No. 13-3693

In the United States Court of Appeals for the Third Circuit

GREG MANNING; CLAES ARNRUP; POSILJONEN AB;
POSILJONEN AS; SVEABORG HANDEL AS;
FLYGEXPO AB; LONDRINA HOLDING LIMITED,
APPELLANTS,

v.

MERRILL LYNCH PIERCE FENNER & SMITH, INC.;
KNIGHT CAPITAL AMERICAS, A/K/A KNIGHT EQUITY MARKETS L.P.;
UBS SECURITIES LLC; E TRADE CAPITAL MARKETS LLC;
NATIONAL FINANCIAL SERVICES LLC; CITADEL DERIVATIVES GROUP LLC;
JOHN DOES 1-10; ABC COMPANIES,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (CIV. NO. 12-4466) (THE HONORABLE JOSE L. LINARES, J.)

BRIEF OF AMICUS CURIAE THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF APPELLEES' PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

The Securities Industry and Financial Markets Association has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.[1]

Many of SIFMA's members are financial institutions subject to the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78a *et seq*. This case concerns the interpretation of Section 27 of that Act, which grants exclusive jurisdiction to federal courts over Exchange Act violations. As both regulated entities and litigants in this area, SIFMA's members have a substantial interest in the meaning and scope of that provision. As a result of the panel's decision, the courts of appeals are now squarely divided over the proper interpretation of Section 27, which has resulted in extensive litigation

[1] SIFMA affirms that no counsel for a party authored this brief in whole or in part and no one other than SIFMA or its counsel contributed any money to fund its preparation or submission. SIFMA provided notice of its intent to file this brief, but appellants do not consent. SIFMA therefore has filed a motion for leave to file this brief.

regarding the threshold question of where suits like this one should be brought. Accordingly, SIFMA has a significant interest in this Court's resolution of the issue en banc.

SUMMARY OF ARGUMENT

As the panel observed, "Plaintiffs assert in their Amended Complaint, both expressly and by implication, that Defendants repeatedly violated federal law"—specifically, the Exchange Act and Regulation SHO. *Manning* v. *Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 161 (3d Cir. 2014). Because plaintiffs have elected to premise their state-law claims on violations of the Exchange Act and its implementing regulations, there is federal jurisdiction over this case. Section 27 of the Act provides that federal courts shall have "exclusive jurisdiction" over "violations" of the Act and over "*all* suits . . . brought to enforce *any* liability or duty created by [the Act] or the rules and regulations thereunder." 15 U.S.C. § 78aa(a) (emphasis added). Congress could hardly have spoken in plainer terms. Suits like this one that assert the violation of a federally imposed duty must be brought in federal court, even if plaintiffs nominally cloak their claims in state-law garb.

The meaning of Section 27 clearly warrants rehearing by the panel or by the Court sitting en banc. As explained below, the panel decision is in tension with decisions of this Court and other courts of appeals on an important question of federal law. This case thus presents the classic ground for rehearing: the Court would have the opportunity to clarify the law of this Circuit, and in the process it could resolve the issue in a way that diminishes the need for further review by the Supreme Court. If left to stand, the panel decision would encourage forum-shopping by plaintiffs who dress up putative violations of the Exchange Act as predicates for state-law claims. It also would allow various state courts within this Circuit to insert themselves into the regulation of securities transactions executed on national exchanges. Congress meant to avoid precisely those results when it granted exclusive jurisdiction to federal courts in Section 27.

ARGUMENT

I. The Panel Decision Conflicts With Decisions Of This Court And Other Courts Of Appeals

Thirty-five years ago, this Court recognized that the purpose of Section 27 "is to provide exclusive federal jurisdiction for suits brought . . . in response to substantive violations" of the Exchange Act or its implementing regulations. *First Jersey Secs., Inc.* v. *Bergen*, 605 F.2d 690, 694 (3d Cir.

1979) (*First Jersey*). The Court therefore observed that "under certain circumstances [Section 27] may *confer jurisdiction* on the district court" for suits involving putative violations of the federal securities laws. *Id.* (emphasis added).[2] For that proposition, the Court cited *Bright* v. *Philadelphia-Baltimore-Washington Stock Exch.*, 327 F. Supp. 495 (E.D. Pa. 1971), which had held that Section 27 grants jurisdiction over an action against a stock exchange for failing to comply with its own constitution. *See id.* at 497, 500-501, 506.

Under the reasoning of *First Jersey*, a state-law claim based on an alleged violation of the Exchange Act may be removed to federal court under Section 27. *See Hibbard Brown & Co., Inc.* v. *Nat'l Ass'n of Secs. Dealers, Inc.*, No. 94-CV-285, 1994 WL 827778, at *2 & n.3 (D. Del. Oct. 6, 1994) (relying on *First Jersey* and allowing removal). Without citing, let alone distinguishing, *First Jersey*, the panel in this case held to the contrary that Section 27 does not confer on federal courts any form of original jurisdiction

[2] In *First Jersey*, a securities dealer brought suit against the National Association of Securities Dealers (NASD) to enjoin an impending disciplinary hearing. Although this Court held that there was not federal jurisdiction, it did so on the ground that the dealer had failed to exhaust administrative remedies before the NASD. *See* 605 F.2d at 700. The Court did not question that Section 27 "may confer jurisdiction on the district court to entertain suits against the NASD." *Id.* at 694.

over claims predicated on Exchange Act violations. *See Manning*, 772 F.3d at 167-168 (Section 27 "is coextensive" with Section 1331, "merely serves to divest state courts of jurisdiction," and "does not provide an independent basis to exercise jurisdiction."). That intra-circuit confusion alone warrants rehearing.

More broadly, the panel referred to what it characterized as an inter-circuit conflict over whether Section 27 confers original federal jurisdiction for claims predicated on violations of the Exchange Act or its implementing regulations. *See Manning*, 772 F.3d at 166. The Fifth and Ninth Circuits have held that exclusive-jurisdiction provisions like Section 27 may expand federal jurisdiction beyond that afforded by the general federal-question statute, 28 U.S.C. § 1331. *See, e.g.*, *Hawkins* v. *Nat'l Ass'n of Secs. Dealers Inc.*, 149 F.3d 330, 331-332 (5th Cir. 1998); *Sacks* v. *Dietrich*, 663 F.3d 1065, 1068-1069 (9th Cir. 2011); *California ex rel. Lockyer* v. *Dynegy, Inc.*, 375 F.3d 831, 839-843 (9th Cir. 2004); *Sparta Surgical Corp.* v. *Nat'l Ass'n of Secs. Dealers, Inc.*, 159 F.3d 1209, 1212-1213 (9th Cir. 1998).

The panel here acknowledged that its decision is at odds with those of the Fifth and Ninth Circuits, but stated that it was siding instead with the Second Circuit's decision in *Barbara* v. *New York Stock Exch., Inc.*, 99 F.3d

49 (1996).[3] As an initial matter, *Barbara* need not be read for the broad proposition that Section 27 never creates federal jurisdiction over state-law claims premised on alleged violations of federal securities laws. The claims in *Barbara* concerned whether the New York Stock Exchange (NYSE) had complied with its own internal rules; and as *Barbara* observed, those claims were governed by "ordinary principles of contract law." *Id.* at 55. That is a far cry from cases, like this one, in which plaintiffs unambiguously assert violations of a federal regulation promulgated by the Securities and Exchange Commission.

In any event, the Second Circuit has limited *Barbara*'s significance in recent years. For instance, in *D'Alessio* v. *New York Stock Exch., Inc.*, 258 F.3d 93 (2d Cir. 2001), a broker sued the NYSE for investigating and sanctioning his trading. Although the broker asserted claims only under New York law, the Second Circuit held that there was federal jurisdiction under Section 1331 "because the NYSE's alleged violations of the federal securities laws and its improper interpretation of those laws underlie

[3] The panel also relied on *Marel* v. *LKS Acquisitions, Inc.*, 585 F.3d 279 (6th Cir. 2009). *See Manning*, 772 F.3d at 166 n.6. But in *Marel*, the federal issues arose only "as a possible defense to a state law claim." 585 F.3d at 280. By contrast here, plaintiffs have consciously predicated their claims on alleged federal violations.

D'Alessio's state law claims." *Id.* at 102. In so holding, the Second Circuit distinguished *Barbara* as a case about whether "various *internal* rules of the NYSE [were] in accordance with well settled principles of contract interpretation—a task uniquely within the province of state law." *Id.* at 101 (emphasis in original).

Similarly in *NASDAQ OMX Group, Inc.* v. *UBS Secs., LLC*, 770 F.3d 1010 (2d Cir. 2014) (*NASDAQ*), the Second Circuit again upheld federal-question jurisdiction for state-law claims that raised the issue of whether NASDAQ had complied with the Exchange Act. *See id.* at 1031. In determining that the federal issues were substantial, the Second Circuit went to great lengths to distinguish *Barbara*. *See id.* at 1025-1029. And in concluding that the exercise of federal jurisdiction would not upset the federal-state judicial balance, the Second Circuit relied on "Congress's expressed preference [in Section 27] for alleged violations of the Exchange Act, and of rules and regulations promulgated thereunder, to be litigated in a federal forum." *Id.* at 1030. In short, the Second Circuit found that it "need not revisit" *Barbara* only because it construed federal-question jurisdiction broadly under Section 1331. *Id.*

Thus, as more recent decisions like *D'Alessio* and *NASDAQ* show, the Second Circuit has confined *Barbara* to cases that do not actually implicate federal securities laws and regulations. In cases that *do* assert violations of the Exchange Act or its implementing regulations, the Second Circuit has exercised federal jurisdiction under Section 1331. This Circuit alone, by virtue of the panel decision, would not exercise federal jurisdiction over this case under *either* Section 1331 *or* Section 27. Because both of those provisions were briefed by the parties and addressed by the panel, this case presents an ideal vehicle for en banc consideration. Rehearing would allow the Court to achieve practical uniformity in outcomes with its sister circuits and lessen the need for Supreme Court review.

II. The Panel Decision Incorrectly Resolves An Issue of Exceptional Importance

Beyond the need for federal uniformity, the panel decision satisfies the other traditional criteria for en banc rehearing: it incorrectly resolves a federal issue of exceptional importance. First, the panel decision misinterprets the plain text of a federal statute, the purpose of which is to ensure that federal courts—not state courts—define the contours of the Exchange Act's requirements. The Supreme Court's decision in *Pan American Petroleum Corp.* v. *Superior Court of Delaware*, 366 U.S. 656

(1961) (*Pan American*), does not compel a different result, as the panel mistakenly concluded. Second, the panel decision could affect other federal exclusive-jurisdiction provisions, thus enabling plaintiffs in a variety of contexts to avoid federal court by dressing up federal violations in the language of state law.

A. The Panel Decision Is Inconsistent With The Text Of Section 27

Plaintiffs' complaint repeatedly and expressly references federal law, in addition to incorporating standards of conduct located exclusively in federal regulations. *See, e.g.*, Am. Compl. ¶¶ 3, 5, 24, 28, 29, 30, 33, 43. As both the panel and the district court therefore recognized, "[t]here is no question that Plaintiffs assert in their Amended Complaint, both expressly and by implication, that Defendants repeatedly violated federal law." *Manning*, 772 F.3d at 161; *see Manning* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-CV-4466, 2013 WL 1164838, at *3 (D.N.J. Mar. 20, 2013) ("Plaintiffs do not dispute that the alleged unlawful conduct is predicated on a violation of Regulation SHO, 17 C.F.R. § 242.204.").

Plaintiffs' own allegations should end the jurisdictional analysis. Section 27 of the Exchange Act vests federal courts with "exclusive jurisdiction of (1) violations of [the Act] or the rules and regulations

thereunder, and of (2) all suits . . . brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder." 15 U.S.C. § 78aa(a) (numbering added). The present suit is brought to "enforce" a "duty" created by Regulation SHO, even if the mechanism for enforcing that duty is a state-law cause of action that incorporates the federal standard. The panel effectively read the second clause to apply only to suits that arise under the Exchange Act for federal-question purposes. But the language of Section 27 is much broader: it extends to "all suits" intended to enforce federal duties created by the Exchange Act or its implementing regulations, regardless of whether those suits are pleaded under federal or state law.

Even if this Court were inclined to read the second clause narrowly, that still would not justify the panel's ruling. Congress also provided jurisdiction over all "*violations*" of the Act and its implementing regulations. 15 U.S.C. § 78aa(a) (emphasis added). That language is not limited to criminal violations. Indeed, with respect to venue, Section 27 uses the term "violation" to refer not only to criminal proceedings, but also to civil actions for injunctive relief. *See id.* (providing for venue in "[a]ny suit or action . . . to enjoin any violation" of the Exchange Act or its implementing regulations). By its terms, the violations clause of Section 27 extends to suits that,

although not pleaded under the Exchange Act, are predicated on alleged violations of the Act.

Remarkably, the panel did not address the text of Section 27. It held instead that its ruling was controlled by the Supreme Court's decision in *Pan American*. *See Manning*, 772 F.3d at 166. But *Pan American* was fundamentally a contract case. There, a pipeline company paid more for natural gas than its contracts required because of a pending state regulatory order. The company notified its suppliers that it had challenged the order and that it expected repayment in the event the order was lifted—a condition to which the suppliers did not object. *See* 366 U.S. at 658-659. When the Supreme Court set aside the order, the pipeline company brought suit on its contracts in state court, but the suppliers claimed that the case had to be heard in federal court in part because of the exclusive-jurisdiction provision in the Natural Gas Act (NGA), 15 U.S.C. § 717u.

The Supreme Court disagreed for the obvious reason that although the plaintiff in *Pan American* could have pursued a federal filed-rate claim under the NGA, it had elected to pursue solely a contract claim, to which federal issues could arise only by way of a defense. *See* 366 U.S. at 663. In a very real sense, the plaintiff in *Pan American* was not invoking federal law,

either formally or functionally. Here, by contrast, plaintiffs do not have a genuine, independent state-law claim. Only by poaching federal standards of conduct do they manage to assert a claim at all. Their complaint repeatedly borrows the language of, and directly refers to, federal regulations. As masters of their complaint, plaintiffs have elected to allege violations of the Exchange Act and Regulation SHO, and that conscious choice brings them within the ambit of Section 27.

To be sure, the Supreme Court in *Pan American* recited the truism that exclusive jurisdiction is "'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction." 366 U.S. at 664. But no one here contends that the term "exclusive" in Section 27 generates jurisdiction. What creates federal jurisdiction is the language that *follows* the term "exclusive," *i.e.*, the language defining the scope of federal jurisdiction over all violations of, and all suits brought to enforce, the Act and its implementing regulations. Moreover, although *Pan American* states in passing in a footnote that the NGA's exclusive-jurisdiction provision is limited to cases "arising under" the NGA, *id.* at 665 n.2, the Court based that dictum not on the provision's text,

but on its legislative history.[4] That does not remotely warrant ignoring the plain text of Section 27 in this case.

B. The Panel Decision Concerns An Issue Of Exceptional Importance

The purpose of Section 27 is "to achieve greater uniformity of construction and more effective and expert application of" the Exchange Act. *Matsushita Elec. Indus. Co., Ltd.* v. *Epstein*, 516 U.S. 367, 383 (1996) (quotation marks omitted). The panel decision unquestionably undermines that purpose. It enables plaintiffs to plead around Section 27 in state court, thus posing the "danger that state court judges who are not fully expert in federal securities law will say definitively what the Exchange Act means and enforce legal liabilities and duties thereunder." *Id.*; *cf. id.* at 384 ("[B]inding legal determinations of rights and liabilities under the Exchange Act are for federal courts only.").

The panel decision thus allows plaintiffs to have their federal cake but eat it in state court. Plaintiffs in this Circuit can now invoke federal substantive standards while simultaneously staving off federal jurisdiction.

[4] The NGA's legislative history specified that the exclusive-jurisdiction provision there governs "cases arising under the act." S. Rep. No. 1162, at 7 (1937); *see* H.R. Rep. No. 709, at 9 (1937) (same). There is no analogous legislative history for Section 27. *See Matsushita Elec. Indus. Co., Ltd.* v. *Epstein*, 516 U.S. 367, 383 (1996).

That result is precisely what an *exclusive*-jurisdiction provision is meant to avoid. Moreover, as this Court well knows, the State of Delaware is the preeminent domicile for this country's businesses. There are over one million companies domiciled in Delaware, including more than half of all U.S. publicly traded companies and 64 percent of the Fortune 500. *See* Jeffrey W. Bullock, *Delaware Division of Corporations 2012 Annual Report* 1 (2013). The panel decision will permit forum-shopping by plaintiffs in state courts within this Circuit, particularly Delaware courts, as they plead putative violations of the Exchange Act as the predicates for state-law claims.

Nor will the effects of the panel decision necessarily be limited to Section 27, because the panel's reasoning is not cabined to the Exchange Act. There are other similarly worded exclusive-jurisdiction provisions in federal law, *see, e.g.*, *Lockyer*, 375 F.3d at 839-840 (addressing removal under exclusive-jurisdiction provision of Federal Power Act, 16 U.S.C. § 825p), and the panel decision stands to undermine those provisions as well.

CONCLUSION

For the reasons set forth above, appellees' petition for rehearing should be granted.

RESPECTFULLY SUBMITTED,

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December 22, 2014

CERTIFICATE OF BAR MEMBERSHIP, COMPLIANCE WITH TYPEFACE LIMITATIONS, AND VIRUS CHECK

I, Jeffrey B. Wall, counsel for amicus curiae, certify, pursuant to Local Appellate Rule 46.1(e), that I am a member in good standing of the Bar of this Court. I further certify, pursuant to Federal Rule of Appellate Procedure 32(a)(5) and (6) and Local Appellate Rule 32.1(c), that the foregoing Brief of Amicus Curiae The Securities Industry and Financial Markets Association In Support of Appellees' Petition for Rehearing is proportionately spaced, has a typeface of 14 points or more, and contains 3,018 words. I further certify, pursuant to Local Appellate Rule 31.1(c), that System Center Endpoint Protection, Antimalware Client Version 4.6.305.0 did not detect a virus.

S/ JEFFREY B. WALL
JEFFREY B. WALL

December 22, 2014

CERTIFICATE OF SERVICE

I, Jeffrey B. Wall, counsel for amicus curiae, certify that, on December 22, 2014, a copy of the foregoing Brief of Amicus Curiae The Securities Industry and Financial Markets Association In Support of Appellees' Petition for Rehearing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. All counsel of record in this case are registered CM/ECF users.

S/ JEFFREY B. WALL
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December 22, 2014