No. 15-134

In The Supreme Court of the United States

SCHWAB INVESTMENTS, ET AL.,
Petitioners,

v.

NORTHSTAR FINANCIAL ADVISORS, INC., ON BEHALF OF ITSELF AND OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented are:

(1) Can a district court order a plaintiff to file an amended or supplemental complaint to allege an assignment of claim obtained after the action was initiated to cure a standing defect that came about as a result of an intervening change in case law, instead of ordering the plaintiff to commence a new action, and can defendants delay twenty months to challenge that procedural method?

(2) If the issue is properly before the Court in the first instance, whether a state common law breach of contract claim based upon a mutual fund's breach of fundamental investment objectives that were established by a majority shareholder vote pursuant to a proxy statement, and that can only be changed by a subsequent majority shareholder vote, is preempted by federal securities laws?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent Northstar Financial Advisors, Inc. states that it has no parent corporation and no publicly-held corporation owns 10% or more of its stock. Northstar received an assignment of claim from non-party Henry Holz, an individual and a client of Northstar.

Northstar commenced this litigation as a proposed class action. At this time, there has been no motion for class certification and Northstar is the only respondent.

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INTRODUCTION

The petition is particularly ill suited for this Court's review. First, concerning the standing question, the district court's order that plaintiff-respondent Northstar Financial Advisors, Inc. ("Northstar") file a supplemental complaint to allege a post-filing assignment of claim, which undisputedly conferred standing, and the Ninth Circuit Court of Appeal's affirmance of that order, is consistent with this Court's precedent allowing for post-filing addition of parties pursuant to Rule 21 to cure a perceived lack of standing. *See Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952) (using Rule 21 to add two union members post-filing to ensure standing); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 834 n.8 (1989) (the addition of the plaintiffs [in *Mullaney*] "was considered necessary to establish the existence of a justiciable case" because "[a]t the time, it was not clear that unions had standing to sue on behalf of their members.").

The crux of petitioners' argument is not that Northstar lacks standing, but that Northstar was required to commence a new action, rather than file a court-ordered supplemental complaint. However, petitioners have not acted as if this were a significant issue warranting this Court's attention. Petitioners did not challenge that order at the time it was issued, and instead delayed twenty months before arguing that a new action, instead of a supplemental complaint, was required. In the intervening time they filed a motion for 28 U.S.C. §1292(b) interlocutory appeal on a different issue from that very same order (which was granted), interlocutory appeal briefs, and a motion to

dismiss Northstar's first amended complaint (the first time Northstar alleged the assignment of claim).

There is no meaningful circuit split warranting this Court's review. Rather, petitioners rely on decisions of the Federal Circuit limited to patent cases, where the Patent Act forms the legal interests that form the basis of Article III standing, and where a prudential limit on the exercise of jurisdiction exists to avoid the prejudice resulting from successive suits exposing accused infringers to inconsistent judgments.

There was no abuse by Northstar of the judicial process because Northstar filed its complaint relying upon Ninth Circuit precedent supporting its standing to sue on behalf of its clients. The district court's order concerning standing followed a decision of the Second Circuit Court of Appeals that was issued *after* Northstar filed its complaint and defendants moved to dismiss. The district court also found that Northstar had standing at the outset of the litigation "to sue in its own right due to the direct financial injury it alleges that it suffered due to the decline in total value of assets under management." 177a.

Second, the petition should also be denied concerning the question of whether Northstar's common law contract claim conflicts with or is preempted by federal law. Petitioners mischaracterize the Ninth Circuit's holding when they assert that all disclosures may now be considered contracts. The Ninth Circuit said nothing of the sort; it correctly applied state law to find a contract arising from a proposal in a proxy statement and a majority shareholder vote adopting a fundamental investment objective that can only be changed by a subsequent majority shareholder vote.

Any question of preemption or conflict with the federal securities laws or regulations is premature, interlocutory, and not properly before the Court. The Ninth Circuit expressly declined to decide the issue of preemption under the Securities Litigation Uniform Standards Act and remanded the issue to the district court for a determination in the first instance. That motion is being briefed and is scheduled for argument on October 1, 2015.

There is nothing extraordinary about this lawsuit. It is a simple case of breach of contract that is not based on a federal disclosure requirement. Federal law did not require the adoption of any specific investment policy. Petitioners could have avoided liability either by adhering to their specific fundamental indexing investment policy or by establishing a more general investment policy. Here, the mutual fund chose to deviate from its contractually mandated policy and should accordingly be liable to investors. The petition should be denied so the litigation can proceed to a determination on the merits.

STATEMENT OF THE CASE

1. a. The Schwab Total Bond Market Fund (the "Fund") was initiated by Schwab Investments, an investment trust organized under Massachusetts law (the "Schwab Trust"), on March 5, 1993 as an actively managed U.S. Government bond fund. The Schwab Trust, pursuant to a July 25, 1997 Proxy Statement (the "Proxy Statement"), sought a shareholder vote to amend the Fund's fundamental investment objective to "attempt to provide a high level of current income consistent with preservation of capital *by seeking to track the investment results of [the Lehman Brothers Aggregate Bond Index (the "Index")] through the use of*

an indexing strategy." 13a-14a, 32a-33a, 147a (emphasis added). The Proxy Statement provided that, if approved, the Fund's new fundamental investment objective was only changeable by majority shareholder vote. 14a, 32a-33a.

On September 22, 1997, a majority of Fund shareholders voted to approve these changes to the Fund's fundamental investment objectives. The Fund's new fundamental investment policy was confirmed in the Schwab Trust's Registration Statement and Prospectus dated November 1, 1997. 14a, 33a, 147a.

b. From August 31, 1997 through August 31, 2007, an investment in the Fund substantially performed in a manner consistent with the Index, returning an annualized rate of 5.75% compared to 6.04% for the Index. The Fund's net assets increased from $24 million to approximately $1.5 billion during this period.

Beginning in or about September 2007, the Fund breached its stated fundamental investment policy and began to purchase high risk non-United States agency collateralized mortgage obligations ("CMOs") that were not a part of the Index. 15a, 91a. From August 31, 2007 through February 27, 2009, as a result of the Schwab Trust's deviation from the Index, an investment in the Fund underperformed the Index by an aggregate of 12.64%, causing investors substantial direct financial injury.

2. a. At all relevant times, Northstar was an investment advisory firm that managed discretionary and non-discretionary accounts. Northstar was an Independent Schwab Investment Advisor that traded through the Charles Schwab's Institutional Advisor Platform, and had a contractual relationship with

affiliates of the two Schwab-entity petitioners. 90a. As of August 2007, Northstar managed over 200,000 shares of the Fund. 14a, 90a.

Northstar commenced this class action on August 28, 2008, alleging that defendants failed to adhere to the Fund's mandatory fundamental investment objective to seek to track the Index through the use of an indexing strategy. 90a-91a. Northstar's initial complaint was brought against the Fund, the Schwab Trust, and Charles Schwab Investment Management, Inc., the Fund's investment advisor (the "Schwab Advisor"), and asserted claims for (i) violations of Section 13(a) of the Investment Company Act of 1940 ("ICA"), 15 U.S.C. §80a-13(a) ("Section 13(a)"), (ii) breach of contract, (iii) breach of fiduciary duty, and (iv) breach of the covenant of good faith and fair dealing. 91a-92a, 172a, 195a-96a. Northstar also alleged that it "operates under a fee-based structure based on the total value of assets under management." 176a. As a result, Northstar suffered damages through a reduction in fees when the total value of the assets it managed decreased. Northstar brought the action in its own name on behalf of its clients, and at that time, Ninth Circuit precedent supported Northstar's standing to pursue class claims on behalf of its clients and Fund shareholders. *See Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 922 n.1 (9th Cir. 2007).

b. Defendants[1] subsequently moved to dismiss the complaint, including for lack of standing because

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[1] Only two of the eleven petitioners were defendants in the initial complaint and the first amended complaint ("1AC"): the Schwab Trust and the Schwab Advisor, whom Northstar refers to herein as "defendants." Northstar refers to "petitioners" as the group of

Northstar was not the beneficial owner of any Fund shares. In December 2008, after defendants' motion to dismiss was filed, the Second Circuit decided *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, holding that to bring claims on behalf of its clients, a financial advisor needed a valid assignment or legal title to the claims. 549 F.3d 100, 108-09 (2d Cir. 2008). In light of *Huff*, Northstar obtained an assignment of claim from one of its clients (the "Assignment") and, in its opposition to defendants' motion to dismiss, offered, in the event the district court followed *Huff*, to cure any perceived deficiency in standing by amending the complaint to allege the Assignment. 176a. Petitioners did not challenge Northstar's ability to amend to allege standing either in their reply memorandum or at oral argument on the motion to dismiss.

c. The district court followed *Huff* and, in a February 19, 2009 Order, granted defendants' motion to dismiss the complaint for lack of standing. The district court found that "[t]he assignment of claims from one of Northstar's clients would…cure this [standing] deficiency," that "Northstar could amend the complaint to cure these [standing] deficiencies," and directed Northstar to file an amended complaint to allege the Assignment. 176a-78a, 199a. The district court further found "that Northstar would likely have standing to sue in its own right due to the direct financial injury it alleges that it suffered due to the decline in total value of assets under management." 177a. The district court also found a private right of action under Section 13(a), and that Northstar had properly alleged that "the Fund's significant

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eleven petitioners, who are the named defendants in the second amended complaint ("2AC") and third amended complaint ("3AC").

investments in non-agency CMOs violated the Fund's investment objective." 183a, 188a.

Defendants did not move for reconsideration of the Order as it pertained to standing or the district court's direction for Northstar to file an amended complaint. On March 2, 2009, Northstar filed the 1AC, which included allegations of the Assignment. 93a. Defendants moved to dismiss the 1AC, but did not challenge Northstar's ability to allege the Assignment in an amended complaint or Northstar's standing to assert the class claims on behalf of its clients resulting from their losses in the Fund. [2]

d. Defendants moved for and were granted leave to file an interlocutory appeal of the district court's Order concerning Section 13(a). 93a. On August 12, 2010, the Ninth Circuit reversed and held that there was no private right of action under Section 13(a). 133a. During the interlocutory appeal, petitioners did not challenge that portion of the Order concerning standing or directing Northstar to file an amended complaint to allege the Assignment. The Ninth Circuit observed in its August 12, 2010 Opinion that "[t]he district court…permitted Northstar to amend its complaint to reflect its standing as the assignee of a client-shareholder, *and standing is not an issue in this appeal*." 148a (emphasis added).

e. On September 28, 2010, plaintiff filed the 2AC.[3] On November 10, 2010, petitioners moved to dismiss

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[2] Northstar asserted an individual cause of action in the 1AC alleging individual claims for financial injury and injunctive relief. That claim was withdrawn after defendants moved to compel arbitration.

[3] In connection with the briefing of the motions to dismiss the initial complaint and the 1AC, defendants argued that defendants

the 2AC, and for the first time argued that Northstar could not cure the standing defect by amendment to allege the Assignment. In a March 2, 2011 opinion, the district court (the case having been reassigned to a new judge) rejected this argument:

> [Petitioners] do not dispute that [the Assignment] conferred standing when it was executed; instead, [petitioners] argue that because this [A]ssignment occurred after the complaint was filed, it "came too late" to affect [Northstar's] standing. [] According to this argument, if Northstar had dismissed its original complaint without prejudice and filed a new complaint relying on the [A]ssignment of claim, rather than filing an amended complaint, there would be no standing problem now. In that case, standing would have existed at the time the new case was filed. This argument elevates form over substance. Particularly in light of Judge Illston's previous holding that the assignment would cure [Northstar's] lack of standing, and direction to [Northstar] to file an amended complaint based on the [A]ssignment, it would be unfair to [Northstar] to punish them for relying on the Court's specific instructions. Accordingly, the Court finds that in this particular circumstance,

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in those complaints lacked a fiduciary duty to investors, but acknowledged that other related parties did have a fiduciary duty. In the 2AC, Northstar added as defendants nine trustees of the Schwab Trust that controlled the Fund (the "Trustees"), and the Trustees waived service of the 2AC. There is no dispute that the Trustees were first added to the action after Northstar had obtained the Assignment. Therefore, petitioners standing argument can only properly be brought on behalf of the two remaining petitioners, the Schwab Trust and the Schwab Advisor.

> Judge Illston's order will be construed as granting [Northstar] leave to file a supplemental pleading under Federal Rule of Civil Procedure 15(d)….This supplemental pleading established [Northstar's] standing to sue based on the asserted [A]ssignment of claim.

98a-99a. The district court also held that the Proxy Statement and shareholder vote were not sufficient to create a contract, and dismissed Northstar's breach of contract claim with prejudice. 119a.

On March 28, 2011, Northstar filed the 3AC. Petitioners moved to dismiss the 3AC, and in an August 8, 2011 Order, the District Court dismissed the 3AC with prejudice.

d. Northstar appealed. The Ninth Circuit reversed in part and vacated in part the district court's March 2, 2011 and August 8, 2011 Orders,[4] and remanded the case to the district court. The Ninth Circuit upheld the district court's ruling as to standing, holding that "by filing a supplemental pleading alleging a post-complaint assignment from a party that clearly had standing, Northstar has standing to prosecute the case." 77a. "Rule 15(d) permits a supplemental pleading to correct a defective complaint and circumvents 'the needless formality and expense of instituting a new action when events occurring after the original filing indicated a right to relief." 20a (internal citations omitted).

The Ninth Circuit also reversed the district court's ruling dismissing Northstar's breach of contract

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[4] The Ninth Circuit also vacated the district court's dismissal of causes of action for breach of fiduciary duty, and reversed the dismissal of causes of action for third-party beneficiary breach of contract, determinations not at issue in the petition.

claims, holding that "Northstar adequately alleged the formation of a contract between the investors [in the Fund] and the Schwab Trust." 77a.

> [W]hen [the fundamental investment objectives of the Fund] were adopted by the shareholders, they added a structural restriction on the power conferred on the Trustees in the Agreement and Declaration of Trust that can only be changed by a vote of the shareholders. This created a "contract between the [Trustees themselves], and every [investor]"—that the Schwab Trust "would administer his [investment] according to the terms, and for the objects stipulated in the" two restrictions adopted by the shareholders of the Fund. Significantly, after the shareholders voted in favor of the proxy statement that included these restrictions, they were subsequently reflected in the Fund's registration statements and prospectuses. Thus, anyone who purchased shares in the Fund after 1997, or held shares that he then owned, was legally and contractually entitled to have his investment managed in accordance with the proposals in the proxy statement, unless the shareholders voted to permit otherwise.

40a-41a (internal citation omitted). The Ninth Circuit remanded the issue of whether the breach of contract claim was preempted by the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, §§2(1)-(3) ("SLUSA") to the district court for a determination in the first instance.[5] 36a-37a, 78a.

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[5] On June 25, 2015, Northstar filed a fourth amended complaint ("4AC"), and petitioners moved to dismiss. Northstar has opposed that motion, and discovery has commenced.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED ON THE STANDING QUESTION

Petitioners "do not dispute that [the Assignment] conferred standing when it was executed" 98a, and do not argue that Northstar currently lacks standing. Nor can they. It is well settled by this Court that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000); *see also Sprint Commc'ns. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 271 (2008) (assignee "has standing to pursue [assignor's] claim in federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor.").

Rather, petitioners, in effect, allege fault with *the procedure* by which the district court ordered Northstar to remedy its perceived lack of standing—a supplemental complaint pursuant to Rule 15 alleging the Assignment—instead of ordering that Northstar institute a new action. Pet. at 4-6, 7, 11-12. Petitioners delayed twenty months before raising any objection to that order, even though during that time they brought an interlocutory appeal and a motion to dismiss the 1AC.

The petition should be denied because the decisions of the district court and the Ninth Circuit follow this Court's precedent permitting post-filing addition of parties to ensure standing. There is no conflict among the courts of appeals or confusion among the courts that warrants this Court's review. Finally, this case is

an unsuitable vehicle for resolving any purported conflict.

A. The Ninth Circuit's Decision Is Consistent With This Court's Precedent Allowing For Post-Filing Addition Of Plaintiffs To Ensure Standing

This Court's precedent in *Mullaney*, which permits the post-filing addition of parties to ensure standing, is controlling and evidences no error by the Ninth Circuit or district court. In *Mullaney*, this Court applied Rule 21 and granted a union plaintiff's motion to add two of its members as parties in order cure a lack of standing. 342 U.S. at 416-417.[6] In an opinion by Justice Frankfurter, the Court granted the motion and "merely put[] the principal, the real party in interest, in the position of his avowed agent." *Id.* at 417.

The petition mischaracterizes *Mullaney*, claiming that it permits additional parties only to cure statutory jurisdictional defects. Pet. at 27. Petitioners ignore Justice Marshall's statements in *Newman-Green,* which make clear that *Mullaney* concerned constitutional standing defects:

> [*Mullaney*] cannot be explained as a case involving a technical change to identify the real parties in interest. *The addition of the union members was considered necessary to establish the existence of a justiciable case. At the time, it was not clear that unions had standing to sue on behalf of their members.*

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[6] Rule 21, which permits a court to "at any time, on just terms, add or drop a party," has undergone only "stylistic" changes since this Court's decision in *Mullaney*. Fed. R. Civ. P. 21 advisory comm. notes.

490 U.S. at 834 n.8 (emphasis added).

Northstar was in the same relationship to its clients as the union was to its members in *Mullaney*. Northstar managed more than 200,000 shares of the Fund through discretionary and non-discretionary accounts. 14a. At the time Northstar commenced the action, Ninth Circuit precedent supported Northstar's standing. *See Anchor Capital Advisors*, 498 F.3d at 922 n.1 ("courts have found that an investment advisor has an interest in its own right to receive full and fair disclosures regarding the true value of a company's stock, and therefore is a 'purchaser' under the PSLRA with proper standing to pursue litigation on behalf of its individual clients."). It was only after the action was commenced that the Second Circuit issued its decision in *Huff*, holding that "the minimum requirement for injury-in-fact is that the plaintiff have legal title to, or a property interest in, the claim." 549 F.3d at 108. Further, the Assignment clearly constitutes a change in or addition of a party. *See Kilbourn v. Western Surety Co.*, 187 F.2d 567, 571 (10th Cir. 1951) (holding that party became real party in interest in a written assignment of the claim to him after suit was commenced).

This Court's decision in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) is consistent with Ninth Circuit's (and district court's) examination of Northstar's standing as alleged in the supplemental complaint. In *County of Riverside*, this Court found standing existed after examining the injury and redressability of three additional plaintiffs who were not named in the initial complaint, and who were added through a second amended complaint. 500 U.S. at 51. This Court has also held that a jurisdictional defect can be cured by a supplemental complaint.

Matthews v. Diaz, 426 U.S. 67, 75 (1976) ("A supplemental complaint in the District Court would have eliminated this [nonwaivable condition of jurisdiction] issue."). Further, this Court has looked to amended complaints when assessing whether federal courts have jurisdiction in cases removed to federal court when jurisdiction may not have existed at the time of removal. *See Pegram v. Herdrich,* 530 U.S. 211, 215 n.2 (2000) ("Herdrich's amended complaint alleged ERISA violations, over which the federal courts have jurisdiction, and we therefore have jurisdiction regardless of the correctness of the removal.").

The Ninth Circuit's decision does not conflict with this Court's decision in *Groupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004). *Groupo Dataflux* distinguished the situation here (and in *Mullaney*), where standing was ensured by a *change in party*, from the post-filing *change of citizenship of a party* at issue in *Groupo Dataflux.*

> The authorities relied upon by the dissent [including *Mullaney*] do not call into question the particular aspect of the time-of-filing rule that is at issue in this case--the principle [] that "[w]here there is *no* change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." The dissent identifies five cases [including *Mullaney*] in which the Court permitted a post-filing change to cure a jurisdictional defect. Every one of them involved a *change of party*.

Id. at 575 n.5 (citations omitted, emphasis in original). Northstar acted in this matter just as the *Groupo Dataflux* court suggested it should, did not spend years "litigating jurisdiction," and filed a court-ordered

supplemental complaint to remedy the standing defect (without objection from defendants). *Id.* at 581-82. Petitioners' twenty-month delay before arguing that a new action, rather than the supplemental complaint, was required is contrary to *Groupo Dataflux*'s stated reasoning for the time-of-filing rule: to avoid constant litigation over the facts determining jurisdiction. *Id.* at 580.

The Ninth Circuit's decision also does not conflict with this Court's holdings in *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008), and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Petitioners rely on these cases for the proposition that standing is evaluated at the commencement of suit. However, in neither case does this Court substantively address this proposition, but rather simply notes that the traditional measure for determining Article III standing is a personal stake at the commencement of litigation. *See Davis*, 554 U.S. at 732; *Hollingsworth*, 133 S. Ct. at 2661. In addition, neither case is determinative here as Northstar commenced its litigation relying on Ninth Circuit precedent supporting its standing, and petitioners do not dispute that the assignor had standing at the commencement of the litigation or that the Assignment conferred standing on Northstar. Further, as found by the district court, Northstar had standing at the commencement of the litigation to assert its own direct claims.

B. There Is No Conflict Between The Ninth Circuit's Decision And Decisions Of Other Courts

Contrary to petitioners' arguments, the Ninth Circuit's decision does not create a conflict among the courts of appeals. As recognized by the Ninth Circuit,

courts of appeals have held, relying on this Court's holding in *Matthews v. Diaz*, that a jurisdictional defect in an initial complaint can be cured by a supplemental pleading. *See* 22a-23a (citing, *e.g.*, *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 347 (4th Cir. 2014) ("[W]e construe the present complaint as a supplemental pleading under Rule 15(d), thereby curing the defect which otherwise would have deprived the district court of jurisdiction under Rule 15(c)."); *Black v. Sec'y of Health and Human Servs.*, 93 F.3d 781, 790 (Fed. Cir. 1996) ("Nonetheless, a defect in the plaintiff's case, even a jurisdiction defect, can be cured by a supplemental pleading under Rule 15(d) in appropriate circumstances.")).[7]

In addition, courts of appeals have approved of amended complaints to allege a post-filing assignment of claims pursuant to Rule 17(a)(3) to allege the real party in interest.[8] *See Dubuque Stone Products Co. v.*

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[7] Petitioners distinguish many of the cases relied upon by the Ninth Circuit as concerning statutory as opposed to constitutional, standing. This distinction is not material in light of this Court's holdings in *Mullaney* and *Newman-Green* that the post-filing addition of parties to ensure Article III constitutional standing is permitted.

[8] Rule 17(a)(3) also provides an alternative basis to deny the petition because "[a]fter ratification, joinder, or substitution," here the Assignment, "the action proceeds as if it had been originally commenced by the real party in interest." Fed. R. Civ. P. 17(a)(3). Petitioners do not dispute that the assignor had standing at the outset of the litigation. The Advisory Committee Notes to the 1966 Amendment to Rule 17 further evidence that the district court and Ninth Circuit were correct to allow Northstar to amend its complaint to allege a post-filing assignment of claim. The joinder provision (now Rule 17(a)(3)) was added in the interests of justice and "is intended to prevent forfeiture when the determination of the proper party to sue is difficult or when an

Fred L. Gray Co., 356 F.2d 718, 724 (8th Cir. 1966) (In remanding case for prosecution under Rule 17(a), court rejected that assignment was invalid when made after suit was commenced, reasoning that assignment occurred before trial and defendant had suffered no prejudice); *Kilbourn*, 187 F.2d at 571. "[A]lthough Rule 17(a)(3) does not explicitly address the issue of timeliness of an assignment, courts in construing the rule have held that even when the claim is not assigned until after the action has been instituted the assignee is the real party in interest and can maintain the suit." *Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co.*, 515 F. Supp. 64, 84-85 (D.S.C. 1979), *aff'd* 644 F.2d 877 (4th Cir. 1981).[9]

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understandable mistake has been made." Fed. R. Civ. P. 17 advisory comm. note (1966 Amendment). Here, Northstar justifiably relied on the state of the law when it filed suit that it had standing to sue as a financial advisor. When *Huff* was decided during the pendency of petitioners' motion to dismiss for lack of standing, Northstar proactively obtained the Assignment (only three months after commencement of suit).

[9] District courts have also allowed (or recognized the ability of) plaintiffs to file supplemental or amended complaints to allege standing through assignments of claims that were made after the initial complaint was filed. *See Universal Trade & Inv. Co v. Kiritchenko*, No. C-99-3073, 2007 WL 2669841, at *6 (N.D. Cal. Sept. 7, 2007) ("If a claim has been assigned, the assignee becomes the real-party-in-interest and can maintain suit in its own name… Where a plaintiff obtains an assignment after the filing of his initial complaint, and thereafter files a timely amended complaint, dismissal for lack of standing is not warranted." (footnote and citations omitted); *Perry v. Village of Arlington Heights*, 180 F.R.D. 334, 337 (N.D. Ill. 1998) ("a supplemental complaint may correct deficiencies such as lack of standing"); *See also In re Vivendi Universal, S.A. Sec. Litig.*, 605 F. Supp. 2d 570, 585 (S.D.N.Y. 2009) (citing with approval the district court's decision to grant Northstar leave to amend its complaint to allege the

Petitioners cite to a series of cases in the Court of Appeals for the Federal Circuit that are in the special context of patent claims and involve the standing of patent-holders in infringement cases. Pet. at 12-14. The unusual circumstances addressed by the Federal Circuit in that specialized setting are inapposite to the context presented here. *See Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F. 3d 1304, 1309 (Fed. Cir. 2003) ("[T]his court has determined that in order to assert standing for patent infringement, the plaintiff must demonstrate that it held enforceable title to the patent at the inception of the lawsuit.") (citation omitted); *Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1364 (Fed. Cir. 2010) ("Based upon Supreme Court jurisprudence, we have held that in a patent infringement action, 'the plaintiff must demonstrate that it held enforceable title to the patent at the

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assignment of claims). Further, in *Huff*, the district court, on remand from the Second Circuit, granted the beneficial owners' motion pursuant to Rule 60(b) to file an amended complaint substituting themselves as named plaintiffs pursuant to Rules 15 and 17(a).

> Huff . . . cannot be said to have waited more than a reasonable time to respond to defendants' objection to its failure to have its clients sue in their own name. It responded to the motion embodying that objection filed in this Court by defendants. In responding to the motion it asked for leave to amend if the motion were granted.... This Court (erroneously it is now known) was not persuaded by defendants' objection, and that cannot be blamed on Huff. When the Court of Appeals reversed, Huff acted promptly and within a reasonable time to seek as it might originally have done had this Court not erred. To deny Huff relief now would be punishing it for this Court's error.

In re Adelphia Commc'ns Corp. Sec. Litig., No. 03 Civ. 5752, 2009 WL 1490599, at *5 (S.D.N.Y. May 21, 2009).

inception of the lawsuit' to assert standing.") (citing *Paradise Creations*, 315 F. 3d at 1309-310); *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1208 (Fed. Cir. 2005) ("In the area of patent infringement, this court has held that if the original plaintiff lacked Article III initial standing, the suit must be dismissed and the jurisdictional defect cannot be cured by the addition of a party with standing, nor by the subsequent purchase of an interest in the patent in suit." (citing *Paradise Creations*, 315 F.3d at 1309, *Gaia Techs, Inc. v. Reconversion Techs, Inc.*, 93 F.3d 774, 780 (Fed. Cir. 1996)).[10]

The Federal Circuit's specialized rule regarding *nunc pro tunc* assignments of patent rights is consistent with its general approach to standing in patent infringement cases. "In a suit for patent infringement, the Patent Act supplies the basis for federal question jurisdiction and creates the legal interests that form the basis for Article III standing." *Simmons Bedding Co. v. Leggett & Platt, Inc.*, No. 11-cv-232-wmc, 2012 WL 11909449, at *7 (W.D. Wis. Mar. 27, 2012); *see also Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1337 (Fed. Cir. 2007) ("the patent statutes have long been recognized as the law that governs who has the right to bring suit for patent infringement"). "Since the patent statutes give rise to the right to sue others for patent infringement, they also define the nature and source of

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[10] It should be noted that certain of these cases were dismissed without prejudice, which allowed for refiling if and when the standing defect was cured. *See Paradise Creations*, 315 F. 3d at 1310 ("we hold that this case was properly dismissed for want of standing, though the plaintiff may refile the action."); *Abraxis Bioscience, Inc.,* 625 F.3d at 1368 (remanding with instructions to dismiss "without prejudice").

the infringement claim and determine the party that is entitled to judicial relief." *Id.* at 1339.

To sue for patent infringement, each plaintiff must have constitutional standing, and plaintiffs individually or jointly must have prudential standing with respect to each patent in suit.[11] *See Bushnell, Inc. v. Brunton Co.*, 659 F. Supp. 2d 1150, 1158-59 (D. Kan. 2009) (citing *Morrow*, 499 F.3d at 1339-41). A patent ownership interest is required for constitutional standing, and joinder of all co-owners (*i.e.* total ownership on plaintiffs' side) is required for prudential standing. *See id.* at 1158. "The statutory standing requirement is a prudential limit on the exercise of jurisdiction. Its goal is to avoid the prejudice that may result from successive suits exposing accused infringers to inconsistent judgments and to protect the interest of a patent-holder in choosing his forum." *Simmons Bedding*, 2012 WL 11909449, at *8 (citing *Ortho Pharm. Corp. v. Genetics Inst., Inc.*, 52 F.3d 1026, 1031-32 (Fed. Cir. 1995)); *see also Morrow*, 499 F.3d at 1340. This rigidity is further evidenced in the federal statute that sets forth certain procedural requirements for an assignment of a patent claim to be effective, and adopts the principles of real property recording acts. *See* 35 U.S.C. §261.

The statutory constraints as to standing in patent infringement cases and the Federal Circuit's unwillingness to accept *nunc pro tunc* assignments to cure standing are distinguishable from the Ninth Circuit decision at issue here, where, at the time

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[11] "Prudential standing is satisfied when the injury asserted by a plaintiff 'arguably [falls] within the zone of interests to be protected or regulated by the statute . . . in question.'" *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998).

Northstar filed the initial complaint, Ninth Circuit precedent supported Northstar's standing to bring the action on behalf of its clients, and Northstar had standing to assert direct claims against Schwab.

Further, even the Federal Circuit, in the context of patent cases, acknowledges "[a] party may sue for past infringement transpiring before it acquired legal title if a written assignment expressly grants the party a right to do so." *Abraxis*, 625 F.3d at 1367. Here, the Assignment transferred "all of the Assignor's right, title and interest in any claim that the Assignor *has or could have against*" the defendants "as currently set forth in" the initial complaint. This was clearly sufficient to provide Northstar with the right to sue for past claims, unlike the contracts at issue in *Abraxis*. In addition, petitioners "do not dispute that [the Assignment] conferred standing when it was executed." 98a.

Petitioners rely upon two other cases to support their argument that post-filing assignments cannot cure standing defects: *SunCom Mobile & Data, Inc. v. Fed. Commc'ns Comm'n*, 87 F.3d 1386 (D.C. Cir. 1996) and *Innovative Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377 (Fed. Cir. 2010). However, both of those cases involve plaintiffs requesting declaratory determinations prior to demonstrating actual injury. *See Suncom,* 87 F.3d at 1389 ("Significantly, SunCom does not allege that any of [the agreements] were in effect before the [FCC] released its final rulings…. In the absence of such agreements at that time, and the interests SunCom claims they conferred, we do not see how the [FCC's] rulings could have been the cause of SunCom's alleged injury, as required under Article III.") (citation omitted); *Innovative Therapies,* 599 F.3d at 1382-83 (plaintiff competitor of defendant patent

owners seeking declaratory judgment that they were not in fact competing could not satisfy requirement for actual controversy needed for justiciability at time of filing). These cases do not concern standing, but rather whether the plaintiffs can sufficiently allege injury. No such deficiency is present here as it is not disputed that Northstar's assignor suffered a loss in value of his investment, it is not disputed that the Assignment conferred standing on Northstar when executed, and Northstar itself lost monies due to a decreased total value of assets under management.

C. This Case Is An Unsuitable Vehicle For Resolving Any Purported Conflict

At least two vehicle problems exist that impair the Court's ability to reach the issues raised in the petition. First, petitioners waited twenty months to make their challenge to the district court's procedural order, during which time they filed an interlocutory appeal to challenge the district court's ruling concerning Section 13(a) (which was granted), and filed a motion to dismiss the 1AC (which contained the first allegation of the Assignment). Petitioners are not in fact challenging Northstar's standing to assert the claims, and "do not dispute that Plaintiffs' assignment conferred standing when it was executed." 98a. What petitioners actually challenge is that the district court chose to direct Northstar to file an amended (supplemental) complaint rather than initiate a new action. As stated by this Court in *Mullaney*, petitioners' delay acknowledges their "silent concurrence" to the supplemental complaint and the Assignment:

> [t]o dismiss the present [action] and require the new plaintiffs to start over in the District Court

> would entail needless waste and runs counter to effective judicial administration -- the more so since, with the silent concurrence of the defendant, [Northstar] was deemed [the] proper part[y] below.
>
> 342 U.S. at 417.

Second, petitioners identify no prejudice they suffer as the result of a supplemental complaint filed pursuant to Rule 15(d), rather than a new complaint filed pursuant to Rule 3. Nor can they, as petitioners were served with the 1AC and 2AC, and the Trustees were added to the action after the Assignment was executed. *See M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1489 (11th Cir. 1990) ("Except for the technical distinction between filing a new complaint and filing an amended complaint, the case would have been properly filed…We therefore hold that we have jurisdiction over this appeal and we will reach the merits.") (footnote omitted); *Hackner v. Guaranty Trust Co. of New York*, 117 F.2d 95, 98 (2d Cir. 1941) (Clark, J.)[12] ("Hence no formidable obstacle to a continuance of the suit appears here, whether the matter is treated as one of amendment or of power of the court to add or substitute parties, Federal Rule 21, or of commencement of a new action by filing a complaint with the clerk, Rule 3."). In fact, their twenty month delay would refute any such argument. Petitioners' argument requests hyper-technical formalism, and is contrary to the purpose of the Federal Rules of Civil Procedure, which "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and

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[12] Judge Clark was "the principal architect of the Federal Rules of Civil Procedure." *Zahn v. International Paper Co.*, 414 U.S. 291, 297 (1973).

proceeding." Fed. R. Civ. P. 1; *see Newman-Green*, 490 U.S. at 837 ("If the entire suit were dismissed, Newman-Green would simply refile in the District Court against the Venezuelan corporation and the four Venezuelans and submit the discovery materials already in hand. The case would then proceed to a preordained judgment. Newman-Green should not be compelled to jump through these judicial hoops merely for the sake of hypertechnical jurisdictional purity.").

D. Petitioners' Policy Arguments Do Not Warrant Review

As discussed above, the Ninth Circuit's opinion follows this Court's precedent in *Mullaney*, and does not create a new exception to the time-of-filing rule. Nevertheless, petitioners claim that the decision will lead to class action plaintiffs racing to the courthouse to sue first, without standing, and then trolling for assignments later. Pet. at 23. The situation petitioners describe was absent here. Northstar filed suit at a time when Ninth Circuit precedent supported its standing. As recognized by the Ninth Circuit, Northstar did not win a race to the courthouse. "[B]y the time [Northstar] obtained the [Assignment], over three months had passed since the complaint was filed. This was more than enough time for a competing plaintiff to file a complaint. No such complaint was filed." 30a-31a.

Further, as the Ninth Circuit correctly observed, "[U]nder current law,[] the benefit that the [petitioner] suggests…does not exist," 30a, as the Federal Rules of Civil Procedure prevent such races to the courthouse by class action plaintiffs without standing. Under Rule 23, the district court must examine whether the representative parties are adequate to protect the

interests of the Class. Fed. R. Civ. P. 23(a)(4). The same adequacy requirements are involved in the Private Securities Litigation Reform Act's ("PSLRA") Lead Plaintiff inquiry. *See* 15 U.S.C. §78u-4(a)(3)(B)(iii)(cc). Further, in appointing class counsel, Rule 23(g) directs district courts to consider, among other things, the work counsel has performed in identifying claims, counsel's experience in such matters, and counsel's knowledge of the applicable law. Fed. R. Civ. P. 23(g)(1)(A). "[I]t would be an abuse of discretion to appoint an attorney as class counsel solely because he may have won the race to the courthouse." 31a.

II. THE PETITION SHOULD BE DENIED ON THE BREACH OF CONTRACT QUESTION

Certiorari is also not warranted on the breach of contract question. The petitioners mischaracterize the Ninth Circuit's holding in an attempt to give it breadth beyond its scope. The Ninth Circuit applied the relevant state common law of contract formation, and held that a contract is formed when a majority of mutual fund shareholders vote to approve fundamental investment objectives that can only be changed by a subsequent majority vote of fund shareholders. The Ninth Circuit did not hold, as petitioners argue, that all disclosures can create a contract. Any question of preemption or conflict is interlocutory and not properly before the Court. The Ninth Circuit remanded the issue of preemption under SLUSA to the district court for a determination in the first instance. In any event, the Ninth Circuit's decision does not conflict with the federal securities laws or regulations and does not conflict with the decisions of other courts.

A. The Petition Mischaracterizes The Ninth Circuit's Holding

Petitions argue for this Court's review of the Ninth Circuit's holding because they claim that "[d]isclosures are not contracts, and treating them as such misconstrues both the concept of a 'contract' and the role of mandatory SEC disclosures under federal law." Pet. at 30. However, it is petitioners that have misconstrued the Ninth Circuit's opinion.

The Ninth Circuit did not hold that the SEC-required disclosures in prospectuses create contractual obligations. Rather, the Ninth Circuit correctly applied applicable state law concerning contract formation—offer, acceptance, and consideration—and held that shareholder approval of the Fund's mandatory investment objectives pursuant to proxy vote, which could only be changed by a vote of the majority of Fund shareholders,

> created a "contract between the [Trustees themselves], and every [investor]"—that the Schwab Trust "would administer his [investment] according to the terms, and for the objects stipulated in the" two restrictions adopted by the shareholders of the Fund.… anyone who purchased shares in the Fund after 1997, or held shares that he then owned, was legally and contractually entitled to have his investment managed in accordance with the proposals in the proxy statement, unless the shareholders voted to permit otherwise…

41a; *see also* 46a ("Moreover, the Fund's registration statement and prospectuses reflected the adoption of those restrictions. The acquisition of the securities constituted an acceptance of the offer."). Petitioners

identify no defect in the Ninth Circuit's contract formation analysis, and their argument does not address the issue of majority shareholder approval pursuant to proxy vote of the fundamental investment objectives.

Petitioners' objection seems rooted in the fact that the contractual terms were included in certain SEC filings. Initially, the ICA does not in any way foreclose plaintiff's state law claims. *See, e.g.*, *Burks v. Lasker*, 441 U.S. 471, 486 (1979) (holding that federal courts should apply state law unless inconsistent with the ICA). As the Ninth Circuit stated, "[t]he mere fact that Congress has chosen to ensure that investors are fully informed of the fundamental investment objectives of mutual funds hardly provides a license to ignore the objectives, enshrined by shareholder approval, which a mutual fund has obligated itself to pursue." 47a-48a; *see also* 15 U.S.C. §§80a-1, 80a-13(a)(3).

Moreover, petitioners ignore that the Schwab Trust was *not* obligated by federal (or other) law to establish any specific investment policies only changeable by shareholder vote, and were required, pursuant to 15 U.S.C. §80a-8(b)(2), to disclose that policy precisely because it was changeable only by shareholder vote. Rather, the Schwab Trust and the Fund could have established a general investment policy "to attempt to provide a high level of current income consistent with preservation of capital" and retained flexibility to pursue any number of strategies to achieve that objective (including to actively manage or index the Fund's assets). However, they chose to establish a very specific investment policy that was only changeable by majority shareholder vote to "seek[ ] to track the investment results of [the Index] through the use of an indexing strategy." 33a. Because the Fund's

fundamental investment objective was mandatory, and could only be changed by shareholder vote, it was binding on the Schwab Trust.

Petitioners' arguments that (i) federal regulations give funds the right to unilaterally change or withdraw aspects of the prospectus or adopt other fundamental policies, (ii) the SEC at times changes what mutual funds are required to disclose, and (iii) funds are required to update disclosures annually, Pet. at 33-34, are irrelevant and continue to misinterpret the Ninth Circuit's decision. A contract was not formed by the disclosure of information, but by fundamental investment objectives that were proposed in the Proxy Statement, approved by the shareholders, and unchangeable without a subsequent majority shareholder vote. Petitioners' claim that the Ninth Circuit's ruling puts mutual funds in an "untenable" position or a "Hobson's Choice" of having to choose between complying with federal securities laws or common-law breach of contract liability fails for the same reason. Pet. at 32-35.

B. The Petition's Arguments Concerning Preemption And Conflict Are Interlocutory And Not Properly Before The Court, And In Any Event, Do Not Warrant Review By This Court

This Court has repeatedly reaffirmed that it "is a court of final review and not first view." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (internal quotation marks omitted). The Court "do[es] not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999). In this matter, the Ninth Circuit expressly declined to reach the question

of whether any of Northstar's claims were barred by SLUSA because "[t]he district court has not yet had the need to determine whether the allegations in the 3AC can survive under SLUSA, and should do so in the first instance." 37a. That issue is currently before the district court on petitioners' motion to dismiss the 4AC, which is scheduled for oral argument on October 1, 2015, is not ripe for review, and should not be addressed here. Further, other than arguing generally that disclosures cannot be contracts, petitioners did not raise any question of conflict with federal laws or regulations prior to their petition for rehearing or rehearing *en banc*.

In any event, Northstar's claims are not preempted and do not conflict with federal securities laws or disclosure regulations.[13] SLUSA prohibits class actions brought on behalf of more than 50 people if the

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[13] It is well-settled that the existence of a robust federal disclosure regime does not preempt state-common causes of action. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992) (Federal Cigarette Labeling and Advertising Act, which requires warnings on cigarette packages, does not preempt state law claims); *Brown v. Wells Fargo Bank, N.A.*, 869 F. Supp. 2d 51 (D.D.C. 2012) (fraud claims asserting affirmative misrepresentations in connection with mortgage application not preempted by Home Owners' Loan Act or accompanying regulations, which mandate disclosures during mortgage-lending process); *cf. Davis v. Chase Bank U.S.A., N.A.*, 650 F. Supp. 2d 1073, 1086 (C.D. Cal. 2009) (false advertising claim under state unfair competition law not preempted under National Bank Act, as claim "does not seek to force Chase to set its contracts in a certain way, but rather merely to *adhere* to the contracts it does create") (emphasis in original)). Further, as this Court has recognized, the existence of a comprehensive federal regulatory scheme does not itself preempt state law breach of contract actions. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 221 (1995) (Airline Deregulation Act of 1978 does not preempt breach of contract actions).

action is based on state law and alleges (a) "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security;" or (b) "that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. §77p(b). Northstar's breach of contract claim contains no allegations of misrepresentations or omissions, but rather only allegations of contractual commitments entered into in 1997. Such allegations are not preempted by SLUSA. "[S]tate law claims that do not depend on false conduct are not within the scope of SLUSA, even if the complaint includes peripheral, inessential mentions of false conduct." *In re Kingate Mgmt. Ltd. Litig.*, 784 F.3d 128, 132 (2d Cir. 2015); *id.* at 134-35 ("breach of contractual, fiduciary, or tort-based duties owed to Plaintiffs" do not implicate SLUSA.).

Contrary to petitioners' claims, the Ninth Circuit's opinion is not an "end-run" around federal securities laws, and will not "inject chaos where uniformity is demanded." Pet. at 40. Simply put, the Ninth Circuit's decision finding a cause of action for breach of contract does not cause conflict with the federal securities laws referenced by defendants. A failure to perform state beach of contract claim (as this case is) is different and distinct from a federal securities claim, and creates no conflict with the Securities Act of 1933 or the Securities Exchange Act of 1934 (the "Exchange Act"). *See Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1069 (2014) (quoting *The Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) (recognizing that "ordinary state breach-of-contract claims" are "actions that lie outside the [Exchange] Act's basic objectives")). The National Securities

Market Improvement Act ("NSMIA"), 15 U.S.C. §77r also does not automatically preempt state common law claims. *See, e.g., Zuri-Invest AG v. Natwest Fin. Inc.,* 177 F. Supp. 2d 189, 194 (S.D.N.Y. 2001) ("the NSMIA's preemption provisions do not expressly preempt state common law fraud claims.").

C. There Is No Conflict Between The Ninth Circuit's Decision And The Decisions Of Other Courts

Despite petitioners' contention, the Ninth Circuit's holding does not establish "an unprecedented theory that is inconsistent with the decisions of other courts and this Court's precedents declining to recognize common-law theories of liability in the securities area." Pet. at 40. All four of the cases petitioners rely upon in an attempt to create a conflict are distinguishable, if not irrelevant. Each case either supports a common-law breach of contract claim in the securities area; precludes a common-law breach of contract claim where a securities law specifically forecloses such a claim; or no common-law claim was asserted.

In re Intelogic Trace, Inc., No. 97-50932, 1999 WL 152944 (5th Cir. Feb. 22, 1999), involved the attempt of bondholders to bring a common-law breach of contract claim against the bond issuer on the grounds that the prospectus was a contract. While the court affirmed the dismissal of the breach of contract claim—not on preemption grounds but on the grounds that the prospectus in question was not a contract—it noted that "the Prospectus did not contain any restrictive representations regarding the manner in which the proceeds would be used, and [] the Prospectus did not establish any statutory or common law duty between Intelogic and the Bondholders." *Id.* at *1. Since the

cornerstone of Northstar's breach of contract claim is that the shareholders' approval of the fundamental investment objectives in the Proxy Statement created a contractual obligation that the Fund would be managed in accordance with those objectives, *In re Intelogic* is readily distinguishable.

In *Lanier v. BATS Exchange, Inc.*, No. 14-cv-3745 (KBF), 2015 WL 1914446 (S.D.N.Y. Apr. 28, 2015), the class action plaintiff brought common-law breach of contract claims under a subscriber agreement to receive electronic market data against numerous securities exchanges, claiming as a breach that preferred data customers received data faster than the plaintiff. The court, in dismissing plaintiff's breach of contract claim for lack of jurisdiction on preemption grounds, held that Exchange Act §11A specifically gives the SEC "pervasive rulemaking power to regulate securities communications systems," and requires the exchanges, as "self-regulatory organizations" to "comply with rules promulgated by the SEC governing the 'distribution' of information 'with respect to quotations for and transactions in…securities." *Id.* at *8. The court further reasoned that the SEC was aware that proprietary feeds resulted in limited advanced access and still approved their use. *Id.* at *10. As such, *Lanier* is distinguishable from this action because the specific conduct giving rise to the alleged breach of contract in that case was both regulated and approved by the SEC.

Petitioners finally rely upon two decisions of this Court for the proposition that this Court has "rejected judicial attempts to create causes of action under the federal securities laws that Congress has not expressly prescribed." Pet. at 41; *see Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S.

164 (1994) (Where Exchange Act §10(b) dealt directly with the scope of personal liability of a principal actor for the use of manipulative or deceptive practices in connection with the purchase or sale of any security, liability under the Exchange Act could not be expanded to those who aided and abetted the principal actor because failure to include such liability in the statute evidenced that it was purposefully omitted.); *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302-03 (2011) (A private right of action did not exist under federal law against aiders and abettors in connection with 17 C.F.R. §240.10b5(b) claims for making untrue statements of material fact regarding the purchase or sale of securities, as entities that contribute "substantial assistance" to the making of a statement, but do not actually make it, can only be sued by the SEC under 15 U.S.C. §78t(e)). These cases, however, in which the plaintiffs sought to expand liability arising from federal securities laws, have no bearing here, where Northstar alleges breach of contract based in common law, not federal securities law.

CONCLUSION

The petition for a writ of certiorari should be denied.

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