IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

NATIONAL ASSOCIATION OF MANUFACTURERS and NATURAL GAS SERVICES GROUP, INC., Plaintiffs, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION and GARY GENSLER, in his official capacity as Chair of the SEC, Defendants.	No. 7:21-cv-183-DC-RCG

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Erica T. Klenicki (*pro hac vice*)
NAM LEGAL CENTER
733 10th Street NW, Suite 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

Paul W. Hughes (*pro hac vice*)
Andrew A. Lyons-Berg (*pro hac vice*)
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Debbie E. Green (TBN 24059852)
MCDERMOTT WILL & EMERY LLP
2501 North Harwood Street, Suite 1900
Dallas, TX 75201
(214) 295-8000
dgreen@mwe.com

Counsel for Plaintiffs

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INTRODUCTION

The SEC agrees with the central legal principle in this case: An agency may not suspend the effectiveness of a regulation unless it issues a *new* regulation through notice-and-comment rulemaking. That is, the SEC expressly concurs with Plaintiffs' demonstration (Mot. 6-7) that, subject to exceptions not applicable here, "an agency may not delay the effective or compliance date of a rule without providing notice and comment." Opp. 6.

The only question, then, is whether the SEC *did* effectively suspend the compliance date for certain provisions of the Proxy Advice Rule. The SEC's contention that it "has not suspended the December 1, 2021 compliance date" (Opp. 7) is flatly incorrect. The statements by Chair Gensler and the Division of Corporation Finance have informed the regulated public that they need not comply with the implicated aspects of the Proxy Advice Rule. A blanket suspension of enforcement actions *is* a suspension of the rule itself. From the perspective of the regulated public, it matters not whether an agency purports to suspend a rule as a whole or just the rule's compliance mechanism; in either case, the result is the same—regulated parties need not comply. Put differently, the SEC cannot circumvent the black-letter law prohibiting it from delaying the compliance date of a rule simply by characterizing its action as a policy of non-enforcement. Gutting the enforcement mechanism for a rule's compliance date is just one way to gut the compliance date itself.

The Court need not take Plaintiffs' word for it. The SEC itself has established just what its actions mean: It "provide[d] . . . proxy voting advice business[es] *relief* from the December 1, 2021 compliance date." Hughes Decl. Ex. C, at 4 (emphasis added). This was not some offhand "informal" remark (Opp. 12); rather, it was a representation made in a court filing explaining precisely why holding litigation in abeyance—litigation which sought to invalidate the Rule—would not cause prejudice to proxy voting advice businesses, including the plaintiff in that action.[1] Having told proxy voting advice businesses that they would enjoy "relief from the December 1, 2021 compliance date" (*id.*), it strains all credulity for the SEC to claim now that "[t]he Commission has

[1] The plaintiff there, ISS or Institutional Shareholder Services, is the leading proxy advisory firm. It sued to enjoin the Proxy Advice Rule, and only agreed to abeyance after the SEC provided it "relief from the December 1, 2021 compliance date." Hughes Decl. Ex. C, at 4.

not suspended the December 1, 2021 compliance date" (Opp. 6). Indeed, the doctrine of judicial estoppel exists precisely to foreclose parties from benefitting from such inconsistent positions.

What is more, the SEC offers no plausible explanation as to *why* it took the actions it did—informing regulated parties that it would categorically not enforce the Rule and then representing to a court that its actions had provided "relief" from the Rule's "compliance date"—*other than* to effect a suspension of the Rule itself. The SEC plainly sought to inform the regulated parties of their respective obligations: It told the public, in clear terms, that there is *no* compliance obligation.

The SEC's extended explanation (*e.g.*, Opp. 7, 15) that only the Commission itself, acting by majority vote, is legally authorized to issue or amend regulations simply serves to underscore our point. The staff may not—through statements issued to the public and binding promises made in court—undermine the effectiveness of the regulations that the Commission itself duly adopts. Far from supporting the legality of the SEC's actions at issue, this point merely highlights the irregular and unlawful actions taken here.

Recognition that the SEC has effectively suspended the Proxy Advice Rule's compliance date compels swift judgment in favor of Plaintiffs. The government does not dispute that Plaintiffs have standing (*see* Mot. 13-16); nor do they argue that the *Heckler v. Chaney* doctrine bars review (*see* Mot. 11-13). And the government's claim that there has been no final agency action (Opp. 14-17) rests on the same faulty premise as its merits arguments: that the SEC's actions are something other than a suspension of the Proxy Advice Rule's compliance date. Because that contention is incorrect, the Court should set aside the SEC's unlawful suspension of the Rule.

ARGUMENT

A. The SEC has suspended the compliance date.

As we explained in our motion for summary judgment (at 6-8), "[a] decision [by an agency] to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration"; rather, the delay of a rule's compliance date can only lawfully be accomplished through notice and comment rulemaking. *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018); *see also, e.g.*, *Clean Water Action v. EPA*,

936 F.3d 308, 314 (5th Cir. 2019) ("[C]ourts have rejected [agency] delay actions undertaken without notice and comment precisely because they recognize that the modification of effective dates is itself a rulemaking.") (collecting authorities). The government agrees. *See* Opp. 6.

This rule is not formalistic; rather, it prohibits any actions which either purport to expressly suspend a rule, or achieve the same effect less explicitly. Thus, the government also agrees that the prohibition on agencies suspending compliance with regulations encompasses actions that "*effectively* suspend[]" regulatory mandates, in addition to those that are explicitly "expressed as a suspension of the regulations." Opp. 10 (quoting *Envt'l Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816, 818 (D.C. Cir. 1983) (emphasis added); *see also id.* (discussing other cases "involving agency actions that had the *substantive effect* of suspending or amending a rule") (emphasis added).

The government's central contention in resisting summary judgment is that the SEC has not actually relieved proxy advisory firms of their obligation to comply with the substantive provisions of the Proxy Advice Rule by December 1, 2021, as the Rule explicitly provides. But that argument suffers a fatal defect: The SEC told another court, only months ago, that its actions *have* "provide[d] ISS (as well as other proxy voting advice business[es]) relief from the December 1, 2021 compliance date." Hughes Decl. Ex. C, at 4. The SEC's own, earlier explanation of its conduct—which, as we explain, is now subject to judicial estoppel—is correct.

It is revealing that the government addresses the Division's statement largely in isolation, disregarding the concrete representations it made in the *ISS* litigation. The SEC takes the broad position that staff statements "'merely express[] the view of the Division's staff' and 'do not oblige or prevent action by the SEC, the parties, or the courts.'" Opp. 8 (quoting *N.Y. City Emps.' Ret. Sys. v. SEC*, 45 F.3d 7, 13-14 (2d Cir. 1995)). But that argument cannot salvage the SEC's action here, where the staff's statements are accompanied by judicial action that *is* binding on the agency. *See* pages 5-8, *infra*. Indeed, *that* action was expressly taken in the name of the Commission itself. *See* Hughes Decl. Ex. C, at 1, 5.

Thus, the SEC's assertion that "the Commission might elect to proceed against a proxy voting advice business that fails to comply with [the 2020 Rule] no matter what the [staff] recommends" (Opp. 16 (quotation marks omitted)) is belied by what the SEC itself told the D.C. court. To the contrary, if there were no suspension of the Proxy Advice Rule, then there would have been no "relief . . . from the December 1, 2021 compliance date" (Hughes Decl. Ex. C, at 4) under any rational understanding of the term "relief." In all, the SEC told the regulated industry, in a representation in United States district court, that it has provided the industry relief from complying with the Rule. That amounts to an unlawful suspension of the Rule.[2]

Even if the Division's statement were taken in isolation, divorced from the binding representations made in federal court, none of the SEC's cases actually support its position. *Cf.* Opp. 8-9. The SEC rests on cases addressing no-action letters opining as to whether *particular* proposed conduct by regulated parties is lawful. *See, e.g.*, *N.Y. City*, 45 F.3d at 10 (no-action letter "stating that the SEC would not bring an enforcement action against Cracker Barrel" based on a new interpretation of the governing rule that made Cracker Barrel's conduct lawful). Here, by contrast, the SEC has announced that, *notwithstanding* the Proxy Advice Rule's unequivocal compliance deadline, the Division—equally unequivocally—will not recommend enforcement against any firm that fails to comply. And as we explained, such general non-enforcement policies—as opposed to an individual no-action decision that *interprets* a law—are both reviewable and flatly prohibited. *See Pub. Citizen Health Res. Grp. v. Acosta*, 363 F. Supp. 3d 1, 18 (D.D.C. 2018) (agency statement

[2] The government also makes a passing argument that its statement in the *ISS* litigation can be safely disregarded, citing two cases holding that legal positions taken in court briefs did not constitute final agency action. *See* Opp. 12-13. But those two cases hold only that agency "counsel's paraphrasing" of a regulation is not the sort of "definitive[] interpret[ation]" that may be separately challenged in court (*Syngenta Crop Protection, Inc. v. EPA*, 202 F. Supp. 2d 437, 445-447 (M.D.N.C. 2002)), and that an agency's *amicus* brief endorsing a consent decree "cannot be construed as a regulation" (*Querim v. EEOC*, 111 F. Supp. 2d 259, 268-270 (S.D.N.Y. 2000)). They do not indicate—notwithstanding *Clean Air Council* and all the other cases to the same effect—that an agency actually *can* "issue a brief stay of a final rule" without notice and comment (*Clean Air Council*, 862 F.3d at 9), so long as the agency communicates that stay through a factual representation in litigation against the largest regulated party, rather than by some other channel.

that it would "not enforce [a rule's compliance] deadline without further notice" was in fact "tantamount to amending or revoking [the] rule" and therefore reviewable) (quotation marks omitted); *Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 481 (D. Md. 2019) ("[A] refusal to take enforcement action[] may be reviewed in court . . . if it amounts to a rule amendment or revocation.").

This case is straightforward. The SEC has told regulated parties that the agency component responsible for recommending enforcement of the proxy rules *absolutely will not do so* with respect to the Proxy Advice Rule; the agency then told a federal district court—in litigation against one of the two primary players that make up a virtual duopoly in the regulated industry—that this statement "provides . . . proxy voting advice business[es] relief from the December 1, 2021 compliance date." Hughes Decl. Ex. C, at 4. When considered together, those actions can only be seen as reflecting an "effective[] suspen[sion]" of a lawfully promulgated rule. *Envt'l Def. Fund*, 713 F.2d at 816. And as the SEC itself recognizes, such a suspension is unlawful. Opp. 6, 10. Unless and until the 2020 Proxy Advice Rule is amended through notice-and-comment rulemaking, that rule's lawfully promulgated compliance date governs the regulated industry. The SEC's suspension of the compliance date must be set aside.[3]

B. Judicial estoppel bars the SEC's sole defense.

We also demonstrated in our motion that the SEC is judicially estopped from arguing that it has done something other than "provide[] . . . proxy voting advice business[es] relief from the December 1, 2021 compliance date," as it told the D.C. court in order to obtain an abeyance of the *ISS* litigation. Hughes Decl. Ex. C, at 4; *see* Mot. 10-11. The government's responses to this demonstration fail to persuade. *Cf.* Opp. 13-14. Having "assume[d] a certain position in a legal proceeding, and succeed[ed] in maintaining that position," the SEC may not now, "simply because

[3] The government points to statements by the NAM in its response to the SEC's *ISS* abeyance motion, filed on the same day as the motion itself. Opp. 8-9. But the NAM's position then was the same as it is now: "An 'agency decision' that 'effectively' delays a rule's effective date . . . 'constitutes rulemaking subject to notice and comment.'" Opp. Ex. 1, at 2. And upon analysis of the SEC's filing, it has become clear that that is exactly what the agency has done.

[its] interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quotation marks omitted).

1. First, to the extent the SEC argues that judicial estoppel is inapplicable to federal agencies, it is simply wrong. *See, e.g.*, *Reynolds v. C.I.R.*, 861 F.2d 469, 472-474 (6th Cir. 1988) (Commissioner of Internal Revenue judicially estopped); *SE Property Holdings, LLC v. Unified Recovery Grp., LLC*, 410 F. Supp. 3d 775, 785-786 (E.D. La. 2019) (IRS judicially estopped); *Seward v. U.S. Dep't of Ag.*, 229 F. Supp. 2d 557, 569 (S.D. Miss. 2002) (USDA judicially estopped); *Hous. Auth. of Slidell v. United States*, 149 Fed. Cl. 614, 642 n.53 (2020) ("Judicial estoppel applies equally against the Government as it does private parties."); *cf. United States v. Farrar*, 876 F.3d 702, 711 (5th Cir. 2017) (noting that the Fifth Circuit "has twice assumed, without deciding, that the Government may be judicially estopped" even "in *criminal* cases") (emphasis added).

Moreover, to the extent government agencies are treated differently for judicial estoppel purposes, the government's own cases explain that the basis for that special treatment is an unwillingness to render "the Government . . . unable to *enforce the law* because the conduct of its agents has given rise to an estoppel." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984) (emphasis added). But this case is precisely the opposite: The government claims immunity from judicial estoppel principles so that it can *refuse* to enforce the law as written. *Cf. New Hampshire*, 532 U.S. at 755 (applying judicial estoppel against a State where "this is not a case where estoppel would compromise a governmental interest in *enforcing the law*.") (emphasis added). Indeed, the government's unlawful suspension of a duly promulgated regulation is the entire gravamen of this case. Under these circumstances, the government is not entitled to any special exemption from judicial estoppel principles.

2. Further, the prerequisites for judicial estoppel are all satisfied here. *See* Mot. 11-12. First, the government's insistence that its current arguments are not "plainly inconsistent with a prior position" (*Fornesa v. Fifth Third Mortg. Co.*, 897 F.3d 624, 627 (5th Cir. 2018)) is startling on its face. No reasonable speaker of English could read a statement that the SEC has "provide[d] . . . proxy voting advice business[es] *relief* from the December 1, 2021 *compliance* date" (Hughes

Decl. Ex. C, at 4 (emphases added)), as "not suggest[ing] that the [agency] had *relieved* PVABs of their obligation to *comply* with the 2020 Rule Amendments" (Opp. 14 (emphasis added)). The agency's statement in *ISS* speaks for itself.

What is more, ISS had alleged in that case that it "would suffer concrete and particularized harm as a result of" the Proxy Advice Rule, including "expend[ing] resources and divert[ing] staff time to comply with these burdensome new obligations," and purportedly "suffer[ing] irreparable harm to its First Amendment Rights." Am. Compl. ¶¶ 70-72, *ISS v. SEC*, No. 19-cv-3275 (D.D.C. Sept. 18, 2020), Dkt. 19. That is why ISS brought the lawsuit. In asking for an abeyance, then, the SEC explained that its provision of "relief" to ISS, and all others similarly situated, was what precluded ISS from enduring that "substantial hardship" during the abeyance period. Hughes Decl. Ex. C, at 4. The "relief" that the SEC provided is intelligible only by reference to the claims asserted by ISS, and that reference makes plain that the "relief" envisioned is relief from compliance.

The government also asserts that there is no "basis to conclude that the Commission convinced the court to accept that it had relieved PVABs of their obligation to comply with the amendments," noting that the D.C. court's order did not mention the compliance date one way or another. Opp. 14 (quotation marks omitted). But in deciding the abeyance motion, the district court was obligated to consider the harms that such a stay could cause. *See Belize Social Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 732-733 (D.C. Cir. 2012) (reversing district court abeyance order for abuse of discretion where district court failed to "engage in the interest balancing required by" Supreme Court precedent, including considering "any possible hardship to the parties") (quotation marks omitted); *accord Fishman Jackson PLLC v. Israely*, 180 F. Supp. 3d 476, 482 (N.D. Tex. 2016).

Indeed, as just noted, the very premise of ISS's case was that the firm "will suffer concrete and particularized harm" from compliance with the 2020 Rule. Am. Compl. ¶¶ 70-72, *ISS v. SEC*, No. 19-cv-3275 (D.D.C. Sept. 18, 2020), Dkt. 19. And the government's only assurance that no harm would result from holding the litigation in abeyance was its statement that it had "provide[d] ISS . . . relief from the December 1, 2021 compliance date." Hughes Decl. Ex. C, at 4. The district court therefore could not have satisfied its obligation to consider "any possible hardship to the

parties" as part of the abeyance inquiry (*Belize Social Dev.* 668 F.3d at 732-733) *without* "accept[ing]" the government's "position" (*Fornesa*, 897 F.3d at 627).

Nor, as the government asserts in a single sentence, was the SEC's statement in *ISS* "clearly 'inadvertent.'" Opp. 14 (quoting *Trinity Marine Prods. Inc. v. U.S.*, 812 F.3d 481, 490 (5th Cir. 2016)). "[I]nadvertence is an applicable defense to judicial estoppel" only "if the offending party did not have the relevant correct information at its disposal to begin with," or lacked "a motive to conceal the truth." *Engines Sw., Inc. v. Kohler Co.*, 263 F. App'x 411, 413 (5th Cir. 2008) (collecting cases). Here, the SEC certainly could not have lacked the relevant information, where the statement in question concerns the effect of the SEC's own actions. And the agency had ample "motive" both to argue in *ISS* that the requirements had been stayed (in order to avoid the burden of defending the case), and to argue here that the requirements remain in place (to avoid summary judgment). But the purpose of judicial estoppel is precisely "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment," as the SEC has done here. *New Hampshire*, 532 U.S. at 749-750 (citation omitted).

In short, the government cannot "hav[e] [its] cake and eat[] it too." *Reynolds*, 861 F.3d at 473 (applying judicial estoppel to a federal agency). Having obtained an abeyance of the *ISS* case on the theory that its actions have "provide[d] . . . proxy voting advice business[es] relief from the December 1, 2021 compliance date" (Hughes Decl. Ex. C, at 4), it cannot now "seek an inconsistent advantage by pursuing an incompatible theory." *New Hampshire*, 532 U.S. at 749 (quoting 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4477, p.782 (1981)). In addition to being substantively wrong, the government's position is thus foreclosed by judicial estoppel.

C. The SEC's suspension of the compliance date is final agency action.

Finally, the SEC argues that its suspension of the Rule's compliance date is neither "agency action" nor "final." *See* Opp. 14-17. But these arguments assume the conclusion of the SEC's merits contentions: that the agency has not effectively amended the compliance date of the Rule.

1. The government's argument (at 15) that it has not performed an "agency action" *at all* is wrong on its face and only serves to highlight it extraordinary and unlawful conduct.

First, looking to the government's own authorities, the SEC's action here is a "rule" under the APA because it "implement[s]" and "prescribe[s] . . . policy" (5 U.S.C. § 551(4))—specifically, the policy that proxy firms need not comply with the Proxy Advice Rule by December 1, 2021. *Cf. Indep. Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (Letter sent by EPA was not reviewable where it "merely restated . . . EPA's longstanding interpretation" of the law, rather than making new policy). Even under the SEC's view of its action, its statement still "prescribe[s]" the "policy" that the Division of Corporation Finance will not recommend enforcement actions against violators of the Rule, and therefore constitutes agency action.

Further, the action here also plainly qualifies as "relief" within the meaning of the APA. As we have explained, the SEC itself described its action as providing "relief" to proxy advisory businesses. Hughes Decl. Ex. C, at 4; *see* 5 U.S.C. § 551 (defining "relief" to include the "grant" or "recognition of a[n] . . . exemption[] or exception"). "Relief" need not be "binding" to fit within the APA definition. In any event, for all the reasons demonstrated (*see* pages 2-8, *supra*), the SEC's conduct here—that is, the Division's statement, in concert with the same-day representations in the *ISS* litigation—most certainly does "bind" it. *Amalgamated Clothing & Textile Workers Union v. SEC*, 15 F.3d 254, 257 (2d Cir. 1994).

Second, if anything, the SEC's argument further highlights the action's illegality. The SEC claims that, in issuing the statement relevant here, the Division did not act pursuant to either "a majority vote" of the SEC itself "or through a lawful delegation of its authority." Opp. 15. The SEC insists that this observation supports its position, arguing that its staff was thus powerless to bind it. *Id*. But this gets things backwards—by virtue of its litigation conduct, the SEC *has* bound itself. If the process used to reach that result was illegal because the staff who did so lacked appropriate authority, that is simply an additional reason to hold the SEC's conduct unlawful. After all, the proper remedy for a procedural violation (like lack of required notice and comment) is to set aside the unlawful action, not to perversely shield it from judicial review.

2. The government does not contest that suspending a compliance date—either expressly or by effect—requires notice-and-comment rulemaking. *See* Opp. 6; Mot. 6-7. If, as Plaintiffs have

explained at length, this action qualifies as such a suspension, it then necessarily qualifies as "final agency action" within the meaning of the APA.

If an agency takes an action that ordinarily requires notice and comment, that action "by definition" constitutes "final agency action." *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) ("[A] substantive rule . . . is, by definition, a final agency action."); *id.* at 451 ("[S]ubstantive rule[s]" are those that are "subject to the APA's notice-and-comment requirement."); *accord Ctr. For Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006) (explaining that the "final agency action" requirement is satisfied where the agency has issued a "*de facto* rule or binding norm that could not properly be promulgated absent . . . notice-and-comment rulemaking," since the "two inquiries are alternative ways of viewing" the same "question"); *Cal. Communities Against Toxics v. EPA*, 934 F.3d 627, 635 (D.C. Cir. 2019) ("[I]f a rule is legislative it has the force and effect of law, and a legislative rule is thus necessarily final."). That is, all rules that *should have been* promulgated through notice and comment qualify as final agency action, regardless of whether they in fact were lawfully promulgated.

Indeed, our motion collected numerous cases holding that, when an agency issues a "stay" or other order functionally "delaying [a] rule's effective date," that action satisfies the *Bennett* final agency action test because "such orders are tantamount to amending or revoking a rule." *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017); *see* Mot. 8-9 (collecting additional cases). The government's finality arguments rest on a rejection of the factual premise that it has issued an effective stay here—but as we have described, that rejection is unfounded. *See* pages 2-8, *supra*; Mot. 6-13. Because the SEC *has* effectively suspended the compliance date of the Proxy Advice Rule, its finality arguments have no bite. Once again, the SEC's suspension of the Rule's compliance date is unlawful, and must be set aside.

CONCLUSION

For the foregoing reasons and those set out in Plaintiffs' motion, the Court should grant summary judgment in favor of Plaintiffs, and set aside the SEC's suspension of the Rule's compliance date.

Dated: December 22, 2021

Respectfully submitted,

/s/ *Paul W. Hughes*

Erica T. Klenicki (*pro hac vice*)
NAM LEGAL CENTER
733 10th Street NW, Suite 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

Paul W. Hughes (*pro hac vice*)
Andrew A. Lyons-Berg (*pro hac vice*)
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Debbie E. Green (TBN 24059852)
MCDERMOTT WILL & EMERY LLP
2501 North Harwood Street, Suite 1900
Dallas, TX 75201
(214) 295-8000
dgreen@mwe.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that that on December 22, 2021, I filed the foregoing document via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: December 22, 2021 /s/ *Paul W. Hughes*