No. 24-598

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOSAIC HEALTH, INC. and CENTRAL VIRGINIA HEALTH SERVICES, INC., individually and on behalf of all those similarly situated
Plaintiffs-Appellees,

v.

SANOFI-AVENTIS U.S., LLC, ELI LILLY AND COMPANY, LILLY USA, LLC, NOVO NORDISK INC. and ASTRAZENECA PHARMACEUTICALS LP,
Defendants-Appellants,

On Appeal from the United States District Court for the Western District of New York No. 21-cv-06507 (Hon. Elizabeth A. Wolford)

AMICUS CURIAE BRIEF BY THE AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF PLAINTIFFS- APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org/[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Conspiracies to increase price have long been considered the "supreme evil" of antitrust. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004). This is for good reason. Agreements to raise prices have no redeeming consumer benefits. At the same time, the economic incentive for companies to engage in such behavior is strong. And while the likelihood of harm to consumers is high, such illegal agreements are hard to detect and often go unpunished. *See infra,* Part II. Accordingly, antitrust law has rightly been more concerned about underdeterrence of cartel behavior than overdeterrence. The antitrust statutes, for example, impose treble damages to deter such violations, and the courts have long condemned such

[1] All parties consent to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus or their counsel—has contributed money that was intended to fund preparing or submitting this brief. Certain members of AAI's Boards may be involved as counsel in this case, but they played no role in the drafting of this amicus brief.

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agreements as per se violations of the law subject to criminal prosecution and punishment by steep fines and even imprisonment.

Today, the majority of Section 1 cases are brought by private plaintiffs. A large number of those are the product of original and time-consuming investigations by plaintiffs and their attorneys, not simply follow-ons to government investigations. *See infra,* Part III. The case before this Court is an example of this independent investigative work. Private enforcement actions like this are a key tool in optimal cartel deterrence. But they can only be effective if evidentiary standards reflect the real-world challenges of cartel detection. If not, we risk losing one of the most powerful tools for discouraging cartel behavior and protecting consumers from its harms.

Indeed, this concern is at play throughout the caselaw on Section 1 of the Sherman Act. Courts universally acknowledge, for example, that an illegal agreement may be shown by circumstantial, not just direct, evidence. *See, e.g., Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.,* 346 U.S. 537 (1954). This is because "conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with [ ] precision." *United States v. Snow,* 462 F.3d 55, 68 (2d Cir. 2006). But the issue of under-deterrence is nowhere more important than in pleading standards. These threshold decisions determine whether plaintiffs ever get the discovery that might uncover hidden agreements or if defendants' conduct goes unexamined and unchallenged.

This Circuit has articulated a pleading standard for Section 1 complaints that effectively walks the line between requiring sufficient factual allegations that support an inference of agreement and demands so rigid that a savvy company can easily evade scrutiny. However, the

court below failed to follow it. *See infra,* Part I. For this reason, the district court's decision should be reversed.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIES THIS CIRCUIT'S PLEADING STANDARDS BY IGNORING ITS KEY GUARDRAILS

In this case, plaintiffs Mosaic Health, Inc. and Central Virginia Health Services, Inc., on behalf of a class of safety-net health clinics, ("Plaintiffs") allege that the defendants Sanofi-Aventis, Eli Lilly, Novo-Nordisk and AstraZeneca ("Defendants"), four pharmaceutical companies who collectively control markets for major types of insulin, conspired in violation of Section 1 of the Sherman Act to cut back on discounts available under the 340B drug program, a federal program requiring discounts on outpatient drugs purchased by health care providers for underserved populations. *Sec. Am. Compl.* ¶¶ 2, 23, 78, 85. According to the Second Amended Complaint, Defendants, frustrated with unsuccessful lobbying efforts to remove 340B requirements, instead agreed with one another to put in place substantial restrictions in supplying 340B drugs. *Id.* at ¶132.

The SAC alleges that Defendants' restrictions, although differing in the details, had the same effect: reducing the availability of discounted drugs to community pharmacies serving low-income populations. *Id.* at ¶¶ 177, 275. Plaintiffs allege facts showing that this was a stark departure both from Defendants' previous practice under 340B and the practice of other drug manufacturers who did not have the market power advantages of Defendants. *Id.* at ¶¶ 155, 156, 163. Further, the SAC explains that, absent their agreement, the Defendants would have faced the potential loss of full-price sales in the same channels, and because the restrictions violated 340B, the risk of financially devasting exclusion from federal healthcare programs. *Id.* at ¶¶ 64-

77. As a result, no rational manufacturer would have taken such actions independently. But by acting together, Plaintiffs allege, these companies could leverage their collective control over one of the most important categories of drugs to avoid those adverse consequences. *Id.* at ¶ 77.

The allegations in the SAC are more than sufficient to avoid dismissal under the standards articulated by *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007). But instead, the district court declared the conduct to be insufficiently parallel, and the "plus factors" to suggest agreement to be lacking. SPA-35-41. In so doing, the court adopted a definition of "parallel conduct" and an understanding of plausibility that are inconsistent with the Supreme Court's guidance in *Twombly* and this Court's precedent.

The Supreme Court in *Twombly* may have shifted the emphasis in assessing a complaint from assertions to factual allegations. *See id.* at 556-57 ("a conclusory allegation of agreement […] does not supply facts adequate to show illegality"). It did not, however, change other core principles of pleading. The facts alleged must be assumed to be true. *See id.* ("Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations"). And all reasonable inferences must be drawn in favor of the plaintiff. *See, e.g., Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974) ("[I]t is well established that, in passing on a motion to dismiss […] the allegations of the complaint should be construed favorably to the pleader."). This Court has held as much. *See Anderson News, L.L.C. v. Am. Media, Inc.,* 680 F.3d 162, 185 (2d Cir. 2012) ("we accept as true the factual allegations of the complaint, and construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff."). These are dual guardrails that prevent the judge from stepping into the role of a fact-finder before any discovery has occurred.

What follows from these twin principles is clear. Judges cannot dismiss a plaintiff's well-pleaded complaint based on whether defendants' alternative version of the facts strikes them as more meritorious. *Id.* at 184 ("The choice between or among plausible inferences or scenarios is one for the factfinder"). *See also Palin v. N.Y. Times Co.,* 940 F.3d 804, 815 (2d Cir. 2019)(explaining that it is "not the district court's province to dismiss a plausible complaint because it is not as plausible as the defendant's theory." This is the mistake the district court made in this case, breaking with the precedent of this Circuit and Supreme Court.

In the Decision and Order on Plaintiffs' Motion to Amend, the district court accepted as true large parts of the Defendants' alternative narrative. SPA-20-41. In so doing, the court ignored the first guardrail of this Circuit's pleading standard: facts alleged in the complaint must be assumed true. Plaintiffs, for example, allege that Defendants would not have acted independently to restrict 340B discounts for fear of exclusion from federal health programs. *Sec. Am. Compl.* at ¶¶ 72-77. Plaintiffs further alleged that threat of exclusion is described in the statute itself as a potential consequence for violations of 340B. *Id.* at ¶ 73. Yet the district court discounted the importance of the statutory punishment, and instead adopted Defendants' argument that only the receipt of specific threats of exclusion from HHS would affect Defendants' decision-making. And since those only came after some Defendants had started implementing the restrictions, the court discounted them as irrelevant to Defendants' decision-making. SPA-40. The judge could only reach this conclusion by improperly picking and choosing which of plaintiffs' factual allegations to accept.

The district court's decision to favor Defendants' alternative version of the facts violates a second pleading standard guardrail: all reasonable inferences must be drawn in favor of the plaintiff. For example, Plaintiffs allege Defendants' joint lobbying efforts to roll back 340B

showed Defendants had the motive and the opportunity to conspire in the period just before the restrictions were imposed. But instead of crediting that reasonable inference, the judge accepted Defendants' "alternative explanation" for the timing of the restrictions—that each was independently motivated to act by the issuance of a disappointing Executive Order. SPA- 36-37. By weighing one inference against another, the district court applies a summary judgment standard rather than one appropriate for a motion to dismiss. *See, e.g., Anderson News, LLC* , 680 F.3d at 189 ("The question at the pleading stage is not whether there is a plausible alternative to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible."); *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (contrasting summary judgment, where "plaintiff must offer evidence," with the motion to dismiss stage where "a plaintiff need only allege 'enough factual matter (taken as true) to suggest that an agreement was made.'").

Finally, the district court's decision relies on a rigid definition of parallel conduct that falls short in at least two ways. It ignores the Supreme Court's guidance in *Twombly* that such allegations must be viewed in context and their sufficiency assessed "in light of common economic experience." 550 U.S. at 565. And more importantly, it loses sight of "concerted action" as the fundamental question under Section 1 of the Sherman Act.

In *Twombly*, the Supreme Court analyzed the plaintiffs' allegations of parallel conduct in light of the factual context alleged in the complaint. The allegation that defendant ILECs failed to expand to compete with one another was assessed against a number of factual considerations, including the changes brought by the Telecommunications Act of 1996, the long history of monopolies in the industry, and the "nearly insurmountable barriers to profitability" described in

the complaint. *Id.* The Supreme Court agreed, given that factual context, that the district court was correct in finding the complaint inadequate.

In contrast, the district court concludes that the timing of the restrictions make agreement implausible based, not on the factual allegations in the complaint, but on assumptions borrowed from other cases with different factual contexts. SPA-13-14. And in its eagerness to fit the allegations in this case into the mold of *Twombly*, the district court discounts factual allegations that draw sharp distinctions with the situation considered by the Supreme Court, including Defendants' previous decade-long compliance with 340B requirements. Its analysis runs counter to the example set by *Twombly* and contradicts the Supreme Court's guidance that allegations be assessed in the factual context described by the complaint.

The district court's definition of parallel conduct also looks too narrowly at the mechanics of the conduct rather than the core principle for which it is meant to be a proxy. A violation of Section 1 depends on showing "concerted action" and an unreasonable restraint of trade. *Twombly,* 550 U.S. at 553-54 ("the crucial question is whether the challenged anticompetitive conduct stems from an independent decision or from an agreement, tacit or express."). Parallel conduct with "plus factors" is one way to show concerted action but it is not the exclusive way. Plaintiffs, for example, may meet the requirements of concerted action by showing that "defendants had a motive to conspire and acted contrary to their self-interest." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co*., 998 F.2d 1224, 1244 (3d Cir. 1993). *See also id.* at 1246 (such evidence "take[s] this case beyond the simple allegation of parallel behavior . . . [and] indicates that [Defendants] had an actual agreement"); *Twombly*, 550 U.S. at 564 (distinguishing claims that rest solely on allegations of parallel behavior from ones that rest on an "allegation of actual agreement").

The focus of the "concerted action" test is on the ends, not the means. By making "variations in [Defendants'] timing and particulars" decisive, the district court focuses so myopically on parallelism that it loses sight of the real question of whether there is concerted action. As a result, the district court failed to properly credit Plaintiffs' allegations that the potential loss of market share on full price drug purchases and the potential exclusion from federal health programs made it contrary to Defendants' interests to independently impose the 340B restrictions. In short, the district court's definition of parallel conduct misses the forest for the trees.

II. THE PLEADING STANDARD APPLIED BY THE DISTRICT COURT IGNORES THE DOCUMENTED REALITIES OF CARTEL BEHAVIOR

The district court's overly rigid definition of parallel conduct and inappropriate discounting of factual allegations don't just violate this Circuit's pleading standards; they ignore the fundamental realities of cartel behavior. Illegal agreements are reached in private, not in public. And conspirators work, often in creative and novel ways, to hide any evidence of it. It is routine for the DOJ's criminal antitrust cartel cases, for example, to also include counts of obstruction for participants who lied to investigators or destroyed documentary evidence of price fixing. *See, e.g.,* Press Release, U.S. Dep't of Just., "Six Additional Individuals Indicted on Antitrust Charge in Ongoing Broiler Chicken Investigation" (Oct. 7, 2020) (describing one defendant's indictment on an obstruction charge for making false statements); Press Release, U.S. Dep't of Just., "Former Health Care Staffing Executive Convicted of Obstructing FTC Investigation into Wage-Fixing Allegations" (April 14, 2022).

In his article *How to Hide a Price-Fixing Cartel*, Professor Christopher Leslie catalogues dozens of different ways in which cartels have hidden their illegal actions and avoided timely detection. *See* Christopher R. Leslie, *How To Hide A Price-Fixing Conspiracy: Denial,*

Deception, and Destruction of Evidence, 2021 U. Ill. Rev. 4 (2021). To take just a few illustrative examples:

- Conspirators adopted elaborate codes to hide the identity of its participants and make the illegal communications seem innocuous. Members of a freight-forwarding cartel "referred to their conspiracy as the "Gardening Club" and called each other by vegetable-themed names such as asparagus and baby courgettes." *Id.* at 1207.
- Meetings of conspirators were disguised by creating cover stories or by meeting in places and ways that made detection difficult. A vitamins cartel adopted a strict policy of meeting in pairs rather than all at once to prevent scrutiny by authorities. *Id.* at 1212.
- Documentation of coordination was avoided or destroyed. Another cartel insisted all meeting notes be on red or pink paper, so they could be easily identified for collection and destruction after conspiratorial meetings. *Id.* at 1221.
- Third-party go-betweens were used to facilitate coordination while avoiding direct communications. In Europe, for example, a "cartel consultant" assisted various price-fixing conspiracies with organizing meetings and hiding incriminating evidence. *Id.* at 1212-13.

Most relevant for this case, Professor Leslie recounts how conspirators have used various shams to camouflage collusive actions and to make them appear to be independent decisions. Some cartels designated a member to "lead" a price increase, rotating leaders to avoid detection. Others manipulated the timing of price increases to make them less suspect. A well-known vitamins cartel worked to avoid scrutiny by agreeing to delay implementation of price increases for eight months after the cartel meetings. *Id.* at 1216-17.

Given these realities, variations in the details of the restrictions and the timing of their implementation do not seem implausible at all. Defendants are sophisticated pharmaceutical companies with extensive experience as defendants in antitrust cases. If they were engaged in an illegal agreement, would we expect them to publicly announce their discount reductions at the same time and in the same manner as their competitors? That would unquestionably invite unwanted scrutiny. Instead, the opposite seems more likely—that they would be as creative as possible in finding different ways to achieve the same agreed-upon outcome and to spread out public announcements of the policies as much as possible.

Soon after the *Twombly* decision, the Supreme Court elaborated on pleading standards in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). It explained that "[d]etermining whether a complaint states a plausible claim for relief will […] be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. In the context of a Section 1 claim, part of that judicial experience includes the knowledge that cartelists will engage in all manner of subterfuge to hide their illegal agreements. The district court here failed entirely to take account of this reality when it faulted Plaintiffs' allegations of parallel conduct for "variations in timing and particulars."

III. THE DISTRICT COURT'S AGGRESSIVE PLEADING STANDARD, IF AFFIRMED BY THIS COURT, RISKS FURTHER UNDER-DETERRENCE OF CARTEL BEHAVIOR

Section 1 cartels are all too common in the U.S. economy. In the past ten years alone, the U.S. Department of Justice has charged over 100 corporations and more than 300 individuals with criminal antitrust violations. Total criminal fines and penalties imposed, one possible approximation of the economic harms caused by these cartels, reached almost $7 billion in the

same period. *See* DOJ Antitrust Division, Criminal Enforcement Trends Chart (last updated Oct 24, 2023), available at https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

But these measures only include the cartels that have been detected and prosecuted criminally. Many more go undetected. It is impossible to know exactly how many price-fixing cartels operate undiscovered every year, but a wide range of different studies have all estimated that fewer than a third of cartels are discovered. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays,* 34 Cardozo L. R. 427, 462-66 (2012) (cataloguing several different studies employing a variety of methodologies for estimating undetected cartels with estimated probabilities of detection ranging from 13%-30%).

Estimates of the economic harms caused by undetected cartels also vary, but all are significant. The U.S. Sentencing Guidelines are based on an estimated average cartel overcharge of 10%. *See USSC Guidelines Manual,* Sect. 2R1.1., n. 3. Other methods, however, suggest higher average overcharges are more likely. Connor and Lande, for example, compiled comprehensive data sets of overcharges based on discussions in scholarly articles and antitrust cases in which a neutral finder of fact reported overcharges that could be converted into percentages. Based on this large database of information, they calculated median overcharges that hover around 25%. *Id.* at 455-57.

Regardless of the exact overcharge, the harm cartels do is massive. To add to the damage, those harms are often visited on the most financially vulnerable populations. Past cartels have raised the prices of key consumer goods, like groceries and electronics, and have targeted products consumers cannot do without, like generic drugs. As scholars have observed, "cartel overcharges [..] resemble a system of regressive taxes…that is, effective collusion in the great majority of markets transfers income from relatively low-income buyers to relatively high-

income owners and managers of the companies" raising price. John M. Connor and Robert H. Lande, *The Prevalence and Injuriousness of Cartels Worldwide,* University of Baltimore School of Law Legal Studies Research Paper (2023) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4319572. In this case, if plaintiffs' allegations prove to be true, millions of particularly vulnerable patients will have lost out on access to discounted drugs they were due under HHS regulations.

The temptation to engage in cartel conduct is strong. The harm to consumers translates almost directly into profits for the cartel participants. The draw is so powerful that cartels continue to proliferate despite threats of significant financial punishments, criminal prosecution, and potentially years of imprisonment. *Id.* at 6-8 (describing a growing number of detected cartels despite significant levels of punishment).

Academics studying optimal deterrence attribute the persistence of cartel behavior to (1) the high likelihood that the cartel will go undetected and unpunished, and (2) insufficiently stiff penalties. *See, e.g.,* Connor & Lande, Cardozo L.R. at 479. In short, despite vigorous prosecution by the U.S. antitrust agencies, the risk/reward ratio still tilts all too often in favor of illegal behavior. Not only does the relatively low likelihood of detection embolden potential cartelists, but as some analyses have suggested, cartel activity might still be profitable even if the cartel members are caught. *Id*. Taken together, the available evidence suggests very significant under-deterrence of cartel behavior.

The 2012 study by Connor & Lande used a sample of 75 cartels sanctioned in the U.S. between 1990 and 2005 to estimate whether the total penalties imposed over- or under-deterred their illegal conduct. The authors estimated the net consumer harm caused by each cartel and compared this to an estimate of total penalties imposed in the U.S., including fines for

corporations and individuals, prison terms, restitution payments, civil treble damages verdicts and settlements in private antitrust actions. After discounting the net consumer harm, a measure of the cartel's profitability, by the estimated likelihood of detection and punishment, the authors determined that only one of the 75 cartels was arguably over-deterred. Of the remaining, a remarkable 73 of the cartels were under-deterred, sometimes drastically so. Based on their estimates, the authors conclude that the cartel sanctions would have had to be approximately five times larger to reach an optimal level of deterrence. *Id.* at 478.

Such levels of under-deterrence are arguments for steeper penalties, but they are also arguments for broadening opportunities for cartel detection across the "complex and interconnected antitrust system," including private enforcement. These findings debunk concerns that the treble damages awarded in private cartel actions are excessive. This, in turn, undermines the rationale courts sometimes seem to embrace for narrowing the path to liability for private plaintiffs, including by adopting demanding pleading standards.

As discussed above, an overly rigid pleading standard, particularly with respect to easily manipulated aspects of an agreement like timing and details of implementation, provides clever defendants with a blueprint to avoid discovery and thus detection. Narrowing the opportunity to root out cartel behavior through private enforcement has a particularly outsized effect on deterrence for several reasons.

First, private enforcement accounts for a considerably larger number of Section 1 cases than government enforcement. But beyond sheer numbers, analyses of cases from 1990 to 2011 have shown that private action accounts for more than three times the deterrent value of government cases. *See* Josh Paul Davis & Robert H. Lande, *Defying Conventional Wisdom: the Case for Private Antitrust Enforcement,* 48 Ga. L. R. 1, 26 (2013). While the authors of that

analysis estimate sanctions of all types resulting from government cases in that period to have a total deterrent value of $11.7 billion, the private cases tracked during that same period represent an estimated $34-$36 billion in deterrent value. *Id.*

Second, private enforcement complements government actions and thus has a unique role in detecting wrongdoing. Contrary to assumptions that private cases largely pile further damages onto cases already unearthed by government enforcers, the 2013 Davis & Lande study also showed that more than half of the cases examined were not preceded by a government action or included substantially different claims than the government prosecutions. *Id.* at 30-31. This is significant because an excessively demanding pleading standard is likely to have a chilling effect on these "complementary" claims not buttressed with information made public by government actions. In turn, this would have a pernicious effect on the deterrent value of private enforcement.

Third, private enforcers appear to be less risk averse than government authorities. Historically, DOJ has succeeded in "a very high proportion of its cases," often prevailing over 90% of the time. *Id.* at 32. Even without exact measures of success rates, private plaintiffs "almost certainly […] prevail at much lower rates." *Id.* At the same time, attorneys for private plaintiffs have ample reasons to invest in meritorious cases rather than shaky ones. *Id.* at 34-36. (describing plaintiff attorneys' level of investment in developing cases, reliance on outcome-based contingency awards, and expectation of court scrutiny during class action settlements). This puts private enforcers in a unique position to detect cartel behavior that may not be the focus of government efforts.

A pleading standard that allows cartelists to easily evade discovery prevents private enforcement from acting most effectively as a complement to government enforcement. In an

economy in which Section 1 violations are already under-deterred, such a standard will deprive consumers of an important protection against the harms of collusion.

CONCLUSION

The district court in this case misapplied the pleadings standards described by this Circuit and the Supreme Court. By adopting a rigid definition of parallel conduct and discounting some of Plaintiffs' key factual allegations, the district court improperly put itself in the role of finder of fact. Moreover, its analysis failed to account for the reality that cartel participants will try to hide their illegal conduct, including by varying the timing and the manner in which they implement the agreement. Uncorrected, this approach to Section 1 pleadings could provide cartelists with a blueprint to avoid private enforcement. On a broader scale, this could mean a significant decline in private enforcement and the loss of its vital deterrent value. In an economy where all signs suggest cartels are already under-deterred, the harm to consumers could be significant. For these reasons, this Court should reverse the district court's decision and remand for further proceedings.

Respectfully submitted,

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(s) Kathleen W. Bradish

Attorney for American Antitrust Institute

Dated: 6/17/24

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2024, 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 ACMS system. Counsel for all parties to the case are registered users and will be served by the appellate ACMS system.

s/ *Kathleen W. Bradish*

Dated: June 17, 2024