No. 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 ASSOCIATION OF CORPORATE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS/APPELLEES URGING AFFIRMANCE.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, the Association of Corporate Counsel states that it is a non-profit corporation that has no parent corporation and no shareholders.

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INTEREST OF THE ASSOCIATION OF CORPORATE COUNSEL

The Association of Corporate Counsel ("ACC") was formed in 1982 as the bar association for in-house counsel. With over 22,000 members from over 9,000 private sector organizations in 73 countries, ACC members represent a broad range of domestic and international public, private, and not-for-profit companies. Its members are at work in every one of the Fortune 100 companies; internationally, its members represent 74 of the Global 100 companies. One of the primary missions of the ACC is to act as the voice of the in-house bar on matters of concern to corporate legal practice and matters implicating the ability of its members to fulfill their functions as legal and compliance counselors to their corporate clients.

The issue presented in this appeal is of extraordinary concern to multinational corporations and the lawyers who advise them. Plaintiffs have attempted to predicate jurisdiction in the United States upon the allegedly errant operations of the United States subsidiary, Home Side Lending, Inc. But it is not the conduct of the subsidiary about which they complain; it is the manner in which that conduct was reported, or not adequately reported, by a foreign company in documents prepared abroad. Thus, the essence of the complained-about conduct occurred abroad and cannot be the basis for jurisdiction here.[1]

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[1] The justification Plaintiffs advance is, in any event, increasingly unworkable in an internet world: sophisticated and complex transactions for multinational companies now often involve participants in multiple countries and financial

The last twenty-five years have witnessed an explosion in multinational corporate business. The trend will no doubt accelerate into the indefinite future. One practical effect of this phenomenon is that many if not most sizeable corporations have at least some presence or impact in a number of countries. If each sovereign nation subjects foreign corporations with minimal contacts to the full extent of its own domestic laws -- complete with standards of conduct, rights and remedies that may be inconsistent with those of the country in which the corporation is organized and primarily doing business -- multinational corporations will find doing business increasingly confusing and costly because of the impossibility of predicting what legal rules apply. This concern encompasses a broad array of laws that regulate all aspects of corporate conduct, from antitrust, to labor relations, to financial privacy, and much more. Yet predicting the applicable rules, and advising corporations to conform their conduct to those rules, is the essence of the role of the good corporate law department.

This case presents another aspect of the problem. The securities issuer National Australia Bank, Ltd. ("NAB") is organized, and operating primarily in Australia, a country with sophisticated and well-developed courts and

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centers, and that trend will only accelerate. Adopting a rule that predicates jurisdiction on the locus of the alleged misconduct will soon become anachronistic, as the courts wrestle with the question of where an internet transaction or conduct "occurred."

jurisprudence. Australia has struck certain balances regarding the rights and remedies of shareholders of Australian corporations. In complete derogation of this balance of rights and remedies, Plaintiffs seek to subject NAB to American rights and remedies because some of NAB's business activities occurred in the United States. Such a rule would make the United States the final arbiter of what in reality is a foreign dispute. The great wealth of America means that many foreign corporations have some operations or business here. The threshold for federal court jurisdiction over what are essentially foreign disputes should be high, and the rules clear, so that a corporate lawyer advising a corporation in Sydney, Stockholm or Johannesburg, would be able to know what laws and remedies govern corporate transactions and conduct. The lack of clear guidance critically undermines the role of the corporate lawyer and impedes efforts to achieve corporate compliance with laws.

In deciding this appeal, we submit that the Court should take into account the following jurisprudential and policy concerns:

1. Neither the relevant statute, its legislative history nor the regulations of the Securities and Exchange Commission ("SEC") speak to the question of extraterritorial jurisdiction. The Supreme Court has instructed that, in the absence of a clear expression from Congress indicating that domestic laws apply abroad, the "longstanding principle of American law 'that legislation of Congress, unless a

contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'" governs. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*quoting Foley Bros., Inc., v. Filardo*, 336 U.S. 281, 285 (1949)). Nonetheless, this and other courts have decided jurisdiction on a case-by-case basis, resulting in decisions that fail to give clear guidance to corporate lawyers who are responsible for advising their corporations with respect to applicable law.

2. This unpredictability, coupled with the specter of extremely costly class action securities litigation, deters foreign issuers from entering United States markets, and/or purchasing American companies, with a consequent loss of domestic jobs and revenue. For example, the recently issued Schumer-Bloomberg Report found that meritless securities class action lawsuits and settlements in the United States, the possibility of corporations being forced into bankruptcy by even the threat of such litigation, and personal liability of corporate officers under domestic law, has made London and other European capitals increasingly more attractive to businesses than the United States, which is viewed as having an expensive and unpredictable legal environment. If investors would prefer to do business in Europe to avoid United States private securities litigation then, *a fortiori*, they will forego buying United States companies or operations that potentially could drag the entire foreign corporation into American courts.

3. Extending the jurisdiction of United States courts to foreign shareholder class action lawsuits, in addition to contributing to the problems discussed above, interferes with the sovereignty of other nations. Every nation has the right to decide how to regulate businesses operating within its borders and how to protect shareholders and investors in those businesses from securities fraud. Australia has a very vigorous SEC-like government agency, and also permits private class action lawsuits. Many countries do not recognize the class action device but have adopted other approaches to securities regulation and shareholder protection reflecting social choices and policies more compatible with their national characters. Our courts should exercise extreme restraint before grafting onto foreign legal systems American principles of law. Doing so not only offends the sovereignty of other nations (with the possibility of retaliatory action), but makes American courts the *de facto* forum of choice for any plaintiff anywhere in the world who has a securities-related issue and can find some "effect" or some "conduct" in the United States.

4. Significant practical problems with litigating the claims of foreign shareholders in domestic courts suggest that jurisdiction should be construed narrowly. A judge must, for example, certify a class, pursuant to Fed. Rule Civ. P. 23(c) prior to actual litigation. This presents notice problems with respect to potential claimants who are citizens of other countries, especially when not all

class members are identified. The United States court may have difficulty asserting jurisdiction over foreign co-defendants, including foreign accounting firms, corporate business partners, and others. A court will also find that documents and key witnesses are located abroad, adding greatly to the costs and burdens. Managing a class action lawsuit in these circumstances strains judicial resources for the court is, in essence, overseeing foreign litigation. These logistical problems are magnified in securities class action litigation, the most expensive form of litigation, where many meritless suits settle at great expense to the defendants. Moreover, defendants may have no protection against foreign plaintiffs suing a second time in their own courts. Accordingly, permitting foreign plaintiffs to join United States class actions requires that defendants expend enormous resources, including substantial managerial time and huge costs, on the defense of lawsuits that do not guarantee finality. While United States securities laws are designed to achieve finality through settlement or judgment, there is no certainty that foreign jurisdictions will honor the judgments and settlement bars of American courts and law. For these practical reasons too, the Court should decline to find jurisdiction in this case.

STATEMENT OF THE ISSUE PRESENTED

Whether the district court correctly held that the securities laws of the United States did not provide subject matter jurisdiction to hear this case in which

foreign shareholders allegedly sustained financial losses when the stock price of a foreign company fell, and who thereafter brought a class action lawsuit in the United States claiming that the decline in price was due to misrepresentations that violated United States securities laws.

ARGUMENT

IMPORTANT JURISPRUDENTIAL AND POLICY REASONS SUPPORT THE DISTRICT COURT'S RULING THAT IT LACKED JURISDICTION.

The district court faithfully applied the law of this Circuit in holding that subject matter jurisdiction was not present. The alleged fraud, as the district court observed, "had very little – if any – demonstrable effect on the United States market." Indeed, "[t]he Lead Foreign Plaintiffs do not appear to contend otherwise." Special Appendix at 11. Moreover, the actions occurring in the United States consisted of a domestic subsidiary's making of allegedly fraudulent internal reports of its financial health to its Australian parent. We agree, therefore, with the arguments made by the Defendants that under decisions such as *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975) and *Froese v. Staff*, No. 02 CV 5744 (RO), 2003 WL 21523979 (S.D.N.Y. July 7, 2003), the alleged conduct was insufficient to permit foreign plaintiffs to invoke the jurisdiction of United States courts.

Rather than make duplicative arguments on the merits, we ask the Court to consider the many important policy and jurisprudential reasons why the district

court's ruling was correct. As set forth below, this case raises critical issues for all non-domestic public companies that do business in the United States as well as for securities regulators abroad.

Neither the Statute, Legislative History Nor Supreme Court Precedent Supports Extraterritorial Application of American Anti-Fraud Laws.

While Congress has authority to enforce its laws beyond the borders of the United States, *see, e.g. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), whether Congress has in fact exercised that authority is a matter of congressional intent. *Id.* The anti-fraud provisions of federal securities laws are silent on the matter of their extra-territorial application, *see Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121-22 (2d Cir. 1995) and *Alfadda v. Fenn,* 935 F.2d 475, 478 (2d Cir.), *cert. denied*, 501 U.S. 1005 (1991),[2] and it is clear that these laws were enacted

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[2] Section 30(b) of the Securities Exchange Act of 1934 is the only section that addresses foreign securities transactions, and it provides that the Exchange Act "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 and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter." 15 U.S.C. § 78dd(b) (2000). The SEC, however, has never adopted "such rules and regulations." The SEC has adopted rules in other areas, for example clarifying the extraterritorial reach of the registration provisions of the Securities Act. *See* Regulation S, 17 C.F.R. §§ 230.901- 905 (2007).

Further, while the Exchange Act applies to "the use of any means or instrumentality of interstate commerce . . . in connection with the purchase or sale of any security," and defines interstate commerce to include "commerce . . . among the several States, or between any foreign country and any State," 15 U.S.C. § 78c(a)(17), the Supreme Court has "repeatedly held that even statutes that contain

primarily to protect domestic investors and to maintain the integrity of the securities markets in the United States. *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987) (*citing* H.R. Rep. No. 1383, 73d Cong., 2d Sess. 1-16 (1934); S. Rep. No. 792, 73d Cong., 2d Sess., 1-13 (1934)). *See Robinson v. TCI/US W. Commc'ns, Inc.*, 117 F.3d 900, 906 (5th Cir. 1997) ("What little guidance we can glean from the securities statutes indicates that they are designed to protect American investors and markets, as opposed to the victims of any fraud that somehow touches the United States.").

The Supreme Court has instructed that, in the absence of a clear expression from Congress indicating that domestic laws apply abroad, the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'" governs. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. at 248 (*quoting Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). This presumption recognizes that Congress "is primarily concerned with domestic conditions." *Foley Bros.*, 336 U.S. at 285. The Court has reiterated this principle in a series of decisions spanning almost a century. *See, e.g. Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357-59 (1909) (declining to give extraterritorial effect to provisions of the

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broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad." *Arabian Am. Oil Co.*, 499 U.S. at 251.

Sherman Act); *New York Central R.R. Co. v. Chisholm*, 268 U.S. 29, 31-32 (1925) (declining to give extraterritorial effect to the Federal Employees Liability Act); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. at 248 (declining to give extraterritorial effect to Title VII of the Civil Rights Act); *Smith v. United States*, 507 U.S. 197, 203-05 (1993) (declining to give extraterritorial effect to the Federal Tort Claims Act); *Sale v. Haitian Ctrs. Council, Inc.,* 509 U.S. 155 (1993) (declining to give extraterritorial effect to the Immigration & Nationality Act).[3] Just this term, in *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746 (2007), the Court applied the presumption against the extraterritorial effect of domestic laws in construing 35 U.S.C. § 271(f), a provision of the Patent Act that makes it an infringing act to export the components of a patented invention for assembly abroad. Although the purpose of the statutory section was to give United States patent holders a remedy against foreign infringement, the Court concluded that petitioner's conduct fell outside the scope of Section 271(f). The Court observed that any doubt concerning this matter of statutory construction "would be resolved by the presumption against extraterritoriality." *Id.* at 1758. In rejecting the extraterritorial

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[3] In the instances where the Court has held the presumption overcome, it identified an affirmative intention of Congress to permit extraterritorial application of the laws at issue. *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 & n.22 (1993), *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285, 287 (1952).

application of Section 271(f), the Supreme Court advised that "United States law governs domestically but does not rule the world." 127 S. Ct. at 1758.

Despite the Supreme Court's repeated admonition that only a "clear expression" from Congress can overcome the presumption against extraterritoriality, and the lack of such a clear expression with respect to the anti-fraud provisions of the securities laws, this Court has ruled that questions of extra-territorial jurisdiction will be taken up on an *ad hoc* basis, using "our best judgment as to what Congress would have wished if these problems occurred to it." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975). Yet, as Judge Bork observed in *Zoelsch v. Arthur Andersen Co.*, 824 F.2d at 31-33, "[i]t is somewhat odd to say . . . that courts must determine their jurisdiction by divining what 'Congress would have wished' if it had addressed the problem. A more natural inquiry might be what jurisdiction Congress in fact thought about and conferred." *Id.* at 32. Congress has conferred no jurisdiction on the federal courts to hear these cases, yet "it could easily provide such jurisdiction if that seemed desirable today." *Id.* In the absence of a clearly expressed intention that the securities laws be applied extraterritorially, the Court should not read the anti-fraud provisions of the securities acts to afford a private right of action to foreign purchasers of securities of a foreign corporation who charge as fraudulent conduct that occurred abroad.

Extending Jurisdiction to Actions Brought by Foreign Shareholders Discourages Foreign Business Investment in the United States, Creates the Impression that the Legal System Is Unfair and Compromises the Ability of Corporate Counsel To Advise Corporations As to the Rules of Law.

A. The *ad hoc* decision making of American courts, in the absence of any indication from Congress or the SEC that the anti-fraud provisions extend beyond our borders to reach conduct occurring wholly abroad, confounds corporate counsel whose duties are to advise corporations as to applicable law, and gives multinational corporations the impression that the American legal system is arbitrary and unfair. Directly to this point, a recent report authored by McKinsey & Company and the New York City Economic Development Corporation, issued by New York City Mayor Michael R. Bloomberg and Senator Charles E. Schumer, concluded that international companies are less likely to purchase assets in the United States because of "America's general propensity for litigation" evidenced by often meritless class action lawsuits, frequently accompanied by excruciatingly high settlements, as well as "the increasing extraterritorial reach of US law and the unpredictable nature of the legal system." *See* Sustaining New York's and the US' Global Financial Services Leadership, ("Schumer-Bloomberg Report") Jan. 2007 at 73.[4]

[4] *Available at*: http://tinyurl.com/28f6vs.

There is good reason for foreign corporations, operating under different regulatory systems, to be wary of our domestic class action lawsuits. Class action securities actions are so costly to litigate that defendants are inevitably forced to settle. These so-called "blackmail settlements" resulting from "a small probability of an immense judgment" are acknowledged to be a serious problem with the class action device. Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

This Court is no stranger to class action securities litigation involving domestic plaintiffs who assert that there have been fraudulent disclosures, or lack of disclosures, by public corporations. While these cases have often been shown to be without merit, trial courts must accept the well-pleaded facts as true at the motion to dismiss stage. As a result, many complaints survive threshold motions, and launch the parties into hugely expensive fact discovery that can distract corporate management and deplete corporate resources. Although, as the Supreme Court recently observed, plaintiffs with largely groundless claims should not be permitted to "take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value," *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007) (quotations omitted), there is no doubt that this is exactly what occurs in securities litigation. Moreover, trial judges who deny motions to dismiss are seldom willing to permit interlocutory review under

28 U.S.C. § 1292(b) thus presenting defendants with the choice of settling or litigating for years. While vindication at the end of a long case is possible, this is more theory than reality; as the Supreme Court correctly noted in *Twombly*, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those [trial] proceedings." *Id.* at 1967. *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, __S. Ct. __, No. 06-484, 2007 WL 1773208, at *4 (June 21, 2007) ("Private securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006) ("[N]uisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and manipulation by class action lawyers of the clients whom they purportedly represent had become rampant" and prompted Congress to enact the Private Securities Litigation Reform Act of 1995, 109 Stat. 737) (citing H.R. Rep. No. 104-369, p. 31 (1995)).

As the Schumer-Bloomberg Report observes, "[t]he propensity toward litigation, a significant issue for society as a whole, is of particular importance to the securities industry, which in recent years has borne a disproportionate share of the overall cost." "The total bill for securities settlements in 2005 was $3.5 billion (omitting WorldCom-related settlements of approximately $6.2 billion), up more

than 15 percent over 2004 and nearly 70 percent over 2003." Schumer-Bloomberg Report at 74. "Not surprisingly," the report continues, "the high legal cost of doing business in the US financial services industry is of real concern to corporate executives," with London seen as a dramatically better legal environment. *Id.* at 75. The report further concluded that because the mere threat of securities-related litigation can force a company into bankruptcy or liquidation (e.g., Adelphia, Arthur Andersen, WorldCom), because liability can extend under United States laws to individuals, even if they are only remotely involved in our markets, because conduct can not only be subject to civil remedies but criminal remedies as well, America's legal system has a negative reputation abroad and is deemed to be punitive and unpredictable. *Id.* at 76-77. In these circumstances, not only is the cost to the legal system of private securities actions immense, and a burden on the courts, but exercising jurisdiction over foreign companies for wholly foreign transactions, merely because the foreign company has a United States subsidiary, raises the costs of doing business in the United States and discourages foreign investment in this country. Yet foreign investment is increasingly important to the well-being of the American economy.

B. This wariness of being ensnared in meritless, but extraordinarily costly securities litigation in the United States, is exacerbated by the uncertainty of federal case law. The approach to extraterritoriality varies among the circuits. For

example, the United States Court of Appeals for the District of Columbia Circuit, adopting what it considered to be the law of this Circuit, requires that the domestic conduct itself constitute a violation of the securities laws' anti-fraud provisions. *Zoelsch*, 824 F.2d at 31. The Third, Eighth and Ninth Circuits find jurisdiction where "at least some activity designed to further a fraudulent scheme occurs within this country." *See SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977). The Fifth and Seventh Circuits require, as the Seventh Circuit has phrased the test, "a higher quantum of domestic conduct" than the Eighth, Ninth and Third Circuits. *See Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 666 (7th Cir. 1998) (collecting cases).

Even within this Circuit, however, the cases are so fact-specific and the holdings so often inconsistent, that they do not create a body of law with fixed standards that can guide corporate conduct. *Bersch* remains the key case; but since *Bersch* was decided the district courts have issued conflicting interpretations. As Judge Marrero concluded in *In re Alstom SA Securities Litigation*, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005), after surveying Circuit law, "any notion that a single precedent or cohesive doctrine may be found which may apply to dispose of all jurisdictional controversies in this sphere is bound to prove as elusive as the quest for a unified field theory explaining the whole of the physical universe. Even on a surface reading, the variegated standards . . . coupled with the latitude accorded by

Second Circuit guidance that no particular consideration may be decisive, rather than offering explicit counsel and a clear path towards the resolution of a jurisdictional challenge in a complex case . . . serve only to confirm that the determination is by no means an easy task"; the court must accommodate "potentially incompatible statements of applicable rules." Unfortunately, entirely fact-dependent and ad hoc case-by-case decision-making encourages litigation. As Judge Bork observed in *Zoelsch*, it would be "counterproductive to adopt a balancing test, or any test that makes jurisdiction turn on a welter of specific facts. . . . As we know from our experience in the extraterritorial application of antitrust law, such tests are difficult to apply and are inherently unpredictable . . . . They thus present powerful incentives for increased litigation, which inevitably tends to defeat efforts to protect limited American judicial resources." 824 F.2d at 32 n.2 (citations omitted).

The current tests are not only fact-bound but the claims of plaintiffs as to jurisdiction are often arbitrary. In this case, for example, Plaintiffs have attempted to predicate jurisdiction in the United States based upon the allegedly errant operations of a United States subsidiary. However, it is not the conduct of the subsidiary about which they complain, it is the manner in which that conduct was reported, or not adequately reported, by a foreign company in documents prepared abroad. The argument, therefore, turns on the fortuity of an Australian company

having a subsidiary in the United States that allegedly made fraudulent reports to its foreign parent. That a subsidiary of a foreign company happens to be in the United States, however, rather than in Ireland or Singapore, should not weigh in favor of federal court jurisdiction when the plaintiffs are citizens of another country who complain about actions taken abroad.[5] The need for predictability demands a jurisdictional test that is not only objective but capable of consistent application. One predictable test would be to look to the jurisdiction where the shareholders reside. Another might be to look to the jurisdiction of the securities exchange where the transaction was executed, for an investor would reasonably expect that stock bought on an Australian stock exchange, for example, would be subject to the protections of Australian law. Although securities markets have indisputably become more global, and transactions in cross-border securities more frequent, most modern securities exchanges are regulated on a national basis, and the power to enact and enforce securities laws remains a uniquely sovereign function.

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[5] Lead Foreign Plaintiffs assert that when a parent company such as NAB makes public disclosures, the report should be parsed; disclosures that relate to an American subsidiary's internal reports to its parent company are then subject to American disclosure requirements and to shareholder suits in the United States; disclosures relating to subsidiaries located elsewhere are subject to the laws, and to legal actions, in those jurisdictions. Under this absurd theory, one corporate report or press release issued abroad could spawn lawsuits in different countries having different liability standards.

So long as the courts, in the absence of clear congressional intent, take it upon themselves to determine what Congress would have thought about extraterritorial jurisdiction, had Congress considered the matter, the case law will vary from circuit to circuit, and within the circuits themselves, giving corporations and their counsel little in the way of predictive rules to guide them. The Australian Chamber of Commerce and Industry ("ACCI") has concluded that "[t]he extraterritorial application of national laws by some countries, notably the USA, has created uncertainty and added cost to the operation of businesses involved in international trade and commerce. Beyond the standard risks of international trade and commerce, businesses operating across national borders are confronted with the added burden of potential uncertainty in legal jurisdiction." *See* ACCI, Issues Paper, *The Extra Territorial Application of National Laws: An Unwarranted Burden for International Business*, ACCI Review (Aug. 2006).[6] Clearly, it is of utmost importance that other nations consider American jurisdictional policy to be fair. If nations believe that American law is arbitrary, and unfair to their corporate citizens, they are likely to resist enforcement and retaliate with legislation of their own, a matter discussed below.

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6 Available at: http://tinyurl.com/2y5g6s.

Domestic Courts Should Not Violate the Sovereignty of Other Nations by Supplementing Carefully Crafted Foreign Regulatory Schemes with American Rights and Remedies.

The Supreme Court has, for over 200 years, recognized that international considerations are of importance in determining whether a domestic statute applies abroad. *See Murray v. Schooner Charming Betsy*, 6 U.S. [2 Cranch] 64, 118 (1804) (Marshall, C. J.) (holding that an act of Congress should never be construed to violate the law of nations "if any other possible construction remains"); *New York Central Railroad v. Chisholm*, 268 U.S. 29 (1925) (observing that "the character of an act as lawful or unlawful must be determined wholly by the country where the act is done," and that extending this nation's jurisdiction would "be unjust" and "an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.") 268 U.S. at 31-32 (quotations omitted).

The principle of comity remains part of our jurisprudence. In *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004), for example, the Court considered a case in which vitamin sellers around the world conspired to fix prices, leading to higher vitamin prices in the United States and independently leading to higher prices in a number of other countries. The Court held that while a purchaser in the United States could bring an antitrust action under the Foreign Trade Antitrust Improvements Act, a foreign purchaser could not bring a similar claim in

United States courts based on foreign harm. The Court's decision was guided by several principles. First the statute itself was intended to limit and not expand the jurisdiction of domestic courts. Second, the Court found that principles of "prescriptive comity" required it to construe the statute in a way that would avoid unreasonable interference with the sovereign authority of other nations. The Court asked: "Why is it reasonable to apply this law to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?" And the Court answered: "We can find no good answer to the question." 542 U.S. at 166.

Most recently, in *Microsoft v. AT&T*, the Court again counseled that courts "should assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws . . . . Foreign conduct is [generally] the domain of foreign law" because "foreign law may embody different policy judgments about the relative rights of [those subject to the legislation]'" 127 S. Ct. at 1758 (quoting *Empagran*, 542 U.S. at 164 and Brief of the Solicitor General as Amicus Curiae). *See also Bersch*, 519 F.2d at 996 ("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.").[7]

These decisions recognize that every sovereign nation is entitled to strike the balance on how to regulate businesses operating within its borders and how to protect its shareholders and investors from securities fraud. Australia has a very vigorous SEC-like government agency, and also permits private class action lawsuits. *See infra*, at pp. 26-29. Other countries have adopted different approaches to securities regulation reflecting choices and social policies unique to those nations. For example, Switzerland, a federal republic consisting of twenty-six cantons, has no comprehensive federal legislation governing securities fraud, and private remedies are the sole means for addressing these problems. *See* 10C Harold S. Bloomenthal & Samuel Wolff, *International Capital Markets and Securities Regulation*, §§ 45:2, 45:43 (2007). Canada recognizes securities class action lawsuits but the law of most provinces does not recognize the fraud on the

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[7] Courts have recognized, moreover, that a securities suit brought by the SEC has greater legitimacy than suits brought by private parties, because the SEC "is a responsible governmental agency and will surely take into account in framing its enforcement actions any foreign policy concerns communicated to it by the Department of State." Hence "[a] court can feel more comfortable asserting jurisdiction if it knows that foreign policy concerns can be accommodated by the plaintiff and are not left entirely to the court's untutored evaluation." *Zoelsch*, 824 F.2d at 33 n.3. This assurance is obviously not present here because this lawsuit is brought by private parties.

market doctrine, and instead requires each individual investor to prove individual reliance. *See Carom v. Bre-X Minerals Ltd.*, (1999), 44 O.R. 3d 173 (S.C.J.). Whatever the country and its regulatory scheme, however, this balance of rights and remedies is not accidental, but is a studied reflection of national priorities. The exercise of jurisdiction by United States courts poses the danger of distorting foreign legal systems by grafting onto those systems rights, remedies and principles of law that the foreign nation has chosen not to adopt. *See Strengthening Investor Confidence in Europe: U. S .- Style Securities Class Actions And The Acquis Communautaire*, 15 J. Transnat'l L. & Pol'y, 281, 283-84 (2005-6) (observing that "EU member states have taken divergent approaches in an attempt to avoid the procedural flaws of U.S.-style securities class actions.").

Because, as the Court in *Chisholm* correctly recognized, "interference with the authority of another sovereign, contrary to the comity of nations" is a matter the "other state concerned justly might resent," 268 U.S. at 32, on those occasions when American courts extend domestic laws extraterritorially, it has frequently caused problems with America's relations with other nations. As one commentator has observed, "the American courts in the twentieth century developed a variation of the objective territorial principle, the so-called 'effects doctrine,' which has proven particularly antagonistic to other states and a serious source of contention

in the international law of prescriptive jurisdiction." John H. Currie, *Public International Law*, 300 (2001).

Foreign courts are particularly wary of giving effect to the judgments (or settlements) of United States courts where jurisdiction is based on a concept foreign to the law of the country where enforcement is sought, or where the foreign judgment is based on a private cause of action that the foreign country itself regards as a public law issue. *See* William S. Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161, 183 (2002). Many countries are suspicious of the class action device itself. *See* Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DePaul L. Rev. 401, 402 (2002).

At least in some instances, the interference by American courts with the domestic regulations of other countries has resulted in "blocking statutes" that seek, through various means, to force domestic companies in other countries to observe local law and "ignore any conflicting American law or judicial order." *Id.* (citing Canada's Foreign Extraterritorial Measures Act, R.S.C. 1985, ch. F-29). *See, e.g., Joseph E. Newhaus, Note, Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 Colum. L. Rev. 1097 (1981). Australia in particular has found the United States application of its law extra-territorially troublesome. The Australian government has enacted legislation

intended to block the application of other sovereign's laws to its own nationals. *See*, *e.g*. Foreign Proceedings (Excess of Jurisdiction) Act 1984, No. 3, which provides the Attorney General with authority, *inter alia*, to issue orders barring compliance with foreign judgments.[8] If a foreign court acting pursuant to a clawback statute chooses not to recognize the preclusive effect of litigation in the United States, a corporation could face inconsistent judgments, the American court that adjudicated the case could well have spent its scarce judicial resources on litigation that, after all is said and done, had been rendered a nullity, and a party that may have settled to achieve protection from claims may find itself a defendant on the same claims in a foreign court.

As Judge Friendly presciently remarked in *Bersch*, applying the securities laws to foreign purchasers not only raises "delicate questions of foreign relations law" but "the problem of judgment recognition." 519 F.2d at 989 n. 35. Often enough, in large securities cases, plaintiffs, including governmental agencies may be litigating the very same issues in foreign jurisdictions, as those sought to be raised in proceedings in the United States. As a result, "the United States may be asserting jurisdiction in order to apply its laws to activities that more properly are

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[8] Part IV, section 14(2) of the Act provides that: "Where a foreign court has given a relevant judgment against a person, the Attorney-General may, if he is satisfied that the making of an order under this subsection in relation to the relevant judgment is desirable for the protection of the national interest, by order prohibit the person from complying with the relevant judgment in Australia."

the subject of regulation by other sovereign states, and which currently are the subject of litigation there." *Id.*

Extending Jurisdiction Encourages International Forum Shopping.

The effect of judicially expanding the reach of domestic securities laws not only runs the risk of friction with other countries but encourages international forum shopping, often in circumstances when the plaintiff has an adequate remedy at home. Australia is a case in point. Australia regulates the conduct that Plaintiffs charge here.[9] Securities fraud is addressed by provisions of the Australian Corporations Act 2001 and the Australian Securities and Investments Commissions Act 2001. Section 1041H of the Corporations Act (misleading and deceptive conduct in relation to a financial product) and section 12DA of the ASIC Act (misleading and deceptive conduct in relation to financial services) are the equivalent of SEC Rule 10b-5. Actions may be brought by the Australian Securities and Investment Commission ("ASIC") on behalf of individuals, *see* section 12GM (2), (3) of the ASIC Act, or by the individuals themselves, under section 1041I of the Corporations Act. Australian law affords individuals the right to bring class action lawsuits ("representative proceedings"). Pt. IVA, Federal Court of Australia Act 1976. Thus, if seven or more investors have suffered losses,

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[9] *See generally*, S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective,* 11 Duke J. Comp. & Int'l L. 289 (2001).

and the claims arise out of the same securities transactions and have common issues of law or fact, a proceeding may be brought with a lead plaintiff representing the others. Class action lawsuits have been permitted since 1992, reflecting the fact that fifty-five percent of Australians own stock directly or through managed funds. Class action suits include those based on the issuance of a misleading prospectus. *See King v. GIO Australia Holdings Ltd* (2000), 100 FCR 209 (alleging misleading and negligent statements while defending against a hostile takeover bid); *Rhone-Poulenc Agrochimie SA v. UIM Chemical Services Pty Ltd.*, (1986), 12 FCR 477. Australian shareholders, therefore, have comprehensive statutory remedies to rectify misleading and deceptive conduct under the Trade Practices Act of 1974; section 12DA of the ASIC Act and section 728 of the Corporations Act. In addition they may sue for the tort of negligent misrepresentation, and they have the right to injunctive relief and damages. *See* Corporations Act § 1324.

While Australian courts are well-equipped to entertain the type of lawsuit brought by Australian Plaintiffs, the Australian Plaintiffs are in the United States for an obvious reason: to maximize their chances for recovery. Although class actions are brought in Australia, they are more difficult for plaintiffs to finance. Australia has adopted the English rule, whereby a successful party may claim its

costs against the losing party.[10] This loser-pays rule may result in named plaintiffs paying millions of dollars in defense legal fees if their suit is unsuccessful, thus perhaps suggesting that well-advised plaintiffs with marginal suits would choose courts of the United States over the courts of Australia. Contingency fee arrangements are also barred in Australia, thus providing less of a financial incentive for attorneys to assume the risk of litigating these cases.[11] In addition, American substantive law is more favorable than Australian law. For example, in the United States, the fraud-on-the-market theory has opened the door to thousands of shareholder class actions by assuming that the price of shares in an open and developed market reflects all publicly available material information about those shares, including materially false or misleading statements issued by a corporation. Individual reliance, therefore, does not have to be established; the theory presumes shareholders rely on the integrity of the market price in making their decisions. The fraud-on-the-market doctrine has not been recognized under Australian law, making the American forum far more attractive to potential litigants.[12]

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10 *See, e.g.*, Clark & Harris, 11 Duke J. Comp. & Int'l Law at 301.

11 *See, e.g.*, Peta Spender, *Securities Class Actions: A View from the Land of the Great White Shareholder*, 31 Common L. World Rev. 123, 143 (2002) (contingency fees prohibited in four Australian states; rule against champerty controls in others).

12 *See, e.g.*, Michael Duffy, *Fraud on the Market: Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada*

It is clear that when an additional United States remedy conflicts with the "comprehensive" policy of another country, jurisdiction is unreasonable. *See Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953). *See also* Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987) (confirming the rule of construction that whenever possible statutes must avoid unreasonableness and be construed to avoid "conflict with the law of another state." cmt. g). Moreover, American securities laws are even more subject to question as the source of preemptive rules because the law as to several key issues, including materiality, secondary liability, fraud-on-the-market and presumption of reliance are judge-made. Using United States judge-made law to preempt foreign statutory law is unreasonable.

Here there is not only a conflict, but the foreign plaintiffs are attempting to take advantage of more favorable American laws, by bringing suits that in truth belong in their own country's courts. A sovereign state like Australia, however, is entitled to enforce its own laws against its own nationals for acts occurring on its own territory – the very case here. The assertion of United States jurisdiction would effectively supersede Australia's own laws and the policies that support

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and Australia, 29 Melb. U.L. Rev. 621, 655 (2005) ("there is no case law in Australia where shareholders have attempted to invoke the 'fraud on the market' theory before Australian courts," and "whether Australian courts would . . . adopt a 'fraud on the market' theory . . . is not clear").

them. While the interests of the United States, when compared to that of the home country, would be insubstantial, the effect of finding subject matter jurisdiction in such circumstances would be to make American courts the *de facto* forum of choice for any plaintiff anywhere in the world who has a securities-related issue and could find some "effect" or some "conduct" in the United States, no matter how small.

Significant Practical Problems in Litigating Claims Counsel Against Reading the Securities Laws Broadly.

Plaintiffs attorneys are now setting up shops in Europe in the hopes of encouraging foreign plaintiffs to sue in the United States, even when the link to America is at best tenuous.[13] If courts are willing to find subject matter

[13] In May 2006, the New York-based class action law firm of Labaton Sucharow & Rudoff, the law firm that represents the Plaintiffs in this litigation, announced a "joint alliance with TILP International," a German law firm. As the *American Lawyer* characterized this alliance, and other alliances between American law firms and their foreign counterparts, "American class action lawyers are aggressively pursuing foreign clients. Each plaintiffs firm has its own strategy, but the goal is the same: Sign up lead plaintiff contenders as clients, boosting the firm's chances of being named lead counsel and eventually raking in huge attorneys fees." Moreover, "[o]verseas investors see the U.S. court system – where plaintiffs lawyers shoulder the risk by getting paid on contingency – as often the best venue to recover losses." *See* Andrew Longstreth, *Coming to America*, American Lawyer, Nov. 1, 2006 at S53; *see also* Mary Jacoby, *For the Tort Bar, A New Client Base: European Investors*, Wall St. J., Sept. 2, 2005, at A1 (describing how "some of the biggest names in the plaintiffs bar have a new strategy: Hunt for plaintiffs in Europe").

jurisdiction in these cases, the courts will be flooded with new securities class action litigation. This poses a host of practical problems.

First, even assuming jurisdictional issues are resolved in favor of the foreign plaintiffs, a judge must certify a class, pursuant to Fed. Rule Civ. P. 23, prior to actual litigation. This presents notice problems with respect to potential claimants who are citizens of other countries, especially when not all class members are identified.[14] Because notice is a component of due process, individuals who do not receive adequate notice cannot be bound by any settlement or judgment, even in American courts. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). In addition, in order to have personal jurisdiction over a defendant, the defendant must have minimum contacts with the United States and the exercise of jurisdiction must be reasonable. *See SEC v. Alexander*, 160 F. Supp. 2d 642, 657 (S.D.N.Y. 2001) (granting motion to dismiss defendant's motion to dismiss for lack of personal jurisdiction). In cases such as this, courts will inevitably have difficulty exercising jurisdiction over co-defendants, including, for example, foreign accounting firms and corporate subsidiaries. Documents and witnesses

[14] *See* Matthew H. Adler, *If We Build It, Will They Come? The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*," 26 Law & Pol'y Int'l Bus. 79, 95-96 (1994) (listing countries that "impose service of process procedures that are not common in the United States and will not "enforce a U.S. judgment" when these procedures are not followed).

will likely be located abroad. Managing a class action lawsuit in these circumstances strains judicial resources.

Further, while a United States court may enter an order that under the Full Faith and Credit Clause binds all plaintiffs, foreign and domestic, to any settlement or final judgment, so that foreign class members may not sue again on the same facts in the courts of the United States, there may be nothing that prevents those claimants from suing again in their own courts, particularly where the other countries do not recognize class actions. Permitting foreign plaintiffs to join class actions, accordingly, requires that defendants expend huge amounts of time and money on the defense of lawsuits that do not guarantee finality. *See e.g. Tracinda Corp. v. DaimlerChrysler AG* (*In re DaimlerChrysler AG Sec. Litig.*), 216 F.R.D. 291, 294 (D. Del. 2003) (declining to certify because plaintiffs could sue again in foreign courts); *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454, 459-60 (S.D.N.Y. 1989) (noting in dictum that the ability of foreign claimants to file suits abroad undermines the res judicata effect of the class action device and counsels against including a large number of foreign claimants in a class); *Bersch*, 519 F.2d at 997 ("European courts are far less inclined to recognize foreign judgments than are American courts. . . ."). These practical problems also argue against extending domestic securities laws extraterritorially.

* * * * *

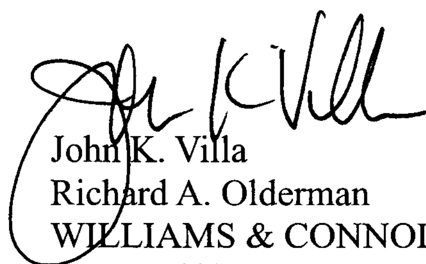
The foregoing journey through the interface between United States and foreign securities laws is merely one illustration – albeit perhaps the most dramatic one – of the growing problem of the reach of domestic courts into the operations and conduct of foreign corporations. While the case at bar involves the sale of securities, it could as easily involve antitrust laws, licensing, labor standards, or a host of other important issues. The reach of our courts into these areas based upon *ad hoc* rules, varying from court to court and circuit to circuit, is unpredictable and increasingly confounding. And if the law lacks predictability, then the corporate stewards whose task it is to interpret and apply that law to promote corporate compliance are frustrated.

It is universally recognized that the corporate counsel has been an important and positive force in promoting and achieving corporate compliance. To do this most effectively, however, the corporate lawyer must at a minimum understand what laws – indeed what nation's laws – will apply to that conduct. Increased extraterritorial reach of United States laws undermines the ability of corporate counsel to predict the applicable laws and to achieve the compliance with laws for their corporate employers.

CONCLUSION

For the foregoing reasons, the ruling of the district court should be affirmed.

Respectfully submitted,



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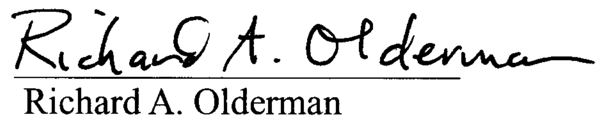
July 12, 2007

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a), I hereby certify that the foregoing Brief of the Association of Corporate Counsel complies with the type-volume limitation in Fed. R. App. P. 28.1(e)(2)(B). This brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief has been prepared in a proportionately spaced typeface using Microsoft Word 2003, 14 point Times New Roman.



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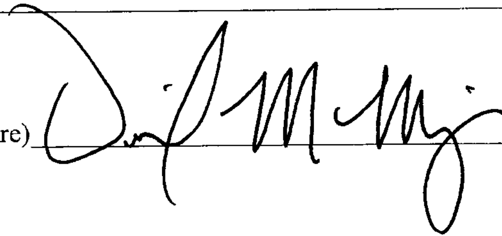
(Your Signature) 

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I hereby certify that true and correct copies of the foregoing Brief of the Association of Corporate Counsel as *Amicus Curiae*, were served both electronically and by overnight mail this 12th day of July, 2007, upon the Court and the following counsel:

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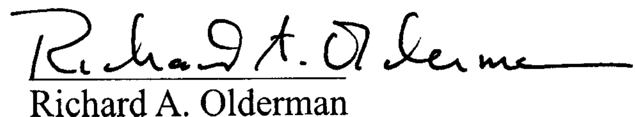

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