UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

Case No. 21-cv-02114 (KMM/JFD)

CAREBOURN CAPITAL, L.P., CAREBOURN PARTNERS, LLC *Relief Defendant*, and CHIP ALVIN RICE,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Pursuant to the Court's broad discretion to accept amicus briefs, the Alternative Investment Management Association, Ltd. ("AIMA"), Trading and Markets Project, Inc. ("TMP"), and National Association of Private Fund Managers ("NAPFM") (collectively, "Amici") respectfully seek leave to file the accompanying brief as amici curiae in support of Defendants' motion for summary judgment and in opposition to Plaintiff's motion for summary judgment (together, "Cross Motions"). Defendants consent to Amici filing their brief; Plaintiff the United States Securities and Exchange Commission ("SEC") opposes this motion.

In support of the motion, Amici state as follows:

1. Amici are three trade organizations affiliated with the finance industry and securities markets that have a keen interest in securities regulation and the interpretation of the securities laws.

- AIMA is the global representative of the alternative investment industry. AIMA's members manage over $2 trillion in hedge fund assets and include some of the world's largest, most sophisticated investors.

- TMP is a non-partisan non-profit organization dedicated to enhancing capital markets and ensuring the stability and competitiveness of the financial system. TMP advocates on behalf of entities and individuals focused on securities regulation and the securities markets—including private fund managers, registered investment advisers, investment companies, and others. TMP members include, among others, financial market participants, and former officials from the SEC and the legislative, executive, and judicial branches of government.

- NAPFM represents the legal and economic interests of investment advisers in the private fund management industry, which serve a diverse set of investors including pensions, endowments, and insurers.

2. Amici and their members have a strong interest in how courts and the SEC define the meaning of the term "dealer" under the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78c(a)(5). In a growing number of cases, including this one, the SEC appears to be arguing for the first time for a much broader definition of the term "dealer" than courts have traditionally recognized. The SEC has even argued that *any* person that buys and sells securities as a business is a "dealer," regardless of whether they have customers, as the statutory definition historically has been understood to require, and regardless of the presence of the factors the SEC has developed, applied, and encouraged participants to rely upon. *See, e.g.*, Dkt. 127 (SEC Mot.) at 1, 2, 20, 23-25; Dkt. 142 (SEC Opp.) at 26-27, 29-34.

3. Many members of Amici have long understood that they are not "dealers" under the Exchange Act based on the language of the statute, the underlying history and context of the Exchange Act, and years of guidance from the SEC. But that understanding has been called into question by the SEC's theory and statements in cases like this one. If the SEC's new view becomes the law, it could cause major consequences and hardship beyond this case by negatively impacting capital markets and market participants like Amici's members—which include investment advisers, public and private funds, insurers, family offices, foundations, retirees, individual investors, and others. Amici therefore seek leave to file their brief to highlight the potential industry-wide implications of the SEC's position and the Court's decision in this case, and to help avoid unintended consequences if the Court were to adopt the SEC's novel and broad interpretation of the Exchange Act.

4. This Court has broad discretion to accept amicus briefs that it deems "useful." *Murphy by Murphy v. Piper*, 2018 WL 2088302, at *11 (D. Minn. May 4, 2018); "The decision to allow the filing of an amicus brief is based on 'whether the brief[s] will assist the Court by presenting arguments, theories, and or facts that are not contained in the parties' briefs.'" *North Dakota v. Heydinger*, 2013 WL 593898, at *7 (D. Minn. Feb. 15, 2013) (quoting *ACLU of Minn. v. Tarek ibn Zayad Acad.*, 2010 WL 1840301, at * 9 (D. Minn. May 7, 2010)). Courts have also accepted an amicus brief "[i]n the interest of compiling a comprehensive record on … the difficult issues before it." *Ossman v. Diana Corp.*, 825 F. Supp. 870, 873 n.13 (D. Minn. 1993).

5. Applying this standard, this Court and others in this district have routinely accepted amicus briefs. *See, e.g.*, Order, *Worth v. Harrington*, No. 21-cv-01348 (D. Minn.

Aug. 12, 2022), ECF No. 69 (granting motions to file amicus briefs); *Pavek v. Simon*, 2020 WL 1467008, at *4 (D. Minn. Mar. 26, 2020) (granting motion to file amicus brief "filed late in the briefing cycle"); *Murphy*, 2018 WL 2088302, at *12 (granting motion to file amicus brief); *see Heydinger*, 2013 WL 593898, at *7 (granting motion to file amicus brief); *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 38 F. Supp. 3d 1043, 1054-55 (D. Minn. 2014) (granting motion to file amicus brief).

6. Amici's brief easily satisfies this standard. Among other things, it provides:

- context about convertible securities in financial markets, including an explanation as to why these instruments are important for investors and for companies that may otherwise be unable to access capital;

- an overview and detail about how the regulatory framework for investment advisers and funds differs from the framework for dealers, and why those differences support construing the definition of a "dealer" more narrowly than the SEC urges to avoid causing harm to capital markets and a broad swath of market participants;

- discussion of the text, history, and structure of the Exchange Act showing that Congress understood the definition of a "dealer" and the "regular business" exemption to limit dealer status to entities that transacted for their own account to execute customer orders and earned transaction-based compensation, not traders who bought and sold securities for investment purposes; and

- strong reasons for this Court to look to the SEC's own guidance in determining what constitutes dealing—as an SEC official recently encouraged market participants to continue doing, and as the Eighth Circuit implicitly did in a case involving an unregistered dealer and explicitly did in a case involving an unregistered broker.

In sum, Amici's brief should be accepted because among other things Amici "are entities with particular expertise not possessed by any party to the case," "argue points deemed too far-reaching for emphasis by a party," and "explain the impact a potential

holding might have on an industry[.]" *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002); *see Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761 (7th Cir. 2020) (Scudder, J., in chambers) (describing value of amicus briefs).

7. Amici have good cause for filing their brief now. Following the SEC's submission of supplemental authority in support of its position on the Cross Motions (*see* Dkt. 161), Amici became aware of the status of this case and appreciated its relevance to the SEC's broader efforts to revise the definition of "dealer" through various enforcement actions across the country.

8. Accepting Amici's brief will not delay the Court's consideration of this case. Nor will the SEC be prejudiced by allowing Amici to provide the Court with their considered and unique perspective on the issues in this case. Indeed, the SEC's recent submission of supplemental authority indicates that the SEC itself believes the Court could benefit from additional information as it considers the Cross Motions. *See* Dkt. 161.

9. Counsel for the SEC has stated that the SEC opposes Amici's motion because the SEC believes it could cause delay and unnecessary expenditure of resources when the Cross Motions have been fully briefed. Notably, however, in other cases counsel for the SEC has consented to or did not oppose motions by Amici to file briefs even when the underlying motion or appeal was already fully briefed.[1] A district court in the Southern

[1] *See* Unopposed Letter Mot. for Leave to File Br. as Amici Curiae, *SEC v. Morningview Fin., LLC*, No. 22-cv-08142 (S.D.N.Y. June 30, 2023), ECF No. 29; Unopposed Mot. of TMP for Leave to File Amicus Curiae Br. Supporting Defs.-Appellants and Reversal, *SEC v. Almagarby*, No. 21-13755 (11th Cir. July 13, 2023), ECF No. 60-1; *see also* Br. of AIMA as Amicus Curiae Supporting Def.-Appellant and Reversal at 1 n.1, *SEC v. Keener*, No.

District of New York recently granted a motion by Amici to file a brief in support of a fully briefed motion to dismiss claims asserted by the SEC that are similar to the claims asserted here. *See* Order granting motion for leave to file amicus brief, *SEC v. Morningview Financial, LLC,* No. 22-cv-08142 (S.D.N.Y. July 5, 2023), ECF No. 32. And, in other contexts, courts have found good cause to grant motions by amici to file a brief more than 7 days after the filing of the principal brief of the party being supported. *See* Order, *Cal. Rest. Ass'n v. City of Berkeley*, No. 21-16278 (9th Cir. Mar. 31, 2022), ECF No. 64 (granting trade association's out-of-time amicus motion); Order, *In re Coinbase Inc.*, No. 23-1779 (3d Cir. May 11, 2023), ECF No. 20 (granting trade association's out-of-time amicus motion).

10. Any prejudice the SEC contends it might suffer by expending additional time and effort to litigate this case is far outweighed by the public interest in this Court having the opportunity to consider Amici's perspective as it considers the Cross Motions. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (noting courts "retain[] the independent power" and duty "to identify and apply the proper construction of governing law"); *United States v. Undetermined Quantities of All Articles of Finished & In-Process Foods*, 936 F.3d 1341, 1350 (11th Cir. 2019) ("The court's role is to get it right, not to choose which side's argument is better and adopt it lock, stock, and barrel.").

11. Amici certify that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the

22-14237 (11th Cir. June 7, 2023), ECF No. 36 (noting SEC consent to the filing of the amicus brief).

brief; and no person—other than amicus curiae, its members, or its counsel—contributed money intended to fund preparing or submitting the brief.

12. Given their substantial interest in this case, Amici respectfully move for leave to file the attached brief as amici curiae.

Date: July 24, 2023

Respectfully submitted,

/s/ Gabriel K. Gillett

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CERTIFICATE OF COMPLIANCE

I, Gabriel K. Gillett, an attorney, hereby certify that this memorandum complies with Local Rule 7.1(h) because the memorandum was prepared using 13-point font. I further certify that this document complies with Local Rule 7.1(f) because this memorandum contains 1,692 words as indicated by the word count function of Microsoft Office Word 365 which was used to prepare this document, excluding those items contained in Local Rule 7.1(f)(1)(C). The word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the above word count.

/s/Gabriel K. Gillett
Gabriel K. Gillett

CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, hereby certify that on July 24, 2023, I caused the attached **Motion, Memorandum of Law in Support of Motion for Leave to File Amici Curiae Brief in Support Of Defendants on Cross Motions for Summary Judgment,** and **Proposed Order** to be electronically filed with the clerk of the Court for the United States District Court, District of Minnesota using the CM/ECF system. I certify that all participants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Gabriel K. Gillett
Gabriel K. Gillett

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

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CAREBOURN CAPITAL, L.P., CAREBOURN PARTNERS, LLC *Relief Defendant,* and CHIP ALVIN RICE,

Defendants.

Case No.: 21-cv-02114 (KMM/JFD)

BRIEF OF ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION, LTD., TRADING AND MARKETS PROJECT, INC., AND NATIONAL ASSOCIATION OF PRIVATE FUND MANAGERS AS AMICI CURIAE IN SUPPORT OF DEFENDANTS ON CROSS MOTIONS FOR SUMMARY JUDGMENT

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INTEREST OF AMICI CURIAE[1]

The Alternative Investment Management Association, Ltd. ("AIMA") is the global representative of the alternative investment industry. AIMA's members manage over $2 trillion in assets and include some of the world's largest, most sophisticated investors.

Trading and Markets Project, Inc. ("TMP") is a non-partisan non-profit organization dedicated to enhancing capital markets and ensuring the stability and competitiveness of the financial system. TMP advocates on behalf of entities and individuals focused on securities regulation and the securities markets—including private fund managers, registered investment advisers, investment companies, and others. TMP members include, among others, financial market participants, and former officials from the Securities and Exchange Commission ("SEC") and the legislative, executive, and judicial branches of government.

The National Association of Private Fund Managers ("NAPFM") represents the legal and economic interests of investment advisers in the private fund management industry, which serve a diverse set of investors including pensions, endowments, and insurers.

Amici and their members have a strong interest in how courts and the SEC define the meaning of the term "dealer" under the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78c(a)(5). Many members of Amici—including investment advisers and managers of private funds and other institutional investors—have long understood that

[1] No party or party's counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting the brief, and no person other than amicus, its members, or its counsel contributed money intended to fund preparing or submitting the brief. *Cf.* Fed. R. App. P. 29.

they are not "dealers" under the Exchange Act based on the language of the statute, the underlying history and context of that Act, and years of guidance from the SEC. But in recent cases like this one, the SEC has argued for a much broader definition of "dealer" than courts and market participants have traditionally recognized. Amici therefore write to provide the Court with important background and context, additional support for Defendants' legal arguments about what it means to be a "dealer," and to amplify why this Court should reject the SEC's position to avoid causing serious negative consequences beyond this case—including for capital markets and many market participants.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises important issues of statutory interpretation because the SEC proposes breaking with nearly a century of precedent and reinterpreting the securities laws contrary to their long-understood meaning. The Exchange Act defines a "dealer" as "any person engaged in the business of buying and selling securities … for such person's own account," 15 U.S.C. § 78c(a)(5)(A), and includes an express exemption for persons buying and selling securities "not as a part of a regular business," *id.* § 78c(a)(5)(B). That language historically has been understood—and was understood by Congress when passing the Exchange Act in 1934—as limiting "dealer" status to a narrow category of entities that buy and sell securities to execute *customer* orders.

Here, however, the SEC suggests that *anyone* "engaged in the business of buying and selling securities" for their own account may be a dealer—regardless of whether they have customers, as the statutory definition historically has been understood to require, and

regardless of the presence of the factors the SEC has developed, applied, and encouraged participants to rely upon. *See, e.g.*, Dkt. 127 (SEC Mot.) at 1, 2, 20, 23-25; Dkt. 142 (SEC Opp.) at 26-27, 29-34. That view is wrong. It contravenes the Exchange Act's text, conflicts with long-settled understandings of what it means to be a "dealer" and operate a "regular business," and contradicts the SEC's own guidance that it continues to publicly endorse. The "dealer" definition was never intended to reach market participants like investment advisers, private funds, or institutional investors that trade for investment purposes.

Serious consequences could result if this Court were to adopt the SEC's broad and novel view that any business buying or selling securities is a "dealer"—regardless of whether the transactions were part of a "regular business" for executing customer orders, or the presence of other factors the SEC and market participants have traditionally relied on. Under the SEC's view, almost any professional adviser or investor could arguably be deemed a dealer. This could obligate mutual funds, private funds, pension funds, insurers, family offices, foundations, individuals, and others to register as dealers. In turn, that would ensnare them in a thicket of burdensome and ill-fitting regulation that has nothing to do with their businesses and does not aid regulators or markets, and risk major sanctions for ordinary investments that no one thought constituted dealing at the time. Adhering to the well-settled meaning of "dealer" the SEC has used for almost ninety years, however, is both textually and historically correct and also avoids these harmful consequences.

In any event, the SEC is in the wrong forum to assert its unprecedented view about what it means to be a dealer under the Exchange Act and to restructure its regulatory regime. The SEC does not dispute that Defendants complied with the safe-harbor it provides under Rule 144. If the SEC believes that rule or others are insufficient, it should attempt to change them via proper notice-and-comment rulemaking. If the SEC believes the statutory "dealer" definition is too narrow, it should ask Congress to amend it. But the SEC cannot use this case to target activity it may now dislike by advancing a new interpretation of "dealer" that conflicts with statutory text, historical context, and settled understandings.

ARGUMENT

I. Registered Investment Advisers And Funds Are Different From Dealers.

A. Registered Investment Advisers And Funds Seek Returns For Investors, Including Through Investments In Convertible Securities.

Private investment funds are one type of investment vehicle that can provide competitive, diversified, uncorrelated risk-adjusted returns, as well as downside protection and flexibility. *See* AIMA, FAQs, https://tinyurl.com/34vwwur9 (visited July 24, 2023); *Goldstein v. SEC*, 451 F.3d 873, 876 (D.C. Cir. 2006). They are "usually structured as limited partnerships" to achieve "maximum separation of ownership and management," where "the general partner manages the fund (or several funds) for a fixed fee and a percentage of the [fund's] gross profits" and "[t]he limited partners are passive investors and generally take no part in management activities." *Goldstein*, 451 F.3d at 876; *see* AIMA, FAQs, *supra*. The general partner typically hires an investment adviser, who is paid to provide investment advice and may have discretion to invest and trade for the fund's own account. *See*

SEC, Private Fund, https://tinyurl.com/2p8kxmmp (visited July 24, 2023).

Investors may also utilize other investment vehicles, including private equity funds, registered investment companies, pension funds (public or private), and family offices. Collectively, their impact is substantial. In 2021, U.S. pension plans held over $27 trillion in assets. *See* Cong. Rsch. Serv., IF12117, In Focus: *U.S. Retirement Assets: Amount in Pensions and IRAs* (2022). In 2022, mutual funds were owned by 115.3 million investors and 52.3% of U.S. households. Inv. Co. Inst., *Mutual Funds Are Key to Building Wealth for Majority of US Households* (Oct. 31, 2022).

Among instruments available to investors are convertible notes or bonds, which typically have periodic interest payments but also include "the option to convert [the security] into shares of the underlying company at a later date, often at a discounted rate." Tim Stobierski, Harv. Bus. Sch. Online, *What is Arbitrage?* (July 20, 2021). Convertible bonds are attractive to companies looking to reduce their cost of capital and provide access to funding when companies may lack other options. *See* Elizabeth Howcroft, *RPT-Convertible Bond Issues Surge in Coronavirus-Hit Market*, Reuters (July 6, 2020). Convertible bonds offer investors upside if the company's stock appreciates and afford "a degree of indexation to rising consumer prices." *Why Convertible Bonds Are the Asset Class for the Times*, Economist (July 10, 2021). They are thus "well-suited to fast-changing conditions." *Id.* Since 2021, over $270 billion in convertible bonds have been issued. *See ECM Highlights: FY22*, dealogic (Dec. 19, 2022). Convertible bonds are frequently issued directly by

issuers to investors in a private placement that Rule 144A expressly exempts from the Securities Act's registration requirement; a wide range of market participants rely on the ability to acquire convertible bonds in this manner, without a bank serving as an underwriter.

Advisers, funds, and investors ultimately seek returns on investment rather than to profit from market-making. Investment opportunities may come from an SEC-registered broker or dealer engaged by an issuer looking for investors, or from a fund or adviser contacting a registered broker or dealer in search of investments that meet certain criteria. Typically, investments are made through or with the assistance of a broker or dealer intermediary, not through a structure where the issuer is the customer. And typically the adviser, fund, or investor does not hold itself out as predominantly being in the business of matching buyers and sellers or of financing companies by underwriting new securities offerings.

B. Registered Investment Advisers, Funds, And Dealers Are Structured And Regulated By The SEC Differently.

Registered investment advisers, private funds, and dealers are very different. They are subject to different regulatory frameworks, "have different types of relationships with investors, offer different services, and have different compensation models when providing … investment advisory services to customers." *Reg. Best Interest: The Broker-Dealer Standard of Conduct*, 84 Fed. Reg. 33,318, 33,319 (July 24, 2019).

The SEC actively encourages market participants to consult its website and *Guide* to determine if they are a dealer. *See, e.g.*, Remarks by Kelly Shoop, Branch Chief, Office of Chief Counsel, SEC Division of Trading and Markets, *Fundamentals of Broker-Dealer*

Regulation 2023 (July 17, 2023) ("Shoop Remarks"), https://tinyurl.com/4en7jj7f (referring to the SEC's *Guide to Broker-Dealer Registration*, https://tinyurl.com/4kym57cy (modified Dec. 12, 2016)).[2] The *Guide* explains, for example, that dealers typically hold themselves out as willing to make two-way markets by buying and selling securities from and with customers, quote prices, and advertise and solicit buyers and sellers (or issuers) who would be a dealer's customer. *Id.*; *see also SEC v. Ridenour*, 913 F.2d 515, 516-17 (8th Cir. 1990) (affirming that defendant failed to "register as a broker-dealer," noting he transacted "with his customers," arranged "matched transactions" to buy and sell the same securities, quoted prices, and was "more than an active investor"). Dealers also hold inventory (often acquired in bulk) to pair those who wish to buy and sell a security at different times. A dealer's "recommendations may include recommending transactions where the [dealer] is buying securities from or selling securities to retail customers on a principal basis or recommending proprietary products." *Reg. Best Interest*, 84 Fed. Reg. at 33,319.

Dealers "effect securities transactions for customers, for which they typically charge a commission or other transaction-based fee," *XY Plan. Network, LLC v. SEC*, 963 F.3d 244, 248 (2d Cir. 2020) (citing 15 U.S.C. § 78c(a)(5)(A)); *see also* Shoop Remarks, *supra* (noting dealers receive "transaction based compensation" and handle "funds or securities on behalf of customers"). Advisers, on the other hand, receive compensation based on the "ongoing, regular advice and services" they provide and the results they achieve. *See Reg.*

[2] Although this SEC official stated that she was speaking in her personal capacity, market participants understandably will rely on SEC officials' statements directing them to consult the SEC *Guide* and underlying factors to determine whether they must register as a dealer.

Best Int., 84 Fed. Reg. at 33,319. Private funds, which are "created to pool money from multiple investors … to make investments on behalf of the fund," have investors who are the fund's equity owners and benefit from its returns. Private Fund, *supra*. Funds, unlike dealers, do not have clients or customers. A fund is the adviser's client. A fund's investors do not transact as a counterparty of the fund. And a fund is not in a customer relationship with the companies in which it invests.

Because they raise different types of public policy concerns, registered investment advisers and private funds are regulated differently from dealers. Under the Investment Company Act, mutual funds and investment advisers to private funds with assets under management over $150 million must register with the SEC—and are thus subject to SEC oversight and regulation. 15 U.S.C. § 80b–3(m); SEC, *Private Fund Adviser Overview*, https://tinyurl.com/2s3udjsd (modified Oct. 21, 2016). For example, advisers must file reports with the SEC and are examined for compliance. SEC, *Information for Newly-Registered Investment Advisors*, https://tinyurl.com/y5dwcs7m (modified Mar. 31, 2017). Registered investment advisers must disclose detailed information about the private funds they manage, including "fund size, use of borrowings and derivatives, strategy, and types of investors." SEC, *Annual Staff Report Relating to the Use of Form PF Data* (Dec. 9, 2022), https://tinyurl.com/2p8vpwzr. Private funds are also subject to securities laws when they raise money from investors. *See* 17 C.F.R. § 230.500 *et seq.*

By contrast, dealers are governed by the Exchange Act—not the Investment Advisers Act or the Investment Company Act. *See* 15 U.S.C. §§ 80a-1(b)(2), 80a-3(a). Among

other things, dealers must: maintain minimum net capital levels to satisfy customer claims (17 C.F.R. § 240.15c3-1); possess or control certain margin securities carried for a customer's accounts (17 C.F.R. § 240.15c3-3); join a fund to insure customer accounts (*see* 15 U.S.C. § 78fff-4(c)); and implement safeguards to control risks associated with direct access to securities markets (17 C.F.R. § 240.15c3-5). These rules are designed to protect broker-dealers' customers. But they have no utility for traders or funds that have no customers. And these rules may harm fund investors by imposing unnecessary costs and burdens without a corresponding benefit to investors, markets, or regulators.

II. This Court Should Hold, Consistent With The Exchange Act's Text And History, That A "Dealer" Executes Customer Orders As "Part Of A Regular Business."

A. The SEC's Interpretation Of "Dealer" Contravenes The Statutory Text, Its Own Guidance, And Well-Established Understandings.

The SEC describes the statutory dealer definition as "clear" and concedes that courts may not "'override Congress' considered choice by rewriting' the words of a statute," SEC Opp. 29-30; *see* SEC Mot. 2, 19-22, 29. But the SEC does just that by interpreting the dealer definition to cover anyone that buys and sells securities as part of a business—even when the person has no customers and does not satisfy the traditional criteria for what constitutes dealing. *See* SEC Mot. 1, 2, 20, 23-25; SEC Opp. 26-27, 29-34. The SEC's expansive interpretation eschews bedrock principles of statutory construction in favor of a hyper-literal, myopic reading that contradicts the statutory text, ignores historical context about what Congress understood a "dealer" to be when enacting that text, and disregards

the SEC's own longstanding and contemporaneous guidance to market participants about what constitutes "dealing." This Court should therefore reject it.

1. Dealers, Like Brokers, Effectuate Orders For Customers.

Today, as when the Exchange Act was passed in 1934, there are only two methods of effectuating customer orders. A firm can trade "solely for the account of the customer," as agent or "broker," or for its own account, as principal or "dealer," with the customer on the opposite side and "not as agent for the customer." SEC, *Report on the Feasibility and Advisability of the Complete Segregation of the Functions of Dealer and Broker*, at XIV (1936), https://tinyurl.com/y6h3a4ts; *see XY Plan.*, 963 F.3d at 248.

The own-account/others'-account distinction for effectuating customer orders was well established when the Exchange Act was adopted in 1934. Prominent treatises defined brokers and dealers based on that distinction. *See, e.g.*, Charles F. Hodges, *Wall Street* 361 (1930) ("A dealer sells to and buys from a client whereas a broker buys and sells for the account of a client."); Charles H. Meyer, *The Law of Stockbrokers and Stock Exchanges and of Commodity Brokers and Commodity Exchanges* 32-33 (cumulative suppl. 1933) (similar). The SEC used similar references in the same way. *See, e.g.*, *G.L. Ohrstrom & Co.*, 1938 WL 33306, at *7 (SEC Dec. 16, 1938) (broker traded "for [the customer's] account," dealer traded "for [its] own account"). Early SEC rules reflected this distinction, requiring brokers and dealers to "disclose to [their] customer … whether [they] [were] acting as a dealer for [their] own account," or "a broker" for the customer's account. *Rules for the Reg. of Over-the-Counter Markets*, 1936 WL 31460, at *6 (SEC Jan. 20, 1936).

And the SEC acknowledged that although investment companies and investment advisers' businesses involved buying and selling securities, they were not governed by rules that applied to "'brokers and dealers' only," H.R. Doc. No. 76-279 pt. II, at 1523 n.434 (1939), and "[f]ederal regulation" of investment advisers did "not exist," H.R. Doc. No. 76-477, at 31 (1939)—reflecting the understanding that brokers and dealers execute *customer* orders.

Case law from the era confirms this understanding. *E.g.*, *Donander Co. v. Comm'r*, 29 B.T.A. 312, 314-15 (1933) (dealer is "a merchant who holds himself out to sell to customers"); *Harriman Nat'l Bank v. Comm'r*, 43 F.2d 950, 952 (2d Cir. 1930) (dealer bought "securities to fill specific orders" and "hold them for customers"). The common law meaning—which Congress presumptively retained, *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 187 n.2 (2016)—also distinguished between means of effectuating customer orders. *See Johnson v. Winslow*, 279 N.Y.S. 147, 156 (N.Y. Sup. Ct. 1935), *aff'd*, 3 N.E.2d 872 (N.Y. 1936); *Weisbrod v. Lowitz*, 282 Ill. App. 252, 255 (1935).

The interplay between "broker" and "dealer" in the securities laws confirms that both definitions referred to different means of effectuating customer orders. The terms "broker" and "dealer" are linked throughout the Exchange Act (*see, e.g.*, 48 Stat. 882-897 §§ 3(a)(3), 7(c), 9(a)(3)-(5), 11(d)-(e), 12(a), 14(b), 17(a)-(b)), indicating that they have a related meaning, Antonin Scalia, *Reading Law: The Interpretation of Legal Texts* 198 (2012) (explaining canon that words are known by the company they keep). The SEC itself does not distinguish between the two, requiring registration "as a broker-dealer," not as

one or the other. 17 C.F.R. § 249.501(a); SEC Form BD, item 2.A, https://tinyurl.com/2p82stzb (visited July 24, 2023). The two definitions are also used specifically to impose customer protection requirements. For example, section 11(d) requires a broker or dealer to "disclose[] to [the] customer in writing… whether he is acting as a dealer for his own account" or "as a broker for [the] customer." 48 Stat. at 892, 15 U.S.C. § 78k(d).

Congress's re-enactment of the "dealer" definition in 1999 reinforces that Amici's interpretation is correct. At that time, Congress amended the bank exemption from the Exchange Act's definition of dealer and simultaneously amended the corresponding definitions in the Investment Company Act and the Investment Advisers Act to track the new Exchange Act definition. Pub. L. No. 106–102, §§ 202, 216, 219, 113 Stat 1338 (1999). But Congress did not change the substantive language of the Exchange Act's definition or the "regular business" exemption. And Congress neither disturbed settled precedent that dealers execute customer orders, nor adopted a position like the SEC now advances. That change further undermines the SEC's position. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Here, the SEC asserts that an entity can be a dealer if it is "in the business of buying and selling securities" whether or not the entity has customers. SEC Mot. 23-27. That approach fails to recognize the original and limited *customer*-focused meaning of "dealer." *Accord* Shoop Remarks, *supra*. The SEC's new near-limitless reading could make a dealer out of many if not all investment advisers, funds, and other market participants—subjecting

them to rules like costly capital requirements and customer protection regulations that make no sense for businesses without customers. That result cannot be squared with the historical context in which Congress enacted the Exchange Act in 1934, so it is not a permissible way to interpret the meaning of "dealer" under the Exchange Act today. *See Sackett v. EPA*, 143 S.Ct. 1322, 1338 (2023) ("The meaning of a word 'may only become evident when placed in context.'"); *accord* SEC Opp. 29-30 (noting courts may not "'override Congress' considered choice by rewriting' the words of a statute).[3]

2. The Statutory Exemption Provides That Traders And Entities That Do Not Have Customers Are Not "Dealers."

The Exchange Act's exemption from dealer status for activity "not as a part of a regular business," 15 U.S.C. § 78c(a)(5)(B), also makes clear that traders and investors (who do not have customers) are not dealers. Elsewhere, the SEC has conceded the exemption applies if traders accept risk regardless of how frequently they trade. *See* SEC *Almagarby* Sur-Reply, *supra*, at 4-6; *Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer*, SEC Release No. 34-94524,

[3] Tacitly recognizing that historical context shows "dealers" execute customer orders, in other cases the SEC has suggested that issuers are a defendant's customers. *See, e.g.*, SEC Sur-Reply at 4, *SEC v. Almagarby*, No. 21-13755 (11th Cir. Dec. 12, 2022), ECF No. 51-2. The SEC does not make that assertion here, and the evidence would not support it in any event. The SEC does not show Defendants were intermediaries pairing issuers selling with investors buying, or compensated through commissions or bid-ask spreads. Rather, the SEC argues Defendants made investments on favorable terms, accepted the risk those investments might fail, and then profited on investments that did not. *See, e.g.*, SEC Mot. 4-6, 13-14; SEC Opp. 11-13. That is trading, not dealing. Market realities also undermine the SEC's position because traders frequently purchase newly issued securities (including convertibles) from issuers as part of a broader trading strategy—which makes that activity fit squarely within the "regular business" exemption and insufficient to trigger "dealer" status.

87 Fed. Reg. 23,054, 23,058-59, 23,059 nn.53-56 (proposed Apr. 18, 2022) ("*Proposed Rule*"). In context, the "regular business" exemption thus shows a "dealer" includes only those trading for their own account to fill *customer* orders.

Around the Exchange Act's adoption, "many" courts interpreted the phrase "not in the course of an established business," which appeared in the regulatory definition of "dealer in securities," to mean traders without an established place of business to serve customers could not be dealers—regardless of the frequency of their trading and whether the trading was for an entity. *Schafer v. Helvering*, 299 U.S. 171, 173-74, 173 n.1 (1936) ("'dealer in securities'. … is limited to one who, as a merchant, buys and sells securities to customers."); *see Sec. Allied Corp. v. Comm'r*, 95 F.2d 384, 386 (2d Cir. 1938) (not a dealer when company "had no place of business to which customers could come to buy").

Congress had these settled interpretations in mind when it paraphrased that language in the Exchange Act's "regular business" exemption. *See* Scalia, *supra* (describing "Prior-Construction Canon"). The legislative history reflects that the Exchange Act "excludes from the definitions of a broker and dealer a man who just buys securities for his own account and is not in the business of making a profit by *merchandising* them, like an ordinary dealer." *Comm. On Interstate and Foreign Com., The Exchange Act of 1934: Hearings on H.R. 7852 and H.R. 8720*, 73d Cong. 687 (1934) (statement of Rep. Corcoran) (emphasis added), https://tinyurl.com/2mbsmcur.

That historical context is critical to understanding the Exchange Act. In modern times, a professional business that seeks investment profits by trading securities might seem like a "regular business." But that is not what Congress thought in 1934—the key time period. *See Wis. Cent. Ltd. v. United States*, 138 S.Ct. 2067, 2074 (2018) (terms "should be 'interpreted as taking their ordinary … meaning … at the time Congress enacted the statute'"). After the 1929 market crash, investors were seen as speculators that did not operate a "regular business" for purposes of the Exchange Act, while dealers did by earning profits through commissions, fees, or the spread when executing customer orders. By using 1934's contemporaneous terminology in the "regular business" exemption, Congress thus made clear that speculative investors and traders are not "dealers" under the Exchange Act.

3. The SEC Relies On Inapposite Cases That Ignore Key Differences Between The Securities Act And The Exchange Act.

The SEC relies heavily on *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786 (11th Cir. 2015). *See* SEC Mot. 20, 25, 27; SEC Opp. 26-27, 30. The Eighth Circuit has never cited *Big Apple* or relied on its reasoning. *Accord Ridenour*, 913 F.2d at 516-17 (unlike *Big Apple*, noting defendant transacted "with his customers," arranged "matched transactions," quoted prices, and was "more than an active investor"). In deciding the Cross Motions, this Court should not either.[4]

[4] This Court previously noted that *Big Apple* found the Securities Act definition of dealer was "'very similar' to the dealer definition in the Exchange Act." Dkt. 76 at 10 n.4 (May 24, 2022). That statement in a footnote in *Big Apple* was *dicta* on an issue the defendant "abandoned." *Big Apple*, 783 F.3d at 806, 809 n.11. This Court should not rely on it, particularly given the SEC's concession that the Securities Act and Exchange Act are indeed materially different, and the meaningful textual and structural differences discussed *infra*.

Big Apple is inapposite because it interpreted "dealer" under Securities Act § 5, not Exchange Act § 15. In the SEC's own words, § 5 is "irrelevant here" because it is a "completely different section of a completely different act" than § 15, which is at issue here. SEC Opp. 25-26; Dkt 156 (Summ. J. Hr'g Tr.) at 31:23–32:23 (describing § 5 as "a completely different section of a completely different act than what we're dealing with here").

That distinction is critical. The Securities Act, enacted in 1933, does not address the registration of dealers and has no exemption that limits the definition of "dealer"—it explicitly includes "trading" and lumps brokers and dealers in a single, catch-all definition. *See* 15 U.S.C. § 77b(a)(12). By contrast, when Congress addressed the registration of dealers in Exchange Act in 1934, it crafted a more nuanced definition—defining "broker" and "dealer" separately, using language that in context referred to customers, eliminating reference to "trading," and exempting investors and traders transacting "not as a part of a regular business," 15 U.S.C. § 78c(a)(5)(B). Disregarding those important textual differences and equating the definitions of "dealer" under the Securities Act and the Exchange Act ignores that when the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning. *See Wis. Cent.*, 138 S.Ct. at 2071 ("differences in language" between companion statutes "convey differences in meaning"); *Ctr. for Special Needs Tr. Admin., Inc. v. Olson*, 676 F.3d 688, 701-02 (8th Cir. 2012) (noting courts "presume[ ]" Congress intended a difference in meaning when it uses "particular language" in one part of a statute but different language in another).

There are also important structural reasons why the definition of "dealer" in the Exchange Act is narrower than in the Securities Act. In general, the Securities Act addresses the registration and oversight of securities and securities offerings, whereas the Exchange Act addresses secondary trading through brokers, dealers or exchanges. *See Slack Techs., LLC v. Pirani*, 143 S.Ct. 1433, 1437-38 (2023). "Dealers" under the Securities Act (analyzed in *Big Apple*) are merely obligated to ensure the securities they are selling into the market for the first time are registered with the SEC or exempt from registration, *see id.*; distributing unregistered shares into the market is ordinarily illegal, and the Securities Act's broad definition of "dealer" ensures that requirement cannot be evaded. By contrast, "dealer" status under the Exchange Act requires SEC registration and triggers a host of regulatory burdens and customer protection rules, which Congress intended to impose only on dealers who serve customers. Applying these rules to entities that lack customers would thus increase burdens without providing any corresponding benefit.

The SEC further implores this Court to rely on decisions from other district courts. *See* SEC Mot. 20-22, 25-27; SEC Opp. 27, 35-39; Dkt. 161 (SEC Suppl. Auth.).[5] Those non-binding decisions, which have not been subject to appellate review, are flawed. Among other reasons, they rely directly or indirectly on *Big Apple*—which as just noted the SEC correctly concedes is irrelevant—and adopt the same defective analysis the SEC uses here.

[5] Amici have filed briefs in many of these cases and in appeals pending before the Eleventh Circuit in *SEC v. Keener* (No. 22-14237), and in *SEC v. Almagarby* (No. 21-13755).

This Court should independently scrutinize the SEC's legal theory. "Without legal limitations, market participants [would be] forced to rely on the reasonableness of the SEC's litigation strategy, but that can be hazardous." *Dirks v. SEC*, 463 U.S. 646, 664 n.24 (1983). Indeed, the Supreme Court—in unanimous or near-unanimous opinions—has recently and repeatedly carefully examined SEC actions and blocked SEC overreach.[6] Here, the SEC cannot "assert[] highly consequential power beyond what Congress could reasonably be understood to have granted" based on "a merely plausible textual basis"—especially when the SEC's "newly uncovered" authority has "conveniently enabled it" to pursue a previously unsupported theory. *West Virginia v. EPA*, 142 S.Ct. 2587, 2609, 2614 (2022).

Yet that is what the SEC is attempting to do here. Nearly ninety years after the Exchange Act's passage—and after years of not requiring investment advisers, funds, and others to register as dealers—the SEC now sees "dealer" in a new light. Its long-running failure to advance the position it now asserts is strong proof that the position lacks merit. *Cf. id.* at 2610-14; *see also SEC v. Federated All. Grp., Inc.*, 1996 WL 484036, at *5 (W.D.N.Y. Aug. 21, 1996) (rejecting SEC's "excessively broad definition of a dealer" that "would embrace as a dealer every securities trader who makes money through buying and selling of securities"); *Goldstein*, 451 F.3d at 878-83 (rejecting SEC's attempt to redefine

[6] *See Axon Enter., Inc. v. FTC*, 143 S.Ct. 890, 900 (2023) (9-0); *see also Lucia v. SEC*, 138 S.Ct. 2044, 2053-54 (2018) (7-2); *Liu v. SEC*, 140 S.Ct. 1936, 1946 (2020) (8-1); *Kokesh v. SEC*, 581 U.S. 455, 465-67 (2017) (9-0); *accord Gabelli v. SEC*, 568 U.S. 442, 454 (2013) (9-0); *cf. Jarkesy v. SEC*, 34 F.4th 446, 465-66 (5th Cir. 2022) (invalidating SEC in-house proceedings), *cert. granted*, No. 22-859, 2023 WL 4278448 (U.S. June 30, 2023).

statutory term when the SEC could not "justify departing from its own prior interpretation" when seeking to impose new registration requirements hedge funds).

B. The SEC Cannot Use This Case To Revise Rule 144. It Must Go To Congress Or Issue A Rule That Can Survive Judicial Review.

Convertible transactions are not new. For years, with the SEC's blessing, companies have issued convertible debt to investors, who converted the debt into stock at a discount and resold it at an advantageous time. If the SEC now wishes to root out such practices by certain market participants, it has many ways to try to do so. Bringing ad hoc enforcement actions based on a new interpretation of what it means to be a "dealer" is not one of them.

The SEC's real concern here is that Defendants were able to distribute securities into the market without registering as an underwriter or dealer. *See* SEC Mot. 1-2, 4-6, 8-11; SEC Opp. 2-3, 27-28. But that was possible because of how the SEC has chosen to write and amend its own Rule 144. *See Revisions to Rules 144 and 145*, 72 Fed. Reg. 71,546, 71,561-62 (Dec. 17, 2007) (adopting six-month safe-harbor from being classified as an underwriter after concluding the prior twelve-month period made it difficult for small issuers to raise capital). If the SEC now believes Rule 144 is insufficient, it should pursue notice-and-comment rulemaking. *See Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). If the SEC believes that the statutory definition of "dealer" is insufficient, it should ask Congress to amend the securities laws—to change the meaning of "dealer" or to expand the SEC's reach. *Slack Techs.*, 143 S.Ct. at 1442; *see West Virginia*, 142 S.Ct. at 2609, 2613. And if the SEC believes fraud is underfoot, or that an issuer's choice to finance itself using convertible bonds is problematic, it can wield existing antifraud authority.

The SEC has chosen a different path—to pursue simultaneously cases like this one *and* a rulemaking adopting a new vision of the meaning of "dealer." *See Proposed Rule*, *supra*. That effort might be appropriate *if* the SEC were clarifying ambiguities in the statutory language, within the scope of its delegated authority and in compliance with applicable rules—such as properly balancing costs and benefits and accounting for stakeholder perspectives. *See West Virginia*, 142 S.Ct. at 2608-09; 5 U.S.C. § 706(2)(A); 15 U.S.C. § 78c(f) (requiring the SEC to consider "whether the action will promote efficiency, competition, and capital formation"), *id.* § 78w(a)(2) (similar).

But there are many reasons why the SEC's putative regulatory efforts regarding the "dealer" definition fail those requirements. For one, the SEC has endorsed the view that the statutory language is "clear and unambiguous" (SEC Mot. 2, 29; *see* SEC Opp. 1, 29-30), which "precludes the Commission from more expansively interpreting that term," *Digital Realty Tr., Inc. v. Somers*, 138 S.Ct. 767, 782 (2018) (rejecting SEC rule). For another, the newfound view the SEC asserts after almost a century, and the "economic and political significance of that assertion," indicate the SEC lacks authority to interpret "dealer" to suddenly cover wide swaths of the financial industry. *See West Virginia*, 142 S.Ct. at 2608-09. Plus, the record before the SEC reflects that the proposed rule will impose many costs but yield few (if any) benefits. *See, e.g.*, AIMA Comment Letter, File No. S7-12-22 (May 27, 2022), https://tinyurl.com/5n7486j5; *see also* Craig Lewis, *The SEC's Proposed Rules for Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer* (Dec. 2022), https://tinyurl.com/38w2s4hj (former SEC

Chief Economist and Director of the Division of Economic and Risk Analysis highlighting proposed rule's flaws and harm it may cause markets and investors). That casts a cloud over the SEC's questionable choice to sidestep Congress while simultaneously pursuing enforcement actions advancing a broad and novel conception of the meaning of a "dealer."

Whether the SEC advances its view through legislation or proper rulemaking, the result would be better than ad hoc enforcement actions based on an unprecedented reinterpretation of nearly century-old language. On the front end, decisionmakers "can conduct factual investigations, can consult with affected parties, [and] can consider how their experts have handled similar issues over the long course of administering a regulatory program." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2413-14 (2019). On the back end, the result should (in theory) provide clarity about the rule and how to follow it. And if the resulting rule is defective, judicial review and political accountability are available. *See id.*

But cherry-picked enforcement actions create a risk that markets and market participants will be whipsawed by the SEC's arbitrary discretion, subjected to a patchwork of inconsistent interpretations of federal law, and beset with uncertainty and unpredictability. Congress prefers interpretive issues related to complex regulatory schemes not to be resolved "piecemeal by litigation." *Id.* The SEC may not misconstrue the text, history, and settled understanding of the Exchange Act or exceed its authority to force a square peg into a round hole in the name of investor protection. In other words, the SEC may not redefine "dealer" through this action in a way that transforms market participants that relied in good-faith on SEC guidance into lawbreakers.

III. The Court Should At Minimum Ground Any Decision In The SEC's Factors That Distinguish "Dealers" From Investment Advisers And Funds.

Defendants highlight how the SEC's new interpretation of a "dealer" and the "regular business" exemption is inconsistent with what the SEC has espoused in public guidance. *See* Dkt. 133 (Defs.' Mot.) at 28-31. The SEC continues to encourage market participants to consult that guidance to determine dealer status. *See* Shoop Remarks, *supra* (highlighting factors and noting that dealer status "is a facts and circumstances analysis"); *accord* SEC Opp. 28 (describing facts here that the SEC *Guide* deems relevant). The SEC even faults Defendants for not doing so. SEC Mot. 18 & n.8, 28-29.

In line with the SEC's own words and actions, at a minimum this Court should anchor its decision in the factors the SEC concedes "Courts and the SEC have, over time, applied … to distinguish dealers from traders." SEC Opp. 19, *SEC v. Morningview Financial, LLC*, No. 22-cv-08142 (S.D.N.Y. May 19, 2023), ECF No. 23; *cf. SEC v. Collyard*, 861 F.3d 760, 766 & n.3 (8th Cir. 2017) (following "[m]ost courts" in adopting "a list of factors to determine whether someone" is a "broker"). That is effectively what happened in *Ridenour*, which the SEC says is "controlling" here. SEC Opp. 27; *see* 913 F.2d at 516-17 (noting defendant transacted "with his customers," arranged "matched transactions" to buy and sell the same securities, quoted prices, and was "more than an active investor").

Instead determining dealer status based on the "frequency and regularity" of securities transactions (SEC Opp. 27) would be inconsistent with the courts that hold that "[w]hether an individual falls within [the Exchange Act's dealer] definition … requires analysis of a variety of factors." *Dervan v. Gordian Grp. LLC*, 2017 WL 819494, at *10

(S.D.N.Y. Feb. 28, 2017); *accord Collyard*, 861 F.3d at 766 & n.3.[7] And it would elevate rather than mitigate the risk that a decision here could cause major unintended consequences for market participants whose activities differ from what the SEC contends constitutes dealing here. For example:

1. Registered investment advisers and funds typically do not advertise, have customers, or "actively" seek business by "cold-calling penny stock issuers" in bulk while '"[holding] themselves" as a dealer. SEC Mot. 1, 15-18, 24; SEC Opp. 19-22, 36; *see also EMA*, 2022 WL 4237144, at *5. While they may attend conferences and express a general interest in investments, those vanilla facts cannot be enough to trigger the weighty burdens that come with dealer status.

2. Although buying and selling convertible notes is a component of the business model used by some registered investment advisers, their entire business model is not typically predicated on purchasing such notes from penny stock issuers, converting them into shares of the issuer, and profiting by quickly selling those shares into the public markets. *See* Dkt. 1 (Compl.) ¶ 2. Nor do they aim to provide liquidity to the market by pairing buyers and sellers.

3. Registered investment advisers and funds do not typically focus on underwriting securities of issuers they have solicited as customers, as opposed to investing through intermediaries. *See SEC v. Hansen*, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984) (providing that a "relevant" factor is "selling" "securities of other issuers"). Investment advisers' clients are the funds they advise, and the funds have investors but do not have clients or customers at all. *See supra* at I.A.

4. Registered investment advisers and funds do not serve as intermediaries between issuers and investors, do not have customers, and are not in the business of buying and selling securities to or from their customers. They most often trade through registered broker-dealer intermediaries. *See supra* at I.A.

[7] *See also EMA Fin., LLC v. AppTech Corp.*, 2022 WL 4237144, at *5 (S.D.N.Y. Sept. 13, 2022); *Federated*, 1996 WL 484036, at *4-5.

5. Registered investment advisers and funds are already subject to SEC oversight and investment advisers are already required to, among other things, disclose detailed information about funds they manage. *See supra* at I.B.[8]

This Court's decision should thus be grounded in the allegations of the complaint and the factors the SEC has itself relied on—not categorically label a business buying and selling securities as a "dealer"—to avoid chaos from upending long-settled expectations.[9]

CONCLUSION

For the foregoing reasons, Amici urge this Court to rule for Defendants on the cross motions for summary judgment, and to issue a narrow opinion that avoids harming markets and market participants.

Date: July 24, 2023

Respectfully submitted,

/s/ Gabriel K. Gillett

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[8] Other facts the SEC highlights are not relevant for determining dealer status. *See, e.g.*, SEC Mot. 1, 4, 6-7; SEC Opp. 35. Convertible securities used both fixed and variable pricing. Some investments like secondary offerings are always discounted. Selling at the earliest opportunity is not inherently problematic. *See* SEC, *Investor Bulletin: Investing in an IPO* 5 (Feb. 2013), https://tinyurl.com/y6neb23x ("flipping, alone, is not prohibited" under the securities laws). And the SEC does not dispute that Defendants complied with Rule 144's holding period. *See* SEC Mot. 8-11.

[9] Amici agree that disgorgement is improper here (*see* Defs.' Mot. 44-46) but for efficiency's sake do not repeat those arguments.

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Local Rule 7.1(h) because the brief was prepared using 13-point font. The brief complies with Local Rule 7.1(f) because the document contains 6,783 words as indicated by the word count function of Microsoft Office Word 365 which was used to prepare this document, excluding those items contained in Local Rule 7.1(f)(1)(C). The word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the above word count.

Date: July 24, 2023

/s/Gabriel K. Gillett
Gabriel K. Gillett

CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, hereby certify that on July 24, 2023, I caused the attached **Brief of Alternative Investment Management Association, Ltd., Trading and Markets Project, Inc., and National Association of Private Fund Managers as Amici Curiae in Support of Defendants on Cross Motions for Summary Judgment** to be electronically filed with the clerk of the Court for the United States District Court, District of Minnesota using the CM/ECF system. I certify that all participants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Gabriel K. Gillett
Gabriel K. Gillett

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

Case No. 21-cv-02114 (KMM/JFD)

CAREBOURN CAPITAL, L.P., CAREBOURN PARTNERS, LLC *Relief Defendant*, and CHIP ALVIN RICE,

Defendants.

MEET AND CONFER STATEMENT REGARDING MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS ON CROSS MOTIONS FOR SUMMARY JUDGMENT

I, Gabriel K. Gillett, represent amici curiae Alternative Investment Management Association, Ltd. ("AIMA"), Trading and Markets Project, Inc. ("TMP"), and National Association of Private Fund Managers ("NAPFM") (collectively, "Amici"). I certify pursuant to Local Rule 7.1(a) that I have met and conferred with the parties' counsel about Amici's Memorandum of Law in Support of Motion for Leave to File Amici Curiae Brief in Support of Defendants on Cross Motions for Summary Judgment, as follows:

1. On July 19, 2023, the undersigned sent an email to counsel for Plaintiff the United States Securities and Exchange Commission ("SEC"), explaining that Amici intended to move this Court for leave to file a brief amici curiae in support of Defendants on the pending cross motions for summary judgment. *See* Dkts. 125, 132. The undersigned

explained why Amici believe their brief will be helpful to the Court as it considers the Cross Motions; certified that no party or parties counsel authored or funded the brief; and noted that in similar cases counsel for the SEC have not opposed similar requests by Amici.

2. On July 19, 2023, counsel for the SEC, Charles J. Kerstetter, responded that the SEC would oppose any amicus filing because, in the SEC's view, the brief is untimely and prejudicial.

3. The undersigned responded, seeking additional information about why in the SEC's view the brief would be prejudicial and inquiring whether the SEC would agree not to oppose Amici's request if Amici agreed not to oppose a request by the SEC to respond to Amici's brief.

4. Counsel for the SEC responded that the SEC would be prejudiced by the delay and the expenditure of resources to respond to Amici's brief, because the SEC viewed the brief as untimely.

5. As of the date of this filing, Amici and the SEC have been unable to resolve their differences.

6. On July 20, the undersigned participated in a teleconference with counsel for the Defendants, during which counsel for the Defendants represented that Defendants consent to Amici filing a brief.

Date: July 24, 2023

Respectfully submitted,

/s/ Gabriel K. Gillett

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CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, hereby certify that on July 24, 2023, I caused the attached **Meet and Confer Statement Regarding Motion for Leave to File Amici Curiae Brief in Support of Defendants on Cross Motions for Summary Judgment** to be electronically filed with the clerk of the Court for the United States District Court, District of Minnesota using the CM/ECF system. I certify that all participants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Gabriel K. Gillett
Gabriel K. Gillett