No. 22-80001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff,

and

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

Plaintiffs,

v.

TOSHIBA CORPORATION,

Defendant.

ON PETITION FOR PERMISSION TO APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE DEAN D. PREGERSON
Case No. 2:15-CV-04194-DDP(JCx)

DEFENDANT TOSHIBA CORPORATION'S OPPOSITION TO PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO RULE 23(f) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee Toshiba Corporation hereby states that no publicly held corporation owns 10 percent or more of Toshiba Corporation's stock.

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The district court's denial of class certification here is unsuitable for interlocutory appeal under this Court's decision in *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (establishing standard for interlocutory appeal under Fed.R.Civ.P. 23(f)). The denial of class certification as to Plaintiffs' U.S. Exchange Act claims was based on *findings of fact* — not conclusions of law — and was soundly supported by a detailed factual record reflecting case-specific transactions. Plaintiffs and their counsel have considerable resources and, if they wish, can appeal that denial after final judgment in accordance with normal appellate practice. Furthermore, the denial "without prejudice" of class certification as to Plaintiffs' claims under Japanese securities law constituted a sound exercise of case management discretion repeatedly endorsed by this Court in a long string of decisions going back at least to *Wright v. Schock*, 742 F.2d 541, 545-46 (9th Cir. 1984) (holding that a district court has discretion under Rule 23 to defer consideration of class certification until after a decision on summary judgment).

I. INTRODUCTION

Toshiba Corporation is incorporated and headquartered in Japan; it has issued and offered securities solely in Japan; it lists those securities only on stock exchanges in Japan; it is regulated by those stock exchanges in Japan as well as by the Financial Services Agency and the Securities Exchange and Surveillance Commission of Japan; it has been subject to investigations by each of those authorities in Japan; and

it is currently subject to dozens of shareholder lawsuits in Japan. This U.S. federal action asserts two types of claims: (i) claims under the U.S. Securities Exchange Act of 1934 based on purchases in the United States of *unsponsored* ADRs — which are not issued by Toshiba but created and sold by unaffiliated depositary banks — and (ii) claims under Japan's Financial Instruments and Exchange Act ("JFIEA") based on purchases in Japan, on exchanges in Japan, of Toshiba stock by American investors.

The district court initially dismissed the U.S. Exchange Act claims under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), because Toshiba is not alleged to have listed, offered, or sold the ADRs on any U.S. securities exchange or to have participated in any domestic transactions in the ADRs. In light of that dismissal, the district court also dismissed the JFIEA claim on grounds of comity and forum non conveniens, because litigation of that claim would be more appropriate and convenient in Japan, where numerous civil actions are already pending against Toshiba.

This Court upheld dismissal of the first amended complaint, holding that it failed to allege a domestic transaction in ADRs or that Toshiba's purported misstatements were "in connection with" Plaintiffs' purchase of ADRs. *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 951 (9th Cir. 2017). This Court, however, remanded with instructions for the district court to allow Plaintiffs to replead.

On remand, Plaintiffs' second amended complaint survived Toshiba's renewed motion to dismiss. In denying dismissal, the district court accepted Plaintiffs' *allegations* that the sole named Exchange-Act Plaintiff, AIPTF, purchased its ADRs in a single transaction on the "OTC Market" in the United States. ECF88 at 7:4-6. After substantial party- and non-party discovery, Plaintiffs filed their motion for class certification.

In moving to certify a class of domestic ADR purchasers, Plaintiffs acknowledged that AIPTF utilized "professional investment managers to direct the purchase and sale of Toshiba securities on its behalf," namely ClearBridge Advisors, Inc. ECF109 at 5:11-13. Plaintiffs further acknowledged that ClearBridge, in turn, utilized a broker-dealer, Barclays Capital Inc., to "acquire[] 6502 to create the ADRs that AIPTF ultimately received." ECF128 at 1:18-19. Plaintiffs concede that ClearBridge acted as AIPTF's agent, *id.*, and the district court found that, under the particular circumstances of the transaction at issue, Barclays's purchase of Toshiba common stock in Japan "substantively function[ed] as an agency transaction." ECF146 ("Order") at 9:9.

Based on documentary evidence provided in discovery by AIPTF, ClearBridge, and Barclays — including a contemporaneous Barclays document confirming its "execution" of the purchase of Toshiba 6502 shares for "Client Clearbridge" in Tokyo (ECF114-14) — the district court found that Japan was the

place where AIPTF "became logically and legally bound to perform its contractual obligations" and thus irrevocably liable for its purchase of unsponsored ADRs referencing Toshiba common stock. Order at 8:8-10. As such, the Court found that Plaintiff AIPTF is not typical of the proposed class of domestic purchasers of ADRs (Order at 10:14–11:1); indeed, Plaintiff AIPTF does not even fall within the proposed class.

The district court also denied class certification, "without prejudice," for the alleged class of plaintiffs bringing claims under the JFIEA, citing potentially dispositive issues related to Plaintiffs' status as unregistered beneficial shareholders and failure to raise all methods of calculating damages. Order at 11-13. Plaintiffs concede that they are not registered shareholders of Toshiba common stock. ECF128 at 4:10-13. Various putative class members certainly are. And Plaintiffs concede that they have not sought all manner of damages allowed under Japan's securities laws. *Id.* at 4:17-19. Various putative class members certainly would seek these damages. The district court, apparently contemplating these scenarios, denied Plaintiffs' motion for class certification as to the JFIEA claims "without prejudice" pending a motion for summary judgment on these issues.

II. STANDARD OF REVIEW

In *Chamberlan*, this Court "explor[ed] the contours" of Rule 23(f), considering the text, purpose, and history of the rule, as well as decisions by other

courts, and decided that interlocutory review under Rule 23(f) "should be granted sparingly," only in "rare cases." 402 F.3d at 957-60. This Court identified three scenarios under which review under Rule 23(f) may be appropriate: "(1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision 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; or (3) the district court's class certification decision is manifestly erroneous." *Id.* at 959.

This Court added that "[t]he kind of error most likely to warrant interlocutory review will be one of law, as opposed to an incorrect application of law to facts." *Id*. A district court's error must be "significant"; "bare assertions of error will not suffice." *Id.* Petitions brought under the manifestly-erroneous standard generally may be granted only when the district court's decision is "virtually certain to be reversed on appeal from the final judgment." *Id.* at 962. That standard is "difficult" to meet without a showing that the district court's decision "applies an incorrect Rule 23 standard or ignores a directly controlling case." *Id.* Further, the error must be "manifest," in that the error is "easily ascertainable from the petition itself," so as to avoid "a time consuming consideration of the merits." *Id*. at 959.

III. ARGUMENT

A. The District Court Denied Class Certification As To The U.S. Exchange Claims Based On Findings Of Fact

Plaintiffs' assertions of manifest legal error are meritless. Plaintiffs cannot dispute that the district court applied the correct test under *Morrison* and *Stoyas*: "the question before this Court is whether AIPTF incurred irrevocable liability to take and pay for the ADRs in the United States or in Japan." Order at 6:23-24, *quoted in* Pet. 12. Instead, Plaintiffs disagree with the district court's *factual findings* that were based on evidence amassed in nearly two years of discovery: "The evidence indicates that Barclays executed the purchase of ordinary stock in Japan on behalf of its client, ClearBridge." Order at 10:4-6 (citing ECF114-14, depicted below, as redacted at the request of non-party Barclays for public filings):

Message

From: Lawton, Justin: BSJL Markets [redacted]
Sent: 3/23/2015 6:47:06 AM
To: Genirs, Tim: Equities Cash Trading [redacted]
CC: BSJL Tokyo Eq Sales Support [redacted]; Tokyo Eq Trade Support [redacted]; International Sales Traders NY [redacted]
Subject: Japan ADR trade for March 23rd, 2015

Hi,

Trade date	23Mar/2015
Name	Toshiba
ORD ticker	6502
ADR ticker	TOSYY (ratio 6 local shares=1 ADR)
Direction	Buy
Client	Clearbridge

For ADR settlement:
----------execution----------
Bot 420,600 TOSHIBA(6502) @ 512.4964; lvs 0

Regards,
Justin

This "undisputed evidence" (Order at 10 n.9) discovered from files of AIPTF's broker Barclays establishes "execution" in Japan, in yen, on March 23, 2015 (Japan time), of the market order placed by "Client Clearbridge" "[f]or ADR settlement." ECF114-4 (debunking Plaintiffs' allegation of a single domestic AIPTF transaction); *compare* ECF75 at ¶22(c), Second Am. Compl. ("Barclay's purchased TOSYY for AIPTF on the OTC Market using the OTC Link trading platform, both of which are based in New York"), *with* ECF128 (Pls.' Class Cert. Reply Mem.) at 2:1-2 (conceding "Barclays obtained the underlying 6502 shares for conversion . . .").

As reflected in Plaintiffs' repeated assertions that the district court misread "evidence," *e.g.*, Pet. 1, 2, 3, 8, 15, 16, 17, 19, the Petition presents a quintessential example of disagreement with a finding of fact, which is no basis for interlocutory review. *See Chamberlan*, 402 F.3d at 959 (holding that "error that must be evaluated based on a well developed factual record" is not properly reviewed under Rule 23(f)).

Attempting to cast the district court's factual conclusions as legal error, Plaintiffs grasp the district court's single use of the phrase "triggering event" and — mentioning it eleven times — argue as if the district court had devised its own gloss on the irrevocable-liability test. *See* Pet. 1-2 ("It engrafted an even-more-demanding criterion onto the *Morrison/Stoyas* tests—what it called a "triggering event" prerequisite . . . .").

Rather than conjuring some new test, "triggering event" was merely the district court's natural-language description of the evidence showing that AIPTF became irrevocably liable "to take and pay," *Stoyas*, 896 F.3d at 949, for the ADRs at the moment Barclays (through its Japanese affiliate) had acquired the underlying Toshiba common stock in Japan:

> Because ClearBridge was ready and willing to purchase the ADRs, it was bound to complete the ADR trade, beginning with the trade of underlying Toshiba common stock. Thus, the triggering event that caused ClearBridge (and by extension, AIPTF) to incur irrevocable liability occurred in Japan when Barclays acquired the shares of Toshiba common stock on the Tokyo Stock Exchange. For these reasons, the court concludes that AIPTF purchased the ADRs in a foreign transaction.

Order at 10:8-15.

This factual finding was indeed the critical one because Plaintiffs had contended, counter-factually, that AIPTF had incurred irrevocable liability upon placing its ADR order — before Barclays had obtained the underlying common stock in Japan. *E.g.*, ECF128 (Pls.' Class Cert. Reply Mem.) at 1:24–2:3 ("Nor does Toshiba confront the fact that AIPTF incurred irrevocable liability to purchase ADRs in the United States ***before*** Barclays obtained the underlying 6502 shares for conversion, mooting all of Toshiba's arguments for denial of certification based on purported transactions occurring in Japan.") (emphasis in original).

Belying the Petition's unsupported assertions that the district court applied some "heightened" standard, Pet. 2, 15, the district court's conclusion is entirely

consistent with prior irrevocable-liability decisions. *See*, *e.g.*, *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 181 n.33 (2d Cir. 2014) ("[W]e have never held that the placement of a purchase order, without more, is sufficient to incur irrevocable liability, particularly in the context of transactions in foreign securities on a foreign exchange.") (citing *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 62, 71 (2d Cir. 2012)); *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166, 177 (S.D.N.Y. 2010) ("The plaintiffs argue . . . that a purchase occurs when and where an investor places a buy order. Other courts considering similar claims have unanimously rejected this construction.") (collecting cases), *cited in Absolute Activist*, 677 F.3d at 68.

Beyond ignoring the unanimous case law, Plaintiffs brazenly continue to ignore the foreign elements of the transaction. *Compare*, *e.g.*, Pet. 14 ("[E]very step of AIPTF's purchase of the Toshiba ADRs took place within the U.S."), *with* Order at 7:16-17 ("Plaintiffs' approach ascribes little importance to the first step in the ADR conversion process: the purchase of Toshiba common stock.").

For example, the Petition's two pages of single-spaced bullets purportedly detailing the "chronological and geographical mileposts" of the transaction, Pet. 8-11, omit that, pursuant to an agreed foreign-exchange rate of yen to dollars, ClearBridge directed Barclays to acquire Toshiba common stock in Japan, which

Barclays did through its Japanese affiliate Barclays Securities Japan Ltd., for delivery to Citigroup in Tokyo for subsequent conversion into ADRs, and that throughout Barclays acted at ClearBridge's direction for a fixed, four-cent per share commission as Barclays's only compensation. *See supra* 6 (depicting Exhibit ECF114-14); ECF114-12 (Bloomberg chat between Barclays and ClearBridge: "FX = 120.01 . . . when I book out I will have 4cps as comm"); ECF114-13 (Citigroup Global Markets Inc. Bloomberg chat with Barclays: "sure thats [*sic*] not a problem at all . . . *we will issue the DRs same day the ords are delivered to us in Tokyo*.") (emphasis added).

Plaintiffs argue that "*Stoyas* doesn't ask where a security's *genesis* occurred, what matters is the parties' U.S. presence *when irrevocable liability attaches*." Pet. 15 (citing *Stoyas*, 896 F.3d at 948-49) (emphasis in original). Plaintiffs thus conveniently ignore *Stoyas*'s focus on *where* irrevocable liability attaches, which is *not* dictated solely by the location of some of the parties to the transaction: "Looking to where purchasers incurred the liability to take and pay for securities, and where sellers incurred the liability to deliver securities hews to Section 10(b)'s focus on transactions and *Morrison*'s instruction that purchases and sales constitute transactions." *Stoyas*, 896 F.3d at 949 (citing *Absolute Activist*, 677 F.3d at 68 and *Morrison*, 561 U.S. at 267–68); *see also Absolute Activist*, 677 F.3d at 68 ("Given that the point at which the parties become irrevocably bound is used to determine

the timing of a purchase and sale, we similarly hold that the point of irrevocable liability can be used to determine the locus of a securities purchase or sale.").

Here, "[t]he evidence indicates that Barclays," acting through its Japanese affiliate Barclays Securities Japan Ltd., "executed the purchase of ordinary stock in Japan on behalf of its client, ClearBridge." Order at 10:4-6 (citing ECF114-14, depicted *supra* 6). That factual conclusion by the district court is entirely consistent with a long line of decisions (none of which Plaintiffs address) finding that the transactions involved are *not* domestic under *Morrison* due to a foreign locus of irrevocable liability — *despite* the U.S. presence of some parties, including the purchaser. *See*, *e.g.*, *Banco Safra S.A.-Cayman Islands Branch v. Samarco Minercao S.A.*, 849 F. App'x 289, 293 (2d Cir. 2021) ("[M]erely providing the physical location of a broker-dealer involved in the relevant transaction *does not necessarily demonstrate where a contract was executed*—at least without additional allegations that the broker carried out tasks in the United States that irrevocably bound the parties to buy or sell the securities. This is because *territoriality under Morrison concerns where, physically, the purchaser or seller committed him or herself*.") (internal quotation marks and alterations omitted) (emphasis added); *Stackhouse v. Toyota Motor Co.*, No. 10-922, 2010 U.S. Dist. LEXIS 79837, at *2 (C.D. Cal. July 16, 2010) ("[B]ecause the actual transaction takes place on the foreign exchange, the purchaser or seller has figuratively traveled to that foreign

exchange — presumably via a foreign broker —" here, Barclays Securities Japan Ltd., "to complete the transaction.") (citing *Morrison*, 561 U.S. at 267), *cited in* Order at 8:10-14.

The district court's finding that the acquisition of Toshiba's common stock in Japan by Barclays Securities Japan Ltd. was the point of no return in terms of liability for the ADRs between AIPTF and Barclays followed directly from this Court's direction in *Stoyas* "[l]ooking to where purchasers incurred the liability to take and pay for securities . . . ." 896 F.3d at 949. As a factual matter, the district court rejected Plaintiffs' contention that AIPTF could *not* have canceled its ADR order prior to Barclays obtaining the Toshiba common stock necessary for the ADRs' creation: "As Defendant notes, 'if [AIPTF] for any reason had elected to cancel the ADR order before Barclays obtained the common stock in Japan needed to create the ADRs, then AIPTF could not have been liable 'to take and pay for' non-existent ADRs.'" Order at 8:5-8 (citing ECF141 at 10:1-4).

Plaintiffs persist in obscuring the purchase of Toshiba common stock in Japan, suggesting that Barclays received authorization to execute ClearBridge's order only *after* Barclays had already acquired the common stock. *Compare* Pet. at 9 (implying execution did not occur until ClearBridge's trader "agreed" to the TOSYY price), *with* Order at 7-8 nn.5-6 (finding ClearBridge had already placed a market order that

Barclays had executed in Japan and subsequently "communicated the details of the trade to ClearBridge 'as a courtesy'") (citing ECF128-3 39:6-9 & 39:13-21).

The district court's conclusion about when AIPTF could no longer cancel its order is consistent with both the case evidence and prior decisions on irrevocable liability, neither of which Plaintiffs address. *See* ECF128-3 at 71:15-24 (Barclays deposition testimony: "Q: Once Clearbridge has sent a market order to a broker like Barclays, can it cancel that order? A: It can. Q: At what point can it not cancel that order anymore? A: Once it's been fully executed."); *Connell v. Johnson*, No. 20-1864, 2020 U.S. Dist. LEXIS 92742, at *6 (S.D.N.Y. May 27, 2020) ("Johnson's placement of the trade to purchase the shares on December 21, 2018 *does not constitute a purchase* under the Exchange Act. Because he *cancelled* that transaction, he *had not incurred an irrevocable obligation* to pay for the stock."); *Olagues v. Perceptive Advisers LLC*, No. 15-1190, 2016 U.S. Dist. LEXIS 122436, at *9-10 (S.D.N.Y. Sept. 8, 2016) ("[Party] incurred an 'irrevocable obligation' to exercise the puts and sell the underlying shares of Repros stock at 5:30pm Eastern Time on Friday, March 15, 2013. *That was the last moment that [Party] could have submitted instructions not to exercise its puts*.") (emphases added).

Plaintiffs' argument that "[h]ad the *executed* deal gone sour, either [Barclays/AIPTF] could/would have sued the other in an *American* court—but not a Japanese one[,]" Pet. 14-15 (first emphasis added), is off point but helps illustrate

the propriety of the district court's finding. Had the "deal gone sour" *prior to execution* — i.e., prior to Barclays acquiring the Toshiba common stock in Japan — AIPTF would *not* have been liable to "take and pay for" non-existent ADRs; AIPTF would have been liable only for Barclays's fixed, $1,440 commission (i.e., $.04 x 36,000, *see* ECF114-9), which is the entirety of what Barclays stood to gain even if the transaction had been completed. *See*, *e.g.*, Restatement (Second) of Contracts § 347 cmt. a (Am. L. Inst. 1981) ("Contract damages are ordinarily based on the injured party's expectation interest . . . .").

Given the district court's thoroughly supported, fact-bound conclusion that AIPTF incurred irrevocable liability outside the United States and thus lacked the requisite "domestic transaction" under *Morrison* — and given that AIPTF is the only named Plaintiff for a putative class of Exchange Act claimants who purchased their ADRs domestically — the district court's denial of class certification on Plaintiffs' Exchange Act claims for lack of typicality was entirely appropriate. *See*, *e.g.*, *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980) ("The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims."); *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1007 (9th Cir. 2018) ("A named plaintiff must be a member of the class she seeks to represent . . . .").

The district court's fact-bound conclusion that AIPTF lacked the requisite domestic transaction thus posed a classic Rule 23 typicality question, rather than a

merits issue endemic to the whole putative class. *Compare Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992) ("Because of [plaintiff's] unique situation, it is predictable that a major focus of the litigation will be on a defense unique to him. Thus, [plaintiff] fails to satisfy the typicality requirement of Rule 23(a).") (internal citations and quotation marks omitted), *cited in* Order at 4:5-19, *with* Pet. 2 ("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.").

Plaintiffs offered the district court neither any evidence nor any legal basis to find that the deficiency in AIPTF's individual Exchange Act claims presented a classwide issue. There certainly was no factual or expert evidence to that effect, and Plaintiffs never disputed that purchasers could in fact purchase preexisting unsponsored ADRs on the secondary market in the United States or create new unsponsored ADRs through purchase and conversion of Toshiba common stock already present on the secondary market in the United States. *See* Trans. of Oral Argument at 38:23–39:1, 46:4-8, *Stoyas v. Toshiba Corp.*, 2022 U.S. Dist. LEXIS 3996 (C.D. Cal. Oct. 4, 2021) (No. 2:15-cv-04194); *see also* ECF139-1 (Pls.' Supp. Class Cert. Mem.) at 4 n.4 (noting different ways "an investor can purchase" the ADRs at issue); Pet. 19-20 (acknowledging that putative class includes purchasers of ADRs "previously-issued and resold on the OTC").

Under *Chamberlan*, none of Plaintiffs' other complaints here raise colorable grounds for manifest-error review. First, Plaintiffs contend that the district court "downplayed th[e] evidence," Pet. 17 — namely, the deposition testimony of a Barclays trader — that Barclays acted as a so-called "riskless principal" rather than as an agent in the transaction. Plaintiffs omit that the district court expressly found, relying on both the case evidence and SEC guidance:

> [T]he fact that Barclays acted in a 'riskless principal' capacity only further supports the proposition that AIPTF incurred liability in Japan. The evidence indicates that Barclays executed the purchase of ordinary stock in Japan on behalf of its client, ClearBridge. Barclays did not assume any risk of loss for purchasing the underlying shares because it already knew that ClearBridge would purchase the converted ADRs at market price.

Order at 10:3-8; *see also id.* at 9:15-19 & n.8 (quoting SEC guidance).

Second, Plaintiffs argue that "[t]aken to its logical conclusion the district court's reasoning would mean that *all* transactions in newly-issued ADRs (whether sponsored or not) are 'foreign' . . . removing them from the Exchange Act's strictures." Pet. 17-18 (emphasis in original). Not so. Sponsored ADRs trading on U.S. exchanges automatically satisfy *Morrison*. And Plaintiffs conceded below that, unlike AIPTF, other purchasers of ADRs, sponsored or unsponsored, could have purchased on the secondary market in the United States or created newly issued ADRs through conversion of Toshiba common stock already present in the United States. *See supra* 15-16.

B. Plaintiffs Fail In Their Attempts To Recast The District Court's Findings Of Fact As Manifest Legal Error

The Petition's Argument B merely repeats Plaintiffs' attempts to recast as legal error the district court's evidentiary conclusion that AIPTF incurred irrevocable liability in Japan. Given the district court's finding on AIPTF's ADR purchase, AIPTF could not satisfy Rule 23's typicality requirement for a class of Exchange Act claimants predicated on having incurred irrevocable liability in domestic transactions under *Morrison*. *See supra* 6-7; *Stoyas*, 896 F.3d at 949 n.20 ("Any class definition . . . should comport with *Morrison* and the irrevocable liability test.").

Plaintiffs overlook that the *Amgen* case they cite (Pet. 19) concerned whether materiality under Section 10(b) can be proven on a class-wide basis, which is a meaningfully different question than the *Morrison* one here. In fact, in *vacating* an order of class certification based on *Morrison*'s domesticity requirement, the Second Circuit expressly distinguished *Amgen*:

> Because materiality is determined objectively from the perspective of the "'reasonable investor,' materiality can be proved through evidence *common to the class*." "In no event will the individual circumstances of particular class members bear on the [materiality] inquiry." . . .
>
> In the present action, by contrast, it cannot be said that the class members' *Morrison* inquiries will "prevail or fail in unison."

See In re Petrobras Secs. Litig., 862 F.3d 250, 273 (2d Cir. 2017) (quoting *Amgen*, 568 U.S. at 467, 460) (emphasis in original).

The Second Circuit's vacatur of class certification in *Petrobras* — which this Court cited in *Stoyas*, 896 F.3d at 950 n.22 — also illustrates why the district court's denial of class certification was perfectly sound rather than "erroneously premature" as Plaintiffs contend. *Compare* Pet. 19 ("It's a question reserved for summary judgment or trial, *after* class certification.") (citing *Tyson Foods*) (emphasis in original), *with Petrobras*, 862 F.3d at 272 ("On the available record, the investigation of domesticity appears to be an 'individual question' requiring putative class members to 'present evidence that varies from member to member.' . . . These transaction-specific facts are not obviously 'susceptible to class-wide proof,' nor did Plaintiffs suggest a form of representative proof that would answer the question of domesticity for individual class members.") (quoting *Tyson Foods*, 136 S. Ct. at 1045-46).

C. The District Court Acted Within Its Discretion To Defer A Ruling On Class Certification As To Plaintiffs' JFIEA Claims Until After Toshiba's Motion For Summary Judgment

Plaintiffs even request interlocutory review of the district court's decision to *defer consideration* of class certification as to the JFIEA claims "without prejudice" until after a summary-judgment motion by Toshiba. Plaintiffs assert that the district court was "requir[ed]" to address and resolve class certification before entertaining a motion for summary judgment. Pet. 3, 20-24. But this Court has repeatedly held

to the contrary and endorsed the discretion of district courts to consider summary judgment ahead of class certification.

In *Wright v. Schock*, 742 F.2d 541 (9th Cir. 1984), this Court squarely held that district courts have discretion to address and resolve a motion by a defendant for summary judgment before deciding a timely motion by a plaintiff for class certification. In that case, coincidentally also a securities case, the plaintiffs argued that the district court's grant of summary judgment, before ruling on class certification, violated Rule 23(c)(1) as well as the due process rights of the plaintiffs and putative class members. *Id*. at 543. This Court roundly rejected that argument, holding that a district court had discretion to defer a ruling on class certification as a matter of sound case management.

Notably, *Wright* was decided when Rule 23(c)(1) required a ruling on class certification "as soon as practicable after the commencement of an action brought as a class action." *Id*. at 543. Analyzing the rule's history, this Court concluded that "practicable" was the "key word" in the rule, deliberately chosen to avoid a mechanical approach and to vest district court judges with discretion to weigh each case's particular circumstances to determine the best approach to case management. *Id.* This Court held that the district court had not abused its discretion in light of considerations of economy and fairness. *Id*. at 545-46.

Since *Wright*, Rule 23(c)(1) has been revised to reinforce the discretion of district courts to determine the appropriate time to rule on class certification. Instead of requiring a ruling "as soon as practicable," the current version of the rule (since 2003) calls for a ruling "[a]t an early practicable time" in the case. Fed.R.Civ.P. 23(c)(1)(A). This change, which acknowledges that the soonest "practicable" time may not be the most appropriate, makes even more clear that district courts have discretion over when to rule on class certification. *See, e.g.*, Notes of Advisory Committee on 2003 amendments to Fed.R.Civ.P. 23(c)(1) ("The 'as soon as practicable' exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. Time may be needed to gather information necessary to make the certification decision. . . . Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified.").

Not surprisingly, this Court has repeatedly confirmed *Wright*'s holding under the current version of Rule 23(c)(1)(A). For example, in *Saeger v. Pac. Life Ins. Co.*, 305 F. App'x 492, 493 (9th Cir. 2008), yet another securities case, this Court expressly followed *Wright* and affirmed a grant of summary judgment that preceded a ruling on class certification. Likewise, in *Estakhrian v. Obenstine*, 859 Fed. App'x

121 (9th Cir. 2021), this Court followed *Wright* and held "[h]ere, it was reasonable for the district court to address the issues raised in the summary judgment motion first because they could have been dispositive as to whether the suit could even move forward." *Id*. at 122. In *Browning v. Unilever United States, Inc.*, 809 F. App'x 446, 447 n.2 (9th Cir. 2020), this Court noted that "resolving dispositive motions before turning to class certification . . . is typically the 'the proper course to follow.'" *Id*. at 447 n.2.

This discretionary approach to timing is embraced in federal courts across the country and is enshrined in the current Manual on Complex Litigation. *See* Ann. Manual Complex Lit. § 21.133 (4th ed.) (May 2021) ("The court may rule on motions pursuant to Rule 12, Rule 56, or other threshold issues before deciding on certification; however, such rulings bind only the named parties. Most courts agree, and Rule 23(c)(1)(A) reflects, that such precertification rulings on threshold dispositive motions are proper, and one study found a substantial rate of precertification rulings on motions to dismiss or for summary judgment.") (citing cases).

Plaintiffs acknowledge that the district court did not make any substantive ruling on class certification as to the JFIEA claims, but merely deferred a ruling. Employing pejorative characterizations of the deferral, Plaintiffs state that the district court "deflected" a class-certification ruling by "kicking down the road" and

"punt[ing]" a supposed "duty" to decide the matter. Pet. 20, 23. But the exercise of discretion by the district court here is comfortably in line with *Wright* and its progeny.

Indeed, in *Wright*, this Court's primary concern about a deferral was that it might prejudice *the defendant*, as a grant of summary judgment would have res judicata effect only as to the named plaintiff and not as to putative class members. *Wright* concluded that such a concern was not problematic where (as here) a defendant does not object to pre-certification consideration of summary judgment. *Wright* also found that deferral caused no potential prejudice to the named plaintiff or especially to putative class members. The logic of *Wright* applies with even greater force here, as the named Plaintiffs' lack of standing (due to not being registered shareholders) should not cause an adverse post-certification judgment that precludes claims of class members who do have standing.

Deferring consideration of class certification as to the JFIEA claims is particularly sensible here, as apparently no court has ever certified a class asserting claims under any foreign securities statute. Before wading into such unchartered

territory, the district court showed sound discretion to consider whether the claims of the named Plaintiffs were subject to summary judgment in any event.

IV. CONCLUSION

For the foregoing reasons, the Petition should be denied.

Dated: January 31, 2022

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for Defendant is not aware of any cases deemed related to this case that are pending in this Court.

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 5,095 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 31, 2022.

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