Administrative Proceeding
File No. 3-20238

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UNITED STATES OF AMERICA

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of ALPINE SECURITIES CORPORATION, a Utah limited liability company For Review of Adverse Action Taken By NATIONAL SECURITIES CLEARING CORPORATION	Admin. Proc. File. No. 3-20238

ALPINE'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR AN EMERGENCY INTERIM STAY AND OTHER APPROPRIATE COMMISSION RELIEF

***** EXPEDITED CONSIDERATION REQUESTED UNDER RULE 401(d)(3) *****

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Pursuant to SEC Rules of Practice 154 and 401(d)(3), Alpine Securities Corporation ("Alpine"), through counsel of record, submits this Reply Memorandum in Support of its Motion for An Emergency Interim Stay and Other Appropriate Relief by the Commission ("Emergency Motion") in connection with Alpine's pending Application for Review of adverse actions taken by the National Securities Clearing Corporation ("NSCC"), and in response to NSCC's Memorandum in Opposition to Emergency Motion ("NSCC's Opposition").

INTRODUCTION

NSCC in its Opposition puts forth, and expects the Commission to accept, double speak. Even though NSCC has proposed to eliminate the Intraday Backtesting Charge – which comprises $1.6 million of the $2.1 million Backtesting Charge at issue – because it has determined that it provides an "***immaterial impact*** on its backtesting results,"[1] it insists in response to Alpine's Motion that it remains necessary to impose this charge on Alpine for risk mitigation. NSCC cannot have it both ways and, as an SRO under the Commission's control, should not be permitted to take completely opposite positions to try to prevent Alpine from obtaining the relief that it needs. NSCC's attempts to avoid Commission review by trying to throw up a host of procedural roadblocks are similarly meritless. There must be an avenue for review of NSCC's actions. Section 19(d) provides that avenue for a Charge that result in a limitation on access to NSCC's clearing and settlement services. And ***if*** *the Commission agrees that there is no review under Section 19(d),* then Alpine asks that the Commission issue a decision to that effect as quickly as possible so that Alpine can present this issue in court.

[1] *See* Securities Exchange Act Release No. 95286 (July 14, 2022), at pp. 24-25, 87 FR 43355 (July 20, 2022) (File No. SR-NSCC-2022-009).

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NSCC's response on the issue of a stay also seeks to obfuscate: the plain fact is that there is *no risk and no prejudice* to NSCC or its other members from staying this Backtesting Charge while the Commission gives fulsome consideration to these issues. The trading positions and purported backtesting "deficiencies" for which the Backtesting Charge was allegedly imposed are no longer even open; they settled in September. And those transactions were fully addressed and mitigated *at the time* of the trades; not only did Alpine indisputably have the shares in its account at DTC to fully cover the position before submitting the trades to NSCC, but Alpine also posted sufficient margin funds to meet a margin call on the purported deficiency when the trades occurred. There is no valid basis, and certainly no risk-based justification, for NSCC's insistence that its risk mitigation requires that Alpine pay a $2.1 million Backtesting Charge penalty a month later *and* keep those funds on deposit with DTCC for up to one year.

In contrast to the lack of risk to NSCC, there is obvious and demonstrable risk of irreparable harm to Alpine absent a stay. Alpine is a small regional clearing firm which has been operating with a $3 million Clearing Fund Requirement. Its Chief Executive Officer has confirmed by declaration that which is not at all surprising: Alpine lacks the capital to pay an additional $2.1 million and still continue clearing trades for its customers, and the costs to borrow the capital to meet this Charge are so significant that Alpine would be out of business within a couple of weeks. NSCC has no basis for its suggestion that Alpine's situation is other than as bluntly represented by management. All of the elements for issuing an emergency stay, on expedited consideration, are therefore met and the stay should be granted.

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ARGUMENT

I. NSCC's Procedural Arguments Should Be Rejected Because these Issues are Properly Before the Commission.

NSCC's opens its Opposition by again attempting to evade review of its actions, claiming that the Required Deposit charges, including the Backtesting Charge at issue in Alpine's Emergency Motion, are not reviewable under Section 19(d), relying on the self-contradictory claim that the charges at issue are "not fees or charges for delivering clearance services," but purport to be "designed to meet NSCC's regulatory obligations to manage the risks presented by its members' clearing activities …."[2] NSCC has made this argument repeatedly before and it has never been addressed or ruled upon by the Commission.[3] This argument fails for all of the reasons set forth in Alpine's prior responses to these arguments by NSCC,[4] including as set forth below.

First and foremost, NSCC's semantic assertion that the Required Deposit *margin charges* are "not fees or charges" is intellectually disingenuous. NSCC itself refers to the Required Deposit components as "charges," in its Rules and rulemaking, including the "Backtesting ***Charge.***"[5] That Rule 24 of NSCC's Rules also references other "charges" that NSCC may impose does not make the Required Deposit any less of a "charge." Nomenclature aside, NSCC's contention that the Required Deposit can never be a limitation on access makes no sense. NSCC concedes that the Required Deposit margin charges are "a member requirement for participation in NSCC[,]"[6] and

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[2] NSCC Opposition, at 10, 11.

[3] *See, e.g.*, Objection of National Securities Clearing Corporation to Application for Review and Motion for Interim Stay, at pp. 4-6, Admin Proceeding File No. 3-20238, March 12, 2021.

[4] *See, e.g.*, Alpine's Reply Memorandum in Support of Motion for Interim Stay and Response to Objection of Respondent National Securities Corporation, at pp. 8-14, Admin Proceeding File No. 3-20238, March 18, 2021.

[5] NSCC's Rules & Procedures, Procedure XV, at § 1(B)(3).

[6] NSCC Opposition, at 10.

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thus must be paid to access NSCC's essential clearing and settlement services. These margin charges are precisely within the scope of review under Section 19(d) as a "limitation of access" to the "applicant's ability to utilize one of the fundamentally important services offered by the SRO."[7]

Second, NSCC's reliance on *NASDAQ Stock Market, LLC v. Securities Exchange Commission,* 961 F.3d 421 (D.C. Cir. 2020) is misplaced, particularly as it applies to the Backtesting Charge. That case is distinguishable based on the facts alone that it involved different party applicants, a different SRO, a different SRO rule, and a different issue. In *NASDAQ,* an "industry group" filed a petition under Section 19(d) to challenge fees that NYSE Arca, Inc. and Nasdaq Stock Market, LLC (the "Exchanges") charge for their "depth-of-book" data. NASDAQ. *Id.* at 424-25. The Exchanges argued that "generally-applicable fee filings" cannot constitute prohibitions or limitations on access under Section 19(d) because that provision is limited to "review of actions targeting specific members." *Id.* at 425. On appeal, the D.C. Circuit agreed that "Section 19(d) is not available to challenge the reasonableness of generally-applicable fee rules" but also made clear that certain fees may be challengeable under Section 19(d). *Id.* at 424.

> It is conceivable that a fee may act as a "limit" on access to services under Section 19(d). But not every fee is, by mere virtue of being a fee, challengeable as a "limit" on access to exchange services under Section 19(d). Rather, we hold that for a fee rule to be challengeable under Section 19(d), it must, at a minimum, be **targeted at specific individuals or entities**.

Id. at 427-28 (emphasis added).

Here, the Required Deposit margin charges are not "generally-applicable fees rules," but are *individually calculated and applied uniquely to each member*, including Alpine. The

[7] *In re Application of Securities Industry and Financial Markets Association, ("SIFMA"),* SEC Release No. 72182, 2014 WL 1998525, at *8 (May 16, 2014); *see also* 15 U.S.C. §78s(d), (f).

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Backtesting Charge is a prime example. As NSCC itself stated in proposing the Backtesting Charge in 2016:

> Because the settlement activity and size of the backtesting deficiencies varies among impacted Members, NSCC must assess a Backtesting Charge **that is specific to each impacted Member**. To do so, NSCC examines each impacted Member's historical backtesting deficiencies observed over the prior 12- month period to identify the three largest backtesting deficiencies that have occurred during that time"[8]

The Required Deposit Charges, and the Backtesting Charge in particular, is specifically targeted at a specific entity, Alpine, and is thus distinct from the generally applicable fee at issue in *NASDAQ*.[9] In contrast to that case, these are precisely the types of charges and fees reviewable as limitations on access under the Commission's broad interpretation of the scope of review and its jurisdiction under Section 19(d).[10]

Third, NSCC's assertion that "Section 19(d) is not implicated," even as a limitation of access, because its Required Deposit margin charges only "allegedly affect Alpine's cost of doing business," is both predicated on an overly restrictive and self-serving reading of the scope of review under Section 19(d) and is inconsistent with Commission precedent. Once again, the Commission has specifically held that the "loss of or increased costs of doing business" or

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[8] *See* Securities Exchange Act Release No. 34-7808, at p. 5, SR-NSCC-2016-004 (September 9, 2016) (emphasis added).

[9] NSCC also argues, in the connection with its assertion that Alpine's Application and Emergency Motion are not justiciable under Section 19(d), that the Backtesting Charge is not "discretionary." This has little to do with justiciability under Section 19(d). Moreover, NSCC's assertion is not supported by its Rules and Procedures. For instance, unlike the Required Deposit charges at issue in Procedure XV § 1(A), which uses mandatory language for when they will be applied, the Backtesting Charge uses permissive language: "The Corporation [NSCC] ***may*** require a member to make an additional Clearing Fund deposit . . . (the 'Backtesting Charge')." *See* NSCC's Rules and Procedures, Procedure XV, § 1(B)(3) (emphasis added). NSCC further expressly reserves "discretion" to "adjust such charge" in certain circumstances. *Id.*

[10] *See* authorities discussed in Alpine's Emergency Motion, at 13-14, including *In re Bloomberg, L.P.*, Release No. 49076, 2004 WL 67566 at *2 (Jan. 14, 2004); *In re International Power Group, Ltd.*, SEC Release No. 66611, 2012 WL 892229 at *4 (March 15, 2012); *and Application of William Higgins*, 51 Fed.Reg. 6186-04, 1986 WL 89969 (Feb. 20, 1986).

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"difficulties in fulfilling market-making obligations" were "negative impacts" on a "Broker-Dealer Participant" that "could be remedied by challenging DTC's denial of the Participant's access to services."[11] So it is here. Alpine has provided multiple declarations to support its assertion that the payment of the $2.1 million Backtesting Charge, and having to maintain this amount on deposit with NSCC for up to one-year, will effectively put Alpine, a small clearing firm, out of business. NSCC cannot and has not rebutted Alpine's evidentiary showing with any actual evidence, and it should be considered undisputed.

Finally, and perhaps more importantly, NSCC's claim that its actions cannot be reviewed needs to be addressed by the Commission. Alpine is looking for review of NSCC's actions, including its recent imposition of a devastating $2.1 million Backtesting Charge it claims it may keep for up to a full year**,** even though NSCC has proposed to eliminate the Intraday Backtesting Charge (which comprises $1.6 million of the total) because it provides an "***immaterial impact*** on its backtesting results."[12] Alpine would welcome an opportunity to proceed directly to court to seek relief, including a temporary restraining order and/or preliminary injunction, but is concerned that exhaustion principles require it to first seek that review from the Commission under Section 19(d). That NSCC keeps raising this argument confirms the need for a clear ruling by the Commission on this issue to guide the industry. At the very least, the Commission should stay imposition of this charge while it considers these issues.

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[11] *In re International Power Group, Ltd.,* SEC Release No. 66611, 2012 WL 892229 at *4 (March 15, 2012).

[12] *See* Securities Exchange Act Release No. 95286 (July 14, 2022), at pp. 24-25, 87 FR 43355 (July 20, 2022) (File No. SR-NSCC-2022-009).

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II. NSCC's Double Speak About the Necessity of the Intraday Backtesting Charge Should be Rebuked.

As detailed in Alpine's Emergency Motion, and undisputed by NSCC, $1.6 million of the $2.1 million Backtesting Charge at issue is for an "Intraday Backtesting Charge." NSCC also concedes that, as early as July 2022, it proposed – in a *public filing* for notice and comment from the industry – to eliminate this charge entirely, including because (in NSCC's own words): "Studies reviewing the impact of removing the Intraday Backtesting Charge on NSCC's backtesting coverage metrics … indicate that this proposal ***would not have a significant impact*** on NSCC's ability to maintain its backtesting coverage target."[13]

Faced with Alpine's Emergency Motion, however, NSCC takes a directly opposite position, attempting to justify the $1.6 million Intraday Backtesting Charge on Alpine as necessary for "risk mitigation." NSCC even has the audacity to accuse Alpine of telling a "series of half-truths."[14] It is NSCC's attempts to side-step its own statements in proposing to eliminate this charge that are disingenuous. For instance, NSCC insists that the proposal to eliminate the Intraday Backtesting Charge was dependent upon its other proposal to impose a new intraday volatility charge. This explanation is so facially attenuated that the Commission, in its Order Instituting Proceedings to determine whether to approve NSCC's proposed rule change, did not even reference the purported inter-connectivity of these two proposed rule changes in describing NSCC's proposal and justification for eliminating the Intraday Backtesting Charge.[15]

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[13] *Id.* at p. 23 (emphasis added).

[14] NSCC Opposition, at 15.

[15] *See* Securities Exchange Act Release No. 34-96088 (October 14, 2022). In its entirety, the Commission's release states with respect to the proposal to eliminate the Intraday Backtesting Charge: "In the Proposed Rule Change, NSCC is proposing to eliminate the Intraday Backtesting Charge for several reasons, as set forth in more detail in the Notice. First, in connection with recent regulatory feedback, NSCC has determined that the current methodology for calculating the Intraday Backtesting Charge makes an unreasonable assumption that NSCC would cease to act for a member that has paid all of its intraday margin

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Moreover, NSCC disregards that its "impact study" results of the Intraday Backtesting Charge, which are described in the proposed rule change, and which supported its proposal to eliminate this charge, were apparently conducted without consideration of the proposed intraday volatility charge, and did ***not*** consider the impact of replacing the Intraday Backtesting Charge with the proposed intraday volatility charge.[16] To the contrary, NSCC states that during the study period it collected a daily average of $30 million in total Intraday Backtesting Charges, and that "[w]hile NSCC would not have collected these amounts if the proposal was in place during this time period, the results of the study showed that the end of day backtesting would have remained above the 99% coverage target during that time period and would have had ***an immaterial impact*** on intraday backtesting results …."[17] NSCC should not be permitted to circumvent the results of its own impact studies showing the Intraday Backtesting Charge has an "immaterial impact" on its backtesting coverage and risk mitigation simply to try to justify an unnecessary charge imposed on Alpine.

Finally, NSCC ignores another fundamental distinction between the proposed intraday volatility charge and the Backtesting Charge: the intraday volatility charge presumably would be collected alongside other trading margin, and thus refunded after the position settles two days later. The Backtesting Charge, by contrast, must be deposited with NSCC/DTCC for up to one year after

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requirements. As a result, this calculation methodology may underestimate a member's backtesting losses and undercount potential backtesting deficiencies. Second, NSCC believes it will continue to be able to adequately address both its intraday market risk exposures and its backtesting coverage metrics if it eliminates the Intraday Backtesting Charge. Additionally, NSCC would maintain the Regular Backtesting Charge, which is collected at the start of the day, to support its backtesting coverage. Studies reviewing the impact of removing the Intraday Backtesting Charge on NSCC's backtesting coverage metrics indicate that this proposal would not have a significant impact on NSCC's ability to maintain its backtesting coverage target." *Id.* at 5-6.

[16] *See* Securities Exchange Act Release No. 95286 at pp. 24-25 (File No. SR-NSCC-2022-009). NSCC has not disclosed the actual impact studies in the in SR-NSCC-2022-009, but describes them therein.

[17] *Id.*

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it is imposed. That is the gravamen of the harm to Alpine. Indeed, the Backtesting Charge is effectively an after-the-fact penalty that is collected and imposed long after the position is closed and any conceivable risks created by the deficiency have already been covered. Certainly, that is the case with respect to Alpine, which ***indisputably*** posted sufficient margin to cover the alleged deficiency when the trades at issue occurred, in addition to being long the stock to cover the position at DTC. NSCC's effort to speak out of both sides of its mouth when publicly proposing to eliminate the charge, and then taking a directly opposite position here to try to justify imposing it against Alpine should be roundly rejected. [18]

III. NSCC Failed to Demonstrate that there is Any Statistically Significant Risk It Will be Unable to Access Stock at DTC to Close Net Sell Positions.

NSCC also continues to put forth flawed and specious rationale in response to Alpine's argument that it faces no central-counterparty risk from Alpine's sell-side trading activity because Alpine always has sufficient stock in its account at DTC to cover its sell-side position before it submits the trades to NSCC. Specifically, NSCC claims that it does not have a lien on or a legal right to a member's inventory at DTC, and thus still has the so-called central-counterparty risk – the hypothetical that it may have to go into the market to buy or locate the shares to close out the transaction in the event of a member default. But NSCC has failed to offer any support for the notion that there is any statistically significant risk that it would not be able to access stock held at DTC to deliver to the buyer. Contrary to the NSCC's assertions, DTC's obligations to deliver securities it holds in a member's account to NSCC to close out a selling member's open position is not interrupted because of a member default or even a bankruptcy. NSCC has arrangements and

[18] To be clear, Alpine does not believe the Commission should approve the proposed intraday margin charge because NSCC is already significantly over margined, as detailed in Alpine's prior filings, and more requiring ever more capital as margin to guard against alleged risks (which do not actually exist in Alpine's case, as detailed below), is unnecessary.

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contracts, including cross-guaranty and netting contracts, designed to "permit transactions to flow smoothly between DTC's system and the CNS system in a collateralized environment."[19] NSCC's rules confirm that, even where NSCC has "ceased to act" for a member, it can "continue to instruct [DTC] ... to deliver CNS Securities from such Member's account at [OTC] to [NSCC's] account in respect to such Member's Short Position."[20] NSCC further confirmed its ability to close contracts, regardless of an insolvency or default of a member, in its Disclosure Framework:

> The exceptions and safe harbors contained in FDICIA, the Bankruptcy Code, SIPA, FDIA and Title II of Dodd-Frank that support the finality of securities transactions and the closeout of the insolvent Member's open positions provide NSCC with a high degree of certainty as to the effectiveness of its risk management and default management rules and procedures.[21]

NSCC has also had no trouble in the past accessing shares at DTC following a default event. When it dealt with the collapse of Lehman Brothers, for instance, DTCC announced that it "successfully closed out over $500 billion in market participant's exposure including ensuring that $1.9 billion in securities held at DTC were "used to satisfy open trades at NSCC," and that, as a result of DTC' s release of the securities, "NSCC did not need to go to the marketplace to purchase securities to complete those trades."[22] As NSCC itself stated in December of 2021, "[t]o date, including through the 2008 well-publicized broker-dealer closeouts, NSCC has never invoked its membership loss allocation procedures."[23]

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[19] National Securities Clearing Corporation, Disclosure Framework for Covered Clearing Agencies and Financial Market Infrastructures, at p. 42 (December 2021).

[20] NSCC's Rules & Procedures, Rule 18, § 5.

[21] *See* NSCC's Disclosure Framework, at 22; *see also id.* at 19-22 for an extended discussion of the numerous exceptions and safe harbors in the FDICIA, Bankruptcy Code and SIPA that confirm that NSCC's netting and other agreements with OTC "shall not be stayed, avoided or otherwise limited by any state or federal law."

[22] 9 Business Wire Release, DTCC Successfully Closes Out Lehman Brothers Bankruptcy, dated October 30, 2008.

[23] NSCC's Disclosure Framework, at p. 13.

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And NSCC itself long recognized that the risk is non-existent where the stock is in an account at DTC: NSCC used to recognize when it allowed certain members to utilize the "DTC offset" to avoid the onerous "Illiquid Charge" and significantly reduce its margin requirements in such circumstances. If there was no risk then from the supposed lack of a lien, there is no risk now. The purported risk is a figment that could and should be easily resolved by DTCC's subsidiaries – NSCC and DTC – confirming between themselves that stock held at DTC can be applied in relation to a pending sale transaction, rather than by penalizing firms that are attempting to clear sell side transactions.

Accordingly, in addition to admitting the Intraday Backtesting Charge has an immaterial impact on its backtesting coverage, and thus the risk mitigation this charge is purportedly necessary to address, there is no actual risk to NSCC from Alpine's trading because it always has sufficient stock to fully cover the position in its account at DTC. Alpine therefore has demonstrated a substantial likelihood of success to grant the Emergency Motion to Stay the imposition of the Backtesting Charge until the Commission has an opportunity to fully consider these issues and those raised in Alpine's Application and Initial Motion to Stay, or until such time as it decides whether the approve NSCC's proposal to eliminate the Backtesting Charge.

IV. Alpine Meets the Other Requirements for the Stay.

Alpine also meets the other requirements for a stay, including irreparable harm, lack of prejudice and a public interest component. NSCC's efforts to rebut these showings are weak, at best, and should be given short shrift.

First, with respect to irreparable harm, NSCC does not and cannot rebut the sworn declarations from Alpine's CEO that, upon further analysis, it lacks the current capital to pay the Backtesting Charge, and the cost to borrow the capital in Alpine's circumstances are so steep that

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it cannot pay them and continue to trade and earn revenue.[24] That Alpine has, thus far, been able to survive the other onerous margin charges at issue does not mean it has not lost revenue and customers as a result (and as supported by declaration), or that it will not be irreparably harmed by, and faces the closure of its business as a result of the $2.1 million Backtesting Charge.

Second, NSCC's assertion that it and its other members will suffer prejudice if the stay is granted strains credulity and should be rejected. It must be emphasized again that NSCC proposed to eliminate the Intraday Backtesting Charge altogether nearly 4 months ago. Any assertion that NSCC or its membership would be prejudiced by the Commission staying the imposition of this charge on Alpine now is both nonsensical and contrary to its own public statements. Further, NSCC's claim that a stay of the Backtesting Charge would "unfairly force members to take on the additional risk Alpine's positions pose" is unsupported by any evidence and is nothing more than a hypothetical heaped on top of a fiction. Not only is there is no actual risk from these positions for the reasons detailed above, but NSCC itself confirmed the lion share of the $ 2.1 million charge provides no significant impact on its backtesting coverage. And, the Backtesting Charge itself does not even apply open positions, but rather to positions that are long closed and were covered by a margin call Alpine met at the time.

CONCLUSION

For the foregoing reasons, Alpine's Emergency Motion to Stay should be granted.

[24] *See* Declaration of Raymond Maratea, October 28, 2022, *and* Supplemental Declaration of Raymond Maratea, October 31, 2022, attached to Alpine's Motion for an Emergency Interim Stay and Supplemental Letter Motion in Support.

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DATED this 1st day of November, 2022.

PARSONS BEHLE AND LATIMER

/s/ *Aaron D. Lebenta*
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MARANDA FRITZ, P.C.

/s/ *Maranda E. Fritz*
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ATTORNEY CERTIFICATION

Pursuant to Rule 154(c) of the Commission's Rules of Practice, I hereby certify that the foregoing document contains 4,015 words, exclusive of the tables of contents and authorities, caption, and certificates.

PARSONS BEHLE AND LATIMER

/s/ *Aaron D. Lebenta*
Aaron D. Lebenta
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CERTIFICATE OF COMPLIANCE

I, Aaron D. Lebenta, certify that this motion complies with the Commission's Rules of Practice by filing a motion that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

PARSONS BEHLE AND LATIMER

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on the following on this 1st day of November, 2022, in the manner indicated below:

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