# Multiple Documents

| Part | Description |
|---|---|
| 1 | 22 |
| 2 | Memorandum of Law in Support |

Bloomberg Law®

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved. Terms of Service

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

PINNACLE ADVISORS, LLC, ROBERT F. CUCULICH, BENJAMIN R. QUILTY, MARK E. WADACH, and LAWTON A. WILLIAMSON,

Defendants.

**NOTICE OF MOTION**

Civil Action No.
5:23-cv-00547-FJS-ATB

**MOTION BY:** Defendants Pinnacle Advisors, LLC, Robert F. Cuculich and Benjamin R. Quilty (collectively, the "Pinnacle Defendants"), by their attorneys Bond, Schoeneck & King, PLLC.

**REQUEST FOR ORAL ARGUMENT:** Pursuant to Local Rule 7.1(a) the Pinnacle Defendants respectfully request oral argument for this Motion. The Pinnacle Defendants contend that oral argument will assist the Court in deciding this motion because it involves, among other bases, Plaintiff's lack of authority to promulgate the rule that it seeks to enforce in this action and Plaintiff's failure to provide "fair notice" to the Pinnacle Defendants in violation of their due process rights. This is the first case challenging the rule in question and oral argument is the only manner in which the parties can adequately address any questions that the Court may have about the legal issues after review of the parties' submission. If oral argument is granted, Brian J. Butler intends to argue on behalf of the Pinnacle Defendants.

**SUPPORTING PAPERS:** Memorandum of Law dated July 11, 2023.

**RELIEF REQUESTED:** An Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the Complaint by the Securities and Exchange Commission against the Pinnacle Defendants, in its entirety and with prejudice, and granting such other and further relief as is just and proper.

Dated: July 11, 2023

BOND, SCHOENECK & KING, PLLC

By: *s/ Brian J. Butler*

Brian J. Butler (510105)
Suzanne Galbato (510058)
One Lincoln Center
Syracuse, New York 13202-1355
Telephone: (315) 218-8000
Email: bbutler@bsk.com
Email: sgalbato@bsk.com

*Attorneys for Defendants Pinnacle Advisors, LLC, Robert F. Cuculich and Benjamin R. Quilty*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

PINNACLE ADVISORS, LLC, ROBERT F. CUCULICH, BENJAMIN R. QUILTY, MARK E. WADACH, and LAWTON A. WILLIAMSON,

Defendants.

Civil Action No.
5:23-cv-00547-FJS-ATB

**DEFENDANTS PINNACLE ADVISORS, LLC, ROBERT F. CUCULICH AND BENJAMIN R. QUILTY'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS**

BOND, SCHOENECK & KING, PLLC
One Lincoln Center
Syracuse, New York 13202-1355
Telephone: (315) 218-8000

*Attorneys for Defendants*
*Pinnacle Advisors, LLC, Robert F. Cuculich and Benjamin R. Quilty*

# TABLE OF CONTENTS

**Page(s)**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

**Other Authorities**

## PRELIMINARY STATEMENT

Plaintiff Securities and Exchange Commission ("Plaintiff" or the "Commission") commenced this Action by filing a Complaint in the Northern District of New York (the "Complaint") against Defendants Pinnacle Advisors, LLC ("Pinnacle") Robert. F. Cuculich ("Cuculich"), Benjamin R. Quilty ("Quilty"), Mark E. Wadach, and Lawton A. Williamson (collectively, "Defendants"). ECF Doc. No. 1 ("Complaint").

Pinnacle, along with Cuculich and Quilty (collectively, the "Pinnacle Defendants") respectfully submit this Memorandum of Law in Support of their Motion to Dismiss Plaintiff's Complaint (the "Motion"), as pled against them, in its entirety and with prejudice.

The Commission has asserted claims against the Pinnacle Defendants for aiding and abetting the Nysa Series Trust ("NYSA Fund")[1] in its violation of Rule 22e-4, 17 C.F.R. § 270.22e-4 and Rule 30b1-10, 17 C.F.R. § 270.30b1-10 ("Liquidity Rule"), under the Investment Company Act of 1940 ("Investment Company Act"), 15 U.S.C. §80a-1 *et seq.*. The Commission's claims are based on the faulty premise that it had the authority to promulgate the Liquidity Rule. As set forth below, the Commission did not have authority to promulgate the Liquidity Rule under the limited authority provided to the Commission under Section 22(e) of the Investment Company Act, 15 U.S.C. § 80a–22(e). Further, even if the Commission had such authority, the Liquidity Rule did not provide the Pinnacle Defendants with fair notice that the conduct for which it seeks relief was in fact prohibited, in violation of the Pinnacle Defendants' due process rights. Therefore,

[1] The NYSA Fund applied for deregistration on September 9, 2020 and the Commission issued an order on September 29, 2020 declaring that the NYSA Fund was no longer an investment company, and was, as it is now, a liquidating trust.

and for all the following reasons, the Complaint should be dismissed in its entirety and with prejudice.[2]

## SUMMARY OF THE ALLEGATIONS IN THE COMPLAINT CONCERNING THE PINNACLE DEFENDANTS[3]

The NYSA Fund was an open-end registered investment company until September 2020 that had total assets of approximately $1.89 million. Complaint ¶ 18. On September 9, 2020, the NYSA Fund filed with the Commission a Notice of Application for Deregistration under Section 8(f) of the Investment Company Act, and on September 29, 2020, the Commission issued a deregistration order. Complaint ¶ 18. Accordingly, the NYSA Fund no longer operates as an open-end registered investment company. Rather, it has operated as a liquidating trust since September 29, 2020. *Id.*

The Commission asserts in its Complaint that from June 2019 to June 2020, more than 15% of the NYSA Fund's net assets were invested in the restricted shares[4] of a medical device company ("Company Shares") and that the NYSA Fund failed to comply with applicable reporting and filing requirements or to bring its position in the Company Shares under the 15% threshold as required by SEC rules. Complaint ¶ 2. The Commission alleges that the NYSA Fund's adviser, Pinnacle, and its principals, Cuculich and Quilty, were primarily responsible for monitoring the liquidity of the NYSA Fund's investments, classifying the liquidity of such investments in accordance with the Liquidity Rule, reporting to the NYSA Fund's board of trustees ("Board"), and related filings

[2] To the extent any arguments of Defendants Mark E. Wadach and Lawton Williamson (collectively, the "Trustee Defendants") in their Motion to Dismiss Plaintiff's Complaint apply to the Pinnacle Defendants, they are hereby incorporated by reference.

[3] The allegations in the Complaint are accepted as true solely for the purposes of this Motion. *See Ashcroft v. Iqbal*, 556 U.S.662, 678 (2009).

[4] There is nothing in the Liquidity Rule that requires "restricted shares" to be classified in a certain manner. The Liquidity Rule makes no mention of "restricted shares."

with the Commission. Complaint ¶ 3. The Commission asserts that Pinnacle, Cuculich, and Quilty aided and abetted the NYSA Fund's violations by not classifying the Company Shares as an "illiquid investment" when the underlying restrictions, transfer limitations, and lack of any market for the shares required that classification, and by disregarding the advice of the NYSA Fund's counsel[5] who resigned over this issue, as well as the advice of the NYSA Fund's auditors. *Id.* In addition, the Commission alleges that the Pinnacle Defendants made false and misleading statements and omissions about the basis for their improper classification to the Commission's Division of Investment Management and aided and abetted the NYSA Fund's violations by failing to have the NYSA Fund timely submit required reports to its board of trustees and to the Commission. *Id.*

## ARGUMENT

### I. Legal Standard

A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) can be based on: (1) a challenge to the "sufficiency of the pleading" under Fed. R. Civ. P. 8(a)(2); or (2) a challenge to the legal cognizability of the claim. *LaSpisa v. CitiFinancial Co.*, No. 19-CV-0228(GTS/DJS), 2020 WL 2079410, at *2 (N.D.N.Y. Apr. 30, 2020). This motion challenges the legal cognizability of the Commission's claims against the Pinnacle Defendants. "In considering the legal cognizability, a court must accept as true all well-pleaded facts in the pleading and draw all inferences in the pleader's favor." *June v. Blair*, No. 9:09-CV-323(FJS/TWD), 2012 WL 1048463, at *6 (N.D.N.Y. Mar. 28, 2012) (citing *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)).

[5] The Commission repeatedly cites to communications between the NYSA Fund and its counsel throughout the Complaint. The Pinnacle Defendants do not waive any right to challenge the use of such communications by the Commission by not addressing the attorney/client privilege issues in this pre-answer motion.

Documents that can be considered on a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), without triggering the standard governing a motion for summary judgment, include:

> (1) documents attached as an exhibit to the complaint or answer, (2) documents incorporated by reference in the complaint (and provided by the parties), (3) documents that, although not incorporated by reference, are "integral" to the complaint, or (4) any matter of which the court can take judicial notice for the factual background of the case.

*LaSpisa*, 2020 WL 2079410, at *4; *Wheatley v. N.Y. United Tchrs.,* 629 F. Supp. 3d 18, 18 (N.D.N.Y. 2022).

As set forth below, the Commission's claims are fatally flawed inasmuch as they are based on the invalid Liquidity Rule, and the Commission also failed to provide fair notice to the NYSA Fund and the Pinnacle Defendants that the conduct for which it seeks relief was prohibited. Unlike a pleading deficiency, the defects in the Commission's claims cannot be cured and any amendment to the Complaint would be futile.

## II. The Commission has failed to plead a primary violation of the Liquidity Rule by the NYSA Fund and, as such, the claims against the Pinnacle Defendants must be dismissed.

The Commission has alleged that the NYSA Fund failed to comply with Rule 22e-4 and Rule 30b1-10 and that the Pinnacle Defendants aided and abetted the NYSA Fund's violations of those rules. Complaint ¶¶ 1, 6. Specifically, the Commission alleges that the NYSA Fund: violated Liquidity Rule Section (b)(1)(ii) because it did not review the liquidity classification of Company Shares on a monthly basis; violated Liquidity Rule Section (b)(1) for failing to report any occurrence of illiquid investments exceeding 15% of net assets within one business day of the occurrence; and that the NYSA Fund classified the Company Shares as a "less liquid" investment, as opposed to an "illiquid" investment to the NYSA Fund's Board. Complaint ¶ 209, 210, 211 and

214. The Commission also alleges that the NYSA Fund violated the Liquidity Rule because it failed to report on Form N-LIQUID the occurrence of more than 15% of its net assets invested in illiquid investments within one business day of such occurrence. Complaint ¶ 224.

As relevant here, to establish liability for aiding and abetting in the context of a securities law violation, a plaintiff must show: "(1) the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; (2) 'knowledge' of this violation on the part of the aider and abettor; and (3) 'substantial assistance' by the aider and abettor in the achievement of the primary violation." *S.E.C. v. DiBella*, 587 F.3d 553, 566 (2d Cir. 2009) (internal quotation marks and citations omitted). Here, the Commission has failed to allege the existence of a primary violation by the NYSA Fund, and therefore the aiding and abetting claims against the Pinnacle Defendants fail.

**A. The Commission exceeded its statutory authority in promulgating the Liquidity Rule rendering the Rule invalid.**

According to the Commission, the Liquidity Rule was promulgated pursuant to the authority granted to it in Sections 22(c), 22(e), 34(b) and 38(a)[6] of the Investment Company Act. *See* Investment Company Liquidity Risk Management Programs, 81 Fed. Reg. 82142, 82264 (Nov. 18, 2016) (codified at 17 C.F.R. pts. 270, 274) ("Adopting Release").

Section 22(e) of the Investment Company Act, 15 U.S.C. § 80a-22(e), states:

> No registered investment company shall suspend the right of redemption, or postpone the date of payment or satisfaction upon redemption of any redeemable

[6] Section 22(c) [15 U.S.C. 80a-22(c)] of the Investment Company Act [15 U.S.C. 80a-1 et seq.], by reference to Section 22(a) [15 U.S.C. 80a-22(a)] of the Act, authorizes the Commission to adopt rules prescribing, *inter alia*, methods for computing the minimum purchase price and maximum redemption price of redeemable securities issued by a registered investment company. This section is irrelevant to the categorization of assets under the Liquidity Rule. Section 34(b) [15 U.S.C. 80a-33(b)] of the Investment Company Act makes it unlawful to make any untrue statement of material fact in any registration statement, application, report, account, record, or other document filed or transmitted pursuant to this subchapter. This section is also irrelevant to the categorization of assets under the Liquidity Rule.

> security in accordance with its terms for more than seven days after the tender of such security to the company or its agent designated for that purpose for redemption, except—
>
> (1) for any period (A) during which the New York Stock Exchange is closed other than customary week-end and holiday closings or (B) during which trading on the New York Stock Exchange is restricted;
>
> (2) for any period during which an emergency exists as a result of which (A) disposal by the company of securities owned by it is not practicable or (B) it is not reasonably practicable for such company fairly to determine the value of its net assets; or
>
> (3) for such other periods as the Commission may by order permit for the protection of security holders of the company.
>
> **The Commission shall by rules and regulations determine the conditions under which (i) trading shall be deemed to be restricted and (ii) an emergency shall be deemed to exist within the meaning of this subsection." (Emphasis added).**

Section 22(e) is straight forward. In the Complaint, the Commission simply described Section 22(e) as requiring "a registered investment company to satisfy a shareholder's redemption request within seven days." Complaint ¶ 21.

Section 22(e)(1)-(3) of the Investment Company Act provides three exceptions to the seven-day requirement: (1) for any period during which the New York Stock Exchange is closed or trading is restricted; (2) "for any period during which an emergency exists as a result of which disposal by the company of securities owned by it is not practicable or it is not reasonably practicable for such company fairly to determine the value of its net assets"; or (3) "for such other periods as the Commission may by order permit for the protection of security holders of the company." Section 22(e) then specifically and precisely authorizes the Commission to make rules and regulations related only to the exceptions to the seven-day redemption requirement: to "determine the conditions under which (i) trading shall be deemed to be restricted and (ii) an

emergency shall be deemed to exist." Section 22(e) does not mention liquidity. In fact, the term "liquidity" is not found anywhere in the Investment Company Act.

Notably, the Complaint does not allege that the NYSA Fund violated Section 22(e), or that the NYSA Fund ever failed to satisfy shareholder redemption requests within seven days. Rather, the Complaint alleges only that the Defendants aided and abetted the NYSA Fund in violating the Liquidity Rule, which the Commission did not have authority to promulgate under the Investment Company Act.

The Liquidity Rule does not address either of the two conditions set forth in Section 22(e) that the Commission was authorized by Congress to address through rulemaking. Instead, the Liquidity Rule requires funds to develop a liquidity risk management program; classify each investment in its portfolio as highly liquid, moderately liquid, less liquid or illiquid; and report, not to the public, but only to the Commission in accordance with Rule 30b1-10. It is beyond cavil that, by promulgating the Liquidity Rule, which has nothing to do with restricted trading or emergencies, the Commission has far exceeded the authority Congress granted under 15 U.S.C. § 80a-22(e).

"Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)); *see Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002). "'The question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*'" *N.Y. Stock Exch. LLC v. S.E.C.*, 962 F.3d 541, 554 (D.C. Cir. 2020) (quoting *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013)),

or whether the agency has gone beyond what Congress has permitted it to do. *Id.* (*citing* City of Arlington v. FCC, 569 U.S. 290, 297–98, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (internal quotation marks omitted). In other words, "an agency may only act within the authority granted to it by statute." *Nat. Res. Defense Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018); *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) ("Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line.") (quotation marks omitted, alteration incorporated). "This principle is a recognition of the nature of an administrative agency as a 'creature of statute, having no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'" *Id.* (quoting *Atlantic City Elec. Co. v. F.E.R.C.*, 295 F.3d 1, 8 (D.C. Cir. 2002))

Administrative rules, such as the liquidity classification and reporting rule at issue here, are reviewed under the *Chevron* framework. *See Stryker v. S.E.C.*, 780 F.3d 163, 165 (2d Cir. 2015). The question of whether the liquidity classification and reporting rule is valid must be reviewed under the *Chevron* framework. *See Stryker*, 780 F.3d at 165*; see also S.E.C. v. Alpine Sec. Corp.*, 982 F.3d 68, 77 (2d Cir. 2020), *cert. denied* _U.S._, 142 S. Ct. 461 (2021).

"[A] reviewing court must first ask 'whether Congress has directly spoken to the precise question at issue.'" *Brown & Williamson*, 529 U.S. at 132 (internal quotation marks and citation omitted) (quoting *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *see Alpine*, 982 F.3d at 77. "If the intent of Congress is clear [by the statutory text,] . . . the court . . . must give effect to the unambiguously expressed intent of Congress." *Stryker*, 780 F.3d at 165 (internal quotation marks and citation omitted). If "Congress has not directly addressed the precise question at issue[, courts] turn to canons of construction and, if that is unsuccessful, to

[the] legislative history to see if those interpretive clues . . . identify Congress's clear intent." *Id.* (internal quotation marks and citation omitted). As the Second Circuit has explained, "'[i]f, in light of its text, legislative history, structure, and purpose, a statute is found to be plain in its meaning, then Congress has expressed its intention as to the question, and deference is not appropriate.'" *Lawrence + Memorial Hosp. v. Burwell*, 812 F.3d 257, 264 (2d Cir. 2016) (quoting *Li v. Renaud*, 654 F.3d 376, 382 (2d Cir. 2011)). "If the statute is silent or ambiguous with respect to the specific issue," *Chevron*, 467 U.S. at 843, then the court will look to whether the agency "'operate[d] within the bounds of reasonable interpretation.'" *Michigan v. EPA*, 576 U.S. 743, 751 (2015) (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 320 (2014)).

Notably, "'an agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority.'" *N.Y. Stock Exch.*, 962 F.3d at 553-554, 546 (internal brackets omitted) (finding that, contrary to the Commission's argument, Section 23(a) of the Exchange Act did not authorize to the Commission to promulgate Rule 610T, nor was the Commission authorized to promulgate the Pilot Program based on "statutory reference to 'regulations as may be necessary or appropriate'") (quoting *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006)). In other words, "[m]erely because an agency has rulemaking power does not mean that it has delegated authority to adopt a particular regulation." *Id.* at 554; *see Sullivan v Zebley*, 493 U.S. 521, 528, 541 (1990).

The Court need not proceed to the second factor in the *Chevron* analysis because Congress did not authorize the Commission to promulgate the Liquidity Rule and deference is not appropriate. *Lawrence + Memorial Hosp.*, 812 F.3d at 264. Inasmuch as the Commission exceeded its authority in promulgating the Liquidity Rule, the Liquidity Rule is unlawful and cannot form

the basis for a primary violation. Therefore, the aiding and abetting claims against the Pinnacle Defendants must be dismissed.

The Commission's reference in the Adopting Release to Section 38(a), 15 U.S.C. § 80a-37(a), which is the Commission's general rulemaking authority, does not legitimize the Liquidity Rule. It is well settled that "[w]hen two conflicting statutes arguably govern, the more specific statutory provision controls." *Padberg v. McGrath-McKechnie*, No. CV-00-3355(RJD), 2007 WL 2295402, at *1 (E.D.N.Y. Aug. 9, 2007); *see N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 305, 137 S. Ct. 929, 941, 197 L. Ed. 2d 263 (2017); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S. Ct. 2065, 2071, 182 L. Ed. 2d 967 (2012) (the general/specific canon "has full application . . . to statutes . . . in which a general authorization and a more limited, specific authorization exist side-by-side. There the canon avoids not contradiction by the superfluity of a specific provision that is swallowed by the general one, 'violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.'"); *In re Bernard L. Madoff Inv. Sec. LLC*, 12 F.4th 171, 193 (2d Cir. 2021), *cert. denied sub nom. Citibank, N.A. v. Picard*, 212 L. Ed. 2d 217, 142 S. Ct. 1209 (2022); *United States v. Torres-Echavarria*, 129 F.3d 692, 699 n.3 (2d Cir. 1997); *Hudson v. Nat'l Football League Mgmt. Council*, No. 18-CV-04483(GHW/RWL), 2019 WL 5722220, at *24 (S.D.N.Y. Sept. 5, 2019), *adopted as modified*, No. 1:18-CV-4483(GHW), 2019 WL 4784680 (S.D.N.Y. Sept. 30, 2019). "*Michigan v. EPA* . . . makes it clear that a 'necessary or appropriate' provision in an agency's authorizing statute does not necessarily empower the agency to pursue rulemaking that is not otherwise authorized." *N.Y. Stock Exch.*, 962 F.3d at 556.

Based upon this well settled law, the specific, and limited, rulemaking authority granted by Congress in Section 22(e) controls. *See RadLAX Gateway Hotel*, 566 U.S. at 645. Section 22(e) is

plain in its meaning. Congress expressed its intention to limit the Commission's rulemaking to the conditions for restricted trading and emergencies. The Commission's promulgation of the Liquidity Rule was outside the bounds of its statutory authority, and therefore must be deemed invalid and unlawful. As there can be no primary violation of an invalid rule, the aiding and abetting claims against the Pinnacle Defendants must be dismissed.

**B. The Commission violated the Pinnacle Defendants' due process rights by failing to provide the Pinnacle Defendants with fair notice that the conduct for which it seeks relief was in fact prohibited.**

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253, 132 S.Ct. 2307, 2317 (2012). "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Id.* "A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* (internal quotation marks and citations omitted).

The Liquidity Rule required funds, based on information obtained after reasonable inquiry and considering relevant "market, trading, and investment-specific considerations," to classify their portfolio investments into one of four liquidity categories:

**(1) Highly liquid** – Cash and any investment reasonably expected to be convertible to cash in current market conditions in three business days or less without the conversion to cash significantly changing the market value of the investment.

**(2) Moderately liquid** – Any investment reasonably expected to be convertible to cash in current market conditions in more than three calendar days but in seven calendar days or less without the conversion to cash significantly changing the market value of the investment.

**(3) Less liquid** – Any investment reasonably expected to be sold[7] or disposed of in current market conditions in seven calendar days or less without the sale or disposition significantly changing the market value of the investment, but where the sale or disposition is reasonably expected to settle in more than seven calendar days.

**(4) Illiquid** – Any investment that may not reasonably be expected to be sold or disposed of in current market conditions in seven calendar days or less without the sale or disposition significantly changing the market value of the investment.

According to the Commission's Adopting Release for the Liquidity Rule, the seven-calendar-day period referenced in the moderately liquid, less liquid, and illiquid classification categories is tied to the seven-calendar-day period in which funds are required to pay redeeming shareholders under Section 22(e) of the Investment Company Act. Adopting Release, 81 Fed. Reg. 82170. The requirement that a fund consider "relevant market, trading, and investment-specific considerations in classifying and reviewing its portfolio investments' liquidity," rather than the prescribed list of factors, is meant to allow for "principles-based" approach to the liquidity classification.[8] Adopting Release, 81 Fed. Reg. at 82186 (internal quotation marks omitted).

[7] Section 80a-2(a)(34) of the Investment Company Act defines "sale" or "sell" to include "every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." 15 U.S.C. § 80a-2(a)(34).

[8] The proposed rule would have required a fund to take into account the following nine factors, to the extent applicable, when classifying the liquidity of each portfolio position in a particular asset: (1) "[e]xistence of an active market for the asset, including whether the asset is listed on an exchange, as well as the number, diversity, and quality of market participants"; (2) "[f]requency of trades or quotes for the asset and average daily trading volume of the asset (regardless of whether the asset is a security traded on an exchange)"; (3) "[v]olatility of trading prices for the asset"; (4) "[b]id-ask spreads for the asset"; (5) "[w]hether the asset has a relatively standardized and simple structure"; (6) "[f]or fixed income securities, maturity and date of issue"; (7) "[r]estrictions on trading of the asset and limitations on transfer of the asset"; (8) "[t]he size of the fund's position in the asset relative to the asset's average daily trading volume and, as applicable, the number of units of the asset outstanding"; and (9) "[r]elationship of the asset to another portfolio asset." Adopting Release, 81 Fed. Reg. at n.313. The Commission did not to include these

According to the Commission's Adopting Release, the classification requirement was intended to "provide important liquidity profile information to the Commission and investors and reflects that liquidity may be viewed as falling on a spectrum rather than a binary conclusion that an investment is either 'liquid' or 'illiquid.'" Adopting Release, 81 Fed. Reg. at 82154.

With respect to the "less liquid" investment category, the Commission stated that:

> The "less liquid investments" category is meant to identify for the Commission and its staff, as well as investors and other potential users, the portion of a fund's portfolio investments that may be available to meet redemption requests within seven days, but only to the extent that the fund addresses the lengthier settlement period associated with these investments. Because less liquid investments are those that may be sold, but not settled, within seven days, a fund generally could use less liquid investments to meet redemptions within seven days only if the fund obtained an additional source of financing (for example, a line of credit) to bridge the period until the sales would settle, or if the fund used its cash holdings to meet the redemptions while simultaneously selling the less liquid investment and then replenishing its cash holdings upon settlement.
>
> Transparency regarding the portion of a fund's portfolio held in less liquid investments also could demonstrate those investments that could be liquidated in order to meet redemptions that would occur more than a week in the future, if a fund were to enter into a period of extended redemptions that it anticipates would last for multiple days. Because an open-end fund has an obligation to meet redemption requests within seven days, we believe it is important for funds to identify those investments that could pose certain challenges in being used to meet redemption requests within that time period, for purposes of the fund's own liquidity risk assessment and management, as well as to provide transparency into certain funds or strategies that could have relatively limited liquidity compared to peer funds.

---

factors in the final rule because doing so "could lead funds to focus too heavily on evaluating certain factors that may not be particularly relevant to the liquidity of a specific fund's portfolio investments, the evaluation of which may not help produce meaningful outcomes in terms of effective classification." Adopting Release, 81 Fed. Reg. at 82171.

Adopting Release, 81 Fed. Reg. at 82176.

Among the investments classified by open-end funds in December 2021, "$276 billion of all investments were reported as less liquid, and $198 billion of all investments were reported as illiquid. Among the investments reported as less liquid . . . $9% ($25 billion) [were] equities . . ." Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, 87 Fed. Reg. 77172, 77244 (Dec. 16, 2022) (codified at 17 C.F.R. pts. 270, 274) ("Proposed Rule Release").

The Pinnacle Defendants had no way of knowing that what the Commission painstakingly devised as an inherently subjective determination to classify a specific investment as less liquid rather than illiquid would now subject them to liability. This is evinced by the pre-June 1, 2019 disclosures by the Commission to the Pinnacle Defendants and the investment community that liquidity classification determinations were inherently subjective. The Commission then specifically adopted a rule that it acknowledged would depend on the individualized experience in the markets that the adviser brings to the classification exercise.

**1. The Commission has admitted that liquidity classification determinations are inherently subjective.**

In multiple proposed and final rule releases, the Commission has recognized and acknowledged the inherent subjectivity of the liquidity classifications under the Liquidity Rule, and that such classification determinations are dependent on the judgment of fund managers.

**a. Admissions in the Liquidity Rule Adopting Release[9]**

- We proposed liquidity risk assessment and management program requirements with the primary goals of reducing the risk that funds would

[9] The statements and admissions by the Commission in its various rule releases, as well as the statements of commenters reflected in those releases, are admissible and should be judicially noticed. *CMFG Life Ins. Co. v. RBS Securities, Inc.*, 799 F.3d 729, n.3 (7th Cir. 2015) (finding that excerpts from SEC releases from the Federal Register shall be judicially noticed pursuant to 44 U.S.C. § 1507).

be unable to meet redemption and other legal obligations, minimizing dilution, and elevating the overall quality of liquidity risk management across the fund industry while at the same time providing funds with reasonable flexibility to adopt policies and procedures that would be most appropriate to assess and manage their liquidity risk. Adopting Release, 81 Fed. Reg. at 82158.

- When we proposed the rule 22e-4 classification requirement, we noted that the framework was meant to promote a more nuanced approach than a classification requirement under which a fund would simply designate assets as liquid or illiquid. Adopting Release, 81 Fed. Reg. at 82169.

- We recognize that, although we are providing a uniform classification framework, different funds may still classify the liquidity of similar investments differently, based on the facts and circumstances informing their analyses. This simply reflects the fact that different funds likely have different views on liquidity based on considerations such as their assessment of various market, trading, and investment-specific factors, and the size of their position in a particular investment. We acknowledge that liquidity can be difficult to estimate and that there is no agreed-upon measure of liquidity for all asset classes. Adopting Release, 81 Fed. Reg. at 82170.

- . . . a fund that generally considers certain investments to be illiquid (such as Rule 144A securities) could determine that some of these investments should be included in another liquidity category based on relevant market, trading, and investment-specific considerations. Adopting Release, 81 Fed. Reg. at 82178.

- The primary difference between commenters' "asset-type mapping with exceptions" suggested approaches and the approach incorporated in final rule 22e-4 is that commenters' suggested approaches would rely on the Commission (or an industry group) assigning default liquidity categories to each asset class, whereas the approach we are adopting would depend on each fund performing this exercise based on its adviser's individual experience in the markets. Adopting Release, 81 Fed. Reg. at 82180.

- While we acknowledge that liquidity classification determinations may be to some extent subjective and that such information reported on Form N-PORT may be non-standardized, we believe that, on balance, our staff, investors, and other potential users would benefit from the information that will be reported on Form N-PORT that currently may not be reported or disclosed by funds. Adopting Release, 81 Fed. Reg. at 82193.

- We recognize that there is still likely to be variation between funds in how they classify certain asset classes and investments, and believe that despite

any variations, this liquidity information will be useful and valuable to us. Adopting Release, 81 Fed. Reg. at 82194.

- We recognize that liquidity classifications, similar to valuation- and pricing-related matters, inherently involve judgment and estimations by funds. We also understand that the liquidity classification of an asset class or investments may vary across funds depending on the facts and circumstances relating to the funds and their trading practices. We do not believe that data based on estimations of market conditions on a fund-by-fund basis is uninformative or of limited utility because of the information's sometimes fund-specific, subjective nature. Rather, we believe that even with potential variances in determinations, the liquidity information reported will be informative to the Commission. Furthermore, we believe that members of the fund industry are generally in the best position to provide current information on the conditions of fund liquidity since they are in the markets every day trading securities and observe how markets are evolving and related liquidity characteristics are changing. Adopting Release, 81 Fed. Reg. at 82194.

- We also appreciate the limitations and subjectivity of the liquidity classification process, and thus understand the risk of investors potentially giving too much weight to a fund manager's individual liquidity classification choices. Adopting Release, 81 Fed. Reg. at 82195.

- Commenters suggested the rule could have also taken a purely principles-based approach instead of a prescriptive approach. The final rule is not a purely prescriptive rule; while it does specify certain standards, it provides funds with a substantial degree of flexibility in implementing those standards. Adopting Release, 81 Fed. Reg. at 82244.

**b. Admissions in the Liquidity Disclosure Proposed Rule Release [10]**

- Subjectivity: Commenters emphasized that classification is a subjective process. It is based on underlying data, assumptions, measurement periods, and complex statistical algorithms that can vary significantly. Accordingly, different managers classifying the same investment may vary in the way they weigh these factors and come to different classification conclusions, which would be consistent with our intent in adopting the rule. Liquidity Disclosure Proposed Rule Release, 2018 WL 1326288, at *5.

- We recognize that liquidity classifications, similar to valuation- and pricing-related matters, inherently involve judgment and estimations by funds. We also understand that the liquidity classification of an asset class

[10] Investment Company Liquidity Disclosure, Release No. IC - 33046, File No. S7-04-18, 2018 WL 1326288 (Mar. 14, 2018) ("Liquidity Disclosure Proposed Rule Release").

or investments may vary across funds depending on the facts and circumstances relating to the funds and their trading practices. Liquidity Disclosure Proposed Rule Release, 2018 WL 1326288, at n.21 (quoting Liquidity Adopting Release, n.596.

- We note that in the Liquidity Adopting Release, we considered certain proposed uniform approaches to liquidity classification that would have less subjective inputs, and discussed why we believed that the approach we adopted most effectively achieves our goals. This is in part because such approaches that do not include subjective inputs may not have resulted in liquidity classification data that is informed by fund advisers' actual trading experience. Liquidity Disclosure Proposed Rule Release, 2018 WL 1326288, at n.22.

- We acknowledged in the Liquidity Adopting Release that the classification status of a security "inherently involve[s] judgment and estimations by funds" and that "the liquidity classification of an asset class or investments may vary across funds depending on the facts and circumstances relating to the funds and their trading practices." Liquidity Disclosure Proposed Rule Release, 2018 WL 1326288, at n.25.

- We believe that due to the variability and subjective inputs required to engage in liquidity classification under rule 22e-4, providing effective information about liquidity classifications under that rule to investors poses difficult and different challenges than the other data that is publicly disclosed on Form N-PORT, which is more objective and less likely to vary between funds based on their particular facts and circumstances. Liquidity Disclosure Proposed Rule Release, 2018 WL 1326288, at n.33.

- As discussed in the Liquidity Adopting Release, we determined that liquidity classification data on individual securities was necessary for our monitoring efforts, but not appropriate or in the public interest to be disclosed to investors or other market participants in light of the inherent variability of the classification process and the potential for predatory trading using such granular information. Liquidity Disclosure Proposed Rule Release, 2018 WL 1326288, at n.34.

- As an alternative to this new proposed narrative disclosure requirement, we considered moving the aggregate liquidity profile from Form N-PORT to the fund's annual report, which might allow funds to provide additional context and explanation of their methodology. However, we believe that such an approach might not address the concerns discussed above, as investors may still use the liquidity profile to compare funds despite its inherent subjectivity and variability. Liquidity Disclosure Proposed Rule Release, 2018 WL 1326288 n.43.

- However, to the extent that aggregate liquidity profiles are not comparable across funds because portfolio holding classifications incorporate subjective factors that may be interpreted differently by different funds, rescinding the aggregate liquidity profile requirement may not reduce these investors' ability to make informed investment choices. Liquidity Disclosure Proposed Rule Release, 2018 WL 1326288, at *17.

**c. Admissions in the Liquidity Disclosure Final Rule Release [11]**

- We continue to believe that it is important for investors to understand the liquidity risks of the funds they hold and how those risks are managed. We appreciate commenters' concerns regarding the elimination of public disclosure of aggregate liquidity classification reporting. We also recognize that subjectivity is inherent in many financial decisions and is in fact desirable to some extent in the classification information that is reported to us. However, the subjectivity of the classification process when applied to this public disclosure concerns us for several specific reasons. Liquidity Disclosure Final Rule Release, 83 Fed. Reg. at 31861.

- Additionally, we do not believe it is appropriate to adapt Form N-PORT to add the level of detail and narrative context that we believe would be necessary for investors to appreciate better the fund's liquidity risk profile and the subjective nature of classification. The commenters who addressed potentially adapting Form N-PORT generally agreed that it may take significant detailed disclosure and nuanced explanation to effectively inform investors about the subjectivity and limitations of aggregate liquidity classification information so as to allow them to properly make use of the information. Such a long narrative discussion would not be consistent with the nature of, and could undermine the purpose of, Form N-PORT. Liquidity Disclosure Final Rule Release, 83 Fed. Reg. at 31862.

In the various Liquidity Rule releases to the Pinnacle Defendants, and before the implementation of the Liquidity Rule on June 1, 2019, the Commission disclosed to the Pinnacle Defendants and the investment community that liquidity classification determinations were inherently subjective and specifically adopted a rule that would depend on each fund performing the classification exercise "based on its adviser's individual experience in the markets." Adopting Release, 81 Fed. Reg. at 82180. The Commission explicitly stated that the Liquidity Rule "is not

[11] Investment Company Liquidity Disclosure, 83 Fed. Reg. 31859 (July 10, 2018) ("Liquidity Disclosure Final Rule Release").

a purely prescriptive rule; while it does specify certain standards, it provides funds with a substantial degree of flexibility in implementing those standards." Adopting Release, 81 Fed. Reg. at 82244. Importantly, the Commission explicitly and consciously rejected other approaches to liquidity classification because those approaches did not allow for subjective inputs and would not have been informed by fund advisor's individual experience.

**d. The Commission's November 2022 proposed rule seeks to remove the "Less Liquid" classification.**

On November 2, 2022, the Commission proposed to remove the less liquid investment category from the Liquidity Rule and to treat these investments as illiquid. Proposed Rule Release, 87 Fed. Reg. at 77183). According to the Commission, the "proposed amendment is designed to reduce the mismatch between the receipt of cash upon the sale of assets with longer settlement periods and the payment of shareholder redemptions." *Id.* The Commission observed that currently, "treating these investments as 'less liquid' – as opposed to 'illiquid' – allows funds to invest in these assets beyond the 15% limit on illiquid investments, notwithstanding that 'less liquid' investments settle beyond the statutory seven-day period to pay redemptions." *Id.* In other words, funds are categorizing investments as less liquid so their investments can exceed the 15% limit otherwise set on illiquid investments. *See id.* The Commission's observation, and apparent concern, is directly attributable to its implementation of the "less liquid" classification which expressly permits an investment to be classified as "less liquid" even though the sale of those assets settle beyond the statutory seven-day period to pay redemptions. In response to the Liquidity Rule's "less liquid" classification, among the investments classified by open-end funds in December 2021, "$276 billion of all investments were reported as less liquid, and $198 billion of all investments were reported as illiquid. Among the investments reported as less liquid . . . $9% ($25 billion) [were] equities . . ." Proposed Rule Release, 87 Fed. Reg. at 77244. Accordingly, if

the Proposed Rule is adopted, all of those investments will be classified as "illiquid." *See id.* This evinces the fine line between the Liquidity Rule's definition of "less liquid" and "illiquid." It also demonstrates the subjective nature of classification decisions and the discretion funds had in complying with the Liquidity Rule.

Moreover, as with the above referenced releases, the Commission, in the Proposed Rule Release, acknowledges the subjectivity of and the discretionary nature of the Liquidity Rule:

- The current rule allows funds considerable discretion in how funds determine the classification of investments. . . Through staff outreach, we observed that funds had varied approaches in their classifications processes. Proposed Rule Release, 87 Fed. Reg. at 77185.

- At the time of the rule's adoption, the Commission stated that it may be difficult for many funds to estimate readily market impact costs, and that subjective estimates of market impact costs could grant excessive discretion in a fund's determination of a swing factor. Proposed Rule Release, 87 Fed. Reg. at 77206.

- As funds began to implement the liquidity rule's classification requirements, and before funds were required to provide public disclosure of aggregate liquidity classifications, the Commission received additional information about the potential challenges and concerns of publicly disclosing a fund's aggregate liquidity profile at that time, namely the risk that the data would be subjective, that it was presented in isolation, and that it lacked the context of other disclosures about the fund. In response, the Commission replaced this disclosure with narrative liquidity disclosure in 2018. In removing the requirement to report aggregate liquidity classifications, the Commission stated that the subjectivity involved in the classification process raises concerns when applied to public disclosure. Specifically, the Commission expressed concern that the quantitative presentation of the aggregate liquidity information may imply precision and uniformity in a way that obscures its subjectivity, and that funds may face incentives to classify their investments as more liquid in order to make their funds appear more attractive to investors, while also potentially increasing the risk of herding if funds adjusted their portfolios in response to the disclosure requirement. Proposed Rule Release, 87 Fed. Reg. at 77229.

- These changes include introducing the concept of a 10% stressed trade size, establishing a minimum value impact standard, and removing asset class classifications, which would reduce subjectivity in classifications and reduce variation in funds' classification practices even if incentives for a fund to mis-classify its investments remain. These changes are intended to

> reduce the risk of subjectivity impeding an investor's understanding. Proposed Rule Release, 87 Fed. Reg. at 77230.

- Funds may currently use their subjective judgment when determining the meaning and calculation of reasonably anticipated trade size. Proposed Rule Release, 87 Fed. Reg. at 77250.

- The proposal to remove funds' ability to perform liquidity classifications at the asset-class level may improve the quality of liquidity classifications by reducing the potential of funds over- or under-estimating the liquidity of their investments. Proposed Rule Release, 87 Fed. Reg. at 77252.

The Commission's statements, from the inception of the Liquidity Rule to the present, reflect the fact that liquidity classifications are based on estimations and subjective inputs that cannot be adequately explained in public filings, and require the exercise of judgment based on an advisor's experience and allow for "considerable discretion" and "varied approaches" in the classification process.

It is also noteworthy that, in keeping with the subjective nature of the classification determinations, the Commission acknowledged in the Complaint that NYSA Fund's counsel stated that "[r]easonable people can disagree" on the classification of the Company Shares. Complaint ¶ 139.

These subjective, non-prescriptive, characteristics of the Liquidity Rule render it impossible for the Fund to have violated Rule 22e-4(b)(1) by preliminarily classifying the Company Shares as "less liquid" versus "illiquid." At the very least, the Commission failed to provide the Pinnacle Defendants, or any other person of ordinary intelligence, with fair notice that it was a violation to choose to classify the Company Shares as "less liquid" as opposed to "illiquid" based in the advisor's belief that the shares could be sold within seven days and settle after that seven day period.

In addition, the Liquidity Rule is so standardless that it authorizes, or encourages, seriously discriminatory enforcement. This is evidenced by the fact that $276 billion of investments

currently classified as "less liquid," will need to be re-classified as "illiquid" if the proposed amendment to the Liquidity Rule is adopted, yet the Commission decided to bring the first and only action relating to that rule against a miniscule mutual fund in Syracuse that held $1.89 million in total assets as of September 29, 2020, the date of its deregistration as an investment company. Complaint ¶ 18.

Based on the foregoing, the Commission has failed to give fair notice of conduct that is forbidden or required. This violates the NYSA Fund's and the Pinnacle Defendants' right to due process and, as such, the Liquidity Rule cannot form the basis of a primary violation and cannot form the basis for the aiding and abetting claims against the Pinnacle Defendants. Further, inasmuch as the filing requirements under Rule 30b1-10 were promulgated as part of the Liquidity Rule, *see* Adopting Release, 81 Fed. Reg. at 82142, 82144, 82155, 82226, 82227, and are inextricably intertwined with the Liquidity Rule, the claims relating to Rule 30b1-10 also fail. As such, all claims against the Pinnacle Defendants must be dismissed.

Notwithstanding all of the admissions and public statements by the Commission as to the inherently subjective nature of liquidity classifications, the Commission nonetheless filed a 228 paragraph, forty-one page Complaint which appears to be based almost entirely on a "preliminary" classification of the Company Shares by the NYSA Fund (Complaint ¶¶ 123, 152) and a letter that was sent by the NYSA Fund to one Commission staff member (Complaint ¶ 130) that the Commission does not allege was ever responded to by the staff member. Neither a preliminary classification nor a letter to Commission Staff explaining the basis for the preliminary classification of the Company Shares are required under the Liquidity Rule. Ultimately, as acknowledged by the Commission, the NYSA Fund classified the Company Shares as illiquid and filed the Form N-Liquid on June 16, 2020. Complaint ¶¶ 181, 184, 189.

To support its claims, the Commission also relies on the fact that at all times, before and after June 1, 2019, the NYSA Fund reported the Company Shares as "illiquid" in its shareholder reports and financial statements. Complaint ¶¶ 44, 195. However, the Commission fails to recognize that the NYSA Fund's financial statements are prepared in accordance with Generally Accepted Accounting Principles ("GAAP") and were never required to be filed in accordance with the Liquidity Rule. This fact is clearly identified in the NYSA Fund's deregistration application stating the NYSA Fund's "financial statements will be prepared in conformity with generally accepted accounting practices in the United States of America . . ." 85 Fed. Reg. 57279 (Sept. 15, 2020). More importantly, neither the shareholders of the NYSA Fund nor the investing public ever knew that the NYSA Fund made a preliminary classification of the Company Shares as "less liquid" because to shareholders and investors, it was always classified on the financial statements pursuant to GAAP as illiquid. Yet, the Commission has brought the first Liquidity Rule case based on a preliminary classification that was not even required by a rule the Commission had no authority to make.

The Commission's desire to file the first Liquidity Rule case, in which it attempts to enforce an unlawful rule, for which it failed to give "fair notice", based on a preliminary classification determination which has no conceivable, or even alleged, harm to investors and for which the Pinnacle Defendants received no benefit, should not be tolerated. For this and the foregoing reasons, the Complaint must be dismissed in its entirety.

## III. The Commission's request for a permanent injunction must be dismissed.

Assuming *arguendo* that the Commission's claims against the Pinnacle Defendants are not dismissed in their entirety with prejudice, the Commission's request for a permanent injunction must be dismissed.

To obtain injunctive relief, "[t]he SEC must demonstrate that there is a substantial likelihood of future violations of illegal securities conduct." *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998); *see also SEC v. Gabelli*, 653 F.3d 49, 61 (2d Cir. 2011), *rev'd on other grounds sub nom. Gabelli v. SEC*, 568 U.S. 442, 133 S.Ct. 1216, 185 L.Ed.2d 297 (2013) (requiring a showing of a "reasonable likelihood that the wrong will be repeated."). "Unless the agency shows a real threat of future harm, 'there is in fact no lawful purpose to be served' by a preventive injunction." *S.E.C. v. Gentile*, 939 F.3d 549, 556 (3d Cir. 2019) (quoting *SEC v. Torr*, 87 F.2d 446, 450 (2d Cir. 1937)). "[T]he critical question . . . is whether there is a reasonable likelihood that the wrong will be repeated.'" *SEC v. Morningstar Credit Ratings, LLC*, 578 F. Supp. 3d 563, 576 (S.D.N.Y. 2022) (quoting *Gabelli*, 653 F.3d 61).

The NYSA Fund was deregistered on September 29, 2020 and is no longer an investment company but is a liquidating trust. Complaint ¶ 18. Pinnacle is a registered investment advisor whose sole client has been the NYSA Fund. Complaint ¶ 13. The Commission does not allege that either Cuculich or Quilty have been or continue to be involved with any other mutual fund, or investment advisor to a mutual fund. Rule 22e-4(b)(1) is in the process of being amended to remove the "less liquid" classification, which is the primary basis for the Commission's claims in this action. Despite these plead facts and without any supporting facts, the Commission asserts that "unless enjoined, Pinnacle, Cuculich, and Quilty will again aid and abet" violations of Rules 22e-4(b)(1) and 30b1-10. Complaint ¶ 228.

Here, the Commission has not plausibly alleged that there is a reasonable likelihood of the Pinnacle Defendants violating Rules 22e-4(b)(1) and 30b1-10, especially in light of the fact that the NYSA Fund is no longer an investment company, the NYSA Fund is Pinnacle's sole client and the Commission does not allege that either Cuculich or Quilty have any involvement with the

management of any other mutual fund. Accordingly, the Commission has not plausibly asserted that the Pinnacle Defendants are reasonably likely to violate those rules in the future. *See Morningstar Credit Ratings*, 578 F. Supp. 3d at 576 (dismissing the request for injunctive relief because the SEC does not allege that the defendant plans to renew its registration as a credit rating agency and is no longer operating in that capacity). As such, the Commission's request for injunctive relief must be dismissed.

## CONCLUSION

For the foregoing reasons, the Pinnacle Defendants respectfully request that the Court grant their Motion in its entirety and with prejudice.

Dated: July 11, 2023

BOND, SCHOENECK & KING, PLLC

By: *s/ Brian J. Butler*

Brian J. Butler (510105)
Suzanne Galbato (510058)
One Lincoln Center
Syracuse, New York 13202-1355
Telephone: (315) 218-8000
Email: bbutler@bsk.com
Email: sgalbato@bsk.com

*Attorneys for Defendants Pinnacle Advisors, LLC, Robert F. Cuculich and Benjamin R. Quilty*

# General Information

| | |
|---|---|
| **Case Name** | Securities and Exchange Commission v. Pinnacle Advisors, LLC et al |
| **Court** | U.S. District Court for the Northern District of New York |
| **Date Filed** | Fri May 05 00:00:00 EDT 2023 |
| **Judge(s)** | FREDERICK JAMES SCULLIN, JR |
| **Federal Nature of Suit** | Statutes: Securities / Commodities / Exchanges [850] |
| **Docket Number** | 5:23-cv-00547 |
| **Status** | Closed |
| **Parties** | Securities and Exchange Commission; Pinnacle Advisors, LLC; Robert F. Cuculich; Mark E. Wadach; Lawton A. Williamson; Benjamin R. Quilty |


© 2025 Bloomberg Industry Group, Inc. All Rights Reserved. Terms of Service