Daniel J. Wadley (10358)
wadleyd@sec.gov
Amy J. Oliver (8785)
olivera@sec.gov
Alison Okinaka (7954)
okinakaa@sec.gov
Cheryl M. Mori (8887)
moric@sec.gov
Attorneys for Plaintiff
Securities & Exchange Commission
351 South West Temple, Suite 6.100
Salt Lake City, Utah 84101
Tel. 801-524-5796

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

v.

TRAFFIC MONSOON, LLC, a Utah Limited Liability Company and CHARLES D. SCOVILLE, an individual,

DEFENDANTS.

RESPONSE TO DEFENDANT'S SURREPLY

Case No.: 2:16-cv-00832-JNP

Judge Jill N. Parrish

Plaintiff, Securities and Exchange Commission (the "Commission"), by and through its counsel of record, respectfully submits this Response to Defendant's Surreply (Doc. No. 41-1). In his Surreply, defendant employs hyperbole and mischaracterizes case law in an apparent attempt to deflect attention from his failure to address or discuss Section 929P(b) of the Dodd-Frank Act in his Opposition to the Commission's request for entry of a preliminary injunction. Neither the defendant's mischaracterizations, nor his arguments, are persuasive. As evidenced by the plain language of the statute, together with the legislative history, Section 929P(b) is properly read to reinstate the "conduct and effects" test that had operated prior to *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). Under that test, Traffic Monsoon's conduct

clearly took place, and caused significant effects, within the United States. As such, the anti-fraud provisions of the federal securities laws extend to Traffic Monsoon's and Charles Scoville's fraudulent scheme.[1]

Moreover, even applying *Morrison's* "domestic securities transaction" test, as set forth more fully in the Commission's Reply in Support of Motion for Preliminary Injunction ("Reply"), because the transactions were effected, tracked, and managed through U.S.-based servers, by a U.S. company, which in turn was founded and operated by a United States citizen, they constituted domestic securities transactions. Accordingly, as the court found in *SEC v. Chicago Convention Center, LLC*, 961 F.Supp.2d 905 (N.D. Ill. 2013), the federal securities laws apply under either test. As such, the Court should properly enter the preliminary injunction against the defendants here.

ARGUMENT

In his Surreply, the defendant describes the Commission's argument regarding Section 929P(b)'s reinstatement of the conduct and effects test as a "tortured reading," and that it is "absurd," "stupefying," and "defies belief." Surreply, pp. 2, 7. The defendant cites four cases in support of his hyperbolic characterization:

- *SEC v. Sabrdaran*, Case No. 14-cv-04825-JSC (N.D. Cal. Sept. 14, 2016) (unpublished)[2];
- *SEC v. Brown*, Case No. 14-cv-6130 (N.D. Ill. Mar. 4, 2015) (unpublished);
- *SEC v. Battoo*, 158 F.Supp.3d 676, 692 (N.D. Ill. 2016); and
- *SEC v. Chicago Conv. Ctr., LLC*, 961 F.Supp.2d 905 (N.D. Ill. 2013).

[1] Importantly, Section 929P(b), and its codified sections (Section 22(c) of the Securities Act and Section 27(b) of the Exchange Act), by their terms, only extend the extraterritorial reach of the antifraud provisions to actions brought by the Commission and the United States. The provisions do not extend to private rights of action.

[2] Pursuant to Local Rule 7-2(c) regarding citation to unpublished decisions, the Commission has attached hereto as Exhibit A copies of the two unpublished decisions included in the defendant's Surreply: *SEC v. Brown*, Civ. No. 14-cv-6130 (N.C. Ill. Mar. 4, 2015) (unpublished) and *SEC v. Sabrdaran*, Civ. No. 14-cv-04825-JSC (N.D. Cal. Sept. 14, 2016) (unpublished). Neither appears to be available on an electronic database and neither was attached to the Surreply.

The *SEC v. Sabrdaran* opinion does not appear to pertain to the *Morrison* case in any way. Rather, the *Sabrdaran* Order is a magistrate judge's denial of a motion for partial summary judgment and appears to deal solely with the "in connection with" element of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"). *See* Ex. A. It is unclear why the defendant included this case in his Surreply.

SEC v. Brown does address the *Morrison* issue and concludes that, when the complaint is construed in the light most favorable to the Commission, as it was required to do at that stage of the proceedings, jurisdiction would apply under both the *Morrison* "domestic securities transaction" test and Section 929P(b)'s conduct and effects test. *See* Ex. A. The court refused to make a definitive ruling on the issue and denied the defendant's motion to dismiss.

The *Chicago Convention Ctr.* case, like *Brown*, considered the *Morrison* and Section 929P(b) issue and also concluded that jurisdiction would apply under either test:

> Here, viewing the facts in the light most favorable to the SEC, as must be done at this stage, the SEC's complaint passes muster under either the pre-*Morrison* "conducts and effects test," which the Dodd-Frank Act may have revived, or the "transactional" test set forth in *Morrison*.

Chicago Conv. Ctr., 961 F.Supp.2d at 916. The *Chicago Conv. Ctr.* court did conduct an extensive evaluation of the arguments on both sides of the issue and, in contrast to the defendant's position here, recognized that reading Section 929P(b) as purely jurisdictional would create a superfluous result:

> In other words, if Section 929P(b) is purely jurisdictional, it would be redundant and superfluous because other provisions in the "Jurisdiction of offense and suits" section already granted federal courts extraterritorial jurisdiction.
>
> Interpreting Section 929P(b) as jurisdictional, rather than as a partial refutation of *Morrison*, may, therefore, run contrary to a cardinal principle of statutory construction to avoid superfluous portions of statutes.

Id. at p. 913. As evidenced by the case law cited in the Commission's Reply, together with the extensive legislative history regarding Section 929P(b)'s intended purpose, it is clear that Congress intended to address the enforcement scope of the antifraud provisions of the federal

securities laws, reinstating the conduct and effects test, not merely redundantly codify the jurisdictional scope of those laws that already existed.

The final case cited in the Surreply, *SEC v. Battoo*, is the one that received the most attention. Yet, the *Battoo* court, like the others cited by the defendant, did not rule on the *Morrison* issue. Rather, the court specifically held that "[i]t is not necessary to decide whether Section 929P(b) does indeed overrule *Morrison* for actions brought by the SEC, because the Court concludes that Section 929P(b) does *not* apply retroactively to any pre-Dodd-Frank enactment conduct, which makes up the bulk of the alleged conduct committed by [the defendant] in this case." *Battoo*, 158 F.Supp.3d at 692. The court did elaborate on the *Morrison* fix issue in a footnote, quoted by the defendant in his Surreply, in which the court highlights the merits versus jurisdiction issue but stated, "[t]o repeat, this Court does not need to decide this issue because, as explained below, Section 929P(b) does not apply retroactively in any event." *Id.* at n. 12.

These are the four cases – none of them controlling, none of them even providing a definitive ruling – upon which the defendant rests his *Morrison* case.[3] Collectively, the three decisions that actually address the *Morrison* issue merely stand for the underwhelming proposition that a court has yet to conclusively rule on Section 929P(b)'s efficacy in reinstating the conduct and effects test. For the reasons set forth in the Commission's Reply, including the

[3] In contrast, *see, e.g.*, *Liu v. Siemens A.G.*, 2013 WL 5692504, *3 (S.D.N.Y. Oct. 21, 2013) ("Section 929P(b) permits the SEC to bring enforcement actions for certain conduct or transactions outside the United States."); *SEC v. Tourre*, 2013 WL 2407172, *1 n.4 (S.D.N.Y. June 4, 2013) (929P(b) "effectively reversed Morrison in the context of SEC enforcement actions"); *In re Optimal U.S. Litig.*, 865 F. Supp. 2d 451, 456 n.28 (S.D.N.Y. 2012) ("Congress has . . . restor[ed] the conducts and effects test for SEC enforcement actions."); *SEC v. Gruss*, 2012 WL 3306166, *3 (S.D.N.Y. Aug. 13, 2012) ("Section 929P(b) . . . allows the SEC to commence civil actions extraterritorially in certain cases."); *SEC v. Compania Internacional Financiera S.A.*, 2011 WL 3251813, *6 n.2 (S.D.N.Y. July 29, 2011) ("It may be that [929P(b)] was specifically designed to reinstate the Second Circuit's 'conduct and effects' test."); *Cornwell v. Credit Suisse Grp.*, 729 F. Supp. 2d 620, 627 n.3 (S.D.N.Y. 2010) ("[I]n legislation recently enacted, Congress explicitly granted federal courts extraterritorial jurisdiction under the conduct or effect test for proceedings brought by the SEC.").

case law observing the purpose of Section 929P(b) and the legislative history clearly setting out that section's purpose, the Commission respectfully requests that the Court recognize the purpose and application of this Section and apply the conduct and effects test here.

Nevertheless, as was the case in both *Chicago Conv. Ctr.* and *Brown*, and as further discussed in the Commission's Reply, even under the *Morrison* domestic securities transaction test, the Commission has adequately stated a claim pursuant to which it can pursue its causes of action against Traffic Monsoon and Charles Scoville. Traffic Monsoon operated as a Utah company, run by a Utah resident, through servers housed in the United States, which in turn facilitated all transactions, purchases, and redemptions.[4] The only actions taken outside of the United States were users submitting purchase orders to the U.S.-based servers. Because Traffic Monsoon incurred legal obligation to deliver the securities within the United States, the transactions constituted domestic securities transactions. As such, the federal securities laws apply to the entirety of Traffic Monsoon's operation, not just that portion that targeted U.S. investors.[5]

---

[4] *See* Doc. No. 3, TRO Motion, p. 5, and Exhibit A attached thereto (5/17/2016 Testimony of Charles D. Scoville ("Scoville Test.") at pp. 9, 39-41. When asked during investigative testimony what his home address was, Scoville gave his Murray, Utah address. *Id.*, p. 9. When asked where Traffic Monsoon had offices, Scoville responded: "Technically we don't have any offices, just my home address" in Murray, Utah. *Id.*, p. 40. He stated Traffic Monsoon doesn't really have employees, but when asked did cite call centers in Florida, North Carolina, and the Philippines. *Id.* at p. 39. Lastly, he confirmed that Snoork was his web hosting company that managed all business transactions. *Id.* at pp. 34-35, 84-86. Snoork is located in the United States. The only non-domestic aspect of Traffic Monsoon's business was the location of a portion of its investors, which courts have held is not determinative in evaluating whether a domestic securities transaction has taken place. *See Absolute Activist Value Master Fund Ltd.*, 677 F.3d 60, 69 (2d Cir. 2012).

[5] For this same reason the Court should retain its asset freeze over all Traffic Monsoon assets, not just those attributed to U.S.-based investors. As will be shown in the Hearing, although it appears that U.S.-based investors are owed approximately $10 million in order to be made whole (the actual funds invested less the funds actually withdrawn), in order to make all investors whole, wherever situated, it would take over $87 million, significantly more than the $50 million that is frozen and held by the Receiver. It would be reckless to unfreeze $40 million and return the funds to the control of the defendant, especially when he has already transferred, as recent as July, millions of dollars to accounts in Eastern Europe, well outside the Traffic Monsoon enterprise, with no explanation as to the purpose of the transfers or current disposition of the funds.

CONCLUSION

For these reasons, the Commission respectfully requests that the Court deny the defendant's Motion for Leave to File Surreply.

Respectfully submitted this 24th day of October, 2016.

/s/ Daniel J. Wadley
Daniel J. Wadley
Amy J. Oliver
Alison Okinaka
Cheryl Mori
Attorney for Plaintiff
U.S. Securities & Exchange Commission

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, I caused to be filed the forgoing using the Court's CM/ECF System. A true and correct copy of the document was served on all parties entitled to service through the Court's CM/ECF System.

/s/ Marlea Furlong
Marlea Furlong