No. 23-0763-cv

In the United States Court of Appeals for the Second Circuit

PHHHOTO INC.,

Plaintiff-Appellant,

– v. –

META PLATFORMS, INC., fka Facebook, Inc.,

Defendant-Appellee,

DOES NOS. 1-7,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS IN SUPPORT OF PLAINTIFF-APPELLANT

Nada Djordjevic
Amy Keller
DiCello Levitt LLP
10 N. Dearborn St., Sixth Floor
Chicago, Illinois 60602
Tel: (312) 214-7900
ndjordjevic@dicellolevitt.com
akeller@dicellolevitt.com

Gregory Asciolla
Robin A. van der Meulen
DiCello Levitt LLP
485 Lexington Avenue, Suite 1001
New York, New York 10017
Tel: (646) 933-1000
gasciolla@dicellolevitt.com
rvandermeulen@dicellolevitt.com

Attorneys for Amicus Curiae the Committee to Support the Antitrust Laws

(Counsel list continued on inside cover)

Kristen G. Marttila
Lockridge Grindal Nauen P.L.L.P.
100 Washington Ave S, Ste. 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
kgmarttila@locklaw.com

Victoria Sims
Cuneo Gilbert & LaDuca LLP
4725 Wisconsin Ave NW, Ste. 200
Washington, DC 20016
Tel: (202) 789-3960
vicky@cuneolaw.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Committee to Support the Antitrust Laws states that it is a nonprofit corporation and no entity has any ownership interest in it.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE DISTRICT COURT'S HOLDING DISMISSING THE ACTION AS TIME-BARRED WILL IMPAIR FUTURE PRIVATE ANTITRUST ENFORCEMENT 6

II. THE DISTRICT COURT'S RULING WILL IMPEDE FUTURE PRIVATE ANTITRUST ENFORCEMENT BECAUSE IT CREATES UNRESOLVEABLE TENSION BETWEEN RULE 11 AND STATUTES OF LIMITATIONS 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

In re Aspartame Antitrust Litig.,
2007 WL 5215231 (E.D. Pa. Jan. 18, 2007).....9

Bethlehem Steel Corp. v. Fischbach and Moore, Inc.,
641 F. Supp. 271 (E.D. Pa. 1986).....10

In re Beef Indus. Antitrust Litig.,
600 F.2d 1148 (5th Cir. 1979).....9

California v. Am. Stores Co.,
495 U.S. 271 (1990).....1

In re Credit Default Swaps Antitrust Litig.,
2014 WL 4379112 (S.D.N.Y. Sept. 4, 2014).....8

DPWN Holdings (USA), Inc. v. United Air Lines, Inc.,
2014 WL 5394950 (E.D.N.Y. Sept. 16, 2014).....8, 9

In re Elec. Carbon Prods. Antitrust Litig.,
333 F. Supp. 2d 303 (D.N.J. 2004).....9

Hinds Cnty., Miss. v. Wachovia Bank N.A.,
620 F. Supp. 2d 499 (S.D.N.Y. 2009).....4

Hinds Cnty., Miss. v. Wachovia Bank N.A.,
700 F. Supp. 2d 378 (S.D.N.Y. 2010).....8

Koch v. Christie's Int'l PLC,
699 F.3d 141 (2d Cir. 2012).....8

In re Mercedes–Benz Antitrust Litig.,
157 F. Supp. 2d 355 (D.N.J. 2001).....9

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985).....2

New York v. Hendrickson Bros. Inc.,
840 F.2d 1065 (2d Cir. 1988).....7

In re Nine West Shoes Antitrust Litig.,
80 F. Supp. 2d 181 (S.D.N.Y. 2000) 7

Phhhoto Inc. v. Meta Platforms, Inc.,
2023 WL 2710177 (E.D.N.Y. Mar. 30, 2023).....3, 8, 10, 11

In re Processed Egg Prod. Antitrust Litig.,
2011 WL 5980001 (E.D. Pa. Nov. 30, 2011) 7

Reveal Chat HoldCo LLC v. Meta Platforms, Inc.,
2022 WL 595696 (9th Cir. Feb. 28, 2022) 11

Schenker AG v. Société Air France,
102 F. Supp. 3d 418 (E.D.N.Y. 2015) 11

United States v. Topco Assocs., Inc.,
405 U.S. 596 (1972).....1

Other Authorities

Federal Rule of Civil Procedure 9(b).....4, 10

Federal Rule of Civil Procedure 11 .....5, 6, 12, 13

Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879, 897, 906 (2008).....2

STATEMENT OF INTEREST OF AMICUS[1]

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). The Committee to Support Antitrust Laws ("COSAL") is an independent, non-profit corporation that is devoted to preventing, remediating, and deterring anticompetitive conduct since its founding in 1986.[2] COSAL advocates for the enactment, preservation, and enforcement of a strong body of antitrust laws, which it accomplishes through legislative efforts, public policy debates, and by serving as *amicus curiae* before the circuit courts as well as the Supreme Court of the United States.

Private enforcement of the antitrust laws is "an integral part of the congressional plan for protecting competition." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). The federal government cannot prosecute every violation of the antitrust laws. Nor has the federal government traditionally seen its role as compensative of the victims of antitrust violations. Private enforcement fills these

---

[1] All parties consent to the filing of this brief. *Amicus* COSAL states that no counsel for any party has authored this brief in whole or in part and no party, party's counsel, or any other person or entity—other than COSAL—has contributed money to fund its preparation or submission.

[2] *See* COSAL, https://www.cosal.org/about (last visited June 24, 2023).

significant gaps, buttressing public enforcers' limited resources and recovering damages to be paid directly to victims.[3] The Supreme Court has long recognized the key role private litigants and private enforcement play. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime.").

Businesses and consumers benefit from robust private enforcement of the antitrust laws. But private litigants cannot play their part in protecting competition in U.S. markets if they are kept out of court by the machinations of the very companies against which they are seeking to enforce the antitrust laws. Companies engaging in unlawful anticompetitive conduct often take great pains to hide the true nature of their conduct, and thus anticompetitive conduct can take years to uncover. As a result, antitrust plaintiffs often include allegations that defendants' fraudulent concealment of their unlawful conduct tolls the statute of limitations.

COSAL's interest in this matter is clear: the policy implications of the district court's decision go beyond this specific case. By prematurely dismissing this action on statute of limitations grounds prior to discovery and effectively raising the bar for pleading fraudulent concealment for an antitrust claim, the

[3] *See* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879, 897, 906 (2008) (reviewing 40 successful private antitrust cases and finding that of the $18-19.6 billion recovered for victims in those cases, almost half of the total recovery came from 15 cases that did not follow government actions).

district court has endangered critical private enforcement of the antitrust laws. The near-impossible standard for pleading fraudulent concealment in an antitrust case demanded by the district court will impede future private enforcement. If the district court's decision stands, meritorious antitrust cases will be time-barred, through no fault of the injured plaintiffs and class members, allowing significant anticompetitive conduct in the United States to proceed unchecked.

SUMMARY OF ARGUMENT

On November 4, 2021, Plaintiff-Appellant Phhhoto Inc. ("Phhhoto") filed a Complaint alleging unlawful exclusionary conduct by Defendant-Appellee Meta Platforms, Inc. ("Meta") in the market for Personal Social Networking Services, *i.e.*, online personal social networking. Joint Appendix ("A") at A-8, A-130, ¶ 135. In dismissing the Complaint, the district court held that Phhhoto's claims were time-barred because Phhhoto failed to plead sufficient facts to support its allegations of fraudulent concealment to toll the statute of limitations. *Phhhoto Inc. v. Meta Platforms, Inc.*, No. 21-cv-06159 (KAM)(LB), 2023 WL 2710177, at *11-21 (E.D.N.Y. Mar. 30, 2023).[4]

[4] The district court's Memorandum and Order, in its slip opinion form as issued, can be found at A-155-221. For the Court's convenience, citations herein are to the Westlaw version, *Phhhoto Inc. v. Meta Platforms, Inc.*, No. 21-cv-06159 (KAM)(LB), 2023 WL 2710177 (E.D.N.Y. Mar. 30, 2023).

When a person fraudulently conceals his actions, he is in unique possession of the particular facts of that concealment. Requiring a plaintiff to plead such concealment with greater specificity than what is already required under the law, as the district court demanded, will create an undue burden on future plaintiffs and hamper private antitrust enforcement.[5] The district court's new standard would make it significantly more difficult for private antitrust plaintiffs to prosecute viable claims, particularly when the subject matter is highly technical and key information is in the hands of a single entity. This *amicus* focuses on the far-reaching adverse consequences to future private antitrust enforcement as a result of the district court's faulty reasoning with respect to pleading fraudulent concealment.

First, the district court raised the burden of pleading fraudulent concealment for would-be plaintiffs beyond the already-heightened standard currently required on a motion to dismiss. Fraudulent concealment is, by its nature, a fact-intensive inquiry—facts that often are uniquely in the defendant's possession. This is especially true for an unlawful monopolist. For this reason, courts generally will allow fraudulent concealment allegations to proceed past a motion to dismiss and into discovery, where such allegations can be properly examined. *See* Section I

[5] A claim for fraudulent concealment must be pleaded with particularity. Fed. R. Civ. P. 9(b). *See Hinds Cnty., Miss. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 520 (S.D.N.Y. 2009).

below (listing cases). The district court here departed from this, denying the plaintiff essential discovery on the issue by prematurely rejecting plaintiff's fraudulent concealment allegations. The implication of this decision, and the message being sent to other courts in the district deciding similar cases, is that meritorious antitrust cases may be dismissed before the benefits of full discovery, thus impeding the use of a critical tool of private antitrust enforcement in combatting anticompetitive conduct.

Second, and relatedly, the pleading requirement for fraudulent concealment demanded by the district court creates friction between complying with Federal Rule of Civil Procedure 11 and the statute of limitations. Rule 11 requires plaintiffs to certify that factual allegations in their complaint have evidentiary support, *see* Fed. R. Civ. P. 11(b)(3), and the statute of limitations requires the timely filing of claims. But the district court's opinion creates needless tension between these pleading requirements for antitrust plaintiffs when an inquiry into defendant's concealed anticompetitive acts cannot be completed within the limitations period. Plaintiffs who do not yet possess all the necessary facts to prove an antitrust claim will be forced to choose between enforcing their rights within a limitations period, without the benefit of the fraudulent concealment toll, or risking a Rule 11 sanction for filing claims for which they may not yet have sufficient evidentiary support. The consequence of this conflict will be to

discourage the filing of legitimate antitrust cases out of responsible counsel's understandable desire to avoid Rule 11 sanctions. But this is not a conundrum antitrust plaintiffs need face: a properly pleaded claim of fraudulent concealment tolls the statute of limitations and allows plaintiffs ample opportunity for discovery on their claims. The district court's opinion precludes this and should be reversed.

ARGUMENT

I. THE DISTRICT COURT'S HOLDING DISMISSING THE ACTION AS TIME-BARRED WILL IMPAIR FUTURE PRIVATE ANTITRUST ENFORCEMENT

Anticompetitive conduct is, by its nature, covert. That is unsurprising: the financial consequences for an antitrust violation are substantial (*e.g.*, treble damages, interest, costs) and potentially criminal. As a result, a person or company engaging in anticompetitive behavior often makes every effort to conceal that anticompetitive behavior for as long as possible—often for a period of time greater than the four-year statute of limitations for bringing a federal antitrust claim under the Sherman Act. *See* 15 U.S.C. § 15(b). However, such extended concealment does not necessarily extinguish an antitrust claim—if that were true many successful antitrust claims would have been barred. Indeed, tolling the statute of limitations is permitted in certain circumstances. For instance, an antitrust plaintiff can toll the four-year statute of limitations for a Sherman Act antitrust claim by sufficiently alleging (and ultimately proving, after an opportunity for discovery)

that the defendant fraudulently concealed the conduct that otherwise would have provided a plaintiff with notice that he may have a viable claim. *See In re Nine West Shoes Antitrust Litig.,* 80 F. Supp. 2d 181, 192 (S.D.N.Y. 2000); *New York v. Hendrickson Bros. Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988).

The core purpose of the fraudulent concealment doctrine is to "prevent a defendant from 'concealing a fraud, or . . . committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it.'" *Hendrickson Bros.*, 840 F.2d at 1083 (internal citation omitted). The district court's decision thwarts that purpose, instead penalizing antitrust plaintiffs for not knowing the as-yet unknowable and allowing anticompetitive actors to further benefit from concealing their unlawful conduct by making them legally untouchable.

Fraudulent concealment, by its very nature, is a fact-intensive inquiry. *In re Processed Egg Prod. Antitrust Litig.*, No. 08-MD-02002, 2011 WL 5980001, at *7 (E.D. Pa. Nov. 30, 2011) ("[C]ourts confronting fraudulent concealment arguments in antitrust cases often highlight the fact intensive inquiry required in ascertaining whether a plaintiff should have known of her claim and the reasonableness of a plaintiff's investigation."). As the district court correctly found, to benefit from tolling based on fraudulent concealment, a plaintiff must allege three elements: (1) defendant wrongfully concealed material facts relating to its wrongdoing; (2)

such concealment prevented plaintiff from discovering the claim within the limitations period, and (3) plaintiff exercised due diligence in pursuing the discovery of the claim. *See Phhhoto*, 2023 WL 2710177, at *11, *citing Koch v. Christie's Int'l PLC*, 699 F.3d 141, 157 (2d Cir. 2012). However, the district court's opinion went above and beyond requiring plaintiffs to plead their fraudulent concealment claims with particularity and in effect demanded that antitrust plaintiffs be either omniscient or paranoid about any actions taken by their competitors and business partners.

Because fraudulent concealment is such a fact-intensive inquiry, it is not appropriately decided on a motion to dismiss. *Hinds Cnty., Miss. v. Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 400 (S.D.N.Y. 2010) ("Resolution of a claim of fraudulent concealment so as to toll the statute of limitations is 'intimately bound up with the facts of the case' and is thus not properly decided on a motion to dismiss.") (internal citation omitted). Courts within the Second Circuit and elsewhere recognize the fact-intensive nature of the inquiry, regularly denying motions to dismiss to the extent they sought more particular pleading on fraudulent concealment grounds. *See, e.g.*, *In re Credit Default Swaps Antitrust Litig.*, No. 13-MD-2476 (DLC), 2014 WL 4379112, at *16 (S.D.N.Y. Sept. 4, 2014) (holding that "[w]hile the issue of fraudulent concealment must be determined on the merits," plaintiffs pleaded sufficient facts of fraudulent concealment); *DPWN*

Holdings (USA), Inc. v. United Air Lines, Inc., No. 11–CV–564 (JG), 2014 WL 5394950, at *2 (E.D.N.Y. Sept. 16, 2014) (denying motion to dismiss and reserving determination of plaintiff's knowledge of antitrust claim for summary judgment stage and "only after discovery has been conducted"); *In re Aspartame Antitrust Litig.*, No. 2:06–CV–1732, 2007 WL 5215231, at *6 (E.D. Pa. Jan. 18, 2007) (holding plaintiff sufficiently pleaded fraudulent concealment: "Issues of diligence and constructive notice, which are inherently factual, generally should not be decided on a motion to dismiss."); *In re Elec. Carbon Prods. Antitrust Litig.*, 333 F. Supp. 2d 303, 317 (D.N.J. 2004) (denying motion to dismiss to extent it sought more particular pleading of fraudulent concealment and sending case to discovery: "The question of whether the plaintiffs exercised due diligence to uncover their claim 'implicates factual questions as to when plaintiff discovered or should have discovered the elements of the cause of action.'" (internal citation omitted)); *In re Mercedes–Benz Antitrust Litig.*, 157 F. Supp. 2d 355, 374 (D.N.J. 2001) ("The issue of tolling of the statute of limitations due to defendants' alleged fraudulent concealment is an equitable one. As such it is intimately bound up with the facts of the case," (citing *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1171 (5th Cir. 1979)), and holding "[t]he Court will not now dismiss potentially time-barred claims in the complaint on the pleadings alone, confident that each of the issues discussed above will be revisited with a mature record later in the case.");

Bethlehem Steel Corp. v. Fischbach and Moore, Inc., 641 F. Supp. 271, 275 (E.D. Pa. 1986) (holding allegations of due diligence sufficient to withstand a motion to dismiss: "Whether a party has exercised due diligence is a factual issue which cannot be decided on a motion to dismiss unless it appears beyond doubt that plaintiff can prove no facts to support the claim."). As a result, and as the aforementioned cases demonstrate, fraudulent concealment allegations should and regularly do proceed to discovery where they can be properly and thoroughly vetted.

Courts recognize that the facts needed to plead fraudulent concealment are the very facts purposely being concealed by the defendant, making them even more difficult to uncover without the benefit of discovery. This issue is particularly acute in antitrust cases alleging monopoly conduct, where all the facts are closely held by a single actor, versus conspiratorial conduct, where there are multiple transgressors, one of whom can eventually disclose the conduct to protect itself. Thus, allowing cases to move forward to discovery is appropriate and fair. However, the district court in *Phhhoto* did the opposite. The level of detail the district court required to sufficiently allege fraudulent concealment effectively *raises* the bar above what is already required under Rule 9(b). Future antitrust plaintiffs subject to this opinion will be extremely hard pressed to meet the district court's pleading requirements. Simply put, what the district court has done is

apply a supra-exacting pleading standard to an antitrust complaint's fraudulent concealment allegations despite courts' general common-sense refusal to rule on fraudulent concealment at the motion to dismiss stage.

And the district court all but acknowledged that the factual details relating to concealment were solely in the hands of the defendant Meta when it found that Phhhoto was insufficiently diligent in pursuing discovery of its claim because Phhhoto *did not ask Meta directly* whether Meta's algorithm operated in an anticompetitive manner. *Phhhoto*, 2023 WL 2710177, at *21. This defies common sense and ignores the realities of the business world. "The antitrust laws do not obligate Meta to share its motivations for its business decisions" with competitors. *Reveal Chat HoldCo LLC v. Meta Platforms, Inc.*, No. 21-15863, 2022 WL 595696, at *2 (9th Cir. Feb. 28, 2022). Meta was under no obligation to tell Phhhoto why Meta was doing what it was, so what possible purpose would Phhhoto's inquiry with Meta serve? Asking a competitor for information the competitor is neither required nor inclined to truthfully provide in order to show "diligence" is a clear example of futility, and courts within the Second Circuit have held that plaintiffs "are not required to allege affirmative inquiries" to show diligence "when such inquiries would be futile." *Schenker AG v. Société Air France*, 102 F. Supp. 3d 418, 426 (E.D.N.Y. 2015) (listing cases).

The implications of this opinion are that otherwise meritorious cases should be tossed out of court prematurely, on timeliness grounds, rather than proceeding into discovery where further evidentiary support may be found to prove tolling. It will have a profound chilling effect on antitrust cases. This decision could discourage cases from being brought based on concerns by counsel that the unattainable standard used by the district court for tolling the statute of limitations could not be satisfied. And this ruling likely will resonate to extend beyond antitrust cases alleging monopolization through exclusionary conduct, such as here, to cases alleging unlawful horizontal price-fixing conspiracies in violation of Section 1 of the Sherman Act. In short, private antitrust enforcement—an integral component of sound antitrust policy—could be significantly weakened if this decision stands.

II. THE DISTRICT COURT'S RULING WILL IMPEDE FUTURE PRIVATE ANTITRUST ENFORCEMENT BECAUSE IT CREATES UNRESOLVEABLE TENSION BETWEEN RULE 11 AND STATUTES OF LIMITATIONS

Federal Rule of Civil Procedure 11(b) provides, among other things, that by presenting a pleading to the court, an attorney "certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ

P. 11(b)(3). As a direct repercussion of the district court's decision, future plaintiffs will be on the horns of a dilemma: file later and risk dismissal of an otherwise well-pleaded case on statute of limitations grounds because the district court's heightened pleading standard for fraudulent concealment cannot be met, or risk running afoul of Rule 11 by filing a complaint before an investigation is complete, but within the statute of limitations and without the benefit of the toll for fraudulent concealment.

Both of these outcomes are undesirable. Under the first scenario, too many otherwise viable antitrust cases will be dismissed as time-barred. Under the second scenario, fewer antitrust cases will be filed to avoid the risk of a Rule 11 violation, and for those that are filed, more will be prematurely dismissed because the plaintiff may not have had the time to complete a full investigation into the facts of the case.

Importantly, both of these scenarios will have deleterious effects on future private antitrust enforcement by leading to the *underenforcement* of antitrust violations, either by more cases being dismissed or fewer cases being filed. This ultimately and most directly impacts victims of antitrust violations, who will invariably lose the opportunity to recover damages for their losses. Further, with essential private antitrust enforcement at risk, victims lose an effective deterrence tool against future anticompetitive behavior.

CONCLUSION

Consistent with the foregoing, the district court's decision should be reversed.

Dated: June 27, 2023

By: */s/ Gregory Asciolla*

Gregory Asciolla
Robin A. van der Meulen
DiCello Levitt LLP
485 Lexington Avenue, Suite 1001
New York, New York 10017
Tel: (646) 933-1000
gasciolla@dicellolevitt.com
rvandermeulen@dicellolevitt.com

Nada Djordjevic
Amy Keller
DiCello Levitt LLP
10 N. Dearborn St., Sixth Floor
Chicago, Illinois 60602
Tel: (312) 214-7900
ndjordjevic@dicellolevitt.com
akeller@dicellolevitt.com

Kristen G. Marttila
Lockridge Grindal Nauen P.L.L.P.
100 Washington Ave S, Ste. 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
kgmarttila@locklaw.com

Victoria Sims
Cuneo Gilbert & LaDuca LLP
4725 Wisconsin Ave NW, Ste. 200
Washington, DC 20016
Tel: (202) 789-3960
vicky@cuneolaw.com

Counsel for Amicus Curiae the Committee to Support the Antitrust Laws

CERTIFICATE OF COMPLIANCE

United States Court of Appeals for the Second Circuit: Case No. 23-0763-cv.

I, Gregory Asciolla, hereby certify that:

1. I am an attorney for *amicus curiae* the Committee to Support the Antitrust Laws, my name appears on this brief and I am a member of the bar of this Court.

2. This document is an amicus brief and complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) and Second Circuit Local Rule 29.1(c) and the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Second Circuit Local Rule 32.1(a)(4)A) because, excluding the items exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 3055 words.

3. The brief's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5)(A) and (6) because this document has been prepared in the proportionally spaced typeface Times New Roman in 14-point font.

Dated: June 27, 2023

/s/ *Gregory Asciolla*
Gregory Asciolla

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate EM/ECF system. Counsel for all parties in the case are registered EM/ECF users and will be served by the appellate CM/ECF system.

Date: June 27, 2023

/s/ *Gregory Asciolla*

Gregory Asciolla
DiCello Levitt LLP
485 Lexington Avenue, Suite 1001
New York, New York 10017
Tel: (646) 933-1000
gasciolla@dicellolevitt.com