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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF UTAH

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. TRAFFIC MONSOON, LLC, a Utah Limited Liability Company, and CHARLES DAVID SCOVILLE, an individual, Defendants.	**DEFENDANT'S SURREPLY TO PLAINTIFF'S REPLY IN SUPPORT OF PRELIMINARY INJUNCTION** Civil No.: 2:16-cv-00832 JNP Judge: Jill N. Parrish

By this motion, Defendant Scoville replies to the arguments raised in the SEC's Reply Brief, which were not raised in its Motion for Preliminary Injunction, namely, that Section 929P(b) statutorily overruled the Supreme Court's opinion in *Morrison v. Nat'l Australia Bank*

Ltd., 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010). For the reasons cited below the SEC's arguments are unavailing and nothing in the Dodd-Frank legislation changed the effect of *Morrison's* holding on the viability of the SEC's claims here.

ARGUMENT

In the SEC's Reply Brief, the Commission spends 18 pages engaging in a tortured attempt to convince this Court to ignore the two most basic rules of statutory interpretation. First, a court must analyze the "statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251, 130 S. Ct. 2149, 2156, 176 L. Ed. 2d 998 (2010) (quoting *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 2350, 174 L.Ed.2d 119 (2009)). Second, a court must enforce "plain and unambiguous statutory language according to its terms." *Id.*

Because the statutory language the SEC relies on in its brief is clear and unambiguous — and ultimately supports Defendants' argument — the SEC's reply reaches an improper conclusion of law: that under the Supreme Court's holding in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010), that the U.S. Securities laws do not apply to purchases or sales of securities[1] outside the United States is no longer the law. This is not the first time the SEC has made this same argument, but no Court has yet adopted the SEC's tortured reading of the interplay between the Supreme Court's decision in *Morrison* and Section 929P(b) of Dodd-Frank. *See e.g. United States Sec. & Exch. Comm'n v. Battoo*, 158 F. Supp. 3d 676, 692 n.12 (N.D. Ill. 2016).

[1] Scoville argued in his opposition that AdPacks are not securities and that therefore the U.S. Securities laws don't apply in any event and he maintains that argument. For purposes of this surreply that argument need not be resolved since even if AdPacks are securities, since the purchase and sale of 90% of the Adpacks took place outside the United States, the laws at issue in the SEC's complaint do not apply.

I. SECTION 929(P)(B) OF THE DODD-FRANK ACT DID NOT CHANGE THE LAW ESTABLISHED IN *MORRISON* BECAUSE SECTION 929(P)(B) DEALS SOLELY WITH JURISDICTION.

A. *Morrison* Held that Courts Have Jurisdiction Over Extraterritorial Claims But The Anti-Fraud Provisions Are Not Applicable To Purchases or Sales of Securities Outside The United States.

In *Morrison*, the United States Supreme Court decided two issues: (1) the jurisdiction question: whether a federal court has jurisdiction to hear a case alleging extraterritorial violations of the securities laws; and (2) the merits question: whether the anti-fraud provisions of the U.S. Securities laws apply to sales of securities not made in the United States and not listed on a domestic exchange.

The Supreme Court answered the first question in the affirmative: "[t]he District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies." *Morrison* at 254.

As to the second question, the Court held that "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." *Morrison* at 273. In other words, although the district court in *Morrison* had jurisdiction to hear the claim, the plaintiffs could not state a claim because Section 10(b) does not apply to extraterritorial conduct. The Supreme Court stated its opinion clearly: the anti-fraud provisions of the U.S. Securities laws did not prohibit extraterritorial conduct, and that this was not an issue of jurisdiction. Because those substantive provisions of law have not been changed, this is still the law today.

B. Section 929 of Dodd-Frank Merely Codified the Supreme Court's Decision in *Morrison* That District Courts Have Jurisdiction Over Extraterritorial Claims, But it Does Not Change The Substantive Prohibitions of Any Law.

After the decision in *Morrison*, as explained at great length in the SEC's brief, Congress passed the Dodd-Frank Act. Section 929 of Dodd-Frank provides ("the "Jurisdiction Provision"), in relevant part:

> (b) ***EXTRATERRITORIAL JURISDICTION***.—The district courts of the United States and the United States courts of any Territory ***shall have jurisdiction of an action or proceeding*** brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving
>
> > (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
> >
> > (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

(*Id*. (emphasis added).)

This statutory language of the Jurisdiction Provision is clear and unambiguous—it grants district courts jurisdiction over certain extraterritorial claims, nothing more. The plain language of the statute merely codified the Supreme Court's holding in *Morrison* that district courts have "jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies." *Morrison* at 254. Thus, while the SEC claims that this section was a *Morrison* "fix", in fact the plain language of the Jurisdiction Provision makes clear it is a codification of the jurisdictional holding in *Morrison*. It also bears noting that nothing in *Morrison* needs to be fixed. Merely from the SEC's benighted perspective could it be interpreted that anything that limited their discretion was necessarily broken and needed to be "fixed."

"It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. U.S. Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 1030, 157 L. Ed. 2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000)). Here, the terms of Jurisdiction Provision are clear and not absurd. "Section 929P(b), on its face, merely addresses subject matter jurisdiction … rather than the substantive reach of the U.S. Securities Laws." *SEC v. Chicago Convention Center, LLC*, 961 F. Supp. 2d 905 (N.D. Ill. 2013). Because the Jurisdiction Provision's terms only grant jurisdiction, that section does not "fix" the SEC's inability to move forward with 90% of the sales at issue. *Morrison's* holding that the anti-fraud provisions of the Securities and Exchange Acts apply "only

in connection with the purchase or sale . . . of a security in the United States." *Morrison,* 561 U.S. at 273.

Because the statute's language is clear and unambiguous, the SEC's lengthy brief recounting statements made during the passing of the law is irrelevant. "When the meaning of the statute is clear, it is both unnecessary ***and improper*** to resort to legislative history to divine congressional intent." *Edwards v. Valdez*, 789 F.2d 1477, 1481 (10th Cir. 1986) (emphasis added). The Jurisdiction Provision is clear, must be applied according to its terms, and does nothing to cast doubt on Defendants' argument that the SEC cannot prevail on more than 90% of its claims.

Moreover, even if examining legislative history were appropriate—which it is not—the SEC's examination of legislative history relies entirely on one legislator's statements. The statements of a single legislator are an unreliable indication of the meaning of a statute, particularly where, as here, the statement conflicts with plain language of the statute. *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802, 809 (7th Cir. 2002) (holding that "undue weight" was accorded to the statement of a single congressman, whose statement was "at odds with the straightforward language of the statute.")

II. DESPITE THE SEC MAKING THE SAME ARGUMENTS THEY MAKE HERE IN MULTIPLE COURTS, NO COURT HAS HELD THAT SECTION 929 AMENDED THE ANTI-FRAUD PROVISIONS AS WOULD BE NECESSARY TO "FIX" THE SEC'S *MORRISON* ISSUES.

Starting on page 3 of the SEC's Reply, the SEC argues at length that the Jurisdiction Provision is a "fix" for the problem that U.S. Securities Laws do not apply when the purchases and sales of over 90% of the AdPacks took place outside the United States; assuming AdPacks are even securities. In claiming that the Supreme Court's holding in *Morrison* has been "fixed" by the Jurisdiction Provision, the SEC fails to note that in the years since the Jurisdiction Provision passed, not a single court has ruled as the SEC asks this Court to rule here. The SEC has advanced the exact same argument they advance here as in other cases—indeed multiple paragraphs in the SEC's brief here are word-for-word copies of paragraphs from the SEC's previous briefing in other

districts—multiple times. *See* Response to Defendants Motion to Dismiss at 16, *SEC v. Brown*, No. 14 C 6130 (N.D. Ill. Mar. 4, 2015). To the extent district courts have directly answered the question, they find the SEC's arguments lack merit.

For example, in *United States Sec. & Exch. Comm'n v. Battoo*, 158 F. Supp. 3d 676, 692 n.12 (N.D. Ill. 2016), the court addressed the SEC's alleged "*Morrison fix*" argument. As the court there simply and briefly stated: "There is no binding case law that decides whether the Dodd-Frank Act reinstated the conduct-and-effects test for actions brought by the SEC. **As the SEC acknowledges**, some courts have expressed doubt that Section 929P(b) overruled Morrison." (emphasis added). (*See id.* at n. 12). The *Battoo* opinion continues, "[T]he Supreme Court did not decide *Morrison* on jurisdictional grounds, but rather held that the pertinent securities law did not cover 'foreign' transactions." (*Id.* citing *SEC v. Chicago Convention Center, LLC*, 961 F. Supp. 2d 905 at 2–10 (N.D. Ill. 2013) (analyzing whether Section 929P(b) effectively superseded *Morrison*)).

The SEC has heard this response in other cases since the enactment of Dodd-Frank Jurisdiction Provision. In *SEC v. Brown*, No. 14 C 6130 (N.D. Ill. Mar. 4, 2015) the court found that:

> construing the Dodd-Frank Act to supersede *Morrison* may be problematic. The new language refers specifically to the "jurisdiction" of district courts and appears in the sections of the '*33 Act* and the '*34 Act* entitled "Jurisdiction of offenses and suits." On one reading of the new language, the Dodd-Frank Act merely confirmed the power of district courts to hear securities law claims without clearly expressing Congress' intent to apply the statutes to foreign transactions.

(*See also SEC v. Sabrdaran*, No. 14-cv-04825-JSC (N.D. Cal. Sept. 14, 2016) reaching same conclusion).

Without informing the Court that this argument has been presented but never accepted before, the SEC is asking this Court to be the first court in the nation to ignore the plain language of the statute and interpret the Jurisdiction Provision to effectively modify the anti-fraud provisions that were at issue in *Morrison* even though the plain language of the statute does nothing of the sort.

III. THE SEC'S ARGUMENT IS BOTH ILLOGICAL AND ABSURD.

The SEC suggests to the Court that the Jurisdiction Provision "fixed" their *Morrison* issue, which is to say it returned the law to the state it was at before the Supreme Court's opinion. This argument makes little sense for two reasons: (1) it makes little sense to "fix" a merits issue by passing a section affecting only jurisdiction; and (2) the pre-*Morrison* world to which the SEC asks the Court to return was characterized by a patchwork of complex, unpredictable, and inconsistent tests applied across the country.

A. If Congress Wanted To Reverse *Morrison*, the Supreme Court's Opinion Gave a Clear Roadmap of How to Do So, Which Congress Did Not Do.

As noted above, the Supreme Court's opinion in *Morrison* was clear and not difficult to comprehend: the courts of the United States have jurisdiction to hear extraterritorial claims but the anti-fraud provisions do not apply extraterritorially. The opinion could not have been more clear that jurisdiction was not the problem, the breadth of the substantive prohibition was. If Congress wanted to "fix" *Morrison*, which is to say statutorily reverse it, it merely needed to amend the anti-fraud statutes to express a clear intent that they apply to sales of securities outside the United States. It did not.

The SEC would have the Court believe that Congress "fixed" their *Morrison* issue not by addressing the substantive anti-fraud statutes at all. Instead, stupefyingly, according to the SEC's version, Congress "fixed" *Morrison* by passing a statute that, on its face, addressed only jurisdiction, the part the Supreme Court in *Morrison* said was not a problem, and not the limitation the Supreme Court recognized, namely that the anti-fraud sections of the U.S. Securities laws do not prohibit extraterritorial conduct.

This defies belief. Why would Congress, if it truly wanted to "fix" *Morrison*, pass a statute that "fixed" only what was not broken and left alone only what the SEC believes was?

B. There is No Conduct and Effects Test; There are multiple contradictory inconsistent Conduct, Effects, and Conduct and Effects Tests.

The SEC suggests to the Court that Congress intended to effectively reverse *Morrison* and reinstate the conduct and effects test. The Supreme Court's opinion in *Morrison* noted that the conducts and effects test "has produced a collection of tests … complex in formulation and unpredictable in application" (*Morrison*, 561 U.S. at 248). This is because, prior to *Morrison*, the "conduct and effects test" was the subject of a multiple circuit split including the Second[2], Third,[3] Eight[4] and Ninth Circuit Courts[5]. Thus, the SEC is asking this Court to believe that Congress, through a statute that references only jurisdiction, re-imposed a convoluted, contradictory test for determining the reach of extraterritoriality of the anti-fraud provisions. This improbable result is simply not supported by the text of statute that Congress passed.

CONCLUSION

For all the foregoing reasons, Defendant respectfully requests the Court decline the Commission's invitation to become the first court in the country to rule that the Jurisdiction Provision of the Dodd-Frank reversed the Supreme Court's ruling in *Morrison*. Defendant further requests that the Court rule consistent with his Opposition and exclude the over 90% of transactions that took place outside the United States from any of the relief sought by the SEC.

DATED this 24th day of October, 2016.

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[2] *Schoenbaum v. Firstbrook* 405 F.2d 200, 206,209 (2d Cir. 1968) (using the effects portion of the test) and *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d. Cir. 1972) (using the conduct portion of the test).
[3] *SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977)
[4] *Cont'l Grain (Austl.) Pty Ltd. v. Poe Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979).
[5] *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424 (9th Cir. 1983)

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, the foregoing **DEFENDANT'S SURREPLY TO PLAINTIFF'S REPLY IN SUPPORT OF PRELIMINARY INJUNCTION** was served upon the person(s) named below, at the address set out below by Electronic Filing:

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