ORAL ARGUMENT SCHEDULED FOR MAY 5. 2020
No. 19-7127

In The United States Court of Appeals
For The District of Columbia Circuit

IOAN MICULA; VIOREL MICULA; S.C. EUROPEAN FOOD S.A.; S.C. STARMILL S.R.L.; S.C. MULTIPACK S.R.L.,

Petitioners-Appellees,

v.

GOVERNMENT OF ROMANIA,

Respondent-Appellant,

FINAL BRIEF FOR *AMICUS CURIAE* THE EUROPEAN COMMISSION IN SUPPORT OF REVERSAL

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March 23, 2020

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *Amicus Curiae*, the European Commission, by and through its undersigned counsel, hereby certify the following as to Parties, Rulings, and Related Cases:

A. Parties and Amici

All parties appearing before this Court are listed in Romania's Opening Brief of January 13, 2020 ("Romania Brief").

B. Rulings under Review

References to the rulings at issue appear in the Romania Brief.

C. Related Cases

References to related cases appear in the Romania Brief.

/s/ Benjamin Beaton
Dated: March 23, 2020 Counsel for *Amicus Curiae*

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GLOSSARY

Achmea or the Achmea Judgment	Slovak Republic v. Achmea B.V., Case C-284/16, 6 March 2018, ECLI:EU:C:2018:158
Award	Final arbitral award of December 11, 2013, issued in Ioan Micula et al. v. Romania, ICSID Case No. ARB/05/20
BITs	bilateral investment treaties
Commission	European Commission
EU Court of Justice	Court of Justice of the European Union
EU or Union	European Union
FSIA	The Foreign Sovereign Immunities Act
General Court Judgment	European Food S.A. et al. v. European Commission, Ioan Micula v. European Commission, and Viorel Micula et al. v. European Commission, Case Nos. T-624/15, T-694/15, and T-704/15 (June 18, 2019), JA3870-95
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Romania Brief	Romania's Opening Brief of January 13, 2020
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

INTERESTS OF *AMICUS CURIAE*[1]

The European Commission is an institution of the European Union (the "EU" or "Union"), a treaty-based international organization composed of 28 Member States.[2] Known as the "Guardian of the Treaties," the Commission is responsible for ensuring the proper application of the EU treaties—including the Treaty on European Union (the "TEU") and the Treaty on the Functioning of the European Union (the "TFEU")—and of measures EU institutions adopt under those treaties. It is an independent institution and acts in the interests of the EU as a whole, rather than individual Member States.

The Commission has authority to initiate infringement proceedings before the Court of Justice of the European Union (the "EU Court of Justice") against Member States that fail to comply with their treaty obligations. It may ask the EU Court of Justice to impose penalty payments on such a Member State. TFEU, arts. 258 and 260(2).

[1] Pursuant to Fed. R. App. P. 29(c)(5), *Amicus* affirms that no counsel for a party authored this brief in whole or in part and no person other than *Amicus* made a monetary contribution to the preparation or submission of this brief.

[2] These Member States are Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

The Commission has a substantial interest in this case. The District Court's decision below confirmed an arbitral award (the "Award") that the Commission considers to violate EU law in two respects. *First*, under EU law, arbitration clauses in so-called "intra-EU" bilateral investment treaties ("BITs")—*i.e.*, investment treaties between two EU Member States, such as the Romania-Sweden BIT at issue here—are invalid, and the arbitral tribunal therefore had no jurisdiction to issue the Award under EU law. *Second*, the Award requires Romania to make payments that it is prohibited from making on the basis of two decisions the Commission has adopted on the basis of its power to control state aid under EU law.

The Commission has a critical interest in ensuring that this Court proceeds based on a correct understanding of the principles of EU law that are at stake. This appeal and the decision below raise important and cross-cutting questions about the relationship between EU law and U.S. courts. The District Court failed to give the "respectful consideration" due the Commission's position on the applicable EU law, as explained in the Commission's amicus brief below. The District Court also failed to account for considerations of international comity implicated by the potential conflict between this court's decision and that of the EU Court of Justice. *See* ECF No. 1815247, Romania Statement of Issues on Appeal, Nos. 3 and 6 (November 12, 2019). Although Romania's opening brief does not discuss those

issues, *see* Romania's Opening Brief of January 13, 2020, n.1, the issues nevertheless are necessarily implicated by this Court's review of the District Court's reasoning.

Accordingly, given the Commission's distinct and long-term interest in the deference its legal interpretations receive in U.S. courts, the Commission respectfully requests leave to submit this amicus brief to explain the reasons why it considers that the arbitration clause under which the Award was rendered is invalid and that any payment by Romania under the Award is prohibited by EU state aid law.

In rejecting the Commission's position in the ruling below, the District Court gave practically no consideration to the Commission's authoritative interpretation of EU law, much less the "respectful consideration" the U.S. Supreme Court just held was due a foreign sovereign's interpretation of its own laws. Given the Commission's interest in the treatment afforded its legal interpretations abroad, the Commission urges the Court to correct the error below and make clear the appropriate level of deference due sovereign interpretations in U.S. courts.

In view of these substantial interests, numerous other courts in the United States and abroad—including the Second Circuit, the U.S. District Courts for D.C. and the Southern District of New York, and numerous EU Member State courts—

all have granted the Commission permission to participate in proceedings of this nature both as an intervenor and as *amicus curiae*.[3]

SUMMARY OF ARGUMENT

The District Court required Romania to pay more than $300 million to satisfy an Award that the Commission has prohibited Romania from paying, that was issued pursuant to an arbitration agreement that is itself precluded by EU law, and that the courts of five EU Member States have declined to enforce.

The District Court's decision features three legal defects. *First*, it incorrectly held that sovereign immunity does not apply because Romania had waived immunity by consenting to the arbitration clause in the Romania-Sweden BIT on which the Award was based. The EU Court of Justice, however, has recently ruled that the arbitration agreements in such intra-EU BITs are invalid. It did so in the landmark judgment *Slovak Republic v. Achmea B.V.*, Case C-284/16, 6 March 2018, ECLI:EU:C:2018:158 ("*Achmea*" or the "*Achmea* Judgment"). In *Achmea*, the EU Court of Justice held that intra-EU BIT arbitration clauses violate Articles 267 and 344 of the TFEU and the fundamental principles of autonomy, full effectiveness,

[3] Counsel for the Commission contacted counsel for all parties seeking consent to file this brief. Respondent-Appellant, the Government of Romania, consents to this motion. Petitioners-Appellees Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Multipack S.R.L., and S.C. Starmill S.R.L. declined to consent to this motion.

and mutual trust, which are the cornerstones of the EU legal order.[4] Where, as here, there is no valid arbitration clause, the arbitration exception to sovereign immunity does not exist.

Second, the District Court infringed the principle of international comity. It did so by disregarding the Commission's *amicus* submissions on the likelihood of risk of conflicting judgments between U.S. courts and EU courts, including those of individual Member States. Comity encapsulates the principle that U.S. courts owe a "degree of deference . . . to the act of a foreign government not otherwise binding on the forum." *de Csepel v. Republic of Hungary*, 714 F.3d 591, 606 (D.C. Cir. 2013). This is a classic case to which international comity should apply. The District Court, however, refused to apply international comity by ignoring the ongoing EU law obligations preventing payment of the Award.

Third, the District Court failed to give "respectful consideration" to the Commission's explanations on EU law, as required by the U.S. Supreme Court's recent decision in *Animal Science Products v. Hebei Welcome Pharmaceuticals*, 585 U.S. ___ (2018). As an "agency or instrumentality of a foreign state" under 28 U.S.C.

Counsel for the Commission contacted counsel for all parties seeking consent to file this brief. Respondent-Appellant, the Government of Romania, consents to this motion. Petitioners-Appellees Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Multipack S.R.L., and S.C. Starmill S.R.L. declined to consent to this motion.

1/17, April 30, 2019, ECLI:EU:C:2019:341, ¶¶ 126–128.

§ 1603(b), the Commission is tasked under the foundational EU treaties with "ensur[ing] the application of the Treaties" and with "oversee[ing] the application of Union law under the control of the Court of Justice of the European Union." TEU, art. 17. As such, the Commission's explanations of EU law are authoritative, just like those of any other foreign sovereign. The District Court, however, erred by not giving respectful consideration to many of the Commission's explanations of EU law.

The District Court erred by misconstruing, downplaying, and, in some instances, simply ignoring EU law. It therefore comes as no surprise that the District Court's decision effectively directs Romania to violate EU law and interferes with ongoing litigation currently pending before the EU Court of Justice and the domestic courts of several EU Member States. Accordingly, the Commission respectfully requests that the Court reverse the decision below or hold this appeal in abeyance given the ongoing legal proceedings in the EU.

ARGUMENT

The decision below suffers from three independent legal flaws, each of which justifies reversal. The Commission has taken note of the fact that Romania has paid out part of the Award. In the Commission's view, the arguments set forth below prevent payment of the entirety of the Award, as well as any partial payment of the outstanding amount.

I. The District Court lacked jurisdiction under the Foreign Sovereign Immunities Act because no valid agreement to arbitrate existed and the Award is therefore void.

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*, is "the sole basis for obtaining jurisdiction over a foreign state" in U.S. courts. *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 101 (D.C. Cir. 2015) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). Under the FSIA, "a foreign state is presumptively immune from the jurisdiction of the United States courts[,] unless a specified exception applies." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

The District Court erred by resting its jurisdiction on the FSIA's "arbitration exception" in 28 U.S.C. § 1605(a)(6). Opinion [JA4598–4605]. Under the FSIA and in light of EU law, that exception does not apply—meaning that the District Court lacked jurisdiction to order Romania to pay a $300 million-plus judgment.

The District Court's fatal error was finding the existence of a valid "agreement to arbitrate" under 28 U.S.C. § 1605(a)(6). It did so by incorrectly construing, and then ultimately dismissing, the landmark 2018 *Achmea* Judgment. In that decision, the EU Court of Justice held that EU law "preclude[s] a provision in an international agreement concluded between Member States . . . under which an investor from one of those Member States may, in the event of a dispute concerning investments in the

other Member State, bring proceedings against the latter Member State before an arbitral tribunal." *Achmea* Judgment, ¶ 60.

That ruling applies squarely to the Romania-Sweden BIT: the Micula Brothers are "investor[s] from one of those Members States" who are "preclude[d]" from "bring[ing] proceedings against [a] Member State before an arbitral tribunal." *Id.* When the Micula Brothers sought to enforce an arbitral award in the U.S. courts, the underlying "agreement to arbitrate" was invalid under binding EU law. Therefore the FSIA's arbitration exception did not apply.

The District Court distinguished this case from the *Achmea* Judgment on the ground that the dispute before the ICSID arbitral tribunal[5] did not relate to the interpretation or application of EU law in the sense that concerned the EU Court of Justice in *Achmea*. Although the District Court acknowledged the Commission's explanation that Romania was subject to the 1995 Europe Agreement when the challenged government action occurred and that that agreement forms part of EU law, the District Court concluded that the ICSID arbitral tribunal "did not make the kind of pronouncements about EU law that would invite the type of autonomy concerns expressed in *Achmea*." JA4603 (Opinion at 20 n.8). The District Court

[5] The International Centre for Settlement of Investment Disputes is an arbitral institution based in Washington, D.C.. It was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). The Award was issued under the auspices of ICSID.

cited as support for that conclusion in judgment of the General Court annulling the final State Aid Decision. *Id.* at JA4602-05 (relying on *European Food S.A. et al. v. European Commission, Ioan Micula v. European Commission, and Viorel Micula et al. v. European Commission*, Case Nos. T-624/15, T-694/15, and T-704/15 (June 18, 2019) (JA3870-95) (the "General Court Judgment")).

The District Court was wrong to rely on the General Court Judgment for two independent reasons. *First*, the General Court Judgment's comments on the *Achmea* Judgment were dicta, made in passing in one short paragraph (paragraph 87). That dicta does not detract from the Commission's longstanding position that no valid arbitration agreement existed under the BIT that would justify the Miculas haling Romania into U.S. court. This is because the EU Court of Justice, which is hierarchically superior to the General Court, clearly indicated that its holdings in *Achmea* extended to intra-EU BITs, like that invoked by the Micula Brothers. *See* JA3903 (Commission's Response at 7).

Second, the dicta of the General Court are also inconsistent with the Award itself. The ICSID arbitral tribunal recognized that the 1995 Europe Agreement applied between Romania and Sweden in the time relevant to the dispute. *Id.* ¶ 319. Thus, the *Micula* arbitration tribunal was confronted with the same situation as the *Achmea* arbitration tribunal: it had to apply EU law as a matter of law, but could not

make a preliminary reference to the EU Court of Justice.[6] Moreover, Romania was a member of the EU when the arbitral tribunal issued its Award. The arbitration was therefore an intra-EU proceeding at the time of the Award and thus prohibited on the basis of *Achmea*.

Third, the General Court's judgment was not a conclusive statement of EU law. The Commission has appealed that judgment to the EU Court of Justice, which will review the questions of law at issue, in particular the issue of whether EU law applies to the compensation awarded.[7] *See* JA3865 (Commission's Notice of Supplemental Authority at 1); TFEU art. 256(1) (*de novo* review of any "points of law"). Those proceedings remain ongoing, with judgment expected by the end of this year or in the first half of next year—potentially before this Court would hand down a decision in the ordinary course.

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[6] The preliminary reference system is the keystone of the EU legal order. Pursuant to TFEU, art. 267, the EU Court of Justice may give "preliminary rulings concerning: (a) the interpretation of the [EU] Treaties; [and] (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union[.]" Courts of the EU Member States may (and, in certain cases, must) seek preliminary rulings from the EU Court of Justice on those matters. This dialogue facilitates the uniform interpretation and application of EU law. Arbitral tribunals, like that in *Achmea*, are not, however, authorized to make such preliminary references (unlike courts).

[7] The District Court was wrong to place any weight on the fact that the Commission "did not seek to suspend the General Court's decision pending appeal." JA4608 (Opinion at 26). It was unnecessary to do so because the suspension injunction and opening decision prohibit Romania from implementing the Award. *See infra* at 13–15.

In the meantime, the General Court Judgment does not lift the Commission's prohibition against Romania paying the Award. Instead, that Judgment resulted in the reactivation of the Commission's state aid investigation into the Award. So long as that investigation has not been closed, either by the Court of Justice reinstating the State Aid Decision on appeal or the Commission adopting a new final decision implementing the General Court Judgment, EU law continues to bar Romania from paying the Award. *See* TFEU art. 108(3) ("The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.").

At a minimum, this Court should hold these proceedings in abeyance pending further developments in the EU Court of Justice. That is the authoritative forum for interpreting the *Achmea* Judgment and the EU law on which it rests. Further developments in these proceedings—namely Romania's payment of the Award—have drastically reduced any need for haste. And waiting on the EU Court's ruling would avoid both the need for this Court to interpret EU law as well as a potential conflict between the interpretations and remedial orders of the U.S. and European courts, as discussed below.

II. The District Court infringed the principle of international comity

The District Court's decision also infringed the principle of international comity by ignoring the Commission's *amicus* submissions on the likelihood of risk

of conflicting judgments between U.S. courts and EU courts, including those of individual Member States. Despite these matters being put to it by the Commission, the District Court's only discussion of comity was in the context of Romania's submissions (not those of the Commission), and limited further to a discrete issue of Romanian law concerning characterization of payments made under the Award. JA4613 (Opinion at 30). The Commission's comity arguments concerning EU law and legal proceedings were completely ignored.

Comity encapsulates the principle that U.S. courts owe a "degree of deference . . . to the act of a foreign government not otherwise binding on the forum." *de Csepel v. Republic of Hungary*, 714 F.3d at 606 (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984)).

This dispute is a textbook case to which comity applies. Romania is an EU Member State; the Micula Brothers are EU citizens and residents; the companies benefitting from the Award exclusively carry out business in the EU; the investments underlying the Award were made in the EU; and the BIT on which the Award is based is an agreement between two EU Member States (Romania and Sweden).

Further, this case presents multiple important issues concerning the structure and laws of the EU, including the exclusive jurisdiction of its courts, the EU's prohibition on state aid, and the permissibility of investment treaties and arbitration agreements between Member States. In other words, the matters to which the Award

(and its enforcement) relate implicate public policy of the EU at the highest level. By contrast, they have little, if any, appreciable connection to the U.S. generally or to this Circuit. If U.S. courts were to permit EU nationals (like the Micula Brothers) to circumvent EU law, then that result could jeopardize the very bilateral relations that the comity doctrine aims to protect.

International comity required the District Court to take into consideration, and give appropriate deference to, two related EU proceedings. *First*, the Commission informed the District Court on September 5, 2019 (JA3865-69) that it appealed the General Court's Judgment. The District Court was therefore on notice that further EU proceedings would occur, as well as that the General Court's judgment could be overruled. The District Court nevertheless proceeded to issue its judgment in a manner that created a significant risk that a U.S. court's ruling will come into conflict with a future judgment of the EU Court of Justice.

Second, the District Court misconstrued EU law and the state of European proceedings when it opined that "there is no extant sovereign act that Romania would risk defying if it were ordered to pay the Award." JA4608-09 (Opinion at25–26). To the contrary, there were at least two extant sovereign acts: the May 26, 2014 "suspension injunction" and the October 1, 2014 opening decision, both issued by the Commission. *See* JA1321–23 (State Aid Decision at ¶¶ 6–7).

As the Commission explained, *see* JA3901 (Response at 5), Romania remains prohibited from paying the Award as a matter of EU law despite the General Court's judgment. In EU proceedings, the Micula Brothers only challenged the final State Aid Decision itself (JA1315-53), but did not ultimately challenge the aforementioned suspension injunction or the opening decision. Under longstanding EU law, an act cannot be annulled if it has not been challenged in EU courts in the first place, even if it arguably suffers from the same legal flaw as the act that was annulled. *See ArcelorMittal v. Comm'n*, Case T-364/16, ECLI:EU:T:2018:696, ¶ 64 (cited in Commission's Response, JA3901 at 5); *also note Nachi Europe GmbH v. Hauptzollamt Krefeld*, Case C-239/99, ECLI:EU:C:2001:101, ¶ 26 ("the authority . . . exerted by an annulling judgment . . . cannot entail annulment of an act not challenged before the Community judicature but alleged to be vitiated by the same illegality"). The District Court brushed aside these legal authorities in finding that the suspension injunction and opening decision were also invalidated *sub silentio* by the General Court Judgment—despite the Micula Brothers not ultimately challenging either of those acts before the General Court.

The sole consequence of the General Court's annulment of the State Aid Decision is that the Commission's state aid investigation into the Award is reactivated. Until the State Aid Decision is reinstated on appeal or the Commission adopts a new final state aid decision implementing the General Court Judgment, both

the suspension injunction and opening decision remain valid and prevent implementation of the Award by Romania. The German Supreme Court (Bundesgerichtshof) recently confirmed this understanding.[8]

As such, the District Court was wrong to deny the existence of an "extant sovereign act that Romania would risk defying." By granting the petition, the District Court effectively ignored these ongoing EU law obligations preventing payment on the Award, diminished their efficacy by ordering Romania to act contrary to them, and sought to improperly pre-determine the outcome of ongoing EU proceedings (both before the EU Court of Justice in the appeal, and before the Commission concerning its state aid investigation).

III. The District Court failed to give "respectful consideration" to the Commission's explanations on EU law

Finally, the District Court failed to give "respectful consideration" to the Commission's explanations on EU law, as recognized by the United States Supreme Court in its recent decision in *Animal Science Products v. Hebei Welcome Pharmaceuticals*, 585 U.S. ___ (2018). The EU is an "agency or instrumentality of

[8] *See Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH*, Decision IZB 6/19 of 19 September 2019, ¶ 15 ("If the action for annulment were successful, the Commission Decision would be null *erga omnes*. As a result, the Commission's investigation procedure would still be open and national courts would not have the competence to di-verge from the preliminary conclusions set out in the Commission opening decision without consultation with the Commission or a preliminary ruling procedure in accordance with Article 267 TFEU.") (unofficial translation).

a foreign state" under 28 U.S.C. § 1603(b). *European Community v. RJR Nabisco Inc.*, 764 F.3d 129, 133 (2d Cir. 2014). The Commission is tasked under the foundational EU treaties with "ensur[ing] the application of the Treaties," and with "oversee[ing] the application of Union law under the control of the Court of Justice of the European Union." TEU, art. 17. As such, the Commission's explanations of EU law are authoritative, just like those of any other foreign sovereign.

The District Court erred by not giving respectful consideration to many of the Commission's explanations of EU law. *See* Fahrenthold, *Respectful Consideration of Sovereign Amici in U.S. Courts*, 119 COLUM. L. REV. 1597, 1600 (2019) ("Foreign governments commonly take an interest in U.S. litigation, and they unequivocally demonstrate that interest when they file amicus briefs or other submissions with U.S. courts. If a U.S. court comes to a determination contrary to foreign interests, this can have foreign policy effects that spread far beyond the litigation at hand.").

First, the District Court incorrectly refused to recognize and apply the principles in the *Achmea* Judgment. As stated above, *supra* pp. 7–11, the District Court improperly side-stepped the *Achmea* Judgment by relying on a passing reference to it in the General Court Judgment.

Second, as noted above, the District Court entirely ignored the Commission's comity arguments, only considering those espoused by Romania with respect to a narrow issue of Romanian law. *Supra* pp. 11–12. As such, the District Court did

not give *any* deference to EU legal positions or to ongoing European legal proceedings—much less the "respectful consideration" that the Supreme Court has recently held is necessary.

Third, the District Court wrongly concluded that the May 2014 suspension injunction and the October 2014 opening decision were also invalidated as a result of the General Court's Judgment. In so doing, it ignored clearly applicable European jurisprudence that the Commission had put to it previously, such as *ArcelorMittal v. Comm'n*, Case T-364/16, ECLI:EU:T:2018:696, ¶ 64 (cited in Commission's Response, JA3901 at 5). The *ArcelorMittal* case, for instance, found that an act cannot be annulled if it has not been challenged in EU courts in the first place, even if it arguably suffers from the same legal flaw as the act that was annulled.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court reverse the decision below or hold this appeal in abeyance given the ongoing legal proceedings in the EU.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(c)–(d) and 32(a)(7)(B)(i). The brief was prepared in Microsoft Word, using Times New Roman 14-point font. According to the word count function, the word count, including footnotes and headings, is 4,027.

By /s/ *Benjamin Beaton*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies on the foregoing *Amicus* Brief upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, and all counsel of record are registered users of CM/ECF for this case.

Dated this 23nd day of March, 2020.

/s/ Benjamin Beaton