No. _____

In The
Supreme Court of the United States

CHRISTOPHER HALL,

Petitioner,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

BURTON W. WIAND
Counsel of Record
JARED J. PEREZ
ERIC R. FELD
WIAND GUERRA KING PA
5505 West Gray Street
Tampa, FL 33609
Telephone: (813) 347-5100
E-Mail: bwiand@wiandlaw.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED FOR REVIEW

Whether an appellate court has authority to consider challenges to issues of law raised in a *pre*-verdict Federal Rule of Civil Procedure 50(a) motion for judgment as a matter of law if the same challenges are not subsequently renewed in a *post*-verdict Rule 50(b) motion in the district court.

And if so, whether purported misrepresentations, which do not involve or affect the value or underlying substance of the securities transacted, can support a finding of a violation of the anti-fraud provisions of the securities laws, Section 10(b) of the Securities Exchange Act of 1934 or Section 17(a) of the Securities Act of 1933.

PARTIES TO THE PROCEEDINGS BELOW

This case arises from a civil enforcement action in the United States District Court for the Southern District of Florida ("district court") and the denial of Petitioner's appeal in the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit").

Petitioner Christopher Hall ("Hall") is an individual residing in San Antonio, Texas. Hall was the appellant in the appeal before the Eleventh Circuit and was the defendant in the district court action.

Respondent United States Securities and Exchange Commission (the "Commission") initiated the civil enforcement action in the district court and was the appellee before the Eleventh Circuit.

RULE 29.6 STATEMENT

The Petitioner is not a nongovernmental corporation.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceedings Below ii

Rule 29.6 Statement ii

Table of Authorities vi

Petition for a Writ of Certiorari 1

Opinions and Orders Below 1

Basis for Jurisdiction 1

Relevant Statutes 2

Statement of the Case 2

Argument and Reasons for Granting the Petition 9

I. The courts of appeals are divided over whether they have authority to hear arguments raised in pre-verdict Fed. R. Civ. P. 50(a) motions when the arguments are not thereafter revived in a post-verdict Rule 50(b) motion 11

A. This Court's prior opinion in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.* ... 11

B. The Eleventh Circuit's opinion in *Hi Ltd. Partnership v. Winghouse of Florida, Inc.* 13

C. The Fourth, Sixth, Seventh, and Eighth Circuits 15

TABLE OF CONTENTS—Continued

Page

II. There is ambiguity in the courts over the extent to which misrepresentations must affect or relate to the value or substance of the securities transacted in order to be made "in connection with" the purchase or sale of a security as to support a violation of the anti-fraud provisions of the securities laws 17

A. The Second Circuit's decision in *Chemical Bank v. Arthur Answer & Co.* 17

B. This Court's opinion in *SEC v. Zandford*.... 20

C. This Court's opinion in *Chadbourne & Parke LLP v. Troice* 23

D. The Eleventh Circuit's opinion in *Securities and Exchange Commission v. Radius Capital Corp.*..... 25

III. This Court should grant *certiorari* and hold that challenges to issues of law raised in a pre-verdict Fed. R. Civ. P. 50(a) motion for judgment as a matter of law can be reviewed in the appellate courts, notwithstanding a party's failure to renew those arguments on a post-verdict Rule 50(b) motion 27

TABLE OF CONTENTS—Continued

Page

IV. The Court should grant certiorari and hold that in order to satisfy the "in connection with" element of the anti-fraud provisions of the securities laws, the fraud or misrepresentation at issue must relate to or affect the value or substance of the securities transacted 29

Conclusion..... 32

Appendix

U.S. Court of Appeals for the Eleventh Circuit's Order, dated January 4, 2019, affirming the district court.....Pet. App. 1-17

U.S. District Court for the Southern District of Florida's Order, dated June 27, 2017....Pet. App. 18-27

U.S. District Court for the Southern District of Florida's Instructions to the Jury, dated February 23, 2017 .....Pet. App. 28-37

TABLE OF AUTHORITIES

Page

CASES

Badger v. S. Farm Bureau Life Ins. Co.,
612 F.3d 1334 (11th Cir. 2010).....29

Bryant v. Dollar Gen. Corp.,
538 F.3d 394 (6th Cir. 2008).....10, 16

Chadbourne & Parke LLP v. Troice,
571 U.S. 377 (2014) 23, 24, 31, 32

Chemical Bank v. Arthur Andersen & Co.,
726 F. 2d 930 (1984), *cert. denied*, 476 U.S.
1171, 106 S.Ct. 2894, 90 L.Ed.2d 981
(1986).....17, 18, 19

Cone v. West Virginia Pulp & Paper Co.,
330 U.S. 212 (1947) 13

Fuesting v. Zimmer, Inc.,
448 F.3d 936 (7th Cir. 2006).....10, 16

Hi Ltd. P'Ship v. Winghouse of Fla., Inc.,
451 F.3d 1300 (11th Cir. 2006).....*passim*

Linden v. CNH America, LLC,
673 F.3d 829 (8th Cir. 2012).....*passim*

Marine Bank v. Weaver,
455 U.S. 551(1982) 30

Matrixx Initiatives, Inc. v. Siracusano,
563 U.S. 27 (2011) 24

Rudolph v. Arthur Andersen & Co.,
800 F.2d 1040 (11th Cir. 1986).....26

S.E.C. v. Radius Capital Corp.,
653 Fed. Appx. 744 (11th Cir. 2016).....25, 26

TABLE OF AUTHORITIES—Continued

Page

S.E.C. v. Zandford,
535 U.S. 813 (2002) .....*passim*

Superintendent of Insurance v. Bankers Life & Casualty Co.,
404 U.S. 6 (1971) 19, 22, 31

Unitherm Food Systems, Inc. v. Swift–Eckrich, Inc.,
546 U.S. 394 (2006) .....*passim*

Van Alstyne v. Elec. Scriptorium, Ltd.,
560 F.3d 199 (4th Cir. 2009).....10, 16

STATUTES & REGULATIONS

15 U.S.C.A. § 77q(a) .....*passim*

15 U.S.C.A. § 78j(b) .....*passim*

28 U.S.C.A. § 1254(1) 1

17 C.F.R. § 240.10b-5 .....*passim*

RULES

Fed. R. Civ. P. 50.....*passim*

Fed. R. Civ. P. 59.....8, 12, 15

OTHER AUTHORITIES

9B *Fed. Prac. & Proc.* § 2540 (3d ed.) 16

PETITION FOR A WRIT OF CERTIORARI

Hall respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The January 4, 2019 opinion of the Eleventh Circuit being appealed is unreported and is found at Appendix, Pet. App. 1-17.

The June 29, 2017 order of the United States District Court for the Southern District of Florida granting the Commission's motion for reconsideration and ordering the entering of final judgment against Petitioner is unreported, and is found at Appendix, Pet. App. 18-27.

Relevant portions of the instructions to the jury by the United States District Court for the Southern District of Florida are found at Appendix, Pet. App. 28-37.

BASIS FOR JURISDICTION

The opinion of the Eleventh Circuit was entered on January 4, 2019. On March 29, 2019, Justice Thomas granted an extension of time for filing a petition for a writ of certiorari until May 20, 2019. No. 18A988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES

This petition involves Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) ("It shall be unlawful for any person . . . to use or employ, in connection with the purchase or sale of a security . . . any manipulative or deceptive device or contrivance. . . ."); Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5 (It shall be unlawful for any person . . . to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security); Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) ("It shall be unlawful for any person in the offer or sale of any securities . . . to employ any device, scheme, or artifice to defraud. . . ."); and Federal Rule of Civil Procedure 50 (If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . grant a motion for judgment as a matter of law. . . .").

STATEMENT OF THE CASE

This case involves what appellate remedies are available to parties who seek review of challenges to issues of law in the trial courts. In this case, the Eleventh Circuit—citing its own precedent—construed a requirement that parties file both a Fed. R. Civ. P. 50(a) motion for judgment as a matter of law *prior* to a

matter being submitted to a jury and then renew their argument in a *post*-verdict Rule 50(b) motion, before an appellate court has authority to consider the arguments raised on appeal. Pet. App. 8-9, n. 6 (citing *Hi Ltd. P'Ship v. Winghouse of Fla., Inc.*, 451 F.3d 1300, 1302 (11th Cir. 2006)).

Other circuits have held that the *Hi Ltd. P'Ship*, Rule 50 analysis is too broadly cast, explaining that the procedural requirement of both *pre* and *post*-verdict motions only applies where challenges are made to the *sufficiency of the evidence*. Where a party presents arguments as to *issues of law* in their *pre*-verdict motion, *post*-verdict Rule 50(b) motions are not necessary to vest authority of appellate courts to hear challenges to issues of law on appeal. *See, e.g.*, *Linden v. CNH America, LLC*, 673 F.3d 829 (8th Cir. 2012).

Here, the Eleventh Circuit viewed certain of Hall's substantive arguments on appeal as falling under the umbrella of its *Hi Ltd. P'Ship* decision dealing with sufficiency of the evidence challenges. The Eleventh Circuit therefore determined it lacked authority to consider Hall's arguments on appeal because he had not filed a *post*-verdict Rule 50(b) motion in the district court. As a result, the Eleventh Circuit dismissed Hall's arguments without discussion. Petitioner believes this was improper.

In fact, Hall's appellate claims were challenges to *issues of law*, and no such *post*-verdict Rule 50(b) motion should have been necessary. Hall's substantive securities laws arguments on appeal—that the

purported misrepresentations at issue were not made "in connection with" the purchase or sale of a security—should therefore have been considered by the Eleventh Circuit. And because the purported misrepresentations did not relate to or substantively affect the value or substance of the securities transacted, the Eleventh Circuit should have resolved those arguments in Hall's favor.

The facts of this case are largely undisputed. Petitioner Hall—and a company he was the controlling shareholder of, Call Now, Inc.—obtained millions of dollars in loans from the brokerage firm (and its affiliate), Penson Financial Services, Inc. ("Penson"). Hall obtained these loans in connection with a "margin" account at Penson, in which Penson agreed to loan Hall funds, so long as Hall pledged sufficient collateral to Penson to secure the loans (with the pledged collateral generally being held in the margin account).[1]

By 2009, during the global financial recession, both Hall's and Call Now's brokerage accounts had substantially diminished in value, so Penson required Hall and Call Now to deposit and/or pledge additional

[1] "Margin" is money borrowed from a brokerage firm to purchase an investment. It is the difference between the total value of securities held in an investor's account and the loan amount from the broker. Buying on margin is the act of borrowing money to buy securities. The practice includes buying an asset where the buyer pays only a percentage of the asset's value and borrows the rest from the bank or broker. The broker acts as a lender and the securities in the investor's account act as collateral. Alexandra Twin, *Margin*, Investopedia (Mar. 25, 2019), https://www.investopedia.com/terms/m/margin.asp.

collateral into the accounts. In particular, Penson desired, as collateral, enough shares to constitute a controlling interest in Call Now, since Call Now had what Penson believed to be valuable assets.

In response to Penson's call for collateral, Hall declined to pledge shares of Call Now stock in the amount requested by Penson unless Penson provided additional loans to Hall. Hall justified his request by telling Penson the shares were already pledged to other parties. Penson agreed to loan Hall money to pay off the supposed lien. Admittedly, the shares were not actually encumbered by other lenders; and Hall's representations about the shares being encumbered was a negotiating tactic to secure additional financing for the pledge of his shares. Importantly, Hall made no misrepresentations about Call Now itself or the value of its shares, and the Commission below made no such allegations.

In 2010, Hall and Call Now again had shortfalls in their margin accounts and required additional pledges of collateral to avoid liquidation of the previously pledged collateral. Hall pledged additional shares of Call Now, which he again claimed were encumbered and for which he would need an additional loan to pay off the lien. While these shares were, in fact, subject to a lien, it was in an amount that was less than what Penson loaned Hall. Hall also pledged his interest in a real estate limited partnership as additional collateral for the margin loans. As he had with the Call Now stock, Hall claimed that his interest in the limited partnership was subject to an existing lien, but failed

to disclose that he himself was the holder of that lien through his control of a separately-created entity. Once again, this was not an alleged misrepresentation about the underlying securities Hall pledged.

All told, Hall received approximately $3.7 million as a result of the loans at issue, but he pledged approximately $15 million worth of collateral to Penson to secure those loans. Importantly, Hall's misrepresentations were as to the reasons *why* he needed the additional loans; the misrepresentations did not affect or relate to the value or underlying substance of the *pledged securities*—which were precisely what Penson had bargained for and which far exceeded the value of the loans provided. It was not alleged that Penson was deceived about the value of the securities nor the amount of money it loaned to Hall.

In September 2015, the Commission brought an enforcement action against Hall alleging violations of Section 17(a) of the Securities Act of 1933 (15 U.S.C. § 77q(a)), and Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5). In November 2016, Hall filed a motion for final summary judgment, arguing that the alleged misrepresentations were neither "material" nor made "in connection with" the purchase or sale of a security, as required by pertinent law. The district court denied Hall's motion, as well as the Commission's own motion for summary judgment on liability.

The parties in the district court conducted a seven-day jury trial, beginning February 13, 2017. At the close of the Commission's presentation of evidence, Hall moved for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(a), arguing the Commission failed to demonstrate that Hall's misrepresentations were "material" or that the misrepresentations were made "in connection with" a securities transaction, as to support a violation of the securities laws. The district court denied the motion.

Hall additionally objected to the district court's jury instructions, which, in relevant part, instructed that "[t]he "in connection with" requirement is satisfied where fraud '*touches* the transaction in some way.'" (Pet. App. 35-36) (emphasis by Petitioner).

The jury found Hall committed violations of the anti-fraud provisions of the federal securities laws. After the verdict, Hall did not file a Fed. R. Civ. P. 50(b) *renewed* motion for judgment as a matter of law or move for a new trial.

In March 2017, the SEC filed a Motion for Final Judgment seeking: (1) entry of a final judgment; (2) a permanent injunction barring Hall from violating the securities laws in the future; (3) disgorgement of over $3.7 million; (4) pre-judgment interest of more than $950,000; (5) a civil penalty of over $3.7 million; and (6) a permanent officer-and-director bar. Hall opposed the requested remedies.

On April 13, 2017, the district court entered its first order and final judgment. The district court

granted the Commission's request for a permanent injunction and imposed a ten-year officer-and-director bar, but did not order the disgorgement requested because the court held that the Commission was required to offset Hall's purported ill-gotten gains by the value of the collateral Hall had deposited/pledged in his margin account. The district court also imposed a $225,000 civil penalty against Hall.

On May 11, 2017, the Commission filed a motion pursuant to Fed. R. Civ. P. 59(e), seeking partial reconsideration of the first order and final judgment. Hall opposed. On June 29, 2017, the district court entered its second order and adopted the Commission's renewed argument as to disgorgement, ordering Hall to disgorge approximately $3.7 million along with prejudgment interest in the amount of approximately $955,000, for a total judgment of approximately $4.7 million. (Pet. App. 26-27). Hall timely appealed to the Eleventh Circuit.

On appeal, Hall (1) argued that the district court abused its discretion in assessing disgorgement and in requiring him to pay prejudgment interest; (2) challenged the imposition of the injunction and officer-and-director bar; and (3) argued that the transactions at issue did not implicate the securities laws—namely, (a) the misrepresentations by Hall were not made "in connection with" the purchase or sale of a security and (b) the transactions did not involve material statements.

On January 4, 2019, the Eleventh Circuit issued its opinion, denying Hall's appeal and affirming the

district court. (Pet. App. 17). While the Eleventh Circuit substantively discussed Hall's arguments as to disgorgement, prejudgment interest and the permanent injunction and officer-and-director bar, it ignored Hall's arguments as to whether his conduct implicated the securities laws.

In dismissing Hall's securities laws arguments out-of-hand, the Eleventh Circuit relied on its prior decision in *Hi Ltd. P'Ship v. Winghouse of Fla., Inc.*, 451 F.3d 1300, 1302 (11th Cir. 2006) to hold that it lacked "authority" to consider Hall's "challenges to the sufficiency of the [Commission]'s evidence at trial" because Hall had not filed a Fed. R. Civ. P. 50(b) *post*-verdict motion for reconsideration or for a new trial in the district court. (Pet. App. 8-9, n. 6).

On March 26, 2019, Hall filed an application for extension of time to file this Petition, which Justice Thomas granted, extending the deadline to file to May 20, 2019. This Petition timely followed.

ARGUMENT AND REASONS FOR GRANTING THE PETITION

This case presents the important question of whether courts of appeals have authority to hear challenges to issues of law raised in the trial court in a *pre*-verdict Fed. R. Civ. P. 50(a) motion for directed verdict where the issue of law is not subsequently renewed in a *post*-verdict Rule 50(b) motion. This is a question over which the courts of appeals conflict. This case also

presents the Court with the opportunity to clearly articulate the "in connection with" standard of the anti-fraud provisions of the federal securities laws.

The Eleventh Circuit—citing this Court's opinion in *Unitherm Food Systems, Inc. v. Swift–Eckrich, Inc.*, 546 U.S. 394 (2006)—has previously held that where a party files a Rule 50(a) motion for judgment as a matter of law, the party's failure to file a *post*-verdict Rule 50(b) motion renewing its argument precludes an appellate court from considering matters on appeal that were before the district court in the *pre*-verdict motion. *See Hi Ltd. P'Ship v. Winghouse of Fla., Inc.*, 451 F.3d 1300, 1302 (11th Cir. 2006).

The Fourth, Sixth, Seventh, and Eighth Circuits, however, have read this Court's opinion in *Unitherm* more narrowly, as precluding appellate authority to review arguments where no *post*-verdict Rule 50(b) motion is made, but where the arguments relate to the *sufficiency of the evidence*. In other words, those courts have read *Unitherm* to be inapplicable where other challenges, such as to issues of law or evidentiary rulings, are made. *See Linden v. CNH America, LLC*, 673 F.3d 829, 833-34 (8th Circuit 2012); *Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199, 203-04 n. 3 (4th Cir. 2009); *Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 397-98 n. 2 (6th Cir. 2008); *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 939 (7th Cir. 2006).

As discussed below, this case would allow the Court to clarify a circuit conflict on an important and recurring question of federal law involving appellate

jurisdiction. Indeed, this conflict can have—and has had—prejudicial consequences to Petitioners such as Mr. Hall, whose appellate rights are dismissed outright, simply because a court misconstrues its ability to consider those arguments. Courts have not applied a uniform standard of review to such appeals. This case would also allow this Court to resolve an ambiguity with respect to the application of standards under the anti-fraud provisions of the federal securities laws.

As such, this Court should accept jurisdiction to review the circuit split to ensure that petitioners have consistent access to appellate process and that the securities laws can be clearly applied.

Petitioner respectfully requests this Court grant certiorari.

I. The courts of appeals are divided over whether they have authority to hear arguments raised in pre-verdict Fed. R. Civ. P. 50(a) motions when the arguments are not thereafter revived in a post-verdict Rule 50(b) motion.

A. This Court's opinion in *Unitherm Food Systems, Inc. v. Swift–Eckrich, Inc*.

In *Unitherm*, prior to the court's submission of the case to the jury, the defendant moved for a directed verdict based on insufficiency of the evidence pursuant to Fed. R. Civ. P. 50(a). 546 U.S. 394, 398 (2006). The district court denied that motion. *Id*. The jury thereafter returned a verdict against the defendant, which

neither renewed its motion for judgment as a matter of law pursuant to Rule 50(b), nor moved for a new trial pursuant to Rule 59. *Id.*

On appeal to the Federal Circuit, the defendant maintained there was insufficient evidence to support the jury's verdict. *Id*. The Federal Circuit, agreeing with defendant, vacated the jury's judgment on appeal and remanded for a new trial. *Id.* at 399. This Court granted certiorari. *Id.*

In its *Unitherm* opinion, this Court began its discussion by explaining:

> Federal Rule of Civil Procedure 50 sets forth the procedural requirements for challenging the sufficiency of the evidence in a civil jury trial and establishes two stages for such challenges—prior to submission of the case to the jury, and after the verdict and entry of judgment. Rule 50(a) allows a party to challenge the sufficiency of the evidence prior to submission of the case to the jury, and authorizes the district court to grant such motions at the court's discretion.
>
> * * *
>
> Rule 50(b), by contrast, sets forth the procedural requirements for renewing a sufficiency of the evidence challenge after the jury verdict and entry of judgment.

546 U.S. at 399-400. After reviewing several prior holdings involving Rule 50, this Court explained that a *post*-verdict Rule 50(b) motion was necessary to appeal

an argument as to the sufficiency of the evidence because, "'[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.'" *Id.* at 401 (quoting *Cone v. West Virginia Pulp & Paper Co*., 330 U.S. 212, 218 (1947)).

This Court ultimately held that because the respondent failed to renew its Rule 50(a) pre-verdict motion as specified in Rule 50(b), there was no basis for review of respondent's sufficiency of the evidence challenge in the court of appeals. *Id.* at 407. This Court therefore reversed the judgment of the Federal Circuit. *Id.*

B. The Eleventh Circuit's opinion in *Hi Ltd. Partnership v. Winghouse of Florida, Inc*.

In *Hi Ltd. Partnership v. Winghouse of Florida, Inc.*, the plaintiffs/counter-respondents brought an action against a competitor alleging trade dress infringement, trade dress dilution, and unjust enrichment. 451 F. 3d at 1301. The district court entered judgment as a matter of law against plaintiffs on their claims of trade dress infringement, and unjust enrichment. Plaintiffs moved for a directed verdict on defendants' counterclaim, which the district court denied and submitted the question to the jury. *Id.*

The jury entered an award of $1.2 million in attorney's fees against the plaintiffs on the defendants/counter-claimants' claim that a previous settlement agreement barred the plaintiffs from bringing the suit. *Id.*

On *de novo* review, the Eleventh Circuit affirmed the district court's holding that plaintiffs' trade dress infringement, dilution and unjust enrichment claims failed as a matter of law. *Id.* However, with regard to the plaintiffs' argument that the settlement agreement at issue violated the Statute of Frauds, the Eleventh Circuit held is was "precluded" from considering plaintiffs' argument because the district court had previously denied plaintiffs' motion for a directed verdict on this issue and submitted the question to the jury—which entered a verdict against plaintiffs—and where plaintiffs did not renew their argument in a *post*-verdict Rule 50(b) motion. *Id.* at 1301-02.

The Eleventh Circuit based its opinion on this Court's ruling in *Unitherm*, concluding that where a party fails to raise a *post*-verdict Rule 50(b) motion after the denial of a *pre*-verdict Rule 50(a) motion, "'cases addressing the requirements of Rule 50' do not permit *any* relief under such circumstances." *Hi Ltd. Partnership*, at 1302 (quoting *Unitherm*, 546 U.S. at 396) (emphasis by the Eleventh Circuit).

As a result, the Eleventh Circuit held it lacked authority to consider plaintiffs' appeal from the jury verdict below because "[f]iling a pre-verdict, Rule 50(a) motion for judgment as a matter of law cannot excuse

a party's [Rule 50(b)] post-verdict failure to move for either a JNOV or a new trial pursuant to Rule 59(b)." 451 F. 3d at 1302.

C. The Fourth, Sixth, Seventh, and Eighth Circuits

In *Linden v. CNH America, LLC*, the plaintiff filed a products liability action against the defendant, based on injuries the plaintiff sustained while operating a defendant-manufactured bulldozer. 673 F.3d 829, 831 (8th Cir. 2012). After the plaintiff's case in chief, the district court granted defendant's motion for a directed verdict under Rule 50(a) and dismissed plaintiff's manufacturing defect claim. *Id.* at 832. At the conclusion of trial, the jury returned a verdict in favor of the defendant on plaintiff's remaining two claims. *Id.*

On appeal, the plaintiff raised three separate claims of error by the district court, with the relevant claim for discussion here being that the district court erred when it granted defendant's motion for a directed verdict on plaintiff's manufacturing defect claim. *Id.*

The defendant argued that plaintiff's entire appeal was forfeited because the plaintiff failed to file a post-trial motion in the district court, and was thus precluded from seeking on a new trial on appeal, citing *Unitherm*. *Id.* The Eighth Circuit disagreed.

The Eighth Circuit opined that the defendant had read the *Unitherm* opinion out of context in suggesting

that an appeal could never be taken unless a post-verdict motion is filed. Instead, the Eighth Circuit noted that courts had limited *Unitherm*'s holding to *sufficiency of the evidence* challenges where parties failed to file a post-verdict motion under Rule 50(b) after the denial of a Rule 50(a) pre-verdict motion. *Id.* at 833 n. 2 (citing *Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199, 203-04 n. 3 (4th Cir. 2009) (finding *Unitherm* inapplicable where party appealing does not challenge sufficiency of the evidence); *Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 397-98 n. 2 (6th Cir. 2008) (concluding defendant's objection to jury instructions preserved claim for appeal and noting ample support exists for the interpretation that *Unitherm* only addresses Rule 50 motions based on the sufficiency of the evidence); *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 939 (7th Cir. 2006) (concluding "in *Unitherm*, the Court was specifically addressing the situation of a litigant seeking a new trial on the basis of the insufficiency of the evidence" and "[t]he Court did not hold that a court of appeals may not award a new trial on the basis of an erroneous evidentiary decision" in the absence of a post-verdict motion).

Indeed, the Eighth Circuit in *Linden* stated, "[r]eading *Unitherm* more broadly would dramatically alter the well-accepted rule that an objection at trial generally preserves an issue for review on appeal." *Id.* at 833; *see also* 9B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2540 (3d ed.) (West 2011) ("If there have been errors at the trial, duly objected to, dealing with matters other than the

sufficiency of the evidence, they may be raised on appeal from the judgment even though there has not been either a renewed motion for judgment as a matter of law or a motion for a new trial. . . .").

Holding, then, that plaintiff's argument was not a *sufficiency of the evidence* challenge, but instead sought review of *legal* determinations made by the district court, the Eighth Circuit concluded that it had authority to consider the merits of plaintiff's appeal. *Id.* at 833-34.

II. There is ambiguity in the courts over the extent to which misrepresentations must affect or relate to the value or substance of the securities transacted in order to be made "in connection with" the purchase or sale of a security as to support a violation of the anti-fraud provisions of the securities laws.

A. The Second Circuit's decision in *Chemical Bank v. Arthur Answer & Co.*

In *Chemical Bank*, a publicly held manufacturer financed its operations by obtaining various secured and unsecured credit lines from several institutions. 726 F.2d 930, 932 (1984).[2] After requiring more operating capital, the manufacturer entered into additional loan obligations with various financial institutions ("banks"), restructured some of these obligations, and

[2] *Cert. denied*, 476 U.S. 1171, 106 S.Ct. 2894, 90 L.Ed.2d 981 (1986).

finally, pledged 100% of the shares of its subsidiary as security for certain loans to the subsidiary. *Id.* at 932-33. The manufacturer and subsidiary thereafter filed for bankruptcy and ceased operation, with much of the debt unpaid. *Id.* at 933.

In the resulting civil action, the banks filed a federal securities fraud claim (as well as state claims) against the manufacturer's accountants (and three principal officers of the company), arguing the banks entered into the transactions with the manufacturer and its subsidiary in reliance on the manufacturer's financial statements which were audited and certified by the accountants. *Id.*

The banks alleged the accountants knew the manufacturer's financial statements were false and misleading in numerous respects—effectively making the company appear more profitable and financially stable than it actually was. *Id.* The first claim in the banks' complaints alleged that in making such certifications, the accountant violated or aided and abetted in the violation of § 17(a) of the Securities Act of 1933, § 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 issued thereunder.[3]

The banks moved for summary judgment on the federal securities laws claim, which the court denied. *Id.* at 934. On appeal (certified for interlocutory appeal by the district court), the accountant argued that previous cases imposing liability for § 17(a) of the 1933

[3] Which are the same sections charged by the Commission against Hall.

Act or § 10(b) of the 1934 Act or Rule 10b-5, in respect of pledges, are cases where the defendant committed a proscribed act ***with respect to the pledged securities***. *See id.* at 941 (citations omitted) (emphasis by Petitioner).

The Second Circuit discussed language from this Court's opinion in *Superintendent of Insurance v. Bankers Life & Casualty Co*., 404 U.S. 6, 12-13 (1971), in which this Court stated that a party sufficiently pleads a claim under § 10(b) of the 1934 Act where the deceptive practices were "touching" the sale of securities.[4] The Second Circuit, however, viewed this Court's choice of the word "touching" as merely a literary variation of the "in connection with" requirement. *Chemical Bank* 726 F.2d at 942.

Ultimately, the Second Circuit concluded where the misrepresentations or omissions involve a securities transaction but do not pertain to the securities themselves, this will not support a cause of action with respect to § 10(b) and Rule 10b-5 as well as § 17(a). *Id.* at 933-94. Notably, the Second Circuit rejected the banks "but-for" causation argument, stating:

> [Accountant] is not alleged to have deceived the Banks with respect to the pledge of the [subsidiary] stock; the Banks got exactly what they expected. Their showing is simply that but for [accountant]'s description of [manufacturer] they would not have renewed the

[4] *Bankers Life & Casualty Co.* involved the sufficiency of claims made in the complaint at the motion to dismiss stage.

> [manufacturer] loans or made the [subsidiary] loan which [manufacturer] guaranteed, and that if they had not done this, there would have been no pledge of [subsidiary]'s stock. Such "but-for" causation is not enough. The [1934 Securities Exchange] Act and Rule [10b-5] impose liability for a proscribed act in connection with the purchase or sale of a security; it is not sufficient to allege that a defendant has committed a proscribed act in a transaction of which the pledge of a security is a part.

Id. at 934.

B. This Court's opinion in *SEC v. Zandford*

In *Zandford*, a stockbroker sold a customer's securities and used the proceeds for his own benefit without the customer's knowledge or consent. 535 U.S. 813, 815 (2002). The SEC filed a civil complaint, alleging violations of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. *Id.* The question before this Court—similarly as it is here—was whether the alleged fraudulent conduct was undertaken "in connection with the purchase or sale of any security" within the meaning of the statute and rule. *Id.*

The facts revealed that on over 25 separate occasions, the broker had transferred money from his client's account to accounts he controlled.[5] *Id*. at 815.

[5] The broker did this in a number of ways, including selling assets in the client's account and then using the proceeds

Respondent was convicted on 13 counts of wire fraud in the U.S. District Court for the District of Maryland. *Id.* at 816. After he was indicted, the SEC filed a civil complaint in the same district court, alleging the advisor violated § 10(b) and Rule 10b-5 by misappropriating approximately $343,000 of the client's securities without their knowledge or consent. *Id.*

The SEC moved for partial summary judgment, arguing the criminal conviction estopped the advisor from contesting facts establishing a violation of § 10(b). The district court granted partial summary judgment in the SEC's favor. *Id.*

On appeal, the Fourth Circuit reversed, not only holding that the wire fraud claims upon which the defendant was criminally convicted did not contain the same elements necessary to support a cause of action under § 10(b)—namely, the lack of the "in connection with" the sale of a security element[6]—but the SEC's civil complaint did not sufficiently allege the necessary connection because the sales of the customer's securities were merely incidental to a fraud that was the theft of proceeds from sales that were conducted in a "routine and customary fashion." *Id.* at 817 (citation omitted).

---

personally as well as writing checks to himself from a mutual fund account held by the clients, which then required liquidating securities to redeem the checks. *Id.* at 815-16.

[6] Recognizing wire fraud only required the findings that: (1) respondent engaged in a scheme to defraud; and (2) that he used interstate wire communications in executing the scheme. *Id.* at 817.

After granting *certiorari*, this Court considered whether the SEC had met its burden of alleging that the fraud alleged by the SEC had occurred "in connect with" the purchase or sale of a security. *Id.* at 818. This Court began its discussion by reviewing the congressional objectives behind the statute and rule, and explained the statute should be construed "flexibly to effectuate its remedial purpose." *Id.* at 819 (citations omitted). The Court also noted its deference to the SEC's broad reading of the phrase "in connection with the purchase or sale of any security." *Id.* at 819-20.

This Court compared the *Zandford* facts as being similar to those of *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co*., where the Manhattan Casualty Company authorized the sale of the company's portfolio of treasury bonds because they had been "duped" into believing the company would receive the proceeds of the sale. *Zandford*, at 821 (citing *Bankers Life*, 404 U.S. at 9 (1971)).

As in *Bankers Life*, the *Zandford* Court concluded that the SEC had properly alleged violations of the securities laws because the fraud by the broker was directed at the securities themselves and it was enough that the scheme to defraud and the sale of the securities "coincide[d]":

> The securities sales and respondent's fraudulent practices were not independent events. This is not a case in which, after a lawful transaction had been consummated, a broker decided to steal the proceeds and did so. Nor is it a case in which a thief simply invested

> the proceeds of a routine conversion in the stock market. Rather, respondent's fraud coincided with the sales themselves.

Zandford, 535 U.S. at 820.

C. This Court's opinion in *Chadbourne & Parke LLP v. Troice*

In *Chadbourne & Parke*, plaintiffs sued firms and attorneys who they allege facilitated the sale of certificates of deposit in a bank which the investors were told would use the funds to buy highly lucrative assets. Instead, the certificates of deposit being sold ended up being part of a massive Ponzi scheme. 571 U.S. 377, 384 (2014). The complaints by the plaintiffs alleged that the fraud included misrepresentations that the bank maintained significant holdings in "highly marketable securities issued by stable governments [and] strong multinational companies," and that the bank's ownership of these securities made the investments in the certificates of deposit more secure. *Id.* at 385-86.

At issue was whether the Securities Litigation Uniform Standards Act ("SLUSA") would bar the actions because the SLUSA forbids class actions based on State statutory or common law where allegations involve a misrepresentation or omission of a material fact in connection with the purchase or sale of a "covered security." *Id.* at 380-82.

This Court held that with respect to the SLUSA's "in connection with" requirement, a fraudulent misrepresentation or omission was not made "in connection

with" the purchase or sale of a "covered security" "unless it is material to a decision by one or more individuals (other than the fraudster) to buy or to sell a 'covered security.'" 571 U.S. 377, 387 (2014). Because the securities at issue (certificates of deposit) were not "covered securities" under the SLUSA's narrow definition, and the complaints merely alleged that the certificates were supposedly backed by covered securities (the fraudulent misrepresentation), then the SLUSA did not apply. *Id.*

The court held that the bank's supposed use of the funds to buy "covered securities" (as defined by the SLUSA) was too attenuated to the plaintiffs' claims which centered on their purchase of "non-covered" securities. *Id.* at 387-89. Importantly, the court noted that the "in connection with" requirement focused on whether there was a misrepresentation or fraud which had a material impact on someone's decision to buy or sell a covered security, not the purported "fraudster's" decision to buy or sell covered securities. *Id.* at 388 (citing *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (a misrepresentation or omission is "material" if a reasonable investor would have considered the information significant when contemplating a statutorily relevant investment decision)).

D. The Eleventh Circuit's opinion in *Securities and Exchange Commission v. Radius Capital Corp.*

In *Radius Capital Corp*. (an unreported decision cited by the Commission below), the founder/CEO of a mortgage lender and issuer of mortgage-backed securities ("MBS") was charged—along with the company—by the Commission with violating the anti-fraud provisions of the Securities Act of 1933 (§ 17(a)) and Securities Exchange Act of 1934 (§ 10(b) and Rule 10b-5). 653 Fed. Appx. 744, 748 (11th Cir. 2016).

The SEC alleged the defendants had made misrepresentations in order to become a Ginnie Mae-backed issuer of MBS[7] and also made misrepresentations in the prospectuses of the MBS that were available to the public. *See id*. The Commission alleged that after certain loans underlying the MBS fell into default, the investors, as well as Ginnie Mae (which guaranteed the MBS) suffered losses. *Id.*

Relevant here, the defendant, on appeal, argued that the statements made to Ginnie Mae in his application to become a backed issuer of MBS were not made "in connection with" a securities transaction as to support a finding of liability under the securities laws, because the misrepresentations were not "disseminated into the public arena" or were not "an

---

[7] The misrepresentations to Ginnie Mae included statements that the loans underlying the MBS were FHA insured, despite knowing that the majority of the loans did not meet FHA insurability standards.

attempted communication directly at the potential investing public." 653 Fed. Appx. at 749.

The Eleventh Circuit began its discussion of the defendant's argument by noting the broad application of the "in connection with" requirement, both in its own prior decisions but also in this Court as well. *See id., generally* at 653 Fed. Appx. at 749-51 (including *Zandford*).

Based upon the previously broad application of the "in connection with" element,[8] the Eleventh Circuit rejected the defendant's argument, holding that the misrepresentations themselves need not be explicitly directed at the investing public or occur during the transaction to be "in connection with the purchase or sale of" or "in the offer or sale of" any security. *Id.*, at 653 Fed. Appx. at 751. However, the *Radius Capital Corp.* opinion did not discuss whether the misrepresentations had to relate to the substance of the securities involved in the transaction or simply the transaction as a whole. *See id.*

---

[8] Indeed, the district court in this case in its jury instructions included language from *Radius Capital* in which Eleventh Circuit restated its prior holding that the " 'in connection with' requirement is satisfied where the fraud" touch[es] the transaction in some way, including situations where "the purchase or sale of a security and the [preceding] proscribed conduct are part of the same fraudulent scheme." (quoting *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1046 (11th Cir. 1986)).

III. This Court should grant *certiorari* and hold that challenges to issues of law raised in a pre-verdict Fed. R. Civ. P. 50(a) motion for judgment as a matter of law can be reviewed in the appellate courts, notwithstanding a party's failure to renew those arguments on a post-verdict Rule 50(b) motion.

In the proceedings below, the Eleventh Circuit determined it lacked authority to hear Hall's arguments regarding whether the purported misrepresentations at issue were made "in connection with" a securities transaction. (Pet. App. 8-9, n. 6). Regardless of whether he would have been successful on the merits of his substantive arguments (though Hall believes he would), the Eleventh Circuit's refusal to even *consider* Hall's arguments denied him of his rights to an appeal. This Court should take the opportunity to correct this error.

As justification for its refusal to consider Hall's arguments, the Eleventh Circuit, in a footnote, cited to its own precedent in *Hi Ltd. P'Ship v. Winghouse of Fla., Inc.*, 451 F.3d 1300 (11th Cir. 2006) that drew heavily from this Court's opinion in *Unitherm Food Systems, Inc. v. Swift–Eckrich, Inc.*, 546 U.S. 394 (2006)—both of which held that in order for an appellate court to have authority to consider *sufficiency of the evidence* arguments on appeal, a party must file a *post*-verdict Fed. R. Civ. P. 50(b) motion in the trial court. (Pet. App. 8-9, n. 6).

However, upon a close reading of the Eleventh Circuit's opinion in *Hi Ltd. P'Ship* (which involved the

determination of whether a settlement agreement fell within the statute of frauds or not), it is unclear whether the Eleventh Circuit would require a Rule 50(b) motion as to permit *any* appeal or only such appeals that involve challenges to the sufficiency of the evidence. The Eleventh Circuit's opinion below—which simply adopts the language of *Hi Ltd. P'Ship*—makes this point no more clear.[9]

Here, Hall does not simply challenge whether the evidence at trial was sufficient to support findings of violations of the securities laws; rather, Hall appeals whether the proper legal reasoning guided that determination in the first place. This does not require evaluating evidence or assessing the credibility of witnesses; it requires an analysis of law as to whether the "in connection with" requirement was satisfied where the fraud (or misrepresentation) merely "touches" upon the transaction (as was instructed to the jury) or whether the fraud has to affect or relate to the value or substance of the security transacted.

Hall's appeal therefore involves *issues of law*: whether it was proper for the court to deny Hall's

---

[9] In the opinion below, the Eleventh Circuit concluded—without discussion—that Hall was challenging the sufficiency of the evidence, and therefore, *Hi Ltd. P'Ship* applied and foreclosed the court's authority to hear his "materiality" and "in relation to" arguments. Because it gave no explanation as to why it concluded Hall's challenges were evidentiary, the Eleventh Circuit has left ambiguity as to whether it is consistently applying the law or is simply adopting language from prior precedent without fully evaluating the difference between appeals of evidentiary matters and those of legal issues.

motion for judgment as a matter of law and whether the jury was instructed with the proper legal standards. *See, e.g.*, *Badger v. S. Farm Bureau Life Ins. Co.*, 612 F.3d 1334, 1339 (11th Cir. 2010) (appellate court reviews jury instructions *de novo* to determine whether the instructions misstate the law or mislead the jury to the prejudice of the party who objects to them).

And Hall appeals issues of law that he raised in the district court not once, not twice, but *thrice*: in his motion for summary judgment; in his *pre*-verdict Rule 50(a) motion for judgment as a matter of law; and in his objections to the district court's jury instructions. His appellate rights should not be foreclosed simply because of a misapplication of a procedural ruling.

Because it is unclear whether the Eleventh Circuit below—and in *Hi Ltd. P'Ship*—would believe that *any* appeal is foreclosed when there is no *post*-verdict motion, this Court should take the opportunity to definitively state what the proper scope of review should be.

IV. The Court should grant certiorari and hold that in order to satisfy the "in connection with" element of the anti-fraud provisions of the securities laws, the fraud or misrepresentation at issue must relate to or affect the value or substance of the securities transacted.

Petitioner concedes that the proceeds of the loans at issue were not used in the same manner in which

Petitioner represented to Penson he would use those funds. However, this did not materially affect the securities element of the transaction, as Penson received as collateral shares of Call Now which *far exceeded* the value of the loans advanced. Importantly, it was Penson that called for enough shares of Call Now which would constitute a controlling interest in the company. This is what they were provided. Penson participated in an arm's length transaction and received as consideration exactly what it had bargained for.

While any potential claim against Petitioner for his conduct may be considered a common-law fraudulent inducement type claim, it should not be a securities law claim. Indeed, as articulated by this Court in *Zandford*, "the [anti-fraud statute] must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b). . . ." 535 U.S. at 820 (citing *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud")). Here, however, the district court's jury instruction does just that.

In the matter below, the court instructed the jury that the "in connection with" standard is met simply where fraud "touches" upon the transaction. (Pet. App. 36). While technically true in language, as applied, this overly basic instruction—which Petitioner objected to—invites a finding of violation of the anti-fraud provisions to any transaction that happens to involve securities *in any capacity*.

This Court has articulated that the "in connection with" requirement is not met unless it is "material to a decision by one or more individuals (other than the fraudster) to buy or sell a [] security." *Chadbourne & Park LLP*, 571 U.S. at 387. The purported misrepresentations here did not have this effect.

The purported misstatements—the reasons articulated *why* Petitioner needed the loans (to pay down liens)—did not have an impact on Penson's decision to accept the Call Now shares as collateral (the securities transaction at issue).[10] Indeed, it was the drop in value of Petitioner's accounts which precipitated the initial call by Penson for additional collateral in the first place. And the value of the securities that Penson received as collateral was consistent with what Penson had bargained for. In other words, to the extent that any fraud occurred, it was merely in the inducement of a transaction that simply *involved* securities but where the parties both received fair consideration.

Petitioner respectfully asks that this Court grant certiorari so that it can clear ambiguity between prior holdings which have held the "in connection with" requirement requires only that fraud or a misrepresentation "touches" upon a securities transaction (*Superintendent of Insurance v. Bankers Life &*

[10] It could also be argued that the misrepresentations were not made "in connection with" the purchase or sale of securities because the misrepresentations did not have an effect on the reasons Penson accepted securities as collateral. Indeed, Penson could have accepted any asset as collateral, including non-securities, but simply happened to prefer shares of Call Now.

Casualty Co.), and articulate a standard that more reliably gives instruction in an application similar to the *Chadbourne & Park LLP* holding, which stated that the fraud or misrepresentation must have a material effect on a party to buy or sell a security.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BURTON W. WIAND
Counsel of Record
JARED J. PEREZ
ERIC R. FELD
WIAND GUERRA KING PA
5505 West Gray Street
Tampa, FL 33609
Telephone: (813) 347-5100
E-Mail: bwiand@wiandlaw.com

Counsel for Petitioner

May 20, 2019