Docket No. 19-305

IN THE

Supreme Court of the United States

ROBERT "BOBBY" MAXELROD, *et al.*,

Petitioner,

v.

AVA CATO

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the determination that a transaction is domestic is sufficient for the extraterritorial application of Section 10(b).

2. Whether an employee who, at the insistence of a superior, inserts a false or misleading statement into investor materials, is subject to primary liability under Rule 10b-5(a) or Rule 10b-5(c), even if that employee is not the maker of the statement for the purposes of Rule 10b-5(b).

STATEMENT OF FACTS

When CEO Marconi ("Marconi"), of Alcollezione, and CFO Factor ("Factor") offered Ava Cato ("Respondent"), a prestigious position within their trendy beverage start-up, the newly minted attorney jumped at the opportunity. Understandably so—a prerequisite for a position of this stature with its boundless potential for growth, under different circumstances, would've certainly been years of experience. (R. at 2-3). Although Respondent's initial role was to serve as General Counsel whilst incorporating the company, she quickly began to fill the shoes of chief compliance officer, becoming the go-to-person for Alcollezione's compliance with beverage regulations in Italy. (R. at 2, 5). The company's rise was thunderous, taking the quickly evolving beverage market by storm. (R. at 2). Drunk on their success, the trio organized a common stock IPO on the Borsa Italiana, the Italian stock exchange. (R. at 2-3). To ensure wide-spread investment beyond the Italian market, the team provided an English-translated "Investor Relations" page on their website. (R. at 3).

In expectation of a bright future for Alcollezione, Investment Banker Doris Schutt ("Schutt") of Hansen Bank and Trust connected with her old friend Factor to set up a meeting with the trio (characteristically, over drinks) while they were stateside in New York to discuss investment opportunities directly in the United States. (R. at 3). Although unsuccessful at the time, Hansen Bank and Trust remained in touch. (R. at 4). Later, from New York,

Schutt contacted Marconi by phone to pitch an idea for unsponsored American Depositary Receipts ("ADRs").[1] While Marconi explained that he typically left more "nuanced financial decisions" to Factor, he jumped on board with Schutt and said that "any friend of [his CFO's was] a friend of [his]." (R. at 4). Having obtained management's support, Hansen Bank and Trust registered the ADRs with a Form F-6 before offering the securities over-the-counter ("OTC"), facilitating trading of the ADRs for its New York and Connecticut investors. (R. at 4).

As the tides began to change, the investment's success began to falter. (R. at 5). When Italian regulators announced stricter compliance rules, the market was spooked. (R. at 5). To prevent investors from jumping ship, the trio decided to introduce Alcollezione's newest product: Frizzantissimo, their answer to the booming spiked-seltzer trend. (R. at 5). Despite Respondent's concern that compliance with new regulatory rules would "be an uphill climb", Marconi required that she create assurances for investors indicating that the new product would be approved and ready for markets in Q2 of 2018. (R. at 5-6). Marconi presented Respondent's creation of condensed assurances at the company's Annual Shareholder Meeting; they were also footnoted in Factor's pro-forma financial statements (R. at 6). This information, along with a video of the announcement and press release, was subsequently uploaded to the

[1] ADRs allow United States investors to contract with a domestic depository to invest in foreign securities, while purchasing a United States registered security rather than purchasing the foreign security through a foreign exchange. American Depositary Receipts, 56 FR 24420-04. *See also Stoyas*, 896 F.3d at 941.

company's "Investor Relations" page. (R. at 6). Excited to hear that the trio was keeping pace, Hansen Bank and Trust reached out, by email from New York, to congratulate the team. (R. at 6). The hype created by the promise of Alcollezione's additional beverage market-capitalization quickly reached their investors; primarily driven by Petitioners through their ADR holdings, the stock price on the Borsa Italiana reaped the benefits, soaring upwards by 14%. (R. at 6)

Alcollezione's artificial success came to an abrupt end when Italian regulators halted Frizzantissimo's production due to noncompliance with quality control standards in their production. (R. at 6). Consequently, the stock and ADR prices tumbled by 29% and 27%, respectively. (R. at 6). Despite the horrendous consequences of the false regulatory assurances, foreign authorities have yet to commence an investigation. United States investors, including Petitioners Robert "Bobby" Maxelrod (Connecticut-based manager of Maxe Capital) and those similarly situated ("Petitioners") are left with the sobering consequences of the scheme formulated by Alcollezione Executives. (R. at 7).

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit's decision below applied a view of the extraterritorial application of Section 10(b) that impermissibly expands this Court's holding in *Morrison*. In *Morrison*, this Court held that the "exclusive focus" of Section 10(b) is the purchase and sale of securities in the United States, which this Court refers to as "domestic transactions." *Morrison v. Nat'l*

Australia Bank Ltd., 561 U.S. 247, 266-68 (2010). Although it did not define the contours of what constitutes a domestic transaction under *Morrison*, this Court's jurisprudence mandates that "the inquiry begins and ends with the domesticity of the *transaction*." (R. 26). As a preliminary matter, this Court has explicitly condemned "judicial-speculation-made-law" that considers individual facts of a particular case that are not provided under *Morrison*. Alternatively, the "irrevocable liability" test that is promulgated in *Absolute Activist* provides a predictable and consistent standard for the extraterritorial application of Section 10(b) that has been adopted by a number of courts in furtherance of *Morrison* and its progeny.

Furthermore, the facts of the case at bar surrounding Respondent's actions as the general counsel for Alcollezione fit squarely within this Court's holding in *Lorenzo* that found a disseminator may still incur scheme liability under subsections (a) and (c), even if the disseminator is not subject to primary liability under Rule 10b-5(b). As a preliminary matter, this Court's jurisprudence indicates that a finding of secondary liability under Rule 10b-5(b) does not preclude a finding of primary liability under the remaining subsections. Petitioners therefore assert a sufficient claim for Respondent's scheme liability under subsections (a) and (c) in light of Respondent's imperative role in the dissemination of false and misleading information, through her knowing and intentional acts, in furtherance of a scheme to defraud Petitioners. Accordingly, Petitioners respectfully request this Court to reverse the decision of the Fourteenth Circuit.

ARGUMENT

I. THE DOMESTIC TRANSACTION OF UNSPONSORED ADRs IS SUFFICIENT FOR THE EXTRATERRITORIAL APPLICATION OF SECTION 10(b) BECAUSE PETITIONERS INCURRED IRREVOCABLE LIABILITY IN THE UNITED STATES.

Section 10(b) of the Securities Exchange Act broadly prohibits fraud in connection with securities transactions. Section 10(b) provides, in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce . . . [t]o use or employ, in connection with the purchase or sale of . . . any security not so registered . . . any manipulative or deceptive device or contrivance.

15 U.S.C. § 78j(b). Although there is a presumption against the extraterritorial application of Section 10(b), this Court has held that Section 10(b) may apply extraterritorially if the transaction involves either the purchase or sale of "a security listed on an American stock exchange" or "*any other security* in the United States." *Morrison*, 561 U.S. at 273 (emphasis added).[2] The Second Circuit has defined the contours of a domestic transaction as requiring "irrevocable liability [be] incurred . . . within the United States." *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012).

Relying on a *sui generis* case, the Fourteenth Circuit held that Petitioners' purchase of unsponsored ADRs does not itself justify extraterritorial application. *See Parkcentral Glob. Hub v. Porsche Auto. Holdings*, 763 F.3d 198, 216 (2d Cir. 2014). The Fourteenth Circuit's holding is

[2] The issue in the case at bar is limited to the second prong of *Morrison*'s transactional test.

misguided in the instant case for two independently sufficient reasons. First, the Fourteenth Circuit's holding would go directly against this Court's jurisprudence under *Morrison*. Second, the "irrevocable liability" test under *Absolute Activist* provides a predictable and consistent interpretation in furtherance of this Court's jurisprudence under *Morrison*.

A. The determination that a transaction is domestic is sufficient for the extraterritorial application of Section 10(b) under *Absolute Activist*.

Congress enacted the federal securities laws to protect "the integrity and efficient operation of the market for nationally traded securities." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006). To give credence to its purpose, this Court decided that the general presumption against extraterritorial application of the antifraud provisions can be overcome when foreign securities not listed on a national exchange are traded domestically. *Morrison*, 561 U.S. at 273. *See Absolute Activist*, 677 F.3d at 69 (finding a domestic transaction where irrevocable liability was incurred within the United States). When faced with a unique "investment" vehicle, however, the Second Circuit impermissibly returned to an old test, thereby rejecting this Court's holding under *Morrison*.

1. Despite this Court's explicit focus on the transaction under *Morrison*, *Parkcentral* seeks to return to old habits.

Despite a finding of domestic transaction under *Absolute Activist*, justifying extraterritoriality under *Morrison*, *Parkcentral* imposes an additional step. The Second Circuit rejects the extraterritorial application of Section 10(b) to domestic transactions where predominantly foreign factors dominate the fact

pattern. *Parkcentral*, 763 F.3d at 214-16. This is in direct discordance to this Court's view that Section 10(b) only applies to "domestic transactions in other securities." *Morrison*, 561 U.S. at 267.

The Second Circuit failed to consider that this Court in *Morrison* had already rejected a predominantly foreign approach in numerous ways. First, the Second Circuit scrambles to justify its reasoning, instead turning the "craven watchdog" into a political attack dog. *Id.* at 266; *Parkcentral*, 763 F.3d at 215. By focusing on the transaction despite the fact that the foreign Defendant issuer only listed his common stock on the foreign exchange and only had foreign investors, *Morrison* implied sufficiency. *Morrison*, 561 U.S. at 266-68. *See generally Stoyas v. Toshiba Corp.*, 896 F.3d 933, 945-50 (9th Cir. 2018). "Deceptive . . . conduct or the presence of other, non-transactional . . . activity cannot substitute" the transaction test. *Id.* at 944.

Second, this Court in *Morrison* explicitly disallowed "judicial-speculation-made-law." In *Morrison*, this Court rejected a test that considered whether the extraterritorial application of Section 10(b) is reasonable in a particular case by examining whether the wrongful conduct substantially affected the United States or its citizens or whether the wrongful conduct took place in the United States. *Morrison*, 561 U.S. at 258-61. Disregarding this Court's instructions in *Morrison*, the Second Circuit in *Parkcentral* risks returning to the guessing game of the past by requiring a laborious fact-intensive review of foreign conduct. *See Parkcentral*, 763 F.3d at 217. As Judge Newman observed in concurrence, this holding forces parties in "the unfortunate position of

effectively flipping a coin" to predict the extraterritorial application of Section 10(b). (R. 25). *See generally* Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiciton*, 9 FORD. J. CORP. & FIN. L. 89, 107-09 (2004).

Even more pernicious to *Parkcentral*'s holding is the Second Circuit's explicit instructions negating a "test that will *reliably* determine when a particular invocation of Section 10(b) will be deemed appropriately domestic." *Parkcentral*, 763 F.3d at 217 (emphasis added). *See also Morrison*, 561 U.S. at 258-59 (stating that "[t]here is no more damning indictment of the 'conduct' and 'effects' tests than the Second Circuit's own declaration that 'the presence or absence of any single factor which was considered significant in other cases… is not necessarily dispositive in future cases'") (internal quotations omitted); *Stoyas*, 896 F.3d at 950.

In its final attempt to save grace, the Second Circuit justifies its recalcitrant holding by arguing a need to protect the ignorant and blindsided issuer from the United States federal securities laws. *Parkcentral*, 763 F.3d at 215. The extension of *Parkcentral* to traditional securities, including unsponsored ADRs, is misguided. *See Stoyas*, 896 F.3d at 950. Depositories issue ADRs to investors to grant "ownership interest in a specified number of securities." American Depositary Receipts, 56 FR 24420-04 (allowing for trade of foreign securities in "substantially the same manner as domestic issuers' equity securities"). In turn, issuers of the underlying security benefit from the

unsponsored ADRs' popularity, experiencing a value increase without incurring oppressive reporting requirements. *Id.*; 17 C.F.R. §§ 240.12g3-2(b)(1)(iii), (b)(3)(i) (only requiring the foreign issuer to offer English-translated information that is "material to an investment decision" on the issuer's website). However, a security-based swap agreement, which is the underlying security at issue in *Parkcentral*, is not a traditional security. *See* 15 U.S.C. § 78c(a)(10); 15 U.S.C. § 78c-1(b)(1). Security-based swap agreements are independent contracts, merely replicating the economic effects of a referenced security. 15 U.S.C. § 78c (rejecting securities registration under Section 78c-1(b)(2)). *See generally* Gramm-Leach-Bliley Act, § 206A; *Parkcentral*, 763 F.3d at 206.

Even if it is assumed, *arguendo*, that the Second Circuit's holding in *Parkcentral* is in accordance with this Court's jurisprudence, it is limited to the narrow circumstances dealing with security-based swap agreements. Issuers to ADRs would have to be wholly ignorant of their asset's value to not notice a capital boost when additional securities begin to sell. Additionally, unsponsored ADRs seek informal consent of the issuer whereas swap agreements exist entirely in their own universe. American Depositary Receipts, 56 FR 24420-04 (noting that unsponsored ADRs seek foreign issuer consent informally). *See also Stoyas*, 896 F.3d at 951. Instead of analogizing ADRs to a contractual arrangement, the rule would be better served if courts analogized unsponsored to sponsored ADRs, which is in accordance with regulatory practice. *Compare* 15 U.S.C. § 78c-1 (regulating swap agreements under Commerce and Trade) *with* 17 C.F.R. § 240.12g3-2 (regulating ADRs under

Commodity and Securities Exchanges). *See also Stoyas*, 896 F.3d at 949 (stating that "it does not matter that a foreign entity was not engaged in the transaction"); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prod. Liab. Litig.*, No. 15–2672 CRB, 2017 WL 66281 at *1, *5-7 (N.D. Cal. Jan. 4, 2017).

Furthermore, applying *Parkcentral* to traditional securities would create a safe harbor for ill-guided foreign issuers intent on abusing a regulatory void. If the United States cannot regulate fraudulent conduct involving United States transactions, no foreign regulatory body will have jurisdiciton. *See Parkcentral*, 763 F.3d at 215 (arguing foreign regulators had already begun investigations into misconduct underlying the foreign security listed on the foreign exchange).

As Judge Newman notes, *Parkcentral* ushers in a world of judicial cherry-picking and issuer abuse. (R. at 29). Accordingly, this Court's holding under *Morrison*, its progeny, and the overall purpose of the federal securities laws are best served when holding a domestic transaction is sufficient for the extraterritorial application of Section 10(b).

2. Because demonstrating a domestic transaction under *Absolute Activist*'s "irrevocable liability" test is sufficient, this Court should permit the extraterritorial application of Section 10(b).

Under *Absolute Activist*, a transaction is domestic "if irrevocable liability is incurred . . . within the United States." *Absolute Activist*, 677 F.3d at 67-68. This test has been readily adopted across the circuits. *See generally United States v. Vilar*, 729 F.3d 62, 76 (2d Cir. 2013); *United States v. Georgiou*, 777 F.3d 125, 136 (3d Cir. 2015); *Quail Cruises Ship Mgmt. Ltd. v. Agencia de*

Viagens CVC Tur Limitada, 645 F.3d 1307, 1310-11 (11th Cir. 2011). Irrevocable liability is incurred when trade, clearance, and settlement on the OTC is complete. American Depositary Receipts, 56 FR 24420-04; *Absolute Activist*, 677 F.3d at 70.

The Ninth Circuit granted leave to amend where the facts indicated a domestic transaction of unsponsored ADRs. *Stoyas*, 896 F.3d at 949. *See also Melvin v. Brayshaw*, 2019 WL 6482220 at *1, *4 (C.D. Cal. Oct. 3, 2019) (granting leave to amend despite the court's skepticism that investors could show irrevocable liability incurred in the United States because the contract was accepted abroad and the transaction closed abroad). The unsponsored ADRs were being offered by a United States depository that held custody to the underlying foreign common stock. *Stoyas*, 896 F.3d at 940. When traded on one of the U.S. OTC markets, the court found that irrevocable liability was incurred domestically. *Id.* at 946. *See also Georgiou*, 777 F.3d at 130-31, 136-37 (finding that irrevocable liability was incurred domestically because the "U.S.-based market makers" facilitating trades acted as intermediaries); *S.E.C. v. Levine*, 462 F. App'x 717, 719 (9th Cir. 2011) (finding that irrevocable liability incurred where the sale closed in Nevada upon the investor paying in full and receiving the stock purchase agreement). *But see In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 530-31 (S.D.N.Y. 2011) (rejecting a finding of domestic transaction where the foreign securities were listed on the NYSE and "were un-tethered to *any* [ADR]." emphasis added); *Plumbers Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F.

Supp. 2d 166, 171-72, 178-79 (S.D.N.Y. 2010) (finding that irrevocable liability incurred abroad because the common stock was purchased on and the trade executed, cleared, and settled on the foreign exchange despite purchase being initiated from Chicago.)

The facts of the transaction in the case at bar are analogous to the facts in *Stoyas*. Just as in the Ninth Circuit case, which involved unsponsored ADRs that were traded on a United States OTC market, Hansen Bank and Trust offered unsponsored ADRs on a United States OTC market. A finding of United States based irrevocable liability is further supported by *Levine*, where irrevocable liability was incurred in Nevada because the stock purchase was finalized in that State. Here, the transaction initiated in Connecticut and New York, closing on the U.S. OTC with a U.S. based seller. The depository seller, acting as a domestic intermediary, is comparable to *Georgiou's* market makers. However, unlike *Georgiou*, where both sending and receiving accounts were foreign accounts, the investor's account and the seller's accounts in here are both located in the United States.

Moreover, this transaction looks dramatically dissimilar from the stock purchase in *Plumbers*, in which investors "traveled to that foreign exchange" to settle the transaction. *Plumbers*, 753 F. Supp. 2d at 179 (internal citations omitted). Here, Respondent traveled to a domestic OTC only – not to Italy or the Borsa Italiana. Furthermore, instead of purchasing a stock no longer tethered to an ADR, as in *Vivendi*, Petitioners purchased ADRs that were strongly tethered to the foreign stock, demonstrable by the common stock's value

increase after ADR purchases skyrocketed due to Respondent's assurances. Because the facts demonstrate that this is a domestic transaction, Section 10(b) should apply extraterritorially, following in *Morrison's* footsteps.

B. Even if this Court were to adopt *Parkcentral* to other, more traditional securities, the extraterritorial application of Section 10(b) is appropriate.

Because the domestic transaction is associated with substantial United States contacts, the foreign conducts are overshadowed by the domestic conducts' significance. The foreign elements of this transaction are inconsequential. *Parkcentral* requires foreign conducts to be "predominant" before expanding Section 10(b) extraterritorially in favor of a domestic transaction. *Parkcentral*, 763 F.3d at 214-16. This subsequently requires a review of the facts. *Id.*

Where "substantial domestic contacts" were presented, the court applied Section 10(b) extraterritorially to the domestic transaction even after noting foreign factors such as a foreign incorporated issuer, registration of the issue with foreign authorities, and management by non-US residents. *Giunta v. Dingman*, 893 F.3d 73, 82-83 (2d Cir. 2018). Because the meetings occurred in the United States, the contract was concluded in the United States, and the money transfer originated in the United States, the court found that these domestic contacts were substantial enough to justify applying Section 10(b) extraterritorially. *Giunta*, 893 F.3d at 76-80. *See generally* 17 C.F.R. § 240.12g3-2(b). *See also In re Volkswagen* at *1, *4, *6 (finding sufficient domestic contacts to justify extraterritorial application of 10(b) where the

foreign issuer of OTC transacted and United States registered ADRs complied with domestic regulatory requirements by offering an English-translated disclosure section on its website); *S.E.C. v. Benger*, No. 09 C 676, 2013 WL 593952 *10, *13 (N.D. Ill. Feb. 15, 2013) (rejecting to apply Section 10(b) extraterritorially because acceptance occurred and money was received abroad whereas the only domestic conduct was a "back and forth" shuttling of documents).

Despite the foreign characteristics here, a foreign issuer, with foreign securities on a foreign exchange, there are substantial domestic conducts outweighing the foreign ones. First, as the court in *In re Volkswagen* held, publishing English-translated disclosure requirements is alone sufficient to find domestic contacts. Respondent's compliance with ADR reporting requirements by publishing English-translated assurances on the website weighs in favor of extraterritoriality. Second, and more importantly, Respondent met with Schutt in New York. Because the transaction was concluded on the OTC amongst US based parties, this follows *Giunta's* facts of meeting location and contract conclusion.

A finding of substantial contacts is further justified because the transaction originated in either Connecticut or New York and moved to Hansen Bank and Trust in New York. This is more comparable to *Levine*, in which the entire transaction concluded in Nevada. Under *Giunta*, however, the money only originated within the United States to pay for the transaction. Hence, *Giunta* and *Levine* dictate an application of Section 10(b) extraterritorially. The

Benger transaction, on the other hand, closed abroad because the offer was accepted and money was sent abroad. These foreign activities, such as Respondent issuer's meetings, business incorporation in Italy, and securities listings on Borsa Italiana are similar foreign factors present in *Morrison*. Yet, this Court in *Morrison* ceded them no deference. The foreign activities in the instant case should receive equal deference.

The domestic transaction's justification for extraterritorial application of 10(b) is not overshadowed by "predominantly foreign" factors. Section 10(b) should be applied to Respondent extraterritorially.

II. RESPONDENT IS SUBJECT TO PRIMARY LIABILITY UNDER RULE 10b-5(a) AND RULE 10b-5(c).

Only primary liability grants a private right of action under the federal securities laws. *See generally Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142-44 (2011). A primary actor is a person who commits the act prohibited by a statute or rule. 15 U.S.C. § 78t(e). A secondary actor, by contrast, is merely tangentially involved. *Id.* By filling a gap left by *Janus*, this Court's holding in *Lorenzo* guides the analysis of primary liability for the remaining subsections.[3]

[3] The 10b-5 elements of "fraud" and "in connection with" are met in the case at bar because Respondent knew that her assertions were false and Respondent reasonably knew that the fraudulent information was distributed to investors in a manner that would reasonably influence the investor. *See generally S.E.C. v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 860 (2d Cir. 1968); *Semerenko v. Cendant Corp.*, 223 F.3d 165, 174 (3d Cir. 2000).

A. A finding of secondary liability under Rule 10b-5(b) does not preclude primary liability under the remaining subsections (a) and (c) based on the plain language and legislative intent.

The Fourteenth Circuit's holding that a finding of secondary liability under Rule 10b-5(b) precludes primary liability under the remaining subsections goes defiantly against the plain language and legislative intent of Rule 10b-5. Rule 10b-5 provides, in relevant part:

> It shall be unlawful for any person, directly or indirectly . . .
> (a) To employ any device, scheme, or artifice to defraud,
> . . . or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. §§ 240.10b-5(a), (c). The application of subsections (a) and (c) to deceptive conduct is grounded in both the plain language and legislative intent of Rule 10b-5.

First, the plain language of both subsections (a) and (c) demonstrates that they cover deceptive conduct, not misstatements. *S.E.C. v. SeeThruEquity, LLC*, 2019 WL 1998027 *1, *5 (S.D.N.Y. Apr. 26, 2019). Black's Law Dictionary provides two separate and distinct lexical interpretations of "deceit." The first definition pertains generally to the act of deceit. The second definition, on the other hand, pertains pointedly to "a false statement of fact." *Deceit*, BLACK'S LAW DICTIONARY (11th ed. 2019). Moreover, the driving language of the subsections, "employ" and "engage" logically direct the reader to the first option listed in the dictionary. *See Lorenzo v. S.E.C.*, 139 S. Ct. 1094, 1101 (2019). For example, a person can engage in the act of deceit, but not necessarily in the act of a false

statement of fact. One does not "employ" or "engage" statements; statements are made.[4] It is illogical to "engage" in a false statement. Yet, it is possible for a person to "engage" or partake in deception. *See generally Engage*, BLACK'S LAW DICTIONARY (11th ed. 2019). Alternatively, one logically "makes" a statement. 17 C.F.R. § 240.10b-5(b). *See Janus*, 564 U.S. at 142.

Second, the underlying intent of Rule 10b-5 is to prevent financial gain through fraudulent practices. *Fischer v. Kletz*, 266 F. Supp. 180, 190 (S.D.N.Y. 1967). Congress intended to construe the federal securities laws broadly. *See generally* Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 392-94 (1990). A broad interpretation grants the regulator the necessary flexibility to monitor novel and creative manipulators and fraudsters, ensuring a protected marketplace for investors. *Id.* at 394-95 (1990); *Lorenzo*, 139 S. Ct. at 1103. Granting a private right of action furthers the federal securities laws goals of deterring fraud, compensating victims, and promoting market confidence. Elizabeth Cosenza, *Is the Third Time the Charm - Janus and the Proper Balance between Primary and Secondary Actor Liability under Section 10(b)*, 33 CARDOZO L. REV. 1019, 1027 (2012). Yet, *Janus* created an abyss of fraudulent conduct untouchable by a regulator through the creation of the 'maker' test in order to find primary liability under Rule 10b-5(b); *Lorenzo* bridges this gap. *Lorenzo's* significance

[4] A maker, for purposes of Rule 10b-5, is "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not 'make' a statement in its own right." *Janus Capital Grp., Inc.*, 564 U.S. at 142-44.

was to impose liability for the bad acts of behind-the-scene actors that would otherwise walk away scot-free. *Lorenzo*, 139 S. Ct. at 1098-99. *Lorenzo* incorporates a capitalistic philosophy guaranteeing an informed market. *Id.* at 1103.

In addition to the plain language and legislative intent, there is no reason to hold that Rule 10b-5's subsections occupy mutually exclusive spaces in light of policy concerns. *Kornitzky Grp., L.L.C. v. Elwell*, 929 F.3d 737, 744 (D.C. Cir. 2019). To hold otherwise would artificially separate "borderline cases", once again excluding nuances. *Lorenzo*, 139 S. Ct. at 1103-04 (finding that "it is hardly unusual for the same conduct to be a primary violation with respect to one offense and aiding and abetting with respect to another"). Furthermore, the doctrine of stare decisis would have this Court adhere to its well-reasoned decision in Lorenzo. There, this Court specifically rejected the argument of mutual exclusivity amongst the subsections. This Court recognized that a reading of overlap between the subsections is consistent with the U.S. philosophy of guaranteeing an informed marketplace. *Id.* at 1102-1103.

This Court's language in *Lorenzo* furthermore indicates a conscious distinction between primary and secondary liability. Although the distinction of primary and secondary liability is inconsequential in S.E.C. actions, this Court purposefully addressed the distinction. The primary and secondary liability distinction is a tool by which the world determines the relative roles of parties under the securities laws; its vitality to the private right is so clear that if it had been upended, the consequences would be disastrous. This is not something

this Court would not have seen go quietly into the abyss. Here, the case at bar stands in the absence of a convincingly clear need to renounce its precedent, and this Court's prior decisions should be upheld.

By applying *Lorenzo* broadly, actors unreachable under Rule 10b-5(b) absent a finding that they are a 'maker' may face liability under subsections (a) and (c). *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (finding "[a]ny person or entity, including a lawyer . . . who employs a manipulative device . . . on which a purchaser or seller of securities relies may be" primarily liable). *Lorenzo's* findings are consistent with the statutory language and legislative intent in granting the SEC wide latitude to establish "added safeguards." *United States v. Naftalin*, 441 U.S. 768, 774 (1979).

Accordingly, secondary misstatement liability under Rule 10b-5(b) does not exclude a finding of primary scheme liability under subsections (a) and (c). *Lorenzo* guides the analysis of these two subsections, supported by statutory language and legislative intent.

B. Respondent is subject to primary liability under subsections (a) and (c) for her imperative role in the dissemination of false and misleading statements.

A person is subject to primary liability as the disseminator of false or misleading information under Rule 10b-5(a) and Rule 10b-5(c) if the person sought to deceive or drafted misleading statements with knowledge that they would be distributed to investors. *See* Rule 10b-5(a), (c); *Lorenzo*, 139 S. Ct. at 1102; *Malouf v. S.E.C.*, 933 F.3d 1248, 1259 (10th Cir. 2019); *In re Longfin*

Corp. Sec. Class Action Litig., 2019 WL 3409684 *1, *3 (S.D.N.Y. July 29, 2019). Merriam-Webster defines "disseminate" as "to spread abroad as though sowing seed" or "to disperse throughout." DISSEMINATE, The Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/disseminator (last visited Mar. 2, 2020).

Deception is shown if a person knowingly and intentionally acts in furtherance of the plan to defraud. *S.E.C. v. Fiore*, 2019 WL 4688538 at *1, *6 (S.D.N.Y. Sept. 25, 2019); *S.E.C. v. Thompson*, 238 F. Supp. 3d 575, 591 (S.D.N.Y. 2017); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007); *Fischer*, 266 F. Supp. at 184 (finding that deceit involves an affirmative misrepresentation). Such a deceptive act requires a finding that the act mislead investors and artificially affected market pricing. *See United States v. Finnerty*, 533 F.3d 143, 148 (2d Cir. 2008); *Fezzani v. Bear, Stearns & Co.*, 384 F. Supp. 2d 618, 641 (S.D.N.Y. 2004).

In order to successfully plead primary liability for Respondent's role in a scheme to defraud, Petitioners must have alleged that Respondent (1) possessed knowledge that the information was false, (2) was the creator of the false information, (3) knew that investors would rely on the information, and (4) made a showing of conduct that satisfies the remaining elements under 10(b)-5.[5] *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d

[5] Respondent has met the remaining Rule 10b-5 elements for four reasons. First, Respondent materially misrepresented the company's viability when assuring compliance. Second, Respondent did so knowing that compliance would, at best, be an "uphill climb." Third, this caused an increased purchase of the ADRs because investors relied on that misrepresentation, thereby resulting in Petitioners losing their investment due to artificially inflated prices. Fourth,

549, n. 4 (S.D. Tex. 2002). Courts disagree on whether an additional prong, requiring the author to be identified, is required. *Compare In re Software Toolworks Inc. Securities Litigation*, 50 F.3d 615, 628 (9th Cir. 1994) *with In re MTC Elec. Techs. Shareholders Litig.*, 898 F. Supp. 974, 987 (E.D.N.Y. 1995). *See also Wright v. Ernst & Young L.L.P.*, 152 F.3d 169, 175 (2d Cir. 1998). *See generally* Elizabeth Cosenza, *Is the Third Time the Charm - Janus and the Proper Balance between Primary and Secondary Actor Liability under Section 10(b)*, 33 CARDOZO L. REV. at 1037.

A number of courts recognize that gatekeepers, such as attorneys, are subject to primary liability when disseminating false information. *Cent. Bank of Denver, N.A.*, 511 U.S. at 191. *See also H. L. Green Co. v. Childree*, 185 F. Supp. 95, 96 (S.D.N.Y. 1960); *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960, 970 (C.D. Cal. 1994) (finding attorneys primarily liable because they were intricately involved with publishing false information that the securities market relied on); *See also S.E.C. v. Navellier & Assocs., Inc.*, 2020 WL 731611 *1, *7 (D. Mass. Feb. 13, 2020) (finding that investment advisors who marketed a fraudulent product after incorporating false and misleading information from a client sufficiently demonstrated a "device, scheme, or artifice to defraud" investors). *See also S.E.C. v. SeeThruEquity, LLC*, 2019 WL 1998027 *1, *5 (finding Rule

but for Respondent's assurances, Petitioners would not have invested as heavily in the ADRs as evidenced by the patterns of valuation following the release of the false assurances. *See Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008); Hydro Investors v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir.2000).

10b-5(a) and (c) scheme liability where Defendants "made false or misleading statements in their research reports, press releases, and website").

Courts will impose primary liability for an actor's role in a scheme when they knowingly create false statements with the intent that the statements be distributed to investors. For example, the *Fiore* court found the Defendant primarily liable, notwithstanding that he was not considered the "maker" of the false information, because the Defendant knowingly created false information with the intent to distribute to investors. *Fiore*, 2019 WL 4688538 at *8 (S.D.N.Y. 2019). In *Fiore*, the Defendant attempted to artificially inflate stock prices of a penny stock. *Id.* at *4. The Defendant created marketing and investment materials that he in turn provided to promoters, knowing that the promoters would subsequently provide the information to investors. *Id.* at *3-4. The court held that the facts sufficiently demonstrated a fraudulent scheme and imposed liability under subsections (a) and (c). *Id.* at *8. Additionally, courts have imposed primary scheme liability on Defendants absent a finding that they were the "mastermind" of the scheme. *S.E.C. v. U.S. Envtl., Inc.*, 155 F.3d 107, 112 (2d Cir. 1998) (finding that Defendants participated in a fraudulent scheme when their conduct induced artificial stock pricing notwithstanding that the actor was not the "mastermind" of the scheme).

However, in *S.E.C. v. Kelly*, the court did not impose liability for the Defendants role in a scheme when the deceptive qualities were tied to misstatements alone. 817 F. Supp. 2d 340 343-44 (S.D.N.Y. 2011) (rejecting conduct as deceptive because the financial transactions were not inherently

deceptive when structured so as to induce the purchase of advertising. The transaction "became deceptive only through [the Defendant's] misstatements."). Additionally, courts are reluctant to find primary liability in the absence of fraudulent statements that misrepresent financial information when the creators have no duty to disclose. *Shapiro v. Cantor*, 123 F.3d 717, 721 (2d Cir. 1997) (finding no primary liability where no fraudulent information was alleged to misrepresent financial information and the creators had no legal duty to disclose). In Ziemba, the court imposed a requirement that the information be publicly traceable directly to the Defendant. *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) (requiring the information to be publicly attributable to Defendant).

In *In re Enron Corp.*, which involved an issuer's outside counsel's participation in a scheme to "enrich themselves," the court found a private right of action because the attorneys defrauded investors of the issuer's securities. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d at 604. After a thorough analysis of the applicable federal securities laws and ethical requirements, the court held that the attorneys had a duty to protect investors from false information that they knew would influence a reasonable investor. *Id.* at 609. In so ruling, the court reasoned that by making certain financial representations to investors about their client, the attorneys thereby attributed the misstatements to themselves, effectively establishing themselves as co-authors. *Id.* at 610-11. Significantly, the court found a private right of action existed because the Plaintiff demonstrated that external counsel aimed

its canon of fraudulent information precisely at "investors with the goal and purpose of attracting funds." *Id.* at 610. *See generally Kline v. First W. Gov't Sec., Inc.*, 24 F.3d 480, 490-91 (3d Cir. 1994) (finding attorney primarily liable despite not being identified as the creator because he knew that the information would be disseminated to investors); *U.S. Envt'l., Inc.*, 155 F.3d at 112 (finding primary liability even where defendant did not mastermind the fraudulent information).

The case at bar is readily distinguishable from *Shapiro*. In *Shapiro*, the Plaintiff failed to claim that the misstatements involved the financial information. Here, because Alcollezione published Respondent's compliance assurances at the Annual Meeting and subsequently on Alcollezione's website, all investors were immediately affected by the increase in trading. In addition, Respondent's assurances were directly included in Alcollezione's financial statements. Furthermore, unlike in *Shapiro* in which the Defendant had no duty to disclose misstatements, Respondent had an affirmative duty to disclose any misstatements in her position as Alcollezione's general counsel. In addition, this is supported by the *Fiore* and *Enron* decisions. In *Fiore* and *Enron*, the courts determined that attorneys are charged with a duty to protect the public from false information, notwithstanding whether the attorney is the author of the information or merely attributing their client's statements to themselves. The courts' holdings in this regard are well-settled law. Even if this Court were to find that the misstatements must be publicly attributed to the attorney as it was required under *Ziemba*, the act of publishing this content on

Alcollezione's website makes it attributable to its agents, including Respondent. As a licensed attorney and high-level executive of Alcollezione, Respondent is undeniably positioned as an agent of the company. Any statements of the company are therefore attributable to her.

Furthermore, just as in *Fiore*, where the Defendant created the false information, Respondent created the assurances. She conducted the regulatory research, drafted the assurances, and was an imperative actor in the ultimate inclusion of her content in the presentation and financial statements. To hold otherwise would result int too narrow a reading which is not necessarily required, as indicated by the *Navellier* court when they expanded primary liability where Defendant's misstatements were merely incorporated and not even crafted by Defendant.

This Court should adhere to the court's holding in *SeeThruEquity*, rather than the holding in *Kelly*, by solidifying that the information that companies publish on their websites ultimately conditions the market. Respondent, by creating the information that was provided on Alcollezione's website, ultimately conditioned the market to respond to information that she knew was false. The *Kelly* approach is misplaced here, as the Defendants in *Kelly* were not engaging in an inherently deceptive transaction. Respondent's act of providing of false information about the Allcolezione's compliance status is inherently misleading. Using the company's website as an intermediary does not preclude primary liability for the creator as demonstrated by the *Fiore* court when

finding Defendant liable despite his use of promoters to disseminate the information to investors.

Although it could be argued that Marconi imposed some pressure on Respondent to draft a statement for the Annual Meeting, Respondent was the mastermind behind the regulatory research and document creation. In the case at bar, Respondent deceived investors by knowingly misleading them with false assurances, artificially conditioning the market. She had knowledge that compliance was not secured, she created and drafted the assurances, and she did so with full knowledge of the impact this would have on any reasonable investor. Even if this Court were to find that Marconi was the "mastermind" behind the publication, the determination of liability should not hinge solely on the person who "masterminded" the false information as confirmed by the *U.S. Envt'l* court. Schemes may, by their nature, involve multiple actors that possess the requisite level of scienter to necessitate a primary actor label. Should this Court refuse to find that primary liability extends beyond the "mastermind", it would be drawing a line in the sand that too narrowly limits private recourse, eviscerating the private right of action under subsections (a) and (c).

In blatant disregard of her heightened gatekeeper duties, Respondent knowingly and intentionally acted in furtherance of a scheme to defraud investors by playing an imperative role in the dissemination of false and misleading information. Accordingly, this Court must hold Respondent primarily liable under subsections (a) and (b).

CONCLUSION

For the reasons stated herein, Petitioners respectfully request this Court to reverse the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

_____ /s/

Team P11

Counsel of Record for Petitioners