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January 21, 2022

No.:	22-80001
D.C. No.:	2:15-cv-04194-DDP-JC
Short Title:	Mark Stoyas, et al v. Toshiba Corporation

Dear Appellant/Counsel

This is to acknowledge receipt of your Petition for Permission to Appeal under Federal Rule of Civil Procedure 23(f).

All subsequent letters and requests for information regarding this matter will be added to your file to be considered at the same time the cause is brought before the court.

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No. 22-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK STOYAS, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

AUTOMOTIVE INDUSTRIES PENSION TRUST FUND; NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND,

Plaintiffs-Petitioners,

v.

TOSHIBA CORPORATION

Defendant-Respondent.

On Appeal from the United States District Court
for the Central District of California
No. 2:15-cv-04194-DDP(JCx)
Honorable Dean D. Pregerson

PETITION FOR PERMISSION TO APPEAL CLASS-CERTIFICATION ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Petitioners are not corporations.

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I. INTRODUCTION

This matter involving a domestic sale/purchase of American securities linked to underlying Toshiba stock has been here previously.

In *Stoyas v. Toshiba Corp.*, 896 F. 3d 933, 952 (9th Cir. 2018), this Court held that the district court had "misapplied" *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010)—the seminal case on extraterritorial applicability of American securities laws—and reversed.[1] This Court adopted an "irrevocable liability" test to determine when a securities transaction is "domestic" under *Morrison*, focusing on whether the securities' buyer and/or seller had incurred that liability within the U.S. *Stoyas*, 896 F.3d at 948. Here, on remand, "an amended complaint could almost certainly allege sufficient facts to establish that [Lead Plaintiff] purchased" its Toshiba-linked securities "in a domestic transaction." *Id*. at 949.

Plaintiffs established that irrevocable liability. Documentary and testimonial evidence showed that the securities transaction's offer, acceptance, agreed-upon consideration, final execution, and delivery *all took place in the U.S.*, on March 23, 2015. Irrevocable liability for all parties arose at that time, and at that location.

In denying class certification, however, the district court got *Morrison* wrong again—and *Stoyas*, to boot. It engrafted an even-more-demanding criterion onto the

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[1] Internal citations and footnotes are omitted and emphasis is added throughout, unless noted otherwise.

Morrison/Stoyas tests—what it called a "triggering event" prerequisite—while ignoring or diminishing undisputed evidence that the U.S.-located parties were irrevocably bound here. In the court's view, the transaction's "triggering event" *also* had to occur in the U.S.; because it decided that event was a foreign-stock purchase in Japan, irrevocable liability couldn't attach here.

In reaching that holding, the district court committed numerous errors.

The court erroneously "imposed a heightened standard" upon the legal-analysis "framework" that *Morrison/Stoyas* already established. *United States v. Lummi Nation*, 876 F.3d 1004, 1007, 1009 (9th Cir. 2017). It also improperly imported a merits inquiry into the class-certification stage. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 457 (2016). And it ignored documentary and testimonial evidence—the latter from Barclays itself—that Barclays hadn't acted as an "agent" for the Lead Plaintiff while purchasing the Toshiba stock that the court deemed a "triggering" event.

The district court injected additional error into its analysis by misapplying Rule 23 and deciding that a classwide question was unique to the Lead Plaintiff. But even if the court were correct that a "triggering event" of the U.S.-based securities transaction had occurred overseas and destroyed irrevocable liability here, it's a conclusion that would apply to *all* similarly-situated Class members. Their arguments on the point "will prevail or fail in unison." *Amgen Inc. v. Conn. Ret. Plans & Tr.*

Funds, 568 U.S. 455, 460 (2013). Whether they do, in fact, is a question reserved for later—*after* class certification. *Tyson Foods*, 577 U.S. at 457.

Finally, the district court erred by deflecting "potentially dispositive" classwide issues to a later inquiry. Nothing in Rule 23 counsels that delay; to the contrary, it's beyond cavil that Rule 23 allows certification of classes "that are fated to lose as well as classes that are sure to win." *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010). Here, Toshiba stock purchasers' "standing" and damages-calculation methodologies are precisely the sort of questions requiring resolution at the class-certification stage. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 36 (2013).

In sum, this is a paradigmatic case warranting Rule 23(f) review.

II. QUESTIONS PRESENTED

1. Did the district court err in (i) misapplying Supreme Court and Ninth Circuit precedent, (ii) while disregarding evidence, to erroneously conclude that the proposed Class representative bought common stock in Japan instead of the domestic ADRs it had purchased in the U.S., and finding, on that basis, that the proposed representative was atypical—despite transaction circumstances identical to those of absent Class members?

2. Whether the district court manifestly erred in denying class certification even though all requirements of Rule 23 were met, so that it could first rule on classwide issues of liability by way of summary judgment?

III. RELEVANT FACTS AND PROCEEDINGS

A. An overview of the litigation.

The underlying securities-fraud matter arises from Toshiba Corporation's ("Toshiba," or the "Company") deliberate use of improper accounting over at least six years to inflate its pre-tax profits by more than $2.6 billion and conceal at least $1.3 billion in impairment losses at its U.S. nuclear business. ECF75:¶3.[2] According to an internal Independent Investigation Committee formed to investigate the fraud (ECF75:¶7), three Toshiba chief executive officers (along with dozens of other senior Toshiba executives) orchestrated the fraud, which involved numerous deliberate violations of generally accepted accounting principles. ECF75:¶¶4-5. As the true facts about the fraud were revealed over several months spanning April-November 2015, the price of Toshiba securities declined by more than 40%, resulting in a loss of $7.6 billion in market capitalization while causing hundreds of millions of dollars in damages to U.S. investors in Toshiba securities. ECF75:¶11.

Among those securities were three types that figure in this Petition: (i) Toshiba American Depository Shares (or "ADS") sold under the ticker symbol "TOSYY" in the U.S.'s over-the-counter market ("OTC Market"); (ii) Toshiba common stock sold

[2] "ECF__" citations are to the district court docket; ECF75 is the operative Complaint.

on the OTC Market as "F-shares"[3] under the ticker symbol "TOSBF"; and (iii) Toshiba common stock sold under the ticker symbol "6502" on two Japanese stock exchanges. ECF75:¶1.[4]

Plaintiffs are injured investors who purchased inflated Toshiba securities during the "Class Period" (spanning May 8, 2012 through November 12, 2015) either as ADS in the U.S. in a domestic transaction, or U.S. residents' or citizens' purchase of common stock in Japan. ECF75:¶¶1-2; ECF109:1. The claims of investors who purchased TOSYY or TOSBF securities on the OTC Market are brought pursuant to §§10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") (ECF75:¶¶343-361), while the claims of American investors who acquired their Toshiba 6502 shares in Japan are brought under Article 21-2 of Japan's Financial Instruments Exchange Act ("JFIEA"). ECF75:¶¶362-376.

B. A short primer on ADS and ADRs.

ADS are also referred to as American Depository Receipts, or "ADRs." ECF75:¶40 n.3. As the U.S. Securities and Exchange Commission ("SEC") explains, while ADS "represent an interest in the shares of a non-U.S. company that have been deposited with a U.S. bank," an ADR is "a negotiable certificate that evidences an

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[3] An "F-share" is a foreign security denominated in United States currency, and traded on the New York-based OTC Market. ECF75:¶39.

[4] One F-share of TOSBF represents ownership of one share of Toshiba common stock sold under ticker symbol 6502 in Japan. ECF75:¶39.

ownership interest" in the corresponding ADS. ECF75:¶51. Notably, the "terms ADR and ADS are often used interchangeably by market participants." *Id*.; *accord Stoyas*, 896 F.3d at 940 n.5. Here, the denial Order used the term "ADR" exclusively; from this point onward so will this Petition.

Lead Plaintiff Automotive Industries Pension Trust Fund ("AIPTF") purchased its Toshiba ADRs—36,000 shares of TOSYY—through transactions on the OTC Market on March 23, 2015. ECF75:¶20. Named plaintiff New England Teamsters & Trucking Industry Pension Fund ("NETPF") purchased some 343,000 shares of Toshiba 6502 common stock on the Tokyo and Nagoya stock exchanges during the Class Period. ECF75:¶23.

C. This Court's *Stoyas* decision clarifies that the Exchange Act could apply to the Toshiba ADRs transactions as "domestic" transactions under the Supreme Court's *Morrison* decision.

In *Morrison*, the Supreme Court held that the presumption against extraterritorial applicability of congressional legislation renders the Exchange Act applicable to deceptive conduct *only* in connection with either (i) the purchases or sales of any securities registered on a national securities exchange, or (ii) domestic transactions in other securities not so registered.

On May 20, 2016, the district court dismissed this matter, finding that the Exchange Act didn't govern transactions in "unsponsored" ADRs regardless of where

they took place. ECF65:16, 23.[5] Deeming amendment futile, the court dismissed the case with prejudice. ECF65:35.

This Court reversed and remanded in *Stoyas*. Although the Court agreed that the OTC Market wasn't an "exchange" under the Exchange Act (896 F.3d at 945, 947), it also held that the district court had "misapplied *Morrison*" in holding the Exchange Act inapplicable to transactions in unsponsored ADRs and had incorrectly decided that amendment was futile "without significant analysis" of where that transaction took place. *Id*. at 952. This Court remanded so that AIPTF could allege facts showing that it had purchased its ADRs in a domestic transaction. *Id*.; *see also id*. at 949 ("an amended complaint could almost certainly allege sufficient facts to establish that AIPTF purchased its Toshiba ADRs in a domestic transaction").

Importantly, *Stoyas* discussed just what comprised a "domestic transaction" under *Morrison*'s second prong—with "irrevocable liability" being the linchpin factor. "Cases since *Morrison* have articulated an 'irrevocable liability' test to determine when a securities transaction is domestic." *Stoyas*, 896 F.3d at 948 (noting test "originated in" *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012)). While that test "determines the *timing* of a transaction, it also determines

[5] It also dismissed the Japanese-law claims under principles of comity and *forum non conveniens*. ECF65:30-35. Later, after this Court's reversal, the district court rejected Defendant's comity and *forum non conveniens* arguments. ECF88:12.

the location: a plaintiff must plausibly allege 'that the purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security.'" *Stoyas*, 896 F.3d at 948. Thus, facts relevant to determining where a buyer (or seller) became irrevocably liable to take and pay for (or deliver) securities are the location of "contract formation, placement of purchase orders, passing of title, and the exchange of money." *Id*. at 949; *see also Absolute Activist*, 677 F.3d at 68 ("a plaintiff must allege facts suggesting that irrevocable liability was incurred or title was transferred within the United States").

D. The chronological and geographical mileposts establishing AIPTF's domestic transactions in Toshiba ADRs.

On remand, Plaintiffs alleged facts demonstrating that AIPTF's irrevocable liability incurred in the United States, explaining how the "placement of the [Toshiba ADRs] buy order, the payment of the purchase price, transfer of the title to the securities, and other related transactions took place within the territorial jurisdiction of the United States." ECF75:¶22.

At the class-certification stage, Plaintiffs introduced documentary and testimonial evidence establishing that both AIPTF and the seller (Barclays) had incurred irrevocable liability in the United States. ECF128; ECF140. That evidence comprised, *inter alia*, the facts that:

- On March 20, 2015, AIPTF's investment manager, ClearBridge, placed an order for TOSYY ADRs with Barclays.[6] ClearBridge's trader on the deal, Lisa Utasi, placed an order for 70,100 TOSYY ADRs—36,000 of which were for AIPTF.[7] Utasi placed the order from ClearBridge's offices on Eighth Street in New York City.[8]

- On Monday morning (March 23, 2015), Barclays' Queenie Yuen (also in New York) contacted ClearBridge's Utasi, notifying her of the price for the ADRs and asking if she agreed.[9]

- Utasi agreed[10], at which point—according to Barclays trader Tim Genirs who ended up executing the trade—there was no other information needed by Barclays in order to execute on the ADRs trade.[11] ClearBridge's head of trading—Patrick Collier—echoed that reality, testifying that other than quantity and price, Barclays needed no more information to execute that TOSYY order on morning of March 23, 2015.[12]

- AIPTF, ClearBridge, and Barclays were all located in the United States throughout the entire transaction.[13] The Barclays employee who took the order was located at Barclays' Seventh Avenue offices.[14] The Barclays

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6 ECF128-3/22:13-18, 23:18-25.

7 ECF128:6.

8 *Id*. The order was a "market order," meaning it specified the number of ADRs to be purchased at the best market price while not identifying that price. ECF128-3/71:15-17.

9 ECF114-12/BARC_000088; ECF128-3/38:7-18.

10 ECF114-12/BARC_000088 (showing agreement at 11:48:18 a.m. UTC)

11 ECF128-2/23:2-8.

12 ECF128-3/40:8-15.

13 ECF128-3/23:11-20; ECF128-2/10:4-6, 13:1-9, 18:19-20.

14 *Id*.

trader who then executed the ADRs trade did so from that same location.[15]

- Thirty seconds after Utasi stated her agreement to the price, a New York Barclays trader wrote he was "filling the [FIX] ticket" which, Genirs testified, meant he was submitting the trade to Barclays' internal system to "carry out the trade"—*i.e.*, execute the ADRs transaction.[16]

- Consistent with Genirs's statement that the trade was executed, Barclays' records reflect the ADRs' sale to ClearBridge two minutes later. ECF114-21 (timestamping sale at 11:50:55 a.m.).

- ClearBridge, according to head trader Collier, could only cancel its order "without facing some type of consequence" until "final execution" of the ADRs order.[17] As Barclays' testimony and documents corroborate, that final execution occurred on March 23, 2015 at approximately 11:50 a.m. UTC (7:50 a.m. New York time).[18]

- Likewise, Collier confirms that "final execution" of the ADRs trade "occurred on Monday, the 23rd," at which point ClearBridge could no longer cancel the order.[19]

- At that point of final execution, every party to the ADRs transaction—AIPTF (buyer), ClearBridge (buyer's investment manager), and Barclays (broker and seller/counterparty)—was located in the United States. ECF140:12.

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15 *Id*.

16 ECF128-2/23:10-13; ECF114-12/BARC_000088.

17 ECF128-3/72:15-19.

18 ECF128-2/23:10-13; ECF114-12/BARC_000088; ECF114-21.

19 ECF128-3/72:15-22.

AIPTF thus became the beneficial owner of 36,000 TOSYY ADRs on March 23, 2015, with Barclays allocating the shares to AIPTF's account in the United States later that morning and confirming their purchase.[20]

Notably, evidence shows a trade date of March 23 and a settlement date of *March 25* for the underlying Toshiba common stock (ECF114-21/BARC_000158_001, BARC_000158_003)—two days *after* the March 23 final execution of the ADRs transaction. ClearBridge's head trader testified that it hadn't purchased any Toshiba 6502 shares for AIPTF.[21] Indeed, ClearBridge's investment agreement with AIPTF *limited it* to buying ADRs.[22]

On March 26, 2015, consistent with the settlement period applicable at the time—three days after the trade day—AIPTF paid for the ADRs by transferring $922,057.20 to Barclays from its Amalgamated Bank account in New York.[23]

E. The district court's denial of class certification.

Plaintiffs moved for class certification on February 19, 2021. ECF108. They defined the prospective Class thusly:

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[20] ECF128-8 (showing 9:43 a.m. allocation); ECF114-9 (confirming March 23, 2015 purchase).

[21] ECF128-3/71:5-7.

[22] ECF114-4/ClearBridge_0000001, ClearBridge_0000008.

[23] ECF128:7; ECF128-3/28:18-30:3.

> Plaintiffs seek certification of this action as a class action on behalf of a proposed class of the persons defined below (the "Class") who purchased Toshiba securities between May 8, 2012 and November 12, 2015 (the "Class Period"):
>
> All persons who purchased securities listed under the ticker symbols TOSYY or TOSBF during the Class Period using the facilities of the OTC Market ("American Securities Purchasers"); and
>
> All citizens and residents of the United States who purchased shares of Toshiba 6502 common stock during the Class Period ("6502 Purchasers").

ECF109:1.

The district court denied Plaintiffs' class-certification motion on January 7, 2022, making two determinations relevant to this Petition.

First, the district court denied class certification for Plaintiffs' Exchange Act claims on "typicality" grounds. ECF146 ("Order") at 5-11. The court's rationales utilized its interpretation of the Supreme Court's *Morrison* decision and this Court's "irrevocable liability" test in *Stoyas*, and its acceptance of Defendant's argument that AIPTF hadn't acquired "'Toshiba securities' in the United States." *Id*. "[T]he question before this Court is whether AIPTF incurred irrevocable liability to take and pay for the ADRs in the United States or in Japan." *Id.* at 5.

The district court came down in favor of Japan. *Id.* at 5-10.

That's because the court observed that "the *first step* in the ADR conversion process" required a "purchase of Toshiba common stock" (*id.* at 7)—which stock was admittedly (and unsurprisingly) trading on Japanese stock exchanges. In the court's

view, AIPTF's ability to acquire the ADRs "was contingent upon the purchase of the underlying shares of common stock that could be converted into ADRs." *Id.*; *see also id*. (Barclays traders in New York and Japan executed the purchase of the common shares that would be converted into ADRs). It was at *that* point, believed the court, "AIPTF was bound to take and pay for the ADRs, once converted." *Id*. at 8; *see also id*. at 10 (Barclays' acquisition of shares in Japan was the "triggering event" that caused ClearBridge "and by extension, AIPTF" to incur irrevocable liability").[24]

Second, the court denied class certification for Plaintiffs' JFIEA claims. Order at 11-13. After noting Defendant raised two issues—"statutory standing" and damages calculations—the court pronounced them "potentially dispositive questions of law" that were "more appropriate" for resolution at summary judgment. Order at 13. The court then denied "without prejudice" the JFIEA claims' certification. *Id*.

IV. APPLICABLE LEGAL STANDARDS

Under Rule 23(f), this Court is granted "broad discretion" to permit an appeal from a class-certification order in cases where "interlocutory review is preferable to end-of-the-case review." *Chamberlan v. Ford Motor Co*., 402 F.3d 952, 959-60 (9th

[24] The district court also rejected evidence that Barclays was acting not as ClearBridge's agent, but rather as a "riskless principal" when it (i) acquired 420,600 ordinary Toshiba shares, (ii) transferred them to Citibank for conversion to ADRs, and (iii) in a separate transaction sold *some* of those ADRs to AIPTF. ECF128:8. Instead, the court cited an article asserting that "'riskless principal[s]'" are "'analogous'" to agents—albeit without citing authority for its assertion. Order at 9.

Cir. 2005). Relevant here, review is warranted where the certification order, *inter alia*, (i) is "manifestly erroneous" or (ii) "presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review." *Id*. at 959.

V. ARGUMENT

A. The district court's misapplication of the *Morrison* and *Stoyas* decisions comprised manifest error while implicating fundamental issues of class-action law.

Relevant for these non-exchange-listed ADRs, *Morrison* articulated a test asking whether "the purchase or sale" of the at-issue security "is made in the United States." 561 U.S. at 269-70; *Stoyas*, 896 F.3d at 944 (*Morrison*'s "transactional test" asks simply "whether the purchase or sale … takes place in the United States"). The answer to that test, this Court holds, considers whether the purchaser's/seller's "irrevocable liability" occurred within the U.S. *Stoyas*, 896 F.3d at 948.

On the record facts here, that's precisely what happened: every step of AIPTF's purchase of the Toshiba ADRs took place within the U.S.—indeed, largely within the confines of New York City—over several days in late-March 2015. *Supra* §III.D. There was an offer, agreed-upon consideration, and acceptance: both the seller (Barclays) and AIPTF's buying agent (ClearBridge) concur that the transaction's final execution happened on the morning of March 23, at which point the ADRs were delivered and the order couldn't be canceled. *Id*. Had the executed deal gone sour,

either could/would have sued the other in an *American* court—but not a Japanese one. Irrevocable liability in the U.S. is plain.

But in rejecting that conclusion, the district court added *another* criterion to the *Morrison*/*Stoyas* tests. It demanded that the underlying stock purchase—what it labeled a "triggering event"—*also* occur in the U.S. in order for irrevocable liability to arise here. Order at 7-10. With that demand, the court committed manifest error on a fundamental issue of class-action law.

For one thing, the district court's "triggering event" test injects a heightened prerequisite into the *Morrison/Stoyas* tests that finds no support in either precedent. *Cf. Lummi*, 876 F.3d at 1007, 1009 (reversing court that "improperly imposed a heightened standard" upon longstanding "framework" of legal analysis); *Frank v. Dana Corp.*, 547 F.3d 564, 567 (6th Cir. 2008) (reversing court's "formulation of the applicable pleading standard [that] is contrary to the Supreme Court's decision"). Interpreting *Morrison*'s "domestic transaction" test, *Stoyas* doesn't ask where a security's *genesis* occurred; what matters is the parties' U.S. presence *when irrevocable liability attaches*. *Stoyas*, 896 F.3d at 948-49; *accord Absolute Activist*, 677 F.3d at 68. Thus, even if the court's "triggering event" timing were correct, it erroneously overlooked undisputed evidence that the ADRs-transaction parties were in the U.S. at that moment. *Supra* §III.D.

For another, the district court manifestly erred by importing a *merits* determination into the class-certification stage. *Amgen*, 568 U.S. at 466 ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."). Under the court's newly-crafted test, whether the underlying stock's acquisition in Japan was truly a "triggering" event goes to the heart of that inquiry—and one that Plaintiffs' evidence disputes. While it's doubtful that the dispute could be resolved even at summary judgment, nonetheless *that* is the proper stage to address it—not at class certification. *Tyson Foods*, 577 U.S. at 457 (when faced with potential concerns about "'[an alleged] failure of proof as to an element of the plaintiffs' cause of action[,] courts should engage that question as a matter of summary judgment, not class certification'").

It was undisputed that AIPTF purchased ADRs—not Toshiba common stock—and, moreover, that its investment guidelines *prohibited* it from acquiring foreign securities. Nevertheless, the district court held that AIPTF *had* acquired common stock in Japan by finding—contrary to all record evidence—that Barclays had purchased the foreign stock while acting as AIPTF's "agent." Order at 7-10. This was manifest error.

The undisputed testimony of those involved establishes that Barclays was "*not* acting as agent" for either AIPTF or AIPTF's actual agent, ClearBridge. ECF128-3/17:11; *see also* ECF128-2/41:11-12 ("we [Barclays] acted in a riskless principal

fashion *instead of as agent*"); *see also* ECF128:8 (trade confirmations specify Barclays acted in "riskless principal" capacity versus "agent").[25] Barclays also confirmed that its original purchases of Toshiba shares were for *its own* account—not AIPTF's. ECF128-2/24:22-25:10. The resulting post-conversion ADRs totaled 70,100—well beyond the 36,000 AIPTF purchased. ECF128:6. And the post-purchase conversion from shares to ADRs was done in Barclays' own account in the United States. ECF128-2/13:23-14:8.

The district court downplayed this evidence, however, remarking that a riskless principal's function may be "'analogous to that of an agent.'" Order at 9. But appearing "analogous" to an agent and *actually being an agent* are two different things, legally—especially here, where documentary evidence highlighted the difference, and Barclays' testimony corroborated it. The court's failure to credit the class-certification evidence and reserve its merits-based conclusions for later in the litigation was manifestly erroneous. *Tyson Foods*, 577 U.S. at 457.

All ADRs traded in America hale originally, by definition, from foreign stock issued by a "non-United States company." *Stoyas*, 896 F.3d at 940. Taken to its logical conclusion the district court's reasoning would mean that *all* transactions in

[25] A "riskless principal" purchases securities in the marketplace for purposes of selling them back to another purchaser as a counterparty, at the same price. ECF128:9 & n.10.

newly-issued ADRs (whether sponsored or not) are "foreign" due to their origination via "triggering events" in another country, removing them from the Exchange Act's strictures. But that ignores the factual realities of ADRs while contravening both the Exchange Act's protections for American investors and SEC oversight of ADRs.

Such disparate enforcement would ignore the purpose for which ADRs were created—permitting American investors to invest in non-U.S. companies[26]—while making a mockery of the securities laws' animating intent: investor protection. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976).

B. The district court committed manifest error when it misapplied Rule 23 and decided that a classwide question was unique to AIPTF.

Even if the district court correctly ruled that AIPTF was a foreign purchaser of Japanese securities by dint of the ADR conversion process—which it didn't, *see* §V.A. *supra*—that conclusion cannot mean that AIPTF is an *atypical* class representative under Rule 23. The court was thrice wrong.

First, the district court's conclusion applies to *all* Class members whose Exchange Act claims are linked to newly-issued ADRs, for each of them were participants in the *same* process that required as its "first step" the purchase of Toshiba common stock. Order at 7. That "first step," the court held, would be fatal to

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[26] ADRs "'allow U.S. investors to invest in non-U.S. companies *and* give non-U.S. companies easier access to U.S. capital markets.'" *Stoyas*, 896 F.3d at 940.

AIPTF's claims under *Morrison* and *Stoyas*—and so, perforce, it must be equally fatal to absent Class members similarly situated. It's a question "common to all members of the class [AIPTF] would represent." *Amgen*, 568 U.S. at 459. Class members' arguments on the point "will prevail or fail in unison." *Id*. at 460.

Second, the district court's ruling was erroneously premature. Whether the "first step" it identified was *the* "triggering" event for irrevocable liability under *Morrison* and *Stoyas*—and thus fatal to the Class's ADR claims—is something that cannot be decided at the class-certification stage. It's a question reserved for summary judgment or trial, *after* class certification. *Tyson Foods*, 577 U.S. at 457; *see also Castillo v. Johnson*, 853 F. App'x 125, 127 (9th Cir. 2021) ("Indeed, the existence of a common defense fatal to the claims of each member of the putative class *tends to prove certification is proper* because common issues predominate."). Moreover, to the extent the court *was* permitted to consider this issue at this stage, uncontroverted record evidence, including that summarized above, demonstrates that its ruling was incorrect because AIPTF's purchase of ADRs *was* domestic.

Finally, the district court ignored that all ADRs—whether newly-issued like those acquired by AIPTF or previously-issued and resold on the OTC—are merely receipts reflecting beneficial ownership of stock originally purchased on a foreign market. As with its prior order incorrectly finding a distinction between "sponsored" and "unsponsored" ADRs, the district court's demarcation of a line between "newly-

issued" and previously-sold ADRs makes no sense—legally or logically. *Both* are vehicles to permit American investors to invest in foreign companies … *both* are equally affected by a fraud committed by the underlying stock's issuer … and *both* are sold to many U.S. purchasers who have no say in which "type" of ADR they're given. Given this confluence of characteristics, AIPTF remains a typical, adequate class representative for all Class ADR purchasers. *See, e.g.*, *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) ("The test of typicality 'is whether other members have the same *or similar* injury, whether the action is based on *conduct which is not unique* to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'").

The district court's failure to recognize this classwide application is yet another manifest error requiring review.

C. The district court erred when it denied class certification and deflected to a later summary-judgment inquiry questions concerning claims under the JFIEA.

The district court's kicking down the road of two issues—Plaintiffs' standing to bring JFIEA claims (and thus to represent other 6502 Purchasers), and whether an alternative, rarely-allowed damages-calculation method rendered Plaintiffs inadequate class representatives—comprised manifest error implicating fundamental issues of class-action law for at least two reasons.

First, nothing in Rule 23 permits a class-certification denial based on "potentially" dispositive questions. Order at 13. To the contrary, "the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" *Amgen*, 568 U.S. at 460; *B.K. v. Snyder*, 922 F.3d 957, 971 (9th Cir. 2019) ("class certification is not a decision on the merits"), *cert. denied sub nom. Faust v. B.K.*, __U.S.__, 140 S. Ct. 2509 (2020).

That the district court thought the two issues were "potentially dispositive" is just another way of saying it believed that somewhere down the road, those issues *might* be decided against Plaintiffs (and the Class), thus denying the JFIEA claims. But even if that were a possibility, that's no reason to avoid ruling upon class certification *now*. "Rule 23 allows certification of classes that are fated to lose as well as classes that are sure to win." *Schleicher*, 618 F.3d at 686. The district court's allusion to potentially dispositive questions that might be resolved against the Class reveals its legal error. *Stockwell v. City & Cnty. of S.F.*, 749 F.3d 1107, 1113-14 (9th Cir. 2014) ("We conclude that the district court erred in denying class certification because of its legal error of evaluating merits questions, rather than focusing on whether the questions presented, whether meritorious or not, were common to the members of the putative class.").

Second, the two "potentially dispositive" questions the district court identified present classwide issues and defenses, rendering them inappropriate to be used to deny class certification. *See, e.g.*, *Tyson Foods*, 577 U.S. at 457 (when faced with potential concerns about "'[an alleged] failure of proof as to an element of the plaintiffs' cause of action[,] courts should engage that question as a matter of summary judgment, not class certification'"); *Castillo*, 853 F. App'x at 127 (existence of a common defense fatal to the claims of each putative class member "*tends to prove certification is proper* because common issues predominate").

As to whether only "direct owners" of Toshiba 6502 common stock may pursue JFIEA claims but not "beneficial" owners (like Plaintiffs and Class members) (Order at 11), that presents a classwide issue affecting *all* similarly situated Class members. Later, at summary judgment or at trial, Class members' arguments in favor of beneficial owners "will prevail or fail in unison." *Amgen*, 568 U.S. at 460. But for class-certification purposes, Plaintiffs' JFIEA claims are sufficiently "'"typical" if they are reasonably coextensive with those of absent class members; they need not be substantially identical.'" *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014).

So, too, with the JFIEA "damages" issue the district court flagged.

Plaintiffs discussed two usual methods of calculating damages for injured 6502 Purchasers, which methods Defendant *conceded* were acceptable. ECF114:38-39. Nonetheless, Defendant insisted that a third method involving recissory damages

needed to be included, and because it wasn't Plaintiffs couldn't adequately represent the Class. *Id*.[27] When Plaintiffs countered that Defendant's additional method was attempted only in "rare" and "extraordinary" situations not presented here, and "routinely rejected" by Japanese courts (ECF128:39-40), the district court again punted—committing manifest legal error.

The district court didn't acknowledge that Plaintiffs' suggested methods were viable (and commonplace) methods of calculating stock-fraud damages. They do *not* "fail[] to measure damages resulting from the particular [securities-fraud] injury on which [Defendant's] liability in this action is premised." *Comcast*, 569 U.S. at 36. Indeed, Defendant conceded the methods' application, but wanted a third method discussed too. Given this reality, had the court fulfilled its duty to consider the issue now, it would have agreed that "damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id*. at 35.

Adding to the court's manifest error, the issue isn't *ripe* for resolution; the time for definitively calculating damages will come later. At class certification, it's enough that Plaintiffs have "demonstrated the nexus between [their] legal theory … and [their] damages model[s]." *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 821 (9th Cir.

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[27] Although classwide damages ordinarily are a Rule 23 "predominance" issue (*Comcast*, 569 U.S. at 34), Defendant approached them under Rule 23(a)(4) adequacy. ECF114:38; Order at 11.

2019). That Defendant suggested a possible third method doesn't invalidate that demonstration. *Id*. at 817 (damages issues won't defeat certification when "'a valid method has been proposed for calculating those damages'").

VI. CONCLUSION

For the foregoing reasons, the Petition's grant is warranted.

DATED: January 21, 2022

Respectfully submitted,

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STATEMENT OF RELATED CASES
(Circuit Rule 28-2.6)

Petitioners' counsel is not aware of any related cases pending before this Court.

s/Joseph D. Daley
JOSEPH D. DALEY

CERTIFICATE OF COMPLIANCE

(Circuit Rules 5-2 and 32-3)

The undersigned counsel certifies that PETITION FOR PERMISSION TO APPEAL CLASS-CERTIFICATION ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f) uses a proportionally spaced Times New Roman typeface, 14-point, and complies with the length limitations of Circuit Rule 5-2(b) pursuant to the "PAGE/WORD CONVERSION FORMULA" of Circuit Rule 32-3 because the brief contains 5,197 words.

s/Joseph D. Daley
JOSEPH D. DALEY

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. I hereby certify that on January 21, 2022, I electronically filed the foregoing document: PETITION FOR PERMISSION TO APPEAL CLASS-CERTIFICATION ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f) with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

3. I hereby certify that on January 21, 2022, I caused a copy of the foregoing document to be served on the parties to the within action via email and U.S. Mail, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 21, 2022, at San Diego, California.

s/Joseph D. Daley
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ATTENTION ALL PARTIES AND COUNSEL
PLEASE REVIEW PARTIES AND COUNSEL LISTING

We have opened this appeal/petition based on the information provided to us by the appellant/petitioner and/or the lower court or agency. EVERY attorney and unrepresented litigant receiving this notice MUST immediately review the caption and service list for this case and notify the Court of any corrections.

Failure to ensure that all parties and counsel are accurately listed on our docket, and that counsel are registered and admitted, may result in your inability to participate in and/or receive notice of filings in this case, and may also result in the waiver of claims or defenses.

PARTY LISTING:
Notify the Clerk immediately if you (as an unrepresented litigant) or your client(s) are not properly and accurately listed or identified as a party to the appeal/petition. To report an inaccurate identification of a party (including company names, substitution of government officials appearing only in their official capacity, or spelling errors), or to request that a party who is listed only by their lower court role (such as plaintiff/defendant/movant) be listed as a party to the appeal/petition as an appellee or respondent so that the party can appear in this Court and submit filings, contact the Help Desk at http://www.ca9.uscourts.gov/cmecf/feedback/ or send a letter to the Clerk. If you or your client were identified as a party to the appeal/petition in the notice of appeal/petition for review or representation statement and you believe this is in error, file a motion to dismiss as to those parties.

COUNSEL LISTING:
In addition to reviewing the caption with respect to your client(s) as discussed above, all counsel receiving this notice must also review the electronic notice of docket activity or the service list for the case to ensure that the correct counsel are

listed for your clients. If appellate counsel are not on the service list, they must file a notice of appearance or substitution immediately or contact the Clerk's office.

NOTE that in criminal and habeas corpus appeals, trial counsel WILL remain as counsel of record on appeal until or unless they are relieved or replaced by Court order. *See* Ninth Circuit Rule 4-1.

REGISTRATION AND ADMISSION TO PRACTICE:
Every counsel listed on the docket must be admitted to practice before the Ninth Circuit AND registered for electronic filing in the Ninth Circuit in order to remain or appear on the docket as counsel of record. *See* Ninth Circuit Rules 25-5(a) and 46-1.2. These are two separate and independent requirements and doing one does not satisfy the other. If you are not registered and/or admitted, you MUST, within 7 days from receipt of this notice, register for electronic filing AND apply for admission, or be replaced by substitute counsel or otherwise withdraw from the case.

If you are not registered for electronic filing, you will not receive further notices of filings from the Court in this case, including important scheduling orders and orders requiring a response. Failure to respond to a Court order or otherwise meet an established deadline can result in the dismissal of the appeal/petition for failure to prosecute by the Clerk pursuant to Ninth Circuit Rule 42-1, or other action adverse to your client.

If you will be replaced by substitute counsel, new counsel should file a notice of appearance/substitution (no form or other attachment is required) and should note that they are replacing existing counsel. To withdraw without replacement, you must electronically file a notice or motion to withdraw as counsel from this appeal/petition and include your client's contact information.

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