No. 19-305

In the Supreme Court of the United States

ROBERT MAXELROD, ET AL., PETITIONERS

v.

AVA CATO, RESPONDENT

ON WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Whether the wholly foreign conduct of a foreign national is enough to subject that foreign national to Rule 10b liability when they neither knew of nor participated in a domestic sale of an unsponsored ADR.
2. Whether an employee who was directed by a superior to draft assurances and for investor materials can be held primarily liable when Rule 10b-5(b) establishes that merely writing these statements is **not** synonymous with disseminating them.

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STATEMENT OF THE CASE

This is an appeal from the D.C. Circuit in which Appellants are seeking relief. Initially, Appellants sought to hold three of the executives of Alcollezione primarily liable under Rule 10b-5, but two settled, thus leaving the only Respondent, Ava Cato potentially liable. In 2007, Gianni Marconi relocated to Italy, where he became "enamored" with challenging Lampari Group's (Lampari) dominance of the wine and spirits market and started Alcollezione with Benny Factor. Record, 1. Marconi and Factor sought to hire a General Counsel, ultimately selecting Respondent Ava Cato. Id. Factor and Marconi agreed to take Alcollezione public with Marconi as Chief Executive Officer (CEO) and Factor as Chief Financial Officer (CFO). Id. at 2-3. Shortly before its initial public offering (IPO) in 2011, Alcollezione published an "Investor

Relations" section to its website, including financial statements, corporate disclosures, and other investor materials in both the English and Italian languages. Id. at 3. At the IPO, Alcollezione offered 20,000,000 shares of common stock listed on the Borsa Italiana (Italian stock exchange). Id.

Marconi and Factor then took some off-time to visit family in New York early 2016. Id. Cato had never been to New York and decided to visit "the Big City" for the first time. Id. During the trip, Marconi, Factor, and Cato went out in the West Village and met with some of Factor's old business friends. Id. There, Doris Schutt, suggested that Alcollezione should form a local subsidiary in the United States to "better manage the retail sector and stay abreast of American trends." Id. Speaking for Alcollezione, Marconi said he did not want to form the local subsidiary because it would involve too much time in America. Id. Schutt instead suggested sponsoring an American Deposit Receipt (ADR) to "access the American capital markets." Id. Again, Marconi declined on behalf of Alcollezione. Id.

A group of hedge fund managers expressed interest in Alcollezione to Schutt, who "lauded" Marconi and the company and strongly advised the managers to "buy in." Id. However, due to the restrictions on trading on foreign exchanges, the managers would not be able to "buy in." Id. To solve this dilemma, Schutt advised Marconi that she was considering setting up an unsponsored ADR at Hansen Bank and Trust, a New York depository, but first sought approval given that Factor was a "dear friend." Id. Hansen Bank and Trust then formally registered the unsponsored Alcollezione ADRs. Id. These

ADRs were traded over-the-counter ("OTC") and were sold to various hedge fund managers in New York and Connecticut by Hansen Bank and Trust employees. Id. Marconi then suggested to Factor and Cato that the company should produce a spiked mineral water. Id. Cato then met privately with Marconi and stated that she would have to "do some research to ensure the beverage would comply with Italian regulations. Id. Thus, Cato began a diligent assessment of the current Italian regulatory landscape regarding sparkling alcoholic beverages. Id.

Unfortunately for Alcollezione, a few weeks before the Annual Meeting, the stock prices began fluctuating. Id. Marconi felt pressured to convince his investors that "their battle against Lampari still had its best days ahead." Id. Knowing that the investors would require assurances of Frizzantissimo's regulatory compliance, Marconi met with Cato to receive such assurances. Id. However, Cato's report described offered these regulations "would be an uphill climb" that "seemed unlikely in the short-term" even if it might be possible in the long-term. Id. Marconi went on to ask Cato to trust him in that it is "better to ask forgiveness than permission" and assured her that he could handle any negative "PR stuff if there is blowback." Id. In response to Marconi's insistent pressure to draft the assurances, Cato went ahead and drafted them without it being clear if Frizzantissimo would comply. Id. at 6.

Following the publication of these fraudulent investor materials, the stock (and ADR) price continued to grow another 14% through the early winter of 2018. Id. The hedge fund investors were the main drivers of this continued

increase in the ADR price. Id. On March 14, 2018, the Alcollezione management team received an immediate halt order on all production of Frizzantissimo, "due to noncompliance with quality control standards of production." Id. Shortly after being issued the halt order, Alcollezione's stock price plummeted nearly 29%, while the ADR dove nearly 27%. Id.

SUMMARY OF THE ARGUMENT

The present case considers two primary issues regarding the liability under Rule 10b-5. First, this Court must decide whether or not the conduct in question was sufficient enough to apply Rule 10b-5 extraterritorially. Second, if the conduct is found sufficient, does Rule 10b-5 hold that individual primarily liable.

With regard to the extraterritorial application of Rule 10b-5, this Court should adopt a rule holding that the existence of a domestic transaction alone is necessary but not sufficient for such application. This Court should adopt this rule because the robust presumption against extraterritoriality calls for a more complete showing of relevant facts before automatically rebutting this presumption. Additionally, even under the Ninth Circuit's mistaken bright line rule, the facts of this case are so predominantly foreign that a finding of extraterritoriality would be impermissible.

With regard to primary liability under Rule 10b-5, this Court should adopt a bright-line rule which states that only makers and disseminators of fraudulent or misleading statements can be held primarily liable. This Court should adopt this bright-line rule because they have been careful in the past

not to broaden the scope of primary liability too much at the risk of flooding the courts with senseless litigation. Additionally, this Court has had the opportunity in the past to extend such scope but declined and instead said that future "borderline" cases will tailor 10b-5.

ARGUMENT

I. The Robust Presumption Against The Extraterritorial Application Of Rule 10b-5 Necessarily Implies That A Domestic Transaction Alone Is Not Sufficient to Justify Such Application.

This Court in Morrison took the opportunity to restore the long-standing presumption against extraterritoriality. Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255, 130 S. Ct. 2869, 2877, 177 L. Ed. 2d 535 (2010). There, this Court held that the existence of a domestic transaction is necessary to permit the extraterritorial application of Rule 10b-5. Id at 273. However, under this Court's reasoning in Morrison, the Second Circuit held that while a domestic transaction is necessary, it alone is not sufficient to apply Rule 10b-5 abroad. Id.; Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 213 (2d Cir. 2014). Furthermore, even under the reasoning in Stoyas, the Respondent's conduct, in this case, was so predominantly foreign that such an application would be impermissible. Stoyas v. Toshiba Corp., 896 F.3d 933, 949 (9th Cir. 2018). Finally, it is the Respondent's position that given the robust presumption against extraterritoriality, holding a domestic transaction alone to be sufficient would lead to just the kinds of conflicts with foreign laws that this Court sought to prevent. Morrison, 561 U.S. at 255.

A. Recognizing The Robust Presumption Against The Extraterritorial Application Of Rule 10b-5, This Court In Morrison Held That A Domestic Transaction Is Necessary To Permit Such Application.

The transactional test promulgated by this Court in Morrison, makes a domestic transaction necessary for the extraterritorial application of Rule 10b-5. This Court has consistently recognized the longstanding presumption that, unless contrary intent suggests otherwise, Congressional legislation is meant to apply exclusively within the United States. Morrison, 561 U.S. at 255 (quoting E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991)); Foley Bros. v. Filardo, 336 U.S. 281, 285, 69 S. Ct. 575, 577, 93 L. Ed. 680 (1949). Recognizing the complex formulation and unpredictable application of the Second Circuit's conduct and effects test, this Court in Morrison established the transactional test for determining the extraterritorial application of Rule 10b-5. Id at 273. This transactional test, in pertinent part, requires the existence of a domestic transaction for the extraterritorial application of Rule 10b-5. Id.

The presumption against extraterritoriality applies to all cases in which a party seeks to give *any* federal legislation, including the Securities Exchange Act, extraterritorial effect. Morrison,561 U.S. at 255. Thus, absent an "affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions." Id. (quoting E.E.O.C, 499 U.S. at 248.) In other words, unless a statute gives a "clear indication of an extraterritorial application" no such application exists. Morrison, 561 U.S. at 255. Therefore, in order to establish the extraterritorial application of Rule 10b-5 of the Exchange Act, this

Court must first look for a "clear indication of an extraterritorial application" within the statute itself. Id.

This Court in Morrison correctly noted that since Rule 10b-5 was promulgated under § 10(b), that regulation "does not extend beyond conduct encompassed by § 10(b)'s prohibition"; therefore "if § 10(b) is not extraterritorial, neither is Rule 10b–5." Morrison, 561 U.S. at 261–62. (quoting United States v. O'Hagan, 521 U.S. 642, 651, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997)) After careful consideration of § 10(b) this Court in Morrison held that "[o]n its face, § 10(b) contains nothing to suggest it applies" extraterritorially. Morrison, 561 U.S. at 262. Similar to the Petitioner's and the Solicitor General's argument in Morrison, the Petitioners, in this case, may argue that the following three facts "indicate that § 10(b) of the Exchange Act, in general, has at least some extraterritorial application"; however, for the reasons outlined below, this Court did not find these arguments persuasive. Morrison, 561 U.S. at 262.

First, Petitioners may claim that the use of the term "interstate commerce" within the statute, necessarily implies the extraterritoriality of the statute because that term includes "trade, commerce, transportation, or communication … between any foreign country and any State." Id. at 262. However, this Court in Morrison, explicitly rejected this argument noting this court has "repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad." Id. at 262–63 (quoting E.E.O.C 499 U.S. at 248.) Therefore, the

use of the term interstate commerce in § 10(b) "does not defeat the presumption against extraterritoriality" Morrison, 561 U.S. at 263.

Second, Petitioners may argue that the fact that Congress has observed that the prices in such transactions are "generally disseminated and quoted throughout the United States and foreign countries" is enough to rebut the robust presumption against extraterritoriality. Morrison, 561 U.S. at 263. However, this Court in Morrison again explicitly rejected this argument on the grounds that "the fleeting reference to the dissemination and quotation abroad of the prices of securities traded in domestic exchanges and markets cannot overcome the presumption against extraterritoriality." Id. Accordingly, Petitioners' argument would fail because this "fleeting reference" to the dissemination and quotations of domestically traded securities is not enough to show a "clear indication of an extraterritorial application." Id. at 255.

Finally, Petitioners may argue that under § 30(b), the Exchange Act does mention the Act's extraterritorial application and therefore the presumption against such application was rebutted on a showing of "clear indication of an extraterritorial application"; however, this Court in Morrison again rejected this argument because "the presumption against extraterritoriality operates to limit that provision to its terms." Id at 265. In other words, although § 30(b) mentions the extraterritoriality of the statute, the robust presumption against extraterritoriality effectively limits that provision to the contours of § 30(b). Id. In pertinent part § 30(b) states that none of the rules or regulations of the Exchange Act apply extraterritorially, unless the transactions at hand were

done in violation of the SEC's regulations aimed at preventing the evasion of the Exchange Act's regulations. 15 U.S.C.A. § 78dd (West). Furthermore, this Court in Morrison noted that the fact that a statute's language could be interpreted to apply extraterritorially does not quash the presumption against extraterritoriality. Morrison, 561 U.S. at 264.

Accordingly, § 30(b)'s mention of an extraterritorial application bears no relevance in the instant case because, similar to the facts in Morrison, the Petitioners have not brought a claim based on a regulation promulgated by § 30(b). Id. After a detailed examination of the Exchange Act, this Court correctly noted that "there is no affirmative indication" that § 10(b), either facially or in essence, applies extraterritorially. Id. at 265. In the absence of such a "clear indication of extraterritorial application" this Court in Morrison set forth the transactional test to determine whether the extraterritorial application of Rule 10b-5 is appropriate. Id. at 269-70.

The transactional test adopted by this Court in Morrison illustrates a two-prong approach for determining when the extraterritorial application of Rule 10b-5 is permissible. Id. Specifically, this transactional test requires that the transaction in question involves the purchase or sale of a security listed on an "American stock exchange" or "any security in the United States" in order to rebut the presumption against extraterritoriality. Id. In other words, under the transactional test, in order to apply Rule 10b-5 extraterritorially the transaction at issue must involve the purchase or sale of a security listed on a domestic exchange or the domestic purchase or sale of any other security. Id.

Although this Court in Morrison did not explicitly define what constitutes a domestic transaction, the Second Circuit's irrevocable liability test has proven particularly effective when determining when a transaction is considered domestic. Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 67 (2d Cir. 2012).

Under the Second Circuit's holding in Absolute Activist, "transactions involving securities that are not traded on a domestic exchange are considered domestic if irrevocable liability is incurred or title passes within the United States." Absolute Activist Value Master Fund Ltd., 677 F.3d at 67. To be clear, a domestic transaction occurs when "the purchaser incur[s] irrevocable liability within the United States to take and pay for a security, or [when] the seller incur[s] irrevocable liability within the United States to deliver a security." Id. at 68. In other words, the transaction is considered domestic if the parties become bound to effectuate the transaction within the United States. Id at 67. The Second, Third, and Ninth Circuits have all consistently adopted the irrevocable liability test to determine when a transaction is domestic. Absolute Activist Value Master Fund Ltd., 677 F.3d at 67; Stoyas v. Toshiba Corp., 896 F.3d at 949; United States v. Georgiou, 777 F.3d 125, 137 (3d Cir. 2015). Given the irrevocable liability test's widespread adoption and consistent application in various circuit courts, this Court should adopt the Second Circuit's test when determining what transactions are considered domestic under Rule 10b-5. This Court's adoption of such a rule would serve to clarify

the facially obscure definition of a domestic transaction left unresolved by Morrison. Morrison., 561 U.S. at 269–70.

In Morrison, a foreign plaintiff brought a cause of action against a foreign defendant alleging fraud in connection with securities transactions on foreign exchanges. Id at 251. Most notably however, "all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States." Id at 273. Accordingly, this Court in Morrison held that the extraterritorial application of Rule 10b-5 is impermissible because the transaction in question did not occur domestically. Id. The present case's facts are distinguishable from Morrison, however, the rationale espoused in Morrison is still instructive in analyzing the domesticity of the transactions in question.

Here, the transactions in question were the purchase and sale of American Depositary Receipts between various American hedge fund managers and an American Depository. R. at 7. Given the robust presumption against the extraterritorial application of Rule 10b-5, this Court must apply the transactional test, as tailored by the irrevocable liability test, to the facts in the instant case to justify such application. Here, the transactions in question were effectuated within the United States and as such, the irrevocable liability passed to the purchasing party, within the United States. Id. Accordingly, the transactions at issue in the present case are indeed domestic; however, for the reasons detailed below, this inquiry does not end with a finding of a domestic transaction alone.

B. Under This Court's Reasoning In Morrison, While A Domestic Transaction Is Necessary, It Is Not Sufficient To Apply Rule 10b-5 Extraterritorially.

In light of this Court's reasoning in Morrison and this Court's own interpretation of the Morrison holding in Kiobel, this Court should adopt the Second Circuit's holding in Parkcentral, stating that while a domestic transaction is necessary, it is not sufficient to apply Rule 10b-5 extraterritorially. Morrison, 561 U.S. at 255; Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117, 133 S. Ct. 1659, 1665, 185 L. Ed. 2d 671 (2013); Parkcentral Glob. Hub Ltd, 763 F.3d at 213. This Court in Kiobel recognized that the same presumption against extraterritoriality espoused in Morrison controls the extraterritorial application of the Alien Tort Statute (ATS). Kiobel, 569 U.S. at 117. Citing Morrison, this Court in Kiobel noted that "to rebut this presumption, the ATS would need to evince a 'clear indication of extraterritoriality.'" Id. at 118. Again citing Morrison, this Court noted that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." Id. at 125.

In Morrison, this Court took the opportunity to restore the robust presumption against extraterritoriality noting the longstanding principle that absent some evidence of contrary intent, Congressional legislation is meant to apply exclusively within the United States. Morrison, 561 U.S. at 255 (quoting E.E.O.C, 499 U.S. at 248. This Court in Morrison noted that in re-establishing this robust presumption against extraterritoriality it's focus was on two

primary concerns. Id. at 261, 269. First "preserving a stable background against which Congress can legislate with predictable effects" and second, avoiding "the interference with foreign securities regulation that [an] application of § 10(b) abroad would produce." Id at 261, 269 (modified).

In light of these concerns, this Court in Morrison toted the importance of the presumption against extraterritoriality and further elaborated its role in addressing these concerns. Id. First, this Court in Morrison notes that "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States." Id. at 266. This assertion by this Court in Morrison is the first suggestion that a domestic transaction alone will usually not be sufficient to rebut the presumption against extraterritoriality. Second, this Court in Morrison correctly notes that the presumption against extraterritoriality would be a "craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case"; a characterization of the presumption against extraterritoriality that this Court specifically rejects. Id. In other words, this Court in Morrison cautioned that the mere existence of some domestic activity, like a domestic transaction, does not always rebut the presumption against extraterritoriality. Id. This assertion by this Court in Morrison is the second suggestion that a domestic transaction alone will usually not be sufficient to rebut the presumption against extraterritoriality. Furthermore, the rationale espoused in Kiobel illustrates this Court's interpretation of Morrison's holding that a domestic transaction is necessary for the extraterritorial application of Rule 10b-5, as only being the

first step in the analysis. Kiobel, 569 U.S. at 117. Accordingly, this Court should adopt a more complete rule for determining when the extraterritorial application of Rule 10b-5 is permissible.

Parkcentral's reliance on this Court's holding in Morrison makes it particularly instructive in constructing a rule that encompasses this Court's characterization of the presumption against extraterritoriality in light of this Court's rationale in both Morrison and Kiobel. Morrison, 561 U.S. at 255; Kiobel, 569 U.S. at 117. After careful consideration of this Court's "word's and arguments" in Morrison, the Second Circuit in Parkcentral held that while a domestic transaction is necessary, a domestic transaction alone is not "sufficient to state a properly domestic claim" under § 10(b) of the Exchange Act. Parkcentral Glob. Hub Ltd, 763 F.3d at 215. The Second Circuit promulgated this holding in Parkcentral for the following two reasons.

First, this Court in Morrison never explicitly said that a domestic transaction was alone sufficient to apply Rule 10b-5 extraterritorially. Morrison, 561 U.S. at 255. Furthermore, this Court's quote that "*only* transactions in securities listed on domestic exchanges, and domestic transactions in other securities" rebut the presumption against extraterritoriality in Morrison was "consistent with the description of necessary elements rather than sufficient conditions." Id. Second, adopting a rule that makes the domestic transaction alone sufficient to rebut the presumption against extraterritoriality would "seriously undermine Morrison's insistence that § 10(b) has no extraterritorial application." Id. Such a rule would force this

Court to apply Rule 10b-5 to "wholly foreign activity clearly subject to regulation by foreign authorities solely because a plaintiff in the United States made a domestic transaction, even if the foreign defendants were completely unaware of it." Id. Therefore, a ruling that a domestic transaction alone is sufficient to rebut the presumption against extraterritoriality would inevitably lead to the conflicts with international law that this Court sought to prevent in Morrison. Id.

In Kiobel, foreign plaintiffs brought a cause of action against a foreign petroleum company alleging violent suppression of the environmental protests held by the plaintiffs, in violation of the ATS. Kiobel, 569 U.S. at 113. Following the alleged "atrocities", petitioners immigrated to the United States under political asylum and now reside as legal residents. Id. at 113. This Court in Kiobel held that since "nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach" the ATS is subject to the robust presumption against extraterritoriality. Id. Here, similar to the facts in Kiobel, § 10(b) of the Exchange Act shows no affirmative indication, facially or in essence, that it applies extraterritorially; therefore, like in Kiobel, the presumption against extraterritoriality in the instant case has not been rebutted. Morrison, 561 U.S. at 265.

In Parkcentral, a group of foreign hedge fund managers brought a cause of action against a foreign automobile corporation alleging fraudulent conduct in violation of U.S. securities law. Parkcentral Glob. Hub Ltd., 763 F.3d at 201. The conduct in question was the allegedly fraudulent statements made by the

foreign automobile company with respect to swap-agreements based on a foreign stock option. Id. These allegedly fraudulent statements were "made primarily in Germany, but were also accessible in the United States. Id. After careful consideration of the rationale and language used by this Court in Morrison, the Second Circuit held that "the imposition of liability under § 10(b) on these foreign defendants with no alleged involvement in plaintiffs' transactions, on the basis of the defendants' largely foreign conduct", "would constitute an impermissibly extraterritorial extension of the statute." Id at 202. Although the Second Circuit in Parkcentral declined to apply Rule 10b-5 extraterritoriality, subsequent cases relying on its holding in Parkcentral suggest at least one clear example of the kind of domestic conduct required to rebut the presumption against extraterritoriality. Reese v. Malone, 747 F.3d 557, 581 (9th Cir. 2014); Freidus v. Barclays Bank PLC, 734 F.3d 132, 141 (2d Cir. 2013). Following its ruling in Parkcentral, the Second Circuit only applied § 10(b) of the Exchange Act extraterritorially where the ADR in question was sponsored. Reese v. Malone, 747 F.3d at, 581.; Freidus, 734 F.3d at 141.

Here, similar to the facts in Parkcentral, the fraudulent conduct alleged occurred outside of the United States. R. at 5. Additionally, similar to the facts in Parkcentral, the allegedly fraudulent statements were accessible in the United States. Id. at 6. Notably, the case at instant is distinct from Parkcentral in that the securities in question were ADRs and not securities based swap-agreements, as are the facts in Parkcentral. Id. at 4; Parkcentral Glob. Hub Ltd., 763 F.3d at 201. While the Second Circuit did caution against applying its

holding in Parkcentral to cases not involving securities based swap-agreements, the fact that it has consistently applied it's rationale in Parkcentral to cases involving ADRs suggests that even the Second Circuit understood ADRs to be sufficiently similar to securities-based swap-agreements for this purpose. Reese, 747 F.3d at 581; Freidus, 734 F.3d at 141. Therefore, the facts of the case at instant are sufficiently similar to those of Parkcentral to apply the Second Circuit's holding to this case. Accordingly, following this Court's rationale in both Morrison and Kiobel, and the robust presumption against extraterritoriality, this Court should adopt the Second Circuit's rule holding a domestic transaction to be necessary but not sufficient for the extraterritorial application of Rule 10b-5.

C. Even Under The Reasoning In Stoyas, The Respondent's Conduct Was So Predominantly Foreign That The Extraterritorial Application Of Rule 10b-5 Is Impermissible.

Although the Rule promulgated by the Second Circuit in Parkcentral better resolves this Court's primary concerns in Morrison, even under the reasoning in Stoyas, the extraterritorial application of Rule 10b-5 is impermissible. The Ninth Circuit in Stoyas began its analysis of the extraterritorial application of Rule 10b-5 by formally adopting the Second Circuit's "irrevocable liability test to determine whether the securities were the subject of a domestic transaction." Stoyas, 896 F.3d at 949; Absolute Activist Value Master Fund Ltd., 677 F.3d at 68. The Ninth Circuit in Stoyas, correctly noted that a plaintiff must plausibly allege "that the purchaser incurred irrevocable liability within the United States to take and pay for a security, or

that the seller incurred irrevocable liability within the United States to deliver a security." Stoyas, 896 F.3d at 948.

In applying the irrevocable liability test, the Ninth Circuit noted the kinds of factual allegations that could render a transaction domestic as being "facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money." Id. In Stoyas, the Ninth Circuit gives us an example of its application of the irrevocable liability test that proves particularly instructive. Id. There, the Ninth Circuit held that while the first amended complaint (FAC) alleged that the purchases of the ADRs in question occurred in the United States and the sale of those ADRs were made by an American depository, it failed to make specific allegations to where the parties incurred irrevocable liability. Id. The Ninth Circuit also identified that the relevant facts in this analysis are "who sold the relevant securities and how those transactions were effectuated, as evidenced by documentation such as confirmation slips." Id.

In Stoyas, domestic plaintiffs brought suit against a foreign corporation alleging a violation of Rule 10b-5 involving ADR purchasers. Id. at 937. The foreign corporation in Stoyas admitted it's "substantial institutional accounting fraud." Id. The plaintiffs in Stoyas acquired Toshiba ADRs "'in reliance upon the truth and accuracy' of Toshiba's fraudulent financial statements, paid artificially inflated prices, and suffered economic loss when the ADRs declined in value after the fraud was revealed." Id. at 938. There, under the irrevocable

liability test, the Ninth Circuit ruled that the FAC did not allege the specific facts required to establish a domestic transaction. Id. at 949.

Here, similar to the facts in Stoyas, the facts suggest that the purchases and sales of the ADRs in question occurred within the United States between an American depository and American investors. Id. at 948; Record, at 4. Additionally, the facts suggest that the ADRs in question were "purchased via phone by various hedge fund managers in New York and Connecticut with the assistance of Hansen Bank and Trust employees." Id. However, just as in Stoyas, the facts here fail to specifically allege who sold the relevant securities or offer any documentary evidence on how those transactions were effectuated. Id.; Stoyas, 896 F.3d at 948. The Record merely stated that some of the depository's "employees" helped sell the ADRs to "various hedge fund managers" via phone. R, at 4. Thus, under the Ninth Circuit's holding in Stoyas, absent some documentary evidence showing how the transactions were effectuated, there is no way to know who specifically sold the ADRs in question; thus, no way to know where the irrevocable liability was incurred. Stoyas, 896 F.3d at 948. Therefore, even under Stoyas', complex application of the Second Circuit's irrevocable liability test, the facts as alleged in the Record do not allege the specific facts required to establish a domestic transaction. Id.; Absolute Activist Value Master Fund Ltd., 677 F.3d at 67.

D. Given The Robust Presumption Against Extraterritoriality, If A Domestic Transaction Alone Were Ruled Sufficient For Such Application of Rule 10b-5, It Would Invariably Lead To Conflicts With Foreign Laws And Regulations.

Under, this Court's reasoning in Morrison, holding that a domestic transaction is sufficient alone to rebut the presumption against extraterritoriality would open the flood gates of litigation by allowing an overinclusive set of transactions to be covered by U.S. securities law. Morrison, 561 U.S. at 255. As discussed at length above, this Court in Morrison, has recognized the longstanding principle that absent some evidence of contrary intent, Congressional legislation is meant to apply exclusively within the United States. Morrison, 561 U.S. at 255 (quoting E.E.O.C, 499 U.S. at 248. One of this Court's primary concerns in Morrison was avoiding "the interference with foreign securities regulation that [an] application of § 10(b) abroad would produce." Id. at 261, 269.

Maintaining the robust presumption against extraterritoriality would remedy this primary concern by limiting what types of cases can be brought under U.S. securities law. Conversely, adopting a rule that would automatically rebut this robust presumption by the mere existence of a domestic transaction would ignore this Court's reasoning in Morrison. Id. Furthermore, adopting such a rule would invariably lead to the complex conflicts between U.S. securities laws and foreign laws and regulations that this Court sought to avoid. Therefore, in accordance with the longstanding presumption against extraterritoriality, this Court should avoid adopting a rule that holds a domestic transaction alone, sufficient for such application of Rule 10b-5. Id.

II. Under Rule 10b-5, Respondent Cannot be Held Primarily Liable Because She Merely Substantially Assisted Another's Primary Violation.

This Court has long recognized the ability of the Securities and Exchange Act of 1934 to establish primary liability on those who participate in a "manipulative or deceptive act in connection with the purchase or sale of securities" pursuant to Rule 10b-5 (a), (b), and (c). Central Bank of Denver, N.A. v. First Interstate Bank of Denver N.A., 511 U.S. 164, 167, 114 S. Ct. 1439, 1443, 128 L. Ed. 2d 119 (1994). However, the scope of primary liability has been defined and redefined multiple times in the history of this Court. Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 131 S. Ct. 2296, 2302, 180 L. Ed. 2d 166 (2011); Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, 552 U.S. 148, 128 S. Ct. 761, 766, 169 L. Ed. 2d 627 (2008).

Rule 10b-5 of the Securities and Exchange Act is the seminal rule that paved the way for suits by and against the Securities and Exchange Commission. While it is true that the three subsections of Rule 10b-5 are not to be read as mutually exclusive and have considerable overlap, subsections (a) and (c) differ in a unique way from subsection (b). Lorenzo v. Sec. & Exch. Comm'n, 139 S. Ct. 1094, 203 L. Ed. 2d 484 (2019) (Citing Herman & MacLean v. Huddleston, 459 U.S. 375, 387, 103 S. Ct. 683, 690, 74 L. Ed. 2d 548 (1983)). Subsection (b) of Rule 105-b, deals exclusively with the maker of a statement, while subsections (a) and (c) are less restrictive and go beyond the maker. Moreover, this Court has set distinctions between primary and secondary liability, alluding to the fact that an individual cannot be held primarily liable for another's primary violation. Central Bank of Denver, N.A., 511 U.S. at 166. Therefore, this Court should adopt a bright line rule in which

limits the scope of primary liability to maintain these vital distinctions between a primary violation and a secondary violation.

A. This Court Has Long Recognized the Distinction Between Primary and Secondary Liability Which Still Exists, Even After This Court's Holding in Lorenzo.

This court has consistently upheld the distinction between primary and secondary liability pursuant to Rule 10b-5 of the 1934 Securities and Exchange Act. Central Bank of Denver, 511 U.S. at 173. Subsection (b) of Rule 10b-5 deals with fraudulent statements, while subsections (a) and (c) deals with fraudulent conduct. Traditionally, the "maker" of a fraudulent statement can be found liable for a primary violation. Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. at 143. However, this Court went on to expand the eligibility for a primary violation claim to include those who disseminate fraudulent statements even if they are not the "maker" of the statement. Lorenzo, 139 S. Ct. at 1099. Additionally, this Court also held that one who substantially assists another's primary violation cannot themselves be held primarily liable. Central Bank of Denver, 511 U.S. at 180; Janus Capital Grp., Inc., 564 U.S. at 143; 15 U.S.C. § 78t(e)

There is no dispute that the maker of a statement is always subject to primary liability. Janus Capital Grp., Inc., 564 U.S. at 142-143. A maker of a statement is one who retains ultimate control over the statement. Id. This includes the content of the statement and the means by which it is communicated. Id. Recently, this Court marginally expanded the scope of what constitutes a primary violation to include disseminating false or misleading

statements. Lorenzo, 139 S. Ct. at 1100–01, 203. "A person or entity who disseminates false or misleading statements with intent to defraud can violate the anti-fraud provisions of federal securities law, even if the person or entity could not be liable for securities fraud as the maker of an untrue statement of material fact." Id.

This Court's holding in Janus was not negated by its holding in Lorenzo; thus it does not erase the distinction between primary and secondary liability. Lorenzo, 139 S. Ct. at 1103. Therefore, the narrow scope set out by this court previously is still applicable as long as the individual neither made nor disseminated the fraudulent statements. Id. Here, Respondent neither made nor disseminated the fraudulent statements in question. If this Court were to apply their holding from Janus, Respondent would not be liable because she was not the "maker." Furthermore, if this Court were to apply their holding from Lorenzo, Respondent still would not be primarily liable because she was neither a maker or disseminator pursuant to Rule 10b-5 of the Securities and Exchange Act of 1934.

B. Under Rule 10b-5, Respondent Was Not a Disseminator Because Respondent Did Not Engage in Fraudulent Conduct and is Therefore Not Primarily Liable

Respondent cannot be held primarily liable under Rule 10b-5 (a) or (c) because she was not a disseminator of any fraudulent statements. According to Merriam Webster Dictionary, the definition of dissemination is "to disperse

throughout". *Disseminate,* Merriam-Webster.com Dictionary (11th ed. 2020). Rule 10b-5 states in pertinent part,

> `It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange:
> (a) To employ any device, scheme, or artifice to defraud.
> (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.

These two subsections together are known as the scheme liability provisions and have long been recognized as intentional or knowing behavior. Aaron v. Sec. & Exch. Comm'n, 446 U.S. 680, 696, 100 S. Ct. 1945, 1955, 64 L. Ed. 2d 611 (1980). An individual who knowingly disseminates false or misleading statements to investors, will be held primarily liable pursuant to the scheme liability provisions, even if they are not the "maker" of such statement under subsection (b). Lorenzo, 139 S. Ct. at 1103.

Applied literally, the definition of dissemination means to disperse throughout. *Disseminate,* Merriam-Webster.com Dictionary (11th ed. 2020). Therefore, when applied to the context of Rule 10b-5 of the 1934 Securities and Exchange Act, in order for an individual to be deemed a disseminator, they would have to literally "disperse" the false or misleading statements throughout to the potential investors. Here, Respondent was only following orders by her superior in drafting documents for potential investors. R. at 5-6. The

dissemination of these misleading statements was conduct that was solely executed by Marconi, Respondent's direct supervisor. Id. Therefore, it was Marconi who committed a primary violation, not Respondent. Respondent was substantially assisting his primary violation, thus precluding her from being primarily liable herself.

In Lorenzo, this Court found that Mr. Lorenzo was primarily liable based on his conduct in disseminating the fraudulent statements. Lorenzo, 139 S. Ct. at 1101. On two different occasions, Mr. Lorenzo communicated directly to probable investors via email. Id. While the content of the emails contained false statements and was authored by Mr. Lorenzo's supervisor, Mr. Lorenzo signed these emails with his own name. Id. Additionally, he established his title in these emails, letting investors know that he was the vice president of investment banking. Id. Lastly, Mr. Lorenzo encouraged all potential investors to reach out to him with any questions. Id. Based on Mr. Lorenzo's actions with respect to the fraudulent statements to potential investors, this court found that Mr. Lorenzo was, in fact, a disseminator pursuant to Rule 10b-5 of the 1934 Securities and Exchange Act. Id. Therefore, Mr. Lorenzo was said to have committed a primary violation. Id.

The facts in the case at bar are distinguishable from the facts in Lorenzo. Specifically, Respondent never provided information directly to potential investors. R. at 6. Respondent only drafted assurances at the direction of her supervisor, Marconi. Id at 5-6. It was Marconi who directly relayed these assurances to the investors at the Annual Meeting. Id at 6. Furthermore,

Respondent never introduced herself, contacted or reached out to potential investors with respect to the misleading statements at issue. Id.

Citing the fraudulent conduct in Lorenzo, coupled with the dictionary definition of dissemination, this Court made it clear that there needs to be fraudulent conduct carried out personally by an individual in order to be considered a disseminator. Lorenzo, 139 S. Ct. at 1100. Because Respondent did not participate in the distribution of the assurances or contact investors with the information, she is not a disseminator. Consequently, Respondent cannot be held primarily liable.

C. Under Rule 10b-5, Respondent Cannot Be Held Primarily Liable For Merely Substantially Assisting Another's Primary Violation.

This Court has not been shy in articulating opinions with regard to aiding and abetting liability. Notably, this Court in Central Bank of Denver, N.A., acknowledged that Rule 10b-5 of the Securities and Exchange Act does not cover aiding and abetting liability. Central Bank of Denver, N.A., 511 U.S. at 190. However, in order to arrive at the conclusion that Rule 10b-5 does not apply due to aiding and abetting liability, one must look to see if that individual is primarily liable. Id; Lorenzo,139 S. Ct. at 1101-1103. In order to see if an individual was primarily liable, one must establish that the individual was either the maker or disseminator of fraudulent or misleading statements. Lorenzo, 139 S. Ct. at 1101-1103. Conversely, in order to incur aiding and abetting liability, one has to substantially assist another in committing a primary violation. Central Bank of Denver, N.A., 511 U.S. at 190; Janus Capital Grp., Inc., 564 U.S. at 145; Lorenzo,139 S. Ct. at 1101 at 1102.

However, one cannot be held primarily liable for another's primary violation just for substantially assisting them. Id. According to this Court in Lorenzo, "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." Lorenzo, 139 S. Ct. at 1103.

Pursuant to the fact that aiding and abetting liability is not covered by Rule 10b-5, Congress enacted the Private Securities Litigation Reform Act (PSLRA). The PSLRA clearly states that the Securities and Exchange Commission has the **exclusive** right to enforce aiding and abetting liability. Thus, a private plaintiff cannot assert a claim of aiding and abetting liability. As long as a private plaintiff such as a stockholder, files suit, a claim for primary liability cannot be asserted.

Here, we have private plaintiffs who asserted a claim for primary liability. However, this claim for primary liability proves pointless, as it is clear that Respondent was only aiding and abetting since she does not meet the criteria for being a maker or disseminator. Therefore it is inappropriate for the appellants, who were and still are private plaintiffs, in this matter to have filed suit claiming Respondent was liable for a primary violation.

D. This Court Should Heed Its Own Warning and Limit the Scope of Primary Liability Pursuant to Rule 10b-5 to Just Makers and Disseminators.

Lastly, we ask this court to adopt a bright-line rule with regard to Rule 10b-5 (a), (b), and (c). This court should hold that the only two ways to incur

primary liability under Rule 10b-5 is to be a maker or disseminator. Having the chance to expand primary liability to other fraudulent conduct relating to misleading statements during the decision in Lorenzo, this Court only chose to extend it to makers and disseminators. Lorenzo, 139 S. Ct. at 1104. This further proves the intent of this Court to keep the scope of primary liability limited. With regard to Rule 10b-5 this Court offered, "these provisions capture a wide range of conduct. Applying them may present difficult problems of scope in borderline cases. Purpose, precedent, and circumstance could lead to narrowing their reach in other contexts."

The Court in Lorenzo was cautious in expanding primary liability too broadly, as it would then find that plain fraudulent conduct would be subject to primary liability. Lorenzo, 139 S. Ct. at 1101. This Court further explained that plain fraudulent conduct would be inappropriately classified if it were considered a primary violation pursuant to Rule 10b-5. Id. More importantly, this Court specifically stated that "borderline cases" could perhaps narrow the reach of primary liability. Id. The present case solidifies that the reading of Rule 10b-5 should be narrowed using the bright-line rule proposed.

If this Court were to broaden the conduct considered a primary violation under Rule 10b-5 to apply beyond just makers and disseminators, there would be a number of implications with respect to policy. First, the Supreme Court would be overloaded with cases, as expanding the conduct that is considered a primary violation would open the doors up for more private plaintiffs to file suit. If this Court limited the scope of primary liability, the courts would not be

flooded with senseless litigation stemming from "plainly fraudulent" conduct. Secondly, adopting this bright-line rule is beneficial to the judicial economy because it would set forth the specific conduct that needs to be present for primary liability to apply. Burdening the judicial system with these "borderline cases" in which the courts would have to analyze all facts for each case can be prevented with this bright-line rule. The courts would no longer have to use a case by case analysis and would be able to determine liability based on the conduct at the time the conduct occurs.

Finally, the judicial system has already seen an increase in litigation pertaining to Rule 10b-5 which has been unduly burdensome. In 2017, there were over 400 cases in which private plaintiffs sued companies for fraudulent or misleading statements. Jonathan Stempel, A Lawsuit a Day: U.S. Securities Class Actions Soar (2018). The caseload will only continue to intensify with regard to fraudulent or misleading statements if this Court does not adopt this bright-line rule proposed. Therefore, this Court should heed its own warning set forth in the opinion of Lorenzo, cautioning against the broad expansion of primary liability under Rule 10b-5 and keep the scope of primary violations to only include makers and disseminators.

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's decision and in sum hold that if 10b-5 is applied extraterritorially, only makers and disseminators can be held primarily liable.

Dated: March 2, 2020

Respectfully Submitted,
Team R06

APPENDIX

1. 17 CFR § 240.10b-5 provides:

Employment of manipulative and deceptive devices

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, 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 CFR § 240.10b-5.

2. 15 U.S.C. § 78t(e) provides:

Prosecution of persons who aid and abet violations

"For purposes of any action brought by the Commission under paragraph (1) or (3) of section 78u(d) of this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided."

3. 15 U.S.C. § 78dd-1 provides in pertinent part:

Prohibition

"It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78*l* of this title or which is required to file reports under section 78*o*(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value"