

07-0583-CV

To Be Argued By:
GEORGE T. CONWAY III

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,

—against—

NATIONAL AUSTRALIA BANK LIMITED, HOMESIDE LENDING INC.,
FRANK CICCUTTO, 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 FOR DEFENDANTS-APPELLEES NATIONAL AUSTRALIA BANK LIMITED AND FRANK CICCUTTO

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), defendant-appellee National Australia Bank Limited states that it has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

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PRELIMINARY STATEMENT

If this action were allowed to proceed, it would be a massive Section 10(b) stock-drop class action, consisting virtually entirely of claims of investors who have no connection to the United States or to the United States securities markets. The class would include everyone in the entire world who purchased the common stock of the National Australia Bank, one of the world's largest banks, over a period of almost two and one-half years.

The Australian named plaintiffs and their counsel would have a United States District Court entertain such a massive lawsuit here, in the United States, under United States law, and under United States class action procedures, even though that stock, called "ordinary shares," was issued in *Australia* by an *Australian* corporation headquartered in *Australia*; even though the ordinary shares traded *exclusively* on *Australian* and other *foreign* exchanges, and *not* in the United States; even though 99.97 percent of the ordinary shares were held by investors from *Australia* and other places *outside* the United States; even though the disclosures alleged to have been false were prepared and disseminated in *Australia* by *Australians* to *Australians*, and were filed with *Australian* securities regulators and with the *Australian* Stock Exchange, pursuant to *Australian* laws and rules; and even though, according to one of plaintiffs' cited news clippings, this case involves the "biggest investment disaster in *Australian* corporate history."¹

Merely reciting these undisputed facts makes clear that Judge Jones correctly dismissed the complaint. It is "a longstanding principle of American law 'that legis-

¹ Joint Appendix ("A__") 1258 (emphasis added).

lation of Congress, unless a contrary intent appears, is meant to apply *only* within the territorial jurisdiction of the United States.’ ” *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (emphasis added; quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). The Supreme Court has thus “adopt[ed] the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application.” *Small v. United States*, 544 U.S. 385, 388-89 (2005). The Court has also repeatedly made clear that courts must “ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.” *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). This “presumption that United States law governs domestically but does not rule the world,” *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1758 (2007), means that when American regulatory “policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.” *Empagran*, 542 U.S. at 169.

Accordingly, as the Supreme Court and this Court have consistently held, “absent ‘*clear* evidence of congressional intent’ to apply a statute beyond our borders, the statute will apply *only* to the territorial United States.” *United States v. Gatlin*, 216 F.3d 207, 211 (2d Cir. 2000) (emphasis added; quoting *Smith v. United States*, 507 U.S. 197, 204 (1993)). No such evidence exists for the Securities Exchange Act of 1934. As a result, in accordance with the presumption against extraterritoriality, “we entertain suits by aliens only where conduct material to the *completion* of the fraud

occurred in the United States.” *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983) (emphasis added). And so “the anti-fraud provisions of the federal securities laws . . . [d]o not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.” *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975) (Friendly, J.; emphasis added).

The rule is even more strictly applied in the context of putative class actions like this one. As Judge Friendly felicitously put it, cases like this one create “the likelihood that a very small tail” of domestic conduct “may be wagging an elephant” of a foreign investor class. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 n.31 (2d Cir. 1975). “The management of a class action with many thousands of class members imposes tremendous burdens on over-taxed district courts, even when the class members are mostly in the United States and still more so when they are abroad.” *Bersch*, 519 F.2d at 996. In a case like this one, a district court must “eliminate from the class action all purchasers other than persons who were residents or citizens of the United States.” *Id.* at 997.

The fact that the “underlying” subject of their disclosure claims was a NAB subsidiary in Florida, Home-Side Lending, does not help the Australian plaintiffs here. What controls are the undisputed facts that the disclosures of which the Australian plaintiffs complain were prepared, published and disseminated in Australia, and that whatever reliance they placed on those disclosures, whatever purchases they made, and whatever losses they suffered, occurred in Australia as well. As the district court held, the domestic conduct here

“amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad,” and it was “the *foreign* acts—*not* any domestic ones—that ‘*directly caused*’ the alleged harm here.” Special Appendix (“SA__”) 19-20 (emphasis added; quoting *Bersch*, 519 F.2d at 993).

In short, to borrow Judge Friendly’s words again, the disclosures here

emanated from a foreign source Not only do we not have the case where all the misrepresentations were communicated in the nation whose law is sought to be applied . . . or the case where a substantial part of them were, . . . but we do not even have the oft-cited case of the shooting of a bullet across a state line where the state of the shooting as well as of the state of the hitting may have an interest in imposing its law. At most the acts in the United States helped to make the gun whence the bullet was fired from places abroad.

Bersch, 519 F.2d at 987. That being the case here, the judgment of the district court must be affirmed.

STATEMENT OF FACTS

A. National Australia Bank, Its Ordinary Shares and Its Disclosures

Founded in 1858, headquartered in Melbourne, Australia, and organized under Australian law, National Australia Bank Limited, or NAB, is Australia’s largest bank and financial institution. A72, 142, 620. In 1999, it was the third largest company in Australia by stock market capitalization, and in 2000 it was one of the 25 most profitable banks in the world. A79-80, 187, 446. Frank

J. Cicutto² is the only officer or employee of NAB who is named as a defendant; during the Class Period, he served as the company's Managing Director and Chief Executive Officer. A73.

NAB's common shares are widely held—abroad. They are called “ordinary shares,” and since at least 1974 they have traded principally on the ASX, the Australian Stock Exchange (now the Australian Securities Exchange). A611, 72, 75; <http://tinyurl.com/3bwqwq> (data sheet on ASX web site). The ASX operates in Melbourne, Sydney, Brisbane, Perth, Adelaide and Hobart, all cities in Australia. A611. The ordinary shares also trade directly on the London, Tokyo and New Zealand stock exchanges. *Id.* In October 1999, there were roughly one and one-half billion ordinary shares outstanding—1,484,112,319 to be exact—and these shares were distributed among 284,518 holders. A77, 280, 284. At a trading price of AU\$22.41 per share, NAB had a market value of over AU\$33 billion, which was equal to more than US\$21 billion. A280 (trading price and number of shares); *see* A151 (exchange rate); *see also* A611, A456 (similar figures for 2000).

The ordinary shares do *not* trade on any exchange in the United States. *E.g.*, A280, 72, 75. And almost nobody with an American address owns them. In October 1999, for example, there were 284,518 ordinary shareholders throughout the world, and of these, only 399—roughly *fourteen hundredths of one percent (0.14%)*—were listed as having United States addresses. These 399 shareholders owned less than *three hundredths of one percent (0.03%)* of the outstanding ordi-

² Not “Cicutti,” as plaintiffs’ brief on appeal has it.

nary shares. *See* A284. The vast majority of the shares—some 98.405 percent—were held by people with addresses in Australia. Residents of the United Kingdom, New Zealand and other places outside the United States held another 1.566 percent—meaning that *over 99.97 percent of the ordinary shares were held by people outside the United States*. A284; *see also* A616 (similar figures for 2000).

A few people in the United States, but again, not many, owned NAB's American Depositary Receipts, or ADRs, which traded on the New York Stock Exchange. A284, 72, 75. ADRs are a vehicle by which indirect interests in foreign securities may trade on American markets in prices denominated in United States dollars. The foreign securities are deposited, typically with an American bank or trust company, which issues certificates representing the ADRs. *See, e.g.*, American Depositary Receipts, Securities Act Release No. 33-6894, 1991 SEC LEXIS 936, at *3-*4 (May 23, 1991). But the deposited foreign securities themselves do *not* trade on the American market. "The holder of an ADR is not the title owner of the underlying shares; the title owner of the underlying shares is either the depositary, the custodian, or their agent." *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 367 (3d Cir. 2002). As of October 1999, there were only 200 ADR holders with addresses in the United States, A280, 77, and the ADRs they held represented only about 1.1 percent of the company's ordinary shares. *See* A280; *see also* A611 (similar numbers for 2000).

NAB's disclosures must conform to Australian laws and rules. As an Australian corporation, NAB is required to prepare and file extensive annual and semiannual disclosures with the Australian Securities and Invest-

ment Commission (ASIC), a regulatory agency that serves as Australia's equivalent of the SEC, as well as with the ASX, the exchange upon which the ordinary shares principally trade. *See, e.g.*, Corporations Act, 2001, §§ 285, 292, 295, 298-306, 319-20 (Austl.), *available at* <http://tinyurl.com/2czx46>; AUSTRALIAN STOCK EXCHANGE LIMITED, ASX LISTING RULES 4.2, 4.5 (2005), *available at* <http://tinyurl.com/2tnsze>; *accord* Corporations Law, 1991, §§ 292-94, 301-10, 317 (Austl.). NAB is also required to prepare and to file additional "continuous" disclosures with the ASX. *E.g.*, Corporations Act, 2001, § 674 (Austl.); ASX LISTING RULE 3.1; *see* Anthony B. Greenwood, *Securities Regulation in Australia*, in 1 INTERNATIONAL SECURITIES REGULATION, Australia Booklet 1, at 21-23 (Robert C. Rosen ed., 2004). NAB's financial disclosures are required to conform to Generally Accepted Accounting Principles applicable in Australia ("Australian GAAP," for short). Australian GAAP "differ[s] in . . . material respects from accounting principles generally accepted in the United States." *E.g.*, A148-49, A452, 454, 816-17.

Because it has issued ADRs, NAB is also required to file disclosures with the SEC.³ But these disclosures are essentially identical to NAB's Australian disclosures, as they are filed on forms that effectively allow foreign issuers to use their home-country disclosures to fulfill their disclosure obligations under American law. On Form 6-K, NAB filed market releases and other continuous disclosures originally issued, filed, and distributed

³ *See, e.g.*, American Depositary Receipts, 1991 SEC LEXIS 936, at *40-*41.

in Australia, *see, e.g.*, A1261-1401,⁴ and on Form 20-F, it attached the Australian annual reports that were filed with Australian authorities and distributed to ordinary shareholders in Australia, *compare* A125-289, 442-620, 804-991 (Australian annual reports) *with* A290-441, 622-801, 992-1176 (Forms 20-F).⁵ The Australian plaintiffs “do not allege that they were even aware of the SEC filings, much less relied on them.” SA19 n.9.

B. HomeSide and the Volatility of Mortgage Servicing Rights

Plaintiffs’ allegations of “fraud” are based entirely upon disclosures made about a former NAB subsidiary, HomeSide Lending, Inc., which was based in Jacksonville, Florida, and no longer exists. HomeSide’s tenure as a NAB subsidiary was short-lived: NAB acquired HomeSide in February 1998, and then sold HomeSide’s operating assets to Washington Mutual in December 2001, three months after the end of the pro-

⁴ *See also, e.g.*, Rules, Registration and Annual Report Form for Foreign Private Issuers, Exchange Act Release No. 16371, 1979 SEC LEXIS 220, at *3 (Nov. 29, 1979) (Form 6-K is an “interim reporting form” that requires foreign issuers to disclose “material press releases and information sent to foreign securityholders”).

⁵ *See, e.g.*, International Disclosure Standards, Securities Act Release No. 33-7637, 1999 SEC LEXIS 228, at *7, *20 & n.30, *41-*42 (Feb. 2, 1999) (Form 20-F allows foreign issuers to use their home-country disclosures “as an ‘international passport’”).

posed “class period” here. A73, 81, 1259, 1394.⁶ In addition to NAB and Cicutto, the Amended Complaint names HomeSide and three former HomeSide executives as defendants. A73-74.

HomeSide made money in part by servicing mortgages. It performed, for a fee, “the administrative chores involved in receiving monthly mortgage payments from homeowners and then making payments to investors, insurers, taxing authorities and others.” A1252. The rights to collect those fees in the future are called mortgage servicing rights—MSRs—and, like all income streams, they have a present economic value. The accounting rules treat MSRs as an asset, an asset that must be amortized over its expected life. A82-83.

MSRs are an asset with a highly uncertain value, because of the simple fact that homeowners can prepay their mortgages. The more they prepay, the fewer servicing fees the servicer can expect to receive, and the lower the value of the MSRs. It is axiomatic, as plaintiffs allege, that “[e]arly repayments on mortgages affect the value of MSR because they shorten the life over which the mortgage servicer receives fees on loans which it services.” A82. As a result, the value of MSRs can only be estimated. A505. Mortgage servicers use a

⁶ HomeSide was not, as plaintiffs mistakenly (and irrelevantly) assert, “at all relevant times . . . NAB’s principal subsidiary in the United States.” PB3. NAB had other, more profitable, operations in the United States, including Michigan National Bank. *See, e.g.*, A144, 469, 832. NAB’s United States operations never accounted for more than 13 percent of its assets during the Class Period. A881.

variety of approaches to estimate MSR values. “Fair value” of MSRs can be “estimated using market prices of similar mortgage servicing assets.” *Id.* It can also be estimated through “discounted future net cash flows considering market prepayment rates, historic prepayment rates, portfolio characteristics, interest rates and other economic factors.” *Id.* Like other mortgage servicers, NAB and HomeSide employed “valuation models” and “software systems” to estimate MSR values from these inputs. A82.

The estimation process involves business judgments and predictions every step of the way. Future interest rates, of course, are uncertain, and experts and models differ in predicting them. So too, obviously, with predictions of future prepayment rates on the basis of predicted future interest rates. In fact, even more so: not only has “the market . . . found it extremely difficult to predict precisely how interest rate changes influence prepayment rates,”⁷ but there is in fact “no way to accurately anticipate the amount of prepayments that will result from changes in interest rates or other economic conditions.”⁸

Thus, as plaintiffs themselves allege, different companies could—and did—have differing views on what future mortgage prepayment rates would be. A103 (“Bloomberg shows each Wall Street firm’s view on pre-

⁷ Jay L. Koh, *The Myth of Procedure: Derivatives Investment Reform in St. Petersburg*, 16 YALE J. ON REG. 245, 257 (1989).

⁸ Edward L. Pittman, *Economic and Regulatory Developments Affecting Mortgage Related Securities*, 64 NOTRE DAME L. REV. 497, 504 (1989).

payments”); PB24 (referring to “Bloomberg *median rate*”; emphasis added). And estimates of MSR values, in turn, varied widely depending upon the economic prognostications upon which they were based. According to one article cited by plaintiffs, for example, “a 1 per cent cut in [interest rates] would cut the value of the MSRs by 7 per cent, [and] a 2 per cent drop would slash it by nearly *two-fifths*.” A1257 (emphasis added). In short, MSR values are highly uncertain—and extremely volatile.

Mortgage servicers try to protect themselves against the income-statement effects of wild swings in MSR values by hedging the MSRs (A82, A947), but hedging is hardly a panacea. “A perfect hedge cannot be achieved,” A847, and if “hedges [do] not perform as expected,” a holder of MSRs may “suffer[] significant losses.” A1245. In fact, as illustrated by materials plaintiffs cite in their complaint, that is exactly what happened to many mortgage servicers—not just HomeSide. Long-term interest rates declined sharply in the late 1990s. *E.g.*, A1254, A1243. MSR values dropped, and a lot of servicing hedges didn’t cover the losses. Plaintiffs cite a 1999 *Mortgage Banking* article entitled “Hedging’s Trial by Turmoil,” which explained how these “[t]reachorous conditions in the capital markets [in 1998] made hedging servicing risky business.” A1243; *see* A83 (citing and quoting article). Some firms got hit badly, *see* A1245, 1248-49, 1250, and the problem was only expected to get worse, as a new accounting rule was expected to “lead to more volatile earnings reports” and a new “wave of . . . turmoil” that would cause many to quit the business. A1250, 1245. The new rule “changed the mortgage-servicing business overnight” and made it “a lot less attractive.” A99 (quoting A1257); *see also* PB14 (conceding that “falling interest rates and other

factors in 2001 made the environment increasingly difficult”).

The next wave of turmoil struck in 2001, and this time it hit HomeSide. Interest rates fell repeatedly, and by year-end reached *40-year lows*. A99, 815-16, 1256-57, 1263. On July 5, 2001, NAB announced an AU\$888 million (US\$450 million) write-down on the balance sheet value of the MSR_s held by HomeSide. A826.⁹ NAB’s announcement, issued in Melbourne, Australia, disclosed that the write-down reflected “[u]nprecedented refinancing activity” caused by the rate cuts, “[e]xtreme volatility in US interest rate markets which has adversely impacted HomeSide’s United States hedging positions,” and “[c]hanges to industry and market forces” caused by the “new accounting standards.” A1263; *see also* A94, 99, 1256-57, 1277. NAB’s announcement also warned that, given the “current volatile environment,” “[f]alls in the value of mortgage servicing rights and risk management challenges are common to the industry at this time.” A1263-64.

Although the July 2001 write-down represented about ten percent of the book value of HomeSide’s MSR_s, it was only 0.2 percent of NAB’s total assets (AU\$404.3 billion). A1263. The plaintiffs do not and cannot claim that they suffered loss as the result of this write-down, nor could they, as their own complaint and the materials it cites make clear that the stock only dropped temporarily. *See* A94 (ADR_s fell from US\$86.05 to US\$81.15 per share on July 5, 2001); A71 (ADR_s traded

⁹ The AU\$568 million number cited in the complaint (A94) is the after-tax figure. A1263; *see also* A99, 1256-57.

at US\$92.40 on August 24, 2001). Indeed, within a few weeks, the ordinary shares traded upward to reach “*record*” prices. A1258 (emphasis added).

C. The September 2001 Write-Down

What the plaintiffs *do* claim loss from was a second, larger HomeSide MSR write-down that was announced in Australia on Monday, September 3, 2001. This write-down, which totaled AU\$3.05 billion (US\$1.75 billion), is the centerpiece of the complaint. *See, e.g.*, A71, 95-97.

The second write-down came after NAB had decided to sell HomeSide and to get out of the mortgage servicing business. As NAB’s announcement of the write-down explained, NAB had hired an outside consultant to review “the estimated market sale value of the HomeSide business,” and in the course of that review, HomeSide discovered that it had been using an incorrect interest-rate assumption in its MSR valuation model, and that other assumptions in the model needed to be changed in light of “continued unprecedented uncertainty and turbulence in the mortgage servicing market.” A1267. NAB accordingly wrote down AU\$755 million for the interest-rate error, and AU\$1.436 billion for the other changed assumptions. *Id.* The remaining AU\$858 million was a write-down of goodwill, taken because of NAB’s decision to sell the business. *Id.*; *see also* A1268, A1277.

This announcement caused NAB’s ordinary shares to fall AU\$4.30, from AU\$33.20 to AU\$28.90, on September 3, 2001. PB16; A33. There was an uproar in Australia, as the financial press there considered the write-down to be the “biggest investment disaster in

Australian corporate history.” A1258. But again, the stock quickly recovered, as NAB moved quickly to recoup its losses by selling off HomeSide’s assets. A1259, 1394. By early February 2002, according to an article quoted by plaintiffs, the ordinary shares traded as high as AU\$34.80, “just a whisker below the record [AU]\$35.13 that was set before the HomeSide disaster struck,” and “the stockmarket reckon[ed] [that] NAB [was] worth [AU]\$54bn, exactly the same as it was beforehand.” A1258. Indeed, the February 2002 AU\$34.80 ordinary share price was actually AU\$1.60 *higher* than the share price just before the September 2001 write-down. *See* PB16; A33.

D. Plaintiffs’ Allegations of “Fraud”

The amended complaint that the district court dismissed was filed on behalf of four named plaintiffs—Russell Leslie Owen, Brian and Geraldine Silverlock, and Robert Morrison. A70, 72. It is undisputed that only Morrison is an American who purchased ADRs. SA20; PB2. The other three plaintiffs, Owen and the Silverlocks, purchased ordinary shares and resided in Australia. A119; *accord, e.g.*, PB2 (defining Owen and the Silverlocks as the “Foreign Plaintiffs”). No class was ever certified because no motion for class certification was ever made. A1439.

The complaint squarely asserts that Australians committed a securities fraud in Australia upon Australians. It claims that *NAB* caused HomeSide to falsify the value of its MSRs, and that *NAB* made false and misleading statements about HomeSide. “*As a result of NAB’s conduct* in connection with HomeSide’s financial modeling,” the amended complaint asserts on page 2, “NAB’s

subsidiary HomeSide knowingly used unreasonably optimistic valuation assumptions or methodologies.” A71 (emphasis added). And in paragraph one on page one, the plaintiffs sum up their claim: “This action involves the *dissemination of materially false and misleading statements* during the Class Period concerning *fraud by NAB* at its subsidiary, HomeSide Lending, Inc.” A70-71 (emphasis added). The plaintiffs say that these “material misrepresentations and omissions” “directly or proximately caused” their loss by “inflating the price of NAB’s securities.” A112.

Every single one of the alleged misstatements about the value of HomeSide’s MSR’s was made in Australia by NAB itself. The alleged misstatements are set forth in paragraphs 67 through 100 of the amended complaint, A86-95, which cite and quote at length no fewer than seven earnings and other market releases issued by NAB,¹⁰ as well as NAB’s Annual Reports for the years 1999 and 2000.¹¹ All of these NAB disclosures were, of course, prepared and issued *in Australia*.¹² The complaint not only extensively recites and quotes financial

¹⁰ AC ¶¶ 67-71, 75-77, 79-83, 90-92, 94-97 (A86-91, 93-94).

¹¹ AC ¶¶ 72-74, 84-85 (A87-88, 91).

¹² *See, e.g.*, A190 (“Dated at Melbourne”), A277 (same), A496 (same), A606 (same), A1263 (Melbourne address), A1265 (“Melbourne, 5 July 2001”); *see also* <http://tinyurl.com/3bdtk6> (July 22, 1999 release); <http://tinyurl.com/2tpku8> (Nov. 4, 1999 release); <http://tinyurl.com/2rtkqa> (May 4, 2000 release); <http://tinyurl.com/2pmmjo> (July 27, 2000 release); <http://tinyurl.com/2v9psj> (Nov. 2, 2000 release).

results that NAB reported in these disclosures, but it also makes a point of quoting several statements made in them by NAB's Melbourne-based CEO, defendant Cicutto.¹³ In addition, the complaint quotes statements made by NAB in an investor presentation at an event called the "Sydney Invasion Lunch"—so named because it took place in the financial capital of Australia.¹⁴ Finally, the complaint recites statements attributed to NAB about its financial results in three articles from the *Australian Financial Review*—Australia's leading financial publication.¹⁵

In contrast, the plaintiffs purport to allege just one—*one*—misstatement made by HomeSide in the United States. PB10. But the allegation is irrelevant, and is not even a misstatement at all. In May 1999, the *American Banker* wrote an article about the possible effect of a decline in housing starts on the mortgage industry. A1254. The article reported that defendant Kevin Race, HomeSide's Chief Operating Officer, "said HomeSide Lending, a unit of National Australia Bank, is insulated from a downturn because it does not have retail branches and gets most of its mortgages from brokers, correspondents, and banks that agree to sell HomeSide all their loans." *Id.* Paragraphs 61 through 63 of the amended complaint allege that this statement—on its face, a journalist's paraphrase—was false in light of

¹³ AC ¶¶ 67, 70, 76, 80, 83, 90, 96 (A86-87, 89-91, 93-94).

¹⁴ AC ¶¶ 98-100 (A94-95); *see also* <http://tinyurl.com/2wrrtt> (dated "Sydney - Tuesday 21 August 2001").

¹⁵ AC ¶¶ 78, 88, 93 (A89, 92, 93-94).

NAB's and HomeSide's alleged manipulation of the value of their existing MSR. A84-85.

That is plainly not so. Race's reported statement had nothing to do with misstating the value of HomeSide's *existing* book of MSRs, which is what plaintiffs' case is supposed to be about; the statement concerned HomeSide's ability, in the face of a possible recession, to acquire *new* MSR assets in the *future*, assets that HomeSide did not yet even *own*. Because the plaintiffs make no allegation that NAB or HomeSide lied about its ability to acquire more MSRs, plaintiffs' allegation is entirely spurious. Beyond this, the plaintiffs make no allegation that this statement in *American Banker* was ever disseminated to shareholders in Australia, let alone caused them loss.

In short, the plaintiffs allege *not a single statement* made by HomeSide or its officers that caused any NAB shareholder—let alone any in Australia—any harm.¹⁶

Finally, the amended complaint alleges little on the issue of scienter. Indeed, although the district court did not reach the issue, the defendants argued in the alternative below that the Private Securities Litigation Reform Act of 1995 required the dismissal of the complaint for failing to “state with particularity facts giving rise to a strong inference” that the defendants acted with

¹⁶ The complaint mentions a couple of other statements allegedly made by HomeSide, but does not allege them to be false, and the plaintiffs do not even bother to mention them in their brief on appeal. *See* A84 (*Florida Times Union* article about executive appointments); A85 (news articles about purchase of Cendant portfolio).

scienter, 15 U.S.C. § 78u-4(b)(2)—a contention now fortified by *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 75 U.S.L.W. 4462, 4466-67 (U.S. June 21, 2007), which requires that, on a motion to dismiss, “a court *must* consider plausible *nonculpable* explanations for the defendant’s conduct, as well as inferences favoring the plaintiff.” (Emphasis added.)¹⁷ Most of what the plaintiffs themselves prominently cite, quote, and allege on the defendants’ state of mind cuts *against* a finding of intentional fraud—and strongly in favor of a *nonculpable* explanation. For example, plaintiffs *themselves* plead that:

- “‘HomeSide executives made a very simple and *stupid mistake*: they *accidentally* plugged [the wrong numbers] into the new model.’ ” This was a “‘*blunder.*’ ” PB20 (emphasis omitted in part; quoting A99 (quoting A1257)).
- NAB was “‘*asleep at the wheel*’ ”; NAB’s “‘internal risk controls had become’ ” “‘*lax,*’ ” and there was “‘*a lack of follow-up and implementation.*’ ” PB21 (emphasis added and omitted in part; quoting A100 (quoting A1258)).
- NAB “suddenly [found] itself in so much difficulty” because “HomeSide had *too much independence. There was not enough hands-on control from Melbourne.*” PB20-21 (quoting A99-100 (quoting A1257)).

Such charges of laxity and negligence do not even begin to “approximate an actual intent to aid in [a]

¹⁷ The defendants would seek to renew their PSLRA, Rule 9(b), and Rule 12(b)(6) contentions in the district court if the judgment here were reversed.

fraud,” which is what Section 10(b)’s scienter element requires. *E.g.*, *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 269 (2d Cir. 1996). And given these extensive allegations of “plausible nonculpable explanations” for the defendants’ conduct, it simply cannot be said that “a reasonable person *would* deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged”—as is required for a complaint to survive under *Tellabs*, 75 U.S.L.W. at 4467 (emphasis added).

The plaintiffs also plainly failed to meet the PSLRA’s requirement of “particularity” in pleading scienter. As to NAB and Cicutto, the defendants who made the alleged misstatements and omissions, the best the plaintiffs do is to plead two short and conclusory sentences about a letter that some unspecified individuals allegedly sent to NAB and its auditors, a letter that supposedly “detailed the specific processes” of HomeSide’s alleged manipulation of MSR values and supposedly identified “specific electronic files” that allegedly “confirmed and documented the fraudulent scheme.” PB26 (emphasis omitted). The allegation gets no more specific than that; it contains *no* detail about the alleged letter’s contents, and does not even allege that anyone at NAB actually reviewed the letter, or that, if read, it was disregarded with an intent to defraud. *See* AC ¶ 148 (A107-08). Given the PSLRA’s requirement of factual “particularity,” these “omissions and ambiguities” in plaintiffs’ complaint “count *against* inferring scienter.” *Tellabs*, 75 U.S.L.W. at 4467 (emphasis added).¹⁸

¹⁸ The plaintiffs’ brief also relies upon the fact that an Australian from NAB was stationed at HomeSide, PB17 (citing A1484), but their allegations about that

E. The Proceedings Below

The defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1), 9(b) and 12(b)(6) and the PSRLA. On October 25, 2006, the district court (Barbara S. Jones, J.) granted the motions to dismiss. SA1. The court dismissed the foreign plaintiffs' claims for lack of subject-matter jurisdiction, holding that they had failed to meet "their burden of demonstrating that Congress intended to extend the reach of its laws to the predominantly foreign securities transactions at issue here." SA11, 12-20. As for the lone domestic plaintiff, Morrison, the defendants conceded the existence of subject matter jurisdiction.¹⁹ But the court agreed with the defendants' contention that Morrison did not state a claim because he had failed to allege any recoverable loss under the PSLRA's "lookback" damages limitation provision. SA20-22; *see* 15 U.S.C. § 78u-4(e)(1). In light

employee may be found only in a complaint that was filed, and later *withdrawn*, by a *nonparty* to this appeal, A504, and, in any event, the withdrawn complaint alleged no specifics about what the NAB employee knew or didn't know about HomeSide's MSR valuations, *see* A1484. As for HomeSide itself, the plaintiffs make a series of allegations that the projected mortgage prepayment speeds (PSAs) that HomeSide used in its valuation model in two months in 2000 were lower than those used by other firms. PB24. But the complaint contains not a single specific allegation that anyone at HomeSide actually believed that the PSA estimates were wrong, let alone that the ultimate MSR valuations were wrong. *See* A104-07.

¹⁹ SA6 n.6; NAB Mem. in Supp. of Mot. to Dismiss 3, 4 (Mar. 11, 2004) (docket entry no. 36 (A9)).

of these rulings, the court did not address the defendants' alternative contentions that the plaintiffs had failed to plead fraud with the particularity required by the "strong inference" standard of the PSLRA and Fed. R. Civ. P. 9(b), and had otherwise failed to state a claim.

Judge Jones granted "[p]laintiffs' counsel . . . leave to substitute a lead domestic plaintiff and to otherwise amend the pleadings with respect to ADR purchasers only." SA22-23; A1433. Plaintiffs' counsel later filed a complaint on behalf of a new alleged domestic ADR purchaser, Norman Hauge, A10-11 (docket entry no. 53), but after defendants informed the district court that Hauge, like Morrison, lacked damages under the PSLRA's "lookback" provision, plaintiffs' counsel immediately agreed to withdraw Hauge's complaint, A12 (docket entries nos. 65, 66)), 1504. The district court then entered the final judgment from which only the three Australian plaintiffs and Morrison now appeal. SA24; A1506.

ARGUMENT

NO SUBJECT MATTER JURISDICTION EXISTS OVER THE FOREIGN PLAINTIFFS' CLAIMS.

The lone American plaintiff, Morrison, joined the notice of appeal, but the plaintiffs' opening brief offers no argument that the district court wrongly dismissed his claim. Morrison has thus waived any challenge to the judgment against him,²⁰ and so the only issue before this

²⁰ See, e.g., *Thibodeau v. Portuondo*, 486 F.3d 61, 67 (2d Cir. 2007); *JPMorgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005);

Court is whether the district court lacked subject matter jurisdiction over the three Australian plaintiffs' claims.

On that question, there is a significant burden, one that rests squarely upon the Australian plaintiffs. The courts of the United States "are courts of limited jurisdiction" that "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citation omitted). They must "rely only on the clearest indications in holding that Congress has enhanced [their] power." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (citations omitted).

And because it is the plaintiffs who are here "seeking to invoke the subject matter jurisdiction of the district court," it is they who "bear[] the burden of showing that [they were] properly before that court." *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 40 (2d Cir. 1996). They must make this showing "affirmatively," and "*not . . .* by drawing from the pleadings inferences favorable to [them]," *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (emphasis added; internal quotation marks and citation omitted), as they "cannot be helped by presumptions or by argumentative inferences drawn from the pleadings," *Norton v. Larney*, 266 U.S. 511, 515 (1925).²¹

Knipe v. Skinner, 999 F.2d 708, 710-11 (2d Cir. 1993); *see also* FED. R. APP. P. 28(a)(9).

²¹ This being an appeal from a Rule 12(b)(1) dismissal, moreover, this Court "may refer to any material in

The Australian lead plaintiffs cannot meet this burden. As foreign plaintiffs who purchased shares of a foreign company on a foreign securities exchange based upon foreign disclosures created and transmitted directly as the result of foreign conduct by foreign defendants, Owen and the Silverlocks cannot assert Exchange Act claims here.

A. The presumptions against extraterritoriality and interference with other nations' authority apply with full force here.

To prevail, the Australian plaintiffs must overcome two important, and related, principles of statutory construction that their brief entirely ignores: the presumption against extraterritorial application of federal statutes, and the presumption against construing those statutes to interfere with the sovereign authority of other nations.

It is “a 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.’ ” *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“*Aramco*”) (emphasis added; quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). The Supreme Court has “adopt[ed] the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application,” *Small v. United States*, 544 U.S. 385, 388-89 (2005), a “ ‘pre-

the record” to determine whether subject matter jurisdiction exists. *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 121 n.1 (2d Cir. 1998).

outside our borders.’ ” *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000) (quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993)).

This “presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind.” *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993); accord, e.g., *Small*, 544 U.S. at 388; *Gatlin*, 216 F.3d at 211. The presumption also “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” *Aramco*, 499 U.S. at 248. Accordingly, “[a]ll legislation is prima facie territorial,” *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (citation omitted), and “[a]n intention . . . to regulate . . . conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.” *Foley Bros.*, 336 U.S. at 286.

The presumption is a strong one. As this Court has put it, “absent ‘clear evidence of congressional intent’ to apply a statute beyond our borders, the statute will apply only to the territorial United States.” *Gatlin*, 216 F.3d at 211 (emphasis added; quoting *Smith*, 507 U.S. at 204). “[T]he presumption against extraterritoriality is not overcome unless there appears ‘the affirmative intention of the Congress clearly expressed.’ ” *Id.* at 212 (emphasis added; quoting *Aramco*, 499 U.S. at 248). And since it is they who urge that American law span the globe, it is “[p]laintiffs [who] carry the burden of demonstrating a Congressional purpose to overcome the presumption against extraterritorial application.” *Labor Union of Pico Korea, Ltd. v. Pico Prods., Inc.*, 968 F.2d 191, 194 (2d Cir. 1992). In short, the “presumption is alive and

well”—and it is not easily overcome. *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7 (1st Cir.) (rejecting extraterritorial application of whistleblower provisions of Sarbanes-Oxley Act), *cert. denied*, 126 S. Ct. 2973 (2006).

A second, and closely allied, canon of construction also applies here. The Supreme Court has repeatedly emphasized that it “ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.” *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (finding lack of subject-matter jurisdiction over Sherman Act claims of foreign plaintiffs). “This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws,” and “thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world.” *Id.* at 164-65. As this Court has stated—in a case refusing to apply the securities laws extraterritorially, no less—Congress cannot be “presumed to have prescribed rules governing activity with strong connections to another country.” *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 131 (2d Cir. 1998).

Both of these presumptions apply with full force to private civil actions under Section 10(b) of the Securities Exchange Act. For the requisite “clear evidence of congressional intent,” “the affirmative intention of the Congress clearly expressed,” *Gatlin*, 216 F.3d at 211-12 (citations and internal quotation marks omitted), simply does not exist here. “The Securities Exchange Act is

silent as to its extraterritorial application.” *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991).²² It could even be said that Congress was *doubly* silent about the extraterritorial reach of the private civil remedy under Section 10(b). For that remedy, of course, is purely a judicial creation: even as to domestic conduct, the statutory history and text fail to “provide *any* indication that Congress considered the problem of private suits” under Section 10(b). *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729 (1975) (emphasis added). As this Court has observed, “the remedy available under § 10(b) and Rule 10b-5 has become ‘a judicial oak . . . grown from little more than a legislative acorn,’ ” an implied cause of action that the Supreme Court “ ‘confirmed with virtually no discussion’ ” “notwithstanding the absence of any . . . provision” in the statute or rule for a private right to sue. *Ross v. A.H. Robins Co.*, 607 F.2d 545, 552 (2d Cir. 1979) (quoting *Blue Chip Stamps*, 421 U.S. at 730, 737).

In short, the presumption against extraterritorial application of American law, and the presumption against interference with the sovereign authority of other nations, fully apply here.

²² Section 30(b) of the Act is irrelevant: it provides that the law “shall not” apply to persons “transact[ing] a business in securities” outside the United States, “unless” they violate “such rules and regulations as the [SEC] may prescribe.” 15 U.S.C. § 78dd(b). No one here is alleged to have transacted “a business in securities.” The provision clearly cuts *against* extraterritorial application in any event. See *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987).

B. There is no subject matter jurisdiction over the foreign plaintiffs' claims because acts within the United States did not directly cause their alleged losses.

1. *The effects test.* In accordance with these canons of construction, this Court has carefully circumscribed the application of the Section 10(b) private civil remedy to cases involving predominantly domestic concerns. The Court has applied two tests to determine whether subject matter jurisdiction exists: an “effects” test, and a “conduct” test. Expressed most generally, the “effects” test looks to “whether the wrongful conduct had a substantial effect in the United States or upon United States citizens,” and the “conduct” test looks to “whether the wrongful conduct occurred in the United States.” *SEC v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003). If the claims at issue meet neither test, then it must be presumed that Congress would not “have wished the precious resources of United States courts . . . to be devoted to them rather than leave the problem to foreign countries.” *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975).

The Australian plaintiffs do not argue, nor could they, that they have met the effects test. As this Court has explained, “the effects test concerns the impact of overseas activity on U.S. investors and securities traded on U.S. securities exchanges”; it “concerns sales to [investors] resident in the United States.” *Europe & Overseas*, 147 F.3d at 128 & n.12 (citation and internal quotation marks omitted). By definition, that excludes the Australian plaintiffs, who do not reside here in the United States, did not purchase a security here, and indeed, purchased securities—the ordinary shares—that *only* trade abroad. As far as the claims of the Australian

plaintiffs are concerned, “[t]here is, thus, no U.S. entity that Congress could have wished to protect from the machinations of swindlers.” *Id.* at 128 (footnote omitted).

The existence of the ADRs or of potential American plaintiffs, moreover, does not help the Australians meet the effects test. In *Bersch*, for example, this Court sustained jurisdiction over the American members of the plaintiff class, 519 F.2d at 991-93, but nevertheless held that there was *no* subject matter jurisdiction over the claims of foreign purchasers, *id.* at 987, and specifically “direct[ed] that the district court eliminate from the class action all purchasers other than persons who were residents or citizens of the United States.” *Id.* at 997. Numerous decisions applying the effects test, too many to set forth in the text, have faithfully applied *Bersch* and similarly held that foreign plaintiffs who purchased securities abroad may *not* establish jurisdiction by “bootstrap[ping] their losses to . . . independent American losses.” *Tri-Star Farms Ltd. v. Marconi, PLC*, 225 F. Supp. 2d 567, 573 n.7 (W.D. Pa. 2002).²³

²³ *Accord, e.g., In re Yukos Oil Co. Sec. Litig.*, No. 04 Civ. 5243 (WHP), 2006 WL 3026024, at *2, *11-12 (S.D.N.Y. Oct. 25, 2006); *In re Bayer AG Sec. Litig.*, 423 F. Supp. 2d 105, 110, 114-15 (S.D.N.Y. 2005); *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 511-12 (S.D.N.Y. 2005); *Pozniak v. Imperial Chem. Indus. PLC*, No. 03 Civ. 2457 (NRB), 2004 WL 2186546, at *8 (S.D.N.Y. Sept. 28, 2004); *In re Baan Co. Sec. Litig.*, 103 F. Supp. 2d 1, 9 & n.11, 11 (D.D.C. 2000); *McNamara v. Bre-X Minerals Ltd.*, 32 F. Supp. 2d 920, 922, 924 (E.D. Tex. 1999); *Nathan Gordon Trust v. Northgate Exploration, Ltd.*, 148 F.R.D. 105, 108 (S.D.N.Y. 1993); *Kaufman v. Campeau*

2. *The conduct test.* Accordingly, the Australian plaintiffs’ theory of subject matter jurisdiction rests upon the conduct test. That test flows from the notion that “[w]e do not think Congress intended to allow the United States to be used as a base for *manufacturing fraudulent security devices for export*, even when these are peddled only to foreigners.” *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (emphasis added); *accord, e.g., Bersch*, 519 F.2d at 987. Its essential object is to prevent “misrepresented securities” from being “*poured*” into foreign countries from the United States, *Vencap*, 519 F.2d at 1017 (emphasis added), to keep “persons who wish to defraud foreign securities purchasers or sellers” from “us[ing] the United States as a *base of operations*,” and to ensure that this country does not become “*a haven for such defrauders and manipulators*,” *Butte Mining PLC v. Smith*, 76 F.3d 287, 290 (9th Cir. 1996) (emphasis added).

The conduct test must be applied with its core purpose—preventing the export of fraudulent securities from the United States to foreign lands—in mind. Thus, and in accordance with the presumptions against extraterritoriality, this Court has repeatedly “cautioned that that basis for jurisdiction ha[s] but *limited* application.” *Fidenas AG v. Compagnie Internationale Pour L’Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 10 (2d Cir. 1979) (emphasis added). As a result, the conduct test requires that conduct in the United States *directly* cause foreign plaintiffs’ losses in order for jurisdiction

Corp., 744 F. Supp. 808, 810 (S.D. Ohio 1990). Even one of the principal cases cited by the Australian plaintiffs agrees. *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 393 (S.D.N.Y. 2005).

to exist over their claims. As Judge Friendly expressed the test in the seminal case of *Bersch*,

the anti-fraud provisions of the federal securities laws . . . [d]o not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States *directly caused* such losses.

519 F.2d at 993 (emphasis added); *accord, e.g., SEC v. Berger*, 322 F.3d at 193; *Europe & Overseas*, 147 F.3d at 128-29; *Fidenas*, 606 F.2d at 9-10.

This test of direct causation means that “we entertain suits by aliens only where conduct material *to the completion of the fraud* occurred in the United States.” *Psimenos*, 722 F.2d at 1046 (emphasis added); *accord, e.g., Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991). This Court has thus consistently emphasized that

this basis of jurisdiction is limited to *the perpetration of fraudulent acts themselves* and does not extend to mere preparatory activities,

and that

the securities laws are *not* to apply in every instance where something has happened in the United States, however large the gap between the something and a *consummated fraud* and however negligible the effect in the United States or on its citizens.

Vencap, 519 F.2d at 1018 (emphasis added); *accord, e.g., Psimenos*, 722 F.2d at 1046; *Fidenas*, 606 F.3d at 10.

The domestic conduct alleged by the Australian plaintiffs plainly falls far short of this direct-causation, completion-of-the-fraud standard set forth by this Court. “The fraud, if there was one, was committed by placing

the allegedly false and misleading [statements] in the purchasers' hands." *Bersch*, 519 F.2d at 987. That inheres in the very nature of a private Section 10(b) action like this one; a plaintiff must allege and prove that the defendant "(1) 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) that plaintiffs' reliance was the proximate cause of their injury." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172 (2d Cir.), *cert. denied*, 126 S. Ct. 421 (2005); *accord, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). The last element, proximate causation—also known as "loss causation"—requires a showing of "*direct*" causation. *E.g., Lentell*, 396 F.3d at 174 (emphasis added). In short, by the very definition of the claim, the conduct that "directly causes" a recoverable loss under Section 10(b) is, at the very least, the making of the material misstatement or omission upon which the plaintiff has detrimentally relied.

In this case, that conduct indisputably occurred in Australia. What the Australian plaintiffs complain of was the inclusion by the Australian defendants, in Australia, of the allegedly intentionally false and misleading information in the disclosures of Australia's largest bank; the filing in Australia, by Australians, of those disclosures with the Australian Securities and Investments Commission and the Australian Stock Exchange; the making, by Australians, of allegedly false statements in the *Australian Financial Review* and other Australian newspapers. *That* was what is alleged to have deceived the Australian plaintiffs into purchasing, through Australian brokers, the Australian bank's Australian-registered ordinary shares on the Australian Stock Exchange.

That was what is alleged to have “*directly caused*” the Australian plaintiffs’ losses, constituted “the perpetration of fraudulent acts *themselves*,” and composed “conduct material *to the completion of the fraud*.” *E.g.*, *Bersch*, 519 F.2d at 993 (emphasis added); *Fidenas*, 606 F.2d at 10 (emphasis added; quoting *Vencap*, 519 F.2d at 1018), *Psimenos*, 722 F.2d at 1046 (emphasis added).

In contrast, the alleged domestic conduct to which the Australian plaintiffs now point—what they tellingly call the “*predicate* fraudulent acts *underlying* the misleading statements” and the “*predicate* acts *underlying* the fraud,” PB28, 29 (emphasis added)—did not “directly cause” their losses as required by *Bersch*. No one in the United States has been alleged to have “manufactur[ed] fraudulent security devices for export” and “peddled [them] to foreigners,” or to have “poured” “misrepresented securities” from the United States into Australia. *Vencap*, 519 F.2d at 1017. Indeed, the alleged domestic conduct would not have led to any harm to the Australian plaintiffs had it not been for “(i) the 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*.” SA19 (emphasis added). In short, as Judge Jones aptly 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.” *Id.* (emphasis added).

And that does not meet the conduct test. It simply does not suffice to allege that “inflated financial infor-

mation emanated from the United States” when “the allegedly fraudulent statements were ‘conceived, engineered and published [abroad]’ and . . . it was ‘these misstatements and not any activity which [led] to the alleged misrepresentations which ‘directly caused’ the financial losses.’ ” SA17 (quoting *Froese v. Staff*, No. 02 Civ. 5744 (RO), 2003 WL 21523979, at *2 (S.D.N.Y. July 7, 2003)). The publication of the misstatements abroad is what “embodie[d] the heart of the alleged fraud” and what controls under the conduct test, even when the misstatements were “about activities occurring in the United States.” *In re Bayer AG Sec. Litig.*, 423 F. Supp. 2d 105, 111, 113 (S.D.N.Y. 2005) (citations and internal quotation marks omitted). Put another way, “[s]imply making fraudulent statements about what is happening in the United States does not make those statements ‘United States conduct’ for purposes of the conduct test. Nor does it make the underlying activity itself fraudulent.” *Tri-Star Farms Ltd. v. Marconi, PLC*, 225 F. Supp. 2d 567, 578 (W.D. Pa. 2002).²⁴

²⁴ *Accord, e.g., Butte Mining PLC v. Smith*, 76 F.3d 287, 288, 291 (9th Cir. 1996) (fact that alleged misstatements made abroad to foreign investors in foreign companies by foreign sellers concerned land transaction in Montana did not establish jurisdiction); *Blechner v. Daimler-Benz AG*, 410 F. Supp. 2d 366, 371-73 (D. Del. 2006) (fact that alleged misstatements made abroad to foreign investors by German company concerned acquisition of Chrysler Corp. in United States did not establish jurisdiction); *In re Baan Co. Sec. Litig.*, 103 F. Supp. 2d 1, 6, 9, 10 & n.14 (D.D.C. 2000) (fact that alleged misstatements made abroad to foreign investors by Dutch company concerned alleged “channel [stuffing] misbehavior”

In contending otherwise, the Australian plaintiffs seek nothing less than to rewrite the conduct test. As a substitute for *Bersch*'s standard of direct causation, the Australian plaintiffs argue that it is enough to say that “*but for*” the “Florida-based” conduct, the “foreign plaintiffs would not have suffered injury.” PB51 (emphasis added); *accord, e.g.*, SA19. Instead of being “limited to the perpetration of fraudulent acts themselves and . . . not extend[ing] to mere preparatory activities,” *e.g.*, *Vencap*, 519 F.2d at 1018, the plaintiffs’ revised conduct test would expand it to “acts *underlying* the misleading statements,” and the “day-to-day misconduct that rendered the defendants’ public statements false and misleading,” PB28 (emphasis added). But that simply cannot be reconciled with the decisions of this Court, which have consistently established *direct* causation, not “but for” causation, as the touchstone of the domestic conduct test. The Australian plaintiffs would entirely dispense with this Court’s holding that “ ‘the securities laws are *not* to apply in every instance where something has happened in the United States.’ ” *Psimenos*, 722 F.2d at 1046 (emphasis added; quoting *Vencap*, 519 F.2d at 1018). Just as “[w]e are not to be a haven for scoundrels,” however, we must not become “a host for the world’s [alleged] victims of securities fraud.” *Butte Mining*, 76 F.3d at 291.

3. *Bersch*. The Australian plaintiffs try at length, but fail, to distinguish *Bersch v. Drexel Firestone*, the only prior decision in which this Court applied the conduct and effects tests in a class action involving foreign investors. PB40-42. The case arose from the notorious

that “took place in the United States” did not establish jurisdiction).

collapse of IOS Ltd., a Canadian company, in the early 1970s. IOS had made a series of public offerings of its common stock to investors outside the United States; the shares were purchased mostly by foreigners, and traded on foreign exchanges, though some of the shares wound up in the hands of Americans. 519 F.2d at 979-81. Shortly after the offerings, the price of the shares plummeted, and Bersch, an American living in New York, brought a class action that was “preponderantly” on behalf of foreigners. *Id.* at 977, 981.

The plaintiff pointed to extensive conduct that occurred in the United States. Indeed, there was far *more* domestic conduct relating to the actual dissemination of the alleged misstatements than is alleged here: the underwriters, their attorneys and their accountants had met in New York on numerous occasions to plan the offering; an American law firm and an American accounting firm were retained to prepare for the offering; parts of the allegedly fraudulent prospectus were drafted in New York; a draft of the prospectus was reviewed in New York; and bank accounts were opened in New York in anticipation of deposits from the offering. *Id.* at 985 n.24. According to the district court, “discussions, investigations, decision-making and planning” for the offering “were carried on to a significant extent in the United States by Americans and others, and the acts abroad were substantially supervised from New York.” *Bersch v. Drexel Firestone, Inc.*, 389 F. Supp. 446, 457 (S.D.N.Y. 1974), *rev’d*, 519 F.2d 974 (2d Cir. 1975).

The district court in *Bersch* found subject matter jurisdiction over the foreign unnamed plaintiffs’ claims upon essentially the same “but for” basis that the Australian

plaintiffs assert jurisdiction here: “conduct constituting an essential link” in the alleged fraud took place “in the United States.” *Id.*; *cf.*, *e.g.*, PB33 (arguing that “without HomeSide’s improper conduct here in the United States,” securities fraud would not have occurred). But this Court squarely *rejected* this reasoning, directing that the foreign plaintiffs’ claims be dismissed, and holding that the foreign investors’ losses had to be “directly caused” by the domestic conduct in order to be actionable in the United States. 519 F.2d at 993. Contrary to the Australian plaintiffs’ contention here, moreover, the result in *Bersch* had *nothing* to do with the situs of the subject “matters” that “should have been disclosed in the prospectuses at issue.” PB40. Instead, it had *everything* to do with where those prospectuses were *disseminated and relied upon*. The fact that controlled, Judge Friendly explained, was that “[t]he fraud, if there was one, was committed by placing the allegedly false and misleading prospectus in the purchasers’ hands”—which occurred in “London or Brussels [or] Toronto [or] the Bahamas and Geneva.” 519 F.2d at 987. What mattered was “where all the misrepresentations were communicated”—namely, overseas:

Not only do we not have the case where all the misrepresentations were communicated in the nation whose law is sought to be applied . . . or the case where a substantial part of them were, . . . but we do not even have the oft-cited case of the shooting of a bullet across a state line where the state of the shooting as well as of the state of the hitting may have an interest in imposing its law. At most the acts in the United States helped to make the gun whence the bullet was fired from places abroad.

Bersch, 519 F.2d at 987. So it is here as well.

Bersch already could not be more on point, but there is more. In both *Bersch* and its companion case, *Vencap*, Judge Friendly noted that the fact that *Bersch* was a class action weighed against a finding of jurisdiction as well. Courts presented with large foreign classes alleging securities fraud must consider “the likelihood that a very small tail” of domestic conduct “may be wagging an elephant” of a foreign investor class. *Vencap*, 519 F.2d at 1018 n.31; accord, e.g., *Bersch*, 519 F.2d at 996; *Tri-Star Farms*, 225 F. Supp. 2d at 573. If courts are to “determine whether Congress would have wished the precious resources of United States courts” to be “devoted” to “predominantly foreign” transactions “rather than leave the problem to foreign countries,” *Bersch*, 519 F.2d at 985, then the existence of a large class of foreign plaintiffs must weigh heavily against a finding of subject matter jurisdiction. For “[t]he management of a class action with many thousands of class members imposes tremendous burdens on overtaxed district courts, even when the class members are mostly in the United States and still more so when they are abroad.” *Id.* at 996.²⁵ The Australian plaintiffs, of course, seek to impose precisely such burdens upon the district court here.

²⁵ See also John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1540 (2006) (“securities class actions have averaged between 47% and 48% of all [federal] class actions,” “take longer to resolve than most other class actions,” a “tendency [that] is increasing,” and thereby “disproportionately” and “necessarily consume significant judicial resources” and “are essentially subsidized by the U.S. taxpayer”).

4. *Berger*. The decision of this Court upon which the Australian plaintiffs most affirmatively rely, *SEC v. Berger*, 322 F.3d 187 (2d Cir. 2003), is readily distinguishable. To begin with, as a legal matter, it was an *SEC enforcement action*, and not a private class action by foreign plaintiffs to recover damages for losses suffered abroad. *Id.* at 195 (distinguishing *Bersch* because it was a class action brought by foreign plaintiffs). And on the facts, it should be enough to quote, as Judge Jones did, the dispositive language in *Berger*: “*In sum, while operating entirely from New York, Berger executed a massive fraud upon hundreds of investors involving transactions on United States exchanges.*” SA15-16 (quoting 322 F.3d at 195; emphasis added). *Berger* presents a paradigmatic case of a fraudster using “the United States . . . as a base for manufacturing fraudulent security devices for export.” *Vencap*, 519 F.2d at 1017.

Berger, who had pleaded guilty to criminal securities fraud and was a fugitive from justice, was the sole shareholder of a Delaware corporation headquartered in New York City, MCM, that ran an investment fund. 322 F.3d at 188-91. Although the fund was nominally an offshore fund, it was not only controlled and operated from *Berger’s* New York office, but “invested . . . in stocks on *domestic securities exchanges*” largely through an account at “*a broker-dealer located in Columbus, Ohio*” that “*cleared all of its transactions through Bear Stearns . . . in New York City.*” *Id.* at 188 (emphasis added). Not only was *Berger* “*working in New York*” when he “created fraudulent account statements that vastly overstated the market value of the Fund’s holdings,” he was there when he incorporated them into “the Fund’s annual financial statements, which were *created at MCM’s*

offices in New York and made available for potential investors to review.” *Id.* at 189 (emphasis added). Beyond this, the Court had “no doubt that the effects of Berger’s actions were felt substantially in the United States.” *Id.* at 195. Berger’s fund was designed for “tax-exempt *domestic* investors” as well as foreigners, *id.* at 188 (emphasis added), and after “the fictitious financial statements [prepared] in New York . . . were . . . sent offshore to the Fund’s administrators,” “calculations based on these statements were *re-transmitted back into this country* and abroad to prospective investors, current shareholders, and their agents,” *id.* at 194 (citation omitted; emphasis added); *accord id.* at 189. These facts distinguish themselves; the SEC had every right to seek redress for such predominantly domestic conduct having such substantial domestic effect.

The Australian plaintiffs here get nowhere trying to analogize Berger’s clerical use of a Bermudian mailing house to HomeSide’s transmittal of information to NAB in Australia. PB36-37. The comparison makes no sense at all. In *Berger*, the fact that “the statements that ultimately conveyed the fraudulent information to investors were prepared and mailed in Bermuda” did not matter because “[t]he Fund Administrator [there] was simply acting under Berger’s instruction,” which came from New York, and its conduct in Bermuda was therefore “not itself fraudulent.” 322 F.3d at 195. The Australian plaintiffs actually assert the opposite here: that HomeSide and its officers worked *for* NAB, their parent company, *not* the other way around; and that NAB, in Australia, called the shots and knowingly carried out a fraud. The fact that the Australian plaintiffs deem *Berger* to be their *best* precedent from this Court only shows

how weak their subject matter jurisdiction claim is here.²⁶

5. *The Restatement*. Equally misplaced is plaintiffs' reliance upon Section 416 of the *Restatement (Third) of Foreign Relations Law*. PB31-32. As an initial matter, the *Restatement* does not purport to interpret the Securities Exchange Act and does not reflect what Congress *has* done; it merely expresses one group's unofficial view of what Congress *could* do if it wanted to. Judge Friendly made this very point in *Bersch* when he refused to apply the (now superseded) *Restatement (Second)* on the ground that "it would be . . . erroneous to assume that the legislature always means to go to the full extent permitted." *Bersch*, 519 F.2d at 985 (citation and inter-

²⁶ Apart from *Berger*, the only other cases upon which the Australian plaintiffs extensively rely are two district court cases. PB37-39. To the extent that these decisions looked to what the Australian plaintiffs here call "underlying" conduct, however, they conflict with *Bersch* and its progeny for the reasons set out above. In any event, these decisions placed dispositive weight upon facts not present in the case at bar. *See In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 393 (S.D.N.Y. 2005) (emphasizing that "*all* of the scheming alleged in the Complaint occurred domestically"; emphasis added); *In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62, 75 (S.D.N.Y. 1999) (emphasizing that 51% of company's stock was held in, half of its assets were located in, and two-thirds of its revenues were generated in, the United States; and that alleged fraud "relate[d] to the illegal operation of a United States subsidiary on United States soil and the deception of a United States regulatory commission").

nal quotation marks omitted).²⁷ This Court emphasized instead that the controlling question was of legislative intent: whether “Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.” *Id.* Put simply, “ ‘the sign of how far Congress has chosen to go can come only from Congress.’ ” *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1752 (2007) (citation omitted).²⁸

But even if the *Restatement (Third)* were somehow imagined to embody the Securities Exchange Act, which it does not, it still would not help the Australian plaintiffs. The relevant conduct in this case did not “occur[] predominantly in the United States,” so jurisdiction cannot be sustained under Section 416(1)(d). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 416(1)(d) (1987). Beyond this, the exercise of jurisdiction would be unreasonable and therefore impermissible under the *Restatement* because, among other reasons, the transactions for which the Australian plaintiffs seek redress did not have, and could not reasonably

²⁷ *Accord, e.g., Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d at 127 (“this circuit has recognized that the federal securities laws do not reach [the] constitutional limit” of due process).

²⁸ Even as an indication of United States foreign relations law, moreover, the *Restatement (Third)* is of limited value. *See United States v. Yousef*, 327 F.3d 56, 99-100 & n.31 (2d Cir. 2003) (“courts must be vigilant and careful” with the *Restatement* because it is “ ‘at variance’ ” with United States law; citation omitted).

have been expected to have, “a substantial effect on a securities market in the United States,” *id.* § 416(2)(a); the “representations [were not] made” and “negotiations [were not] conducted in the United States,” *id.* § 416(2)(b); “the persons sought to be protected are [not] United States nationals or residents,” *id.* § 416(2)(c); and “another state,” namely Australia, has a strong “interest in regulating the activity,” *id.* § 403(2)(g).

In short, in a case that “concerns those shareholders who have no connection to the United States and who did not [purchase] their shares [in] an American market,” in which “[t]he outcome . . . will not affect American investors or markets,” and where “there may be conflicts between the laws of the United States and different nations, and other nations may have a greater interest in regulating the people and activities within their borders,” the *Restatement* counsels *against* the exercise of jurisdiction, not for it. *Blechner v. Daimler-Benz*, 410 F. Supp. 2d at 369-70 (finding exercise of jurisdiction unreasonable under Sections 403 and 416 of the *Restatement*). That is exactly the case here.

6. *The “tipping factors.”* Finally, the Australian plaintiffs cannot justify jurisdiction under the conduct test on the basis of so-called “tipping factors.” PB44-46. To begin with, they entirely butcher the concept; “tipping factors” do not justify the exercise of jurisdiction where none would otherwise exist. In *Europe & Overseas Commodity Traders v. Banque Paribas London*, the case upon which the Australian plaintiffs rely, this Court held precisely the *opposite*: that even where there is United States conduct that “ordinarily would be sufficient to support jurisdiction” under the conduct test, the law may nonetheless require “some *additional* factor tipping the

scales in favor of our jurisdiction” before jurisdiction may be acquired. 147 F.3d at 129 (emphasis added). Specifically, the plaintiff in *Europe & Overseas* was alleged to have been solicited with misleading information, and to have relied upon that information, “*while he was present in the United States,*” and “*the most important piece of the alleged fraud—reliance on a misrepresentation—may have taken place in this country.*” *Id.* at 129, 130-31 (emphasis added). The critical conduct thus occurred *in the United States*. Yet this Court nonetheless found *no jurisdiction* because there was no additional factor “tipping” in favor of jurisdiction: the buyer and seller were both foreign and the transaction ultimately occurred abroad.

That hardly helps the Australian plaintiffs here. The case against jurisdiction is even *stronger* here because the misrepresentations to the Australians were made and relied upon in Australia. Indeed, *Europe & Overseas* is affirmatively *unhelpful* to the Australian plaintiffs: despite the fact that the critical conduct took place in the United States, this Court applied its “tipping” analysis—and thus found no jurisdiction—largely because “*the transaction is clearly subject to the regulatory jurisdiction of another country with a clear and strong interest in redressing any wrong.*” *Id.* at 129 (emphasis added).

That is undeniably true here, and, as will be shown immediately below, requires the dismissal of the Australian plaintiffs’ claims even apart from their failure to meet this Court’s conduct test.

C. Plaintiffs’ construction of Section 10(b) is precluded by the presumptions against extraterritoriality and interference with the sovereign authority of other nations.

The Australian plaintiffs’ claims not only fail this Court’s conduct test, but they cannot be reconciled with the Supreme Court’s recent decisions rejecting the extraterritorial application of American law. In those decisions, the Supreme Court has emphasized the strength of both “[t]he presumption that United States law governs domestically but does not rule the world,” *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1758 (2007), as well as the “principle of general application . . . that courts should ‘assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws,’ ” *id.* (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004)). In particular, the Supreme Court has made clear that the federal courts “*must* assume” that “Congress . . . would not have tried to impose [American laws], in an act of legal imperialism, through legislative fiat” in cases just like this one—where “foreign . . . conduct plays a significant role and where foreign injury is independent of domestic effects.” *Empagran*, 542 U.S. at 169 (emphasis added). The Australian plaintiffs ask this Court to assume precisely the *opposite* here.

1. *Empagran* involved a class action under the Sherman Act. At issue was whether foreign plaintiffs could recover damages caused by “anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury.” *Id.* at 158. The plaintiffs

alleged a global price-fixing conspiracy that took place *both* in the United States and abroad and harmed *both* domestic and foreign purchasers. *Id.* at 159. There was “significant foreign anticompetitive conduct,” although “some of the anticompetitive price-fixing conduct alleged here took place in *America.*” *Id.* at 159, 165 (emphasis in original). This foreign and domestic conduct “significantly and adversely affect[ed] *both* customers outside the United States and customers within the United States.” *Id.* at 164 (emphasis added). Nevertheless, “the adverse foreign effect [was] independent of any adverse domestic effect,” *id.*, as “the conduct’s domestic effects did not help to bring about that foreign injury.” *Id.* at 175.

The defendants moved to dismiss the foreign purchasers’ claims for lack of subject matter jurisdiction. *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 315 F.3d 338, 342 (D.C. Cir. 2003), *rev’d*, 542 U.S. 155 (2004). In opposing the motion, the foreign antitrust plaintiffs in *Empagran*, quite *unlike* the foreign securities plaintiffs here, actually pointed to a *specific provision* of the antitrust laws that *authorized* extraterritorial reach. They relied upon a section of the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”) that specifically placed “within the Sherman Act’s reach” conduct that “has a ‘direct, substantial, and reasonably foreseeable effect’ ” on American commerce, where the effect “ ‘gives rise to a [Sherman Act] claim.’ ” 542 U.S. at 162 (quoting 15 U.S.C. §§ 6a(1), (2)). The foreign plaintiffs argued that jurisdiction existed under this provision because they had alleged a global price-fixing conspiracy, one that involved both domestic and foreign companies and hurt not just foreigners, but independently harmed Americans as well. 315 F.3d at 340. The District

of Columbia Circuit—following this Court’s decision in *Kruman v. Christie’s Int’l Plc*, 284 F.3d 384 (2d Cir. 2002)—held that these allegations sufficed to establish subject matter jurisdiction. 315 F.3d at 347-48, 355-60.

The Supreme Court unanimously reversed—and held that the foreign plaintiffs could not sue. Justice Breyer’s opinion for the Court did briefly consider the “language and history” of the statute. 542 U.S. at 169. But that was secondary: the Court looked *first* to, and discussed far more extensively, the rule that courts must “ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.” *Id.* at 164. “This rule of statutory construction,” the Court observed, “cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.” *Id.* The rule “helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world.” *Id.* at 164-65.

When “*domestic . . . injury*” is involved, the Court observed that “application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable” even if it “interfere[s] with a foreign nation’s ability independently to regulate its own commercial affairs.” *Id.* at 165 (emphasis in original). But that is not true, the Court held, when the injury is *foreign*. Where *foreign* harm is involved, the Court held, “the justification for that interference seems insubstantial.” *Id.* Justice Breyer’s opinion for the Court pointedly asked:

But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes inde-*

pendent foreign harm and that foreign harm alone gives rise to the plaintiff's claim? . . .

Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?

Id. (emphasis in original); *accord id.* at 166 (repeating first question). The Court held that there was “no good answer” to these questions—“no convincing justification for the extension of the Sherman Act's scope” to redress foreign harm. *Id.* at 166, 167 (emphasis added).

The Court emphasized, moreover, that it was the mere “risk of interference with a foreign nation's ability independently to regulate its own commercial affairs”—not proof of *actual* interference—that controlled the interpretation of the statute. *Id.* at 165 (emphasis added). The idea that courts should weigh “comity considerations case by case” was “too complex to prove workable.” *Id.* at 168. What mattered was that other nations could disagree about what conduct should be illegal, and “even where [they] agree” on that, they could “disagree dramatically about appropriate remedies.” *Id.* at 167. All of this created a risk, for example, that “to apply our remedies would unjustifiably permit [foreign] citizens to bypass their [countries'] own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic . . . laws embody.” *Id.*

The Court accordingly concluded that Congress could not be presumed to have imposed American economic

policies upon other nations “in an act of legal imperialism, through legislative fiat”:

Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America’s antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. *But, if America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.*

Id. at 169 (emphasis added).

Finally, the Supreme Court in reaching this conclusion—and, on remand, the District of Columbia Circuit in applying it—emphasized how the plaintiffs’ allegations of significant *domestic conduct* made *no* difference to the result. The domestic conduct was irrelevant, Justice Breyer explained, because it was “intertwined with foreign conduct” and caused “foreign harm” that was “independent” of domestic effects; as a result, “the higher foreign prices of which the foreign plaintiffs here complain are not the consequence of any domestic anticompetitive conduct *that Congress sought to forbid.*” *Id.* at 165-66 (emphasis in original). On remand, the plaintiffs refined their domestic-conduct argument: alleging that the relevant market “is a single, global market,” the plaintiffs “paint[ed] a plausible scenario” that the defendants “‘were able to sustain super-competitive prices abroad *only* by maintaining super-competitive prices in the United States as well.’” *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 417 F.3d 1267, 1270, 1271 (D.C.

Cir. 2005) (emphasis added; citation omitted), *cert. denied*, 126 S. Ct. 1043 (2006). The panel on remand noted that this was merely an allegation of “but-for causation,” of “only an indirect connection” between domestic conduct and effect and foreign harm—and held that such “but-for” causation could *not* suffice if the prerogatives of foreign nations are to be respected:

To read the [statute] broadly to permit a more flexible, less direct standard than proximate cause would open the door to . . . interference with other nations’ prerogative to safeguard their own citizens from . . . activity within their own borders.

Id. at 1271 (emphasis added).

2. The Supreme Court’s most recent pronouncement on the extraterritoriality of United States law came in *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746 (2007), a patent case. AT&T there alleged that Microsoft, through the worldwide licensing of its Windows software, had induced the infringement of an AT&T patent for digitally encoding and compressing speech. *Id.* at 1753. Microsoft conceded that it was liable domestically—that it had induced the infringement of the AT&T patent to the extent that it had licensed Windows to United States manufacturers of personal computers. *Id.* The Supreme Court faced the question of whether Microsoft could be held liable for licensing Windows abroad to foreign manufacturers. The controlling provision of the patent law, like the antitrust statute at issue in *Empagran*, expressly provided for extraterritorial liability. It provided that anyone who “supplied in or from the United States all or a substantial portion of the components of a patented invention” and “actively induce[d]

the combination of such components outside of the United States” would be “liable as an infringer” if the combination would have “infringe[d] the patent [had it] occurred within the United States.” *Id.* at 1752 (quoting 35 U.S.C. § 271(f)(1)).

The Court had to decide whether Windows, in the form in which Microsoft transmitted it abroad, was a “component of a patented invention” within the meaning of this provision. *Id.* at 1753-54. Microsoft argued that the word should be read narrowly, and contended that the “master disks” it shipped abroad could not be a “component” because the disks could not themselves be used in a personal computer. AT&T, in contrast, argued that the master disks were properly treated as a “component” because Windows could be so easily transferred from the master disk format to a medium readable by a personal computer. *Id.* at 1754-56. The Supreme Court ruled in favor of Microsoft, and held that Windows did not become a “component” until it was converted into a form readable by a personal computer, and, accordingly, that no “component of a patented invention” had been “supplied in or from the United States” under 35 U.S.C. § 271(f)(1). 127 S. Ct. at 1755-57.

As in *Empagran*, the Court again emphasized the importance of the presumption against extraterritoriality. Justice Ginsburg’s opinion for the Court emphasized, among other points, that “United States law . . . does not rule the world,” and “[f]oreign conduct is [generally] the domain of foreign law,” and that foreign law “may embody different policy judgments” than those made by Congress. *Id.* at 1758 (citation and internal quotation marks omitted). In particular, the Court rejected AT&T’s argument that the presumption did not apply because the

statute specifically provided for extraterritorial application. The presumption “remains instructive in determining the *extent* of the statutory exception.” *Id.* (emphasis in original; citing, among other cases, *Empagran*, 542 U.S. at 161-62). The Court also rejected AT&T’s argument that the presumption did not apply because the statute at issue only applied “to domestic conduct, *i.e.*, to the supply of a patented invention’s components ‘from the United States.’ ” *Id.* (quoting 35 U.S.C. § 271(f)(1)). The Court observed that AT&T’s reading of the law would have had a significant—and impermissible—extraterritorial effect: it would have “convert[ed] a single act of supply from the United States into a springboard for liability each time a copy of the software is subsequently made [abroad] and combined with computer hardware [abroad] for sale [abroad].” *Id.* at 1758-59 (citation and internal quotation marks omitted).

3. The reasoning of *Empagran* and *Microsoft* fully governs here. Indeed, the Securities Exchange Act actually provides a *stronger* basis for dismissal of the foreign plaintiffs’ claims in this case. Unlike the antitrust and patent laws at issue in those cases, the Exchange Act contains no relevant provision at all that addresses foreign conduct, let alone one that expressly provides, as did the statutes in *Empagran* and *Microsoft*, that such conduct may in some cases be subjected to American law. *Nothing* in the Exchange Act suggests that Congress sought to provide redress for foreign plaintiffs who suffer foreign harm from foreign conduct. Given such congressional silence, the statute must be presumed *not* to apply to “significantly foreign” conduct that “causes independent foreign harm [that] alone gives rise to the

plaintiff's claim." *Empagran*, 542 U.S. at 166 (emphasis omitted).

And that precisely describes this case. The Australian plaintiffs do not deny that this case involves significant conduct in Australia by Australians; in fact, they allege that it does. And they do not deny that they suffered their supposed injury *solely* in Australia and that "the conduct's domestic effects did not help to bring about that foreign injury," *id.* at 175; they do not and cannot contend that their losses from buying ordinary shares on the ASX were brought about by losses suffered by Americans who bought ADRs on the NYSE. Indeed, to the extent the Australian plaintiffs rely upon domestic conduct at all—the transmittal of information from Florida to corporate headquarters in Australia—it is only to suggest that "*but for*" the commission in the United States of such "acts *underlying* the fraud" in Australia, they would not have suffered harm. PB29, 51 (emphasis added). But to allow that to pass for an Exchange Act claim here would do exactly what *Empagran* forbids: it would "permit a . . . less direct standard than proximate cause [to] open the door to . . . interference with other nations' prerogative to safeguard their own citizens from . . . activity within their own borders." 417 F.3d at 1271. And it would transform a limited amount of domestic conduct "into a springboard for liability each time" an Australian investor made a purchase of Australian securities in Australia based upon allegedly misleading statements made in Australia. *Microsoft*, 127 S. Ct. at 1758-59.

All this being so, the Australian plaintiffs cannot be "unjustifiably permit[ted] . . . to bypass their own [country's] remedial schemes," even if—indeed, espe-

cially if—they are “less generous”; they must not be allowed to “upset[] a balance of competing considerations that their own [country’s] laws embody.” *Empagran*, 542 U.S. at 167.

* * *

The Australian plaintiffs’ theory of Exchange Act jurisdiction poses exactly the sort of impermissible risks to international comity that Justice Breyer discussed at length in *Empagran*. Sovereign nations throughout the world should remain free to design private securities enforcement schemes as they see fit. They may choose to adopt such a system. Or they may choose not to—and choose to rely solely on enforcement by public authorities, or perhaps by exchanges or self-regulatory organizations. They could decide to allow actions by private investors, but to do so using decidedly *non*-American procedures. They might allow American-style opt-out class actions—or, like many nations, they might not. They might adopt the American-judge-made fraud-on-the-market theory as a substitute for actual reliance—or they might not. They might recognize liability of corporate issuers for secondary trading—where, as under the system created by American judicial precedent under Section 10(b), a company (and by extension, its current shareholders) may be held liable even for third-party trades in which the company itself did not buy or sell shares for a profit.²⁹ Or perhaps not.

They could establish different schemes of disclosure, different pleading and substantive standards for scienter,

²⁹ See, e.g., Coffee, *Reforming the Securities Class Action*, 106 COLUM. L. REV. at 1561-66 (discussing policy merits of imposing issuer liability for secondary trading).

different standards of materiality, different measures of damages, different limitations periods, different rules of discovery, or allow no discovery at all. They could use juries, or judges, or specialized arbitrators to decide facts. The English rule or the American rule on attorneys' fees—they could pick either, or neither. They could craft alternative rules of contribution and indemnity. They can select among countless different policy choices on a surfeit of issues, more than could fit in this brief. And in fact they do.³⁰

³⁰ See generally, e.g., Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT'L L. & POL'Y 281 (2006) (European Union, Sweden, Netherlands, France, and Germany); Ted Allen, *More Nations Open the Door to Securities Lawsuits* (Mar. 7, 2006) (Australia, Canada, Germany, Israel, Italy, South Korea, and Sweden), available at <http://tinyurl.com/3xyaza>; Bernard Murphy & Camille Cameron, *Access to Justice and the Evolution of Class Action Litigation in Australia*, 30 MELB. U. L. REV. 399 (2006); Michael Duffy, "Fraud on the Market": *Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia*, 29 MELB. U. L. REV. 621 (2005); Ted Allen, *Interest in Class Actions Grows Outside the U.S.* (June 14, 2005) (Australia, Canada, United Kingdom, France, Netherlands, Germany, and European Union), available at <http://tinyurl.com/2m9s2b>; Jason Betts, *The Rise of Shareholder Class Actions in Australia* (Apr. 21, 2005), available at <http://tinyurl.com/3dte5c>; Peta Spender, *Securities Class Actions: A View from the Land of the Great White Shareholder*, 31 COMMON L. WORLD REV. 123 (2002) (Australia); Edward F.

In the United States, legislators, regulators, other policymakers, judges, academics, investors, and issuers continue to debate the wisdom of policy choices that have been made both expressly by statute as well as implicitly by judges under Section 10(b). In a case like this one, involving foreign investors and a foreign issuer and predominantly foreign conduct, the choices of their foreign counterparts must be respected—unless Congress has expressly said otherwise, which it surely has not. To paraphrase one of Justice Breyer’s rhetorical questions:

Why should American law supplant Australia’s own determination about how best to protect Australian investors from allegedly fraudulent conduct engaged in significant part by an Australian company?

Cf. Empagran, 542 U.S. at 165. The answer, once again, is that there is “no good answer to the question.” *Id.* at 166.

Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401 (2002) (Germany, Sweden, United Kingdom, Australia, and Canada); S. Stuart Clark and Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT’L L. 289 (2001).

CONCLUSION

It is respectfully submitted that the judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as modified for printed briefs in pamphlet format by Local Rule 32(a)(2), and complies with the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using QuarkXPress 5.1 in 12-point Times font.

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