APL-2020-00044
New York County Clerk's Index No. 600979/09

Court of Appeals

STATE OF NEW YORK

J.P. MORGAN SECURITIES INC., J.P. MORGAN CLEARING CORP., and THE BEAR STEARNS COMPANIES LLC,

Plaintiffs-Appellants,

—against—

VIGILANT INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, FEDERAL INSURANCE COMPANY,

Defendants,

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA., LIBERTY MUTUAL INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, and AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendants-Respondents.

BRIEF FOR *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

JORDAN S. JOACHIM
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018
Telephone: (212) 841-1000
Facsimile: (212) 841-1010

MITCHELL F. DOLIN
(*admitted Pro Hac Vice*)
DUSTIN CHO
COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, DC 20001
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

Attorneys for Amicus Curiae

August 20, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT OF INTEREST OF *AMICUS CURIAE* vii

QUESTIONS PRESENTED viii

ARGUMENT 1

I. BEAR STEARNS' LOSS IS NOT AN UNINSURABLE PENALTY. 3

A. New York's Public Policy Against Insurance for Punitive Damages Does Not Apply to Disgorgement Relief That Has a Compensatory Purpose. 3

1. The Insurers' Vague Test for Whether a Loss Is "Punitive" Is Contrary to New York Law. 4

2. A Payment Is Not a Penalty Where It Serves a Compensatory Purpose in Whole or in Part. 7

3. Kokesh Does Not Control New York Insurance Law. 9

B. An Insurance Policy Exclusion for "Penalties Imposed by Law" Must be Narrowly Construed. 12

C. Expanding the Scope of Excluded "Penalties" Would Reduce Compensation for Victims and Impede Responsible Risk Management. 14

II. NEW YORK COURTS SHOULD NOT CREATE AN EXTRACONTRACTUAL EXCLUSION THAT WOULD OVERRIDE INSURERS' CONTRACTUAL PROMISES TO INSURE CLAIMS FOR DISGORGEMENT AND SETTLEMENT 20

A. There Is No Public Policy Exclusion for Disgorgement, and the Court Should Not Create One. 20

B. Public Policy Does Not Bar Insurance for Voluntary Settlements of Allegations that Include Covered Claims. 24

III. NEW YORK DOES NOT PROHIBIT INSURANCE FOR “INTENTIONAL CONDUCT,” ONLY FOR A NARROW CATEGORY OF SUCH CONDUCT INTENDED TO CAUSE INJURY THAT IS NOT IMPLICATED HERE. 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

159 MP Corp. v. Redbridge Bedford, LLC,
33 N.Y.3d 353 (2019) 16, 22, 29

Auto. Ins. Co. of Hartford v. Cook,
7 N.Y.3d 131 (2006) 28

AXIS Reinsurance Co. v. Northrop Grumman Corp.,
975 F.3d 840 (9th Cir. 2020) 21

Burks v. XL Specialty Ins. Co.,
534 S.W.3d 458 (Tex. App. 2015)..21

Civil Serv. Bar Assn. v. City of N.Y.,
64 N.Y.2d 188 (1984) 25

Cont'l Cas. Co. v. Rapid-Am. Corp.,
80 N.Y.2d 640 (1993) 12

Denburg v. Parker Chapin Flattau & Klimpl,
82 N.Y.2d 375 (1993) 24

Matter of Estate of Walker,
64 N.Y.2d 354 (1985) 16

Gallup, Inc. v. Greenwich Ins. Co.,
2015 WL 1201518 (Del. Super. Ct. Feb. 25, 2015) 21, 23

Hartford Acc. & Indem. Co. v. Village of Hempstead,
48 N.Y.2d 218 (1979) 7, 8

Hollis v. Drew Theological Seminary,
95 N.Y. 166 (1884) 16

Holy Props. Ltd., L.P. v. Kenneth Cole Prods., Inc.,
87 N.Y.2d 130 (1995) 14, 15

Home Ins. Co. v. Am. Home Prod. Corp.,
75 N.Y.2d 196 (1990) 8

Indian Harbor Ins. Co. v. Dorit Baxter Skin Care, Inc.,
430 F. Supp. 2d 183 (S.D.N.Y. 2006) 24

J.P. Morgan Secs., Inc. v. Vigilant Ins. Co.,
166 A.D.3d 1 (1st Dep't 2018) .... *passim*

J.P. Morgan Secs., Inc. v. Vigilant Ins. Co.,
21 N.Y.3d 324 (2013) 20, 21, 25, 27

Kokesh v. SEC,
137 S. Ct. 1635 (2017) .... *passim*

Liu v. SEC,
140 S. Ct. 1936 (2020) .... *passim*

Messersmith v. Am. Fid. Co.,
232 N.Y. 161 (1921) 28

O'Brien v. Lodi,
246 N.Y. 46 (1927) 25

Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co.,
12 N.Y.3d 302 (2009) 13

Pub. Serv. Mut. Ins. Co. v. Goldfarb,
53 N.Y.2d 392 (1981) 27, 28

RSUI Indem. Co. v. Murdock,
248 A.3d 887 (Del. 2021) 21, 23, 24

SEC v. Citigroup Global Mkts., Inc.,
752 F.3d 285 (2d Cir. 2014) 17

Slayko v. Sec. Mut. Ins. Co.,
98 N.Y.2d 289 (2002) 23, 27

Soto v. State Farm Ins. Co.,
83 N.Y.2d 718 (1994) 7, 9

Spandex House, Inc. v. Hartford Fire Ins. Co.,
2019 WL 4014232 (S.D.N.Y. Aug. 26, 2019) 26

In re TIAA-CREF Ins. Appeals,
192 A.3d 554 (Del. 2018) 15, 22

U.S. Bank Nat. Ass'n v. Indian Harbor Ins. Co.,
2014 WL 3012969 (D. Minn. July 3, 2014) 21, 23, 26

Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.,
84 N.Y.2d 309 (1994) .... *passim*

Statutes and Rules

15 U.S.C. § 78u 10, 17

28 U.S.C. § 2462 10

Other Authorities

Statement of SEC Chairman Jay Clayton Regarding Offers of
Settlement (July 3, 2019) 17

James M. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of A Justification*, 30 Santa Clara L. Rev. 95 (1990) 30

Christopher C. French, *Debunking the Myth That Insurance Coverage Is Not Available or Allowed for Intentional Torts or Damages*, 8 Hastings Bus. L.J. 65 (2012) 29

Dixie L. Johnson & M. Alexander Koch, *Reflections on* Kokesh v. SEC*: Potential Ramifications of SEC Disgorgement Being a Penalty,* L. J. Newsletters (Sept. 2017) 19

Doug Rendleman, *Measurement of Restitution: Coordinating Restitution and Compensatory Damages and Punitive Damages*, 68 Wash. & Lee L. Rev. 973 (2011) 6

Deborah Solomon, *SEC Considers Stronger Sanctions — Applying Stiffer Penalties in Coming Cases Is Seen As Having Deterrent Value*, Wall St. J., June 16, 2003 18

Mengqi Sun, Defense Bill Proposes to Expand SEC's Authority in Seeking Disgorgement, Wall St. J., Dec. 29, 2020....................17

Nicholas Thompson, *The Sword of Spitzer*, Legal Affairs (May/June 2004) 19

8 Williston on Contracts § 19:20 (4th ed. 2019)....................24

PRELIMINARY STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers, including local and regional institutions. SIFMA's mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. It regularly files amicus curiae briefs in cases raising issues of vital concern to securities industry participants.

SIFMA previously submitted an amicus brief urging that this Court grant review and now submits this amicus brief on the merits because this appeal involves important issues that are directly relevant to SIFMA's members and to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry. The insurers suggest that this Court should limit coverage in various respects, including as a matter of public policy. If the insurers' position were adopted by this Court, it would frustrate the reasonable expectations of SIFMA members regarding coverage under their existing policies and would impede SIFMA members' ability to obtain insurance to manage business risk.

QUESTIONS PRESENTED

Plaintiffs below (collectively, "Bear Stearns") have appealed the Judgment and Decision of the Appellate Division to address, among others, the following questions relevant to SIFMA's members and mission:

1. Whether New York's public policy prohibiting insurance for punitive damages awards should be extended to bar courts from enforcing insurance contracts covering payments to settle an SEC "disgorgement" claim, where the payments are required to be used to compensate injured third parties. The answer is "no" because this Court's precedents recognize that such a payments are insurable.

2. Whether the Court should create a new public policy prohibiting insurance for relief bearing the "disgorgement" label, even if the relevant policy provides coverage. The answer is "no" because a growing number of courts have refused to recognize such an exclusion and the prerequisites for creating a public policy exclusion in New York are not met here.

3. Whether New York's public policy prohibiting insurance for conduct intended to cause injury should be expanded to apply where there was no intent to harm. The answer is "no" because this Court has repeatedly held that the exclusion is narrow, and the insurers' arguments for expanding it are unpersuasive.

ARGUMENT

This Court has consistently held insurance companies to their word. Recognizing the importance of the freedom to contract, the Court has enforced insurance policies as written and limited extracontractual exclusions based on notions of public policy to two narrow circumstances. First, this Court has held that punitive damage awards are not insurable, but only if they have no compensatory elements. Second, the Court has recognized a public policy exception for damages flowing from an intent to injure, but not where the resulting injury was foreseeable but unintended. Beyond those narrow exceptions, the Court has refused to create new exclusions that would disregard the terms of an insurance contract based on notions of public policy.

In this appeal, the insurers ask the Court to discard these long-held principles and to dramatically expand New York's public policy exceptions in an attempt to avoid their agreement to insure Bear Stearns' SEC disgorgement payment. First, they argue that New York's rule that punitive damages awards are uninsurable should be extended to preclude insurance for any form of relief "primarily" intended to punish or deter. But that vague and unpredictable theory has never been the law, would lead to uncertainty and controversy, and is contrary to this Court's precedents enforcing insurance agreements to cover payments that are at least partially compensatory.

As a fallback, the insurers suggest that the Court should create a new public policy exclusion for disgorgement, despite the Court's refusal to do so when it considered this case eight years ago. Alternatively, they argue that the limits the Court has placed on the extracontractual intentional harm exclusion should be wiped out so that it would extend even to unintended harms. The insurers' attempt to create or expand these unwritten and unlegislated insurance exclusions would do violence to this Court's precedents and upset the settled expectations of insurance policyholders.

Moreover, the insurers' proposed extracontractual exclusion would prevent financial industry participants large and small from managing the risks of unpredictable regulatory enforcement activity through insurance, with potentially broad effects: SIFMA's members depend on the availability of insurance to manage these risks. It also would reduce compensation for victims, violating one of the core public policy principles of insurance. And it would undermine the freedom of contract that has helped to make New York the financial capital of the world.

For these reasons and those explained below, the Court should not permit the insurers to escape their promises in the insurance contracts they sold, and should decline the insurers' invitation to outlaw insurance arrangements for payments like Bear Stearns' payment at issue here.

I. BEAR STEARNS' LOSS IS NOT AN UNINSURABLE PENALTY.

The insurers' primary arguments are that Bear Stearns' SEC disgorgement payment is uninsurable on public policy grounds and excluded under the policies as a "penalty." These arguments contradict this Court's precedents and would create or expand both written and unwritten exclusions far beyond any intended scope.

A. New York's Public Policy Against Insurance for Punitive Damages Does Not Apply to Disgorgement Relief That Has a Compensatory Purpose.

While the insurers seek to defend the outcome of the Appellate Division's decision below, they have wholly abandoned its reasoning. In holding that Bear Stearns is not entitled to coverage for its SEC disgorgement payment, the Appellate Division wrongly reasoned that the U.S. Supreme Court's decision in *Kokesh* "establish[ed] that disgorgement is a penalty, whether it is linked to the wrongdoer's gains or gains that went to others." *J.P. Morgan Secs., Inc. v. Vigilant Ins. Co.*, 166 A.D.3d 1, 10 (1st Dep't 2018).

Presumably recognizing that the Appellate Division's reasoning misconstrues *Kokesh* and is irreconcilable with the Supreme Court's later decision in *Liu*, the insurers propose a new test for what constitutes an uninsurable penalty. Citing only authority outside the insurance context, the insurers argue that a penalty includes any payment that: "(i) redresses a wrong to the public, not to an

individual, and (ii) is primarily intended to punish and deter, not to compensate a victim for his loss." Vigilant Br. 27. As explained below, both the Appellate Division's flawed reasoning and the insurers' newly concocted test should be rejected.

1. The Insurers' Vague Test for Whether a Loss Is "Punitive" Is Contrary to New York Law.

The insurers' proposed standard and the Appellate Division's categorical approach are contrary to settled New York law. In *Zurich Insurance Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 316-17 (1994), this Court held that legal remedies labelled as "punitive damages" are nonetheless insurable if they have "compensatory elements," even if "punitive … elements" are present as well. Put differently, *Zurich* held that punitive damages are insurable as long as they serve some compensatory purpose, even if they also serve some punitive purpose. *See id.* (policy "must supply coverage" for punitive damages awards with "both punitive and compensatory elements").

Neither *Zurich* nor any other opinion by this Court has applied the two-part test advanced by the insurers to determine insurability. Nor has this Court ever endorsed the Appellate Division's categorical conclusion that all "disgorgement is a penalty." 166 A.D.3d at 10. To the contrary, *Zurich* eschewed such a label-based approach, and looked instead at the underlying purpose of the payments at

issue. *See id.* (examining the particular punitive damages awards at issue to determine their purpose).

Applying *Zurich*, Bear Stearns' disgorgement payment falls squarely outside the public policy exclusion for punitive damages awards because it indisputably had "compensatory elements." For one, the SEC Order provided that the payment would be used to compensate injured parties and permitted Bear Stearns to use the payment to offset its civil liability to investors. (R.1598-1600.) For another, there is undisputed evidence that the disgorgement payment amount was based on the estimated harm to investors. *See* Bear Stearns Reply Br. 10. Because the disgorgement payment was not purely punitive, the public policy exception does not apply.

The insurers' attempts to minimize *Zurich* are unavailing. The insurers first argue that *Zurich* "presented special comity concerns not present here"—specifically, that *Zurich* analyzed whether New York public policy barred coverage for a damages award from another state. Vigilant Br. 43. But the issue decided in *Zurich* was about "*New York's* public policy," and the Court nowhere mentions comity concerns. 84 N.Y.2d at 316 (emphasis added).

The insurers also argue that *Zurich* "can stand only for the proposition that where an award is indeterminate … then public policy will not categorically bar coverage." Vigilant Br. 44. But if an "indeterminate" award is insurable, surely an

award that specifies that it has compensatory elements—like the award here—is insurable. And in any event, the *Zurich* Court was not faced with only an "indeterminate" award. To the contrary, the Court found "[o]n the record before [it], it appears that the damages awarded in the [Georgia] action also had a compensatory purpose," and therefore held that the insurer "must indemnify its insured for them." *Zurich*, 84 N.Y.2d at 317.

Even if the insurers' two-part test were not precluded by settled law, it should be rejected as vague and unworkable. The Court established a simple rule in *Zurich*: If a punitive damage award is purely punitive, then it is uninsurable. If, instead, it includes or might include compensatory elements, then it is insurable. By contrast, the insurers' hazy test raises a litany of questions that would significantly complicate this inquiry and lead to uncertain coverage and disputes. Contrary to the insurers' simplistic characterizations, legal scholars have recognized that compensatory damages, disgorgement, and punitive damages each have "multiple polic[y] justifications and feature primary, secondary, and overlapping justifications." Doug Rendleman, *Measurement of Restitution: Coordinating Restitution and Compensatory Damages and Punitive Damages*, 68 Wash. & Lee L. Rev. 973, 979-80 (2011). As a result of these multiple and overlapping functions, even scholars have struggled to draw neat lines between these remedies. *See id.* at 980. Adopting the insurers' test would encourage

insurers to deny coverage in a wide range of cases that they could try to argue fall within a gray area, resulting in confusion, disputes, and extensive litigation.

2. A Payment Is Not a Penalty Where It Serves a Compensatory Purpose in Whole or in Part.

This Court's other precedents confirm that the public policy exclusion for punitive damages does not reach Bear Stearns' disgorgement payment. The Court first announced a public policy exclusion for punitive damage awards in *Hartford Accident and Indemnity Co. v. Village of Hempstead*, 48 N.Y.2d 218 (1979), which held that public policy prohibits coverage for punitive damages awarded in federal civil rights actions. The Court explained that it "reach[ed] that conclusion primarily because to allow insurance coverage is totally to defeat the purpose of punitive damages," which is "to punish and to deter others from acting similarly." *Id.* at 226-28. The Court further explained that "allowing coverage serves no useful purpose since [punitive] damages are a windfall for the plaintiff who, by hypothesis, has been made whole by the award of compensatory damages." *Id.* at 226.

Since *Hartford*, this Court has continued to emphasize the unique reasons for prohibiting coverage for punitive damage awards. In *Soto v. State Farm Insurance Co.*, 83 N.Y.2d 718, 724 (1994), the Court explained that "since punitive damages are not designed to compensate an injured plaintiff for the actual injury that that person may have suffered, their only real purpose is to punish and

deter the wrongdoer." And in *Zurich*, the Court explained that it has "consistently adhered to the view that the purpose of punitive damages is solely to punish the offender and to deter similar conduct on the part of others." 84 N.Y.2d at 316. Although the Court has clarified that the exclusion applies to punitive damages awarded for unintentional conduct and to awards by out-of-state courts, *see Home Ins. Co. v. Am. Home Prod. Corp.*, 75 N.Y.2d 196, 201 (1990), it has never extended the public policy bar beyond punitive damages to other forms of relief, even to extent they have punitive aspects.

Bear Stearns' disgorgement payment is neither a punitive damages award nor akin to one. The parties agree that Bear Stearns' disgorgement payment was used to compensate victims. *See* Vigilant Br. 45. And the undisputed evidence demonstrates that the payment was calculated based on the loss suffered by investors. As a result, the purpose of the disgorgement payment was not "solely to punish the offender and to deter similar conduct on the part of others." *Zurich*, 84 N.Y.2d at 316. So unlike in the case of punitive damages, "to allow insurance coverage" would not "totally … defeat the purpose of" the disgorgement remedy. *Hartford*, 48 N.Y.2d at 228.

Moreover, the disgorgement payment here was not a "windfall" for victims. *Id.* at 226. Unlike in the case of punitive damages, the victims had not already "been made whole by [an] award of compensatory damages." *Id.* To the contrary,

the disgorgement payment was "designed to compensate [the victims] for the actual injury that [they] may have suffered." *Soto*, 83 N.Y.2d at 724. Because of these fundamental differences between Bear Stearns' disgorgement payment and punitive damages awards, the public policy bar for punitive damages is inapplicable.

3. **Kokesh** ***Does Not Control New York Insurance Law.***

The insurers incorrectly argue, and the Appellate Division below incorrectly held, that these well-established principles have been displaced by recent U.S. Supreme Court case law limiting the SEC's authority to seek disgorgement. Below, the Appellate Division held that *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) "establish[ed] that disgorgement is a penalty, whether it is linked to the wrongdoer's gains or gains that went to others." 166 A.D.3d at 10. Abandoning that categorical rule, the insurers argue here that under *Kokesh* and the more recent *Liu v. SEC*, 140 S. Ct. 1936 (2020), "disgorgement payments exceeding the wrongdoer's own profits from illegal conduct constitute penalties." Vigilant Br. 6. Both the insurers and the Appellate Division are incorrect because the Supreme Court's decisions interpreting the SEC's disgorgement authority do not control the meaning or application of an insurance policy under New York law.

In *Kokesh*, the Supreme Court addressed the narrow question of whether SEC disgorgement claims were subject to the five-year statute of limitations period

of 28 U.S.C. § 2462, which applies to "penalty" claims. 137 S. Ct. at 1639. The Court held that that the five-year limitations period applied because SEC disgorgement would be deemed to "represent" a penalty for statute-of-limitations purposes. *Id.* While the Court acknowledged that "disgorgement serves compensatory goals in some cases," it explained that for statute-of-limitations purposes, a "civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Id.* at 1645.

In holding that Bear Stearns' payment is uninsurable, the Appellate Division misunderstood this Court's precedents and *Kokesh*. Ignoring *Zurich*, the Appellate Division held that all payments labelled as disgorgement are categorically uninsurable, regardless of the facts underlying the payment at issue. *See* 166 A.D.3d at 8, 10. And the court misinterpreted *Kokesh* as "establishing that disgorgement is a penalty, whether it is linked to the wrongdoer's gains or gains that went to others," even though *Kokesh* itself made clear that "disgorgement serves compensatory goals in some cases." *Id.* at 10; 137 S. Ct. at 1645.

The Appellate Division's error became even more apparent after the Supreme Court issued its opinion in *Liu*, which decided whether the SEC is authorized to seek disgorgement as "equitable relief" under 15 U.S.C. § 78u(d)(5). In direct conflict with the Appellate Division's reasoning, the *Liu* Court rejected

the contention that under *Kokesh* "disgorgement is necessarily a penalty." 140 S. Ct. at 1946. The Supreme Court explained that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief" and *not* a punitive sanction. *Id.* at 1940.

After *Liu*, the insurers abandoned the Appellate Division's flawed reasoning. The insurers now concede that not all disgorgement payments are penalties, but argue that under *Kokesh* and *Liu*, Bear Stearns' payment was a penalty because it exceeded its own profits. The insurers' reliance on *Kokesh* and *Liu* is misplaced for several reasons.

To start with, neither *Kokesh* nor *Liu* examined any insurance policies or insurability concepts, let alone interpreted New York insurance law. *Kokesh* analyzed how a federal statute of limitations applied to SEC disgorgement. *Liu* analyzed the SEC's statutory authority to seek disgorgement. Neither inquiry is relevant to the issues here.

There are also crucial differences between the Supreme Court's reasoning in *Kokesh* and *Liu* and this Court's analysis under the punitive damages exception. For example, under *Kokesh*'s statute-of-limitations analysis, a payment is considered a penalty if it has any retributive or deterrent purpose, even if it also has a compensatory purpose. 137 S. Ct. at 1645. By contrast, under this Court's precedents, punitive damages are uninsurable only if they lack any "compensatory

elements." *Zurich*, 84 N.Y.2d at 316-17. A payment with both compensatory and deterrent elements would thus be considered punitive for the purpose of the statute of limitations but not so for insurance purposes.

Like *Kokesh*, *Liu* answers a fundamentally different question than the one at issue here. *Liu* merely defined the category of SEC disgorgement that constitutes equitable relief authorized by statute, based on the traditional remedies awarded by equity courts. *See* 140 S. Ct. at 1940, 1942-46. The Supreme Court did not decide whether certain categories of SEC disgorgement constitute penalties or characterize which categories of disgorgement would be penalties. Nor did *Liu* apply any standard comparable to the rules governing insurability established by this Court, for example, by determining whether the disgorgement payment had any "compensatory elements." *Zurich*, 84 N.Y.2d at 316-17.

B. An Insurance Policy Exclusion for "Penalties Imposed by Law" Must be Narrowly Construed.

The insurers' next argument, that the policies' written exclusion for "fines and penalties imposed by law" applies to the disgorgement payment, also fails. Under well-settled insurance law principles, the policies' exclusion for "penalties" must be interpreted narrowly so it does not apply to SEC disgorgement.

"To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case." *Cont'l Cas. Co. v.*

Rapid-Am. Corp., 80 N.Y.2d 640, 652 (1993). Exclusions in insurance policies must therefore be interpreted narrowly, with any ambiguity resolved in favor of coverage. *Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co.,* 12 N.Y.3d 302, 306-08 (2009). Accordingly, the policies' exclusion for "penalties" must be construed narrowly, so it applies only to losses that are in fact penalties and denominated as such. At a minimum, this interpretation is reasonable, and therefore must be adopted. *Id.* at 308.

The disgorgement payment here was not a penalty in either form or substance. The disgorgement relief awarded in the SEC Order was not described as or denominated a "penalty." On the contrary, the SEC Order provided for a "penalty" separate from the "disgorgement" payment ordered, and treated the "penalty" and "disgorgements" amounts in a materially different manner. (R.1598-1600.) The Order provided that the penalty would be treated as a penalty for tax purposes, whereas the disgorgement would not. (R.1600.) It stated that Bear Stearns could not use the penalty to offset damages that may be owed to civil plaintiffs, whereas it could for the disgorgement payment. (*Id.*) And Bear Stearns could not seek insurance coverage or indemnification for the penalty, whereas it could for the disgorgement payment. (R.9223.)

As a matter of plain meaning, Bear Stearns' disgorgement payment therefore falls squarely outside the policies' exclusion for "penalties and fines." And given

the mandate to construe exclusions narrowly, it is not even arguable that the exclusion applies here.

C. Expanding the Scope of Excluded "Penalties" Would Reduce Compensation for Victims and Impede Responsible Risk Management.

New York law recognizes that absent clear contrary mandates, insurance should be promoted, not proscribed, because it serves important interests, including ensuring the availability of compensation for victims and encouraging businesses to provide valuable services in industries that are highly regulated and otherwise exposed to potentially prohibitive liability. Adoption of the insurers' position—that courts should either construe "penalty" in a sweeping manner to reach the disgorgement payment at issue here, or deem that payment uninsurable as a punitive damages remedy based on a vague two-part test—would cast uncertainty over the availability of insurance, including for disgorgement claims by regulatory agencies, and thus undermine New York public policy interests.

First, contracting parties should be entitled "to rely on the stability of" precedent as they "engage in transactions based on prevailing law." *Holy Props. Ltd., L.P. v. Kenneth Cole Prods., Inc.*, 87 N.Y.2d 130, 134 (1995). SIFMA members have paid substantial premiums for insurance coverage based on settled New York law, which never before suggested that a settlement payment that partially serves a compensatory purpose might be uninsurable. And the insurers

have long been aware that SEC disgorgement remedies present a significant risk of liability for insureds in this industry. The insurers easily could have written an exclusion for SEC disgorgement remedies if they did not want to cover such liabilities. But they knew insureds in this industry seek to buy insurance for precisely such risks, and they chose to sell insurance policies that did not exclude SEC disgorgement. Given such reliance interests, this Court has recognized that "certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the 'correct' rule." *Id.*

The reliance interest is particularly compelling here. The Appellate Division's decision to contradict this Court's 2013 ruling had been premised on its conclusion that *Kokesh* had been "a change of law." 166 A.D.3d at 9. But *Kokesh* was decided nearly two decades after Bear Stearns' insurance policies were issued and approximately five years after this Court left the law well-settled in its *J.P. Morgan* decision. *See, e.g.*, *In re TIAA-CREF Ins. Appeals*, 192 A.3d 554, at *2 (Del. 2018) (noting that, at most, "New York public policy prohibits enforcement of insurance agreements in cases involving disgorgement *where the payment* is *conclusively linked, in some fashion, to improperly acquired funds in the hands of the insured*") (citing, *inter alia*, *J.P. Morgan Secs., Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324 (2013)) (emphasis added).

Second, expanding the scope of uninsurable "penalties" casts a pall of uncertainty over insurance coverage in other contexts. Any unlegislated common-law exception to the enforceability of contracts will disrupt widely held and settled expectations. Courts should therefore hesitate to create a new public policy exception that may be based only on "their subjective view of what is sound policy or good policy." *Matter of Estate of Walker*, 64 N.Y.2d 354, 359 (1985). Indeed, the "question, what is the public policy of a State, and what is contrary to it," when left to judicial decisionmaking, "will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ." *Hollis v. Drew Theological Seminary*, 95 N.Y. 166, 172 (1884). Rather than "assum[e] legislative functions," *id.* at 171, the parties should be left to bear "the consequences of their bargain," *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 359 (2019).

Third, adoption of the Insurers' position could lead to the elimination of insurance coverage for past SEC disgorgement orders, which would have the deleterious effect of encouraging litigation and deterring compromise and compliance with the SEC.[1] If settlements of certain SEC disgorgement orders that

[1] Although *Liu* concluded that the SEC lacked statutory authority to seek disgorgement in excess of the wrongdoer's net profits, 140 S. Ct. at 1940,
(continued…)

are intended, at least in part, to compensate victims are ultimately uninsurable—as the insurers argue—then businesses and individuals may be forced to litigate rather than settle. This would hamper the SEC, which considers settlement "a significant carrot" in exercising its enforcement authority. Statement of SEC Chairman Jay Clayton Regarding Offers of Settlement (July 3, 2019), https://www.sec.gov/news/public-statement/clayton-statement-regarding-offers-settlement.

The SEC "has long recognized that an appropriately-crafted settlement can be preferable to pursuing a litigated resolution, particularly when … the Commission obtains relief that is commensurate with what it would reasonably expect to achieve in litigation." *Id.* For both the SEC and businesses, settlement is a "means to manage risk," including "the prospects of coming out … worse, after a full trial, and the resources that would need to be expended in the attempt." *SEC v. Citigroup Global Mkts., Inc.*, 752 F.3d 285, 295 (2d Cir. 2014) (quoting *SEC v. Citigroup Global Mkts., Inc.*, 673 F.3d 158, 164 (2d Cir. 2012)). New York courts should not undermine the SEC's prerogatives in exercising its enforcement authority on existing orders.

Congress amended the SEC's authority to seek disgorgement in the 2021 National Defense Authorization Act (NDAA), *see* 15 U.S.C. § 78u(d)(7). Commentators have suggested that the SEC will argue that the NDAA removes the restrictions for seeking disgorgement that the Supreme Court established in *Liu*. *See* Mengqi Sun, Defense Bill Proposes to Expand SEC's Authority in Seeking Disgorgement, Wall St. J., Dec. 29, 2020, https://www.wsj.com/articles/defense-bill-proposes-to-expand-secs-authority-in-seeking-disgorgement-11609279448.

Indeed, years ago, the SEC considered and rejected proposals to require that payments on disgorgement orders be treated as uninsurable, even though it routinely prevented indemnification of remedies labeled as penalties. *See* Richard A. Rosen, Settlement Agreements in Commercial Disputes: Negotiating, Drafting & Enforcement § 34.15[A] (2012) ("[N]o-insurance-for-penalties language has become standard in SEC settlement documents."). The SEC previously further explained that if companies were deprived of means to insure all SEC payments, it "likely [would] result in more litigation and fewer agreements as defendants balk at the stricter terms." Deborah Solomon, *SEC Considers Stronger Sanctions — Applying Stiffer Penalties in Coming Cases Is Seen As Having Deterrent Value*, Wall St. J., June 16, 2003. Thus, the SEC itself understood that payment of disgorgement orders would not undermine insurance, but rather that its authority would be undermined if such payments were deemed uninsurable.

Fourth, undermining or eliminating insurance for payments that partially serve a compensatory purpose could increase costs and the risk of insolvency for many financial services businesses and their customers. That the financial institution seeking coverage here did not face such a risk at the time in no way lessens the industry-wide concern. Businesses rely on insurance in order to operate in the highly-regulated financial services industry, which faces variable and often unpredictable enforcement activity.

Because participants in the financial services industry, both large and small, must manage the risk of responding to and resolving issues with regulatory bodies, the availability of insurance is particularly "important to individual defendants, who often would not be able to afford to pay disgorgement without indemnification from their former employer, insurance company or some other source." Dixie L. Johnson & M. Alexander Koch, *Reflections on* Kokesh v. SEC*: Potential Ramifications of SEC Disgorgement Being a Penalty*, L. J. Newsletters (Sept. 2017).[2] Small businesses, in particular, also rely on insurance to ensure their solvency in the event of an SEC action. There is simply no support for the insurers' contention that the main regulatory risk sought to be insured under the policies at issue relate to New York's Martin Act, and only to the extent damages are paid and measured based on the "harm to victims." Vigilant Br. 37 (citing no legal authority).[3]

---

[2] *Available at* http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/09/01/reflections-on-kokesh-v-sec-2/?slreturn=20190927180407.

[3] Indeed, it is fanciful to suggest that financial services companies in the late 1990s and early 2000s would have purchased insurance because of an exclusive focus on liability under the Martin Act, a state law that, at least through the 1990s, was used "only as a tool to go after small-time fraud." Nicholas Thompson, *The Sword of Spitzer*, Legal Affairs (May/June 2004), https://www.legalaffairs.org/issues/May-June-2004/feature_thompson_mayjun04.msp.

II. NEW YORK COURTS SHOULD NOT CREATE AN EXTRACONTRACTUAL EXCLUSION THAT WOULD OVERRIDE INSURERS' CONTRACTUAL PROMISES TO INSURE CLAIMS FOR DISGORGEMENT AND SETTLEMENT.

Unable to fit the disgorgement payment into the narrow public policy exception for "punitive damages," the insurers attempt to create a new one. They argue that even if the payment is not a penalty or equivalent to punitive damages, it is uninsurable because "New York law 'preclud[es] indemnity for disgorgement.'" Vigilant Br. 46 (quoting *J.P. Morgan*, 21 N.Y. 3d at 337). But this Court has never before recognized a public policy against insurance for disgorgement. It should not deviate from that course now. And even if such a public policy existed, it should not apply to settlements of disgorgement claims.

A. There Is No Public Policy Exclusion for Disgorgement, and the Court Should Not Create One.

This Court has never held that public policy excludes insurance coverage for disgorgement. The insurers argue that New York law recognizes such an exception by pointing to the 2013 appeal of this case, but the Court's decision establishes precisely the opposite. Specifically, this Court explained that it had "not considered the issue" of whether disgorgement is uninsurable. *J.P. Morgan*, 21 N.Y. 3d at 335-36. Although the Court noted that some courts "have held that the risk of being ordered to return ill-gotten gains—disgorgement—is not insurable," it did not embrace such a public policy exclusion. *Id.* Nor did the

Court apply such an exclusion to Bear Stearns' disgorgement payment. Instead, the Court "agree[d] with Bear Stearns that the Insurers are not entitled to dismissal of its coverage claim premised on the SEC disgorgement payment." *Id.*

Since 2013, a growing consensus of courts in other jurisdictions, some applying New York law, has rejected a blanket prohibition on the insurability of disgorgement and instead has examined the relevant policy's wording to determine coverage for disgorgement or restitution. *See, e.g.*, *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 902 (Del. 2021) (rejecting the insurer's public policy argument that recovery for settlement of securities fraud and breach of fiduciary duty claims "would undermine the Court of Chancery's disgorgement remedy"); *AXIS Reinsurance Co. v. Northrop Grumman Corp.*, 975 F.3d 840, 848 (9th Cir. 2020) ("public policy rule" against insuring disgorgement payments is inapplicable if there is no final adjudication or admission of guilt, and there are multiple theories of recovery besides standard disgorgement); *Burks v. XL Specialty Ins. Co.*, 534 S.W.3d 458, 469-70 (Tex. App. 2015) (reversing order granting summary judgment to insurer where policyholder settled claims for disgorgement); *Gallup, Inc. v. Greenwich Ins. Co.*, 2015 WL 1201518, at *10 (Del. Super. Ct. Feb. 25, 2015) ("[The insurers'] attempt to construe the Settlement as offensive to public policy because it is for restitution is unpersuasive [in light of the policy language]."); *U.S. Bank Nat. Ass'n v. Indian Harbor Ins. Co.*, 2014 WL 3012969,

at *5 (D. Minn. July 3, 2014) ("Delaware law does not prohibit insurance for restitution."); *see also TIAA-CREF Ins. Appeals*, 192 A.3d at *2 (applying New York law and holding public policy did not bar coverage for settlement absent finding of an ill-gotten gain by the insured).

This Court should likewise reject an extracontractual exclusion for disgorgement and apply the policies' language as written. *First*, "disgorgement" relief is widely sought in financial litigation. SIFMA's members often resolve regulatory matters through settlements that incorporate disgorgement remedies. Any insurer seeking to exclude coverage for "disgorgement" should negotiate to limit coverage by an express exclusion. There is no reason that the insurance industry should be entitled to a court-inferred exclusion based on public policy.

Second, courts may deem a contract—here, policies providing broad coverage grant without a disgorgement exclusion—unenforceable only if it "clearly contravene[s]" a "weighty and countervailing" public policy. *159 MP Corp.*, 33 N.Y.3d at 360-61 (citations and ellipsis omitted). "Only a limited group of public policy interests has been identified as sufficiently fundamental to outweigh the public policy favoring freedom of contract." *Id.* at 361. The insurers do not assert a countervailing public policy sufficient to outweigh New York's strong public policy supporting freedom of contract.

Third, this Court has explained that "when statutes and Insurance Department regulations are silent, we are reluctant to inhibit freedom of contract by finding insurance policy clauses violative of public policy." *Slayko v. Sec. Mut. Ins. Co.*, 98 N.Y.2d 289, 295 (2002). The insurers do not identify any legislation to support a public policy against insurance coverage of disgorgement. In the absence of such evidence, this Court should "defer[] to the parties' contractual choices and to the legislature's prerogative in matters of public policy." *RSUI Indem. Co.*, 248 A.3d at 904.

Fourth, many insurance agreements provide an exclusion for damages in the form of amounts to which the insured "is not legally entitled." The very existence of such an exclusion confirms that insurers are capable of drafting exclusions to conform to their exclusionary intent. But tellingly, the common exclusion for amounts to which the insured is not legally entitled is typically written to apply only when that lack of entitlement is "determined by a final adjudication in the underlying action." As other courts have reasoned in interpreting such agreements, "[b]ecause the parties expressly excluded [coverage for] any restitution resulting from a final adjudication … they must have intended to include any restitution not resulting from a final adjudication (say, a settlement) within the definition of 'Loss'." *U.S. Bank Nat. Ass'n*, 2014 WL 3012969, at *3-4; *Gallup*, 2015 WL 1201518, at *10 (same). But a blanket prohibition on insurance

for disgorgement would defeat that intent by excluding coverage for all disgorgement payments, even when pursuant to a settlement without any adverse final adjudication.

Finally, a public policy exclusion for disgorgement would leave injured parties worse off. "[C]ompensation of the injured party" is often described as the "most important objective" in assessing the validity of indemnification provisions. *Indian Harbor Ins. Co. v. Dorit Baxter Skin Care, Inc.*, 430 F. Supp. 2d 183, 190 (S.D.N.Y. 2006). When courts refuse to permit indemnity, that "will often, if not usually, result in an injury being unredressed by compensation." 8 Williston on Contracts § 19:20 (4th ed. 2019). A blanket prohibition on disgorgement would therefore "leave many injured parties without a means of recovery." *RSUI Indem. Co.*, 248 A.3d at 904.

B. Public Policy Does Not Bar Insurance for Voluntary Settlements of Allegations that Include Covered Claims.

The Court should not apply a public policy exclusion to Bear Stearns's disgorgement payment for another reason: It was a settlement payment, representing an agreed-upon compromise between the parties, and without characterization as a penalty or as ill-gotten gains. Excluding disgorgement payments in the settlement context as a matter of public policy would be misguided for at least three reasons.

First, New York has long recognized a strong public policy in favor of voluntary settlements. *See, e.g.*, *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 385 (1993) (recognizing "the strong policies in favor of voluntary settlements of disputes"); *Civil Serv. Bar Assn. v. City of N.Y.*, 64 N.Y.2d 188, 198 (1984) ("[N]ot to be overlooked is the strong policy of the law favoring settlement of litigation."); *O'Brien v. Lodi*, 246 N.Y. 46, 50 (1927) ("Settlements are favored by the law, the only condition being that of fair dealing."). Ensuring coverage for all settlements of covered claims will further this public policy by encouraging insureds to settle claims rather than litigate them to judgment and risk application of a public policy exclusion. It will also provide a bright-line rule in favor of coverage for settlements, thereby reducing the amount of insurance coverage litigation over underlying disputes that have already been resolved by compromise.

Second, parties reasonably expect insurance agreements to cover settlements such as this one. For example, the policies here expressly include "settlements" in their definition of covered "Loss." (R.1152.) "[P]arties to an insurance arrangement may generally 'contract as they wish and the courts will enforce their agreements without passing on the substance of them.'" *J.P. Morgan*, 21 N.Y.3d at 334. Excluding coverage for certain settlements because of extracontractual exclusions (especially those that have not been previously recognized, as with disgorgement) would frustrate reasonable expectations.

Third, the reasons for recognizing a public policy exclusion for disgorgement would not apply in the context of settlements, even if such an exclusion existed in this State. A settlement does not ordinarily "establish that the underlying allegations are true or false," and accordingly, courts should "not automatically presume … that [a] settlement constitutes restitution because it resolved claims alleging ill-gotten gains and seeking disgorgement of those gains." *U.S. Bank Nat. Ass'n*, 68 F. Supp. 3d at 1050. Such a presumption would be particularly inappropriate under the circumstances here. There was no admission or finding of whether Bear Stearns's disgorgement payment represented ill-gotten gains in the underlying SEC action, let alone a final adjudication on the merits. Nor did Bear Stearns and the SEC characterize the payment as one for ill-gotten gains. The purported interest in preventing coverage for disgorgement would not be served where, as here, the insured has simply settled a claim without admitting receipt of "ill-gotten gains." In sum, a public policy exclusion for disgorgement, even if recognized by the Court, should not apply in the context of this settlement.

III. NEW YORK DOES NOT PROHIBIT INSURANCE FOR "INTENTIONAL CONDUCT," ONLY FOR A NARROW CATEGORY OF SUCH CONDUCT INTENDED TO CAUSE INJURY THAT IS NOT IMPLICATED HERE.

As a further fallback, the insurers also invoke another of the "very narrow circumstances" in which "New York recognizes a limited 'public policy' exception to insurance agreements"—namely, when an insurance provision "provides

indemnification for conduct committed with the intent to cause injury." *Spandex House, Inc. v. Hartford Fire Ins. Co.*, 2019 WL 4014232, at *12 n.17 (S.D.N.Y. Aug. 26, 2019). But like the punitive damages exception, this exception is construed narrowly and has no application here.

As this Court explained in 2013, "the public policy exception for intentionally harmful conduct is a narrow one, under which it must be established not only that the insured acted intentionally but, further, that it acted with the intent to harm or injure others." *J.P. Morgan*, 21 N.Y.3d at 335. By contrast, "intentional act[s] caus[ing] an unintended injury," even if reckless, are insurable and do not trigger any public policy exception. *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 399 (1981); *see also Slayko*, 98 N.Y.2d at 293 ("[T]he insured's conduct, though reckless, was not inherently harmful for the purpose of the intentional act exclusion.").

This Court's precedents demonstrate the narrow reach of this exception. In *Goldfarb*, this Court held that the public policy exception would only apply to a dentist who sexually abused a patient if the jury made a specific finding that the dentist "*intended to injure*" the patient. 53 N.Y.2d at 400. But "[w]here no finding of an intent to *injure* has been made, nothing in the public policy of this State precludes indemnity for compensatory damages flowing from a defendant's volitional act." *Id.* at 400-01; *see also id.* at 400 ("[I]f … awarded on any ground

other than intentional causation of injury—for example, gross negligence, recklessness or wantonness—indemnity for compensatory damages would be allowable.”). As Judge Cardozo famously explained a century ago, the “field of exclusion would be indefinitely expanded if” acts were excluded merely because they were intentional. *Messersmith v. Am. Fid. Co.*, 232 N.Y. 161, 165 (1921).

Similarly, in *Automobile Insurance Co. of Hartford v. Cook*, 7 N.Y.3d 131 (2006), this Court held that a policy exclusion for “expected or intended” acts did not apply where the insured shot and killed an intruder in the insured’s home using a 12-gauge shotgun after the intruder advanced menacingly towards the insured and the insured warned that he would shoot if the intruder came any closer. *Id.* at 135, 138. The Court concluded that despite some evidence of intentional behavior, it was “uncertain” whether a factfinder would conclude that the insured *intended to cause* the intruder’s death. *Id.* at 138.

There is no evidence here that Bear Stearns intended to injure its customers. The insurers do not argue otherwise. Instead, they ask the Court to desert the rule it articulated in *Goldfarb*—and reiterated in this case in 2013—by importing the standard for “intentional” conduct used in the tort context in order to exclude coverage whenever an insured “knowingly takes an action with substantial certainty that the harm will result.” Vigilant Br. 59.

Adopting the Insurers' position would significantly expand this narrow exception without any countervailing policy benefit. As noted above, this Court "disfavor[s] judicial upending of the balance struck at the conclusion of the parties' negotiations." *159 MP Corp.*, 33 N.Y.3d at 359-60. The "public policy in favor of freedom of contract both promotes certainty and predictability and respects the autonomy of commercial parties in ordering their own business arrangements." *Id.* In keeping with these principles, the Court has interpreted this public policy narrowly, to apply only to conduct intended to cause harm.

The insurers contend that expanding this public policy exception would guard against moral hazard by refusing to indemnify insureds who know their acts will cause harm. But such "deterrence- and retribution-based concerns do not support a blanket prohibition on insurance of all liabilities arising out of intentional injuries." Restatement of the Law of Liability Insurance § 45(g) (2019). Rather, the reality is that in "many cases, the presence or absence of insurance has no effect on the behavior of the wrongdoer." *Id.* And the availability of criminal penalties for many types of intentional wrongful conduct will limit the risk of moral hazard. *See id.* § 45(d).[4] Moreover, "the presence of liability insurance can

[4] *See also, e.g.*, Christopher C. French, *Debunking the Myth That Insurance Coverage Is Not Available or Allowed for Intentional Torts or Damages*, 8 Hastings Bus. L.J. 65, 94 (2012) ("[W]hen examined, the suggestion that the policyholder would be deterred from engaging in criminal conduct if insurance were not available is suspect even in the first party insurance context.").

promote, rather than hinder, the objectives of tort law, by providing compensation for the victim as well as the means to employ the civil-justice system to name, blame, and shame the defendant." *Id.* § 45(g).[5] Excluding coverage in such cases therefore would have the severely negative social and economic effects of reducing the compensation available to victims and limiting the economic viability of civil suits against wrongdoers.

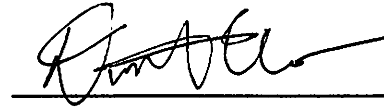
CONCLUSION

For all the foregoing reasons, the Appellate Division's decision should be reversed.

[5] *See also, e.g.*, James M. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of A Justification*, 30 Santa Clara L. Rev. 95, 97 (1990) ("Compensation of the insured or the victim of the insured's misconduct is now frequently intoned as a basic policy of insurance law and this invariably raises conflicts with the competing policies of deterrence or punishment of the insured.").

Dated: August 20, 2021

Respectfully submitted,



MITCHELL F. DOLIN*
DUSTIN CHO
COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, DC 20001-4956
(202) 662-6000 (Tel.)
(202) 662-6291 (Fax)

JORDAN S. JOACHIM
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405

* Admitted *pro hac vice*

Attorneys for Amicus Curiae Securities Industry and Financial Markets Association

DISCLOSURE STATEMENT PURSUANT TO 22 N.Y.C.R.R. 500.1(F)

The Securities Industry and Financial Markets Association ("SIFMA") is an incorporated, not-for-profit entity that is not publicly traded and of which no publicly traded company has an ownership interest. SIFMA does not have any corporate parent, subsidiaries, or affiliates.

CERTIFICATE OF WORD COUNT

Pursuant to 500.23(a)(1)(i) and 500.13(c), the printed text in the body of this brief contains 6,988 words, exclusive of the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented; and any authorized addendum.