ORAL ARGUMENT REQUESTED

No. 17-4059
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

CHARLES D. SCOVILLE,

Defendant-Appellant,

TRAFFIC MONSOON, LLC,

Defendant.

On Appeal from the United States District Court for the District of Utah
Case No. 2:16-cv-0832, Honorable District Judge Jill Parrish

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLEE

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

UNITED STATES COURT OF APPEALS
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On Appeal from the United States District Court for the District of Utah
Case No. 2:16-cv-0832, Honorable District Judge Jill Parrish

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLEE

PRELIMINARY STATEMENT

This interlocutory appeal has been taken from a Securities and Exchange Commission enforcement action charging Charles David Scoville and the Utah-based company that he wholly owned and controlled, Traffic Monsoon, LLC, with orchestrating a massive on-line securities fraud directed at Traffic Monsoon's members here and abroad (many located in the poorest countries in the world). Although Traffic Monsoon purported to be an internet-advertising business, in fact it was offering and selling securities in a Ponzi scheme. Traffic Monsoon's

revenues were generated almost entirely from the sale of nearly $872 million of these securities, the company had virtually no other revenue from any other source, and Traffic Monsoon paid returns on these securities almost entirely from the money contributed by new investors.

The Commission initially sought and obtained a temporary restraining order enjoining the defendants from continuing their scheme in violation of the securities laws, an asset freeze, and an order appointing a receiver over the frozen assets. The district court subsequently held three days of hearing and argument to determine whether the TRO and the asset freeze should be converted to a preliminary injunction. In support of the requested relief, the Commission provided the district court with financial records and testimony from a forensic accountant demonstrating that Scoville was operating a Ponzi scheme. The Commission also provided testimony from Scoville in which he admitted that he had withheld important information from investors about Traffic Monsoon's fraudulent operations, in particular the fact that Traffic Monsoon's revenues came almost entirely from the sale of additional securities. Scoville opposed the imposition of a preliminary injunction by arguing, among other things, that Traffic Monsoon was not a Ponzi scheme, that it was not selling a security, and that the Commission's enforcement authority did not extend to the company's sales to members who were located overseas. For essentially the same reasons, Scoville

moved to have the receivership set aside.

The district court granted the Commission's request for a preliminary injunction and denied Scoville's request to terminate the receivership, explaining that "Traffic Monsoon operated as a Ponzi scheme" (A2097), it funded the scheme through the sale of securities (A2102-04), and the defendants undertook this scheme with scienter (A2104-05). The court further explained that, notwithstanding the cross-border scope of the defendants' Ponzi scheme, the Commission could reach the entire scheme (including the sales to persons abroad) both because a substantial portion of the fraudulent conduct occurred in the United States and because Traffic Monsoon offered and sold the securities from within the United States.

COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction under Sections 20 and 22 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. 77t and 77v, and Sections 21 and 27 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78u and 78aa. The district court's interlocutory orders granting the Commission's motion for preliminary injunctive relief and denying Scoville's motion to set aside the receivership were entered on March 28, 2017. Scoville timely filed a notice of appeal on April 14, 2017. *See* FED. R. APP. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. 1292(a)(1) to consider the appeal of the order granting

the preliminary injunctive relief, and has pendent appellate jurisdiction to consider the order denying Scoville's motion to set aside the receivership. *See Streit v. County of Los Angeles*, 236 F.3d 552, 559 (9th Cir. 2001) (exercising pendent appellate jurisdiction where identical legal issues raised).

COUNTERSTATEMENT OF ISSUES PRESENTED

1. With respect to the preliminary relief that the district court ordered based on the Commission's claims under Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, did the district court act within its discretion in finding that Traffic Monsoon was likely a Ponzi scheme, that the defendants had sold securities in connection with undertaking the scheme, and that they had done so with scienter? *See* Argument Part I, *infra*.

2. Did the district court correctly conclude that the Commission's enforcement authority under Sections 17(a) and 10(b) encompasses the totality of the defendants' U.S.-orchestrated securities fraud, including the securities transactions involving victims who were overseas, given that: (1) Congress amended the securities laws in 2010 to authorize the Commission to maintain a securities-fraud action if substantial conduct in furtherance of the fraud occurs in the United States; and (2) Traffic Monsoon offered and sold all of the securities from within the United States? *See* Argument Part II, *infra*.

COUNTERSTATEMENT OF THE CASE

A. Facts

1. Scoville is a Utah resident who had a series of failed internet-advertising companies before launching Traffic Monsoon.

Scoville is a U.S. citizen who, for all periods relevant to this appeal (September 2014-July 2016), resided in Utah. A1010. Although Scoville has suggested that he was actually a resident of the United Kingdom during part of this period (A527), the record demonstrates otherwise: before and during the relevant period, Scoville rented an apartment in Murray, Utah ("Murray Apartment") (A606, A1010-1011); in 2014 and 2015, he filed federal and Utah state taxes in which he stated that he was a resident of Utah for the entire year (A613, A1141, A1147); and in February 2016, in connection with the formation of a new U.K. entity (*see* Part A(6), *infra*), Scoville listed himself as an American citizen who was usually a resident in America (A597-600, A1073). *See also* A609 (court-appointed receiver testifying that bank account records and receipts show that Scoville was "in Utah every month for at least the last year"); A297 (Scoville's only bank account in Utah); A1011 (Scoville renewed lease on the Murray Apartment in August 2016 and kept his vehicle there).

In the four years before launching Traffic Monsoon, Scoville established at least nine separate internet-based advertising entities. A296-300. For each entity, Scoville sought advertisers who would embed their internet advertisements on the

entity's web page (these embedded ads are called "banner ads") and Scoville would in turn incentivize third parties to click on the advertisements by paying them a commission. A300; *see also* A724; *see generally* A312, A577. Each of these businesses quickly failed, however. *See* A297 ("after a number of months went by, no one was using the services"); A300.

2. In September 2014, Scoville established Traffic Monsoon in Utah.

On September 29, 2014, Scoville established Traffic Monsoon by registering it with the State of Utah as a limited liability company. A592, A1007, A1022-23. The registration and organizational documents listed Scoville's Murray Apartment as the company's address. A593-95, A1019, A1023. Further, Traffic Monsoon's website identified the Murray Apartment as the company's location (A595-96, A1027), Scoville admitted during testimony that the company was located at the Murray Apartment (A303), and the apartment contained business records and other papers related to the company (A608, A611-12).

Scoville was Traffic Monsoon's sole owner and operator (A302, A593, A1007), and the company had no employees (although it contracted with a call-center operator to respond to phone inquiries from Traffic Monsoon members and a Russian computer programmer to provide logistical support). A303. As Scoville explained, he and Traffic Monsoon were one and "the same." A311.

Scoville operated Traffic Monsoon entirely through U.S.-based computer

servers. A614-15, A804-06. These servers housed and operated the Traffic Monsoon website (A804) through which "all people who were involved in Traffic Monsoon went … to do their business, whether [they] were located here in the states or overseas" (A575). Among other things, these servers sent the electronic communications that offered and completed transactions with third parties, processed the transactions, and also stored all the resulting data and other financial records. A614-15, A804-06. Scoville, as the exclusive administrator of the Traffic Monsoon servers (A653), could access at any time all of the data about the company's transactions, could reverse transactions or allocate revenue received from the transactions, and could access the company's balance sheet and income statement. A653-54.

3. Traffic Monsoon claimed to be an internet-advertising business.

Scoville represented on his website that Traffic Monsoon was established to "provide high quality [internet] ad services for affordable prices, and share revenues for a perfect winning combination[.]" A459; *see also* A385-86 (Traffic Monsoon's own website described it as an "advertising and revenue sharing company"). To do this, Traffic Monsoon purported to combine a pay-to-click program—which, similar to Scoville's earlier failed ventures, paid Traffic Monsoon members to click on advertisers' website banner advertisements (A312)—and a traffic-exchange program—which required members to browse the

websites of other members for a specified period of time to earn credit. A304, A308, A809. Moreover, Traffic Monsoon operated these programs within a "closed environment" in which the advertisements were posted on Traffic Monsoon's website for viewing by members. A576.

Generally speaking, Traffic Monsoon's closed environment worked as follows. Anyone looking to participate in the scheme (or even just buy an advertising service) had to create their own account through the company's website. A312, A577-78; *see also* A304. Once enrolled as a member and signed into the member's account using individualized log-in credentials, the member's personalized "dashboard" page would appear. A311, A578. Each member's dashboard would show the specific statistics for that member's account, such as the purchases made and credits earned (A311, A578), as well as a rotating series of other members' banner advertisements to click on (A308; *see also* A578). Further, a member's dashboard would include functionality allowing the member to request that any credits be used to buy additional Traffic Monsoon products or cashed out through an e-payment processor such as PayPal. *See also* A331-32, A581-83.

4. The AdPack comprised over 98 percent of Traffic Monsoon's sales.

Traffic Monsoon claimed to sell a wide variety of internet-advertising products, but the AdPack "was far and away" what members purchased. A580, A836-37.

a. The AdPack included a revenue-sharing opportunity.

Traffic Monsoon represented that an AdPack comprised three things: (1) 1,000 visitors to the purchaser's webpage; (2) 20 clicks to the purchaser's banner advertisement; and (3) the ability to share in Traffic Monsoon's revenue, up to a maximum amount of $55 per AdPack. A580-82. Although members could have purchased the two internet advertising services for only $10.95, they were willing to pay $50 per AdPack for the addition of the revenue-sharing option (*i.e.*, a $39 additional cost just for the revenue-sharing). A315-16, A581.[1]

According to Traffic Monsoon, AdPack purchasers could qualify for any given 24-hour period to share in Traffic Monsoon's revenue for that day by clicking on a limited number of banner advertisements. A374, A444. For all but the last month that Traffic Monsoon was operational, Scoville required members to qualify on a daily basis by clicking 10 banner advertisements each day and viewing each website the advertisements opened for five seconds; Scoville raised this to 50 clicks in July 2016. A320, A374, A581. The total time a member needed to spend clicking and viewing to qualify was less than 5 minutes a day. A586. Moreover, a member's obligation to click on 10 (or later 50) advertisements daily did not scale with the number of AdPacks purchased—the total number of daily clicks remained

[1] By his own admission, Scoville's selection of the $50 AdPack cost and the $55 maximum return per AdPack was arbitrary. A317 (explaining that $50 "was a good, even, round number"); A322 ("So I just thought, you know, 55 seems to be decent.").

constant whether the member owned one AdPack or 1,000. A586.

Although Scoville has argued that there was no guarantee that a member would receive any revenue-sharing return (*see generally* A2100), Scoville operated Traffic Monsoon to create a contrary impression with members. Traffic Monsoon's website stated that "[a]ll our members have equal opportunity to benefit from an attractive revenue sharing plan on a long-term basis." A386; *see also* A388 (representing that "you can't go wrong" with "our advertising & sharing plans"). To ensure that members actually viewed the revenue sharing as an attractive, long-term opportunity, Scoville—as the district court found—typically paid members $1 per day that they qualified (A2068), meaning that in about 55 days they received a $55 maximum possible return per AdPack, which reflected repayment of their $50 purchase price plus a $5 gain (*i.e.*, a 10 percent return in only 55 days). To achieve such consistent returns, Scoville used whatever funds Traffic Monsoon had available "from all the sales since [the company] started"—and not, contrary to his representation to members, just the revenue during the 24-hour period that the member was qualified. A219-20.

Additionally, Traffic Monsoon offered members a second way to earn money through the AdPack program: Scoville paid commissions to members for recruiting new members to Traffic Monsoon. A583. For every person a member recruited, that member "would receive a ten-percent commission, and the

commission would run on *every* purchase that th[e] person made from the time they became a member until they were done being a member[.]" A583 (emphasis added), A697, A888.

Finally, when members earned revenue-sharing returns or commissions, these appeared as credits on the members' dashboard. As described below, members typically used these credits to acquire new AdPacks that could in turn generate a new $55 return. *See* A328, A892. Alternatively, members could make a withdrawal in that amount, which would then result in Traffic Monsoon converting the credits into real currency and transferring that amount into the member's account at PayPal or a similar e-payment-processing company. *See* A335-39.

b. Members acquired AdPacks as investments.

Interest in the AdPack scheme was particularly high in some of the poorest countries in the world—countries such as Bangladesh, Venezuela, and Morocco—where the potential easy returns offered by the AdPack program could be especially attractive. A379-80. The record demonstrates that these and other members primarily viewed the AdPacks as investments producing financial returns, and not as an internet advertising product:

- As discussed above, members paid $50 for each AdPack when they could have purchased the two underlying advertising services for only $10.95 (A713-16), representing a $39 premium for a payout of $55 (and an investment return of $5) in only 55 days (A581, A699).

- Members continued to purchase AdPacks—frequently by the hundreds and thousands (A586, A1510, A1512)—when they had neither received nor used the advertising services to which they were already entitled from their earlier AdPack purchases. *See*, *e.g.*, A744-749. Indeed, members continued to purchase AdPacks even though, by Traffic Monsoon's own description, the company had delivered only 10 percent of the web visits that it was contractually obligated to provide. A645-47.

- Even though members were not using their advertising services, many continued to fulfill their web-browsing obligations to qualify for their investment return (A821-26)—in fact, nearly 99 percent of AdPack purchasers qualified so that they could receive their revenue-sharing returns (A825).

- When AdPacks matured by hitting the $55 ceiling, members commonly used the resulting Traffic Monsoon credits to immediately acquire new AdPacks—thereby enabling them to receive additional returns—rather than cashing out or even timing their additional purchases to coincide with their use of the underlying advertising services. A583, A813-15, A873.

- "[A] lot" of the members who purchased AdPacks had no use for the advertising services because they did not have their own website to promote and thus no need for banner advertisements to tout their non-existent website.[2] A584.

[2] Scoville was aware of this, as Traffic Monsoon would provide these members with a Traffic Monsoon banner advertisement so that they could still participate in the AdPack program. A584 (noting that a member was "required to have a banner ad to participate in the AdPack program").

- Hundreds of AdPack purchasers have contacted the court-appointed receiver describing themselves as investors. A638-40; *see also* A641-42. This is consistent with the third-party AdPack internet descriptions, which characterize the AdPack as a way to earn money, not as a way to advertise a website online. A648-52, A695, A698. This is also consistent with Scoville's own testimony in which he conceded that many members have "no other source of income" except the AdPacks. A336.[3]

5. Traffic Monsoon was able to keep the scheme going because its explosive growth allowed it to use the revenue from new AdPack purchases to pay returns on all of the outstanding AdPacks that had not yet hit the $55 ceiling.

Traffic Monsoon experienced explosive growth due to the AdPack. A580, A590. For example, from October 2014 until January 2016, Traffic Monsoon's monthly revenue rose from under $100,000 to nearly $30 million, and nearly 99 percent of this revenue resulted from AdPack sales. A589.

When sending new money to Traffic Monsoon to purchase AdPacks (as compared to using existing credits to make rollover purchases), members generally used PayPal. A582, A616-17; *see also* A318, A811. Traffic Monsoon would then typically pool all of the incoming money in the company's PayPal accounts until

[3] Although Scoville during the preliminary-injunction hearing offered testimony from two members who claimed that they had acquired the AdPacks solely for the advertising services, the Commission presented evidence suggesting otherwise. One member had expended a total of $2,050 to acquire 41 AdPacks, subsequently rolled the returns from those into purchases of another 850 AdPacks even though he had not used all of the underlying advertising services, and ultimately managed to withdrawal $5,800 (a net gain of $3,750). A897-99. The second member conducted seminars to promote Traffic Monsoon and, during one of those seminars where Scoville made an appearance, the member represented to participants: "if you can click a mouse, you can get paid." A774.

the money was needed for a member withdrawal or an expenditure. A318, A588-89, A617. Moreover, although Traffic Monsoon might display a member's AdPack returns as credits on the member's dashboard (or similarly deduct from those credits when the member made a new rollover AdPack purchase), no actual funds were segregated from the pooled money or otherwise specifically attributed to a member's account unless and until the member actually made a withdrawal. A323, A326, A335, A588-89; *see generally* A331-32, A810.

Further, when Traffic Monsoon did pay returns to members (either in the form of credits or actual money transfers), those returns were "drawn almost exclusively from the sale of additional AdPacks." A590. Indeed, the AdPack revenue-sharing returns made to members were based on $872 million in revenue from AdPack sales (both new-money and rollover sales), but *only* $3.8 million of non-AdPack product sales. A836-37. Scoville never disclosed this fact to members, and even falsely claimed on his webpage that "[w]e sell 1 service LOWER in demand which includes a profit sharing position, and share profits from the services with HIGHER demand with those who click a minimum of 10 ads per day." A459 (capitalization in original).

6. In early 2016, PayPal froze Traffic Monsoon's account believing the company was a Ponzi scheme and Scoville sought to open a U.K. affiliate as a dummy entity so that he could use a U.K. e-payment processor.

Until early 2016, Traffic Monsoon used PayPal almost exclusively to receive

new funds from members, to pool those funds, and to cover member withdrawals. A318, A334, A588-89, A616-17. But on January 11, 2016, PayPal notified Scoville that it was freezing Traffic Monsoon's accounts because PayPal had detected suspicious factors indicating a Ponzi scheme. A336-37, A589, A617. As a result of the freeze, Scoville was unable to access the funds pooled at PayPal to fund member withdrawals.[4] A336-37, A589. The day after the freeze was imposed, Scoville posted a video on the internet claiming that Traffic Monsoon had decided to transition from PayPal and that this would cause a delay in processing member withdrawals, but Scoville intentionally withheld any mention of the PayPal freeze until a month later. A337-38 ("But I didn't want to up front tell them exactly what had gone on ….").

With the PayPal freeze in place, Scoville shifted to using other e-payment processors, including Allied Wallet, Inc. A603-04, A618-19. According to Scoville, Allied Wallet "required" a corporate "registration in the U.K." A303, A604, A1614. As a result, in February 2016 Scoville took control of an entity called Traffic Monsoon Global Limited which had been formed only two months earlier by several of his friends. A295-96, A303, A597-98, A1614-15. Although the U.K. corporate registration documents listed a London address for the entity, no actual Traffic Monsoon business operations were conducted at this address

[4] Before the freeze took effect, Scoville managed to transfer some money from Traffic Monsoon's PayPal account to his personal account. A616.

(A303, A606) and Scoville himself admitted that he had no idea what went on there (A1618; *see also* A1616).

The PayPal freeze remained in place until July 11, 2016. A373, A703. When the freeze expired, there was approximately $46.6 million in Traffic Monsoon's Pay Pal accounts. A373. Over the next 10 days, Scoville transferred $23 million "in $100,000 increments, the maximum allowed by PayPal," to Traffic Monsoon's bank account and then immediately transferred $21 million of those funds into his own personal bank account. A373; *see also* A422-24, A616-17. "During the same period, Scoville attempted to withdraw an additional $10 million, however, PayPal reversed the transactions." A374. By the time the court-appointed receiver took possession of the PayPal accounts, there was only approximately $20 million remaining.[5] A703.

7. Traffic Monsoon's business model was unsustainable and it has caused substantial member losses.

Traffic Monsoon was not a sustainable business. A852. For every $50 that Traffic Monsoon received for an AdPack purchase (whether from new money coming into Traffic Monsoon or a rollover of member credits), "the company would refund $55, for a $5 loss" for each AdPack. A811. As the receiver's forensic accountant testified, "[t]hat $5 loss would increase exponentially as the

[5] From among the various bank accounts and e-payment processors, the receiver now has control of approximately $50-60 million in frozen Traffic Monsoon assets. A673.

repurchases would occur. And because of that, in order to pay out [on] those AdPack purchases, if there was going to be withdrawals, new money would be required to do that." A814; *see also* A813.

Further, the potential member losses were rapidly accumulating because members were using revenue-sharing credits from their AdPacks to continually repurchase more AdPacks. A853-61, A988, A994. This is so in at least three critical respects. *First*, members were receiving revenue-sharing credit for these rolled over purchases when in fact there was no new money backing up these revenue credits. A988. *Second*, each rollover purchase reflected an additional $5 loss to the company. A811. And *third*, on many of these rollover transactions, Traffic Monsoon was losing an additional $5 as a commission to the member who originally referred the purchaser. *See, e.g.*, A865-67, A887-88.

The scheme's collapse was inevitable. Had the Commission not stepped in, at some future point Scoville would have been unable to cover member withdrawals as Traffic Monsoon's outstanding obligations to members continued to grow based primarily on rollover purchases using members' credits. When Scoville could not cover the outstanding obligations, members would stop both the new-money and rollover purchases, so no additional amounts would be credited to members on AdPacks that had not fully matured, making the money invested in these purchases permanently lost and the outstanding AdPacks essentially

"worthless." A949.

Even though the Traffic Monsoon scheme had not yet collapsed when the Commission brought this enforcement action, the potential member losses are still substantial. When this case was filed, Traffic Monsoon had taken in a total of approximately $176 million from members' purchases with new money (not credits), and had transferred out $88.4 million to members as returns and commissions. A844-45. Yet investors were owed $34.3 million based on outstanding Traffic Monsoon credits and were reasonably anticipating at least another $243.9 million of revenue-sharing returns on outstanding AdPacks. A848-49. In addition to these amounts, Traffic Monsoon would also be obligated to spend millions more to acquire and deliver the tens of billions of website visits that it still owes to its members. *See generally* A377.

B. District Court Proceedings

1. The Commission filed this enforcement action against the defendants and obtained a temporary restraining order and the appointment of a receiver.

On July 26, 2016, the Commission filed this enforcement action against the defendants. A3. At that point, Scoville had sold approximately 17.5 million AdPacks (for a total of $872.4 million in new money and rolled-over credits) to more than 160,000 investors worldwide, of which approximately 1.24 million (for a total of $61.8 million) were sold to members who were in the United States.

A378, A1402.

The Commission's complaint alleged, among other things, that Traffic Monsoon's advertising business is simply a façade to obscure the reality that the AdPacks are securities that the defendants were offering and selling in a Ponzi scheme. A14; *see also* A68. Based on this misconduct, the complaint alleged that the defendants violated Section 17(a)(1) and (a)(3) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5(a) and (c) thereunder. A28-29.

Concurrently, the Commission requested a temporary restraining order that enjoined the defendants from continuing their securities-fraud violations and froze their assets, as well as order that appointed a receiver over those assets. A3. In support of this emergency relief, the Commission included affidavits and other documentation to establish a *prima facie* case that the defendants were engaged in violations of the antifraud provisions and that the requested relief was necessary so that the assets could be marshalled and preserved for eventual distribution to the victims of the defendants' Ponzi scheme.

On July 26, 2016, the district court granted the Commission's request to enjoin the defendants from further violations and to temporarily freeze their assets; two days later the court granted the Commission's request to appoint a receiver. A3, A285-89, A290-91.

2. After a multi-day hearing, the district court granted the Commission's request for a preliminary injunction and denied Scoville's motion to terminate the receivership.

The Commission sought a preliminary injunction that would continue the court's temporary emergency relief through the pendency of the litigation. Scoville opposed the request and separately moved to have the receivership set aside. A5. Scoville argued, among other things, that (i) Traffic Monsoon was not operating a Ponzi scheme, (ii) the AdPacks were not securities, and (iii) the sales of the AdPacks to overseas purchasers were beyond the scope of the federal securities laws.

Over three days in November 2016, the district court heard witness testimony, received evidence, and heard the parties' legal arguments concerning the pending motions. During the hearing, the court-appointed receiver testified that the AdPacks' revenue-sharing returns were paid almost exclusively from the sale of additional AdPacks (A590) and that many of her communications with members revealed that they viewed the AdPack as an investment opportunity (638-42). In addition, a forensic accountant testified that the Traffic Monsoon business model was entirely contingent on new investments of money from members, and that this was ultimately not sustainable. A947, A949, A990-91.

On March 28, 2017, the court granted the Commission's motion for a preliminary injunction and denied Scoville's motion to terminate the receivership.

A2064. In doing so, the court determined that the Commission had established that the defendants were likely orchestrating a Ponzi scheme and the AdPacks were likely securities. A2096-2105. The court also rejected Scoville's contention that the antifraud provisions do not apply to AdPack sales to persons who were overseas, concluding (among other things) that Congress had amended the securities laws in 2010 to expand the Commission's enforcement authority with respect to cross-border securities frauds and that this expanded authority reached all of the defendants' AdPack sales. A2078-91.

SUMMARY OF ARGUMENT

This appeal concerns whether the district court acted within its discretion by issuing a preliminary injunction and declining to set aside a receivership.

Part I: As the district court determined, the Commission established a likelihood that it would succeed in establishing that the defendants violated Section 17(a)(1) and (a)(3) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5(a) and (c) thereunder. Specifically, the Commission's evidence (which included testimony from a forensic accountant as well as substantial documentary evidence) demonstrated that: (1) by operating Traffic Monsoon as a Ponzi scheme, the defendants employed a scheme to defraud and engaged in a fraudulent course of business; (2) the AdPacks that were offered and sold as part of the fraud were investment contracts, and thus securities; and (3) by engaging in the Ponzi scheme

and making other misstatements and omissions, the defendants acted with scienter.

Part II: As the district court concluded, Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act reach the entirety of the defendants' cross-border Ponzi scheme, including the AdPack transactions with investors who were overseas, because Congress in 2010 amended the securities laws to clarify that the Commission's antifraud enforcement authority extends to transnational securities frauds (like the scheme in this case) that involve substantial conduct within the United States in furtherance of the fraud. Moreover, the Commission has subsequently adopted a regulation clarifying the effect of the statutory amendments, and that regulation is entitled to deference. And in any event, as the district court found, the defendants offered and sold all of the AdPacks within the United States (irrespective of where the investors were when they committed to the transactions), and this is sufficient to provide the Commission with enforcement authority over the entirety of the defendants' Ponzi scheme.

STANDARD OF REVIEW

This Court reviews a district court's order granting preliminary injunctive relief and denying a motion to vacate a receivership for abuse of discretion. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1243 (10th Cir. 2001); *Skirvin v. Mesta*, 141 F.2d 668, 674 (10th Cir. 1944). "A district court abuses its discretion if it commits an error of law, or is clearly erroneous in its

preliminary factual findings." *Prairie Bank*, 253 F.3d at 1243 (internal quotation marks and citations omitted)

This Court will defer to an agency's construction of a statute that the agency administers when the statute is silent or ambiguous on the question at issue and the agency's reading is neither arbitrary, capricious, nor manifestly contrary to the statute. *See, e.g.*, *Herrera-Castillo v. Holder*, 573 F.3d 1004, 1007 (10th Cir. 2009) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)). Deference is required if "Congress delegated authority to the agency generally to make rules carrying the force of law" and the agency's interpretation of the statute was issued pursuant to that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

ARGUMENT

I. Contrary to Scoville's contentions, the district court acted within its discretion in concluding that the Commission established a likelihood of success on its securities-fraud claims to justify the preliminary injunction and receivership.

A person violates Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c) thereunder if he "directly or indirectly" [1] "employ[s] any device, scheme or artifice to defraud," or "engage[s] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, [2] in connection with the purchase or sale of any security[,]" and [3] does so with scienter. Essentially the same elements are required under Securities Act Sections 17(a)(1) and (a)(3) in the offer and sale of a security, though no showing of scienter is required under subsection (a)(3). *See Aaron v. SEC*, 446 U.S. 680, 701-02 (1980).

The district court properly determined that each of the three requirements to establish a securities-law violation exists here.

A. The defendants employed a scheme to defraud and engaged in a fraudulent course of business by operating Traffic Monsoon as a Ponzi scheme.

Scoville does not challenge the district court's determination that "the operation of a Ponzi scheme will likely violate the prohibitions against employing 'any device, scheme, or artifice to defraud' or engaging 'in any act, practice, or course of business which operates or would operate as a fraud or deceit' contained in Rule 10b-(5)(a),(c) and Section 17a(1),(3)." A2099. *See generally Mosier v.*

Callister, Nebeker & McCullough, 546 F.3d 1271, 1273 n.2 (10th Cir. 2008) (Ponzi scheme is a "fraudulent investment scheme") (quoting *Ponzi scheme*, BLACK'S LAW DICTIONARY 1198 (8th ed. 2004)); *In re Armstrong*, 291 F.3d 517, 520 n.3 (8th Cir. 2002) ("fraudulent business venture[]"). Rather, Scoville contends (at 46-49) only that Traffic Monsoon was not a Ponzi scheme.

This Court has described a Ponzi scheme as:

> [a] fraudulent investment scheme in which money contributed by later investors generates artificially high dividends for the original investors, whose example attracts even larger investments. Money from the new investors is used directly to repay or pay interest to earlier investors, usually without any operation or revenue-producing activity other than the continual raising of new funds.

Mosier, 546 F.3d at 1273, n.2. And although this Court has also utilized other definitions with minor variations, "those definitions all agree that the central characteristic of a Ponzi scheme is that returns are not based upon the underlying business activity. Instead, money from new investors is used to pay earlier investors." A2097. *See also In re Twin Peaks Financial Services, Inc.*, 516 B.R. 651, 655 (Bankr. D. Utah 2014).

Applying this description (which Scoville does not challenge, *see* Br. 46-47), the district court appropriately determined that "Traffic Monsoon operated as a Ponzi scheme." A2097. As the district court found, the profits and commissions generated by the AdPack did not come from any underlying Traffic Monsoon business activity, but instead "were derived from subsequent investments in

AdPacks by later purchasers." A2097. The district court also found that, in classic Ponzi-scheme fashion, the earlier returns were used to entice new investments: "[t]he impressive 66% (or more) annual return obtained by early AdPack investors [who during the year continuously rolled over their AdPacks when they matured] served as an example that both attracted new investors and convinced existing investors to roll over their AdPack returns into new AdPacks." A2097-98. These findings, grounded in the evidence, support the district court's determination that Traffic Monsoon is a Ponzi scheme.

None of the challenges that Scoville raises undermines the district court's determination. Scoville contends (at 46) that Traffic Monsoon is not a Ponzi scheme because it "did not limit its available revenue sharing to only 'original members.'" But this Court has never said that "only" the original investors in a Ponzi scheme may receive returns from the new investments, and Scoville does not cite any case supporting such a requirement.

Scoville also argues that the absence of a "guarantee of any revenue sharing" is relevant, but a Ponzi scheme does not require a guaranteed return. To be sure, this Court has said that "[*t*]*ypically*, investors are promised large returns," *In re. M&L Business Machine Co.*, 84 F.3d 1330, 1332 n.1 (10th Cir. 1996) (citation omitted and emphasis added), but this Court has also labeled a fraudulent investment scheme a Ponzi scheme where there was no actual promise of returns,

see Sender v. Simon, 84 F.3d 1299 (10th Cir. 1996). *See also In re Manhattan Inv. Fund, Ltd.*, 397 B.R. 1, 12 (S.D.N.Y. 2007) (rejecting argument that the absence of a promised return was dispositive of Ponzi-scheme classification). Relatedly, Scoville appears to argue (at 52) that Traffic Monsoon was not a Ponzi scheme because it had "fully disclosed everything to its members." But this contention fails because, as the district court found, there was nothing approaching full disclosure here. A2100 ("The deception at the heart of the Traffic Monsoon Ponzi scheme is that it concealed the fact that almost all of the returns from the AdPacks were derived from subsequent AdPack purchases.").

Lastly, Scoville seems to argue (at 59) that there was no Ponzi scheme here because two Traffic Monsoon members testified that Traffic Monsoon's advertising services helped promote their internet businesses. But even if some investors may have benefited from services that Traffic Monsoon provided, that does not change the fact that the company primarily operated as a Ponzi scheme. *See, e.g.*, *In re Twin Peaks Financial Services, Inc.*, 516 B.R. at 655 (explaining that "[t]he fact that an investment scheme may have some legitimate business operations is not determinative" and if "the payments to investors are funded by newly attracted investors, then the debtor is operating a Ponzi scheme"). *See also* footnote 3, *supra* (discussing Commission evidence indicating that Scoville's two witnesses were primarily motivated to purchase AdPacks for the revenue-sharing

returns and commissions).

B. Defendants undertook the Traffic Monsoon Ponzi scheme in connection with the purchase and sale of securities, the AdPacks.

Contrary to Scoville's contention, the AdPacks are securities and, thus, Traffic Monsoon's Ponzi scheme (which centered on AdPack transactions) was undertaken in connection with the purchase and sale of securities.[6] "Congress 'painted with a broad brush' in defining 'security,' so as to capture under the ambit of the [securities laws] the 'countless and variable schemes devised by those who seek to use the money of others on the promise of profits." *See SEC v. Thompson*, 732 F.3d 1151, 1157 (10th Cir. 2013) (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 62 (1990)). Included within the Acts' broad definitions of "security" are investment contracts. *See* Securities Act § 2(a)(1); Exchange Act § 3(a)(10). This Court—relying on the Supreme Court's decision in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946)—has adopted a three-part test for an investment contract: "(1) an investment, (2) in a common enterprise, (3) with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." *SEC v. Shields*, 744 F.3d 633, 642, n.7 (10th Cir. 2014) (internal citation omitted).

[6] Scoville erroneously argues that the existence of a security is a subject-matter-jurisdiction requirement, rather than a merits issue. But this is incorrect; the subject-matter-jurisdiction provisions in neither the Securities Act nor the Exchange Act includes language limiting jurisdiction to matters involving securities. *See* Securities Act § 22; Exchange Act § 27. *See, e.g., Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006). *See also infra* Part II(A)(1)(b) (discussing *Arbaugh*).

The district court correctly concluded that the AdPacks are securities under the three-part investment-contract test. *First*, the economic realities—as demonstrated by the Commission's evidence—confirm that the AdPacks were investments and that many Traffic Monsoon members viewed them as such. *See, e.g.*, *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564, 575 (10th Cir. 1991) (explaining that "[t]he proper inquiry was whether the economic realities of the transaction as a whole demonstrated an investment"). And while Scoville argues (at 24) that "there was no 'investment of money'" and that members were merely "purchas[ing] advertising packages," the district court appropriately found that the Commission's evidence demonstrated otherwise:

> The fact that members received some services for the AdPack purchases, however, does not mean that the AdPack was not an investment. The same services available through the AdPack could be purchased à la carte for just $10.95. The only explanation for why members would pay an additional $39.05 for the same services was that they wanted to invest their money to obtain the generous returns obtained by early investors. The evidence clearly points to the fact that Traffic Monsoon's explosive growth was driven by members purchasing and repurchasing AdPacks in order to obtain the incredible returns on their investments, not by intense demand for Traffic Monsoon's services. Indeed, many AdPack purchasers had no interest in the website visits Traffic Monsoon offered, and Traffic Monsoon only ever delivered a fraction of the clicks it promised to deliver. In short, the economic reality of the AdPack purchases is that they were investments.

A2103.

Second, the members' AdPack investments were part of a common

enterprise. To determine whether a common enterprise exists, this Court again looks to "the 'economic reality' of the transactions that occurred." *McGill v. Am. Land & Exploration Co.*, 776 F.2d 923, 925 (10th Cir. 1985) (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)).

> If … a transaction is purely commercial in nature (for example, a commercial loan or a sale of assets), then it does not give rise to a 'common enterprise' or a 'security.' If, on the other hand, a transaction is in reality an investment …, then it creates a 'common enterprise'….

McGill, 776 F.2d at 925. Given (as the district court found) that members purchased the AdPacks as investments, the common-enterprise requirement is satisfied. And additional facts confirm that the AdPack scheme was a common enterprise. The money members used to purchase AdPacks was pooled together, and the revenue-sharing returns were paid from these pooled funds and tied directly to the number of qualifying AdPacks that the member owned. *See Revak v. SEC Realty Corp.*, 18 F.3d 81, 87 (2d Cir. 1994) (horizontal commonality—"the tying of each individual investor's fortunes to the fortunes of the other investors by pooling of assets, usually combined with the pro-rata distribution of profits"—is an indicium of a common enterprise). Further, the members' returns were linked both to the efforts and returns of the defendants: as described earlier, Scoville established and operated Traffic Monsoon and the AdPack program, without which there would have been no funds for members "revenue sharing" or commissions;

and the members' returns were a portion of the funds that Traffic Monsoon accumulated. *See id.* at 87-88 (vertical commonality—the "fortunes of the investors" being linked either to the efforts or fortunes of the promoter—is an indicium of a common enterprise).

Third, the defendants alone contributed the entrepreneurial and managerial efforts that generated the revenue-sharing returns. *See Crowley v. Montgomery Ward & Co.*, 570 F.2d 880, 877 (10th Cir. 1975) ("[T]he test is whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.") (internal quotation marks and citation omitted). The district court properly rejected Scoville's argument (at 24) that this factor is not present because members needed to spend a few minutes each day clicking on banner ads to qualify their AdPacks:

> [T]he efforts of the members in visiting websites for about four minutes a day was not a significant contribution to the success or failure of the AdPack scheme. Over 98% of Traffic Monsoon's revenue sharing came from the sale of AdPacks. The success of the AdPack sales had nothing to do with the members' efforts and depended solely on Mr. Scoville's acumen in promoting them.

A2104.

Although the AdPacks qualify as investment contracts under the three-part *Howey* test, Scoville nonetheless argues (at 25) that the AdPacks are not securities because of the "contingent nature" of any potential returns—*i.e.*, reaching a $55 return on any AdPack purchase was dependent on Traffic Monsoon generating

revenue and on the member qualifying the AdPack each day for 55 days. But as the D.C. Circuit has explained, "[v]ery few investments 'guarantee' a return—all that *Howey* requires is a 'reasonable expectation of profits.'" *SEC v. Int'l Loan Network*, 968 F.2d 1304, 1308 (D.C. Cir. 1992) (quoting *United Hous. Found, Inc.. v. Forman*, 421 U.S. 837, 852 (1975)). Moreover, as the district court found, members had a reasonable expectation of profits given that, for each day they qualified their AdPacks, they "typically received about $1 per day in revenue sharing per AdPack purchased." A2068.

Scoville's arguement (at 27) that even if the AdPacks are securities, he should be dismissed from the case because Traffic Monstoon, not he, offered or sold the AdPacks fails both because Scoville did not raise this issue below, thereby waiving it on appeal, and because neither Section 17(a) nor Section 10(b) restricts liability to only those who directly offer, purchase, or sell a security. Under Section 10(b), for instance, it is sufficient that a defendant's fraudulent conduct occurred in connection with a securities transaction. *See, e.g.*, *SEC v. Pirate Investor LLC*, 580 F.3d 233, 244 (4th Cir. 2009) ("a fraud is in connection with a securities transaction whenever it coincides with a transaction") (internal quotation marks and citation omitted); *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993) ("the in connection with requirement is met if the fraud alleged somehow touches upon or has some nexus with any securities transaction")

(internal quotation marks and citation omitted). Further, given that Scoville alone controlled Traffic Monsoon, he would have control-person liability for the company's securities-law violations. *See, e.g.*, Securities Act §15(a); Exchange Act § 20(a).

Accordingly, the district court correctly determined that the AdPacks are securities and that the defendants' Ponzi scheme was undertaken in connection with the purchase and sale of securities.

C. The defendants acted with scienter.

Scoville erroneously contends (at 49) that the district court "never actually determined that Traffic Monsoon had any fraudulent intent."

As discussed above, Section 17(a)(1) and Section 10(b) require scienter, which the Supreme Court has described as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hockfelder*, 425 U.S. 185, 193-94, n.12 (1976).[7] Further, this Court has held that recklessness satisfies the scienter requirement. *See, e.g.*, *Hackbart v. Holmes*, 675 F.2d 1114, 1117 (10th Cir. 1982). Recklessness is "conduct that is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Id.* at 1118 (internal quotation marks and citation omitted).

[7] As also discussed above, the district court did not need to find scienter to determine that the defendants likely violated Section 17(a)(3).

Moreover, Scoville's scienter can be attributed to Traffic Monsoon since he was its only member and he exercised exclusive control. *See, e.g.*, *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1106 (10th Cir. 2003). *See also* A311 (Scoville testifying that he and Traffic Monsoon were one and "the same").

The district court correctly determined that the defendants' "operation of a Ponzi scheme itself is evidence of scienter." A2105. As the court explained, "[t]he perpetrator of a Ponzi scheme must know all along, from the very nature of his activities, that investors at the end of the line will lose their money." A2105 (internal quotation marks and citation omitted). *See, e.g.*, *Donnell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008) ("The mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud.") (internal quotation marks and citation omitted); *see also Wing v. Layton*, 957 F.Supp.2d 1307, 1313-14 (D. Utah 2013) (similar) (citing cases).

Scoville's numerous false misrepresentations and omissions that were designed to forestall the disclosure of the Ponzi scheme further support the district court's scienter finding. On his webpage, Scoville misrepresented to members that the AdPack was a low-demand product and that Traffic Monsoon's other products were in high demand (A459)—even though he must have known this was false—in an effort to create the misimpression that AdPack sales were not the nearly exclusive source of revenue-sharing returns and commissions. And by his own

admission, Scoville intentionally withheld from members the fact that the daily investment-sharing returns that Traffic Monsoon was paying were not based exclusively on the company's revenue over that twenty-four-hour period as Traffic Monsoon claimed on its webpage. *See* A320. Further, Scoville intentionally delayed disclosing the PayPal freeze to members for over a month, undoubtedly worried such a disclosure could cause the scheme to collapse. A337-38.

Additionally, Scoville's conduct in running Traffic Monsoon as largely a sham internet-advertising company further demonstrates that he (and thus Traffic Monsoon) acted with scienter. Scoville knew or must have known that Traffic Monsoon was not operating as a legitimate internet-advertising entity given that the company had provided only 10 percent of the total advertising that it had sold (yet members continued to purchase AdPacks) and that many members had no need for the advertising as they lacked webpages to promote (resulting in Traffic Monsoon providing these members with its own banner advertisements, as members were required to have banner advertisements to participate (*see generally* A584-85)).

Nonetheless, Scoville argues that he lacked scienter because he did not believe the AdPacks were securities (at 50), he did not "personally receive any of the funds generated" from the AdPack transactions (at 50-51), and he "cooperated extensively with the SEC" during the investigation (at 51). But each of these

contentions is irrelevant: scienter does not require that a defendant know he is committing *securities* fraud, only that he possess an intent to deceive, manipulate, or defraud, *see Hochfelder*, 425 U.S. at 193-94; *see also SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 76 (D.C. Cir. 1980); whether or not Scoville *personally* benefitted is irrelevant given that the company that he solely owned unquestionably benefited (and, in any event, Scoville testified that he did take 4.5% of the AdPack revenue as his income (A318)); and any cooperation that Scoville offered during the Commission's investigation cannot negate or excuse his fraudulent misconduct.

Accordingly, the district court did not commit clear error in finding that the defendants acted with scienter.

II. Contrary to Scoville's contention, all of the AdPack transactions that comprise the defendants' Ponzi scheme are covered by Sections 17(a) and 10(b).

The district court correctly determined that the Commission's antifraud claims reach the totality of the defendants' cross-border Ponzi scheme—including the AdPack transactions involving overseas investors—under both the broad cross-border standard that Congress codified in 2010 and the test that the Supreme Court had earlier adopted in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

A. The Commission's cross-border antifraud enforcement authority reaches securities-fraud schemes such as the defendants' where significant steps in furtherance of the fraud occurred in the United States.

In Section 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376, Congress amended the Securities Act and the Exchange Act to expand the Commission's authority under Sections 17(a) and 10(b) to reach transnational securities frauds. Congress did so by codifying the so-called conduct-and-effects test that the Supreme Court had just rejected in *Morrison*.

Scoville does not dispute that the Traffic Monsoon scheme meets the conduct-and-effects test. A2091 (district court noting that the defendants do "not dispute" that the Traffic Monsoon scheme satisfies the conduct-and-effects test because "significant steps" in furtherance of the scheme occurred in the United States). Rather, Scoville erroneously argues that Section 929P(b) is a nullity because it is written in terms of subject-matter jurisdiction and, in *Morrison*, the Supreme Court held that the extraterritorial reach of Section 10(b) is not an issue of subject-matter jurisdiction.

This argument ignores the statutory language and the relevant legislative history, which demonstrate that when Congress enacted Section 929P(b), it followed the bright-line approach that the Supreme Court had established (and reaffirmed in *Morrison*) for making extraterritoriality or any other statutory

limitation an issue of subject-matter jurisdiction. *See* Section (A)(1), *infra*. Basic principles of statutory interpretation further support that understanding. *See* Section (A)(2), *infra*.

1. Relevant judicial and statutory developments

a. For nearly four decades, every court of appeals that considered the cross-border reach of Section 10(b) applied a conduct-and-effects test and considered it to be a requirement of subject-matter jurisdiction.

Beginning with the Second Circuit in 1972, the lower federal courts before *Morrison* applied a so-called "conduct-and-effects test" to determine the cross-border reach of Section 10(b) and other anti-fraud provisions of the securities laws. *See Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972); *see generally Morrison*, 561 U.S. at 256-60 (citing cases). Under this test, the antifraud provisions applied if sufficient "wrongful conduct occurred in the United States" or "the wrongful conduct had a substantial effect in the United States or upon United States citizens." *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003). And courts before *Morrison* consistently treated the conduct-and-effects test as a requirement of subject-matter jurisdiction. *See, e.g.*, *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1313 (11th Cir. 2009).

b. In 2006, the Supreme Court announced a new "bright line" rule to determine whether a statutory requirement is jurisdictional or, instead, relates to the merits of the action.

In *Arbaugh v. Y&H Corp.*, the Supreme Court considered how to distinguish statutory requirements that are jurisdictional in nature from those that relate to the merits. 546 U.S. 500, 510-16 (2006). *Arbaugh* involved the "proper classification of Title VII's statutory limitation of covered employers to those with 15 or more employees," requiring the Court to decide between "the lower court's subject-matter jurisdiction characterization" and the petitioner's claim that the 15-or-more-employees requirement "concerns the merits of [his] case." *Id*. at 510. The Court held that, because Congress did not place the requirement within the federal-court subject-matter jurisdiction provisions, it relates to the merits of a Title VII employment-discrimination claim. *Id*. at 515.

In explaining its reasoning, the Court acknowledged that "[o]n the subject-matter jurisdiction / ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous." *Id*. at 511. To end this confusion, the Court adopted a new "readily administrable bright line" rule—"when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id*. at 516.

In establishing that bright line, the Court explained that the power to make a statutory requirement jurisdictional lies with Congress:

> [W]e … leave the ball in Congress' court. If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue.

Id. at 515-16. Thus, the Court explained, Congress can readily shift a merits-related statutory requirement into a jurisdictional requirement by amending the statute to move the requirement into the statute's subject-matter jurisdiction provision. *See id.* at 514-15. *See also Union Pacific RR Co. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67, 81-84 (2009) (applying the *Arbaugh* rule).

c. In *Morrison*, the Supreme Court rejected the lower courts' approach to Section 10(b)'s cross-border reach.

In their *Morrison* briefing, the parties and the United States as *amicus curiae*, citing *Arbaugh* and *Union Pacific*, alerted the Supreme Court that the issue of Section 10(b)'s cross-border reach should not be treated as a question of subject-matter jurisdiction because the provision's cross-border reach was not addressed in the Exchange Act's jurisdictional provision. Given the parties' agreement on this issue, the Court reasonably engaged in a truncated discussion. The Court cited *Arbaugh* and *Union Pacific*, quoted the subject-matter jurisdiction provision (which did not contain language indicating that Congress considered the territorial reach a jurisdictional issue), and summarily stated "[t]he District Court here had jurisdiction … to adjudicate the question whether §10(b) applies to [respondents'] conduct," and that therefore, as written, the statute left the question as one on the

merits of the case. *Morrison*, 561 U.S. at 254.

After concluding that the question of Section 10(b)'s extraterritorial reach is a merits issue, the Court examined the language of Section 10(b) and the Exchange Act. The Court recognized the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id*. at 255 (internal quotation marks and citation omitted). The Court explained that, in order to find a congressional intent to apply a statutory provision extraterritorially, "context can be consulted" and "a clear statement" is not required. *Id*. at 265. Nonetheless, the Court found "no affirmative indication in the Exchange Act that §10(b) applies extraterritorially." *Id*. As such, the Court rejected the lower court's application of the conduct-and-effects test and, instead, held that Section 10(b) is limited to securities frauds involving domestic transactions. *See* Part II(B)(1), *infra*.

d. While *Morrison* was pending before the Supreme Court, Congress began legislative action to clarify the cross-border scope of the antifraud provisions of the securities laws.

In October 2009, while the *Morrison* petition for *certiorari* was pending, Representative Kanjorski, Chairman of the House Financial Services Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, introduced the provision that would eventually be enacted as Section 929P(b) of Dodd-Frank. *See* Investor Protection Act of 2009, H.R. 3817, 111th

Cong. (introduced Oct. 15, 2009), at § 216. The legislative proposal responded to part of the Second Circuit's decision in *Morrison*. Observing that Congress had "omitted" any express statutory language providing that "transactions taking place outside of the United States" are within the court's subject-matter jurisdiction, the *Morrison* panel "urge[d] that this significant omission receive the appropriate attention in Congress." *Morrison v. Nat'l Australia Bank Ltd*., 547 F.3d 167, 170 & n.4 (2d Cir. 2008).

Kanjorski's proposal sought to make Congress's intent clear by expressly codifying the conduct-and-effects test and incorporating it as a requirement of subject-matter jurisdiction. *See* Committee Report on the Investor Protection Act of 2009, H.R. Rep. 111-687, pt. 1, at 80 (Dec. 16, 2010) ("This section addresses the authority of the SEC and the United States to bring civil and criminal law enforcement proceedings involving transnational securities frauds" by "codify[ing] … both the conduct and effects tests"). The provision did so by proposing to amend the subject-matter-jurisdiction provisions of the Securities Act and the Exchange Act to provide:

> EXTRATERRITORIAL JURISDICTION OF THE ANTIFRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS
>
> * * *
>
> (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 [antifraud provisions], 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.

The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (as passed by the House, Dec. 11, 2009), at § 7216. *Compare with* Dodd-Frank Act § 929P(b).

The Supreme Court granted the petition to review the Second Circuit's decision and entered its own decision in the case before Congress took any final action on Representative Kanjorski's proposal. In fact, the proposal was incorporated into the House-Senate Conference Committee on what became the Dodd-Frank Act the same day that the Supreme Court issued its decision in *Morrison*. Thus, what had begun as a codification of the prevailing court-of-appeals law with regard to the cross-border reach of the antifraud provisions of the securities laws (an issue of jurisdiction to which the conduct-and-effects test applied) became effectively a response to the Supreme Court's decision—overriding the decision as to Commission and U.S. Department of Justice enforcement actions involving transnational securities frauds that occur after the

Act became law.

Representative Kanjorski subsequently recognized the changed context of the statutory language during the legislative debates on Dodd-Frank, explaining on the House floor that *Morrison* "appl[ied] a presumption against extraterritoriality" and his amendment "rebut[s] that presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department." 156 Cong. Rec. H5237 (daily ed. Jun. 30, 2010). He emphasized:

> Thus, the purpose of the language of section 929P(b) of the bill is to make clear that in actions and proceedings brought by the SEC or the Justice Department, the specified provisions of the Securities Act, the Exchange Act and the Investment Advisers Act may have extraterritorial application, and that extraterritorial application is appropriate, irrespective of whether the securities are traded on a domestic exchange or the transactions occur in the United States . . . .

Id. *See also* 156 Cong. Rec. S5915-16 (July 15, 2010) (Senator Jack Reed discussing intended effect of Section 929P(b)) (explaining that Section 929P(b) "clarifies" that the antifraud provisions apply in Commission actions if the conduct-and-effects test is met).

2. Scoville's construction of Section 929P(b) as a nullity fails.

As shown above, Section 929P(b) addressed the *Arbaugh* issue by expressly adding the new language into the Acts' jurisdictional provisions, and it addressed the scope of the Commission's cross-border enforcement-authority by codifying the conduct-and-effects test. Scoville nonetheless asks this Court to treat Section

929P(b) as a nullity, asserting that because *Morrison* construed the scope of Section 10(b), Section 929P(b)'s jurisdictional language did nothing to override *Morrison*'s limitations on the cross-border reach of either Sections 17(a) or 10(b). That argument is misguided for several reasons.

Most significantly, this reading of Section 929P(b) would render its amendment of the Acts an unnecessary, superfluous appendage. The Acts' existing jurisdictional provisions *already* afforded broad subject-matter jurisdiction. *See* 15 U.S.C. 77v(a), 78aa(a), 80b-14(a). The defendants' interpretation would therefore render Section 929P(b) nothing more than a redundant grant of jurisdiction. This would violate "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks and citation omitted). That "cardinal principle" has particularly strong force where, as here, the statutory language is not a stray word or phrase, but rather an entire provision enacted as a deliberate and express amendment to an existing statutory scheme. *See id.*; *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (refusing to

"emasculate an entire section"); *Stone v. INS*, 514 U.S. 386, 397 (1995) (similar).[8]

Similarly meritless is Scoville's related contention (at 35-36) that the district court inappropriately "look[ed] beyond the plain language" of the provisions added by Section 929P(b) to consider the statutory background and legislative history. As this Court has explained, where the plain language of a statute would render a provision a nullity, the statute is necessarily ambiguous. *See, e.g.*, *Herrera-Castillo v. Holder*, 573 F.3d 1004, 1007 (10th Cir. 2009) (holding that a statute is ambiguous where "applying the statute's plain language would render [a specific statutory provision] a nullity"); *Mora v. Mukasey*, 550 F.3d 231, 237-38 (2d Cir. 2008) (same); *see generally United States v. Heckenliable*, 446 F.3d 1048, 1051 (10th Cir. 2006) (rejecting an interpretation that would render a statute "a nullity in a majority of the states" and explaining that this Court's "interpretation must give

[8] Congress's intent to make extraterritoriality jurisdictional was overlooked by the only court that has suggested any willingness to read Section 929P(b) as a nullity. In *SEC v. A Chicago Convention Center, LLC* (No. 13-982), 2013 WL 4012638 (N.D. Ill. Aug. 6, 2013), the court acknowledged that "the legislative history seems to indicate that Congress intended Section 929P(b) to override *Morrison*'s transactional test." *Id*. at *7. But the court appears to have mistakenly believed that effectuating this intent required "interpreting Section 929P(b) as substantive rather than jurisdictional," thus ignoring its jurisdictional language. *Id*. Although the court ultimately chose not to reach the issue, *id*. at *9, the tension it misperceived between Section 929P(b)'s text and its purpose vanishes when one appreciates that Congress intended to make the issue of extraterritoriality jurisdictional. If read in this manner, one need not choose between "render[ing] meaningless Congress's use of the word 'jurisdiction'" and rendering meaningless its enactment of an entire statutory provision. *Id*. at *7. Both are given full effect.

practical effect to Congress's intent, rather than frustrate it"). And it is well established that a court in such circumstances should consult the legislative history and other relevant sources of congressional intent to assist it in determining the appropriate interpretation of the statute. *See United States v. Manning*, 526 F.3d 611, 614 (10th Cir. 2008); *see, e.g.*, *id.* at 617 (considering the reasons that a particular member of Congress introduced the original legislative proposal); *United States v. Craig*, 181 F.3d 1124, 1127 (9th Cir 1999) (looking to an act's legislative history, including House floor statements from several members of Congress, and the underlying genesis of the act, in determining the appropriate interpretation).

In any event, there are several *textual* indicia of Congress's intent that Section 929P(b) extended the Commission's cross-border authority to pursue claims under Sections 17(a) and 10(b). *First*, Section 929P(b) is included under a heading entitled "STRENGTHENING ENFORCEMENT BY THE COMMISSION." *See generally INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a . . . section can aid in resolving an ambiguity in the legislation's text."). *Second*, Section 929Y(a) of Dodd-Frank required the Commission to "conduct a study to determine the extent to which private rights of action under the antifraud provisions . . . should be extended" extraterritorially using the same conduct-and-effects test set forth in Section 929P(b). This provision's exclusive focus on private actions would be difficult to

understand unless Congress believed that it had already "extended" the "antifraud provisions" in actions brought by the Commission. *Third*, Section 929P(b)'s related amendment to the Investment Advisers Act of 1940, which similarly added the conduct-and-effects test as a subject-matter-jurisdiction requirement for antifraud actions under that Act, *see* 15 U.S.C. 80b-14(b), indicates that Congress acted deliberately to ensure that all of the Commission's various antifraud enforcement authorities would reach transnational frauds that satisfy the conduct-and-effects test.

Moreover, the *Morrison* decision does not operate as a barrier to this Court's ability to effectuate Congress's intent. When the Supreme Court construed Section 10(b) in *Morrison* to determine its territorial scope, it acknowledged that the language of 10(b) neither required nor precluded extraterritorial application. *Morrison*, 561 U.S. at 261-62. It was merely silent. The Court also looked to other provisions of the Exchange Act for evidence of extraterritorial intent, but found none. The Court thus applied a "presumption" to find that Section 10(b) lacked extraterritorial effect, while making clear that this presumption was not "a limit upon Congress's power to legislate" and only applied "unless a contrary intent appears." *Id*. at 255.

Section 929P(b) now provides that contrary intent. *See generally Morrison*, 561 U.S. at 265 (to determine whether presumption against extraterritoriality was

overcome, the Court examined the *entire* statute (not just Section 10(b)), and it explained both that "context can be consulted" and there is no clear-statement rule). In order to "make sense rather than nonsense out of the *corpus juris*," courts must construe statutory language in a manner that "fits most logically and comfortably into the body of both previously *and subsequently* enacted law." *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 100-101 (1991) (emphasis added). The antifraud provisions must therefore be read in light of Section 929P(b)'s subsequent enactment. Section 929P(b) thus supplies the "indication of an extraterritorial application" that was missing in *Morrison*. 561 U.S. at 255-56. Rather than applying a default presumption against extraterritoriality, as the Court did in *Morrison*, courts in Commission actions should now look to Section 929P(b) and construe the antifraud provisions to reach the conduct over which Section 929P(b) specifically granted jurisdiction.[9]

Finally, to the extent that Scoville is arguing that Congress needed to modify Section 10(b) itself in order to reject the Court's interpretation in *Morrison* (and to effectively apply the conduct-and-effects test as a jurisdictional requirement), that is incorrect. As Justice Scalia, writing for the Court, explained, "courts frequently

[9] *Stare decisis* is no obstacle here because "Congress is free to change th[e] Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Nor, in any event, does Section 929P(b)'s reinstatement of the conduct-or-effects test in Commission actions alter *Morrison*'s holding that the domestic-transaction test applies in private actions.

find Congress to have" abrogated a judicial interpretation of statutory text where "surrounding text[] that happens to have been subsequently enacted" indicates a new congressional intent. *United States v. Fausto*, 484 U.S. 439, 452-53 (1988). For example, the Supreme Court in *Fausto* dealt with a situation similar to this case where a judicial "presumption" had previously been used to construe statutory language; the Court found the prior interpretation abrogated because the presumption on which it rested had been "overcome by inferences of [congressional] intent drawn from the statutory scheme as a whole," after another provision was amended. *Id*. at 452 (internal quotation marks omitted). The same is true here.

3. In any event, this Court should defer to the Commission's regulation that makes clear the conduct-and-effects test applies here.

At a minimum, the language that Section 929P(b) added to the securities laws creates ambiguity about the scope of the Commission's cross-border antifraud-enforcement authority.[10] *See Herrera-Castillo v. Holder*, 573 F.3d at 1007 (10th Cir.) (holding that a statute is ambiguous where "applying the statute's plain language would render [a specific statutory provision] a nullity"); *Mora v.*

[10] The number of courts that have expressed the view that Section 929P(b) restored the conduct-and-effects test confirms there is *at least* ambiguity here. *See, e.g.*, *In re Optimal U.S. Litig.*, 865 F.Supp. 2d 451, 456 n.28 (S.D.N.Y. 2012); *SEC v. Gruss*, 2012 WL 3306166, *3 (S.D.N.Y. Aug. 13, 2012); *Cornwell v. Credit Suisse Grp.*, 729 F.Supp. 2d 620, 627 n.3 (S.D.N.Y. 2010).

Mukasey, 550 F.3d at 238 (2d Cir.) (same). To clarify any such potential ambiguity, the Commission adopted (through notice-and-comment rulemaking) a regulation that provides in pertinent part:

> *Cross-border antifraud law-enforcement authority*.
>
> (a) Notwithstanding any other Commission rule or regulation, the antifraud provisions of the securities laws apply to: (1) Conduct within the United States that constitutes significant steps in furtherance of the violation; ….
>
> (b) The antifraud provisions of the securities laws apply to conduct described in paragraph (a)(1) of this section even if: (1) The violation relates to a securities transaction or securities transactions occurring outside the United States that involves only foreign investors; ….

17 C.F.R. 250.1. When it adopted this rule, the Commission explained that it was doing so to "clearly set[] forth [its] interpretation of the Commission's cross-border antifraud authority" after the amendments added by Section 929P(b). 79 FR 47278, 47360/3 (Aug. 12, 2004).[11]

This Court should defer to the Commission's interpretation and hold that the conduct-and-effects test governs the scope of the Commission's cross-border antifraud enforcement authority. *See Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (an agency's interpretation is owed deference when "the statute is silence or ambiguous" and the agency offers a

[11] This rule took effect before the defendants' Ponzi scheme began. *See* 79 FR 47278/1 (effective date of rule was September 8, 2014).

"permissible construction of the statute"). Moreover, given that the Commission's interpretation is based on statutory language added after the *Morrison* decision, the Supreme Court's earlier interpretation is not controlling. *See National Cable & Telecommu. Ass'n v. Brand X Internet Servs*, 545 U.S. 967, 982-83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

B. Nonetheless, this case does not implicate the extraterritorial application of the antifraud provisions because each of the AdPack transactions involves the "offer" and "sale" of a security in the United States.

1. Each AdPack transaction involved a domestic "sale" under Sections 17(a) and 10(b).

In determining that the *Morrison* transactional test was satisfied for the AdPack transactions involving overseas purchasers, the district court relied on an "irrevocable liability" test developed by the Second Circuit to assess whether an off-exchange transaction comprises either a domestic sale or domestic purchase. (A2092-93 (citing *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012))). Scoville concedes (at 39-42) that this was the appropriate test to apply.

Under the Second Circuit's test, irrevocable liability occurs within the United States—and thus an off-exchange transaction is a domestic purchase or

sale—if either "the purchaser incurred irrevocable liability within the United States to take and pay for a security," or "the seller incurred irrevocable liability within the United States to deliver a security." *Absolute Activist*, 677 F.2d at 68. The Second Circuit has subsequently explained that the inquiry into where the purchaser or seller incurred irrevocable liability does not turn on contract-law principles concerning where "a contract is said to have been executed." *United States v. Vilar*, 729 F.3d 63, 77-78 n.11 (2d Cir. 2013). Rather, "territoriality under *Morrison* concerns where, physically, the purchaser or seller committed him or herself." *Id.* The Second Circuit illustrated this using the situation of a seller who while overseas communicated an offer to sell securities to a person located in Puerto Rico. As the *Vilar* court explained, the purchaser can incur irrevocable liability in the United States even though, under Puerto Rican law, any contract resulting from the offer would be governed by the foreign law where the offer originated. *Id.*

Applying this test, the district court correctly held that "all of the [AdPack] transactions satisfy the domestic transaction test under *Morrison* and *Absolute Activist*." A2093. The court explained that "Traffic Monsoon sold all of the AdPacks over the internet to both foreign and domestic purchasers. In all of these transactions, the seller of these securities, a Utah LLC, incurred irrevocable

liability in the United States." A2093.[12] Scoville disputes this determination, arguing erroneously (at 7) that, "by virtue of *Morrison*," the defendants' scheme is "beyond" the reach of the federal securities laws with respect to the sales to overseas investors.

To be sure, the business model that Scoville used—operating Traffic Monsoon over the internet with the AdPack sales undertaken in an automated manner through computer programs and the company's U.S.-based servers communicating directly with purchasers (*see generally* A802-06)—is not a development the original authors' of the securities laws would likely have foreseen. But in recent years, a near uniform consensus has developed in the United States regarding the treatment of electronic transactions such as those Traffic Monsoon was undertaking. Since 1999, "nearly every state" (including Utah) has adopted the Uniform Electronic Transactions Act ("UETA"), a model law "that represent[s] the first national effort at providing some uniform rules" to govern electronic transactions. *Cain v. Redbox Automated Retail, LLC*, 136 F.Supp.3d 824, 831 (E.D. Mich. 2015); *see generally* Patricia Brumfield Fry, *Introduction to the Uniform Electronic Transactions Act: Principles, Policies and Provisions*, 37 IDAHO L. REV. 237, 248 (2001). Under the legal standards

[12] Scoville's opening brief does not challenge the district court's conclusion (A2093 (footnote12)) that his own physical location was irrelevant to where the transactions occurred and, thus, he has waived any contrary contention.

incorporated in the UETA, the electronic communications from Traffic Monsoon's automated sales system necessary to irrevocably commit Traffic Monsoon to any AdPack sales are deemed to have been sent from Traffic Monsoon's place of business—*i.e.*, Scoville's apartment in Murray, Utah. *See e.g.*, Utah Code § 46-4-402(4)(a) (providing that "[u]nless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business").[13]

Applying the UETA's standards thus confirms that, as the district court found, Traffic Monsoon did incur irrevocable liability in the United States for all of the AdPack transactions. Further, relying on the UETA's principles to resolve this issue is particularly appropriate as doing so both helps to further promote the legal clarity that has been developing within the United States concerning electronic transactions while also effectuating the broad remedial purposes of the securities laws. *See generally Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972) ("Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed not technically and restrictively, but flexibly to effectuate its remedial purposes.") (internal quotation marks and citation omitted).

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[13] *See also* Utah Code § 46-4-402(4)(b)(i) ("If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction."). *See generally id.* §§ 46-4-102(2) (defining "automated transaction"), 46-4-102(6) (defining "electronic agent"), 46-4-102(11) (defining "information processing system").

Scoville advances two contentions in opposing the district court's determination. *First*, Scoville identifies (at 42) Commission Regulation S, 17 CFR 230.901 *et seq.*, which provides a safe harbor from *registration* in certain limited situations involving sales to overseas purchasers; but as the Commission explained when it adopted that rule, "Regulation S relates solely to the applicability of the registration requirements of section 5 of the Securities Act, and does not limit the scope or extraterritorial application of the antifraud or other provisions of the federal securities laws[.]" 55 FR 18306, 18308 (May 2, 1990). *Second*, Scoville argues (at 44) that the "meeting of the minds" between Traffic Monsoon and its overseas purchasers occurred overseas when the purchaser "press[ed] the button on the web browser" to complete the purchase. But as the Second Circuit has explained, contract-law concepts such as this do not control the irrevocable-liability inquiry. *See Vilar*, 729 F.3d at 77-78, n.11.

2. Each AdPack transaction involved a domestic "offer" under Section 17(a).

As the district court recognized, "the language of Section 17(a) expands the *domestic* conduct that is regulated to include both completed transactions and offers to sell securities." A2093-94 (footnote 13) (emphasis added). *See, e.g.*, *United States v. Sumeru*, 2011 WL 3915506, at *2 (9th Cir. Sept. 7, 2011) (unpublished) (same); *SEC v. Goldman Sachs & Co.*, 790 F.Supp.2d 147, 164-65 (S.D.N.Y. 2011) (same). The Securities Act defines a securities "offer" to "include

every attempt of offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." Securities Act § 2(a)(3). As relevant here, this definition "leaves no doubt that the focus of 'offer,' under the Securities Act, is on the person or entity 'attempt[ing] or offer[ing] to dispose of" the security, not the recipient of the offer. *Goldman Sachs*, 790 F.Supp.2d at 165.

Given that Traffic Monsoon was chartered in the United States and its business operations occurred here, the district court correctly found that "Traffic Monsoon's offer to sell AdPacks over the internet occurred in the United States where Traffic Monsoon, LLC is located." A2094. Scoville's opening brief does not dispute this finding and thus he has waived any challenge to it. Rather, Scoville merely argues (at 33) that Section 17(a) reaches only domestic transactions, but this erroneous contention ignores the provision's plain language. Accordingly, the district court correctly determined that Section 17(a) applies to each of the AdPack transactions because those involved domestic offers.

CONCLUSION

For the foregoing reasons, the district court's orders should be affirmed.

Respectfully submitted,

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October 2017

STATEMENT REGARDING ORAL ARGUMENT

In light of various legal issues of first impression discussed in Part II of this brief, the Commission believes that this Court might find oral argument beneficial to its resolution of the appeal.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. R. 32(b).

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

October 16, 2017

/s/ William K. Shirey
William K. Shirey

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, McAfee VirusScan Enterprise version 8.8, last updated October 10, 2017, and according to the program are free of viruses.

October 16, 2017

/s/ William K. Shirey
William K. Shirey

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, I electronically filed the foregoing Brief of the Securities and Exchange Commission, Appellee, with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system, which will send a notice of electronic filing to the CM/ECF participants listed immediately below.

D. Loren Washburn

Micah S. Echols

Marquis Aurbach Coffing

Michael F. Thompson

Peggy Hunt

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I also certify that on the same date I caused seven copies of the foregoing paper to be delivered to the Clerk of Court via UPS Next Day Delivery.

October 16, 2017

/s/ William K. Shirey
William K. Shirey