Cir. 2004) (emphasis added). Plaintiffs must identify securities that are the subject of manipulation and must specifically plead the dates of purchase, numbers of shares acquired, and price. *See, e.g., Fraser v. Fiduciary Trust Co.*, No. 04-cv-6958, 2005 WL 6328596, at *4 (S.D.N.Y. June 23, 2005) (purchaser-seller requirement not met where plaintiff "fail[ed] to allege the date(s) on which he acquired stock, the number of shares acquired, or the consideration given (if any)" as well as whether he "ever sold this stock"). This is also reflected in the PSLRA's requirement that a certification filed with the complaint must "set[] forth all of the transactions of the plaintiff in the security that is the subject of the complaint." 15 U.S.C. § 78u-4(a)(2)(A)(iv).

Plaintiffs' nonspecific allegations do not meet these requirements. *See supra* at 6-7. Plaintiffs have previously argued that, despite this pleading failure, they have standing due to Rule 10b-5's "in connection with" requirement, D.E. 26 at 60-61, but the Supreme Court has expressly held that the "in connection with" requirement is separate from the *Blue Chip Stamps* standing rule. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 84 (2006)

("*Blue Chip Stamps* … define[d] the scope of a private right of action under Rule 10b-5—not … the words 'in connection with' … ."). Likewise, Plaintiffs' vague allegations that they "purchased and sold" unspecified stock (SCAC ¶¶ 21–25) do not establish the statutory standing Plaintiffs need to support this case. Indeed, the Second Circuit has rejected the contention that there is "universal standing for purchasers of securities, allowing anyone who made use of the markets to sue under Rule 10b-5." *Ontario Pub. Serv. Employees Union*, 369 F.3d at 32. Nor is there any authority for excusing the purchaser-seller or PSLRA requirements merely by alleging that the entire market was "rigged." *E.g.*, SCAC ¶¶ 13, 15.

II. The SCAC Fails to State a Claim Upon Which Relief Could Be Granted

The SCAC also suffers from additional incurable pleading deficiencies.

A. Plaintiffs have not adequately pleaded reliance

"Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008). This element "ensures that, for liability to arise, the requisite causal connection … exists" between the defendant's conduct and the plaintiff's injury. *Id.* "[R]eliance must be reasonable" and cannot be established where the conduct was disclosed or the plaintiff "should have discovered the truth." *Pivot Point Capital Master LP v. Deutsche Bank AG*, No. 08-cv-2788, 2010 WL 9452230, at *5 (S.D.N.Y. 2010) (internal quotation marks omitted).

A plaintiff may establish that causal connection through either direct reliance or one of two presumptions recognized by the Supreme Court. *First*, the fraud-on-the-market presumption "allows courts to presume reliance on public statements because, it is assumed, the information in those statements is reflected in the price at which a stock affected by those statements trades, and investors are presumed to rely on the integrity of that price when deciding to trade." Original Decision, 126 F. Supp. 3d at 365; *see also Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

Second, "if there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance." Original Decision, 126 F. Supp. 3d at 365; *see also Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972).

This Court's holding that Plaintiffs had not pleaded reliance as to Barclays—which Plaintiffs *did not appeal*—controls here. As with their allegations as to Barclays, the only reliance that Plaintiffs plead as to the Exchanges is on "the integrity of the market in the securities listed and traded on the public exchanges." SCAC ¶ 301; *see also id.* ¶¶ 7, 78-83. This Court held this assertion does not qualify as "actual reliance" and does not trigger "either of the presumptions of reliance that have been recognized by the Supreme Court." Original Decision, 126 F. Supp. 3d at 365-66. The fraud-on-the-market presumption does not apply because Plaintiffs have failed to plead the existence of an efficient market for a specific security and do not "point to any statements by [the Exchanges] that could have affected the price at which [Plaintiffs] *decided* to trade." *Id.* at 356; *see Basic*, 485 U.S. at 248 n.27. And the *Affiliated Ute* presumption does not apply to market manipulation claims such as this one. *See Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 940-41 (9th Cir. 2009) (per curiam); *see also Levitt v. J.P. Morgan Sec. Inc.*, 710 F.3d 454, 467-68 & n.9 (2d Cir. 2013) (leaving open the question of whether an act of market manipulation triggers a duty to disclose); Original Decision, 126 F. Supp. 3d at 365 ("[I]t is not even clear that the *Affiliated Ute* presumption applies in a manipulation case."). Moreover, that presumption applies only in cases where there are actionable omissions in the face of a fiduciary duty to disclose. But exchanges owe no fiduciary duties to investors. *See Arneil v. Ramsey*, 414 F. Supp. 334, 343 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 774 (2d Cir. 1977); *Piemonte v. Chi. Bd. Options Exch., Inc.*, 405 F. Supp. 711, 718 n.4 (S.D.N.Y. 1975).

In addition, this Court already declined Plaintiffs' invitation to create a new presumption

of reliance based on "the integrity of the market in the securities listed and traded on the public exchanges." SCAC ¶ 301; *see also id.* ¶¶ 7, 78-83. As the Court explained, this presumption would "effectively excuse a plaintiff from pleading or proving reliance for *any* market-manipulation claim … all but eliminat[ing] the reliance requirement for a market manipulation claim against any entity involved in the operation of a market for securities." Original Decision, 126 F. Supp. 3d at 366. That result "would be inconsistent with the Second Circuit's repeated reiteration of the reliance requirement in market-manipulation cases." *Id.*; *cf. Malack v. BDO Seidman, LLP*, 617 F.3d 743, 749 (3d Cir. 2010) (mere availability of a security does not support an inference that it is free from fraud).

Indeed, the Second Circuit rejected the same invitation in *Fezzani v. Bear, Stearns & Co.*, 716 F.3d 18, 30 (2d Cir. 2013), where the plaintiffs alleged that they "relied [on] the belief that they were transacting business in a bona fide active, liquid securities market." The court found such reliance on the market insufficient to maintain a claim against a defendant who was not involved in any communication with the plaintiffs. *Id.* at 23-25; *see also Fezzani v. Bear, Stearns & Co.*, 777 F.3d 566, 572 (2d Cir. 2015) (confirming that plaintiffs did not adequately plead reliance because they did not allege that defendant's transactions sent a signal to any identified market). Similarly, statements by the Exchanges about "orderly and honest trading," SCAC ¶ 4, are "too general to cause a reasonable investor to rely upon them." *City of Pontiac Policemen's and Firemen's Retirement Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014); *see also In re UBS Auction Rate Sec. Litig.*, No. 08-CV-2967 (LMM), 2010 WL 2541166, at *28 n.19 (S.D.N.Y. June 10, 2010) (declining to recognize an "integrity of the market" presumption).

That unappealed ruling as to Barclays is now law of the case. Thus, because Plaintiffs are not entitled to any presumption of reliance and do not allege actual reliance, their claims

against the Exchanges must be dismissed. *See* Original Decision, 126 F. Supp. 3d at 366.

B. Plaintiffs fail to allege loss causation

Loss causation—the "causal connection between the material misrepresentation and the loss" a plaintiff suffers—is an essential element of a Section 10(b) claim. *See Dura Pharms. Inc v. Broudo*, 544 U.S. 336, 342 (2005). To establish loss causation, plaintiffs must allege that they "suffered … specific economic harm as a result of" the defendants' conduct. *In re Citigroup Auction Rate Sec. Litig.*, 700 F. Supp. 2d 294, 307 (S.D.N.Y. 2009). Plaintiffs thus must allege not only that they bought or sold specific securities at manipulated prices, but also that the prices of those specific securities would have been lower or higher, respectively, "absent such [manipulative] conduct." *Id.*; *see also Acticon AG v. China N.E. Petro. Holdings, Ltd.*, 692 F.3d 34, 40 (2d Cir. 2012); *In re China Organic Sec. Litig.*, No. 11-cv-8623, 2013 WL 5434637, at *7 (S.D.N.Y. Sept. 30, 2013). Plaintiffs are not "excused" from pleading loss causation by alleging a market-manipulation claim. D.E. 26 at 59-60. "[A]llowing a plaintiff to forgo giving any indication of the economic loss [they suffered] … would bring about harm of the very sort [the PSLRA] seek[s] to avoid." *Dura*, 544 U.S. at 347. Accordingly, failure to plead loss causation requires dismissal of market-manipulation cases. *See In re Citigroup Auction Rate Sec. Litig.*, 700 F. Supp. 2d 294, 307 (S.D.N.Y. 2009); *see also* 15 U.S.C. § 78u-4(b)(4).

Plaintiffs make no effort to satisfy this requirement. Plaintiffs here allege only that they "purchased and/or sold shares at artificially distorted and manipulated prices" and "pa[id] higher prices for stocks." SCAC ¶¶ 109, 299. As they concede, they have never identified *any* price they paid for *any* particular security traded on *any* exchange at *any* particular time. D.E. 26 at 59-60. Nor have they pleaded any specifics about how any particular stock was manipulated or by whom. Without this information, Plaintiffs cannot possibly plead any specific loss, nor do they even try,

which mandates dismissal.[6]

Furthermore, the products about which Plaintiffs complain were not concealed from the market; they have been the subject of SEC rulemaking and public disclosures for years. *Cf. Stratte-McClure v. Morgan Stanley*, 598 F.. App'x 25, 29 (2d Cir. 2015) (affirming dismissal for failure to plead loss causation where analyst reports "did not disclose any underlying circumstance that [was] concealed or misstated"). Given the lack of concealment, Plaintiffs cannot demonstrate that any loss was caused by concealment, and so they fail to allege the "specific economic harm" required to plead loss causation. *In re Citigroup*, 700 F. Supp. 2d at 307; *Fezzani v. Bear, Stearns & Co.*, 384 F. Supp. 2d 618, 642 (S.D.N.Y. 2004).

Nor do Plaintiffs make any effort to plead loss causation on a defendant-by-defendant basis, as the PSLRA requires. *See* 15 U.S.C. § 78u-4(b)(4). Beyond failing to allege any specific losses, the SCAC does not try to connect any specific loss resulting from any specific allegedly manipulative conduct to any particular Exchange. Because Plaintiffs have failed to allege loss causation on multiple grounds, the SCAC must be dismissed.

C. Plaintiffs fail to plead scienter

Scienter is another required element. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). It is "particularly important in manipulation claims because in some cases scienter is the

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[6] *See Fezzani*, 384 F. Supp. 2d at 642-43 (dismissing manipulation claim because plaintiffs' "general" allegations failed to specify "which securities were manipulated in what way, how such manipulation affected the market for the *specific* security, and in what way [the] Plaintiffs were harmed"), *aff'd*, 716 F.3d 18 (2d Cir. 2013); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d Cir. 2007) ("[g]eneral allegations … are insufficient," and requiring a plaintiff to plead "what effect the scheme had on the market *for the securities at issue*" (emphasis added)). Notably, the plaintiffs in *In re NYSE Specialists Securities Litigation*, 405 F. Supp. 2d 281 (S.D.N.Y. 2005), which purported to distinguish *Dura*'s loss-causation analysis in certain respects, annexed to the complaint "records of stock trades" in 41 specific stocks. *Id.* at 315. Plaintiffs have not taken any similar steps here.

only factor that distinguishes legitimate trading from improper manipulation." *ATSI*, 493 F.3d at 102. The PSLRA requires a plaintiff to allege facts giving rise to a "strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). This can be done by "alleging facts (1) showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 106 (2d Cir. 2015).

Plaintiffs rely on circumstantial evidence and thus must demonstrate "conscious recklessness—*i.e.*, a state of mind approximating actual intent, and not merely a heightened form of negligence." *Id.* "A complaint will survive … only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 324 (2007); *accord*, *e.g.*, *Stratte-McClure*, 776 F.3d at 106.

Here, Plaintiffs allege only conduct that is within the Exchanges' core function to disseminate market data and regulate trading. They plead no facts from which one could plausibly infer that any Exchange intended to defraud every single public investor or artificially affect the price of any specific security at any time by offering the products and services at issue. Instead, as required by the Exchange Act, the Exchanges publicly disclosed the existence of these products and services. Plaintiffs try to paper over these deficiencies through conclusory assertions of scienter—for example that the Exchanges "consciously design their markets knowing they will lead to the specific HFT firms' orders that deceive other market participants." SCAC ¶ 251. But Plaintiffs fail to allege any *facts* to support that conclusion, let alone facts sufficient to create a

"strong inference" of scienter.[7] Nor is the revenue the Exchanges earned from the products and services at issue sufficient to infer an intent to deceive. General allegations of motives possessed by all corporations, such as increasing revenue, are insufficient to plead scienter. *See S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2009).

The far more "plausible opposing inference" is that the Exchanges were acting within the scope of the Exchange Act, especially given that the SEC has specifically held that the Exchanges' actions with respect to the products Plaintiffs complain about are "consistent with the requirements of the [Exchange] Act" and "protect investors and [the] public interest."[8] These products are set forth in exchange rules, which exchanges are legally obligated to follow (15 U.S.C. § 78s(h)), and Plaintiffs cannot question the wisdom of the SEC in permitting these products and services in an effort to create a basis for scienter.

D. Plaintiffs have not pleaded the falsity of an alleged misstatement with particularity

Plaintiffs waived any attempt to base their claim on alleged misstatements rather than manipulation when they failed to respond to the Exchanges' challenges to their misstatement theory in the earlier motion to dismiss. *See* D.E. 8 at 43-45 (discussing Plaintiffs' failure to plead misrepresentations); D.E. 28 at 12 (noting that Plaintiffs' Opposition did not argue that the Exchanges made actionable misrepresentations). In any event, Plaintiffs have failed to comply

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[7] In trying to plead the Exchanges' scienter, Plaintiffs rely on allegations that conduct by *HFTs*, not the Exchanges, "deceive[d] other market participants." SCAC ¶ 251. But when *traders* have manipulated markets using SEC-approved services, the SEC has taken action against the *traders*, *see, e.g.*, *In re Athena Capital Research, LLC*, Exchange Act Release No. 34-73369, 2014 WL 5282074 (Oct. 14, 2014) (sanctioning HFT firm), not the *exchanges*.

[8] *E.g.*, Exchange Act Release No. 34-59606, 74 Fed. Reg. 13,293, 13,294 (Mar. 6, 2009) (proprietary feeds); Exchange Act Release No. 34-62960, 75 Fed. Reg. 59,299, 59,299 (Sept. 27, 2010) (co-location services); Exchange Act Release No. 34-73333, 79 Fed. Reg. 62,223, 62,226 (Oct. 16, 2014) (order types).

with the strict pleading standards imposed by Fed. R. Civ. P. 9(b) and the PSLRA for pleading a misstatement claim. Fed. R. Civ. P. 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity" the circumstances constituting that fraud. And the PSLRA requires that a securities fraud complaint "specify each statement alleged to have been misleading, and the reason or reasons why the statement is misleading." 15 U.S.C. § 78u-4(b). A complaint that does not meet this requirement must be dismissed. *See* 15 U.S.C. § 78u-4(b)(3).

Plaintiffs have failed to allege facts specifically showing how any challenged statement by an Exchange was false or misleading. Instead, Plaintiffs identify generic statements about the fairness and integrity of markets, *e.g.*, SCAC ¶¶ 84, 97, that are classic inactionable puffery. *See ECA, Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009) ("[S]tatements [that] are too general to cause a reasonable investor to rely upon them" cannot constitute "a material representation."). Plaintiffs even fail to allege that this puffery affected the price of any particular security. Accordingly, Plaintiffs' misstatement claim, to the extent they are attempting to allege one, must be dismissed.

III. Plaintiffs' Claim Is Precluded

Dismissal is also warranted because Plaintiffs' claim conflicts with and is precluded by the Exchange Act's comprehensive regulatory structure. Preclusion is crucial for the operation of the national market system established by Congress under the Exchange Act. Private lawsuits challenging the operation of that system "would conflict with 'Congress's intent that the SEC, with its expertise in the operation of the securities markets, make the rules regarding those markets.'" *City of Providence*, 878 F.3d at 50 n.5 (quoting *Lanier v. BATS Exch., Inc.*, 838 F.3d 139, 155 (2d Cir. 2016)).

These principles apply to Section 10(b) claims. The Supreme Court has established a four-factor framework for determining whether the Exchange Act's regulatory structure

precludes federal claims: (1) "the existence of regulatory authority under the securities law to supervise the activities in question;" (2) "evidence that the responsible regulatory entities exercise that authority;" (3) the "risk" that allowing the claims to proceed "would produce conflicting guidance, requirements, duties, privileges, or standards of conduct;" and (4) whether the conduct at issue "lie[s] squarely within an area of financial market activity that the securities law seeks to regulate." *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 275-76 (2007). Although not all factors need favor preclusion for it to apply (*id.* at 276), here they do.

Because preclusion—like preemption—turns on legal questions regarding the structure established by Congress in the Exchange Act and the SEC's comprehensive regulatory power, this issue is ripe for review based on the allegations of the SCAC alone. *See In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134, 149 (2d Cir. 2003). Courts routinely dismiss private challenges to actions within the SEC's regulatory authority at the motion-to-dismiss phase. *See Lanier*, 838 F.3d at 158; *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 116 (D.C. Cir. 2008); *Desiderio v. NASD*, 191 F.3d 198, 201, 208 (2d Cir. 1999); *see also Credit Suisse*, 551 U.S. at 270, 284-85 (holding that dismissal was proper based on preclusion and rejecting Solicitor General's request for remand for factual development).[9] Accordingly, no factual development is necessary to conclude that Plaintiffs' claim is precluded as a matter of law because each of the relevant factors favors preclusion.

[9] Preclusion is regularly decided in Rule 12(b)(6) motions. *See Barricelli v. City of New York*, No. 15-cv-5273-LTS-HBP, 2016 WL 4750178, at *2 (S.D.N.Y. Sept. 12, 2016); *In re Meridian Funds Grp. Sec. & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 09-CV-7099 TPG, 2015 WL 1258380, at *9-10 (S.D.N.Y.), *aff'd sub nom. R.W. Grand Lodge of Free & Accepted Masons of Pa. v. Meridian Capital Partners, Inc.*, 634 F. App'x 4 (2d Cir. 2015).

A. The SEC possesses the regulatory authority to supervise the conduct that forms the basis of Plaintiffs' claim

The SEC has the authority to supervise the activities in question. As Plaintiffs allege, the Exchanges are national securities exchanges that operate as SROs. *See* 15 U.S.C. § 78c(a)(26). Under the Exchange Act, they must adopt rules "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, … to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest." *Id.* § 78f(b)(5). Exchange rules can be approved by the SEC only if they are "consistent with the requirements of" the Exchange Act "and the rules and regulations issued" thereunder, including Section 6(b)(5)'s "require[ment] … to protect investors and the public interest." *Id.* § 78s(b)(2)(C)(i).[10] The SEC also may modify SRO rules on its own initiative. *Id.* § 78s(c). And if an SRO violates its own rules, the Exchange Act, or applicable regulations, the SEC may take disciplinary action "if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Act]." *Id.* § 78s(h)(1); *see also id.* § 78s(g)(1).

In addition, the Exchange Act directs the SEC to establish a national market system with rules that ensure "fair and orderly markets" and that ensure investors "may obtain" market information "on terms which are not unreasonably discriminatory." 15 U.S.C. § 78k-1(c)(1)(D); *see also* Brief of SEC as Amicus Curiae in *City of Providence*, 878 F.3d 43, 2016 WL 7030327, at *6 (1975 amendments to Exchange Act subject exchanges to "closer Commission review and ensur[ed] that exchanges do not operate in many areas without the Commission's approval"). A

[10] Indeed, the gravamen of the SCAC is that the Exchanges' alleged desire to benefit HFT firms resulted in a failure by the Exchanges to have rules that achieved the ends required by Section 6. Accordingly, the thrust of Plaintiffs' Section 10(b) fraud claim is no different from the Section 6 claim this Court dismissed and Plaintiffs abandoned on appeal.

specific application of this broad regulatory authority is Regulation NMS, which among other requirements directs the Exchanges to distribute quotation and transaction information on "terms that are fair and reasonable" and "not unreasonably discriminatory." 17 C.F.R. § 242.603(a).

The SEC's authority thus clearly covers the "activities in question" here. *Credit Suisse*, 551 U.S. at 276. The SEC recognizes that the Exchanges "must file proposed rule changes" before offering proprietary data feeds, co-location services, and complex order types because each is a "material aspect of the operation of the facilities of the exchange." Brief of SEC as Amicus Curiae, 2016 WL 7030327, at *11-15. Consequently, the SEC has authority to approve these rules, to rewrite or abrogate them, and to take disciplinary action if an exchange violates them, the Exchange Act, or applicable regulations. Indeed, Plaintiffs have described their claim, "[i]n a nutshell," as alleging that the Exchanges violated their duty to "maintain 'fair and orderly' securities markets"—a duty imposed on the Exchanges under the Exchange Act and that the SEC bears responsibility for enforcing. Plaintiffs' Opening Brief in *City of Providence*, 878 F.3d 43, 2016 WL 164375, at *4. The SEC thus has "regulatory authority" to "supervise the activities in question." *Credit Suisse*, 551 U.S. at 276.

B. The SEC exercises its regulatory authority over propriety data feeds, co-location services, and complex order types

The second *Credit Suisse* factor favors preclusion because the SEC has "exercised" this regulatory authority. 551 U.S. at 277. Several years ago, the then-Chair of the SEC confirmed the agency's focus on these issues. Mary Jo White, *Enhancing Our Market Equity Structure* (June 5, 2014) (noting that "a lot of lively debate has centered on high frequency trading, speed, and fairness" and that the SEC is "assessing the extent to which" these products and services "may be working against investors"), https://www.sec.gov/news/speech/2014-spch060514mjw. And the SEC actively monitors these areas: The SEC approves the exchange rules that provide

for these products and services. *See infra* Section III.C. Further, as the Second Circuit recognized and Plaintiffs concede, the SEC "has instituted enforcement proceedings against exchanges for providing proprietary data feeds that are not in compliance with SEC rules," taken "enforcement actions against exchanges for providing [co-location] services in violation of the Exchange Act," and "instituted enforcement proceedings against the exchanges for providing certain complex orders." *Providence*, 878 F.3d at 42-43; *see also* Plaintiffs' Opening Brief, 2016 WL 164375, at *71 (collecting examples where the SEC "stepped in and charged" exchanges for violating securities regulations in connection with challenged practices); Brief of SEC as Amicus Curiae, 2016 WL 7030327, at *12-13 ("The Commission has also taken enforcement actions in its oversight of the exchanges' co-location services."); *id.* at *13-14 (proprietary data feeds); *id.* at *14-15 (order types). The SEC plainly exercises its regulatory authority in this realm.

C. Permitting Plaintiffs' claim would create conflicts with the Exchange Act's regulatory structure and the SEC's regulatory authority

The third *Credit Suisse* factor favors preclusion because there is actual conflict between Plaintiffs' claim and the Exchange Act's comprehensive regulatory structure. Actual conflict exists, for example, when claims under another provision of federal law seek to "inhibit conduct that the SEC permits." *Elec. Trading Grp., LLC v. Banc of Am. Sec. LLC*, 588 F.3d 128, 137 (2d Cir. 2009). That is what Plaintiffs *expressly* seek to do here. They claim that, by providing proprietary data feeds, co-location services, and complex order types, the Exchanges violated Section 10(b) of the Exchange Act and Rule 10b-5. *E.g.*, SCAC ¶¶ 295-302. Yet the SEC has permitted each of these products and services—as Plaintiffs concede. *See* Plaintiffs' Opening Brief, 2016 WL 2620070, at *20.

Proprietary Data Feeds. In adopting Regulation NMS, the SEC authorized "the independent distribution of market data" consistent with the terms of the regulation because that

distribution "would allow investors and vendors greater freedom to make their own decisions regarding the data they need." NMS Adopting Release, 70 Fed. Reg. 37,496, 37,566, 35,597 (June 29, 2005). The SEC has also approved proposed exchange rules establishing particular proprietary feeds, even when those feeds would result in users receiving information more quickly than under the consolidated feed—the very core of Plaintiffs' allegations of manipulation and fraud.[11] Knowing all of this, the SEC expressly found that proprietary feeds are "consistent with the requirements of the [Exchange] Act and the rules and regulations thereunder." 74 Fed. Reg. at 13,294. Plaintiffs directly assail this aspect of the SEC-approved market structure: they seek an order requiring the Exchanges to "ensure that customer bid and offer prices are provided to all investors and trading entities at the same time," and monetary damages that would be inconsistent with the SEC's approval of the products and services. SCAC, Prayer for Relief.

Co-Location Services. The SEC has approved co-location services as "consistent with the requirements of the Act and the rules and regulations thereunder."[12] The SEC approved co-location services notwithstanding its knowledge that "[m]any proprietary firm strategies are highly dependent upon speed" and that "[c]o-location is one means to save micro-seconds of latency," allowing certain traders to be "faster than competitors."[13] Yet Plaintiffs seek monetary

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[11] *See, e.g.*, Exchange Act Release No. 34-59606, 74 Fed. Reg. 13,293, 13,294 (Mar. 26, 2009) (proprietary feed was developed "at the request of traders who are very latency sensitive"); Exchange Act Release No. 34-62181, 75 Fed. Reg. 31,488, 31,491 (June 3, 2010).

[12] Exchange Act Release No. 34-62960, 75 Fed. Reg. 59,299, 59,299-300 (Sept. 27 2010) (NYSE Amex); *see also, e.g.*, Exchange Act Release No. 34-62397, 75 Fed. Reg. 38,860, 38,861 (July 6, 2010) (NASDAQ) (same); Exchange Act Release No. 34-61680, 75 Fed. Reg. 12,590 (Mar. 16, 2010) (Chicago Stock Exchange) (same).

[13] EMS Concept Release, 75 Fed. Reg. 3594, 3610 (Jan. 21, 2010); *see also* Exchange Act Release No. 34-62961, 75 Fed. Reg. at 59,299 ("Users that receive co-location services normally would expect reduced latencies in sending orders to the Exchange and receiving market data from the Exchange.").

damages for the Exchanges' provision of SEC-approved co-location services and an injunction barring the Exchanges from providing these services in the future. *See* SCAC, Prayer for Relief.

Complex Order Types. The SEC has also approved exchange rules regarding order types in the face of the same arguments Plaintiffs make here. *Compare* https://www.sec.gov/comments/s7-02-10/s70210-420.pdf (complaining about a new order type, including that complex order types "cater to high-frequency traders at the expense of the investing public") *with* Exchange Act Release No. 34-73333 79 Fed. Reg. 62,223, 62,226 (Oct. 9, 2014) (approving that order type as a rule consistent with the Exchange Act's requirement that SRO rules be designed to prevent fraudulent and manipulative acts and practices and otherwise promote just and equitable principles of trade).[14]

The Exchanges must "publicly disclose" through proposed rule changes their "trading services," which includes "a wide range of order types for trading on their automated systems." EMS Concept Release, 75 Fed. Reg. at 3,598. The Exchanges' publicly available rules—approved by the SEC—thus describe the order types for each exchange.[15] Plaintiffs nevertheless seek damages and an injunction based on the Exchanges' provision of these SEC-approved order types. SCAC, Prayer for Relief.

By approving all of the challenged products and services—in the face of the same policy arguments Plaintiffs make here—the SEC has exercised its expertise and regulatory authority under the Exchange Act and concluded that the challenged products and services are consistent with the SEC's mandate to ensure fair and orderly markets and foster competition. That

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[14] *See also* Exchange Act Release No. 34-63777, 76 Fed. Reg. 5,630, 5,634 (Feb. 1, 2011) (complex order types "consistent with Section 6(b)(5)").

[15] *See* NASDAQ Stock Market Rule 4751(f); NYSE Rule 13; NYSE Arca Equities Rule 7.31; BATS Exchange Rule 11.9; EDGA and EDGX Rules 11.8; CHX Rules Art. 1, Rule 2.

conclusion also necessarily covers the Exchange Act's requirement that an exchange's rules be "designed to prevent fraudulent and manipulative acts and practices." 15 U.S.C. § 78f(b)(5). To allow Plaintiffs to assert that the same products and services are fraudulent and manipulative under Section 10(b) would create a direct conflict. Products and services that the SEC has expressly found to be "fair," "reasonable," "equitable," "just," and in "the public interest" under the Exchange Act cannot also be manipulative or fraudulent under the Exchange Act.

Indeed, relying on the same regulatory structure, the Second Circuit has already held that state-law claims based on the potential timing advantages offered by proprietary feeds and co-location services would conflict with the SEC's approval of those products and services and thus are preempted. As the *Lanier* court explained, "the SEC has approved the Exchanges' use of proprietary feeds and co-location services," while "expressly acknowledg[ing] that proprietary feeds and co-location reduce latency, which is the very conduct" that the claims at issue challenged. 838 F.3d at 154. Those claims were therefore preempted because they would "conflic[t] with the SEC's interpretation and would undermine Congress's intent to create uniform rules for governing the national market system." *Id.* at 155.

Plaintiffs' Section 10(b) claim is foreclosed for the same reason. Indeed, the Supreme Court has recognized that preemption principles are "instructive" with regard to preclusion. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014). Just like the claims in *Lanier*, the claim here "clearly stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, namely, to encourage forceful self-regulation of the securities industry." *Barbara v. NYSE*, 99 F.3d 49, 59 (2d Cir. 1996), *abrogated in part on other grounds by Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016); *see also Series 7*, 548 F.3d 110 at 113 ("[P]laintiffs cannot raise a common law complaint against

defendants based on duties arising under the Exchange Act."). The "comprehensive structure set up by Congress"—with its "elaboration of duties, allowance of delegation and oversight by the SEC"—illustrates "Congress's desire to protect SROs from liability." *Series 7*, 548 F.3d at 115.

The obstruction of the national market system is equally serious when the claims assert a violation of federal, rather than state, law. Courts have rejected private attempts to enforce Exchange Act duties that fall within the SEC's oversight over the markets, precisely because those attempts clash with the SEC's authority. *See Scattered Corp. v. Chicago Stock Exch., Inc.*, 98 F.3d 1004, 1006 (7th Cir. 1996) (with regard to alleged violations of 15 U.S.C. § 78k-1(c)(5) "aggrieved parties complain to the SEC, not to a judge"); *see also Feins v. Am. Stock Exch., Inc.*, 81 F.3d 1215, 1221-24 (2d Cir. 1996). As with state-law claims, a "rule permitting recovery" under Plaintiffs' securities-fraud theory would allow litigants to define by lawsuit "the regulatory duties of a self-regulatory organization, a result which cannot co-exist with the Congressional scheme of delegated authority under the Exchange Act." *Sparta Surgical Corp. v. NASD*, 159 F.3d 1209, 1215 (9th Cir. 1998); *see also United States v. NASD, Inc.*, 422 U.S. 694, 734 (1975) (applying preclusion, stating that "[i]n generally similar situations, we have implied immunity … to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting [court] judgments").

Moreover, even if there were some factual dispute over the extent of the SEC's authorization, the *potential* for conflict would suffice to preclude Plaintiffs' claim as a matter of law. Preclusion is warranted when there exists a "conflict with an overall regulatory scheme that *empowers* the agency to allow conduct" that the asserted claims "would prohibit." *Stock Exchs. Options Trading*, 317 F.3d at 149 (emphasis added). So long as there exists "a potential conflict … based on the possibility that the SEC will act upon its authority," preclusion is necessary to

preserve the agency's regulatory authority. *Elec. Trading Grp.*, 588 F.3d at 138. Here, even if the SEC has not approved a particular aspect of a product or service at issue, it undeniably *could* do so. For example, even accepting Plaintiffs' allegations that the Exchanges did not "disclos[e] the full functionality" of their order types, *Providence*, 878 F.3d at 43, the SEC remains free to conclude that the Exchanges' disclosures were sufficient. "This potential conflict weighs in favor of implied preclusion." *Elec. Trading Grp.*, 588 F.3d at 138.

D. Plaintiffs base their claim on conduct that lies at the core of the SEC's regulatory mandate

The fourth *Credit Suisse* factor favors preclusion because Plaintiffs challenge products and services that "lie squarely within an area of financial market activity that securities law seeks to regulate"—"heartland securities activity." 551 U.S. at 276-77. The Exchanges' obligation to maintain fair and orderly markets—and the SEC's responsibility to ensure that they do—lies at the heart of the Exchange Act. Congress amended the Exchange Act in 1975 "to facilitate the establishment of a national market system" with "due regard for … the maintenance of fair and orderly markets" and "to carry out the objectives" such as "economically efficient execution of securities transactions," and "the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities." 15 U.S.C. § 78k-1(a)(1)-(2).

The products and services here touch on these central objectives. Disseminating market data is a critical regulatory function within the Exchanges' Exchange Act responsibilities. *See* 15 U.S.C. § 78k-1(a)(1)(D). As the Second Circuit has recognized, "safeguarding the integrity of market information was one of the purposes behind the regulation of the securities markets in the first place." *DL Capital Grp. v. Nasdaq Stock Market*, 409 F.3d 93, 98 (2d Cir. 2005). Rules regarding how market data must or may be transmitted and whether co-location is permissible as a means to obtain that market data therefore fall within the core of the issues subject to SEC

regulation. And "[o]rder types are the primary means by which market participants communicate their instructions for the handling of their orders to the exchange." Exchange Act Release No. 34-74032, 2015 WL 137640, at *2 (Jan. 12, 2015). Because the products and services Plaintiffs challenge "lie squarely" within the core obligations of the Exchanges and the SEC, the Exchange Act precludes Plaintiffs' claim. *Credit Suisse*, 551 U.S. at 276.

E. The SEC's views support preclusion here

Confirming the above analysis, the SEC's articulation of the preclusion standard, analyzed against the regulatory structure at issue, fully supports dismissal on preclusion grounds here:

> 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. A similar analysis would likewise preclude federal Section 10(b) claims that conflict with Commission regulation, including Commission regulation of SRO rules. 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, 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."

Brief of SEC as Amicus Curiae, 2016 WL 7030327, at *33 (quoting *Lanier*, 838 F.3d at 155) (citations omitted). Plaintiffs' claim is precluded and must be dismissed.

CONCLUSION

For the reasons stated above, the Exchanges request that this Court dismiss the SCAC without prejudice for lack of Article III standing. In the alternative, the Exchanges ask that the Court dismiss the SCAC with prejudice based on the other grounds raised above.

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