No. 19A___

In the Supreme Court of the United States

ATLANTIC TRADING USA, LLC, JOHN DEVIVO, ANTHONY INSINGA, XAVIER LAURENS, KEVIN MCDONNELL, ROBERT MICHIELS, PORT 22, LLC, PRIME INTERNATIONAL TRADING, LTD., AARON SCHINDLER, NEIL TAYLOR, AND WHITE OAKS FUND LP,

Petitioners,

v.

BP P.L.C., TRAFIGURA BEHEER B.V., TRAFIGURA AG, PHIBRO TRADING L.L.C., VITOL S.A., MERCURIA ENERGY TRADING S.A., HESS ENERGY TRADING COMPANY, LLC, STATOIL US HOLDINGS INC., SHELL TRADING US COMPANY, BP AMERICA, INC., VITOL, INC., BP CORPORATION NORTH AMERICA, INC., MERCURIA ENERGY TRADING, INC., MORGAN STANLEY CAPITAL GROUP INC., PHIBRO COMMODITIES LTD., SHELL INTERNATIONAL TRADING AND SHIPPING COMPANY LTD., STATOIL ASA, AND ROYAL DUTCH SHELL PLC,

Respondents.

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI FROM JANUARY 14, 2020 TO MARCH 13, 2020

To the Honorable Ruth Bader Ginsburg, as Circuit Justice for the Second Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioners[1] respectfully request that the time to file a Petition for a Writ of Certiorari be extended 59 days from January 14, 2020, to and including March 13, 2020. The U.S. Court of Appeals for the Second Circuit denied a timely filed petition for rehearing en banc on October 16, 2019, App. C, *infra*, after issuing its opinion, App. A, *infra*,

[1] Pursuant to this Court's Rule 29.6, petitioners declare as follows: (i) Atlantic Trading USA, LLC; Port 22, LLC; Prime International Trading, Ltd.; and White Oaks Fund LP are corporate entities; (ii) Atlantic Trading USA, LLC is 100% owned by Atlantic Trading Holdings, LLC (a non-public Illinois limited liability company); and (iii) no publicly held corporation owns 10 percent or more of any of the petitioners' shares.

summary order, App. B, *infra*, and judgment on August 29, 2019. Absent an extension, the petition therefore would be due on January 14, 2020. This application is being filed at least 10 days before that date. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254 to review this case.

Background

Petitioners are traders of futures contracts linked to Brent crude oil ("Brent Futures"). *See* App. A at 3. Brent crude oil ("Brent") originates in the North Sea, and Brent prices serve as the benchmark for two-thirds of the world's crude oil supplies. *See id.* at 4. The spot price for Brent crude oil (known as the "Dated Brent Assessment" or "DBA") is a price component of Brent Futures. Respondents are producers, refiners, and importers of Brent and traders of Brent Futures in the United States. *See id.* This petition arises from litigation alleging that respondents manipulated the DBA in order to manipulate the price of Brent Futures and benefit their trading positions to petitioners' detriment. *See id.* at 8-9.

Petitioners and respondents traded Brent Futures on the NYMEX, which is located in the United States, and on the Intercontinental Exchange Futures Europe ("ICE Futures Europe"), which is located in London, England. *See* App. A at 7.[2] ICE

[2] ICE Futures Europe is registered with the United States as foreign board of trade subject to oversight by the U.S. Commodity Futures Trading Commission ("CFTC") and regulation pursuant to 7 U.S.C. §6. All trades on ICE Futures Europe are subject to the rules of ICE Clear Europe, which is registered with the United States as a derivatives clearing organization ("DCO") subject to CFTC oversight and regulation pursuant to 7 U.S.C. §7a-1. *See* Jan. 22, 2010 CFTC Order of Registration at 1, http://www.cftc.gov/stellent/groups/public/@otherif/documents/ifdocs/Iceclearеudcoorder.pdf (granting "[a]pplication of ICE Clear Europe for registration as a DCO" under "Section 5b of the Act, 7 U.S.C. § 7a-1").

Futures Europe maintains its electronic infrastructure for futures contract formation entirely in Chicago, Illinois. Pursuant to ICE Futures Europe's Rules, the Illinois trading platform is the hub where all buy and sell orders are received, processed, and matched to form binding contracts. Thus, by manipulating the DBA, respondents manipulated the price of Brent Futures that petitioners traded on a domestic commodities exchange, or for which petitioners assumed irrevocable liability in the United States. Respondents allegedly engaged in such misconduct in order to benefit their trading positions in the same Brent Futures, to the petitioners' detriment. *See* App. A at 8-9.

Petitioners asserted claims under Section 22 of the Commodities and Exchange Act, 7 U.S.C. §25, based on respondents' price manipulation and deception in connection with petitioners' Brent Futures transactions in violation of 7 U.S.C. §§9(a)(1) and 13(a)(2). *See* App. A at 9-12. They argued that this was an ordinary, territorial application of the United State's laws governing securities and exchanges because the claims were based upon domestic commodities transactions—a test this Court had announced in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

The district court rejected that argument: Although it assumed petitioners' claims were based upon domestic commodities transactions "within the meaning of *Morrison*," it concluded that, under applicable Second Circuit precedent, they could nonetheless be impermissibly extraterritorial claims insofar as the "crux of the[] complaints … does not touch the United States." *In re N. Sea Brent Crude Oil Futures Litig.*, 256 F. Supp. 3d 298, 309 (S.D.N.Y. 2017). The Second Circuit affirmed. As

relevant here, it adopted the firm view that while a domestic transaction is *necessary* under *Morrison*, it is not alone sufficient to properly state a domestic claim, and then concluded that plaintiffs' claims were "predominantly foreign." App. A at 22-23.

Accordingly, the question presented here is whether the test *Morrison* set out announced a sufficient condition for deeming a claim domestic, or instead merely announced a necessary one. There is a recognized split between the two leading circuits for securities and exchange related claims on that precise question. The Ninth Circuit has held that *Morrison* states a sufficient condition—an application of U.S. law is not extra-territorial if it is based on a transaction on a domestic exchange. *See Stoyas v. Toshiba Corp*., 896 F.3d 933 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2766 (2019). The Second Circuit in the decision below definitively held that *Morrison* states only a necessary condition, and that a plaintiff's "claims [can be] impermissibly extraterritorial even if the transactions are domestic." App. A at 19. The CFTC urged below that the Second Circuit's rule is erroneous, and the Solicitor General has made the same argument in an invitation brief to this Court in *Toshiba Corp. v. Automotive Industries Pension Trust Fund*, No. 18-486 (filed May 20, 2019), endorsing the Ninth Circuit's application of *Morrison* as correct.

Reasons for Granting an Extension of Time

The time to file a Petition for a Writ of Certiorari should be extended for 59 days for at least three reasons:

1. The press of other matters before this and other courts makes the existing deadline on January 14, 2020, difficult to meet. Petitioners have recently retained

Supreme Court counsel to assist in preparing this petition. And in addition to this petition, counsel for petitioners is currently running the three-week Supreme Court Litigation Clinic for Harvard Law School, which involves daily lectures and activities for the class; will file a brief in *Benitez v. Charlotte-Mecklenburg Hospital Authority*, No. 19-2145, in the Fourth Circuit on January 3, 2020; will be delivering oral argument in *Sonterra Capital Master Fund Ltd. v. UBS AG*, No. 17-944, in the Second Circuit on February 5, 2020; and will be preparing for oral argument in *FTC v. Qualcomm Inc.*, No. 19-16122, in the Ninth Circuit on February 13, 2020. The additional time will assist counsel in preparing a concise and well-researched petition that will be of maximum benefit to this Court.

2. Whether or not the extension is granted, the petition will be considered during this Term—and, if the petition were granted, it would necessarily be argued in the next Term. The extension is thus unlikely to substantially delay the resolution of this case or prejudice any party.

3. Finally, the Court is likely to grant the petition. This case involves an important question on which there is now a square disagreement among the leading circuits. This Court has already expressed interest in the question presented, having sought the views of the Solicitor General in *Toshiba*. The Solicitor General recommended a denial in that case because the nature of the Second Circuit's rule was not yet clear. *See Toshiba* U.S. Br., *supra*, at 20. The Second Circuit's rule now is clear, and it is clearly wrong for reasons the CFTC has already articulated in this case. Given this square circuit split on a question of importance, there is a substantial

likelihood that the petition will be granted. It would thus be of value to the Court to allow the time necessary to research and draft an effective petition in this case.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended for 59 days to and including March 13, 2020.

Respectfully submitted,

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