UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 14-0457

Caption [use short title]

In re Facebook, Inc. IPO Securities and Derivative Litigation

Motion for: Leave to File Amicus Curiae Brief

Set forth below precise, complete statement of relief sought:

New York Stock Exchange LLC; NYSE Arca, Inc.; and NYSE MKT LLC seek leave to file a brief as amici curiae in support of Defendants-Appellants.

MOVING PARTY: NYSE Exchanges

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Plaintiffs-Appellees

MOVING ATTORNEY: Douglas W. Henkin

OPPOSING ATTORNEY: Vincent R. Cappucci

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Court-Judge/Agency appealed from: Southern District of New York, Hon. Robert W. Sweet

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Douglas W. Henkin **Date:** June 6, 2014

Has service been effected? ☑ Yes ☐ No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080

MOTION OF NEW YORK STOCK EXCHANGE LLC; NYSE ARCA, INC.; AND NYSE MKT LLC FOR LEAVE TO FILE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

Pursuant to Federal Rule of Appellate Procedure 29(b), counsel for prospective *amici curiae* respectfully moves for leave to file the attached BRIEF OF NEW YORK STOCK EXCHANGE LLC; NYSE ARCA, INC.; AND NYSE MKT LLC AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS. Defendants-Appellants consented to the filing but Plaintiffs-Appellees did not.

Based on the background and interest of *amici curiae*, counsel respectfully requests that the Court grant this motion. In support of the present motion, counsel states the following:

BACKGROUND

1. Collectively, New York Stock Exchange LLC; NYSE Arca, Inc.; and NYSE MKT LLC ("NYSE") trade nearly one-third of the world's cash equities volume. NYSE exchanges are the global leaders in capital raising for listed companies, including the majority of technology IPOs globally in 2013. For example, during 2013, companies raised $59.2 billion in 159 IPOs on NYSE exchanges, approximately 32% of the global capital raised through IPOs. NYSE and Nasdaq's markets together accounted for approximately 40% of the global capital raised through IPOs in 2013.

2. Proposed *amici* are entities registered with the U.S. Securities and Exchange Commission ("SEC") as national securities exchanges and self-regulatory organizations ("SROs") within the meaning of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78c(a)(26).

3. The Exchange Act both authorizes and requires SROs to promulgate and enforce rules governing their membership and the conduct of members, member organizations and their employees and "to remove impediments to and perfect the mechanism of a free and open market … and, in general, to protect investors and the public interest." 15 U.S.C. § 78f(b)(5).

4. The SEC oversees NYSE's compliance with its regulatory and operational responsibilities, including compliance monitoring, enforcement of standards for issuers and regulation of broker-dealers.

INTEREST

5. NYSE has an interest in an application of the securities laws and state common law that is faithful to the limitations imposed by Congress and state legislatures and the Supreme Court and this Court's prior decisions. NYSE believes that the United States' capital markets must not be hindered, or their evolution inhibited, by (i) unreasonable and unpredictable extensions of potential statutory and common law liability to third parties who trade on U.S. exchanges or

(ii) unreasonable narrowing of the immunity from suit SROs have under well-established law from this and other courts.

6. NYSE believes that the boundaries of exchanges' potential liability under federal and state law should be clear and unambiguous, and that interpretations of those laws that risk unbounded expansion of potential liability inhibit growth of and access to the U.S. capital markets because such interpretations would increase the costs of accessing the markets and render them less competitive.

7. NYSE seeks to demonstrate to the Court how the important functions performed by SROs safeguard the integrity of the securities markets and protect market participants and investors. NYSE believes that the well-established law shielding exchanges from lawsuits stemming from the discharge of their Exchange Act duties serves an important public policy function and enables exchanges to better serve listed companies, as well as investors and other market participants, in providing high-quality markets. Exchanges allow companies to raise capital to help fund their growth, entrepreneurship, and innovation, all of which are hallmarks of the U.S. capital markets and are critical to the national economy.

CONCLUSION

8. NYSE is well-situated to advise the Court on how the District Court's incorrect analysis of the regulatory immunity issues, the *Affiliated Ute Citizens of Utah v. United* States, 406 U.S. 128 (1972) presumption of reliance, and the economic loss doctrine would affect the U.S. capital markets, including the interests of market participants and investors.

WHEREFORE, the undersigned counsel respectfully requests that the Court grant its motion for leave to file a brief as *amici curiae* in support of Defendants-Appellants.

Dated: New York, New York
June 6, 2014

Respectfully submitted,

MILBANK, TWEED, HADLEY & McCLOY LLP

By: /s/ Douglas W. Henkin

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Attorneys for proposed amici curiae New York Stock Exchange LLC; NYSE Arca, Inc.; and NYSE MKT LLC

Proposed Brief

14-0457-cv

United States Court of Appeals

for the

Second Circuit

AVATAR SECURITIES, LLC, MEREDITH BAILEY, on behalf of themselves and all others similarly situated, DMITRI BOUGAKOV, on behalf of themselves and all others similarly situated, RYAN CEFALU, on behalf of themselves and all others similarly situated, LORRAIN CHIN, FIRST NEW YORK SECURITIES L.L.C., ATISH GANDHI, on behalf of themselves and all others similarly situated, PHILLIP GOLDBERG, on behalf of themselves and all others similarly situated, ERIC HAMRICK, on behalf of themselves and all others similarly situated, STEVE JARVIS, JOE JOHNSON, on behalf of themselves and all others similarly situated, NUHKET KAYAHAN, on behalf of themselves and all others similarly situated, DAVID KENTON, on behalf of themselves and all others similarly situated, DENNIS KUHN, on behalf of themselves and all others similarly situated, BENJAMIN LEVINE, on behalf of themselves and all others similarly situated, KATERHINE LOIACONO, on behalf of themselves and all others similarly situated,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PROPOSED *AMICI CURIAE* NEW YORK STOCK EXCHANGE LLC; NYSE ARCA, INC.; AND NYSE MKT LLC IN SUPPORT OF DEFENDANTS-APPELLANTS

MILBANK, TWEED, HADLEY
& MCCLOY LLP
Attorneys for Amici Curiae New York Stock Exchange LLC; NYSE Arca, Inc.; and NYSE MKT LLC
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CRYSTAL MCMAHON, on behalf of themselves and all others similarly situated, GEORGE MICHALITSIANOS, on behalf of themselves and all others similarly situated, RANDY TERESA MIELKE, on behalf of themselves and all others similarly situated, JACINTO RIVERA, on behalf of themselves and all others similarly situated, FAISAL SAMI, on behalf of themselves and all others similarly situated, SANJEEV SHARMA, on behalf of themselves and all others similarly situated, COLIN SUZMAN, on behalf of themselves and all others similarly situated, T3 TRADING GROUP, LLC, VIJAY AKKARAJU, ALEXIS ALEXANDER, as custodian for Chloe Sophie Alexander, BRIAN ROFFE PROFIT SHARING PLAN, Individually and on behalf of all others similarly situated, JOSE GALVAN, MARY GALVAN, ROBERT HERPST, Individually, on behalf of all others similarly situated, SANJAY ISRANI, on behalf of themselves and all others similarly situated, KBC ASSET MANAGEMENT NV, and the EMPLOYEES' RETIREMENT SYSTEM OF THE GOVERNMENT OF THE VIRGIN ISLANDS (Collectively, the Institutional Investors), DOUGLAS M. LIGHTMAN, Individually and on behalf of all others similarly situated, DENNIS PALKON, Individually and on behalf of all others similarly situated, RICK POND, JACOB SALZMANN, Individually and on behalf of all others similarly situated, MICHAEL SPATZ, MAREN TWINING, Individually and on behalf of all others similarly situated, GOLDRICH COUSINS P.C. 401(K) PROFIT SHARING PLAN & TRUST, IRVING S. BRAUN, Individually, EDWARD CHILDS, Derivatively on Behalf of Himself and All Others Similarly Situated, KATHY REICHENBAUM, Individually and on behalf of all others similarly situated, JUN YAN, on behalf of herself and all others similarly situated, ELBITA ALFONSO, VICKY JONES, PHYLLIS PETERSON, JERRY RAYBORN, on behalf of themselves and all others similarly situated, EDWARD VERNOFF, JUSTIN F. LAZARD, on behalf of himself and all others similarly situated, SYLVIA GREGORCYZK, on behalf of herself and all others similarly situated, PETER BRINCKERHOFF, GARRETT GARRISON, DAVID GOLDBER, individually and on behalf of all others similarly situated, KEVIN HYMS, individually and on behalf of all others similarly situated, RICHARD P. EANNARINO, Individually and on behalf of all others similarly situated, PETER MAMULA, Individually and on behalf of all others similarly situated, KHODAYAR AMIN, on behalf of himself and all others similarly situated, ELLIOT LEITNER, individually and on behalf of all others similarly situated, BARBARA STEINMAN, on behalf of herself and all others similarly situated, HOWARD SAVITT, on behalf of himself and all others similarly situated, CHAD RODERICK, EUGENE STRICKER, individually and on behalf of all others similarly situated, STEVE SEXTON, Individually and on behalf of all others similarly situated, KEITH WISE, Individually and on behalf of all others similarly situated, JONATHAN R. SIMON, JAMES CHANG, individually and on behalf of all others similarly situated, SAMEER ANSARI, individually and on behalf of all others similarly situated, DARRYL LAZAR, individually and on behalf of all others similarly situated, MICHAEL LIEBER, individually and on behalf of other members of the general public similarly situated, THOMA J. AHRENDTSEN, AARON M. LEVINE, Individually, and on behalf of all others similarly situated, KAREN CUKER, individually and on behalf of all others similarly situated, BRIAN GRALNICK, individually and on behalf of all others similarly situated, JENNIFER STOKES, Individually and On Behalf of All

Others Similarly Situated, WILLIAM COLE, Derivatively on Behalf of Facebook, Inc., VERNON R. DEMOIS, JR., Individually and On Behalf of All Others Similarly Situated, HAL HUBUSCHMAN, Derivatively on Behalf of Facebook, Inc., EDWARD SHIERRY, Individually and On Behalf of All Others Similary Situated, JANIS FLEMING, GAYE JONES, Derivatively on Behalf of Facebook Inc., HOLLY MCCONNAUGHEY, Derivatively on Behalf of Facebook Inc., ROBERT LOWINGER, STEVE GRIFFIS,

Plaintiffs-Appellees,

THOMAS E. NELSON, individually and behalf of all others similarly situated, ROCK SOUTHWARD, Derivatively on Behalf of Himself & All Others Similarly Situated, LIDIA LEVY, on behalf of herself and all others similarly situated, JOHN GREGORY, on behalf of himself and all other similarly situated,

Plaintiffs,

v.

THE NASDAQ STOCK MARKET L.L.C., a Foreign Limited Liability Company, NASDAQ OMX GROUP, INC., ROBERT GREIFELD, ANNA M. EWING,

Defendants-Appellants,

MARC L. ANDREESSEN, BARCLAYS CAPITAL INC., ERSKINE B. BOWLES, JAMES W. BREYER, DAVID A. EBERSMAN, FACEBOOK, INC., a Delaware corporation, GOLDMAN, SACHS & CO., DONALD E. GRAHAM, REED HASTINGS, J.P. MORGAN SECURITIES LLC., MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED, MORGAN STANLEY & CO, INC., DAVID SPILLANE, PETER A. THIEL, MARK ZUCKERBERG, ALLEN & COMPANY LLC, BMO CAPITAL MARKETS CORP., BLAYLOCK ROBERT VAN LLC, C.L. KING & ASSOCIATES, INC., CABRERA CAPITAL MARKETS, LLC, CASTLEOAK SECURITIES, L.P., CITIGROUP GLOBAL MARKET, INC., COWEN AND COMPANY, LLC, CREDIT SUISSE SECURITES (USA) LLC, DEUTSCHE BANK SECURITES, INC., E TRADE SECURITIES LLC, ITAU BBA USA SECURITIES, INC., LAZARD CAPITAL MARKETS LLC, LEBENTHAL & CO., LLC, LOOP CAPITAL MARKETS LLC, M.R. BEAL & COMPANY, MACQUARIE CAPITAL (USA) INC., MORGAN STANLEY & CO. LLC, MURIEL SIEBERT & CO., INC., OPPENHEIMER & CO. INC., PACIFIC CREST SECURITIES LLC, PIPER JAFFRAY & CO., RBC CAPITAL MARKETS LLC, RAYMOND JAMES & ASSOCIATES, INC., SAMUEL A. RAMIREZ & COMPANY, INC., SHERYL K. SANDBERG, STIFEL, NICOLAUS & COMPANY, INC., THE WILLIAMS CAPITAL GROUP, L.P., WELLS FARGO SECURITIES, LLC, WILLIAM BLAIR & COMPANY L.L.C., GOLDMAN SACHS & CO., NASDAQOMX GROUP, INC., LAWRENCE CORNECK, Individually and on behalf of all others similarly situated, JILL D. SIMON, CITIGROUP GLOBAL MARKETS INC., MERRILL LYNCH, PIERCE FENNER & SMITH INCORPORATED, ALLEN & FACEBOOK (SIC) LLC, WILLIAM BLAIR & FACEBOOK (SIC) LLC, M.R. BEAL & FACEBOOK (SIC), COWEN AND FACEBOOK (SIC) LLC, STIFEL NICHOLAS & FACEBOOK (SIC) INCORPORATED, SAMUEL A. RAMIREZ & FACEBOOK (SIC) INC, KEVIN HICKS, individually and on behalf of all others similarly situated, LINH LUU, individually and on behalf of all others similarly situated, HARVEY LAPIN, Individually and On Behalf of All Others Similarly Situated, KING & ASSOCIATES, INC., DAVID E. (sic) EBERSMAN, NICK E. TRAN, NASDAQ

STOCK MARKET, INC., UMA M. SWAMINATHAN, CIPORA HERMAN, J.P. MORGAN SECURITIES LLC, MORGAN STANLEY & CO. LLC,

Defendants.

FRAP 26.1 DISCLOSURE STATEMENT

Proposed *amici curiae* are New York Stock Exchange LLC; NYSE Arca, Inc.; and NYSE MKT LLC. Each of New York Stock Exchange LLC; NYSE Arca, Inc.; and NYSE MKT LLC is an indirect, wholly-owned subsidiary of Intercontinental Exchange, Inc., which is publicly traded under the symbol "ICE." ICE has no parent corporation, and as of the date hereof, no publicly held company owns 10% or more of its stock.

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GLOSSARY OF TERMS

Exchange Act	Securities Exchange Act of 1934
IPO	Initial public offering
Nasdaq Defendants	Nasdaq OMX Group, Inc.; Nasdaq Stock Market LLC; Robert Greifeld; and Anna M. Ewing
NYSE	Proposed *amici curiae* New York Stock Exchange LLC; NYSE Arca, Inc.; and NYSE MKT LLC
Order	Opinion and Order dated December 12, 2013 (JA 302-398)
Plaintiffs	First New York Securities LLC; Avatar Securities, LLC; T3 Trading Group, LLC; Meredith Bailey; Atish Gandhi; Philip Goldberg; Steve Jarvis; Faisal Sami; and Colin Suzman
SEC	U.S. Securities and Exchange Commission
SLUSA	Securities Litigation Uniform Standards Act of 1998
SRO	Self-regulatory organization

STATEMENT OF INTEREST[1]

Pursuant to Fed. R. App. P. 29(a), New York Stock Exchange LLC; NYSE Arca, Inc.; and NYSE MKT LLC seek this Court's leave to submit this brief as *amici curiae* in support of Defendants-Appellants.

Collectively, NYSE exchanges trade nearly one-third of the world's cash equities volume. NYSE exchanges are the global leaders in capital raising for listed companies and have provided a reliable, orderly, and efficient marketplace for securities trading for more than 200 years.

NYSE entities are registered with the SEC as national securities exchanges and are SROs within the meaning of 15 U.S.C. § 78c(a)(26). The Exchange Act both authorizes and requires SROs to promulgate and enforce rules governing their membership and the conduct of members, member organizations and their employees[2] and "to remove impediments to and perfect the mechanism of a free and open market … and, in general, to protect investors and the public interest."[3]

NYSE has an interest in an application of the securities laws and state

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1 No party's counsel authored any part of this brief, no party or party's counsel contributed any money that was intended to fund the preparation or submission of this brief, and no one other than the NYSE entities contributed money that was intended to fund preparing or submitting this brief.

2 15 U.S.C. §§ 78f(b), 78s(g).

3 15 U.S.C. § 78f(b)(5).

common law that is faithful to the limitations imposed by Congress and state legislatures and the Supreme Court and this Court's prior decisions. In particular, NYSE believes that the United States' capital markets must not be impaired, or their evolution inhibited, by (i) unreasonable and unpredictable extensions of statutory and common law claims to third parties who, through exchange members, indirectly trade on U.S. exchanges or (ii) unreasonable narrowing of the immunity from suit SROs have under well-established decisional law. NYSE believes that the boundaries of exchanges' potential liability under federal and state law should be clear and unambiguous, and that holdings that risk unbounded expansion of potential liability would be detrimental to the U.S. capital markets because they would increase the costs of accessing those markets and render them less competitive.

IPOs in particular are a critical means for companies to raise capital to fund new businesses and hire employees. Exchanges are essential to the IPO process, through which a private company sells shares of its stock to the public. For example, during 2013 companies raised $59.2 billion in 159 IPOs on NYSE exchanges, approximately 32% of the global capital raised through IPOs. NYSE and Nasdaq together accounted for approximately 40% of the global capital raised through IPOs in 2013. Access to capital for a company plays a critical role in the U.S. and global economies, highlighting the importance of the liability issues

raised by this case.

The important functions performed by SROs safeguard the integrity of the securities markets and protect investors and other market participants. NYSE believes that the well-established law shielding exchanges from lawsuits relating to the discharge of their Exchange Act duties serves important public policy functions and enables exchanges to better serve listed companies, investors, and other market participants in providing high-quality markets.[4] Exchanges allow companies to raise capital to help fund growth, entrepreneurship, and innovation, all of which are hallmarks of the U.S. capital markets and are critical to the national economy.

INTRODUCTION

Although NYSE agrees with the arguments made by the Nasdaq Defendants regarding why the District Court erred, it submits this brief to address the broader context and potential impact of the Order on exchanges. This appeal presents important questions about the scope of the long-established SRO immunity doctrine, which the District Court incorrectly held did not encompass all conduct Plaintiffs complained of. When correctly applied, the relevant SRO

[4] *See generally* Mary Jo White, Enhancing Our Equity Market Structure, Address Before the Sandler O'Neill & Partners, L.P. Global Exchange and Brokerage Conference (June 5, 2014) (available at http://www.sec.gov/News/Speech/Detail/Speech/1370542004312#.U5Cr5BZlW6V) (last visited June 5, 2014) ("[W]e must evaluate all issues through the prism of the best interest of investors and the facilitation of capital formation for public companies. The secondary markets exist for investors and public companies, and their interests must be paramount.").

immunity precedents require the conclusion that the functions about which Plaintiffs complain are the types to which SRO immunity applies; the District Court should have dismissed Plaintiffs' claims in their entirety under SRO immunity.

The District Court's decision also creates broad and untenable expansions of the scope of claims that can be brought against exchanges as opposed to issuers, underwriters, or broker-dealers. The Exchange Act maintained the long-standing system in which exchanges have no direct relationships with retail investors. Exchanges merely provide the venues in which buyers and sellers come together, through broker-dealer members of exchanges, to effect securities transactions; exchanges are neither buyers nor sellers in transactions that take place using their facilities. Beyond failing to apply SRO immunity correctly, the District Court committed two distinct, additional errors in denying in part the Nasdaq Defendants' motion to dismiss:

First, the District Court erroneously expanded the scope of the *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972) presumption of reliance, which applies to Section 10(b) claims that relate solely to alleged omissions. Nasdaq did not issue Facebook stock; none of the alleged omissions were about Facebook or its stock, they were about Nasdaq itself. This would be a critical expansion of *Affiliated Ute*: Previously, *Affiliated Ute* cases involved

claims that companies, their officers or directors, or someone directly involved in a securities transaction failed to disclose something *about the stock being bought or sold or the transaction at issue* that they had a duty to disclose. But the District Court allowed the presumption to be used to assert securities fraud claims against an entity that did not issue Facebook stock, did not speak about Facebook stock, had no duty to speak about Facebook stock, and was not a party to any purchase or sale of Facebook stock. Such a broad and unwarranted expansion could encourage parties to assert omission claims against exchanges where such claims have never been made before, a problem worsened by the fact that Congress encourages exchanges to allow trading in stock listed on other exchanges; there would be no discernible boundary for such claims.

Second, the District Court's determination regarding the economic loss rule is inconsistent with New York law and the way Congress, the SEC, the exchanges, and their members have (through statutes, rules, and contracts) set the balance between exchanges, broker-dealers that transact on exchanges, and broker-dealers' customers. Exchanges have no direct relationships with customers who, *through their broker-dealers*, buy and sell stock. The economic loss rule prescribes what duties are necessary for plaintiffs to assert potentially viable negligence claims, and the District Court's interpretation risks allowing such claims to be asserted against exchanges despite operating their markets as

Congress intended and their SEC-approved rules and agreements with members provide (none of which provide for customers to sue exchanges).

ARGUMENT

I. THE DISTRICT COURT CONSTRUED THE SCOPE OF SRO IMMUNITY TOO NARROWLY

A. SRO Immunity Background

SROs are entitled to absolute immunity when (i) their "alleged misconduct falls within the scope of quasi-governmental powers delegated to" them or (ii) the activities complained of are "consistent with" or "incident to" such activities.[5] The determinative question is "whether the plaintiff's allegations concern the exercise of powers within the bounds of the government functions delegated to" the SRO.[6] SRO immunity thus "depends only on ***whether*** specific acts and forbearances were incident to the exercise of regulatory power, and not on the propriety of those actions or inactions."[7]

SRO immunity is critical to the functioning of SROs and the markets

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5 *D'Alessio v. NYSE*, 258 F.3d 93, 106 (2d Cir. 2001); *see also Standard Inv. Chartered, Inc. v. NASD*, 637 F.3d 112, 114 (2d Cir. 2011) (actions "incident to the regulatory function of [] SROs ..." are immune from suit); *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95-96, 99 (2d Cir. 2007) (if conduct complained of is "within the ambit of the SRO's delegated power, immunity presumptively attaches"). The same immunity applies to SROs' officers and affiliates. *Forrester v. White*, 484 U.S. 219, 229 (1988).

6 *NYSE Specialists*, 503 F.3d at 98.

7 *Id.* (emphasis in original); *see also D'Alessio*, 258 F.3d at 95-96; *Sparta Surgical Corp. v. NASD*, 159 F.3d 1209, 1215 (9th Cir. 1998).

they oversee. As this Court has held, the purpose of immunity is "to give governmental officials — or those acting with the express delegation of the government, such as SROs — breathing room to exercise their powers without fear that their discretionary decisions may engender endless litigation."[8] Allowing such litigation would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[9]

B. The District Court Erred In Applying Longstanding Immunity Precedents To This Case

The District Court held that Plaintiffs' (i) negligence claims relating to the allegedly inadequate design, testing, and touting of Nasdaq's software and (ii) Section 10(b) claims based on alleged failures to update statements in Nasdaq's public filings, web site, and investor presentations were not protected by SRO immunity.[10] Although the two discussions are in separate sections of the Order, both analyses are based on the same flawed premise.

The District Court concluded that certain negligence and Section 10(b) claims were not protected by SRO immunity by trying to distinguish "design,

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8 *NYSE Specialists*, 503 F.3d at 97.

9 *Barbara v. NYSE, Inc.*, 99 F.3d 49, 59 (2d Cir. 1996) (citations and internal quotation marks omitted); *see also In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 115 (D.C. Cir. 2008) ("[t]he elaboration of duties, allowance of delegation and oversight by the SEC, and multi-layered system of review show Congress's desire to protect SROs from liability for common law suits.").

10 *See* JA 340-348.

promotion and inadequate testing" of software prior to the Facebook IPO from what it acknowledged were immune functions (the regulation of "active, ongoing trading"),[11] but that distinction was analytically flawed. There is no dispute that Nasdaq sought and received the SEC's approval of rules for conducting an opening Cross and that Nasdaq then designed, implemented, and tested systems to perform that function;[12] that is all immune conduct and includes everything Plaintiffs complained about. The District Court also departed from this Court's precedent by finding that Nasdaq's public discussions of these systems served Nasdaq's private business interests as opposed to a regulatory function and thus rendered the conduct not immune. Because the Plaintiffs' claims all concerned Nasdaq's performance of a delegated function under an SEC-approved rule, they were all barred by SRO immunity.[13]

Without citing any authority, the District Court asserted that an exchange's "duty to adequately design and test software to initiate an

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11 *See* JA 342 n.11.

12 *See id.*

13 *See NYSE Specialists*, 503 F.3d at 90 (SRO immune from claims that it "failed to regulate and provide a fair and orderly market"); *MFS Sec. Corp. v. New York Stock Exchange, Inc.*, 277 F.3d 613, 617 (2d Cir. 2002) ("NYSE is immune from liability for claims arising out of the discharge of its duties under the [Exchange] Act") (citation and internal quotation marks omitted); *Gurfein v. Ameritrade, Inc.*, 411 F. Supp. 2d 416, 423 (S.D.N.Y. 2006) (failure "to properly monitor" market participants protected by immunity because it "clearly fall[s] within the scope of the SRO's regulatory and general oversight functions") (internal quotation marks omitted).

unprecedently large IPO does not function to protect investors … ."[14] But the test for SRO immunity is whether the general function at issue is regulatory in nature, not whether a particular performance of that function is unique. The District Court's assertion is at odds with the Exchange Act itself, which requires SROs to, *inter alia*, "remove impediments to and perfect" the free market and "protect investors and the public interest;"[15] the design and testing of systems such as those at issue here fit within both statutory duties and is thus immune.[16] And even if there was a principled way to find that regulating "active, ongoing trading" is regulatory conduct but that creating systems to open trading in IPO securities is not regulatory conduct (there is not), the latter conduct would still have to be deemed at least "incident to" or "consistent with" regulating "active, ongoing trading" and would be immune for that reason alone.

The District Court's view is also at odds with the way the SEC has regulated securities exchanges: The SEC has mandated and provided incentives

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14 JA 344.

15 15 U.S.C. § 78f(b)(5).

16 *See NYSE Specialists*, 503 F.3d at 98 n.3; *see also DL Capital Grp., LLC v. Nasdaq Stock Mkt., Inc.*, 409 F.3d 93, 95 (2d Cir. 2005) (developing, operating, and maintaining markets are within Section 6(b)(5)'s delegation). Because the activities themselves are immune, Nasdaq's public discussion of them was also immune. *See id.* at 98. That is sufficient to provide immunity against Plaintiffs' Section 10(b) claims.

that encourage automation and speed.[17] And the SEC expressly recognized that implementation of these rules by exchanges necessarily requires design, development, and testing of computer systems.[18] Such design and testing must therefore be immune functions — indeed, the SEC has an Automation Review Program which, *inter alia*, regularly inspects exchanges' information technology systems for "systems development" and "quality and testing of new systems."[19]

Finally, as the Ninth Circuit explained in *Sparta Surgical*, immunity applies whenever an SRO exercises its "responsibility of monitoring its market."[20] The design and testing of exchange systems of all varieties, including systems related to opening aftermarket trading after an IPO, is part of that monitoring function. Among other things, the design and testing of exchange systems like the one at issue here is a part of exchanges' continued efforts to enhance their markets by improving liquidity and price efficiency, both extremely important to investors. Such design and testing is thus immune conduct for this reason as well.

That should have ended the District Court's analysis, because whether or not otherwise immune conduct *also* serves an exchange's private business

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17 *See Regulatory Systems Compliance & Integrity*, 78 Fed. Reg. 18,084, 18,088 (Mar. 25, 2013) (citing Regulation NMS, decimalization, Regulation ATS, and the Order Handling Rules).

18 *See id*. at 18,091.

19 *See* THE SEC SPEAKS IN 2011 at 421-23 (PLI 2011)

20 159 F.3d at 1215.

interest is irrelevant to immunity.[21] In *D'Alessio*, for example, this Court upheld immunity even though the plaintiff alleged that the challenged decisions were made to increase NYSE's profits.[22] Similarly, in *Sparta Surgical*, the Ninth Circuit applied SRO immunity to an SRO's decision to suspend trading in a stock, notwithstanding the allegation that the SRO was acting merely as a for-profit "market facilitator."[23] The District Court took *Sparta Surgical*'s discussion out of context — what the Ninth Circuit noted as being beyond the reach of immunity were purely private business actions, not actions with both regulatory and profit-based aspects.[24] The conduct at issue here was clearly regulatory in nature (for multiple reasons) and thus immune.

Another flaw in the District Court's analysis was its over-reliance on two decisions in which courts declined to apply SRO immunity to very different situations:

- *Weissman v. NASD, Inc.*, 500 F.3d 1293, 1297, 1299 (11th Cir. 2007), involved advertisements that were alleged to have promoted the sale of a particular stock and served no regulatory function, and

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21 *D'Alessio v. NYSE, Inc.*, 125 F. Supp. 2d 656, 658 (S.D.N.Y. 2000); *see also Standard Inv. Chartered*, 637 F.3d at 114. The District Court recognized this principle (JA 343 n.13) but failed to apply it correctly.

22 *See* 258 F.3d at 98; *see also Dexter v. Depository Trust & Clearing Corp.*, 406 F. Supp. 2d 260, 264 (S.D.N.Y. 2005) (allegations of profit motive irrelevant to immunity), *aff'd*, 219 F. App'x 91 (2d Cir. 2007).

23 159 F.3d at 1214-15.

24 *Id*. at 1214.

that were "in no sense coterminous with the regulatory activity contemplated by the Exchange Act."[25] The District Court failed to distinguish between paid advertisements addressed to the general public and alleged to promote a particular stock (as in *Weissman*) and the design, testing, and operation of an exchange's market structure itself (as here). The latter is clearly regulatory and thus immune, regardless of whether it also draws business to a particular exchange.

- *Opulent Fund, L.P. v. Nasdaq Stock Market, Inc.*, No. C-07-3683, 2007 WL 3010573(RMW) (N.D. Cal. Oct. 12, 2007), involved calculating the value of a specific index for trading purposes (akin to the Dow Jones Industrial Average or the S&P 500). The court concluded that the operation of that index was separate from the overall regulation of the exchange and specifically emphasized that operating the index did not "involve oversight of the market."[26] Here, however, the challenged conduct directly involved the creation, testing, and operation of parts of the exchange's structure, which is necessarily part of its oversight.

Despite the District Court's heavy reliance on them, neither *Weissman* nor *Opulent Fund* supports the notion that the profitability of an exchange system is relevant to immunity: *Opulent Fund* acknowledged that immunity "turns on the nature of the challenged conduct, not its profitability"[27] and even *Weissman* rejected a "test" that would look to "an SRO's subjective intent or motivation."[28]

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25 The District Court's reliance on *Weissman* for the proposition that "NASDAQ represents no one but itself when it entices investors to trade on its exchange" (JA 343) was mistaken. Promoting regulatory systems is different from promoting particular stocks; the former is at issue here, whereas the latter was at issue in *Weissman*.

26 2007 WL 3010573, at *5.

27 2007 WL 3010573, at *5 n.1

28 500 F.3d at 1297.

The District Court also relied on its finding that the "SEC has never engaged in the business aspects of facilitating and promoting IPOs or creating technology to increase trading, nor has Congress authorized it to do so"[29] to deny immunity. Understanding why that was erroneous requires unpacking that finding:

- Whether the SEC has ever engaged in a particular activity is not the test for immunity. This Court's recent immunity decisions involved activity the SEC has never engaged in — combining SRO regulatory functions (*Standard Chartered*), regulating trading on a specific exchange (*NYSE Specialists*), and deciding whether to cancel trades (*DL Capital*) — and yet immunity applied in each case.

- The SEC has never operated exchanges; that is not what it does. But there is no question that the authority to operate exchanges is delegated to SROs pursuant to the Exchange Act[30] and is thus within the zone of immune conduct pursuant to this Court's precedents.

- What the District Court called the "dual-nature of SROs"[31] is not relevant to immunity. None of this Court's recent SRO immunity decisions have been impacted by the fact that exchanges have demutualized.

Thus, the fact that the SEC has never facilitated IPOs has nothing to do with whether exchanges engage in immune conduct when they do so.

Finally, the District Court appeared to worry that "every time an exchange committed a negligent or unlawful act independent of its regulatory

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29 JA 344.

30 *See* 15 U.S.C. §78f(b)(5) (requiring rules relating to operating a market).

31 JA 346.

authority, it could purport to consider whether some regulatory power existed and retroactively try to immunize itself from damages for the earlier non-immune conduct."[32] The District Court seemed to worry that there could be complaints about alleged SRO misconduct that might go unremedied, but there is no basis to believe that is a problem. Improper acts by SROs that are not immune can be, and have been, addressed through private litigation or SEC action, and even immune conduct can be reviewed by the SEC. Fear of hypothetical non-redressable activity should thus have no place in the proper application of this Court's SRO immunity precedents. In any event, Congress chose what remedies it wanted market participants to have and wrote that into the Exchange Act, and SRO immunity is intimately related to the balancing Congress undertook.[33]

Exchanges should be encouraged to innovate and continuously develop their systems, both to compete with each other and globally,[34] but the District Court's narrow view of SRO immunity risks chilling such innovation and development. When viewed in the proper context and through the lens of this

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32 JA 347.

33 *See Series 7*, 548 F.3d at 115.

34 Congress recognized this when it enacted the 1975 amendments to the Exchange Act, noting that "[u]nless these markets adapt and respond to the demands placed upon them, there is a danger that America will lose ground as an international financial center and that the economic, financial and commercial interests of the Nation will suffer." S. Rep. 94-75, Cong. Record Vol. 121 at 181 (Apr. 14, 1975). That statement is equally valid now.

Court's precedents, the conduct at issue here is clearly immune.

II. THE DISTRICT COURT'S ALLOWANCE OF SECTION 10(B) CLAIMS AGAINST THE NASDAQ DEFENDANTS THREATENS A SUBSTANTIAL EXPANSION OF CLAIMS AGAINST SROS

Ordinarily, a plaintiff asserting a Section 10(b) claim is required to plead and prove reliance on an alleged misstatement or omission.[35] But in *Affiliated Ute*, the Supreme Court held that proof of reliance is not required where the claim is based on "primarily a failure to disclose."[36] The District Court applied *Affiliated Ute* here because it held that Plaintiffs' securities claim was "based not on [Nasdaq's] pre-Class Period statements" but rather on alleged "material omissions."[37] Critically, however, the alleged omissions were not about Facebook or Facebook stock: The District Court allowed Plaintiffs to rely on the *Affiliated Ute* presumption to assert claims related to the purchase and sale of Facebook stock based on alleged omissions about Nasdaq's systems. However, no cases the District Court relied on involving the *Affiliated Ute* presumption permitted the presumption to be used to assert claims about a company the defendant did not speak about or have a duty to speak about.[38]

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35 *See* JA 372.

36 *See* 406 U.S. at 153-54.

37 *See* JA 387.

38 *Compare* JA 379 (citing cases) *and* JA 386-387 (citing cases) *with GAMCO Investors, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88, 98 n.68 (S.D.N.Y. 2013) ("reliance on omissions may be presumed when the omissions are material

This is significant for SROs and the exchanges they operate, because the District Court's holding could permit plaintiffs to assert omission claims against any exchange on which any stock (among hundreds or thousands of other securities) is traded if the stock price falls, simply by trying to find some statement by the SRO about the quality or operation of its market that the plaintiff alleges should have been updated. Regardless of where they are listed, most national exchanges trade most stocks now.[39] Among other reasons, that is because Congress amended the Exchange Act to promote that result, and the SEC implemented that legislative judgment through a series of rules.[40] Were the District Court's expansion of *Affiliated Ute* valid, any exchange could potentially be sued in connection with purchases and sales of almost any stock by anyone.

That goes far beyond what the Supreme Court addressed in *Affiliated Ute*, and the Supreme Court's reasoning shows why the District Court's

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and ***the issuer*** had a duty to disclose") (emphasis added). Put differently, a recent district court decision stated that the *Affiliated Ute* presumption applies when "a defendant has (1) publicly made (2) a material misrepresentation (3) about stock traded on an impersonal, well developed (*i.e.*, efficient) market[.]" *In re SLM Corp. Sec. Litig.*, No. 08 Civ. 1029(WHP), 2012 WL 209095, at *4 (S.D.N.Y. Jan. 24, 2012) (citation and internal quotation marks omitted). Here, the alleged omissions were about the market, not Facebook stock.

39 For example, in 2013 NYSE exchanges captured approximately 23% of the market share for trading in all US securities. *See* www.nyse.com/attachment/Historical_Volume.xls (last visited June 5, 2014).

40 See 15 U.S.C. § 78l(f)(1); 17 C.F.R. §§ 240.12f-1-12f-5.

interpretation is wrong. The defendants against whom the Supreme Court upheld a presumption of reliance in *Affiliated Ute*

> devised a plan and induced the mixed-blood holders of UDC stock to dispose of their shares without disclosing to them material facts that reasonably could have been expected to influence their decisions to sell. *The individual defendants, in a distinct sense, were market makers*, not only for their personal purchases constituting 8 1/3% of the sales, but for the other sales their activities produced. *This being so*, they possessed the affirmative duty under the Rule to disclose this fact to the mixed-blood sellers.[41]

Thus, the Supreme Court approved the application of a presumption against counterparties in securities transactions. But exchanges are not counterparties to securities transactions and share none of the features essential to *Affiliated Ute*'s holding.

The District Court's expansion of the potential scope of *Affiliated Ute* is also inconsistent with the Supreme Court's wairness of expanding the scope of the federal securities laws. For example, in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159-62 (2008), the Supreme Court refused to permit Section 10(b) claims to be brought against companies other than the issuer where those companies at most aided and abetted the issuer's alleged misstatements and investors did not rely on their acts. The Supreme Court explained that the "practical consequences" weighed against such an expansion of

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[41] 406 U.S. at 153 (emphasis added).

liability.[42] In *Stoneridge*, the Supreme Court was concerned with permitting the range of potential defendants to be expanded, and found such an expansion improper. Here the Plaintiffs have attempted to expand the range of defendants in Section 10(b) cases to include exchanges themselves.

This is an even more significant expansion than *Stoneridge* threatened because Plaintiffs allege that Nasdaq made omissions in Nasdaq's public statements ***about Nasdaq*** that Plaintiffs claim led them to seek to invest in ***Facebook*** stock.[43] If reliance could be presumed in such circumstances, there would be no identifiable limit to who could be sued for failing to say something that an investor later thought material about a security not issued by the defendant. And an exchange could potentially be sued regarding a transaction in any stock listed or traded on it.

The District Court's holding was also outside the boundary of the "in connection with" requirement for Section 10(b) claims. Assuming a plaintiff can bring an omission claim, the alleged omission must be "in connection with" the purchase or sale of the security about which the plaintiff complains.[44] However, "misrepresentations or omissions involved in a securities transaction ***but not***

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42 552 U.S. at 163-64 (citing Brief for the Nasdaq Stock Market, Inc. and NYSE Euronext as *Amici Curiae* in Support of Respondents, at 12-14).

43 *See* JA 372-373.

44 *See Anatian v. Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85, 88 (2d Cir. 1999).

pertaining to the securities themselves" cannot form the basis of Section 10(b) liability.[45] That is not what a Section 10(b) claim is for.

To analogize, a plaintiff cannot sue the owner of a mall because he or she was unhappy with something purchased at a store somewhere in the mall. But that is precisely what the District Court allowed here, and it contradicts this Court's precedent. In *Chemical Bank*, actions were brought by four banks that had made loans to Frigitemp Corp. and its wholly owned subsidiary, Elsters, Inc. In order to restructure its debt, Frigitemp engaged in a series of transactions resulting in $15.5 million in debt. One transaction was a $4 million advance, for which Frigitemp pledged 100% of Elsters' common stock pursuant to a pledge and security agreement. About one year later, Frigitemp filed for bankruptcy and the banks sued Arthur Andersen & Co. and three officers of Frigitemp, claiming that they had violated Section 10(b) on the basis that they knew that ***Frigitemp's*** financial statements were false and misleading. Andersen argued that, even if it had made a materially false statement or had omitted to state a material fact, the statement or omission was not "in connection with" the banks' purchase or Frigitemp's sale of Elsters stock. This Court concluded that the misrepresentation was not "in connection with" the stock's sale or purchase.[46] Here, because the

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45 *See Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 943 (2d Cir.) (emphasis added), *cert. denied*, 469 U.S. 884 (1984).

46 *Id*. at 945.

omissions alleged by Plaintiffs do not relate to Facebook or Facebook stock, they cannot support a Section 10(b) claim by a Facebook investor.[47] If the answer were otherwise, then an exchange could be subject to omission claims relating to any stock listed or traded on it, effectively making exchanges insurers of the investors of every company listed on any national exchange.[48] That is not the function of exchanges and is inconsistent with the structure Congress created in the Exchange Act.

III. THE DISTRICT COURT'S FAILURE TO APPLY THE ECONOMIC LOSS DOCTRINE TO PLAINTIFFS' NEGLIGENCE CLAIMS THREATENS A SIGNIFICANT EXPANSION OF CLAIMS AGAINST SROS

Under the economic loss doctrine, a plaintiff cannot recover in tort for purely economic losses caused by the negligence of a defendant with whom the plaintiff had no contractual privity. The doctrine allows parties to know *in advance*, based on who they choose to do business with, the type of litigation risk to which they may be exposing themselves.[49] The doctrine thus avoids surprises

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47 *Id*. at 943. *S.E.C. v. Zandford*, 535 U.S. 813 (2002), does not help Plaintiffs. In *Zandford*, unlike here, the alleged fraud "coincided with the sales themselves." *Id*. at 820.

48 *Cf. Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1066 (2014) (SLUSA "in connection with" requirement only satisfied by misrepresentation that "makes a significant difference to someone's decision to purchase or to sell").

49 *See, e.g., 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 750 N.E.2d 1097, 1101 (N.Y. 2001) ("This restriction is necessary to avoid

regarding the scope of a defendant's potential liability — as a "matter of policy," courts have "restricted liability for damages in negligence to direct customers of [a defendant] in order to avoid crushing exposure" of potential lawsuits.[50]

With the exception of First New York Securities LLC, Plaintiffs are not members of Nasdaq and thus did not have a right to trade directly on Nasdaq.[51] Only exchange members are actually in privity with an exchange and subject to its SEC-approved rules. Because most members of classes like those proposed here are not exchange members, they are unknown and unknowable by an exchange in advance. Instead, retail plaintiffs' orders for Facebook stock were routed to Nasdaq's systems by intermediary entities (many of which may not be parties to this litigation) during and after the Facebook IPO. The Exchange Act itself states that only brokers, dealers, and persons associated with them may be members of an exchange, and SEC-approved exchange rules provide that only members may

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exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act."); Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 Stan. L. Rev. 1513, 1529 (1985) ("The privity limitation seems to have been the manifestation of a general preference for a regime of contract over that of tort"; "a substantial element of that concern was the prospect that the seller might be saddled with considerably more than he bargained for: responsibility for a multiplicity of injuries to parties not privy to the underlying transaction.").

50 *Finlandia Ctr.*, 750 N.E.2d at 1101-03 (collecting cases).

51 First New York's negligence claim was correctly dismissed pursuant to Nasdaq Rule 4626. *See* JA 363-364.

effect transactions on exchanges.[52] Yet the District Court's holding that members of the proposed classes (principally, public buyers and sellers of stock) may assert negligence claims against Nasdaq for purely economic losses[53] exposes exchanges to liability as if they were in direct privity with such parties, contrary to the way the markets operate under the Exchange Act and the markets' SEC-approved rules.

The District Court overlooked this statutory and regulatory distinction and longstanding reality of the operation of the securities markets, holding that brokers are merely agents of their customers and that the required "special relationship" is not broken by the fact that brokers stand between exchanges and customers.[54] Another District Judge recently rejected a similar "conduit" argument in a different context. In *SunTrust Banks, Inc. v. Turnberry Capital Management LP*, 945 F. Supp. 2d 415, 424-25 (S.D.N.Y. 2013), Judge Buchwald held that an investor was not a customer of SunTrust Bank for purposes of bringing a FINRA arbitration because there was no "direct relationship" between the investor and the bank and the investor was not "solicited and advised" by the bank. Judge

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52 *See* 15 U.S.C. § 78c(a)(3)(A) (defining "members"); 15 U.S.C. § 78f(c)(1) (only permitting broker-dealers and associated persons to be members); NYSE Rule 54(a) (only permitting NYSE members to trade on NYSE) (http://nyserules.nyse.com/nysetools/PlatformViewer.asp?SelectedNode=chp_1_3&manual=/nyse/rules/nyse-rules/, last visited June 5, 2014); Nasdaq Rule 4611 (similar).

53 *See* JA 362-368.

54 *See* JA 366-367.

Buchwald rejected the investor's argument that the "economic reality is that [the broker-dealer] was merely a conduit" for the investor, reasoning that the broker had "furnished significant brokerage services" and received a fee for those services. The District Court should have applied a similar analysis here, particularly because the relevant rules expressly provide that an exchange is separated from retail customers by exchange members.[55]

The District Court purported to apply a "duty analysis" gleaned from *Finlandia Center*, finding that the economic loss doctrine does not apply if the plaintiffs are a "settled and particularized class" with a relationship "so close as to approach that of privity" or that the defendant has created a duty to protect the plaintiffs.[56] But *Finlandia Center* does not support the District Court's reasoning: Although the District Court relied on *Finlandia Center* for its citation of *People Express Airlines v. Consolidated Rail Corp.*, 495 A.2d 107 (N.J. 1985), *Finlandia*

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55 Broker-dealers also do far more than the District Court suggested, including choosing where customers' orders are executed. For example, broker-dealers often "internalize" orders from their customers rather than executing the customers' orders on exchanges. *See* Concept Release on Equity Market Structure, Exchange Act Release No. 34-61358, 97 S.E.C. Docket 2115, 2010 WL 148783, § III.4 (Jan. 14, 2010). The District Court's holding ignores these aspects of market structure and potentially opens exchanges to claims by any customers who happen to trade on the exchanges regardless of whether the customers even intended to do so.

56 *See* JA 365-366.

Center expressly declined to follow *People Express* and *dismissed* negligence claims based on the economic loss doctrine.[57]

Not only is the District Court's decision not supported by the authorities it relied on, it is inconsistent with the primary New York Court of Appeals cases addressing the economic loss doctrine. In *Milliken & Co. v. Consolidated Edison*, 644 N.E.2d 268 (N.Y. 1994), the New York Court of Appeals addressed the analogous question of whether to permit tenants of a building who did not have direct contractual relationships with Con Edison to recover against Con Edison. The court held that the mere fact that particular tenants were localized to an identifiable building did not justify allowing them to recover against Con Edison without being in direct privity with it, explaining that "[t]he locale in which the injuries occur, in circumstances such as these, is a distinction without a legal, public policy-rooted difference because, regardless of the situs, the same unlimited, undefined class of potential plaintiffs is implicated."[58]

Milliken involved a "definable" (and much smaller) group of plaintiffs — building tenants who suffered economic loss from a water main burst and fire

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[57] *See Finlandia Ctr.*, 750 N.E.2d at 1102-03.

[58] *See* 644 N.E.2d at 271.

that resulted in the disruption of electricity to Manhattan's "Garment Center."[59] Despite the fact that the tenants could be identified in that case, the Court of Appeals held that the tenants were not a "sufficiently 'narrowly defined class'" because such a finding "would hold regulated utilities liable to every tenant in every one of the countless skyscrapers comprising the urban skyline. This would unwisely subject utilities to loss potentials of uncontrollable and unworkable dimensions[.]"[60] *Milliken* and its progeny make clear that New York courts deem it inappropriate to expand the scope of potential negligence liability beyond the narrow boundaries of those in direct privity with a defendant. Contrary to this authority, the District Court held that an exchange could be subject to liability to anyone who uses an exchange member to buy or sell a security on such exchange without the exchange seeking out those plaintiffs as customers or knowing in advance who they might be.[61]

The District Court also relied on the notion that Plaintiffs' alleged losses might be determinate and identifiable and the plaintiffs limited to specified proposed classes,[62] but that does not address the fundamental objective of the economic loss doctrine — that the group of potential plaintiffs and scale of losses

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59 *See Milliken*, 644 N.E.2d at 269.

60 *Id.* at 271.

61 *See* JA 366-368.

62 *See* JA 367.

be knowable to a defendant *in advance*.[63] In *Milliken*, the class of potential plaintiffs was effectively identifiable in advance for many buildings — tenants (particularly commercial tenants) do not turn over quickly. And yet the Court of Appeals held that it was inappropriate to extend potential negligence liability to such plaintiffs. Here the identities of potential plaintiffs who could conceivably bring claims is essentially impossible for an exchange to determine in advance: Exchanges are not involved in underwriting, do not have access to underwriters' order books and allocations in advance of an IPO, and do not have influence over who might participate in an IPO or who might trade in the aftermarket. This makes it is even more critical for the economic loss rule to apply here than in *Milliken*, because the amount of uncertainty regarding potential plaintiffs is far greater than it was in *Milliken*.

The District Court's decision also cannot be reconciled with *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931) (Cardozo, J.) and its progeny. In *Ultramares*, the Court of Appeals disallowed a claim against an accounting firm for inaccurately prepared financial statements which were relied upon by a plaintiff having no contractual privity with the accountants.[64] In *Credit*

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63 *See supra* note 50.

64 174 N.E. at 444-45 ("If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business

Alliance Corp. v. Arthur Andersen & Co., 483 N.E.2d 110, 115, 118 (N.Y. 1985), the Court of Appeals reaffirmed the "wisdom and policy" of *Ultramares*, and held that the only way that accountants may be held liable in negligence to non-contractual parties is where the relationship is "so close as to approach that of privity." Importantly, *Credit Alliance* held that, to the extent cases from other jurisdictions "were decided upon the ground that *Ultramares* should not be followed and, instead, a rule permitting recovery *by any foreseeable plaintiff* should be adopted, the law in this State, as reiterated today, is clearly distinguishable."[65]

The District Court purported to rely on the *Credit Alliance* test for "near privity."[66] *Credit Alliance*'s analysis of when such a relationship exists, however, sharply diverges from the District Court's analysis. *Credit Alliance* held that, for a "near privity" relationship to be present,

> (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the

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conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.").

65 *Id.* at 119 (emphasis added).

66 *See* JA 365-366.

> accountants' understanding of that party or parties' reliance.[67]

The court held that the relationship in that case was not so close as to approach privity because there was no evidence of "direct dealings" between the plaintiffs and defendant, and the relevant documents were not prepared pursuant to the plaintiffs' specifications or for their use.[68] An analysis consistent with *Credit Alliance* would have led the District Court to conclude that the relationship between Nasdaq and customers was not so close as to approach privity because Nasdaq could not know in advance who those customers might be and had no direct dealings with them.[69]

Finally, the District Court failed to address authority from this Court explaining that (i) "[t]o qualify as 'known parties' under New York law, plaintiffs must be members of a known group possessed of vested rights, marked by a definable limit and made up of certain components" and (ii) "[t]o demonstrate

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67 *Credit Alliance*, 483 N.E.2d at 118.

68 *Id*. at 119.

69 More recent authority confirms this. In *In re Lehman Brothers Securities and ERISA Litigation*, No. 09 MD 2017(LAK), 2012 WL 6000575, at *3 (S.D.N.Y. Dec. 3, 2012), Judge Kaplan held that *Credit Alliance* imposes a "heavy burden" on plaintiffs, which was not met in that case. The *Lehman Brothers* plaintiffs argued that *Credit Alliance* should be liberally construed where the audit was of a public company, because auditors know that investors receive copies of the company's securities filings. Judge Kaplan rejected this "novel" argument, finding that it would effectively overrule *Credit Alliance* and that the Court of Appeals had disapproved of a rule that would permit recovery by any foreseeable plaintiff. *Id*.

linking conduct, a plaintiff generally must show some form of direct contact between the accountant and the plaintiff, such as a face-to-face conversation, the sharing of documents, or other substantive communication between the parties."[70] For the reasons discussed above, neither requirement is met here.

This authority is directly at odds with the District Court's erroneous analysis of the applicability of the economic loss doctrine to investor claims against an exchange.

[70] *Sec. Inv. Protection Corp. v. BDO Seidman, LLP*, 222 F.3d 63, 74-75 (2d Cir. 2000) (internal quotation marks omitted).

CONCLUSION

For all the foregoing reasons, the Court should reverse the District Court's partial denial of the Nasdaq Defendants' motion to dismiss.

Dated: New York, New York
June 6, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Douglas W. Henkin, counsel for proposed *amici curiae* and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 29(d), that the attached Brief for Proposed *Amici Curiae* New York Stock Exchange LLC; NYSE Arca, Inc.; and NYSE MKT LLC in Support of Defendants-Appellants is proportionately spaced, has a typeface of 14 points or more, and contains 6,981 words.

/s/ Douglas W. Henkin

Douglas W. Henkin

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