UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **CHRISTOPHER A. NOVINGER, BRADY J. SPEERS, NFS GROUP, LLC d/b/a NOVERS FINANCIAL a/k/a SAFE RETIREMENT EXPERTS, ICAN INVESTMENT GROUP, LLC, and SPEERS FINANCIAL GROUP, LLC,** **Defendants.**	)	**No. 4:15-CV-00358-O**

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM IN OPPOSITION TO MOTION FOR DECLARATORY RELIEF

B. David Fraser
Texas Bar No. 24012654
Securities and Exchange Commission
Burnett Plaza, Suite 1900
801 Cherry Street, Unit #18
Fort Worth, TX 76102-6882
(817) 978-1409
(817) 978-4927 (fax)
FraserB@sec.gov

Attorney for Plaintiff
Securities and Exchange Commission

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Statutes

Rules and Regulations

Commission Materials

Other Authorities

Defendants, having unsuccessfully invoked Federal Rule of Civil Procedure 60(b) to reopen their consent judgments and strike out the no-deny provisions to which they agreed six years ago, repackage their Rule 60(b) motion as a request for declaratory relief. Their motion should be denied because the declaratory judgment mechanism cannot be used as a replacement for a failed Rule 60(b) motion. Moreover, even if declaratory relief regarding the enforceability of the no-deny provisions were theoretically available, the law of the case doctrine and justiciability limitations preclude its application here. Substantively, Defendants' current request suffers from the same fatal flaw at the heart of their Rule 60(b) motion. Under binding precedent, there is a fundamental difference between voluntary waivers of constitutional rights in settlements and prohibitions imposed against the will of the restrained party. As the Fifth Circuit held in affirming this Court's denial of the Rule 60(b) motion, the no-deny provisions "are the terms to which they agreed" to settle and "[t]he Defendants are not entitled to relief simply because 'it is no longer convenient to live with [those] terms.'" *SEC v. Novinger*, 40 F.4th 297, 307–08 (5th Cir. 2022) (second alteration in original), quoting *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992).

BACKGROUND

To recap, the Commission announced a policy fifty years ago that it would not accept a settlement if a defendant could "consent to a judgment or order that imposes a sanction while denying the allegations in the complaint." 37 Fed. Reg. 25,224 (Nov. 29, 1972). This policy, codified at 17 C.F.R. 202.5(e), aims to avoid creating "an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur." *Id.* The policy binds only the Commission in deciding whether to settle. It does not require anyone to settle; parties are always free to litigate. *See* Dkt. No. 43 at 2–5 (previous briefing on background of policy).

After a year of litigation and while represented by counsel, Defendants chose to settle rather than contest the Commission's allegations that they engaged in fraud. Instead of facing the risk of

adverse findings of fact and conclusion of law, as well as the possibility of greater sanctions after trial, they "submitted a written offer to settle," Dkt. No. 28 ¶ 6, which the Commission accepted. *See SEC v. Citigroup Glob. Mkts.*, 752 F.3d 285, 295–96 (2d Cir. 2014) (*Citigroup II*) (describing how parties settle to manage risk and the factors that affect the decision whether to settle). The parties filed joint motions regarding the settlement, Dkt. Nos. 28, 30, 33, even though Defendants now erroneously contend that the consent judgments were presented "*ex parte*" and that defendants had "no notice and opportunity to be heard," Mot. 3–4. This Court entered the final consent judgments, which imposed injunctive relief and required Defendants to pay monetary sanctions. Dkt. No. 33-1 ¶¶ 1–2; Dkt. No. 33-4 ¶¶ 1–2; Dkt. Nos. 36–37.

Along with waivers of several rights, Defendants "acknowledged that they entered the consent agreements 'voluntarily' and confirmed 'that no threats, offers, promises, or inducements of any kind' caused their agreement." *Novinger*, 40 F.4th at 301, quoting Dkt. No. 33-1 ¶ 7; Dkt. No. 33-4 ¶ 5. The consents also contained the no-deny provisions at issue. Novinger, for instance, agreed that he would not make any public statements denying "any allegation in the complaint" or creating the "impression that the complaint is without factual basis." Dkt. No. 33-1 ¶ 12. Defendants further agreed to a specific remedy: "[i]f Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket." Dkt. No. 33-1 ¶ 12; Dkt. No. 33-4 ¶ 10.

In June 2021, five years after entry of the final judgments, Defendants moved to modify the consent judgments, citing Rule 60(b)(4) and (b)(5). Dkt. No. 40. Defendants asked the Court to delete the no-deny provisions, while maintaining all other aspects of the settlement, on the theory that the provisions violate the First Amendment. The Court denied the motion, Dkt. No. 45 (Aug. 10, 2021), and the Fifth Circuit affirmed, 40 F.4th 297 (5th Cir. 2022). With respect to Rule 60(b)(4), the Fifth Circuit held that relief was unavailable because the consent judgments were

not "void." *Novinger*, 40 F.4th at 302–07. As to Rule 60(b)(5), the Fifth Circuit held that Defendants had not identified any changes in the facts or law that would justify striking the no-deny provisions. *Id.* at 307–08.

ARGUMENT

The Court should deny Defendants' motion because it is procedurally unsound and substantively unavailing.

I. Declaratory relief is not a substitute for Rule 60 that can be invoked to rewrite final consent judgments.

Defendants' motion is an unprecedented request to bypass principles of finality and achieve through the Declaratory Judgment Act what they could not obtain via Rule 60(b). This attempted subversion of principles of finality and the Federal Rules of Civil Procedure has no support in the caselaw and cannot be reconciled with the law undergirding the declaratory judgment mechanism.

A. Defendants cannot request declaratory relief to sidestep Rule 60.

As the Supreme Court and the Fifth Circuit have held, final judgments may be reopened only "under a limited set of circumstances" provided by Rule 60(b). *Novinger*, 40 F.4th at 302, quoting *Gonzalez v. Crosby*, 545 U.S. 524, 528–29 (2005). This narrow "exception" balances the "need for finality of judgment," *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269, 276 (2010), quoting *Gonzalez*, 545 U.S. at 529, with the need for justice, 12 MOORE'S FED. PRAC.–CIV. § 60.02[2] & n.6 (3d ed. updated through Sep. 2022). In this case, Defendants waited five years after entry of the final consent judgments to file a Rule 60(b) motion on supposed constitutional grounds, and now they have relabeled their failed motion as a novel request for declaratory relief.

This procedural maneuver is not permissible. Defendants do not identify a single decision in which a court has issued a declaratory judgment that affords relief from a previously entered final judgment, let alone a decision granting declaratory relief in the wake of an unsuccessful Rule 60(b) motion seeking the exact same relief. Nor does Defendants' request make conceptual sense. They

do not explain how a court, consistent with 28 U.S.C. § 2201 and Rule 57, can issue a declaratory judgment regarding an existing final judgment. "The whole point of a declaratory judgment action" is to decide issues in dispute that are "often preliminary," as "subsequent events will need to occur before a traditional lawsuit can be pursued." *ASARCO, LLC v. Montana Res., Inc.*, 858 F.3d 949, 955 (5th Cir. 2017); *accord Harborside Refrigerated Servs, Inc. v. Vogel*, 959 F.2d 368, 373 (2d Cir. 1992) ("Declaratory relief enables federal courts to clarify the legal relationships of parties before they have been disturbed thereby tending toward avoidance of full-blown litigation."). The time for an early adjudication of rights and remedies in the Commission's action against Defendants lapsed long ago, and the final consent judgments entered in 2016 established the rights of the parties, provided for remedies, and memorialized the conditions of settlement. *See* 12 MOORE'S FED. PRAC. § 57.04[3].

Defendants' attempt to obtain declaratory relief vacating long-standing judgments is also dangerous. It would subvert the rules: Rule 54 defines a judgment; Rules 55–57 describe types of judgments (default, summary, declaratory); Rule 58 prescribes the entry of judgments; and Rules 59–60 establish processes for altering judgments after entry, with deadlines and limitations for seeking relief after the time for direct appeal has passed. Yet, Defendants' vision of declaratory judgment would allow litigants to use Rule 57 to bypass Rules 59–60.

Moreover, Defendants should not be permitted to seek declaratory relief as a way to sidestep the "reasonable time" limitation in Rule 60(c)(1) or the sixty-day limit for direct appeal from consent judgments that Defendants now claim were partially invalid when entered six years ago. The logical end of Defendants' position is that declaratory relief from a final judgment can be sought at any time, which would destroy finality. *See Travelers Ins. Co. v. Liljeberg Enters.*, 38 F.3d 1404, 1408 (5th Cir. 1994) ("[A] Rule 60 motion is not a substitute for an appeal from the underlying judgment."); *Forsythe v. Ohio*, 333 F.2d 678, 679 (6th Cir. 1964) (per curiam) (holding that the Declaratory Judgment Act "cannot be used as a substitute for appeal"); *Glitsch, Inc. v. Koch Eng'g Co.*,

216 F.3d 1382, 1384 (Fed. Cir. 2000) ("When a court enters an order that a party does not like, the party's recourse is to seek relief on appeal; it is not appropriate for the party to contest the court's order by filing a new action seeking a declaratory judgment challenging the court's ruling in the first case.").

Rather than respect "important" values of "repose, finality, and efficiency," *Jackson v. FIE Corp.*, 302 F.3d 515, 529 (5th Cir. 2002), Defendants would permit every litigant who loses a Rule 60(b) motion—even on appeal—to then file an identical request for declaratory relief. The Fifth Circuit has sought to avoid such "duplicative and frivolous litigation," *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998) (habeas), bemoaned "the want of finality attending tolerance of repetitious challenges following duplicative denials," *Gonzalez v. Limon*, 926 F.3d 186, 189 (5th Cir. 2019) (immigration), and advised that "the desirability of orderliness and predictability in the judicial process speaks for caution in the reopening of judgments," *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977). The Court should not grant Defendants' request to convert the Declaratory Judgment Act into a vehicle for reopening final judgments, particularly those entered on consent, after the time for direct appeal and collateral challenge expired years, or even decades, earlier, particularly when this Court and the Fifth Circuit have already rejected Defendants' attempts at altering the consents.

B. The Declaratory Judgment Act cannot be used to rewrite a final judgment.

The Declaratory Judgment Act does not permit litigants to seek modification or the rewriting of existing judgments, including incorporated consents, independent of Rule 60, but that is precisely what Defendants ask the Court to do. Defendants' motion rests on the Court's equity powers, but "the principle that equity will not grant relief when there is an adequate legal remedy implies that relief must ordinarily be sought through a 60(b) type of motion in preference" to the Declaratory Judgment Act (among other procedures). RESTATEMENT (SECOND) OF JUDGMENTS

§ 78 cmt. a (1982). And "if [Rule] 60 is inapplicable, we know of no legal doctrine or rule of civil procedure that even arguably could have empowered a district court to hear, three years after entry of a consent decree that acts as a final judgment, a motion to reconsider the decree." *Cook v. Birmingham News*, 618 F.2d 1149, 1152 (5th Cir. 1980). Rather, even assuming that the no-deny provision constitutes "prospective relief," the Supreme Court and the Fifth Circuit have made clear that "modification of a consent decree is governed by the same standards that govern modifications of judgments as set forth in Federal Rule of Civil Procedure 60(b)." *Alberti v. Klevenhagen*, 46 F.3d 1347, 1366 (5th Cir. 1995), citing *Rufo*, 502 U.S. at 379–81.

While declaratory relief may be used by settling parties to determine their rights under the terms of an agreement as written, that is distinct from modifying a final consent judgment—it is the difference between asking a court to interpret a contract and asking a court to rewrite it. The decision in *City of El Paso v. El Paso Entertainment, Inc.*, 535 F. Supp. 2d 813 (W.D. Tex. 2008), *aff'd*, 382 F. App'x 361 (5th Cir. 2010) (per curiam), illustrates the distinction. Several nightclubs alleged that a city's zoning restrictions were unconstitutional, and the parties settled. *Id.* at 815. The city then passed a new ordinance and sought a declaratory judgment that the consent judgment did not bar enforcement of the new law. *Id.* The Defendants moved to dismiss, arguing that Rule 60(b) provided the exclusive pathway for modifying the prior judgment, but the court disagreed. *Id.* at 816–19. Rule 60(b)(5) was "inapplicable" because the city did not seek "to modify or vacate" the consent judgment—it did not challenge "the terms, the fairness, or the ongoing validity" of the settlement—but rather sought to resolve "the legal uncertainty" about whether the new law was enforceable given the preexisting judgment. *Id.* at 817–18, distinguishing *Cook*, 618 F.2d at 1150–52.

The Fifth Circuit agreed. It held that, "[b]y its very nature, a declaratory judgment seeks to determine the rights of the parties as they currently exist; it does not involve the modification or vacation of a prior judgment." *El Paso*, 382 F. App'x at 365. Because the City did not seek "relief

from the 1995 agreed judgment through a motion to reconsider in the original proceeding," but instead sought "to declare the rights of the parties *pursuant* to the 1995 agreed judgment," without seeking any changes to the agreement itself, it "was not required to employ Rule 60(b)." *Id.*

This case is the mirror image of *City of El Paso*. Defendants are *not* seeking to ascertain the meaning of the existing consent judgments vis-à-vis a new law; rather, they seek to modify the judgments and excise the no-deny provision, materially altering the settlement to which they agreed six years ago. But having failed in their prior effort to modify the consent judgments under Rule 60(b), Defendants may not ask the Court to rewrite the consent under the guise of a declaratory judgment action. *Id.*; *cf. Thompson v. Baltimore & O. R. Co.*, 155 F.2d 767, 772 (8th Cir. 1946) ("A court can not by declaratory judgment make contracts for parties * * * .").

Defendants incorrectly contend that "a consent decree is never final" and that "finality should not be an issue of concern." Mot. 5. But the cases cited by Defendants indicate that while courts may have continuing jurisdiction to enforce a judgment as written and to interpret and apply the terms of a consent, the modification or abrogation of a consent decree can occur only pursuant to Rule 60(b). *Id.*, citing *Horne v. Flores*, 557 U.S. 433, 448–51 (2009) (applying Rule 60(b)(5) and noting that "the dynamics of institutional reform litigation differ from those of other cases"). The Commission's ability to ask this Court to vacate the judgment in the event of a breach—pursuant to the agreed terms of the consent—does not mean that the consent lacks finality or is somehow open-ended, subject to alteration at any time. Defendants distort *Alberti*, Mot. 5, by quoting its description of a court's wide discretion to modify a consent decree, but failing to cite the next paragraph, where the Fifth Circuit held that this discretion (even when exercised in institutional reform litigation) is not "unfettered," but rather is governed by Rule 60(b) and the Supreme Court's decision in *Rufo*. 46 F.3d at 1366. And, as explained more below, the Fifth Circuit has already held *in this case* that modification is not proper under Rule 60(b)(5) and *Rufo*. *Novinger*, 40 F.4th at 307.

Nor do Defendants derive any benefit from Rule 57's statement that "[t]he existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." Mot. 7, quoting Fed. R. Civ. P. 57. It is not "appropriate" to enter declaratory relief when this Court and the Fifth Circuit have denied a request for the same relief under a different banner. *Cook*, 618 F.2d at 1152. A court, "in the exercise of the discretion that it always has in determining whether to give a declaratory judgment, properly may refuse declaratory relief if the alternative remedy is better or more effective." 10B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2758 (4th ed. updated through Apr. 2022) (footnote omitted). Under the parties' agreed-upon remedy, there is an alternative forum for Defendants' constitutional arguments: *if* Defendants were to breach the no-deny provision, and *if* the Commission invoked its contractual remedy by moving to vacate, Defendants would have an opportunity to make their First Amendment arguments as the Court weighs whether to restore the matter to its active docket.

II. Defendants' motion for declaratory relief is not justiciable.

Even if the declaratory judgment mechanism could theoretically be invoked to request the modification of a final consent judgment, Defendants' motion is not justiciable here under the law of the case doctrine, principles of standing and ripeness, and applicable procedural limitations.

A. The Fifth Circuit has already ruled on the availability of the requested relief.

Because Defendants already invoked Rule 60(b) and lost, the relief they are seeking is barred by the law of the case, which "generally precludes reexamination of issues of law or fact decided on appeal." *Todd Shipyards Corp. v. Auto Transp., S.A.*, 763 F.2d 745, 750 (5th Cir. 1985). Typically, courts refuse to reopen what has already been decided, *Musacchio v. United States*, 577 U.S. 237, 244–45 (2016), and "[w]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case," *Pepper v. United States*, 562 U.S. 476, 506 (2011) (internal quotation marks omitted). Defendants run headlong into this doctrine; they request

a declaration that the no-deny provision purportedly violates their First Amendment rights, and they ask this Court to strike out the no-deny provision from the consents, while maintaining the rest of the settlement terms. Such a declaration would be equitable in nature, as Defendants recognize. Mot. 7; *see Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643, 649 (7th Cir. 2002); *Owens-Illinois, Inc. v. Lake Shore Land Co.*, 610 F.2d 1185, 1189–90 (3d Cir. 1979) (recognizing that a declaratory action involving a contract, absent a claim for damages, is typically equitable).

The problem for Defendants is that the Fifth Circuit, in its Rule 60(b)(5) holding, rejected this request for equitable relief. Rule 60(b)(5) "authorizes relief from a final judgment if, among other things, 'applying it prospectively is no longer equitable.'" *Novinger*, 40 F.4th at 307, quoting Fed. R. Civ. P. 60(b)(5). Yet the Fifth Circuit held that this Court "correctly denied the Defendants' Rule 60(b)(5) motion because the Defendants have not shown that it has become 'no longer equitable' to apply the judgment prospectively." *Id.* at 307–08, citing *Rufo*, 502 U.S. at 383, and *Horne*, 557 U.S. at 447. More specifically, the court held that Defendants failed to "demonstrate a significant factual or legal change that justifies relief, much less one that was unanticipated when they entered the consent judgments." *Id.* at 307.[1] Even after taking into account Defendants' arguments about supposed First Amendment harms arising from the no-deny provisions, the Court held that "those are the terms to which they agreed" and they could not obtain "relief simply because 'it is no longer convenient to live with [those] terms.'" *Id.* at 308 (alteration in original), quoting *Rufo*, 502 U.S. at 383.

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[1] Defendants also cite legal encyclopedia entries regarding when judgments may be "void" under various state laws (as opposed to federal law). Mot. 7, citing 47 Am. Jur. 2d *Judgments* §§ 25, 653 (Sept. 2022). But the Fifth Circuit addressed the meaning of voidness under Rule 60(b)(4), holding that Defendants' consent judgments are not void under federal law. *Novinger*, 40 F.4th at 302–07. Moreover, even if legal encyclopedias had persuasive force, the provisions cited by Defendants merely echo what the Fifth Circuit already held. *Compare* 47 Am. Jur. 2d Judgments § 25 ("[A] judgment is not void simply because it is erroneous."), *with Novinger*, 40 F.4th at 302 ("A legal error, standing alone, does not render a judgment void."), citing *Espinosa*, 559 U.S. at 270.

It is thus the law of this case that Defendants do not have a meritorious argument for excising the no-deny provision. Just as courts deny requests for relief that echo rejected Rule 60 motions, this Court should deny Defendants' attempt to evade the Fifth Circuit's mandate simply by "[d]raping their claim in the raiment of the Declaratory Judgment Act." *Gilbert v. City of Cambridge*, 932 F.2d 51, 58 (1st Cir. 1991); *see Humanetics, Inc. v. Kerwit Med. Prods., Inc.*, 709 F.2d 942, 944 (5th Cir. 1983) (where a litigant sought to attack a judgment on the very same grounds underlying a rejected Rule 60(b)(4) motion, "the general policy in favor of finality of litigation" counseled against any further relief) (internal quotation marks omitted); *Goodyear Tire & Rubber Co. v. H.K. Porter Co.*, 521 F.2d 699, 700 (6th Cir. 1975) (per curiam) ("Having chosen to raise the issues which it claims entitle it to relief from * * * judgment * * * by way of motion under Rule 60(b), Goodyear did not have available to it the right also to proceed for the same relief in an independent action.").

B. Under principles of standing and ripeness, Defendants have not articulated an actual or imminent enforcement of the no-deny provision.

Article III's limitations on jurisdiction apply to the Declaratory Judgment Act, *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000), and Defendants' claim for relief is not justiciable because there is no controversy "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment," *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (internal quotation marks omitted). *Accord Total Gas & Power N. Am., Inc. v. FERC*, 859 F.3d 325, 333 (5th Cir. 2017). As a matter of both standing and ripeness, Defendants must identify an "actual or imminent" injury, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted), that must be "certainly impending and immediate" and "not remote, speculative, conjectural, or hypothetical," *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1293 (D.C. Cir. 2007). The focus is on "whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention." *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993).

A "possible future injury" will not suffice. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Thus, "[a] harm that will not occur unless a series of contingencies occurs at some unknown future time is not concrete, particularized, actual and imminent." *Kan. Corp. Comm'n v. FERC*, 881 F.3d 924, 926 (D.C. Cir. 2018); *accord United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) ("A claim is not ripe for review if 'it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'"), quoting *Texas v. United States*, 523 U.S. 296, 300 (1998). Particularly in the pre-enforcement context, Defendants must demonstrate "a credible threat of enforcement or prosecution," and "the existence of an actual controversy is not established" by "allegations of fear of enforcement or prosecution that is remote, hypothetical or speculative." 12 MOORE'S FED. PRAC. § 57.22[8][a][i], citing *Miss State Dem. Party v. Barbour*, 529 F.3d 538, 546 (5th Cir. 2008), and *Septum, Inc. v. Keller*, 614 F.2d 456, 459 (5th Cir. 1980) (requiring "credible threat of prosecution").

At this juncture, with a consent judgment already entered, the possible "injury" from which Defendants seek relief is that the Commission may, at some point in time and following a public denial, avail itself of its contractual remedy and move to vacate, which, if granted, would return the case to the active docket. But this supposed harm rests on multiple contingencies, and Defendants have not identified a "credible threat" that the Commission will invoke its contractual remedy against them. *MedImmune*, 549 U.S. at 127. The Commission is not aware of any breach by Defendants, Defendants have not suggested that they have made any public denials, and they do not claim that the Commission has threatened to invoke the no-deny provision. If Defendants were to breach by publicly denying the allegations in the complaint, the Commission would have to decide how to proceed under the facts and circumstances, and it might decide to do nothing—it might

decline to allocate its resources to trying to return a six-year old case to the active docket.[2] Alternatively, if the Commission were to invoke the no-deny provision and seek relief, this Court would then exercise its discretion in deciding whether to return the case to the active docket.

Whether this particular "extended chain of contingencies" would come to pass, leading the Commission to seek to vacate the judgments, is "entirely conjectural," and, consequently, the imminence requirement has not been satisfied. *Williams v. Lew*, 819 F.3d 466, 473 (D.C Cir. 2016). By contrast, in *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 220–21 (4th Cir. 2019), cited at Mot. 18, the settling defendant had already enforced its contractual remedy for breach of non-disparagement clause, clawing back half the settlement amount from the plaintiff with no prior judicial review. The panel assessed whether to uphold the plaintiff's waiver of her First Amendment rights, which was not *per se* unconstitutional, and the majority (over a dissent) declined to enforce the waiver after balancing the interests under the facts and circumstances presented. *Id.* at 221–23.

Defendants effectively seek a preemptive declaration as to the validity of a constitutional defense they could raise in response to a hypothetical motion to vacate. But Article III does not allow litigants to use the Declaratory Judgment Act that way. *See Calderon v. Ashmus*, 523 U.S. 740, 747–48 (1998) (class of habeas petitioners could not preemptively sue for a declaration as to the validity of a defense that might be raised by the government); *Coffman v. Breeze Corp.*, 323 U.S. 316, 324 (1945) (patent owner could not seek preemptive declaration about the validity of a statutory

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[2] Defendants allude to the possibility of contempt, but it is not an option here. Mot. 5, 19, citing *Cato Inst. v. SEC*, 4 F.4th 91 (D.C. Cir. 2021) (per curiam). In *Cato*, which was decided on Article III standing grounds, the D.C. Circuit discussed the power of courts to respond to violations of consent judgments, mentioning contempt in the abstract. *Id.* at 96. But it did not review actual language from no-deny provisions (because the plaintiff never submitted the consent judgments at issue). A consent judgment must be interpreted based on what the parties agreed. *United States v. ITT Cont'l Banking Co.*, 420 U.S. 223, 233–34 (1975); *United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 343 (D.C. Cir. 2014). In this instance, the parties agreed that the *only* remedy for a breach is a motion to vacate, not contempt. Defendants have not pointed to *any* incidence of the Commission seeking, or a court ordering, contempt for a breach of a no-deny provision.

defense that might be raised by a licensee in a royalties suit). Anticipatory declaratory-judgment litigation may be permissible in some First Amendment cases, *see Calderon*, 523 U.S. at 748–49, citing *Steffel v. Thompson*, 415 U.S. 452 (1974), but only where there is an "imminent threat" of government action and "consequent deterrence." In *Steffel*, for example, "protesters had twice been told they would be arrested for handbilling in front of a shopping center, and the plaintiff's companion had in fact been arrested." *Id.* at 749, citing *Steffel*, 415 U.S. at 455–56, 459.

Defendants have not identified any facts that create the kind of "imminence" present in *Steffel* and required by Article III. They have not shown a "certainly impending" harm *to them* based on their interactions with the Commission. Instead, they discuss consent judgments more broadly, referring in passing to congressional testimony from 2012 that described an instance where the CEO of a large investment firm expressed regret for downplaying the seriousness of settled charges after being publicly reminded of the terms of the settlement. Mot. 8 n.3. And they locate a single instance of the Commission moving to vacate a judgment in 1996 where the settling defendant publicly denied allegations *seven days* after settling, the Commission filed a motion to vacate, the parties resolved the issue, and the Commission then withdrew its motion. SEC Litig. Rel. No. 14886 (Apr. 22, 1996). But asking a defendant to comply with a contract, or seeking relief days after settlement, is not the same as invoking a contractual remedy six years after settlement, let alone obtaining the requested relief from the court. *See Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 176 (D.C. Cir. 2012) (the fact "[t]hat a theoretical possibility of lawsuits exists does not establish the required probability" that such lawsuits would occur, be properly predicated, and prevail).

The Fifth Circuit has long enforced limitations on using the Declaratory Judgment Act in relation to such hypothetical injuries. *Middle S. Energy, Inc. v. New Orleans*, 800 F.2d 488, 491 (5th Cir. 1986) (stating that the court "must be careful to 'avoid imposition under [our] jurisdiction through obtaining futile or premature interventions, especially in the field of public law'"), quoting *Pub.*

Service Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 243 (1952); *Bd. of Comm'rs for Buras Levee Dist. v. Cockrell*, 91 F.2d 412, 413–14 (5th Cir. 1937) (expressing doubt about whether there was a controversy justiciable under the Declaratory Judgment Act where "[t]here seem[ed] to be * * * only a difference of opinion as to the scope of a former decree as it may affect possible controversies which may develop in the future over unascertained tracts of land"). Here, too, uncertainties over whether Defendants would ever breach the no-deny provisions and, if so, how the Commission would respond, render Defendants' request non-justiciable.

At various points, Defendants cite cases involving "chilling effects." Mot. 8, 18. But there are limits to the concept of subjective chill, particularly in the declaratory judgment context. A subjective assertion of chill alone does not indicate ripeness. *See Laird v. Tatum*, 408 U.S. 1, 11–14 (1972) (distinguishing cases where a party merely "fear[ed] that * * * [an] agency might in the future take some other and additional action" from those where an "exercise of governmental power was regulatory, proscriptive, or compulsory in nature"). A party must show "more than a subjective chill—that is, that he is seriously interested in disobeying, and the defendant seriously intent on enforcing, the challenged measure." *Justice v. Hosemann*, 771 F.3d 285, 291 (5th Cir. 2014) (internal quotation marks omitted). Nor can a party "manufacture standing by self-censoring her speech based on what she alleges to be a reasonable probability" that some series of eventualities might occur. *Glass v. Paxton*, 900 F.3d 233, 242 (5th Cir. 2018) (no standing where a professor alleged a subjective First Amendment chill based on a fear that students holding concealed-carry permits might act violently). Having waived their First Amendment rights via settlement, Defendants cannot now seek premature adjudication of their First Amendment claims based on a series of hypothetical concerns about (i) whether they might breach, (ii) how the Commission might react, and (iii) how this Court might respond to a request to vacate the judgments.

C. Defendants' motion is procedurally improper.

Finally, the Court should deny Defendants' motion because it improperly tries to turn the Commission into a defendant in its own action. Defendants are filing a motion for affirmative, declaratory relief as part of the Commission's enforcement action in which it is a plaintiff. Generally, however, "a party may not make a motion for declaratory relief, but rather, the party must bring an action for a declaratory judgment." *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 823, 830 (11th Cir. 2010) (emphasis omitted), quoting *Kam-Ko Bio-Pharm Trading Co., Ltd.-Australasia v. Mayne Pharma (USA), Inc.*, 560 F.3d 935, 943 (9th Cir. 2009). Moreover, the federal securities laws would preclude Defendants from consolidating a separate declaratory judgment action (which would fail in any event) with the Commission's enforcement action. Under Section 21(g) of the Securities Exchange Act of 1934, "no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common question of fact," unless the Commission consents. 5 U.S.C. 78u(g); *see also SEC v. McCaskey*, 56 F. Supp. 2d 323, 325 (S.D.N.Y. 1999) (stating that Section 21(g) "has routinely been employed to dismiss third-party complaints, and counterclaims"); *SEC v. Weintraub*, 2011 WL 4346580, at *1 (S.D. Fla. Sept. 16, 2011) (collecting cases). The Commission does not consent, and Defendants cannot commandeer the Commission's action to assert a request for declaratory relief that rehashes their failed Rule 60(b) motion.

III. Defendants' First Amendment and other arguments are without merit.

Even if the Court were to reach the substance of Defendants' request for declaratory relief, their constitutional and statutory arguments are unavailing.

A. Defendants voluntarily waived their First Amendment rights when they agreed to the no-deny provisions as part of the consent judgments.

Defendants continue to sidestep the dispositive difference between an agreement to be silent and a restraint imposed against the will of the silenced party. "Generally, constitutional rights can be

waived as part of" a settlement with the government, such "as a plea agreement." *United States v. Keele*, 755 F.3d 752, 756 (5th Cir. 2014). And just as "it is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights," *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987), it is settled that parties can waive their constitutional rights when voluntarily resolving other types of litigation. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 321–22 (2001) (describing plea agreements as "a *quid pro quo* between a criminal defendant and the government"—"[i]n exchange for some perceived benefit, Defendants waive several of their constitutional rights (including the right to a trial)").

Defendants do not cite, let alone grapple with, *Rumery*, which controls the outcome here. In *Rumery*, the Court upheld the enforcement of an agreement in which a defendant released his right to bring a Section 1983 action against government actors in exchange for the dismissal of pending criminal charges. 480 U.S. at 390–92. The Court rejected the contention that such agreements are always improper simply because they require "difficult choices that effectively waive constitutional rights." *Id.* at 393. The Court saw "no reason to believe that [the agreements at issue] pose a more coercive choice than other situations," and it declined to establish "a *per se* rule of invalidity." *Id.* at 393–95; *accord Berry v. Peterson*, 887 F.2d 635 (5th Cir. 1989) (upholding waiver of constitutional right to sue under Section 1983 as part of a settlement); *Lake James Cmty. Volunteer Fire Dep't v. Burke Cty.*, 149 F.3d 277, 280 (4th Cir. 1998) ("[S]imply because a contract includes the waiver of a constitutional right does not render the contract *per se* unenforceable."). Instead, the Court established a balancing test that is used for deciding whether to maintain a waiver in the event a party seeks to enforce a judgment containing the waiver. *Rumery*, 480 U.S. at 392.

Applying *Rumery* to a different Commission consent judgment containing a nearly identical no-deny provision, the Second Circuit stated that, in "the course of resolving legal proceedings, parties can, of course, waive their rights, including such basic rights as the right to trial and the right

to confront witnesses." *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021), citing *Rumery*, 480 U.S. at 393, *cert. denied*, 142 S. Ct. 2836 (2022). "The First Amendment is no exception, and parties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings." *Id.*; *accord Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993), *as amended* (Mar. 8, 1994) ("The Supreme Court has held that First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary, and intelligent."), citing *D.H. Overmyer Co. v. Frick Co.*, 450 U.S. 174, 185, 187 (1972). Thus, *Romeril* held that a no-deny provision did "not violate the First Amendment because Romeril waived his right to publicly deny the allegations of the complaint" when he agreed to the "provision as part of a consent decree." 15 F.4th at 172–73, citing *United States v. Int'l B'hd of Teamsters*, 931 F.2d 177, 187–88 (2d Cir. 1991) (holding that when a union resolved an enforcement action through a consent decree that limited the publication of election materials, the union could not challenge the judgment later because it had waived any First Amendment objection).

Relinquishment of constitutional rights, including First Amendment rights, occurs in many contexts. In addition to *Rumery* and *Romeril*, courts "have routinely enforced voluntary agreements with the government in which citizens have" ceded First Amendment rights. *Lake James*, 149 F.3d at 280 (citations omitted). Courts have likewise rejected First Amendment claims by cable television providers who effectively bargained away some free-speech rights by entering into franchise agreements with municipalities that limited the providers' ability to engage in commercial speech. *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988). And the Ninth Circuit has held that a union waived its First Amendment right to petition when it entered into a collective bargaining agreement with a government. *Leonard*, 12 F.3d at 889–90. Similarly, courts have held that in the context of consent decrees agreed to by private parties, one party cannot later seek *vacatur* on the basis that the

settlement violated the First Amendment when it "voluntarily agreed" to "abide by the very provisions that it now challenges as unconstitutional." *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 206–07 (3d Cir. 2012). The basic principle is that a party to a consent decree "is in no position to claim that such decree restricts his freedom of speech" because "[h]e has waived his right and given his consent to its limitations." *In re George F. Nord Bldg. Corp.*, 129 F.2d 173, 176 (7th Cir. 1942).[3]

B. Defendants offer no legitimate justification for disregarding the waiver of their First Amendment rights.

Even if there were an actual and imminent controversy regarding the waiver—if the Court were being asked to consider whether to enforce it in a concrete scenario—the Court would apply the balancing test for enforcement established by *Rumery*. *See* 480 U.S. at 392 (courts must assess whether "the interest in [a waiver's] enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement"). And under that test, Defendants' voluntary waivers should be upheld because the interests in maintaining the parties' agreement and affording the Commission the opportunity to test denials in court outweigh the Defendants' interests in keeping most of the bargained-for settlement provisions while eliminating the no-deny provision.

1. There is a strong interest in enforcing the no-deny provisions to preserve the ability to test denials in court.

Rumery's balancing of interests is set against the backdrop of "[l]ong standing precedent" that "evinces a strong public policy against judicial rewriting of consent decrees." *Reynolds v. Roberts*, 202 F.3d 1303, 1312 (11th Cir. 2000). Courts are "reluctant to upset th[e] balance of advantages and disadvantages" memorialized in a consent decree, *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983)

[3] Defendants cite the line in Judge Jones's concurrence (joined by Judge Duncan) referring to prior restraints. Mot. 1, 4, 9–10, quoting *Novinger*, 40 F.4th at 308. The Commission respectfully disagrees with this statement, which does not discuss *Rumery*, but it is dicta in any event because "it was not necessary to the decision," which turned on Rule 60(b)(4)–(5). *United States v. Nixon*, 777 F.2d 958, 966 (5th Cir. 1985).

(per curiam), particularly because a "defendant who has obtained the benefits of a consent decree—not the least of which is the termination of the litigation—cannot then be permitted to ignore such affirmative obligations as were imposed by the decree," *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985).

The no-deny provision ensures that if Defendants were ever to deny the allegations after settling without admissions, the Commission can seek to have its day in court and obtain findings of fact and conclusions of law. "The parties have a right to compromise their dispute on mutually agreeable terms." *United States v. City of Miami, Fla.*, 664 F.2d 435, 440 (5th Cir. 1981) (en banc, per curiam); *SEC v. Citigroup Glob. Mkts., Inc.*, 673 F.3d 158, 166 (2d Cir. 2012) (per curiam) (*Citigroup I*) (stating that a "settlement is by definition a compromise"). And a material part of the compromise for the Commission was retaining the ability to seek to try the case with evidence, in court, if Defendants later deny what the complaint alleges they did.

Upholding the Commission's ability to revive its case would avoid issues that could result if a defendant settles without admissions one day and denies the next. A complaint and a consent judgment reflect the Commission's determination that the securities laws were violated. If a defendant denies the allegations—unlike with criminal pleas that require admissions and factual bases for the plea, Fed. R. Crim. P. 11—it could create the incorrect impression that there was no basis for the Commission's enforcement action, but only after the Commission relinquished the ability to obtain "the filing of findings of fact and court opinions," and possibly after the passage of time has dimmed memories and reduced the availability of probative evidence. *Clifton*, 700 F.2d at 748. Such denials could also undermine the credibility of courts that enter consent judgments, which require "a determination that the proposal represents a reasonable factual and legal determination based on the facts of record." *Miami*, 664 F.2d at 441; *see also Citigroup* II, 752 F.3d

at 295–96 (district courts may approve consent judgments after establishing "that a factual basis exists for the proposed decree").

Allowing revision of consent judgments long after entry raises other concerns. If Defendants can easily "reopen consent decrees years later, the [Commission] would have little incentive to enter into such agreements." *Miller v. SEC*, 998 F.2d 62, 65 (2d Cir. 1993). Consent judgments allow parties to "manage risk," but if defendants can remove material terms years later through dubious requests for declaratory relief, the Commission (and defendants who would like to settle) may be forced to proceed to trial more often. *Citigroup II*, 752 F.3d at 295. This would affect the Commission's ability "to conserve its own and judicial resources." *Clifton*, 700 F.2d at 748. And it would undercut the "public policy in favor of voluntary settlements." *United States v. City of Alexandria*, 614 F.2d 1358, 1361–62 (5th Cir. 1980); *accord In re Deepwater Horizon*, 739 F.3d 790, 807 & n.69 (5th Cir. 2014). A litigant should not be allowed "to withdraw from performing its obligations * * * while it still continues to retain all of the benefits it received from the [other party] as a result of the agreements." *Erie Telecomms.*, 853 F.2d at 1097.

2. Defendants lack a strong interest in disregarding the no-deny provision while retaining other settlement terms.

Defendants offer the same "grab bag of First Amendment challenges" that they offered in the Fifth Circuit, *Novinger*, 40 F.4th at 304, but none justifies disregarding their voluntary waivers. First, they incorrectly analogize the no-deny provisions to injunctions. Mot. 19, 23. But the no-deny provisions are not injunctive; they are separate from the injunctive relief in the consents, they are not governed by Rule 65, and contempt is not available as a remedy for a breach of this contractual provision. *Compare* Dkt. No. 33-1 ¶ 12 (relief for breach of no-deny provision), *with* Dkt. No. 37, §§ V, VI, VII (contempt as sanction for failure to pay remedies).

Second, Defendants turn to the "unconstitutional conditions" framework, which sometimes applies when certain government benefits are involved. Mot. 17–18. But the Commission's

acceptance of Defendants' offers of settlement is not a benefit—it is not the equivalent of disbursing funds, granting a permit, or issuing a license. *Cf. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214–15 (2013) (distinguishing between permissible limits on spending and improper attempts to leverage "funding to regulate speech outside the contours of the program"). The Commission does not settle cases to benefit Defendants—it settles cases to benefit the public by obtaining the best possible outcome for the public interest, while minimizing risk and maximizing its allocation of finite resources. *Citigroup II*, 752 F.3d at 295. If every settlement were a benefit, and every waiver of constitutional rights an "unconstitutional condition," it would effectively end government settlements, which always contain waivers.

Third, enforcing the waiver will not compel speech, as Defendants claim. Mot. 16–17. In contrast to statutes and regulations that require speech, the no-deny provision reflects voluntary agreement—the opposite of compulsion. And the provision does not require Defendants to speak at all. Silence is an option.

Fourth, Defendants contend that upholding the waiver will limit public debate about the Commission. Mot. 20–22. To begin with, Defendants may contribute to that debate in many ways without triggering the no-deny provision. For example, the Commission could not request *vacatur* if Defendants were to advocate for change in enforcement practices, criticize the Commission, or encourage others to do so. And it makes little sense to assert that the no-deny provision is "designed to suppress truth." Mot. 14. The provision, in effect, determines the venue for denials because the only option the no-deny provision confers on the Commission is the option to seek to reset the matter for trial, at which point the Defendants can deny the allegations in a courtroom. Defendants' alternative vision—litigation by dueling press releases, Mot. 15—is a poor substitute for the premier "truth-finding" function of a trial, where allegations and denials can be tested under the rules of procedure and evidence. *United States v. Cheramie*, 520 F.2d 325, 333 (5th Cir. 1975).

The resources expended in trying a case are just one of the many factors that parties consider in deciding whether to settle. *Citigroup II*, 752 F.3d at 295. Defendants echo concerns about the presumed (albeit unproven) costs of litigation mentioned by the *Novinger* concurrence, Mot. 10, but many Defendants choose to litigate district court actions against the Commission. And, as the Supreme Court has held, the fact that settling Defendants often "are required to make difficult choices that effectively waive constitutional rights" does not mean that waivers should not be enforced. *Rumery*, 480 U.S. at 393.

Finally, in an unsuccessful effort to illustrate the supposedly "real consequences" of no-deny provisions, Defendants resort to fiction; they misrepresent what occurred in a series of civil and criminal cases involving an options backdating scheme, and they mistakenly accuse the Commission of impropriety. Mot. 11–12. The Commission entered into a consent judgment with a defendant (Tullos) to resolve a civil enforcement action (the Commission cannot bring criminal actions); Tullos agreed to pay a civil penalty and disgorgement, the amount of which was deemed satisfied when the issuer (Broadcom, her employer) cancelled her options. *SEC v. Tullos*, No. 08-cv-242, Dkt. Nos. 5–6 (C.D. Cal. 2008). A year later, a district court dismissed criminal proceedings against *different* Broadcom officers charged in the backdating scheme based on its view that attorneys at *a different government agency* had engaged in prosecutorial misconduct. *United States v. Ruehle*, No. 08-cr-139, Dkt. Nos. 222, 754, 780, 828 (C.D. Cal. 2009). The court never found that *Commission attorneys* "grilled" anyone or engaged in "aggressive and questionable enforcement tactics," Mot. 11–12, and Defendants' denunciation is misdirected. In the wake of this criminal dismissal over which it had no control, the Commission ended its civil action against the other Defendants, which was separate from Tullos's case. *See SEC v. Nicholas*, No. 08-cv-539, Dkt. No. 67 (C.D. Cal. 2010). As for Tullos, Defendants get it wrong again: the parties stipulated to an amended final judgment that eliminated disgorgement, effectively allowing Tullos to try and recover the value of her options from the issuer,

but the amended judgment retained the penalty, as well as all the other terms of the consent, including the no-deny provision. *Tullos*, Dkt. Nos. 8, 11.

Defendants never explain the relevance of their incorrect portrayal of *Ruehle* to the no-deny provision to which Tullos agreed. Tullos's consent did not disappear as a result of *Ruehle*. And nothing in the no-deny provision precluded Tullos from speaking about the criminal matter or the other agency's misconduct; the no-deny provision reflected her voluntary agreement not to contest the allegations in the Commission's action against her.

C. Defendants' statutory bases for declaratory relief are meritless.

In addition to their faulty constitutional claims, Defendants erroneously contend that two other aspects of the no-deny provisions justify declaratory relief. First, they challenge the no-deny policy on Administrative Procedure Act grounds, noting that it was adopted without notice and comment. Mot. 22–24. But APA challenges premised on the procedures used to adopt a rule are foreclosed if not brought in a timely fashion. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016), citing *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 324–26 (D.C. Cir. 1994). Any request for declaratory relief as to 17 C.F.R. 202.5(e), which was adopted nearly fifty years ago, would be untimely because review of Commission orders is exclusive in a proper federal court of appeals and upon a petition filed within sixty days of the order. *See* 15 U.S.C. 77i(a), 78y(a); *N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1128, 1130–36 (D.C. Cir. 2015). Moreover, there was no APA error because Rule 202.5(e), which is a policy that binds the Commission only, fits within the exemption from notice and comment for "general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A).

Second, Defendants' argument that no statute expressly gives the Commission authority to seek no-deny provisions in its settlements, Mot. 23, gets things backwards. "In the absence of an affirmative showing to the contrary, it is presumed that an attorney has authority to compromise and

settle a case." *Hot Springs Coal Co. v. Miller*, 107 F.2d 677, 680 (10th Cir. 1939); *accord Citigroup II*, 752 F.3d at 295 (noting "the S.E.C.'s discretionary authority to settle on a particular set of terms").[4] The Commission's authority to bring enforcement actions necessarily includes the ability to negotiate settlements, to enter into settlements, to obtain waivers necessary to settlements, and to agree to other terms, including those that defendants insist upon.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion for declaratory relief.

Dated: September 13, 2022

Respectfully submitted,

/s/ B. David Fraser

B. David Fraser

Texas Bar No. 24012654
Securities and Exchange Commission Burnett Plaza, Suite 1900
801 Cherry Street, Unit #18
Fort Worth, TX 76102-6882
(817) 978-1409
(817) 978-4927 (fax)
FraserB@sec.gov

Attorney for Plaintiff
Securities and Exchange Commission

[4] Defendants also raise a due process claim, while recognizing that the Fifth Circuit's prior ruling forecloses it. Mot. 18; *see Novinger*, 40 F.4th at 303–04.

CERTIFICATE OF SERVICE

I affirm that on September 13, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court for the Northern District of Texas, Fort Worth Division, by using the CM/ECF system which will send a notice of electronic filing to all CM/ECF participants.

/s/ B. David Fraser
B. David Fraser