07-0583-cv

United States Court Of Appeals
for the
Second Circuit

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Plaintiffs-Appellants,

MARIA KENNEDY, HARVARD B. KOLM and NORMAN HAUGE,

Plaintiffs,

– v. –

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, AND THE ASSOCIATION FRANÇAISE DES ENTREPRISES PRIVÉES, AS *AMICI CURIAE* SUPPORTING DEFENDANTS-APPELLEES

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici curiae the Securities Industry and Financial Markets Association, the Chamber of Commerce of the United States of America, the United States Council for International Business, and the Association Française des Entreprises Privées state that they are not subsidiaries of other corporations, and no publicly held corporation owns more than 10% of their stock.

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The Securities Industry and Financial Markets Association ("SIFMA"), the Chamber of Commerce of the United States of America ("the Chamber"), the United States Council for International Business ("USCIB"), and the Association Française des Entreprises Privées ("AFEP") respectfully submit this brief as *amici curiae* in support of affirmance of the district court's order dismissing plaintiffs' amended complaint for lack of subject matter jurisdiction.

STATEMENT OF INTEREST OF THE *AMICI CURIAE*

SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C. and London, and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. As a leading advocate in this field, SIFMA has a perspective that is not represented by the parties to this appeal.

The Chamber is the world's largest business federation. The Chamber's underlying membership includes more than three million companies and professional organizations of every size, in every industry sector, and from every

region of the country. Chamber members transact business throughout the United States, as well as a large number of countries around the world. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

A driving force for American business, **USCIB** works to promote an open system of world trade, finance and investment in which business can flourish and contribute to economic growth, human welfare and protection of the environment. Its membership includes some 300 U.S. companies, professional services firms and associations. For USCIB, an organization with a primary goal of promoting U.S. competitiveness, this case addresses issues of fundamental importance.

AFEP is an organization that represents 85 of the largest French companies, including 14 with shares listed on the New York Stock Exchange, and many more with unlisted American Depositary Receipt (ADR) trading facilities in the United States. AFEP plays a leading role in commenting on French, European and international legal, regulatory and financial developments, from the perspective of its member companies.

PRELIMINARY STATEMENT

The rapid globalization of financial markets in recent years has given rise to new competitive challenges for the United States – challenges recognized not only by *amici* and their members as market participants, but also by respected scholars in law, economics and finance and by leaders at all levels of government, across the political spectrum. A central component of this ongoing and serious competitive threat to U.S. markets is the risk that securities class actions – litigation with abusive potential long acknowledged by the courts and Congress – will reduce cross-border investment and deter foreign companies from accessing U.S. markets.

This case presents a virtual "Exhibit A" for any foreign jurisdiction seeking to demonstrate, for its competitive advantage, the perils of coming into contact with the United States. An Australian company listed on an Australian exchange, with virtually all of its shareholders outside the United States, faces the possibility of protracted litigation in the U.S. courts for alleged misstatements made to those non-U.S. investors. Perhaps even more damaging, plaintiffs principally rest this unprecedented attempt to expand U.S. jurisdiction, rightly rejected by the district court, on the Australian company's decision to invest in a U.S. subsidiary. In other words, plaintiffs seek to convert the decision to acquire a U.S. business into a securities litigation risk factor for non-U.S. companies – discouraging cross-

border economic activity even where that activity bears no relation to the interests protected by the U.S. securities laws.

The Supreme Court consistently has taught that courts must approach cases like this one with the "presumption that United States law governs domestically but does not rule the world." *Microsoft, Inc. v. AT&T*, 550 U.S. ___, 127 S. Ct. 1746, 1758 (2007). This Circuit, as well, has recognized that it should not lightly devote the resources of U.S. courts to predominantly foreign matters and instead should leave the issue to foreign countries. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975). Moreover, as the *Microsoft* Court emphasized, it would be especially inappropriate to apply U.S. law to claims arising outside the United States in areas of law that "may embody different policy judgments." *Microsoft,* 127 S. Ct. at 1758. There can be no question that this case involves just such an area of law – an area fraught with controversy and the potential for abuse even within the U.S. legal system – and where other countries can, and do, make fundamentally different policy decisions.

Whatever the merits of private securities class actions may be, the Supreme Court has recently reiterated that, "if not adequately contained, [they] can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. ___, No. 06-484, 2007 U.S. LEXIS 8270, at *1 (June 21, 2007). The

U.S.' securities-fraud class-action regime stands alone in the world, with its combination of the opt-out class-action procedure, tolerance of contingency fees, expansive and expensive discovery procedures, jury trials and potential for massive and devastating damage awards. Indeed, these very differences between the U.S. system and others have enticed plaintiffs whose claims rightfully belong in other countries to try to find a way into U.S. courts.

No Congressional mandate or judicial precedent requires opening the U.S. courts to these so-called "foreign-cubed" securities class actions – brought by foreign plaintiffs against foreign issuers based on the purchase or sale of securities in foreign countries. On the contrary, principles of comity, equity and effective judicial administration unequivocally favor the resolution of these actions not in the United States, but in the courts of other countries. And while this case appears to be the first of these "foreign-cubed" actions to reach this Court, others will follow. American plaintiffs' law firms are actively recruiting foreign class representatives and recently have filed several such suits in the Southern District of New York.[1] Because this action will establish a guiding precedent for many cases to come, it is especially critical that the Court affirm the district court and make clear that

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[1] *See, e.g.,* Andrew Longstreth, *Coming to America: When can foreign investors who bought shares of foreign companies on foreign exchanges sue in the U.S.?*, AMERICAN LAWYER, Vol. 28, No. 11 (Nov. 2006), Supplement at 53; Mary Jacoby, *For The Tort Bar, A New Client Base: European Investors*, WALL ST. J., Sept. 2, 2005, at A1.

foreign-focused class actions like this one do not justify a U.S. court's exercise of subject matter jurisdiction.

ARGUMENT

POINT I

EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAWS TO FOREIGN-BASED DISPUTES WOULD HARM U.S. MARKETS

The dramatically increased globalization and interdependence of financial markets in recent years has greatly heightened the need to impose appropriate limits on the extraterritorial application of domestic securities laws. Application of domestic law to claims with only remote connections to the United States threatens to undermine the competitiveness and effective operation of U.S. markets. This is especially true in cases such as this one – where the investors, the issuer and the transactions all were located outside the United States and where compelling precedent supports the decision to decline subject matter jurisdiction.

The internationalization of securities and capital markets – and the ongoing competitive challenge this poses for the United States – has become the subject of growing attention by policy-makers and regulators. Leaders in the U.S. Congress and federal agencies, local government and the business community have taken an active role in this debate, focused on how the U.S.' capital markets can strengthen and preserve their competitive position in a rapidly changing global

economy.[2] Treasury Secretary Paulson recently noted, "Our markets are, indeed, the best in the world. Yet we must be vigilant, and we must do everything we can to ensure they stay that way. . . . [T]he fundamental question we must ask is: Have we struck the right balance between investor protection and market competitiveness. . . . ?"[3]

Numerous reports, sponsored by participants across the political spectrum, have sought to identify the legal and policy barriers to effective U.S. competition and have made recommendations to eliminate or reduce those barriers. For example, in a report issued earlier this year,[4] the Schumer-Bloomberg commission found that "the prevalence of meritless securities lawsuits" and the perceived "extraterritorial application of US law" have caused growing concerns in the international business community.[5] Similarly, the Committee on Capital Markets Regulation, composed of

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[2] *See, e.g.,* Schedule for Treasury Conference on U.S. Capital Markets Competitiveness, http://www.ustreas.gov/press/releases/hp304.htm (March 9, 2007).

[3] Opening Remarks by Treasury Secretary Henry M. Paulson, Jr. at Treasury's Capital Markets Competitiveness Conference (March 13, 2007), http://www.ustreas.gov/press/releases/hp306.htm.

[4] Sustaining New York's and the U.S.' Global Financial Services Leadership (2007), http://www.senate.gov/~schumer/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.PDF.

[5] *Id.* at ii, 76.

distinguished members of academia and the business community, identified U.S. class actions as a key deterrent to foreign companies considering entry to U.S. markets.[6]

The Treasury Department has launched a multi-step action plan at the most senior levels to enhance the competitiveness of U.S. capital markets.[7] As part of this plan, Treasury has established a bipartisan committee, headed by former SEC Chairman Arthur Levitt and former SEC Chief Accountant Donald Nicolaisen, to examine oversight of the auditing profession in light of its significance to U.S. market competitiveness.[8] Further, it has called for U.S. regulators to "encourage

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[6] Interim Report of the Committee on Capital Markets Regulation (2006), http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf, at 11 ("Foreign companies commonly cite the U.S. class action enforcement system as the most important reason why they do not want to list in the U.S. market."). *See also* Commission on the Regulation of US Capital Markets in the 21st Century (2007), at 30, http://www.capitalmarketcommission.com/portal/capmarkets/default.htm (follow " Download Full Report" hyperlink) ("[I]nternational observers increasingly cite the U.S. legal and regulatory environment as a critical factor discouraging companies and other market participants from accessing the U.S. markets.").

[7] Press Release, U.S. Department of Treasury, Paulson Announces First Stage of Capital Markets Action Plan (May 17, 2007), *available at* http://www.treas.gov/press/releases/hp408.htm.

[8] *See* Press Release, U.S. Department of Treasury, Strengthening Our Capital Markets Competitiveness (May 17, 2007), *available at* http://www.treas.gov/press/releases/hp409.htm (remarks by Under Secretary for Domestic Finance Robert K. Steel).

international investment opportunities with recognition of comparable regulatory regimes," affording a higher degree of deference to other countries' legal systems.[9]

Consonant with Treasury's efforts, the Securities and Exchange Commission ("SEC") has devoted special care to ensuring that its approach to securities regulation does not deter foreign companies from participating in U.S. markets. Its Chairman and Commissioners have spoken repeatedly on the topic,[10] and in the past year, the Commission has taken pains to reassure foreign stock exchanges that their association with U.S. counterparts will not result in exportation of the entire U.S. legal and regulatory regime to public companies listed on their markets. *See* SEC Office of

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[9] *See* Press Release, U.S. Department of Treasury, Paulson Announces Next Steps to Bolster U.S. Markets' Global Competitiveness (June 27, 2007), *available at* http://www.treas.gov/press/releases/hp476.htm. Just over a month ago, recognizing that "global competition to attract and retain financial services companies has never been greater," the Governor of New York also established a commission to undertake a "comprehensive review" of state financial regulation. N.Y. Executive Order No. 15 (May 29, 2007) *available at* http://www.ny.gov/governor/executive_orders/exeorders/15.html.

[10] *See* Christopher Cox, Chairman, SEC, Remarks at the 34th Annual Securities Regulation Institute (January 24, 2007), *available at* http://www.sec.gov/news/speech/2007/spch012407cc.htm (observing that "in a world in which investors can easily choose where they want to trade, every national government will face new strains on its ability to impose and enforce securities regulations" and "national regulations which don't work well in this new environment of global capital markets will actually work to harm investors. . . ."); Paul S. Atkins, Commissioner, SEC, Remarks before the European Parliamentary Financial Services Forum (October 26, 2005), *available at* http://www.iasplus.com/usa/0510atkins.pdf) (recognizing the possibility that foreign companies' concerns about becoming subject to U.S. securities law may deter them from participating in U.S. markets).

International Affairs and Division of Market Regulation and Corporation Release Fact Sheet (June 16, 2006), *available at* http://www.sec.gov/news/press/2006/2006-96.htm.

Further, the SEC adopted new rules in March of this year to permit de-registration of non-U.S. companies whose principal trading markets are outside the United States -- even in cases where those companies may have hundreds of U.S. stockholders and much greater U.S. shareholder interest than the defendant in this case. *See Termination of a Foreign Private Issuer's Registration of a Class of Securities*, Release No. 34-55540, Vol. 72 Fed. Reg. No. 65 (April 5, 2007), at 16934-35.[11] The SEC explained that the rule was changed to remove "a disincentive to foreign private issuers accessing the U.S. public capital markets."[12] The SEC's goal in modifying the rule was to "attract[] more foreign companies to U.S. public capital markets" and thereby "provide more investment choices to U.S. investors." *Id.* at 16935, 16937.

Thus, the SEC has recognized that enabling foreign companies to avoid the application of U.S. securities law requirements in appropriate circumstances will make the United States a more attractive forum – which in turn

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11 *Also available at* http://www.sec.gov/rules/final/2007/34-55540.pdf.

12 The de-registration rule was adopted in significant part as a result of letters written by AFEP (jointly with ten other European organizations). *See, e.g.*, Letter dated February 9, 2004 from several European organizations to the SEC Chairman, *available at* http://www.sec.gov/rules/proposed/s71205/eurocompanies020904.pdf.

will benefit U.S. markets and U.S. investors. Conversely, an overly aggressive application of U.S. securities law would make this country less attractive to foreign companies, to the detriment of U.S. markets and investors.

Finally, of central importance to *amici* and their members, the application of domestic law to fundamentally foreign disputes raises a host of policy concerns, as courts and commentators have generally recognized for decades.

- It risks weakening core principles of comity – precluding foreign jurisdictions from establishing liability rules best suited to their markets in an area where U.S. courts and regulators have struggled for decades to strike an appropriate balance between plaintiffs and defendants.[13]

- It risks deterring foreign companies from making acquisitions of U.S. companies – for fear of becoming subject to securities law liability if the target companies have prepared financials that arguably mislead the foreign company and its non-U.S. shareholders.[14]

- It creates a reciprocal risk to U.S. companies – exposing them, should foreign courts adopt similar logic, to securities litigation in virtually any jurisdiction in which they have a subsidiary, even if their shares are traded exclusively by investors in the United States.[15]

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[13] *See infra* Section II.C.2.

[14] *Cf.* Commission on the Regulation of U.S. Capital Markets in the 21st Century, *supra*, at 8 (determining that "[t]he perception, if not the reality, of burdensome and duplicative regulatory schemes and an inefficient and unfair legal system are making U.S. capital markets increasingly less attractive to foreign and domestic companies alike").

[15] This risk is by no means purely theoretical, given the recent increase in activity in non-U.S. securities class actions. *See, e.g.,* Sundeep Tucker, *Culture of Class Action Spreads Across Australia,* FIN. TIMES, March 9, 2006, at 12.

- It creates the risk of duplicative litigation – with various plaintiffs seeking out the class action regime most favorable to their case and the possibility of multiple "bites at the apple."[16]

- Lastly, it creates the risk of arbitrariness and inequity – with different companies subject to different liability regimes dependent solely on tenuous factors arising out of the location of business operations or other considerations unrelated to the investor protection objectives of the U.S. securities laws.[17]

Amici ask the Court, in light of the great significance of this issue to the operation of U.S. capital markets, to decline plaintiff's invitation to expand U.S. subject matter jurisdiction, and to affirm the considered decision of the district court in light of the sound precedent on which it is based.

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[16] *See, e.g., Bersch*, 519 F.2d at 996, 997 n.49; *Parsons v. McDonald's Rest.*, [2004] CanLII 28275 (ON S.C.), *available at* http://www.canlii.org/en/on/onsc/doc/2004/2004canlii28275/2004canlii28275.pdf.

[17] *See* Kun Young Chang, *Multinat'l Enforcement of U.S. Sec. Laws*, 9 FORDHAM J. CORP. & FIN. L., 89, 102 (2003) ("[S]ince extraterritoriality will not ensure predictability and certainty in the application of securities laws, the parties involved in transnational transactions might have difficulty in discerning the jurisdictional consequences of their actions.").

POINT II

SETTLED PRECEDENT MAKES CLEAR THAT U.S. COURTS SHOULD DECLINE SUBJECT MATTER JURISDICTION OVER FOREIGN-FOCUSED CLASS ACTIONS

A. The District Court Correctly Decided Against Exercising Subject Matter Jurisdiction Over This Australia-Centered Dispute

Simply reciting the facts of this action makes clear why it does not justify a U.S. court's exercise of subject matter jurisdiction. It is a putative class action brought by Australians against an Australian company concerning securities purchased in Australia. *In re Nat'l Austl. Bank Sec. Litig.*, No. 03 Civ. 6537(RO), 2006 WL 3844465, at *8 (S.D.N.Y. Oct. 25, 2006) ("*In re NAB*"). The primary defendant, National Australia Bank ("NAB"), is Australia's leading bank. *Id*. at *1. The lead foreign plaintiffs are Australians who purchased NAB shares on an Australian exchange. *Id*. at *2. The allegedly fraudulent statements consist of reports NAB issued in Australia, which purportedly overstated the financial condition of NAB's U.S. subsidiary. *Id*. at *2. The lead foreign plaintiffs' alleged reliance on these statements, as well as their claimed loss, if any, took place in Australia. *Id*. at *8.[18]

[18] NAB's ordinary shares are not traded on any U.S. exchange. While ADRs representing shares of NAB traded in the United States during the period at issue, they represented only 1.1% of NAB's nearly one-and-a-half billion ordinary shares. *In re NAB*, 2006 WL 3844465, at *5. A single U.S. holder of NAB's ADRs sought to represent a putative class of U.S. ADR holders in the court below, but his claims were dismissed for failure to demonstrate any actual loss as a result of the alleged

In sum, all the alleged conduct required for a 10b-5 violation – as well as the effects of that alleged conduct – occurred in Australia: (1) the defendant allegedly made misstatements or omissions of material fact; (2) with *scienter*; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) the plaintiffs' reliance was the proximate cause of their injury. *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 153 (2d Cir. 2007). Hence, the district court rightly declined to exercise subject matter jurisdiction over this suit. *In re NAB*, 2006 WL 3844465, at *8.

B. The District Court's Decision Adheres To This Court's Precedents

In reaching its decision, the district court correctly applied the two tests this Court has articulated for assessing whether to exercise subject matter jurisdiction in a particular action: the "effects" test, which considers whether the alleged fraud has a "substantial effect" on U.S. investors; *see, e.g., Itoba Ltd. v. Lep Group PLC,* 54 F.3d 118, 122 (2d Cir. 1995); and the "conduct" test, which considers whether the defendant's conduct in the United States "directly caused" the claimed losses to foreign investors abroad. *See, e.g., Bersch*, 519 F.2d at 993. This Court has instructed that these tests may be considered collectively in determining jurisdiction. *See Itoba,* 54 F.3d at 122 ("[A]n admixture or combination of the two [tests] often gives a better picture of whether there is

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fraud. *Id.* at *8-9. The claims of this U.S. ADR holder, and the potential class he sought to represent, are not at issue in this appeal.

sufficient U.S. involvement to justify the exercise of jurisdiction by an American court.”).[19]

1. The Alleged Securities Fraud’s “Effects” And “Conduct” Were Centered In Australia

Here, the effect of the alleged fraud was overwhelmingly centered in Australia. NAB is an Australian company, and nearly all of its share trading takes place in Australia. In fact, plaintiffs were unable to demonstrate any actual harm suffered by a U.S. citizen at all. *See In re NAB,* 2006 WL 3844465, at *8-9 (dismissing claim of U.S. holder of NAB ADRs for failure to establish any loss). Moreover, the effect of any damages that might be awarded also would be felt overwhelmingly in Australia: it would be paid to Australian plaintiffs by an Australian company, to the detriment of the current Australian shareholders of that company.

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[19] This Court has stated that the Exchange Act is silent as to its extraterritorial reach. *See, e.g., Itoba,* 54 F.3d at 121. But other courts and commentators have read Section 30(b) of the Exchange Act and its legislative history as indicating Congress’s intent to cover only the purchase and sale of securities in the United States. *See* Exchange Act § 30(b), 15 U.S.C. § 78dd(b) (“The provisions of this chapter or of any rule or regulation hereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter.”); *Zoelsch v. Arthur Andersen & Co.,* 824 F.2d 27, 31 (D.C. Cir. 1987) (stating that “it is quite clear that the Securities Exchange Act of 1934 had as its purpose the protection of American investors and markets” and that this “is the inference to be drawn from section 30(b) as well”).

The conduct test also points to Australia. While NAB's U.S. subsidiary allegedly engaged in the underlying improper accounting, the alleged conduct that gives rise to the foreign plaintiffs' securities-fraud claim took place in Australia. As the district court correctly observed:

> HomeSide's alleged conduct – however it may be classified – is not in itself *securities* fraud. It amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad. Thus, while Plaintiffs urge that there would have been no securities fraud but-for the domestic conduct, they fail to appreciate that the domestic conduct would be immaterial to its Rule 10b-5 claim but-for (i) [NAB's] allegedly knowing incorporation of HomeSide's false information; (ii) in public filings and statements made abroad; (iii) to investors abroad; (iv) who detrimentally relied on the information in purchasing securities abroad.

Id. at *8 (emphasis in original).

In the words of this Court, "[t]he fraud, if there was one, was committed by placing the allegedly false and misleading [reports] in the purchasers' hands." *Bersch*, 519 F.2d at 987. That alleged act was committed by NAB in Australia, not in the United States.

2. A Class Action Brought By Foreign Plaintiffs Against A Foreign Defendant Will Rarely, If Ever, Justify Subject Matter Jurisdiction

That this is a class action – and not a suit by an individual plaintiff – adds further grounds for declining subject matter jurisdiction. The *Bersch* Court explained that if an action does not concern domestic impact, "United States courts have no reason to become involved, and compelling reason not to become involved, in the burdens of enforcement and the delicate problems of foreign relations and international economic policy that extraterritorial application may entail." 519 F.2d at 993-98. The Court also emphasized that "[t]he management of a class action with many thousands of class members imposes tremendous burdens on overtaxed district courts," especially when the proposed class members are abroad. *Id.* at 996. Still further, the Court observed that a class action would be unfair to the defendant if other countries, which do not permit American-style opt-out class actions, "would not recognize a United States judgment in favor of the defendant as a bar to an action by their own citizens. . . ." *Id.*[20]

Echoing the observations in *Bersch*, this Court has emphasized that circumstances that may justify subject matter jurisdiction over an SEC action to

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[20] For example, a U.S. class action would not bar a French shareholder from bringing a separate action in a French court based on the same facts and circumstances. *See, e.g.*, Nicolas Molfessis (Professor, Université Panthéon-Assas), "La Situation en France," Roundtable Discussion on Class Actions, Proceedings of Fourth International Conference on Law and Economy (sponsored by the Paris Bar Association, Nov. 15-17, 2005, published by Editions Lamy).

police against fraud, or a suit by an individual foreign plaintiff for damages or rescission, may not support the same outcome for a class action. "Class actions may stand differently, for reasons developed in *Bersch*, primarily the likelihood that a very small tail may be wagging an elephant and that there is doubt that a judgment of an American court would protect the defendant elsewhere." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 n.31 (2d Cir. 1975); *see also SEC v. Berger*, 322 F.3d 187, 195 (2d Cir. 2003) (distinguishing the subject matter jurisdiction analysis in an enforcement action brought by the SEC from the analysis in *Bersch*, which involved "class action lawsuits on behalf of unnamed foreigners").

C. The Presumption Against Extraterritorial Application Of U.S. Laws Further Supports The Rejection Of Subject Matter Jurisdiction Here

The Supreme Court's consistent teaching that U.S. law should be presumed *not* to apply to foreign-focused disputes, to avoid interference with the sovereign right of other countries to regulate their own markets, further supports the district court's decision and reinforces many of the policy concerns discussed in Point I above.

1. The Supreme Court Has Consistently Cautioned Against Exercising Subject Matter Jurisdiction Over Predominantly Foreign Actions

The Supreme Court long has held that unless Congress clearly expresses a contrary intent, courts must presume U.S. law is "primarily concerned with domestic conditions." *E.E.O.C. v. Arabian Am. Oil Co.,* 499 U.S. 244, 248,

111 S. Ct. 1227, 1230 (1991) ("*Aramco*"). This rule of comity – the presumption that "legislators take account of the legitimate sovereign interests of other nations when they write American laws" – "helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65, 124 S. Ct. 2359, 2366 (2004). As the Supreme Court explained in reaffirming the principle this term, the "presumption that United States law governs domestically but does not rule the world" has special force when foreign law "may embody different policy judgments" about the subject at issue. *Microsoft,*127 S. Ct. at 1758.

Following that presumption, the Supreme Court has recently declined to apply patent and antitrust laws extraterritorially, even on facts involving some significant connection with the United States. *See id.* at 1750-51 (patent infringement claim against Microsoft based on its manufacture in the United States of a master disk containing an infringing software program, which it then used to make multiple copies of the software program overseas); *Hoffman-LaRoche*, 542 U.S. at 159, 124 S. Ct. at 2363 (suit asserting Sherman Act claims against American and foreign defendants, based on defendants' alleged global price-fixing scheme that had effects both inside and outside the United States). In each case, guided by the presumption against extraterritorial application of U.S. laws, the Supreme Court

held that subject matter jurisdiction was lacking. *Hoffman-LaRoche*, 542 U.S. at 175, 124 S. Ct. at 2372; *Microsoft*, 127 S. Ct. at 1760.

2. These Principles Of Comity Argue Strongly Against Exercising Subject Matter Jurisdiction Here

The regulation of securities markets implicates the kinds of complex "policy judgments" that argue most strongly against extraterritorial application of U.S. laws. *Cf. Microsoft*, 127 S. Ct. at 1758. Striking the right balance in securities class actions between legitimate remedial actions and abusive strike suits is a complex and shifting line-drawing exercise where even small procedural rule changes have been hotly debated, as illustrated by a brief review of leading issues raised by securities law in this country:

- *What is the standard of materiality for an allegedly material misstatement or omission?*
- *How must a plaintiff establish reliance on the allegedly fraudulent statement or omission?*
- *What knowledge or mental state – i.e., what* scienter *– must defendants be shown to have to be liable for securities fraud?*
- *How should lead plaintiffs be chosen?*
- *Should damages be limited by a "look-back" test that compares the price at which the plaintiff purchased (or sold) the securities at issue to the trading prices following a corrective disclosure?*
- *Should securities fraud class actions be allowed at all?*

- *If class actions are allowed, should the class include all members of the defined class except those who affirmatively opt out, or only those who affirmatively choose to join?*

- *Should the losing party be required to pay the legal fees of the prevailing party?*

As the Supreme Court has observed, the private right of action under § 10(b) and Rule 10b-5 is "a judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737, 95 S. Ct. 1917, 1926 (1975). That Congress chose to address many issues in this area in the Private Securities Litigation Reform Act of 1995 (PSLRA) illustrates their importance as national policy concerns that are properly the subject of legislative balancing and fine-tuning. Stressing that "[t]he Nation's capital markets play a critical role in our domestic economy," Congress sought to strike a "balance between the rights of victims of securities fraud and the rights of public companies to avoid costly and meritless litigation," an exercise that it acknowledged was "difficult." S. Rep. No. 104-98, 1995 U.S.C.C.A.N. 679, 686-89.

Recognizing Congress's intent in the PSLRA to rein in abusive private securities fraud litigation, the Supreme Court likewise has been careful in its recent decisions to protect against abuses in this area. *See, e.g., Tellabs*, No. 06-484, 2007 U.S. LEXIS 8270, at *10 (noting that Congress enacted the PSLRA "[a]s a check against abusive litigation by private parties," and therefore supporting a strict application of its heightened pleading standards); *Merrill Lynch v. Dabit*, 547 U.S.

71, 126 S. Ct. 1503 (2006) (construing the Securities Litigation Uniform Standards Act of 1998 to broadly preempt all covered state-law securities class actions, regardless of whether an alternative remedy is available under federal law); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345, 346, 125 S. Ct. 1627, 1633 (2005) (holding that private securities fraud actions may be brought "where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss," and observing that securities fraud actions are not intended "to provide investors with broad insurance against market losses").

Other sovereigns have an equally strong interest in regulating their own capital markets and striking the difficult balance between protecting investors and shielding public companies from abusive litigation. This balance will reflect policy decisions based on considerations unique to each country's regulatory, legislative and financial environments.

One threshold consideration is whether to permit securities class actions at all. Such actions are different from class actions in other kinds of cases, such as environmental, consumer or antitrust actions, where third parties suffer harm. A securities class action pits shareholders victimized by fraud against shareholders who happen to own the company at the time the suit is brought – indeed, shareholders, and particularly institutional investors, are often on both sides. *See* Interim Report of the Committee on Capital Markets Regulation (2006), *supra*

at 8. Moreover, the shareholders who bear the burden of liability – those who tend to hold investments for more than one year and are therefore not included in the typical class period – are more likely to be individual equity investors saving for retirement. John C. Coffee, Jr., *Reforming The Securities Class Action: An Essay On Deterrence And Its Implementation*, 106 COLUM. L. REV. 1534, 1560 (2006).[21]

Given these considerations, a country's lawmakers reasonably could decide that such litigation is not effective or efficient – and choose instead to rely primarily on governmental enforcement actions to deter securities fraud. Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 TUL. J. INT'L & COMP. L. 5, 9 n.18 (2002) ("In Europe, the functions of deterrence and prevention of norms enacted to protect collective interests are performed by state actions, not private ones, directed at imposing administrative or criminal sanctions."). *See also* Peter L. Murray & Rolf Sturner, GERMAN CIVIL JUSTICE 578-79 (2004) (noting that the disparate roles of private enforcement in Europe and the United States "directly reflect the somewhat different roles of the state itself in the European and American social orders.")

[21] One commentator recently has argued that securities class actions in the United States merely "produce wealth transfers among shareholders that neither compensate nor deter." Coffee, *supra*, at 23. Empirical studies have shown little evidence of specific deterrence attributable to securities class actions. *See, e.g.*, Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?* 7 J. L. ECON. & ORG. 55, 84 (1991).

Whether to adopt the American-style opt-out class-action procedure is another fundamental, and controversial, question. Many countries do not allow opt-out class actions but instead provide that an action will include only those persons who affirmatively choose to join, and be bound by, the suit. Edward F. Sherman, *Group Litigation under Foreign Legal Systems*, 52 DEPAUL L. REV. 401, 420, 424 (2002) ("[M]ost other countries view American class actions as a Pandora's box that they want to avoid opening.").[22] Those countries that do not allow opt-out class actions may deny preclusive effect to such an action in the United States, so that a successful defendant in an action here may nevertheless face a second suit in other countries by plaintiffs who contend they are not bound by the judgment in the United States. *See Bersch*, 519 F.2d at 993-98; Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy*, 90 CORNELL L. REV. 1563, 1579 (2004); Molfessis, *supra*, n.22 ("[The opt-out system] is contrary to very strong procedural rules in France.") (translation from French original).

Further, even countries that do allow such actions may have significant procedural rules that differ from those of the United States, such as the "English" or "loser pays" rule, which enables the prevailing party to recover its legal fees from

[22] *See also* Laurel J. Harbour, *The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World*, 2006 ABA Annual Meeting, Section of Litigation, at 7, *available at* http://www.shb.com/FileUploads/the_emerging_european_class_action__expanding_multi-party_litigation_to_a_shrinking_world_1496.pdf.

the losing party. Stefano M. Grace, *Strengthening Investor Confidence in Europe*, 15 J. TRANSNAT'L L. & POL'Y 281, 289 (2005). In addition, many countries, including Australia, prohibit the contingency-fee arrangements that promote lawyer-driven litigation. Sherman, *Group Litigation under Foreign Legal Systems*, *supra*, at 24; Rachel Mulheron, THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS 7 (2004).

In sum, whether to allow such actions and how to manage them involves policy judgments and balancing considerations that should be left to the country with the greatest interest in regulating a particular transaction. For a U.S. court to entertain and apply U.S. law to a matter that belongs to another country thus could damage the international harmony that comity is meant to protect. *Cf.* Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 NW. U. L. REV. 523, 524 (1993) (applying U.S. securities laws abroad "has offended the sovereignty of other countries which have reacted by passing retaliatory legislation of their own"); Russell Du Puy, *International Cooperation in Securities Enforcement*, 46 WASH. & LEE L. REV. 713, 720 (1989) ("Many foreign states view any effort to apply U.S. laws beyond U.S. borders as a violation of the foreign state's sovereignty and as an improper effort to export American economic, social, and judicial values."). Indeed, these comity concerns arise from the potentially dramatic negative financial effect on foreign businesses of overly

expansive application of U.S. law. *See* John C. Coffee, Jr., *Global Class Actions*, NAT'L LAW J., June 11, 2007, at 12 (observing that for the United States to entertain securities class actions brought by foreign plaintiffs against foreign corporations "disruptively expos[es] foreign corporations to a litigation environment in which plaintiffs arguably have undue leverage" and that "the United States' foreign neighbors must fear that a global class action in a U.S. court may threaten the solvency of even their largest companies and could have an adverse impact on the interests of local constituencies, including labor, creditors and local communities.").[23]

D. The Court Also Should Dismiss Any Purported Direct Claim Against The HomeSide Defendants

Finally, the Court also should reject plaintiffs' belated argument that, even if their claims against NAB are dismissed, they nevertheless should be

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[23] The importance of comity in these circumstances may be illustrated by the converse of the instant case, in which a suit is brought against an American corporation in another country involving claims that should be adjudicated here. Suppose, for example, that an American petroleum company owns a subsidiary in an oil-rich country such as Indonesia, Iran, Libya, Russia, Saudi Arabia or Venezuela, and that the subsidiary intentionally overstates the size of its oil reserves. The petroleum company incorporates those overstatements in the public reports it issues in the United States, and as a result investors here pay artificially high prices when purchasing the company's shares in the United States. When the actual size of the oil reserves is later disclosed, the petroleum company's share price falls. If the company's American shareholders seek to bring a class action against it, alleging they overpaid for the shares they purchased in the United States as a result of the public reports issued by the company in the United States, that suit should be adjudicated in the United States under U.S. law – and not in whatever country the petroleum company's subsidiary happens to be located.

permitted to proceed with 10b-5 claims against NAB's former subsidiary, HomeSide, and HomeSide's former officers. This last-minute attempt to cure the defects in their claims against NAB must fail for the reasons cited by the district court – the connections of the investors, the transactions and the issuer to the U.S. securities markets is simply too tenuous to support subject matter jurisdiction under governing precedent.

Plaintiffs' attempt to distinguish their claim against HomeSide does nothing to alter the facts in this matter or the question in this case: where did the alleged securities fraud occur and, correspondingly, where should plaintiffs' claims be heard?[24] Even assuming that, as plaintiffs contend, the allegedly false statements by NAB could be attributed to HomeSide, all the elements of the alleged securities fraud took place in Australia: NAB's issuance in Australia of false statements, with knowledge or reckless disregard of their falsity, to investors located in Australia, who detrimentally relied on the information in purchasing securities in Australia and allegedly suffered a loss, in Australia, as a result.[25]

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[24] The district court decisions on which plaintiffs rely address *who* may be liable for securities fraud; they do not address *where* the alleged fraud occurred. *See In re Kidder Peabody Sec. Litig.*, 10 F. Supp. 2d 398 (S.D.N.Y. 1998); *In re LaBranche Sec. Litig.,* 405 F. Supp. 2d 333 (S.D.N.Y. 2005); *and Menkes v. Stolt-Nielsen S.A*., No. 3:03cv409(DJS), 2006 U.S. Dist. LEXIS 42644 (D. Conn. June 19, 2006).

[25] The facts alleged here are materially different from those in *Berger*. 322 F.3d 187. Unlike *Berger*, where the defendant, operating entirely from New York,

In any event, plaintiffs do not even appear to have a viable independent 10b-5 claim against the HomeSide defendants, because the allegedly false statements upon which they allege reliance – reports issued by NAB and its CEO in Australia – cannot reasonably be attributed to those defendants. *Wright v. Ernst & Young LLP,* 152 F.3d 169, 175 (2d Cir. 1998), *cert. denied*, 525 U.S. 1104, 119 S. Ct. 870 (1999) ("[A] secondary actor cannot incur primary liability under the [Exchange] Act for a statement not attributed to that actor at the time of its dissemination.").[26]

Indeed, plaintiffs' claims against the HomeSide defendants would operate as nothing more than a back-door method of asserting universal jurisdiction in the U.S. courts for claims on behalf of foreign investors in foreign companies that happen to own subsidiaries or conduct operations in the United States. That result would have the same practical effect as a claim directly against NAB and

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executed a massive fraud upon hundreds of investors involving transactions on U.S. exchanges, with the issuing foreign entity "simply acting under Berger's instruction," *Id.* at 195, NAB is an operating company that controlled HomeSide and had the ability to control its own public statements and reports. *Berger* also is distinguishable for the important reason that it involved an enforcement action brought by the SEC, which bears a lower burden in satisfying subject matter jurisdiction than a class of foreign plaintiffs. *Id.; see also Bersch*, 519 F.2d at 996-97; *IIT*, 519 F.2d at 1018 n.31.

[26] While the complaint also refers to certain statements made by HomeSide officers to trade journals in the United States, these statements appear to relate to tangential issues and, in any event, the complaint alleges no facts to suggest that the Australian plaintiffs were aware of, or relied upon, these statements.

consequently would raise all the same concerns and problems discussed above. Thus, the reasons that compel dismissal of plaintiffs' claims against NAB for lack of subject matter jurisdiction apply with equal force to compel dismissal of their claim against NAB's former subsidiary.

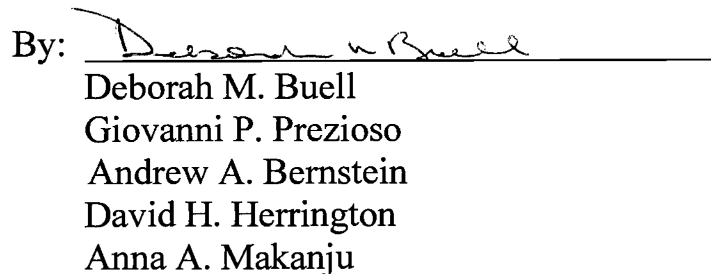
CONCLUSION

For the foregoing reasons, the *amici* respectfully submit that the decision of the district court dismissing this action for lack of subject matter jurisdiction should be affirmed.

Dated: New York, N.Y.
July 12, 2007

Respectfully submitted,

CLEARY GOTTLIEB STEEN & HAMILTON LLP



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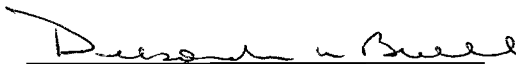

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