IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. CHRISTOPHER A. NOVINGER, et al., Defendants.	CIVIL ACTION NO: 4:15-cv-358-O June 17, 2021

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REOPEN AND FOR RELIEF FROM JUDGMENT PURSUANT TO F. R. Civ. P. 60(b) and subsect. (4) and (5)

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PRELIMINARY STATEMENT

Movants Christopher A. Novinger and ICAN Investment Group, LLC (ICAN) move pursuant to Fed. R. Civ. P. 60(b) and subsections (4) and (5) for relief from the final judgment's prohibition of his future truthful speech about this case. Gag order provisions of Paragraph 12 of the Consent of Defendant Novinger and Paragraph 10 of the Consent of Defendant ICAN incorporated into their final judgments are void because they are unconstitutional prior restraints and content-based restrictions on speech that violate the First Amendment of the U.S. Constitution, compel speech, violate defendants' due process rights, and infringe on their rights of petition for all the reasons more fully set forth below. Additionally, the consent orders rely for their authority upon a rule that the U.S. Securities and Exchange Commission (SEC) never promulgated properly. These provisions are detrimental to the public interest and the right of the public to hear truthful speech—which cannot be waived. Amended Consents of Novinger and ICAN (omitting the gag provisions) are Exhibits to the Proposed Order submitted to the court with this motion.

FACTS AND PROCEDURAL HISTORY

History of the Rule

SEC's "Gag Rule" is set out in 17 C.F.R. § 202.5(e), a regulation that the agency promulgated in 1972, without notice and comment, 37 Fed. Reg. 25224 (Nov. 29, 1972), which provides:

> The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

17 C.F.R. § 202.5(e).[1] SEC then asserts ipse dixit: "The Commission finds that the foregoing amendment relates only to rules of agency organization, procedure and practice and, therefore, notice and procedures specified in 5 U.S.C. 553 are unnecessary. The foregoing amendment is declared to be effective immediately." 37 Fed. Reg. 25224. SEC lacked statutory authority to enact such a substantive rule and further did not follow the provisions of the Administrative Procedure Act, which require prior publication, notice and comment before promulgation of a rule that binds (or, in this case, gags) regulated persons or third parties.

History of this Case

On May 11, 2015, SEC filed a Complaint against all defendants, including Novinger and ICAN. (Dkt. 1.) The following year, SEC and Mr. Novinger and ICAN Investment Group, LLC (ICAN) reached a negotiated settlement and submitted a proposed final judgment to this Court, along with consent agreements that Mr. Novinger had signed on behalf of himself and ICAN.

On June 6, 2016, this Court entered a final judgment against Mr. Novinger, ordering him to pay $199,478 in disgorgement and $150,000 in civil penalties, as well as imposing associational and other bars. (Dkt. 37.). On June 6, 2016, this Court also entered a final judgment against ICAN jointly and severally agreeing to those terms. Both final judgments incorporated the terms of their respective consent agreements with SEC. As relevant here, paragraph 12 of the Novinger consent (Dkt 33-1) required Mr. Novinger and paragraph 10 of the ICAN consent (Dkt 33-4) required ICAN to agree to a Gag Order, which provides:

> Defendant understands and agrees to comply with the terms of 17 C.F.R. § 202.5(e), which provides in part that it is the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while

[1] The New Civil Liberties Alliance (NCLA), counsel for defendants, has also filed a petition with SEC challenging the legality of the Gag Rule because it was enacted without notice and comment in violation of the Administrative Procedure Act (APA), in addition to having the constitutional infirmities set forth in this motion. New Civil Liberties Alliance, *Petition to Amend* (Oct. 30, 2018), *available at* http://bit.ly/2XfFD3Z. SEC has taken no action on the petition, despite the passage of nearly three years.

> denying the allegations in the complaint or order for proceedings," and "a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations." As part of Defendant's agreement to comply with the terms of Section 202.5(e), Defendant: (i) will not take any action or make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis; (ii) will not make or permit to be made any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the allegations, without also stating that Defendant does not deny the allegations; (iii) upon the filing of this Consent, Defendant hereby withdraws any papers filed in this action to the extent that they deny any allegation in the complaint.… If Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the Commission is not a party.

Despite the passage of nearly five years, Mr. Novinger and ICAN continue to be bound by the Gag Order provision. Mr. Novinger desires to engage in truthful public statements concerning SEC's case against him. However, because those truthful statements might indirectly "creat[e] an impression" that the complaint lacked a factual basis or was otherwise without merit, Mr. Novinger has refrained from exercising his right to speak about this matter.

ARGUMENT

I. STANDARDS RELATING TO RULE 60(b)(4) MOTIONS

Rule 60(b)(4) of the Federal Rules of Civil Procedure provides that a "court may relieve a party or its legal representative from a final judgment, order, or proceeding" if "the judgment is void." A Rule 60(b)(4) motion must be made "within a reasonable time" after entry of the judgment. Fed.R.Civ.P. 60(b). "While Rule 60(b)(1) motions must be brought within one year, we have held that motions brought pursuant to subsection (4) of the rule have no set time limit." *Carter v. Fenner*, 136 F.3d 1000, 1006 (5th Cir. 1998).

There is no time limit for filing a Rule 60(b)(4) motion because this class of motion is an "exceptional circumstance[]" and litigants are relieved "from the normal standards of timeliness associated with the rule." *Id*. A judgment is void under Rule 60(b)(4) "only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or it acted in a manner inconsistent with due process of law." *Id.* "A judgment is void for purposes of Rule 60(b)(4) if the court that rendered it entered an order outside its legal powers." *Id.* at 1007.

When a court has entered an order that constitutes an impermissible "prior restraint" on speech in violation of the First Amendment to the Constitution, it is "void, and under Rule 60(b)(4) of the Federal Rules of Civil Procedure, the parties must be granted relief therefrom." *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963).

II. THE GAG ORDER VIOLATES THE FIRST AMENDMENT

A. The Gag Order Is a Forbidden Prior Restraint

Prior restraints on speech and publication "are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "A prior restraint … has an immediate and irreversible sanction…[while] a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes it,'" and it is therefore presumptively impermissible. *Id*. Restraints against future expression because of prior acts are incompatible with the First Amendment. *Universal Amusement Co. v. Vance*, 587 F.2d 159, 166 (1978); *see Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559 (1975) ("a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.")

1. The Gag Order Is a Prior Restraint

The Consent states that Defendant "agrees not to take any action or to make or cause to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis." Consent ¶ 12, Ex. A. The Consent further provides that if Defendant breaches that agreement to restrain his future speech, "the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket." *Id*. This language permanently forbids Mr. Novinger and his company from contesting allegations in SEC's complaint, regardless of their accuracy or the truth of the forbidden speech, on pain of reopened and renewed prosecution. It is a textbook example of prior restraint.

The Consent Agreement also attempts to put Mr. Novinger and his company in the position of "authorizing" future judicial proceedings against them if he or someone on his behalf speaks, a situation analogous to that in *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). In *Near*, because of past conduct, a publisher was subjected to state intervention that controlled his future speech. The Supreme Court found that to be a prior restraint, embodying "the essence of censorship." *Alexander v. United States*, 509 U.S. 544, 570 (1993) (quoting *Near* at 713); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 169 (5th Cir. 1978) (en banc), *aff'd,* 445 U.S. 308 (1980) (Texas nuisance statute prohibiting adult films and unconstitutional prior restraint on future speech based on past acts.) *Accord Sindi v. El-Moslimany*, 896 F.3d 1, 21-22 (1st Cir. 2018). (Judicial order prohibiting future speech invalid, even when past conduct made future defamation likely.) Simply put, the Constitution forbids the kind of censorship the Gag Rule enforces.

2. A Prior Restraint Is Void Even If Consented to

That the defendant or respondent purportedly "consented" to the ban on his future speech by entering into a consent decree does not make the practice lawful. In *Crosby*, the Second Circuit voided a consented-to order prohibiting defendant from publishing about the plaintiff in the future:

> Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which Dun & Bradstreet had and has the right to publish. The court was without power to make such an order; that the parties may have agreed to it is immaterial.

312 F. 2d at 485.

The Fifth Circuit also recognizes that consent does not save an otherwise improper and void settlement. *Carter*, 136 F.3d at 1008. (Consent order void; consent of parties immaterial.)

The constitutional infirmity with SEC's Consent Order is readily apparent: "On its face, the SEC's no-denial policy raises a potential First Amendment problem." *U.S. S.E.C. v. Citigroup Glob. Markets Inc*., 827 F. Supp. 2d 328, 333 n. 5 (S.D.N.Y. 2011), *vacated and remanded on other grounds*, 752 F.3d 285 (2d Cir. 2014). The law of the Second Circuit holds void consent settlements when they "constitute[] a prior restraint by the United States against the publication of facts which the community has a right to know." *Id.* (quoting *Crosby*, 312 F.2d at 485). *See also FTC v. Circa Direct LLC,* No. 11-2172 RMB/AMD, 2012 U.S. Dist. LEXIS 81878, at *23 (D.N.J. June 13, 2012) (a no-admit policy deprives the public of knowing the truth of the allegations).

3. The Gag Order Gives SEC Unbridled Enforcement Discretion

There are "two evils" that will not be tolerated in governmental prior restraints. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), *overruled on other grounds by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004). First, no system of prior restraint may place "'unbridled discretion in the hands of a government official or agency.'" *Id.* (quoting *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics … or other matters of opinion." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Instead, prior restraints "must contain neutral criteria sufficient to prevent (1) censorship that is unreasonable in light of the purpose served by the forum *and* (2) viewpoint-based

censorship," otherwise known as content-based restriction. *Freedom from Religion Found., Inc. v. Abbott*, 955 F.3d 417, 429 (5th Cir. 2020).

The Gag Orders against Mr. Novinger and his company force them to agree they "will not take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis"—a formulation that leaves a reader unable to define any discernible limits on what is prohibited, thereby rendering defendants speechless under threat of further prosecution. 17 C.F.R. § 202.5(e). Such a broad, all-encompassing and impressionistic prohibition fails to provide clear notice of what speech is forbidden or to articulate any limits on the speech ban's reach. SEC provides no neutral criteria that alerts a potential violator to what speech will be considered as creating an "impression" of guilt or innocence. Without neutral criteria, SEC may reopen cases if it does not like the "impressions" created by a settling defendant's statements.

4. The Gag Order Silences Plaintiff in Perpetuity

The second evil arises when "a prior restraint … fails to place limits on the time within which the decisionmaker must issue the license" which is "impermissible." *FW/PBS, Inc.*, 493 U.S. at 226 (citing *Freedman v. Maryland*, 380 U.S. 51, 59 (1965); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980). The Gag Order never expires. The ban is longer even than a criminal sentence would be for the charged violation, something especially relevant here as Mr. Novinger was never criminally charged. Mr. Novinger's Consent requires him to restrict his speech forever—a restriction that cannot be justified under any level of constitutional precedent. *FW/PPS*, at 226-27. Perpetually mandated silence is plainly unconstitutional. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). Prior restraints are particularly impermissible because "[e]ven if they are ultimately lifted, they cause irremediable loss, a loss in

the immediacy, the impact of speech." *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467–69 (5th Cir. 1980), *aff'd*, 452 U.S. 89 (1981) (quoting Alexander Bickel, *The Morality of Consent* 61 (1975)).

B. The Gag Order Is a Content-Based Restriction on Speech

Content-based restrictions are also presumptively invalid. *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992). Regulation of speech based on content must be narrowly tailored to serve a compelling government interest and must do so by the least restrictive means. *Id.* at 395.

1. The Gag Order Mandates the Content of Speech

Content-based prior restraints are "based upon either the content or subject matter of speech" and "distinguish[] favored speech from disfavored speech on the basis of the ideas or views expressed." *In re Sealing & Non-Disclosure*, 562 F. Supp. 2d 876, 881 (S.D. Tex. 2008). Notably, the gag does not prohibit defendants from speech that agrees with SEC's view of the merits. It is therefore demonstrably content-based. By mandating that Defendants completely agree with SEC's view of the complaint and further threatening penalties if a defendant creates even an impression of a forbidden view of his charges, such restrictions are "presumptively invalid" and subject to the highest level of judicial scrutiny. *R. A. V.*, 505 U.S. at 382.

Elevated "judicial scrutiny is warranted" any time a "content-based burden" is placed "on protected expression." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). For example, under the "Son of Sam" laws—which seek to prohibit criminals from profiting from accounts of their crimes—courts have held that the content of the publication may not be restrained. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("The Son of Sam law establishes a financial disincentive to create or publish works with a particular content. To justify such differential treatment, 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'") (quoting *Arkansas*

Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)). If murderers are free to publish books about their crimes and their prosecutions—as they must be in a free society—*a fortiori*, SEC cannot silence SEC targets from speaking about their enforcement proceedings.

2. The Speech Ban Serves No Compelling Government Interest

To pass constitutional muster, speech bans must be narrowly tailored, serve a compelling government interest, and regulate speech by the least restrictive means to protect that interest. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). "[T]he government must demonstrate that (1) the activity restrained poses a clear and present danger or a serious and imminent threat to a compelling government interest; (2) less restrictive means to protect that interest are unavailable; and (3) the restraint is narrowly-tailored to achieve its legitimate goal." *In re Sealing & Non-Disclosure,* 562 F. Supp. 2d 876, 882 (S.D. Tex. 2008).

The Gag Rule was enacted in 1972 "to avoid the perception that SEC had entered into a settlement when there was not in fact a violation" of the securities laws. *See* 17 C.F.R. § 202.5(e). The 2008 financial crisis "gave way to a new concern that the public might believe that the agency was acting collusively with wrongdoers and allowing them to escape serious punishment." David Rosenfeld, *Admissions in SEC Enforcement Cases*, 103 Iowa L. Rev. 113, 120 (2017). This was memorably articulated in *SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 508-12 (S.D.N.Y. 2009):

> The proposed Consent Judgment in this case suggests a rather cynical relationship between the parties: the S.E.C. gets to claim that it is exposing wrongdoing on the part of the Bank of America in a high-profile merger; the Bank's management gets to claim that they have been coerced into an onerous settlement by overzealous regulators. And all this is done at the expense, not only of the shareholders, but also of the truth.[2]

[2] Judicial critiques of Gag Orders address both concerns. On the one hand, judges have refused to approve a consent judgment in part because it contained no admissions of wrongdoing and therefore did not get to the "truth," raising concerns about letting defendants off lightly, or even SEC collusion. *Bank of Am. Corp.*, 653 F. Supp. at 512. At the same time, judges acknowledge that SEC was also likely bringing actions that lacked merit: "Another possibility … is that no fraud was committed. This possibility should not be discounted." Hon. Jed S. Rakoff, "Why Have No High-

Neither policy justification for the enactment or enforcement of the rule is a legitimate basis for extracting silence from SEC targets, let alone a compelling one. Whether SEC is overaggressive in its charges or is underenforcing the laws while colluding with its targets at taxpayer expense, purchasing settlements at the price of eternal silence from defendants ill serves public understanding of the agency and its workings.

Indeed, it is hard to imagine a policy better designed to suppress truth about these important matters than the SEC's sweeping gag orders. Securities law professor John Coffee describes these consents as an "artifact": "The SEC is premised on the idea that sunlight is the best disinfectant, and a nontransparent settlement harms the SEC's reputation." Z. Goldfarb, *SEC May Require More Details of Wrongdoing to Be Disclosed in Settlements*, (Apr. 1, 2010), https://wapo.st/3xcPFVu.

If SEC in 1972 was extracting settlements when there had been no proven violation of the securities laws, *it is important for the American public to know that*. By the same token, if post-2008 SEC was letting powerful defendants off lightly, or even striking collusive deals, *it is equally important to shed light on those practices*. The government is institutionally highly unlikely to admit to either discrediting practice. Silencing the only other parties to the arrangements with a government-enforced muzzle allows the government to act with impunity.

The government has no compelling interest in suppressing speech or suppressing complaints about government regulation and enforcement. The fact that SEC *systematically* demands gag orders as a condition of its settlements is profoundly dangerous. *See generally* James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, NOTICE & COMMENT, (Dec. 4, 2017), https://bit.ly/3gvpa8b. Such a practice

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Level Executives Been Prosecuted in Connection with the Financial Crisis?" (November 12, 2013) https://bit.ly/3q1dDRc

prevents the public, Congress, courts, and policymakers from learning the specifics of how SEC conducts its enforcement actions. Shielding such an important exercise of government power from oversight and scrutiny prevents lawmakers from knowing when to rein in—or unleash—SEC authority and engage in course correction.

Furthermore, the interests protected by the First Amendment are not only the right of the speaker to free expression, but also the right of those *hearing* him to receive information unfettered by any government constraints. As one court stated, "these settlements do not always take adequate account of another interest ordinarily at stake as well: that of the public and its interest in knowing the truth in matters of major public concern." *S.E.C. v. CR Intrinsic Inv'rs, LLC*, 939 F. Supp. 2d 431, 443 (S.D.N.Y. 2013), *abrogated by Citigroup*, *supra.* A 2017 article repeated these concerns noting that a complaint "which largely consists of unproven allegations" filed by SEC suggests that when "very serious misconduct is being alleged … [t]he public … has an obvious interest in knowing whether such serious allegations made by a government agency are true or untrue." Hon. Jed S. Rakoff, *AGAINST: Neither admit nor deny*, Compliance Week, (Sept. 6, 2017), https://bit.ly/3iIBMdL. The article notes the self-serving expedience created by the Gag Rule, which

> in addition to impeding transparency and accountability—also means that wrongly accused parties are incentivized not to prove their innocence if they can get a cheap settlement without admitting anything. By the same token, the SEC can avoid having to litigate questionable cases by the simple expedient of offering a cheap settlement. And to make matters worse, the SEC hides the flimsiness of such cases from the public by imposing a "gag" order that prohibits the settling defendants from contesting the SEC's allegations in the media.

Id.

By systematically silencing settling defendants, such gag provisions insulate SEC from criticism by the very people best placed and motivated to expose wrongdoing, over-aggressive prosecutions and/or flawed enforcement policies. Such a restriction "operates to insulate … [government laws]

from constitutional scrutiny and … other legal challenges, a condition implicating central First Amendment concerns." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001).

3. The Gag Order Does Not Operate by the Least Restrictive Means

The Gag Order's sweeping and perpetual speech restriction is far from the least restrictive means of achieving any compelling interest the government may claim. If SEC believes specific allegations of the complaint should be admitted by the defendant, specific admissions that allow fair opportunity to defendants to truthfully qualify them, can always be negotiated in settlement. If a settling party later untruthfully asserts innocence, SEC need only issue a press release to the contrary, a remedy far preferable and less restrictive than a lifetime ban on the defendant's speech procured under the government's boot and enforced by the threat of renewed prosecution.

C. The Gag Order Forbids Truthful Speech

Mr. Novinger's and ICAN's Gag Orders are also unconstitutional because they forbid true speech just the same as false speech. The Orders end with a provision that "lifts" the Gag—and its substantive commands about admissions and denials—for testimonial obligations or their "rights" to take legal or factual positions in judicial proceedings in which the Commission is not a party. SEC's "lift" is a tacit admission that the Gag Order *must* contain an exception where it conflicts with a defendant's obligation to speak the truth under oath. This telling exception is fatal to any defense of the Gag Order by the Commission because it concedes that defendants' obligations to tell the truth under oath may be at odds with SEC's command that defendants may not deny any allegations in SEC's settled but unproven complaint. This exception would not be necessary unless SEC knows that the gag policy would otherwise lead to false impressions or even perjury. SEC's self-favoring exemption from the exception—"in which the Commission is not a party"—also disturbingly puts SEC's thumb on the scales of justice in any subsequent Commission proceeding.

Further, this "lift" of the ban in testimonial situations appears to be a strategic exception designed to avoid a gag order's coming to the attention of a judge in later proceedings who might well invalidate such a disturbing and unconstitutional speech ban unheard of in normal state or federal settlements. But this exception is much too parsimonious. The government doesn't get to decide *when* defendants may speak the truth, by carving out a caveat calculated to shield the ban from scrutiny in subsequent judicial or testimonial proceedings, but otherwise silencing defendants for life. The statement of the proposition suffices to expose its raw unconstitutionality.

Indeed, the Gag Rule's original justification when it was adopted in 1972 was that it was "important to avoid creating … an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur." 17 C.F.R. § 202.5(e). Yet the Gag Rule as implemented in consents itself creates the false impression that the complaint is completely accurate, when that is seldom, if ever, the case. Complaints consist "largely … of unproven allegations." Rakoff, *AGAINST, supra* at 3. So, SEC's original stated justification for the Gag Rule actually cuts *against* a rule that gives the false impression that a complaint is completely true.

D. The Gag Order Compels Speech in Violation of the First and Fifth Amendments

Defendants' Consent Orders provide at part (ii) that defendants "will not make or permit to be made any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the allegations, *without also stating that Defendant does not deny the allegations*" (emphasis added). That "script" is a raw assertion by SEC of power to compel future speech by those with whom it settles. But the First Amendment prohibits the government from compelling persons to express beliefs they do not hold. "[T]he right of freedom of thought protected by the First Amendment … includes both the right to speak

freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

Government-compelled speech is subject to strict scrutiny. *Riley v. National Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796–97 (1988). "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id.* at 795. The Supreme Court in *Janus v. AFSCME*, 148 S.C. 2448 (2018), held that public employees could not be compelled to subsidize speech on matters with which they disagreed. Likewise, *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___ (2018) stopped the State of California from forcing faith-based pregnancy centers to propound government-scripted speech.

The defendants' consent decrees require them to call into question *their own integrity* by requiring them to spit out words that infer their own guilt as to *all* aspects of a complaint in a settled matter, a form of state-forced self-condemnation. The First and Fifth Amendment interests at stake are thus even more intrusive to individual liberty than those presented in *Janus* or *Becerra.*

In *Nat'l Ass'n of Mfrs. v. SEC*, 800 F. 3d 518, 522 (D.C. Cir. 2015) the court held that an SEC mandated publication that minerals used by companies were not conflict-free was held impermissible: "It requires an issuer to tell customers that its products are ethically tainted … [b]y compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment." 800 F.3d at 530 (holding both Congress's *statute* and SEC's rule requiring disclosure of "conflict minerals" unconstitutional); *see also Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 U.S. Dist. LEXIS 155232, *28-30 (E.D. Tex. Oct. 24, 2016) (discussing *Nat'l Ass'n of Mfrs.* in determining

that an Executive Order and agency implementing rule and guidance were constitutionally defective because they compelled speech).

Government efforts to compel citizens to utter speech with which they disagree deeply offends the fundamental "principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. All. For Open Soc'y, Int'l, Inc.*, 570 U.S. 205, 213 (2013). Such efforts are routinely struck down. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F. 3d 67 (2d Cir. 1996) (Dairy manufacturers may not be compelled to "warn" consumers about their methods for producing milk.). This court must accordingly set aside these Gag Orders because they compel speech.

E. The Gag Order Is an Unconstitutional Condition

SEC cannot condition a person's ability to settle with the government upon the surrender of his First Amendment rights. *Velazquez*, 531 U.S. at 547; *Accord*, *Koontz v. St. Johns River Water Management Dist*., 570 U.S. 595, 604 (2013) (government cannot "deny a benefit to a person because he exercises a constitutional right.") These cases reflect an overarching principle—the unconstitutional conditions doctrine—"that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id.* "[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz*, 570 U.S. at 606.

Nor does it make a difference that the government could have refused to settle at all. Virtually all unconstitutional conditions cases involve an optional governmental action of some kind. As *Koontz* holds, "we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional

rights." *Id.* at 607. *See, e.g., United States v. American Library Assn., Inc.*, 539 U.S. 194, 210 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected … freedom of speech *even if he has no entitlement to that benefit*." (emphasis added, cleaned up)); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (to focus on "the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue.") Even if either party would have been entirely within their rights to not settle, that greater authority does not imply a "lesser" power to condition the settlement upon defendant's forfeiture of his constitutional rights. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 836-837 (1987). Just as Congress cannot condition its funding "lest the First Amendment be reduced to a simple semantic exercise," *Velazquez*, 531 U.S. at 547, here SEC cannot condition the benefit of a conclusively settled case on eternal silence about the case by those it prosecutes.

Circuit courts have recognized that the government may not condition a plea bargain on the surrender of constitutional rights. *Doe v. Phillips*, 81 F.3d 1204, 1212 (2d Cir. 1996) ("[N]o reasonable official could believe" that a deal requiring defendant to surrender her free exercise rights or go to trial was consistent with the First Amendment); *see also Connick v. Thompson*, 563 U.S. 51, 66 (2011) (prosecutors are ethically bound to prevent the violation of constitutional rights). Indeed, the Fourth Circuit recently held that a settlement condition which required a plaintiff to agree "not to speak to the media" about police misconduct violated the First Amendment. *Overbey v. Mayor of Baltimore*, 930 F. 3d 215 (4th Cir. 2019).

III. THE GAG ORDER VIOLATES DUE PROCESS SINCE IT IS UNCONSTITUTIONALLY VAGUE

The Gag Order is also unconstitutionally vague. A settling defendant had better stay mum altogether, rather than navigate at his peril what he can say about his own prosecution under the terms of the Gag Order. The Supreme Court has recognized that a penal law:

> must be sufficiently explicit to inform those who are subject to it what conduct … will render them liable … a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at [the law's] meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *Connally*, 269 U.S. at 391). "When speech is involved," it is particularly important "to ensure that ambiguity does not chill protected speech." *Id.* at 253-54. But SEC's Gag Order has no limiting principle. *Freedom from Religion*, *supra* at 427 (holding that unbridled discretion, instead of neutral criteria, makes it difficult to distinguish what speech is forbidden). The order forbids a defendant from even creating "an *impression* that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur." 17 C.F.R. § 202.5(e). This phrasing confers unlimited discretion on the Commission to decide what future speech is or is not permissible and is therefore unconstitutionally vague and must be set aside.

IV. THE GAG ORDER VIOLATES MOVANT'S FIRST AMENDMENT RIGHT TO PETITION

The First Amendment provides that "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances." U.S. Const. amend. I. Its protections include the right of petition by defendants "with respect to the passage and enforcement of laws." *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The Gag Rule as implemented by SEC in its orders offends our "profound national commitment to the principle

that debate on public issues should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quotation marks omitted). Speech on matters of public concern is at "the heart of … First Amendment [] protection," and "occupies the highest rung of the hierarchy of First Amendment values." *Id.*, quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985). "[S]peech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991), *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

Regulation by enforcement and settlement has drawn the concern and attention of judges and even SEC Commissioners. In a May 2018 speech, SEC Commissioner Hester Peirce noted:

> The practice of attempting to stretch the law is a particular concern … in settled enforcement actions. Often, given the time and costs of enforcement investigations, it is easier for a private party just to settle than to litigate … The private party likely is motivated by its own circumstances, rather than concern about whether the SEC is creating new legal precedent. However, the decision made by that party about whether to accede to an SEC's [*sic*] proposed order can have far-reaching effects. Settlements—whether appropriately or not—become precedent for future enforcement actions and are cited within and outside the Commission as a purported basis for the state of the law. Quite simply, a settlement negotiated by someone desperate to end an investigation that is disrupting or destroying her life should not form the basis on which the law applicable to others is based.

Hester M. Peirce, *The Why Behind the No*: *Remarks at the 50th Annual Rocky Mountain Securities Conference*, May 11, 2018.[3]

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[3] As a former Democrat-appointed SEC commissioner explained over twenty years ago, compelling policy concerns demand more transparency in the settlement process:

> I was particularly troubled by the frequent use of settlements to announce Commission policy in borderline cases. Many of my dissents involved the use of [the securities laws] to settle cases which, in my view, would not have succeeded in the courts … The SEC is an independent agency that represents itself in the lower courts and can bring a wide variety of enforcement actions, including cease-and-desist cases, without even going to court. Enforcement attorneys can assist and encourage U.S. Attorneys to bring criminal cases. The Commission has considerable latitude in choosing its enforcement targets and theories. The Commission therefore has a serious obligation to restrain the enforcement staff from overzealous prosecutions. Generally, the Commission takes this obligation seriously, but political and time constraints sometimes permit the prosecutors to create the law.

Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer As Prosecutor*, Law & Contemp. Probs. at 33, 42, 45 (Winter 1998) *available at* https://bit.ly/2TGFEBe.

Similarly, a former General Counsel to SEC observed in his experience that "the agency seeks to expand liability to the greatest extent possible and well beyond statutory language or established precedent." Andrew N. Vollmer, *Four Ways to Improve SEC Enforcement*, 43 SEC. REG. L. J. 333, 334 (2015) *available at* https://bit.ly/3q2i2TZ.

Consent agreements may well represent either SEC's failure to make a case when put to its burden of proof or a settling target's guilt—or some combination thereof. Any person who waves the white flag to end the process should not be forever silenced on the topic of the merits of his prosecution—most especially not by the prosecutor.

Speech focused on public concern is "'more than self-expression; it is the essence of self-government.'" *Snyder*, 562 U.S. at 451-52 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). Such speech is indispensable to the First Amendment's values and deserves "special protection." *Id.* at 452 (quoting *Connick*, 461 U.S. at 145). When prosecutors abuse their considerable powers beyond lawful and ethical bounds, or a prosecution is based on weak or compromised evidence, their targets, including ICAN and Mr. Novinger, should be free to say so and petition appropriate government bodies for change. When agencies regulate through enforcement, guidance, or other legislatively unauthorized means, the persons affected should never be silenced by the regulator. Any healthy nation should encourage such self-examination. A constitutional democratic republic requires it.

Gag Orders such as Mr. Novinger's stifle informed public debate on these matters. They require defendants to make a difficult choice: surrender their constitutional rights to speak freely and to petition the government or forgo consent settlements with the Commission and face the potentially ruinous costs and risks of contesting the proceedings to the bitter end. Under the orders insisted upon by SEC, the only way for a defendant to settle an enforcement proceeding is to surrender forever his future First Amendment rights of speech and petition with respect to the government's prosecution. Our Constitution does not permit that baleful bargain.

V. THE GAG ORDER IMPLICATES THE JUDICIARY IN VIOLATING THE CONSTITUTION

Agencies that settle charges with their targets are not just acting under their own power. They have harnessed the machinery of the state, whether a court or an administrative tribunal, and they thereby imperil the livelihood, resources, and liberty of defendants. Consent decrees impose injunctive prohibitions and fines enforceable by judicial contempt power. Such applications of judicial power by administrative agencies are "inherently dangerous" and implicate a coordinate branch in the constitutional breach:

> The injunctive power of the judiciary is not a free-roving remedy to be invoked at the whim of a regulatory agency, even with the consent of the regulated. If its deployment does not rest on facts—cold, hard, solid facts, established either by admissions or by trials—it serves no lawful or moral purpose and is simply an engine of oppression … [T]here is an overriding public interest in knowing the truth. In much of the world, propaganda reigns, and truth is confined to secretive, fearful whispers. Even in our nation, apologists for suppressing or obscuring the truth may always be found. But the S.E.C., of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges; and if it fails to do so, this Court must not, in the name of deference or convenience, grant judicial enforcement to the agency's contrivances.

Citigroup, 827 F. Supp. 2d at 335 (footnotes omitted).

As the Second Circuit has noted, prior restraints are "particularly abhorrent to the First Amendment in part because they vest in government agencies the power to determine important constitutional questions properly vested in the judiciary." *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998). Protecting the right to express skeptical attitudes toward the government ranks among the First Amendment's most important functions. *See* James L. Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers,* 15 U. Mich. J.L. Reform, 497, 499 (1982) ("The doctrine of prior restraint has promoted responsibility in government by ensuring that the Government does not suppress exposure of its errors, deceptions, or embarrassments.") All judges have a duty to follow the law of the land, and they should not be the enforcers of that which they know to be against the law, even when the parties may have agreed to the conditions.

VI. THE GAG RULE WAS NOT LAWFULLY PROMULGATED, SO IT PROVIDES NO AUTHORITY FOR SEC TO SILENCE DEFENDANTS WHO SETTLE

A. The Gag Rule Was Slipped into the Federal Register Without Notice and Comment and Accordingly Binds No One Outside the Agency

No agency has any inherent power to make law. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in the Congress, and "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). This constitutional barrier means "an agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, even if an independent agency could constitutionally exercise the legislative power to write a Gag Rule—which it cannot—it certainly cannot purport to bind anyone without congressional authorization, which is utterly lacking here. Congress has not given SEC any authority to impose additional restrictions on the constitutional rights of persons they prosecute, either in court or administratively.[4] Nor is this surprising, as the First Amendment and the unconstitutional conditions doctrine, among others, forbid it.

Given the "stinging criticism" this rule has drawn from federal judges and scholars, it is fair to assume that a proposed rule giving SEC power to gag its targets about agency charges would attract vigorous negative comments if published for notice and comment. *See* Rosenfeld, *supra* at

[4] A Gag Rule, binding upon parties brought before SEC in "any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature" is anything but a rule that "relates only to rules of agency organization, procedure and practice." 17 C.F.R. § 202.5(e); 37 Fed. Reg. 25224 (1972). An agency's *ad hoc* promulgation of a self-protective rule by which SEC not only seeks to bind private parties with the force of law and penalty of re-prosecution, but to silence them on the topic of their prosecution is a wholly illegitimate exercise of government power. Nor is it an "interpretive" rule exempt from the APA. There is no authorizing statute to interpret. An agency regulation is not interpretive if it has "the force and effect of law" or is one "affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). SEC has admitted in related litigation that "the Commission will accept a settlement *only if* the defendant agrees to such a no-deny provision." *See* Dkt. No. 31, at 3 (emphasis added) *SEC v. Allaire*, 2019 WL 6114484 (S.D.N.Y.) No. 03-cv-4087-DLC.

p. 132. We have no record of such public objection because SEC chose to push this through in the guise of a "housekeeping rule" that bypassed APA requirements.

Gag Rules that bind persons charged by the agency who make the difficult decision to settle are not "housekeeping" rules. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014). Binding rules require notice and comment and violate the APA when they are promulgated without it. *Id.* at 252. In this instance, they also exceed any power Congress conferred upon SEC in its various enabling statutes. Thus, in addition to the Gag Rule's fatal constitutional infirmities, it also is unlawful because it lacks statutory authority and violated the APA from its inception.

B. SEC's Gag Order Goes Far Beyond Anything in the Rule

Nothing in this rule provides authority for SEC either to silence defendants' future speech or to reopen the case against them if they speak in a manner that SEC construes as inconsistent with the regulatory body's view of the case. In *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 308-309 (S.D.N.Y. 2011), the court took a hard look at these internally contradictory provisions of SEC's "standard" consent judgments and concluded:

> The result is a stew of confusion and hypocrisy unworthy of such a proud agency as the S.E.C. The defendant is free to proclaim that he has never remotely admitted the terrible wrongs alleged by the S.E.C.; but, by gosh, he had better be careful not to deny them either … here an agency of the United States is saying, in effect, "Although we claim that these defendants have done terrible things, they refuse to admit it and we do not propose to prove it, but will simply resort to gagging their right to deny it." The disservice to the public inherent in such a practice is palpable.

771 F. Supp. 2d at 309. In short, to secure a consent agreement, SEC simultaneously assures defendants that they are not admitting or denying guilt, and yet promises to punish any who might later create the impression of denying any part of the charges with a reopened enforcement proceeding. To put it another way, what SEC giveth with one hand, it taketh away with a gloved

fist. Such internally contradictory language renders the rule contradictory and unenforceable. And the rule itself provides SEC with no authority to either command silence or threaten re-prosecution.

VII. RULE 60(b)(5) PERMITS VACATUR OF CONSENT DECREES NOT IN THE PUBLIC INTEREST

A. Standards Relating to Rule 60 Motions

"Consent decrees are subject to Federal Rule of Civil Procedure 60(b)(5) and are reviewed for abuse of discretion." *Frew v. Janek*, 780 F.3d 320, 326 (5th Cir. 2015). Rule 60 is to be construed liberally and, as its many parts overlap, courts are free to do justice under any of its sections. *Id.*

B. Rule 60(b)(5) Provides an Additional Path to Relief

The Supreme Court recognizes that Rule 60(b)(5) permits consent decrees "detrimental to the public interest," to be modified. *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992). "District courts must take a flexible approach to motions to modify consent decrees." *LULAC v. City of Boerne*, 659 F.3d 421, 437 (5th Cir. 2011) (quoting *Rufo*, 502 U.S. at 379-80, 381).

Gag Orders harm the public interest for two reasons. As discussed, they prohibit healthy criticism of the prosecutorial targets and tactics of SEC. The Gag Order dates back to a 1972 "rule" that evaded notice and comment. 17 C.F.R. § 202.5(e). Nearly 50 years later, the Commission has come under increasing criticism, especially after the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. *See generally* Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), https://on.wsj.com/3cLKN1P ("SEC officials say they also are sending increasing numbers of contested lawsuits to their own judges, reflecting enhanced powers granted by the 2010 Dodd-Frank financial legislation."). Such expansion of SEC's powers makes it essential for the public to learn of the success and failure of its enforcements and how that bears on pressure to settle. Novinger's voice could add to the public discourse, but for a Gag

Order that silences him. The court should modify the decree to untie the gag that has silenced these defendants for five years and counting.

Second, the Gag Order harms the public interest by approving of provisions that violate an individual's constitutional rights. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). This prior restraint on speech unconstitutionally bars Mr. Novinger from publicly denying the Commission's allegations against him. And SEC has not only silenced one individual, but many others. *See SEC v. Allaire*, No. 03cv4087 (DLC), 2019 U.S. Dist. LEXIS 199887 (S.D.N.Y. Nov. 18, 2019); *see generally State St. Bank & Tr. Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158 (2d Cir. 2004) and *Flannery v. SEC*, 810 F.3d 1 (1st Cir. 2015).

VIII. CONGRESS CANNOT IMPOSE A GAG ON DEFENDANTS WHO SETTLE THEIR CASES WITH THE GOVERNMENT

Congress itself cannot pass a statute that gags people from speaking about government action against them. In *McBryde v. Committee to Review Circuit Council Conduct*, 83 F. Supp. 2d 135 (D.D.C. 1999), *judgment affirmed in part, vacated in part by McBryde v. Committee to Review Circuit Council Conduct*, 264 F.3d 52, 55 (D.C. Cir. 2001), a Texas federal district court judge disciplined under Congress' then-recently passed Judicial Council and Disability Act challenged its confidentiality provision. The court held that such a gag "operates as an impermissible prior restraint" and ruled that the disciplined judge "must enjoy the opportunity to speak openly and freely about [the] proceedings" against him. *Id*. at 140, 177-78. The government, wisely, did not appeal the district court's First Amendment holding.[5] *Id*. If judges are free to speak about their disciplinary proceedings, *all* Americans must enjoy that same right.[6]

[5] *McBryde*, 264 F.3d 52, 55 ("[T]he district court agreed with Judge McBryde's First Amendment argument ... but rejected the rest. Only Judge McBryde appealed.").

[6] Congress recently prohibited the use of "gag clauses" in certain private contracts, whether or not the drafters enforce them. *See* 15 U.S.C. § 45b(b). Thus federal regulatory policy treats gag clauses in consumer contracts as unlawful

CONCLUSION

The Gag Rule violates an impressive array of constitutional doctrines, including First Amendment rights to freedom of speech and the press, the right to petition and prior restraint, as well as compelled speech, unconstitutional conditions, void-for-vagueness, and due process. Any rule that racks up a list of constitutional and legal violations that formidable compels the conclusion that some fundamental tenet of our constitutional republic has been violated.

SEC's contrivance of a power to fashion a Gag Order out of rule 202.5(e)'s "policy" works to suppress truth, oppress defendants, and insulate the agency from public understanding and criticism. The value of the free flow of information far outweighs such illegitimate "policies" as bureaucratic discomfort with the appearance of over-reaching or underenforcement, which solely serves the Commission's self-interested aversion to criticism. Agencies do not have some special grant of power to shield themselves from public scrutiny, something Congress, actual courts, prosecutors, judges and lawmakers all lack under well-established law.

Because "[f]ragile First Amendment rights are often lost or prejudiced by delay," *Gulf Oil*, 619 F.2d at 470, defendants respectfully request that this Court set aside and vacate the gag provisions of defendants' Consent Orders, and reenter Final Judgment with the Amended Consent Orders substituted in place of the unconstitutional and void Consents.

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even when those are entered into by private parties engaged in freedom of contract, with neither subject to the First Amendment. Where, as here, a government agency bound by the First Amendment imposes a gag on all who settle, the same logic extends with even greater force to SEC.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the body of this brief is 25 pages in 12-point Times New Roman typeface, except for footnotes which are in 10-point Times New Roman.

/s/ Margaret A. Little_____
Margaret A. Little, N.D. Tex. Bar No. 303494CT

CERTIFICATE OF SERVICE

I certify that on this 17th day of June 2021, I have served a copy of the above and foregoing on all counsel of record through the Court's CM/ECF system.

/s/ Margaret A. Little_____
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