Ms. Florence Harmon
Acting Secretary Securities and Exchange Commission
100 F. Street, NE Washington, DC 20549-9303
Re: Release No. 34-58773; File No. 87-30-08 –
Amendment to Regulation SHO Interim Final Temporary Rule

Dear Sirs,

In noticing the vast disparity between the text of the ’33 and ’34 Acts in regards to fraudulent naked short sales and what the associated SEC enforcement policies appear to be I thought it would be prudent to see what the “official” policies and “official” mindset of the SEC are in this regard. I would think that the “official” policies and mindset of the SEC would be those that the SEC revealed to an appellate court judge while under oath via an amicus curiae brief in an abusive naked short selling case brought against the DTCC.

When called on the carpet for their policies I assumed it would be very difficult for the SEC to “backpedal” and claim later that a certain policy or mindset was not their “official” policy at all. The following are the pertinent excerpts from the Nanopierce v. DTCC abusive naked short selling case that the SEC “volunteered” to file this brief in. My comments/critiques/suggestions for change are in red and in parentheses. Emphasis may have been added via bold letters, capital letters or underlining. Remember these are the “official” statements of the SEC made in a legal context.

The purpose of the brief was to convince the appellate court judge to not let the case go on to the discovery process. The question needs to be asked as to why the SEC would go well out of their way to prevent this case to advance to the point wherein the allegations of massive levels of unaddressed failures to deliver had put the share price of the corporation into a death spiral could be proven or disproven.

Ironically it was the failure of the SEC to provide their congressionally mandated “comprehensive oversight” of the DTCC while using their “plenary rulemaking authority” to prevent these abuses as well as the failure of the DTCC to act as “the tool whose foundation was built upon the provision of investor protection” to follow their Section 17 A congressional

mandate that forced this corporation to seek justice through litigation in the first place.

Once they did seek justice through this route due to the “regulatory vacuum” they were forced to operate in sure enough both of the parties that failed to perform their congressionally mandated duties “tag teamed” up together to shoot down this attempt at seeking justice due to their regulatory lapse.

One should be aware that the SEC did not write this amicus curiae brief. They signed it. Almost all of the phraseology comes right off of the DTCC and NSCC website as well as the comment letters written by the DTCC in regards to this subject. Theoretically an amicus brief is supposed to be written by an “independent” party as a “friend of the court” that may have expertise in a complex subject matter that might help the court render the proper verdict.

Oddly enough writing your own amicus brief is a little bit reminiscent of an abusive hedge fund writing an analytical “hatchet job” on a corporation it is trying to bankrupt and then asking a corrupt analytical firm to sign off on it as being their own. “If only there were a pattern” to all of these abusive acts!

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, ON THE ISSUE ADDRESSED

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protection of investors

(This “foundation” of 17 A states that the SEC is to oversee the DTCC and its NSCC and DTC subdivisions “in accordance with the public interest and the protection of investors”. This very “foundation” clearly places “investor protection” over the financial interests of the NSCC participating “banksters” and their hedge fund “guests”. The reality now is that the SEC has displayed absolutely no control whatsoever over the NSCC and the financial interests of the NSCC participants stand head and shoulders over the provision of any “investor protection” because of the obvious “conflicts of interest” that our clearance and settlement system is riddled with. Note that 17 A is basically the birth certificate of the DTCC. The gist of 17 A is that the DTCC while being tightly overseen by the SEC is to act as Congress’s “tool to provide investor protection”.

I refer to this foundational clause of 17 A as the “snicker clause” because any legal group I speak to in regards to Congress’s intent for the DTCC brings a lot of snickers when these lawyers compare the daily activities of the DTCC with Congress’s intent as the two couldn’t be further apart. Well, snicker not because it really is what Congress mandated of the administrator of this new “national clearance and settlement system” i.e. the DTCC.)

B. The Stock Borrow Program is designed to improve the efficiency of the continuous net settlement system by increasing the likelihood that purchasers will receive their securities on settlement date (A question: Is it “efficient” to credit an unknowing investor’s brokerage account with IOUs denoting a failed delivery obligation that have nothing to do with what they thought they were buying i.e. legitimate “shares” of a corporation? Does the receipt of IOUs that look just like real shares on a monthly brokerage statement really “increase the likelihood that purchasers will receive their securities on settlement date”? Perhaps does the crediting of brokerage accounts with readily sellable IOUs that look just like real shares on paper “increase the likelihood” that the naïve investor will not question the accuracy of what his monthly statement seems to be “implying”?

You at the SEC need to realize that there is a difference between “curing” an FTD that has already occurred after “settlement date” came and went versus “preventing” the formation of an FTD before midnight of T+3. The above

statement labeled "B" is a shameful misrepresentation of the truth especially in the context of a theoretically "independent" amicus brief.)

1. The Continuous Net Settlement system
2. Buy-ins to satisfy delivery obligations when members fail to deliver securities

3. The Stock Borrow Program

4. Plaintiffs' incorrect descriptions of important aspects of the Continuous Net Settlement system and the Stock Borrow Program

C. The Commission has approved the Stock Borrow Program as being in compliance with the Requirements of the Exchange Act (There are literally dozens of examples illustrating where the "SBP" is in total contravention of the tenets of the 1934 "Exchange act". The refusal of the SEC to withdraw its approval of the SBP now that they've witnessed its morphing into a mechanism to facilitate the siphoning off of investor funds into the wallets of abusive DTCC participants is unconscionable. One would hope that this would be job #1 for Ms Schapiro.)

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INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The national clearance and settlement system for securities plays a crucial role in our nation's capital markets. National Securities Clearing Corporation (NSCC), one of the defendants in this case, provides clearing services for virtually all broker-to-broker equity and corporate debt trades in the United States, clearing over 20 million equity transactions on an average trading day. (Yes, they have reached the coveted status of being "too big to fail" or "too crucial to fail" no matter how badly they misbehave? The abusive NSCC participants have learned how to "leverage" this reality in order to predictably shunt the funds of U.S. investors into their own wallets by simply refusing to deliver that which they sell. See Figure "S".)

Because of the importance of the effective performance of this system, Congress requires clearing agencies to be registered with the Securities and Exchange Commission and subject to the Commission's COMPREHENSIVE OVERSIGHT under Section 17A of the Securities Exchange Act of 1934, 15 U.S.C. 78q-1. (Note this "comprehensive oversight" that the SEC is supposed to be exercising to make sure that the NSCC is indeed acting to fulfill its foundational role as the "tool to provide investor protection" (no snickers please). Part of the problem is that you can't provide "comprehensive oversight" over a clearance and settlement system if you haven't developed a sufficient working knowledge of its inner machinations. Ask an SEC attorney tomorrow how the NSCC "RECAPS" system operates or what a "balance order" is or what "novation" refers to.)

Plaintiffs' lawsuit threatens to disrupt or to impose substantial and unwarranted costs on this system by seeking damages against registered clearing agencies for operation of the NSCC stock borrow program pursuant to Commission-approved rules. The gravamen of plaintiffs' complaint is that they have been injured by a stock manipulation carried out by naked short sellers those who sell shares they do not own without borrowing the shares necessary to make delivery. Yet plaintiffs sue here, not the short sellers, but these defendants, despite plaintiffs' concession that defendants are acting in compliance with applicable rules.

(Regardless of what it looked like several decades ago the "Stock Borrow Program" (SBP) has subsequently morphed into a corrupt system that directly facilitates what can only be characterized as the "counterfeiting" of a corporation's shares. How did this come about? Insatiable human greed on the part of the NSCC participating "banksters" plus the LACK of "comprehensive oversight" by the SEC over the NSCC to make sure that they were acting in their foundational role as a "tool to provide investor protection".)

Some of plaintiffs' claims for relief allege that operation of the stock borrow program itself gives rise to damage claims, while others are characterized as "misrepresentation" claims, but both sets of claims are in actuality challenges to the correctness of the Commission's decision to approve the stock borrow program.

(An SBP that allows the shares recently borrowed to "cure" a delivery failure to be placed right back into this same SBP "lending pool" two seconds later by the recipient of the borrowed shares whose purchase order resulted in a failure to deliver is unconscionable. It allows the very same

parcel of shares fortunately for the crooks rendered untraceable due to the SBP's use of "anonymous pooling", to be counterfeited and SIMULTANEOUSLY loaned out in perhaps a dozen different directions after "curing" a dozen different delivery failures. In a Ponzi scheme-like fashion what it does is it "undoes" yesterday's "settlement" of a trade involving "delivery versus payment" in order to "settle" today's trade that involved a "failure to deliver" or "FTD".

Since there is no monthly or annual "day of reckoning" for the NSCC participant's accounts in our current clearance and settlement system the music never stops in this quadrillion dollar game of "musical chairs" such that the enormous amount of electronic book entries on the books of NSCC participants need to find a "chair" to sit on whose numbers are limited by the amount of legitimate "shares" backed up by a paper certificate held in a DTC vault.

Is that how the "tool to provide investor protection" should act while under all of this "comprehensive oversight"? Note the obvious financial incentive to run up huge naked short positions and then merely flood the share structure with the readily sellable "securities entitlements" resulting from these failures to deliver in an effort to manipulate the share price down.

Recall what this "foundation" of our clearance and settlement system was to be: "Section 17A of the Exchange Act charges the Commission with overseeing the national clearance and settlement system **in accordance with the public interest and the protection of investors".** Does the investing public want the share price of the corporation they just invested in manipulated downwards? Is this in the "public interest" or in the "financial interests" of those NSCC participants holding these naked short positions established by simply refusing to deliver that which they sell?)

Thus, a state court award of damages under plaintiffs' allegations would create a direct conflict with that decision, and plaintiffs' case is therefore preempted by the Exchange Act. As the regulator charged by Congress with ensuring that the national clearance and settlement system functions efficiently, in the public interest and for the protection of investors, the Commission has a strong and direct interest in seeing that the threats created by plaintiffs' lawsuit are ended by the affirmance of the district court's dismissal. (The "Commission" (SEC) had the "direct interest" to make sure that this case didn't go into "discovery" so that this "investor fund theft

machine" created by its lack of "comprehensive oversight" wouldn't be revealed to the investing public whose confidence level couldn't be any more anemic.)

ISSUE ADDRESSED BY THE COMMISSION

Whether the Exchange Act preempts state law claims against registered clearing agencies either for operating the stock borrow program in accordance with Commission-approved rules, or for failing to disclose alleged "defects" in that program, the existence of which would be contrary to the factual basis on which the Commission approved the program. (Would this "tool designed to provide investor protection" after learning that its participants were routinely abusing the SBP in order to steal the funds of investors disclose these "alleged defects" to its overseer or keep it quiet to look after the financial interests of its bosses/participants? The NSCC management obviously chose the latter partially to keep the investor's cash flowing into their bosses/participants' wallets and partially to cover up their fraudulent facilitation of these thefts over the years.)

BACKGROUND

A. Section 17A of the Exchange Act charges the Commission with overseeing the national clearance and settlement system in accordance with the public interest and the protection of investors.

Congress enacted Section 17A of the Exchange Act as part of the legislative response to the paperwork crisis of the late 1960s and early 1970s. See generally, In the Matter of the Full Registration as Clearing Agencies of The Depository Trust Co. et al., SEC Rel. No. 34-20221, 48 Fed. Reg. 45167, 45168 (Oct. , 1983)
("Final Approval Order"); Bradford National Clearing Corp. v. SEC, 590 F.2d 1085, 1090-94 (D.C. Cir. 1978). (The formation of the then DTC was indeed a bit of an emergent measure associated with a marked increase in trading volume levels back around 1970. Hastily thrown together emergent legislation might be expected to be lacking in certain areas and not very well thought out. But after 37 years one might think that some fine tuning of the policies not consistent with this foundational role as "the tool to provide investor protection" might have occurred somewhere along the way. In reality the allure of free money (that of unsuspecting investors) presents conflicts of interest so compelling that an entity now "too big to fail" might choose to leverage this in favor of their own financial interests instead of

that of the investors vastly less familiar with how a clearance and settlement system is supposed to operate.)

Section 17A opens with Congressional findings and a general direction to the Commission to be followed in administering the statute. Congress found that

(A) The prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto, are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors. (Note that the "prompt settlement" of securities transactions necessitates the "prompt delivery" of that which was purchased. The posting of an IOU on a monthly statement does not constitute "delivery" of anything. It is symptomatic of a "failed delivery". The "Golden rule": "The prompt "settlement" (involving the "prompt delivery" of that purchased) of securities transactions is necessary for the protection of investors." Any delays in delivery are extremely damaging to investors and corporations in that the "securities entitlements" resulting from FTDs are allowed by UCC Article 8 to be readily sellable. If the were "restricted" for resale UNTIL delivery were to occur then they wouldn't be nearly as damaging but that's not the case. Thus FTDs are of an emergent nature to investors and the corporations invested therein.)

(B) Inefficient procedures for clearance and settlement impose unnecessary costs on investors and persons facilitating transactions by and acting on behalf of investors. (It is not "inefficient" to mandate that the seller of shares cannot touch the investor's money UNTIL he has delivered that which he sold i.e. UNTIL the trade has "settled". This is referred to as "delivery versus payment" or DVP. This is how a DTCC obeying its congressional mandate to act as a "tool to provide investor protection" would act. They would incorporate any efficiency enhancing measures AS LONG AS THEY DIDN'T RESULT IN THE DIMINISHMENT OF INVESTOR PROTECTION i.e. the "foundation" upon which all of their actions were to be based.)

(C) New data processing and communications techniques create the opportunity for more efficient, effective, and safe procedures for clearance and settlement.

(D) The linking of all clearance and settlement facilities and the

development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors. (This is true UNLESS the clearance and settlement systems of less-regulated countries like Canada are allowed to interface directly with our clearance and settlement system as if it were equally well-regulated. Otherwise securities fraudsters would simply set up shop in less well-regulated countries like Canada and participate in a phenomenon known as "regulatory arbitrage".)

Congress directed the Commission, "having due regard for the public interest, the protection of investors, and the safeguarding of securities," (Note that administering a self-replenishing lending pool of securities like that of the SBP that essentially "counterfeits" the shares held in street name can hardly be characterized as "the safeguarding of securities") to "facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities * * * in accordance with the findings and to carry out the objectives set forth" above. Section 17A(a)(2), U.S.C. 78q-1(a)(2).

To achieve these statutory objectives, Section 17A makes it unlawful for a clearing agency to do business in interstate commerce unless it is registered with the Commission. Section 17A(b), 15 U.S.C. 78q-1(b). Section 17A(b), 15 U.S.C. 78q-1(b).

Registration may not be granted unless the Commission finds that both the clearing agency itself and the clearing agency's rules meet specified statutory requirements (the "Requirements"), which implement the broad objectives of the statute. Section 17A(b)(1), 15 U.S.C. 78q-1(b)(1). (The assumption here is that the "registered clearing agency" with these already approved of rules and regulations is willing to enforce these rules and regulations when conflicts of interest arise between the financial interests of its "participants" and the congressionally mandated provision of investor protection upon which the clearing agency's very foundation is based upon.) A clearing agency's application for registration must contain the rules of the clearing agency, and such other information as the Commission requires "as necessary or appropriate in the public interest or for the prompt and accurate clearance and settlement of securities transactions." Section 17A(b)(2), 15 U.S.C. 78q-1(b)(2).

A clearing agency is required, among other things, to be so organized, and have the capacity, to be able to: facilitate the prompt and accurate clearance and settlement of securities transactions, safeguard securities and funds in its custody or control or for which it is responsible, comply with the provisions of the federal securities laws, enforce compliance by its participants with the rules of the clearing agency, and carry out the purposes of Section 17A. (The question arises: What needs to be done to "facilitate the prompt and accurate clearance and settlement of a securities transaction" when the NSCC participant that sold the securities absolutely refuses to deliver that which it sold? The answer is that this "tool to provide investor protection" needs to "buy-in" that failed delivery obligation so that the purchaser of the securities can finally receive that which he purchased.) Section 17A(b)(3)(A), 15 U.S.C. 78q-1(b)(3)(A). The statute imposes both affirmative and negative requirements on clearing agency rules.

Affirmatively, Section 17A requires that those rules be designed to promote the prompt and accurate clearance and settlement of securities transactions, assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and in general, to protect investors and the public interest. Section 17A(b)(3)(F), 15 U.S.C. 78q-1(b)(3)(F). (Another question: Are the "funds" of the investor being "safeguarded" when they are allowed to flow to those that sold securities even though they absolutely refuse to deliver to this investor that which it sold?)

Negatively, the rules must not be designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency, or to regulate by virtue of any authority conferred by the Exchange Act matters not related to the purposes of Section 17A or the administration of the clearing agency. (Note that the DTCC is not to "regulate" on matters not related to the purposes of Section 17 A)Id. Also, the rules must not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 17A(b)(3)(I), 15 U.S.C. 78q-1(b)(3)(I).

Registered clearing agencies are self-regulatory organizations (SROs) under

the Exchange Act. Section 3(a)(26), 15 U.S.C. 78c(a)(26). Therefore, changes to a clearing agency's rules after registration may only be made pursuant to Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b). That section provides that no change may take effect unless approved by the Commission under Section 19(b)(2), 15 U.S.C. 78s(b)(2), as being consistent with the Exchange Act, or unless permitted to take effect without prior approval pursuant to Section 19(b)(3), 15 U.S.C. 78s(b)(3). (Obviously all rules and regulations inconsistent with the "34 Act that have over the years been "snuck" into the DTCC and NSCC's Rules and Regulations while the SEC was asleep at the wheel need to be formally removed. I come up with at least 77 rules that are in direct contravention of the '34 Exchange Act let alone the other 6 " main Securities Acts".

I would think that this has to do with the fact that most of the staff and Commissioners at the SEC have never acquired a working knowledge of the inner workings at the DTCC and I imagine the DTCC management would just as soon keep it that way.)

The Commission also has **plenary rulemaking authority** (This is in addition to its "comprehensive oversight" powers. In other words the SEC has all the power in the world if only it weren't "captured" by the financial interests of those it is supposed to be regulating. An unconflicted SEC now needs to wield those powers effectively to end this pandemic siphoning off of investor funds. Attached are 83 specific suggestions that the SEC might consider.) with respect to clearing agency conduct. No registered clearing agency may engage in any activity as a clearing agency "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of" the Exchange Act. Section 17A(d)(1), 15 U.S.C. 78q-1(d)(1). (The SEC needs to "re-prescribe" these rules and regulations regarding registered clearing agency conduct necessary to protect the investing public.)

B. The Stock Borrow Program is designed to improve the efficiency of the Continuous Net Settlement system by increasing the likelihood that purchasers will receive their securities on settlement date. (Concentrate on the phrase "by increasing the likelihood that purchasers will receive their securities on settlement date". With the way the SBP operates the "securities" being "received"

have nothing to do with what the investors THOUGHT they were purchasing. Of course borrowing from a self-replenishing lending pool of securities will "increase the likelihood that purchasers will receive their securities on settlement date; so would a counterfeiting printing press. This doesn't "improve the efficiency of the CNS system"; it converts it into a fraud facilitator. Once again, this isn't rocket science!)

In this section, we describe the relevant aspects of the continuous net settlement system, the procedures for buying-in securities for delivery to purchasers when sellers fail to deliver securities, and the stock borrow program.

Also, we correct some of the fundamental errors in plaintiffs' descriptions of the continuous net settlement system and the stock borrow program.

1. The Continuous Net Settlement system

The securities that are the subject of the complaint were deposited at defendant The Depository Trust Corporation (DTC). DTC accepts deposits of securities from participants or issuers, credits those securities to participants' accounts, and transfers securities among those accounts by computerized book-entry movements pursuant to the participants' instructions. The securities deposited at DTC are registered on the books of the security's issuer in the name of DTC's nominee, Cede & Co. (This is the result of the congressionally mandated "immobilization" of paper-certificated securities at the DTC and the "dematerialization" of paper-certificated shares (theoretically) INTO AN EQUAL AMOUNT OF ELECTRONIC BOOK ENTRY "SHARES". The faulty design of the SBP facilitates the conversion of "X" amount of paper-certificated shares of a corporation into perhaps 2, 3 or 12 "X" amount of electronic book entry "shares" as will be described in a moment.)

Trades in these securities clear through NSCC's continuous net settlement system. See generally NSCC Rule 11, Sec. 1(a); Final Approval Order, 48 Fed. Reg. at 45170 n.32; Bradford, 590 F.2d at 1091 n.2. (Footnote #2) Under that system, NSCC becomes the contra-party to each purchase or sale of securities. NSCC assumes the obligation of each member that is receiving securities to receive and pay for those securities, and it assumes the obligation of each member that is delivering securities to make the delivery. (Keep this line in mind: "it (the NSCC) assumes the obligation of each member that is delivering securities to make the delivery. Yes, the NSCC is on the hook to make delivery and when an abusive NSCC participant that

sells shares and absolutely refuses to deliver that which it sold in a "prompt" manner then the NSCC must do whatever it takes to make that delivery as per the delivery obligation that it just assumed i.e. buy-in the missing shares and forward the shares to the buyer and the bill for the buy-in to the party refusing to make delivery. But there's a problem here and it's related to those "conflicts of interest" discussed earlier that pop up between the NSCC management looking after the financial interests of its bosses/participants as opposed to the NSCC management following its congressional "foundational" mandate to act as "the tool to provide investor protection". Rule 11, Secs. 1(b), (c), (e); Procedure VII(A).

NSCC is also assigned the receiving party's right to receive securities and the delivering party's right to receive payment. Id. The assumption of these obligations and the assignment of these rights place NSCC between the delivering member and the receiving member – the delivering member is obligated to deliver securities to NSCC; the receiving member is obligated to pay for securities delivered by NSCC; and NSCC is obligated to receive and pay for securities from the delivering member, and to deliver securities to the receiving member. Id. (What was just described is a clearance and settlement based upon the use of "central counterparties" (CCPs) and the legal doctrine of "novation". Basically the CCP (the NSCC management) "discharges" the delivery obligations of its bosses/"participants" (an interesting phenomenon in and of itself) in exchange for "assuming" and then "executing" on these delivery obligations in a "prompt" manner as per Section 17 A described above.

The problem is that after "discharging" the (failed) delivery obligations of its abusive bosses the NSCC management then mysteriously turns around and claims to be "powerless" to do the only thing possible to "execute" on these obligations it recently "assumed" when the original selling party absolutely refuses to deliver that which it sold i.e. buy-in that party's delivery obligation so that it can then finally send these missing shares to the party that bought the shares in the first place.

This type of fraud is referred to as a "straw man" fraud wherein the obligation is "novated" and handed to a party (the straw man) that claims to be "powerless" to perform its role even after the original delivery obligation has already been "discharged". This results in the delivery obligation being placed under a "shell" that can be moved around.

Admittedly a "failure to deliver" does remain on the books but when the only party with the power to do anything about it (buy it in when the original party continues to refuse to deliver that which it sold) pretends to be "powerless" to do so then this FTD becomes a moot point. It becomes an IOU that can't be cashed in on. Why does the NSCC management this "tool to provide investor protection" pretend to be "powerless" to provide the only "cure" available when this "empowerment" comes from its very birth certificate?

The reason is because it came to a fork in the road and willfully chose to look after the financial interests of its abusive bosses/participants and not act as the congressionally mandated "tool to provide investor protection. Meanwhile where is the SEC with its "plenary rulemaking authority" and "comprehensive oversight" capacities? It too, just like the SRO known as the NSCC, has been "captured" by the financial interests of those it is supposed to be regulating like the Bernie Madoffs of the world that actually designed some of the loopholes at the DTCC i.e. the "Madoff exemption" from having to obey the "uptick rule" created to deter abusive naked short selling (ANSS) frauds. Bernie Madoff had a vastly superior working knowledge of the inner machinations of our clearance and settlement system that he was able to leverage quite effectively.)

All member transactions in a given security are netted daily, based on trade date, (Note that the "netting" occurs BEFORE any FTD can occur. The assumption is that everybody will deliver that which they sell. This assumption is dead wrong.) so that each member is required to deliver to NSCC or receive from NSCC only the difference between the total amount of each security that it bought and the total amount that it sold during the trading period (i.e., purchases are netted against sales). Procedure VII(C)(1). NSCC rules provide that a member that owes NSCC securities is described as having a short position, a member that is entitled to receive securities from NSCC has a long position, and a member that is neither obligated to deliver nor entitled to receive securities has a flat position. Rule 11, 17 Secs. 1(a), 2. (This "multi-lateral pre-netting" is very tricky business when mere "securities entitlements" resulting from FTDs are allowed to be readily sellable and therefore "readily nettable". Why? Because mere "securities entitlements" with no paper-certificated shares in existence to justify their existence when sold will offset legitimate shares that are purchased. Why? Because the underlying presumption of pre-netting is that everybody

delivers that which they sell. If the foundational presumption is faulty then this is carried throughout the system.

In other words the delivery status of that being sold is "disconnected" from that which is being "pre-netted". Without the existence of mere "securities entitlements" in the share structure of a corporation then multilateral pre-netting is just fine. The problem is that when the buyer of undelivered shares turns around and sells what he purchased (nonexistent shares) BEFORE delivery occurred then the fact that they never were delivered becomes a moot point and the nonexistent shares will simply get bought and sold in a Ponzi-scheme fashion into perpetuity because there never were any shares involved in that very first sale.

That's why FTDs are an emergency that need to be addressed "promptly" as per Section 17 A via whatever it takes and when the seller continues to refuse to deliver that which it sold then what it takes is a "buy-in". Somewhere along the line the consensus amongst NSCC participants has become that buy-ins are too harsh because short squeezes might ensue. Well perhaps you should have considered that before you decided to refuse to deliver that which you sold. You should have known that it is the ONLY solution that this "tool to provide investor protection" has (if it were unconflicted and following its congressional mandate).

Allowing mere "securities entitlements" to be readily sellable was predicated on the fact that the NSCC management would "promptly" buy-in FTDs as per its congressional mandate on perhaps T+6 or so when it became obvious that the seller had no intent whatsoever to deliver that which it sold.)

2. Buy-ins to satisfy delivery obligations when members fail to deliver securities

Sometimes, members fail to deliver to NSCC the total number of securities that they are obligated to deliver on a particular settlement date, i.e., they do not have sufficient securities on deposit at their designated depository to eliminate their short position. Procedure VII(C)(3). In that situation, NSCC uses an algorithm to allocate the fails to deliver to members who are due to receive securities. Procedure VII(E). A member's failure to deliver may cause the receiving member to whom the fail is allocated to have a long position, i.e., to be entitled to receive securities from NSCC.

A member that has failed to receive securities has two options: it may either maintain that position and wait for delivery to be made to it as securities are delivered to NSCC, or it may file a Notice of Intention to Buy-in with NSCC. Rule 11, Sec. 7(a), Procedure VII(J). (This is the height of absurdity. In a clearance and settlement system wherein the "tool to provide investor protection" (the NSCC) is congressionally mandated to "promptly settle" all transactions it can't, by definition, allow its participants to sit around and "wait" for delivery to "eventually" occur. The previously agreed to "settlement date" was T+3 and the investor kept up his half of the contract by tendering his funds. Otherwise crimes associated with "kiting" are bound to occur. "Kiting" crimes are associated with the abuse of "float" periods.

In securities law the "float period" is the time period in between the previously agreed to "settlement date" and the date when "delivery" finally occurs. Recall that money has a time value. What the SEC cleverly forgot to tell this appellate court judge was that in this "float period" between "settlement date" and the date of delivery the purchasing broker gets to earn the interest off of his own client's funds and thus he is heavily financially incentivised NOT to order the buy-in of this failed delivery obligation. He has been essentially "bribed" not to. Not only this but he has been financially incentivised to aim his client's buy orders to market intermediaries that he can count on to fail to deliver that which they sell.

Of the 16 sources of "empowerment" to buy-in failed delivery obligations the NSCC has 15 of them and the buying broker has the 16th. Every DTCC participating market intermediary on Wall Street is heavily financially incentivised NOT to ever buy-in the failed delivery obligations of a brother DTCC or NSCC "participant". The research of Evans, Geczy, Musto and Reed (2004) revealed that only one-eighth of 1% of even "mandated" buy-ins are ever executed on Wall Street. Now you know why. That's why the SEC's telling this judge that there is a remedy referred to as a buy-in is an option of the buying brokerage firm and thus FTDs are no big deal. Baloney! Procedure X(A)(1) cited below is a total self-serving red herring.

Note that after an FTD occurs the NSCC can be counted on to pretend to be "powerless" to buy-in the delivery failure. But this is the only known "cure" available when an NSCC participant absolutely refuses to deliver that which it sold. Thus the NSCC cannot merely allow one of its participants to sit on

his hands and wait for the "eventual" delivery of that which it purchased for its client.

In response to the filing of such a Notice (to buy-in), NSCC takes a series of steps to facilitate the buy-in, including, if necessary, executing the buy-in in the marketplace of its choice, through the agents of its choosing. Procedure X(A)(1). When a buy-in is executed, any loss incurred in the purchase is allocated in accordance with NSCC procedures to members with short positions in the security. Id.

The fact that a broker-dealer that is an NSCC member fails to receive securities that it purchased on behalf of a retail customer does not mean that the customer's purchase is not completed until the member's failure to receive is cured. (How can a "purchase be completed" when that purchased never got delivered?) Under Article 8 of the Uniform Commercial Code, a securities broker-dealer may credit a customer's account with a security even though that security has not yet been delivered to the broker-dealer's account by NSCC. In that event, the customer receives what is defined under the Uniform Commercial Code as a "securities entitlement," which requires the broker-dealer to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the security. See UCC Sections 8-104, 8-501. (100% misrepresentation as 8-104 and 8-501 say nothing of the sort. Only the board of directors of a U.S. corporation can issue these "packages of rights" known as "shares" of a U.S. corporation. Nobody can sell "entitlements to exercise the rights that comprise a security" unless you own, have pre-borrowed or have "located" such. That would be analogous to "issuing" unregistered securities. The "entitlements to exercise the rights that comprise a security" IS THE SECURITY.)

3. The Stock Borrow Program

The stock borrow program is intended to improve the efficiency of the clearance and settlement system by increasing the likelihood that purchasers will receive delivery of their securities on settlement date even though insufficient securities have been delivered to NSCC. NSCC Rules, Addendum C. Under the applicable Rules, the program is automated and operates without the exercise of discretion by NSCC. (You've got to love this line. The NSCC's SBP is 100% corrupt and knowing this the NSCC management that designed and administers it states that it is "automated" and they have no "discretion" to exercise in the manner that it operates. This statement is coming from "the tool to provide investor protection" and the

party mandated to "promptly settle" all securities transaction. That's like the bank robber claiming that its get away car and its gun are on auto-pilot and it really didn't mean to steal the funds of the bank's clients.)

Members wishing to participate in the program as lenders notify NSCC each day of securities that they have on deposit with DTC that are available to be borrowed for delivery to receiving members. Id. If NSCC has unsatisfied delivery obligations on a particular settlement date, it will borrow available securities according to a formula that allocates the borrowing among members who are willing to lend. Id. Borrowed securities are entered in a special continuous net settlement sub-account, and are used to satisfy delivery obligations to members with long positions who would otherwise fail to receive. The lending member is credited the market value of the securities borrowed, and the long position in the member's account will reflect the borrowing of the shares until those shares are returned. Id. Borrowed stock is returned to the lender through normal allocation in the continuous net settlement system as securities become available. Id. (The obvious financial incentive to "donate" the shares of your own clients into this "lending pool" is that the brokerage firm making the "donation" gets to utilize the cash equivalent of his clients "donated" shares for its own uses during the life of the loan i.e. earn interest off of and count towards its net capital reserves.

Further to that, the NSCC refuses to monitor for the obvious abuses that might involve the "donating" of client shares from accounts that are illegal to donate from i.e. from type 1 cash accounts and qualified retirement plan accounts. Instead this "tool to provide investor protection" puts its individual "participants/bosses" on the honor system in this regard despite the monstrous financial incentive to cheat. Only shares in margin accounts are legally allowed to be donated.

Here's how the NSCC's SBP is allowed to operate. The NSCC sees an FTD occur and it reaches its hand into the SBP's lending pool to borrow shares in order to "cure" this FTD. It then electronically transmits these borrowed shares to the brokerage firm of the purchaser of the originally failed to be delivered shares. This firm is then unconscionably allowed to take these recently borrowed shares and place them right back into the same lending pool from which they just came out of **as if they never left in the first place.**

Picture the shares in the lending pool at any given moment in time as being white marbles of different sizes associated with differing amounts of shares in each parcel. The NSCC reaches in and effects a borrow to cure a delivery failure. Let's dye that borrowed parcel of shares red for identification purposes. The red shares are then sent to the new buyer of shares electronically and then his brokerage firm puts then right back into the SBP as is its right.

Now that very same "red" parcel of shares is ready to be borrowed once again to cure yet another delivery failure. Soon that "red" parcel of shares may have a dozen different "co-beneficial owners" after having "cured" a dozen different FTDs. This is "counterfeiting" pure and simple. Just because the NSCC chooses to keep the shares in the lending pool in an "anonymously pooled" format doesn't mean that we can't artificially identify a parcel with this metaphorical red dye for identification purposes.

Since all of these parcels of red dyed shares are readily sellable due to UCC Article 8 then the share price of the corporation involved has to crash from this manipulation upwards of the "supply" of readily sellable "shares" and /or readily sellable "securities entitlements". This crash in share price financially benefits the NSCC participants that have refused to deliver that which they sold.

Since the NSCC has illegally converted its foundation from the congressionally mandated "delivery versus payment" (DVP) associated with the "prompt settlement" of shares sold to a foundation of "collateralization versus payment" (CVP) wherein those failing to deliver shares need to only collateralize the monetary amount of the failed delivery obligation then as the share price predictably plummets so too do the collateralization requirements.

This allows the funds of the investor that never got delivery of that which he purchased to flow to the sellers of these (nonexistent) shares despite the fact that they continue to refuse to deliver that which they sold. The fact that all of these thefts are being facilitated by the NSCC acting as the "tool to provide investor protection" as well as the party with the congressional mandate to "promptly settle" all transactions is a bit disconcerting to U.S. investors.

The NSCC management is actually doing everything in its power to circumvent the "prompt settlement" of all securities transactions. Why? Because it financially benefits its abusive bosses/participants that refuse to deliver that which they sell.)

Alternatively, the lender, as any other member with a long position, may initiate buy-in procedures by submitting a Notice of Intention to Buy-in. (The lender obviously will not choose this option unless forced to as it would no longer have access to the interest earnings of the cash value of its client's shares.) Until the securities are returned, the lending member no longer has ownership rights in them, and therefore cannot sell or re-lend them. (Note that the investor whose shares were chosen knows nothing about any of these dealings and he will continue to vote his shares as will the recipient of the loaned shares. The NSCC has no right to create voting rights out of thin air; only the board of directors of the corporation can do this. How can one manage a corporation when you aren't even allowed to know how many voting units are in existence? How can an investor know what percentage of a corporation it owns?

If the client of the lending brokerage firm were to learn that his voting rights were being secretly cancelled behind his back and that his shares were being first counterfeited and then loaned out to perhaps a dozen different short sellers intent on bankrupting his investment then investors would obviously not use margin accounts nearly as much. But then all of this wonderful banking income would be lost to the brokerage firm so it is best to keep this a secret. The investor client did sign off on a margin account agreement permitting the "hypothecation" (lending out) of his shares but that margin agreement didn't say anything about his shares being counterfeited by the SBP many times over and then being simultaneously lent out to perhaps dozens of short sellers bent on destroying his invested in corporation.)

4. Plaintiffs' incorrect descriptions of important aspects of the Continuous Net Settlement system and the Stock Borrow Program

This summary of the applicable NSCC rules makes clear that plaintiffs' descriptions of the continuous net settlement system and the stock borrow program are flawed in important respects. Among their erroneous allegations are that (1) the stock borrow program is the only way that fails to deliver can be cured, (2) NSCC is at fault for not requiring buy-ins, and (3) the stock borrow program results in the creation of phantom securities.

First, a receiving member that has failed to receive securities can obtain those securities through a buy-in that does not involve the stock borrow program at all. (But it has been essentially bribed not to access this option.) *Second*, NSCC does not have the authority to require buy-ins. (The NSCC has 15 of the 16 mandates/responsibilities empowering it to execute buy-ins. It voluntarily chooses NOT to do so in order to accommodate the financial interests of its abusive bosses/participants.)

As noted, its role in the stock borrow program is automated and non-discretionary (It designed and administers it on a daily basis. The only reason it would proffer an argument like this absurdity is that it fully appreciates the corrupt nature of what the SBP has morphed into over the years. The SEC is equally responsible for not rescinding their prior approval of this facilitator of fraudulent behavior.)

the only entity authorized by the rules to require a buy-in is the receiving member. (A blatant falsehood)

If a long position remains open for an extended period of time, (The NSCC with the congressional mandate to "promptly settle" all securities transactions, by definition, can't allow this to happen in the first place. Nor can the "tool to provide investor protection". "For an extended period of time" cannot even be in the same sentence as the congressionally mandated "prompt settlement".)

that is because the receiving member has not initiated a buy-in, presumably because that member is willing to rely on the fact that it will eventually be allocated securities pursuant to NSCC's procedures. (How can the party with the congressional mandate to "promptly settle" all transactions even use the word "eventually"?)

These statements are true whether the entity that is owed securities is the original purchaser who did not receive delivery, or a firm that has loaned securities to the stock borrow program. Furthermore, NSCC has no mechanism for determining whether particular fails to deliver have occurred because of illegal naked short selling or for some legitimate reason. (How about the age of the FTD? Only FTDs associated with "legitimate" reasons for ultra short termed delivery delays were to be allowed to be readily sellable because of the incredibly damaging nature of readily sellable "securities entitlements".)

Nor are there any standards or rules that would guide its discretion in deciding whether to make a buy-in, if it were to undertake do so. (An unconflicted party with the congressional mandate to "promptly settle" all transactions and the party mandated to act as "the tool to provide investor protection" would obviously have these policies set in stone.) In short, the assertion that NSCC is in some way culpable for failing to initiate buy-ins is contrary to the clear terms of the Rules.

Third and finally, neither the continuous net settlement system nor the stock borrow program creates artificial securities. (Let's look at that argument for a minute. What they create are referenced on a victimized investor's monthly statement as "securities held long". Thus they are definitely "securities". Now the question becomes are they "artificial" or not? Neither management nor the victimized investors nor prospective investors know anything about their existence. They "artificially" increase the "supply" of readily sellable shares and/or readily sellable "securities entitlements which "artificially" depresses the share price. They "artificially" manipulate the share price lower due to their being readily sellable.

The SEC incorrectly portrays them as "entitling" their purchasers to exercise all of the rights comprising that "security". I'd say the characterization of them as being "artificial securities" is really pretty fitting even though they are TECHNICALLY not "outstanding" although the case could easily be made that they are in essence "outstanding" since they're referenced on unknowing investor's monthly brokerage statements and they're readily sellable.

It is true that they were never "issued" by the board of directors but they were indeed "issued" by somebody else. They were "issued" by the NSCC when one of its abusive participants refused to deliver that which it sold. In fact, if there's nothing wrong with them then why doesn't the NSCC let management and any prospective investors know of their existence as mandated by the '33 ("Disclosure") Act? Why also doesn't the SEC mandate that they be "registered" before resale like all other "securities"? If these aren't as fraudulent as everybody seems to think then there sure seems to be an awful lot of unnecessary "covering up" going on by both the SEC and the DTCC!)

The number of securities issued and outstanding is determined by the security issuer and is reflected in the issuer's records of registered

ownership; nothing that happens in the course of clearing and settling trades, including any action taken by NSCC, can change that number. (As a U.S. citizen this is one of the most hideous misrepresentations ever made by a government "commission" (the SEC). It is the arithmetic sum of the number of readily sellable legitimate shares of a corporation PLUS the number of readily sellable "securities entitlements" in the share structure of a corporation that forms the "supply" variable that interacts with the "demand" variable to determine share prices via the process of "price discovery". You don't need to TECHNICALLY alter the number of "shares outstanding" to perpetrate the largest "fraud on the market" our nation has ever suffered from. Why all of this intentional misrepresentation by the SEC? Should investors reading all of this blather of how safe our markets are to invest in have recourse due to these intentional misstatements?)

As explained above, the continuous net settlement system is essentially an accounting system that records delivery and receive obligations among NSCC members. These obligations do not reflect *ownership positions*. Ownership positions, as opposed to the deliver and receive obligations recorded by NSCC, are reflected on the records of DTC. (This is a true statement that few investors are aware of. On Wall Street you don't "own" what you think you "own". See Rule 200 of Reg SHO.)

The security's issuer maintains its own record of all of the registered ownership positions of its securities. All shares deposited at DTC are recorded on the issuer's records in the name of DTC's nominee, Cede & Co., and constitute some or all of the issuer's securities issued and outstanding. (The point needs to be made is that an issuer's "transfer agent" before "immobilization" and "dematerialization" kicked in used to function as a monitor for any "counterfeiting" of the corporation's shares. That protective role is now gone. All a company's TA ever sees now is that "Cede and Co." owns the majority of the corporation's shares. All of these shenanigans going on at the NSCC are out of the view of a company's TA and management staff. In fact the Mom and Pop TAs in the U.S. are being muscled out of Wall Street and are being replaced by the TA divisions of the "banksters" which will only serve to minimize even further the anti-counterfeiting protection provided by a corporation's TA.)

The fact that securities settle through the continuous net settlement system, or that they are deposited at DTC, does not increase the number of the issuer's shares. (A shameful intentional misrepresentation!)

As to the stock borrow program, as noted above and as further explained by the Commission's staff in guidance on the Commission's website, the securities loaned by NSCC members for use in the program must be on deposit at DTC, and are debited from members' accounts when the securities are used to make delivery. See Responses to Frequently Asked Questions Regarding SHO (Jan. 3, 2005), http://www.sec.gov/divisions/marketreg/mrfaqregsho1204.h 17 tm. Once a member's securities are used for delivery to another member, the lending member no longer has ownership rights in those securities, which means that it cannot sell or re-lend them until such time as the securities are returned to its DTC account. (Yes, but they are still being represented on monthly brokerage statements as "securities held long" to unknowing investors who don't "own" what they think that they "own". This is especially critical when the shares occupying the SBP lending pool are "fully paid for" shares not sitting in a margin account associated with NSCC participants being placed onto the "honor system" by the NSCC while swimming in financial opportunities beyond description. Have you ever called your broker and he didn't allow you to sell shares that you had purchased because they were loaned out through the SBP?)

When securities are not available to be loaned through the stock borrow program, the buyer is required to either wait for delivery or initiate a buy-in. (Again, this is a no brainer as those that opt to wait get the interest earnings off of those funds UNTIL delivery occurs. They secretly hope that they never get delivered. That's why purchasing b/ds often aim their buy orders at parties that they know will naked short sell into the order. Are there many of these to be found? In a clearance and settlement system based on CVP in which you can access the funds of an investor without ever delivering that which you sold to him there are an infinite amount of parties willing to naked short sell into any buy order they have visibility of.)

Neither waiting nor buying-in increases the number of issued and outstanding securities. All that the stock borrow program does is shift the *consequences* of the failure to deliver from a buyer that has not affirmatively indicated a willingness to wait for delivery of its securities to a lender that *has* indicated that it is willing to wait. (An interesting way to explain a fraud.)This shift cannot possibly increase the number of securities issued, any more than the buyer's decision to either wait or initiate a buy-in can do so. Therefore, plaintiffs' assertion that the stock borrow program creates securities is incorrect. (A bold-faced lie. A self-replenishing "lending pool"

like that at the SBP will create readily sellable "securities entitlements" (the most damaging kind) out of thin air all day long. If a "securities entitlement" weren't a "security" then it couldn't be "readily sellable" on a securities market. One of the many definitions of a "security" is "an evidence of indebtedness" which is exactly what a "securities entitlement" is.

Footnote: While the number of securities outstanding does not change because of the clearance and settlement system, the aggregate number of positions reflected in customer accounts at broker-dealers may in fact be greater than the number of securities issued and outstanding. This is due in part to the fact that, as noted above, broker-dealers may credit customer accounts with securities entitlements in anticipation of delivery of the security to the broker-dealer. (Finally, an element of truth. It's all of these extra readily sellable "positions" that force the share price of these corporations down and the money of investors into the wallets of those continuing to refuse to deliver that which they sell. The facilitation of this unconscionable reality should not be in the job description of the congressionally mandated "tool to provide investor protection".

END OF AMICUS BRIEF

SUMMARY

In reality, almost this entire amicus curiae brief was written by the DTCC and not the SEC. Most of the phraseology used comes right off of the DTCC website and the historical publications of the DTCC. Why is this? I think it's due to the sufficient amount of complexity involved rendering most SEC staff unaware of what is really going on at this secrecy-obsessed DTCC and its DTC and NSCC subdivisions.

This congressionally mandated provider of "prompt settlement" acting as the "tool to first and foremost provide investor protection" acts 180-degrees antipodal to its mission statement. There is a lot of investor money out there on Wall Street and an equal amount of insatiable greed amongst the NSCC participating "banksters" and their hedge fund "guests" that enjoy a superior level of knowledge of, access to and visibility of how our clearance and settlement system has been corrupted.

This results in a conflict of interest beyond description. That's why we have SROs like the NSCC with their various mandates. That's also why we have the SEC armed with "comprehensive oversight" powers and "plenary rulemaking authority". The trouble is that both the SEC and the DTCC as regulators and SRO's have been "captured" by the financial interests of those they are supposed to be regulating.

The NSCC management might naturally be looking after the financial interests of its bosses. The SEC might naturally be looking after the financial interests of those that may soon employ them at ten times their current salary at the SEC. Sec employees concerned about this will naturally not do anything to "rock the boat" or disrupt the current status quo on Wall Street no matter how corrupt it is.

One should keep in mind that all of this corrupt activity going on at the DTCC becomes greatly exacerbated in an environment without the protection provided by "the uptick rule". The SEC's succumbing to the pressure applied by industry lobbyists as well as the "banksters" and hedge funds themselves to have the uptick rule rescinded amidst the worldwide outrage against abusive naked short selling crimes was unconscionable.

This amicus curiae brief is just another example of the SEC coming to the rescue of the DTCC when the corruption levels of the DTCC might be revealed to the investing public. We've witnessed it many, many times before.