07-0583-cv

In the United States Court of Appeals for the Second Circuit

ROBERT MORRISON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK AND GERALDINE SILVERLOCK,

Plaintiffs-Appellants,

MARIA KENNEDY, HARVARD B. KOLM AND NORMAN HAUGE,

Plaintiffs,

v.

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

Defendants-Appellees.

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

BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae Washington Legal Foundation hereby states that it is a non-stock, non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code, and therefore, there are no parent corporations or publicly held corporations that own stock of amicus.

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QUESTION PRESENTED

This brief will address whether Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder provide a cause of action for non-U.S. persons for alleged misstatements and omissions made by a foreign issuer outside the United States in connection with purchases of securities outside the United States.

INTEREST OF THE AMICUS CURIAE

Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before the Supreme Court and other federal and state courts as amicus curiae in numerous cases raising issues relating to the proper scope of the federal securities laws. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, --- S. Ct. ----, 2007 WL 1773208 (U.S. June 21, 2007); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006); *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003). In addition, WLF has participated in cases opposing the extraterritorial application of United States law to acts occurring abroad where Congress has not provided clear guidance on the issue. *See Equal Opportunity Employment Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

The questions presented in this appeal, including the proper interpretation of securities laws and their applicability to conduct occurring outside the United States, involve legal issues of fundamental importance to the financial industry, investors, and the national economy. Most particularly, WLF is concerned that reversing the district court would discourage foreign investment in the United States. As amicus curiae, WLF believes that the arguments set forth in this brief will assist the Court in determining and resolving the issues presented in this appeal.[1]

[1] Counsel for all parties consent to the filing of this brief.

SUMMARY OF ARGUMENT

Australian and other non-United States persons have no cause of action in this case under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5.[2] The reason is straightforward and structural: Section 10(b) does not govern the disclosure obligations of an Australian corporation to Australian (and other non-U.S.) investors. The fact that NAB's alleged misstatements related to U.S. activities does not make the U.S. securities laws applicable to what NAB said outside the United States to non-U.S. investors.

This brief makes three points. First, applying this Circuit's "conduct" and "effects" tests, the brief argues that NAB's disclosures are not U.S. "conduct" and that any "effects" on purchases or sales by non-U.S. investors are not U.S. effects. Second, there is a well established presumption that Congress does not intend U.S. law to apply to actions outside the United States with no significant effect in this country; that presumption is fully applicable (and has been applied) to Section 10(b). Third, a ruling extending Section 10(b) to provide a cause of action for non-

[2] Many cases state the issue as whether the district court had "subject matter jurisdiction" of foreign plaintiffs' claims. This brief discusses the underlying question: whether Section 10(b) gives foreign investors a cause of action, i.e., whether they have a claim arising under the laws of the United States. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (deciding a similar question under the Sherman Act in terms of the reach of the Act, rather than the district court's jurisdiction).

U.S. investors for statements made by non-U.S. issuers, merely because alleged misinformation originated in the United States, would discourage foreign investment in U.S. businesses.

ARGUMENT

I. UNDER THE "CONDUCT" AND "EFFECTS" TESTS, SECTION 10(B) AND RULE 10B-5 DO NOT GIVE NON-U.S. PERSONS A CAUSE OF ACTION FOR ALLEGED FALSE AND MISLEADING DISCLOSURES OUTSIDE THE UNITED STATES.

A. This Court Has Held That Section 10(b) Does Not Authorize Claims By Non-U.S. Investors Unless There Is Either Fraudulent "Conduct" Or Substantial "Effects" Within The United States.

Congress did not provide "clear Congressional guidance" that Section 10(b) reaches outside the United States. *See Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998). Therefore, this Court has to decide "whether Congress would have wished the precious resources of United States courts and law enforcement agencies" to be applied to particular foreign conduct alleged to violate that section, "rather than leave the problem to foreign countries." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975) (Friendly, J.). This Court has held that Section 10(b) applies only if there has been "fraudulent activity" or "'conduct'" in the United States or if the conduct had a "substantial impact on investors or markets within the United States." *Banque Paribas*, 147 F.3d at 125; *see also S.E.C. v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003) ("[W]e have consistently looked at two factors: (1) whether the

wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens." (citations omitted)); *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996) ("our analysis . . . has focused on . . . the 'conduct test' and the "'effects test'"); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983) (similar). This case does not pass either test.

B. The Non-U.S. Investors' Claims In This Case Do Not Rest On Fraudulent Conduct In The United States.

The "conduct" on which the non-U.S. investors' claims rest consists of alleged misrepresentations and omissions by NAB in disclosures made in Australia. The complaint alleges that NAB and Cicutto violated Section 10(b) by "disseminat[ing] or approv[ing] . . . releases, statements and reports . . . which were misleading." Consol. Am. Compl. ¶ 175. It further alleges that the putative class "suffered substantial damage" because "they paid artificially inflated prices for [NAB] securities" as a result of these "misleading statements." *Id.* ¶ 178. The foreign plaintiffs thus seek redress for harm allegedly caused by false and misleading disclosures made to the public, in Australia. The question is whether Section 10(b) applies to those disclosures and gives non-U.S. persons a cause of action.

NAB, as an Australian corporation listed on the Australian Securities Exchange, is subject to extensive disclosure regulation prescribed by Australian law. *See generally* Marc I. Steinberg & Lee E. Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 Mich. J. Int'l L. 207, 233-235 (1999) (describing Australia's and other countries' disclosure requirements). NAB is required to file annual and semi-annual reports with the Australian Securities and Investments Commission and is also subject to a "continuous disclosure" requirement mandating disclosure of information which a reasonable person would expect to have a material effect on the price of securities. *See id.*; Anthony B. Greenwood, *Securities Regulation in Australia, in* 1 *International Securities Regulation, Australia Booklet 1: Commentary*, at 22-23 (Robert C. Rosen ed. 2004). Both civil and criminal penalties may be imposed for fraud. *See id.* at 26; *see also Australian Securities and Investments Commission, Report of Operations 2005-06* (reporting criminal convictions and civil proceedings undertaken), *available at* http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC_Annual_Report_2006_18-37.pdf/$file/ASIC_Annual_Report_2006_18-37.pdf (last visited July 11, 2007). Non-U.S. investors in NAB thus have the rights and remedies

Australian laws give them, but plaintiffs have determined that they should instead be members of a putative class in a suit brought in New York under Section 10(b).[3]

Plaintiffs' central argument for the extension of Section 10(b) to protect non-U.S. investors in this case is that the alleged misinformation in NAB's disclosures was supplied by and concerned HomeSide, a U.S. subsidiary of NAB. But the happenstance that the alleged misinformation originated in the United States should not determine what law governs NAB's disclosures elsewhere. HomeSide's reports to NAB (1) are not in themselves the basis for any non-U.S. person's claims against NAB, and (2) did not in themselves injure investors.

(1) A Section 10(b) or Rule 10b-5 violation occurs when "the defendant, in connection with the purchase or sale of securities, ma[kes] a materially false statement or omi[ts] a material fact, with scienter, and the plaintiff's reliance on the defendant's action cause[s] injury to the plaintiff." *Lawrence v. Cohn*, 325 F.3d

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[3] Some NAB shares (less than 2% during the class period) trade in American Depositary Receipt ("ADR") form. JA280. Congress and the SEC have imposed regulatory burdens on foreign issuers that choose to allow their shares to trade in the U.S., in ADR form or otherwise, and their power to do so is not at issue. *See, e.g.*, SEC Release Nos. 33-6894 & 34-29226, 56 Fed. Reg. 24420-04, 24427 (May 30, 1991) ("When a foreign private issuer lists ADRs . . . , it becomes subject to the periodic reporting requirements under the Exchange Act."). But the United States has not attempted to dictate what a foreign issuer must say to the rest of the world, nor does the existence of U.S. regulation designed to protect U.S. investors, or the mere fact that some U.S. investors may own shares of a foreign issuer, afford non-U.S. investors a cause of action against such an issuer. *See* pp. 15-17, *infra*.

141, 147 (2d Cir. 2003) (quoting *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 161 (2d Cir. 2000)); *see also Shapiro v. Cantor*, 123 F.3d 717, 720-21 (2d Cir. 1997). The heart of the violation, in a misrepresentation case, is making a misleading statement on which the plaintiff relies. *See, e.g.*, *id.* But in this case, HomeSide and persons in the United States associated with it *did not make any statement or omission on which plaintiffs claim they relied.* Accordingly, as the district court recognized, the allegations against HomeSide were not allegations of "securities fraud." SPA19. The securities fraud, if there was one, occurred when NAB made disclosures to investors. *Cf. Bersch*, 519 F.2d at 987 ("The fraud, if there was one, was committed by placing the allegedly false and misleading prospectus in the purchasers' hands.").

(2) This Court has repeatedly held that the "U.S.-conduct" test is satisfied only where conduct in the United States "directly caused [the investors'] losses." *Bersch*, 519 F.2d at 993; *see also Banque Paribas*, 147 F.3d at 129 ("U.S. activity [must] directly cause the harm to the foreign interest"); *North South Fin.*, 100 F.3d at 1053 (U.S. conduct must be "the direct cause of the alleged injury"); *E.F. Hutton*, 722 F.2d at 1046 ("Only where conduct 'within the United States directly caused' the loss" should courts entertain "suits by foreigners who have lost money through sales abroad" (quoting *Bersch*, 519 F.2d at 993)). This standard is a demanding one. "[A]ctivity in the United States that is 'merely preparatory' to a

securities fraud elsewhere" is not enough. *Banque Paribas*, 147 F.3d at 129. A suit may proceed only where "fraudulent acts themselves" occurred in the United States. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975) (Friendly, J.); *see also Berger*, 322 F.3d at 192 (question is "whether the wrongful conduct occurred in the United States"); *Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 10 (2d Cir. 1979) (U.S.-conduct test has "but limited application"). When foreign investors claim a violation of Section 10(b) arising from losses incurred abroad, this standard is met only where the alleged misrepresentations giving rise to the claim were sent or communicated from the United States directly to the investors or communicated to the investors within the United States.

In *Bersch*, for example, this Court held that foreign plaintiffs had no claim under Section 10(b) for losses allegedly suffered in a securities offering, even though "the major underwriters . . . met in New York . . . to initiate, organize and structure the offering"; "a New York law firm . . . represent[ed] the underwriters"; and "parts of the prospectus were drafted in New York." 519 F.2d at 985 n.24. Emphasizing that "the final prospectus emanated from a foreign source," the Court concluded that the foreign plaintiffs had no claim because "[t]he fraud, if there was one, was committed by placing the allegedly false and misleading prospectus in the

purchasers' hands" abroad, irrespective of how much ancillary activity occurred in United States. *Id.* at 987.

Similarly, in *North South Finance*, a RICO case applying the conduct test developed in the securities law context, foreign defendants were accused of "artificially depress[ing] the sale price of [a bank]" by issuing false statements in France that misrepresented the bank's liquidity, including the value of its New York assets, and "misus[ing] information drawn from company sources (including a New York office)." 100 F.3d at 1048. Despite these "links to New York," the Court held that the foreign plaintiffs could not proceed. *Id.* at 1052. "At most," the Court explained, the foreign defendants "obtained information from New York that facilitated the fraud" in France. *Id.* at 1053. The U.S. acts were thus merely "peripheral," rather than conduct that was "the direct cause of the alleged injury," and insufficient. *Id.*

Other courts are in accord. In *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987), for example, the D.C. Circuit held that a foreign plaintiff may proceed under Section 10(b) only "when the fraudulent statements or misrepresentations originate in the United States . . . and 'directly cause' the [complained of] harm." *Id.* at 33. The court accordingly held that an allegation that Arthur Andersen, operating in the United States, "provided false and misleading information to [a foreign company] with ample reason to know that this

information would be incorporated in [the company's] audit report and would be relied on by investors" abroad was insufficient. *Id.* at 29. The court explained that "[a]t the most," the allegations "establish that [Arthur Andersen] made misrepresentations . . . that [the foreign company] credited," but the "statements were not themselves made for distribution to the public, and were not transmitted to the public." *Id.* at 34; *see also id.* at 35 ("To put the matter in the Second Circuit's terminology, [Arthur Andersen]'s alleged misrepresentations . . . did not 'directly cause' [foreign investors'] losses." (citing *Bersch*, 519 F.2d at 992-93)).

Similarly, in *Froese v. Staff*, No. 02 CV 5744, 2003 WL 21523979 (S.D.N.Y. July 7, 2003), the court held that the allegation that the "underlying accounting problems that led [a foreign defendant] to overstate its earnings occurred in the United States" was not enough to allow foreign plaintiffs to proceed under Section 10(b). *Id.* at *2. Echoing *Bersch*, the court explained "that the fraud itself occurred, if at all, when the allegedly fraudulent statements were . . . published in Germany" and that "[i]t is these misstatements . . . which 'directly caused' the financial losses." *Id.*; *accord Tri-Star Farms Ltd. v. Marconi PLC*, 225 F. Supp. 2d 567, 578 (W.D. Pa. 2002) ("Simply making fraudulent statements [abroad] about what is happening in the United States does not make those statements 'United States conduct' . . . .").

The court in *In re Bayer AG Securities Litigation*, 423 F. Supp. 2d 105 (S.D.N.Y. 2005), reached the same conclusion. In *In re Bayer*, foreign plaintiffs alleged the U.S. subsidiary of a foreign company "issued a false press release and misleading SEC filings" in the United States, and that "the object of the fraud was to establish a United States market for [a drug]." *Id.* at 111. Because the "preparation and dissemination of the allegedly false information was done . . . abroad," however, the court held there the "overwhelmingly foreign putative class" could not proceed. *Id.* at 112; *see also Societe Nationale d'Exploitation Industrielle des Tabacs et Alumettes v. Salomon Bros. Int'l Ltd.*, 928 F. Supp. 398, 403 (S.D.N.Y. 1996) ("Although the Complaint refers to activity in the Tampa office, ... the alleged fraudulent conduct . . . consisted of inducing [the plaintiff] to enter into Swaps through allegedly false or misleading information – all of which occurred abroad.").

Plaintiffs cite *S.E.C. v. Berger* (Br. 35-37), but in that case the defendant, a New York resident who had pleaded guilty to securities fraud, was the only active director of a company he ran out of New York, and for which he created fraudulent account statements in New York that were sent to Bermuda to be sent back into the United States on a signal from New York. 322 F.3d at 188-89, 194. This was plainly a "U.S." case, with the defendant trying to avoid U.S. authorities by routing information through Bermuda, and this Court had no trouble concluding that "the

fraudulent scheme was masterminded and implemented by Berger in the United States." *Id.* at 194;[4] *cf. S.E.C. v. Princeton Econ. Int'l Ltd.*, Nos. 99 Civ. 9667, 99 Civ. 9669, 2000 WL 1264295, at *2 (S.D.N.Y. Sept. 6, 2000) (U.S.-conduct test met because the defendant "in Princeton, New Jersey, controlled not only [the entities] that issued the notes to the [foreign] investors, but [also] the . . . brokerage firm that marketed the notes," "directed the trading . . . in New York," and "caused certain net asset value letters . . . materially inflating the value of accounts to be prepared" in New York).

When this Court's test is applied to HomeSide's reports to NAB, it is clear that they did not "directly cause" any injury suffered by non-U.S. investors. HomeSide had no relationship to non-U.S. (or U.S.) investors. It was not a public company and it did not itself owe the Australian investors any duty of disclosure. There is no allegation that it prepared the financial statements upon which they allegedly relied, or approved them, or for that matter ever saw them. As the district court explained, HomeSide's alleged improprieties would have had no

[4] Plaintiffs also cite two district court decisions, *In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62 (S.D.N.Y. 1999), and *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346 (S.D.N.Y 2005). Br. 37-39. Neither suggests that the allegations of U.S. conduct in this case are sufficient. In *In re Gaming*, the court placed decisive weight on the defendant's "illegal operation of a United States subsidiary" and "deception of a United States regulatory commission," which in its view "present[ed] a much closer nexus to the United States" than existed in other cases. 58 F. Supp. 2d at 75. In *In re Alstom*, "all of the allegedly fraudulent conduct occurred within the United States." 406 F. Supp. 2d at 395-96.

effect on the non-U.S. investors but for "(i) the allegedly knowing incorporation of [its] false information [by NAB]; (ii) in public filings and statements made abroad; (iii) to investors abroad; (iv) who detrimentally relied on the information in purchasing securities abroad." SPA19. As Judge Friendly said in *Bersch*, 519 F.2d at 987, "At most the acts in the United States helped to make the gun whence the bullet was fired from places abroad . . . .". That is not enough.

Plaintiffs assert that "[w]ithout HomeSide's improper conduct," National's disclosures "simply would not have been false or misleading." Br. 33 (emphasis omitted). A "but-for" test, however, is singularly inappropriate, as a thought experiment will confirm: If NAB had allegedly misreported about a business that happened to be located in Belgium, or Nigeria, or Thailand, no one would suggest that the location of the business should dictate the governing law for a worldwide class action against NAB. It is mere happenstance that the conduct about which NAB allegedly misreported occurred in the United States. It made no difference to investors where the allegedly misdescribed business was located when its reports were "consolidated by [its] overseas corporate parent for inclusion in the parent's financial statements." *Id.* at 28. The conduct that allegedly constituted securities fraud, and allegedly injured the foreign plaintiffs, was the publication of those financial statements in Australia. The claims in this case plainly fail this Court's "U.S. conduct" test.

C. The Non-U.S. Investors' Claims In This Case Do Not Rest On "Effects" In The United States.

The non-U.S. investors' claims also plainly fail this Court's "effects" test. That test "concerns the impact of overseas activity on U.S. investors and securities traded on U.S. securities exchanges." *Banque Paribas*, 147 F.3d at 125 n.12 (citing *Fidenas*, 606 F.2d at 9-10). In *Bersch*, Judge Friendly concluded that foreign plaintiffs could not proceed even where the foreign acts complained of allegedly had "an adverse effect on the American economy or American investors generally," 519 F.2d at 989, where there was no specific direct impact on particular American investors or markets.

Here, the pertinent effects are purchases or sales of NAB ordinary shares by persons claiming to have been misled by NAB's disclosures. Almost all of these purchases and sales were made by non-U.S. persons and none are not alleged to have had any effect on U.S. markets. A very small fraction (less than .04%) of NAB ordinary shares are owned by U.S. persons (NAB Financial Report 2006, *available at* http://www.nabgroup.com/0,,32863,00.html (last visited July 11, 2007)), but the percentage is far too trivial to warrant engaging the U.S. courts in litigation involving a worldwide class, or applying Section 10(b) to NAB's relationship with its investors outside the United States. *Cf. Vencap*, 519 F.2d at 1017 (that American investors owned .5% of an allegedly defrauded foreign

investment trust insufficient); *In re Bayer*, 423 F. Supp. 2d at 114 ("Because United States investors held 'an exceptionally small percentage' of the total number of shares, Plaintiffs cannot demonstrate [the requisite] substantial or significant effect . . . ." (quoting *Froese*, 2003 WL 21523979, at *2)). In short, there is in this case "the likelihood that a very small tail" of U.S. investors "may be wagging [the] elephant" of an overwhelmingly foreign class. *Vencap*, 519 F.2d at 1018 n.31.

Any U.S. "effects" (i.e., losses resulting from trades by U.S. persons) are also entirely separable from losses resulting from trades by Australian and other non-U.S. persons. This case is thus *a fortiori* to *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), in which the Supreme Court rejected the application of the Sherman Act to foreign anticompetitive conduct (price fixing) because even though there was a single worldwide market, the alleged "adverse foreign effect is independent of any adverse domestic effect." *Id.* at 164; *cf. Marconi*, 225 F. Supp. 2d at 573 & n.7 ("foreign purchasers" cannot rely "on domestic 'effects' of foreign conduct" because the purchasers "did not purchase their securities on an American exchange, and they did not suffer the effects of [the defendant]'s alleged conduct within the United States"; they "cannot bootstrap their losses to . . . independent American losses"); *McNamara v. Bre-X Minerals Ltd.*, 32 F. Supp. 2d 920, 923 (E.D. Tex. 1999) (losses sustained by Americans

"were independent and did not flow from the Canadian purchasers" – thus "the Canadian Plaintiffs cannot justify" application of Section 10(b) "by bootstrapping on independent, American losses.").

D. There Is No Danger That A Ruling For The Defendants Will Make The United States A Haven For Fraud.

Plaintiffs contend that if the non-U.S. investors cannot proceed, "foreign entities with U.S. subsidiaries could brazenly turn a blind eye to their subsidiaries' misconduct." Br. 33. "Such an absurd result," they say "would surely 'embolden those who wish to defraud foreign securities purchasers or sellers to use the United States as a base of operations' and 'would, in effect, create a haven for such defrauders and manipulators.'" *Id.* at 33-34 (quoting *S.E.C. v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977)).

That argument is nonsense. In the first place, there is no question of providing a "haven" for misconduct that takes place within the United States. HomeSide, of course, was not the issuer here. It did not use the United States as a base to "manufacture fraudulent security devices for export" abroad. *Vencap*, 519 F.2d at 1017.

Second, and more fundamentally, NAB and Cicutto also have no "haven." They have whatever disclosure responsibilities Australian law imposes, toward both Australian and non-Australian investors, and all such investors in NAB have

whatever remedies Australian law provides them. The issues in this case are whether NAB should have an *additional* and *different*, U.S.-defined, set of disclosure responsibilities to *non*-U.S. investors, and whether NAB should be subject to liability to such non-U.S. investors in a U.S. court merely because one business that is the subject of their disclosure responsibilities is located in the United States. There simply is no danger that a ruling for defendants in this case would make the United States a "haven" for violation of any law.

II. THE COURT SHOULD APPLY THE WELL ESTABLISHED PRESUMPTION THAT CONGRESS, WHEN SILENT, DID NOT INTEND THAT A U.S. STATUTE SHOULD APPLY EXTRATERRITORIALLY.

A. Section 10(b) Should Be Construed In Accordance With The Long-Standing Rule of Construction That Absent Any Expression Of Contrary Intent, U.S. Legislation Is Meant To Apply Only Within The United States.

The Exchange Act is silent as to whether Section 10(b) applies to conduct outside the United States. *See* 15 U.S.C. § 78j(b); *Bersch*, 519 F.2d at 993. This Court has found legislative history to be of little help in answering that question, *see id.*, although more recent scholarship suggests that Congress specifically considered and rejected application of Section 10(b) to non-U.S. investors, *see* Margaret V. Sachs, *The International Reach of Rule 10(b): The Myth of Congressional Silence*, 28 Colum. J. Transnat'l L. 677 (1990). Congressional silence strongly supports affirmance of the district court.

As both the Supreme Court and this Court have recognized, "It is a long-standing 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.'" *Equal Opportunity Employment Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)); *see also id.* ("[U]nless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions." (internal quotation marks and citations omitted)); *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1758 (2007) (relying on the "presumption that United States law governs domestically but does not rule the world"); *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 70 (2d Cir. 1994) ("[W]e must presume that Congress intended its enactments to apply only within the territorial jurisdiction of the United States, unless the legislation reflects a contrary intent.").

This Court has had occasion to apply the principle of non-extraterritoriality to the securities laws. *See Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) (Friendly, J.) (U.S. laws may reach cases where U.S. conduct is involved, but "it would be . . . erroneous to assume that the legislature always means to go to the full extent permitted"); *Bersch*, 519 F.2d at 985 (similar). And this Court has held that "[p]laintiffs carry the burden . . . 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) (citing *Aramco*). Here, because there is no "affirmative intention of the Congress clearly expressed" to apply Section 10(b) to conduct that occurred outside the United States, and whose effects were felt outside the United States, the section should not be construed to give non-U.S. investors a cause of action.

B. Congress Is Presumed To Take Into Account The Legitimate Interests Of Other Sovereign Nations In Drafting Legislation.

The Supreme Court has instructed that in construing ambiguous statutes, courts should "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Empagran*, 542 U.S. at 164; *see also AT&T Corp.*, 127 S. Ct. at 1758 (same); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (describing "'prescriptive comity': the respect sovereign nations afford each other by limiting the reach of their laws"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand) (courts "are not to read general words . . . without regard to the limitations customarily observed by nations upon the exercise of their powers," and "should not impute to Congress an intent to punish all whom its courts can catch"). "This rule of construction reflects principles of customary international law–law that (we must assume) Congress ordinarily seeks to follow," *Empagran*, 542 U.S. at 164 (citations omitted), and "is in accord with the long-

heeded admonition of Mr. Chief Justice Marshall that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,'" *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (quoting *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804)). It "helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Empagran*, 542 U.S. at 164-65.

Australia and other nations have a strong interest in prescribing disclosure rules governing their own issuers, the penalties for violating them, and the procedures to be followed in enforcement proceedings and private actions. U.S. laws can obviously conflict with these rules, penalties, and procedures. *See* p. 6, *supra*; Steinberg & Michaels, *supra*, at 247-48 (describing the issues raised by the "internationalization of the securities markets" given differences in disclosure requirements); Kellye Y. Testy, *Comity and Cooperation: Securities Regulation in a Global Marketplace*, 45 Ala. L. Rev. 927, 957 (1994) ("[N]ot all nations agree on how securities markets should be designed or regulated."); Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 Nw. U. L. Rev. 523, 529-30 (1993) ("[A]ccounting principles are not a subject of universal accord; the financial principles by which a foreign corporation maintains its books and records do not comply with U.S. disclosure requirements.").

Congress and federal agencies do, of course, have power and responsibility to protect U.S. persons, including U.S. persons resident abroad. *See, e.g.*, *Banque Paribas*, 147 F.3d at 128 ("'the federal securities laws'" apply "'to losses from sales of securities to Americans resident abroad if . . . acts . . . of material importance in the United States have significantly contributed thereto'" (quoting *Bersch*, 519 F.2d at 993)).[5] But their exercise of power illustrates the importance of respecting foreign nations' prerogatives to regulate their own nationals. In the antitrust context, for example, the Foreign Trade Antitrust Improvements Act "seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements . . . however anticompetitive, as long as those arrangements adversely affect only foreign markets." *Empagran*, 542 U.S. at 161 (citing H.R. Rep. No. 97-686, pp. 1-3, 9-10 (1982)). In the securities context, the SEC has repeatedly acted to minimize conflicts with other countries' rules for their own issuers. *See, e.g.*, SEC Release Nos. 33-8818 & 34-55998, 72 Fed. Reg. 37962, 37962 (July 11, 2007) ("The Commission is proposing to accept from foreign

[5] Congress may also, of course, enact a statute "governing the conduct of [U.S.] citizens … in foreign countries" where "the rights of other nations or their nationals are not infringed." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285-86 (1952) (internal quotation marks and citation omitted); *see also Aramco*, 499 U.S. at 265 (Marshall, J., dissenting) (discussing the role of the presumption against extraterritoriality "when Congress merely seeks to regulate the conduct of United States nationals abroad").

private issuers their financial statements . . . without reconciliation to generally accepted accounting principles ('GAAP') as used in the United States."); SEC Release No. 33-7745, 70 SEC Docket 1474, 1999 WL 770251, at *13 (Sept. 28, 1999) (amending Form 20-F, the primary disclosure form for foreign issuers, "to encourage and facilitate the use of one disclosure document by issuers seeking to raise capital or list securities in multiple jurisdictions"); SEC Release Nos. 33-7053 & 34-33918, 59 Fed. Reg. 21644, 21645 (April 26, 1994) (describing SEC "accommodations to foreign practices and polices," including "[i]nterim reporting on the basis of home country regulatory and stock exchange practices"); *see also* Steinberg & Michaels, *supra*, 20 Mich. J. Int'l L. at 248-50 (discussing SEC efforts to reduce conflict between U.S. and foreign disclosure requirements).

Congress and the SEC have thus recognized what common sense suggests: "to the extent the United States seeks to regulate investment activity abroad, it cannot help but interfere with the regulatory systems of other countries." Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. Cal. L. Rev. 903, 914 (1998); *see AT&T Corp.*, 127 S. Ct. at 1758 (agreeing with the United States as *amicus curiae* that "foreign conduct is [generally] the domain of foreign law," which "may embody different policy judgments" from our own (internal quotation marks and citation omitted; alteration in original)); *cf. Empagran*, 542 U.S. at 165 (application of U.S.

law to foreign companies' conduct abroad "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs").

Comity is not mere politeness. "If other nations believe that American policy unfairly disadvantages their citizens . . . they are apt to resist enforcement efforts and perhaps to retaliate with countermeasures of their own." Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 Harv. L. Rev. 1310, 1321 (1985). In the past, faced with what they perceive to be overly aggressive application of U.S. law, other nations have enacted retaliatory measures, including "blocking" or "secrecy" laws that hinder American discovery and "clawback" statutes that allow a foreign defendant who has paid a punitive damages award in the United States to recover a portion of the award from the plaintiff. *See, e.g.*, U.K. Protection of Trading Interests Act, § 6 (1980); *see also Predictability and Comity*, *supra*, 98 Harv. L. Rev. at 1311 n.6 (describing the "main categories" of retaliatory legislation); Warren Pengilley, *Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View From "Down Under,"* 16 Vand. J. Transnat'l L. 833, 871-72 (1983) ("differences on the extraterritorial operations of United States . . . laws have

generated friction between otherwise friendly governments" and have "spawned blocking legislation which is counterproductive").[6]

On plaintiffs' view, ownership of a business in the United States could trigger a U.S. class action on behalf of all the foreign issuer's investors, so long as the U.S. subsidiary engaged in "improper conduct" (Br. 33) that affected the foreign issuer's disclosures, even if (1) the subsidiary did not interact with any investor; (2) the affected disclosures were made abroad; and (3) U.S. investors are a small fraction of the total. To say the least, such a regime fails to respect the judgments of other nations as to what disclosures their own issuers must make to their own residents and how best to enforce those requirements. Absent any indication that Congress ignored these "legitimate sovereign interests" in drafting Section 10(b), *Empagran*, 542 U.S. at 164, this Court should reject any reading of Section 10(b) that does so.

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[6] Even if foreign governments take no action, broad application of U.S. law to foreign conduct may nonetheless have negative consequences *in the United States* to the extent it encourages foreign courts to adopt broader interpretations of their own nations' laws. *See, e.g.*, *Fisch*, *supra*, 87 Nw. U. L. Rev. at 571 n.265 (describing the problem of "'copycat' use of extraterritoriality" in which foreign litigants "seek a broad application of the laws of their home country . . . to interfere with a U.S. transaction"); *Blechner v. Daimler-Benz AG*, 410 F. Supp. 2d 366, 372 (D. Del. 2006) (expressing concern that allowing foreign investors to proceed under Section 10(b) on the basis of fraud that allegedly occurred in Germany "could cause other countries to reciprocate by exercising jurisdiction in cases concerning primarily American parties and interests").

C. The United States Has No Interest In Allowing Its Courts To Be Used To Prosecute Claims By Non-U.S. Plaintiffs For Alleged Misrepresentations Or Omissions Made Abroad.

It is particularly appropriate for the Court to conclude that Congress did not intend Section 10(b), which is silent as to the existence of a private cause of action at all, *see, e.g.*, *Klein & Co. Futures, Inc. v. Bd. of Trade of N.Y.*, 464 F.3d 255, 262 (2d Cir. 2006), to afford the broad remedy the foreign investors seek, because the United States has no interest in allowing its courts to be used to prosecute the kind of claim at issue here. As this Court first explained in *Bersch*, and has since repeated many times, when "a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts . . . to be devoted to them rather than leave the problem to foreign countries." 519 F.2d at 985; *see also Vencap*, 519 F.2d at 1018 ("the securities laws are not to apply in every instance where something has happened in the United States"); *Zoelsch*, 824 F.2d at 31 ("Congress was concerned with extraterritorial transactions only if they were a part of a plan to harm American investors or markets."); *cf. Empagran*, 542 U.S. at 165 ("Why should American law supplant . . . Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from . . . conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?").

As explained at pp. 17-18, *supra*, denying non-U.S. investors a remedy under Section 10(b) for allegedly misleading disclosures made by a foreign issuer abroad does not facilitate misconduct in the United States or anywhere else. Plaintiffs' reading of Section 10(b) risks conflict with foreign nations and adds to the burdens of the federal courts, without a corresponding benefit to the United States.

III. A RULING EXTENDING SECTION 10(B) TO PROVIDE A CAUSE OF ACTION FOR NON-U.S. INVESTORS FOR DISCLOSURES MADE BY NON-U.S. ISSUERS, WHENEVER THE SOURCE OF ALLEGED MISINFORMATION LIES IN THE UNITED STATES, WOULD DISCOURAGE FOREIGN INVESTMENT IN U.S. BUSINESSES.

A ruling for plaintiffs would discourage a specific but very important kind of foreign investment in the United States: non-U.S. issuer investment in U.S. businesses or facilities. The costs and risks of acquiring or starting up a U.S. business would, after such a ruling, include the possibility that misreporting (real or alleged) by the U.S. business to its non-U.S issuer parent could trigger an action in a U.S. court, under U.S. law, on behalf of a worldwide class of investors most or all of whom may have no connection with the United States. The non-U.S. issuer, having made what may be a relatively small investment, would find that its securities law responsibilities to investors in its own country, who may be an overwhelming percentage of its shareholders, could now be governed in significant

part by U.S. law. The issuer would face a need to monitor U.S. securities law – "the most stringent in the world," Testy, *supra*, 45 Ala. L. Rev. at 957 – perhaps modify its own disclosure practices, and possibly retain U.S. securities counsel to defend its practices in a court far from home. For a rational issuer, these possibilities may tip the balance against even "transacting business within the United States." W. Barton Patterson, Note, *Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions*, 74 Fordham L. Rev. 213, 236 (2005) ("[B]road . . . tests [for when a plaintiff may maintain a claim] may deter some corporations from conducting any business in America, whether fraudulent or not . . . ."); *see also* Testy, *supra*, 45 Ala. L. Rev. at 935 ("This threat may deter some investors from doing business in the United States, business that is not necessarily fraudulent, due to the risk of application of the stringent U.S. laws."); Louise Corso, Note, *Section 10(b) and Transnational Securities Fraud: A Legislative Proposal to Establish a Standard for Extraterritorial Subject Matter Jurisdiction*, 23 Geo. Wash. J. Int'l L. & Econ. 573, 601 (1989) ("Arguably, expansion of the [ability to bring a claim under] federal securities laws . . . will discourage even minimal conduct in the United States.").

A parallel concern – that non-U.S. issuers may be discouraged from participating in U.S. capital markets by the threat of U.S. securities law claims by non-U.S. investors – has been widely recognized. *See, e.g.*, John C. Coffee, Jr.,

Law and the Market: The Impact of Enforcement, at 71 ("Allowing foreign non-resident investors to be included within the class . . . dissuades foreign issuers from cross-listing . . . . [I]t is not worth risking potential liability in the billions."), *available at* http://finance.wharton.upenn.edu/weiss/wpapers/07-3.pdf (last visited July 11, 2007); McKinsey & Company and the New York City Economic Development Corporation, *Sustaining New York's and the US's Global Financial Services Leadership*, at 16 (2007) (There are "growing international concerns about participating in U.S. financial markets – concerns heightened by recent cases of perceived extraterritorial application of U.S. law."), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf (last visited July 11, 2007). There is no reason to think that the same kinds of risks that deter non-U.S. issuers from participating in U.S. capital markets would not affect investment decisions. *See, e.g.*, Patterson, *supra*, 74 Fordham L. Rev. at 236.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 6923 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) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2000 in Times New Roman 14-point font.

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ANTI-VIRUS CERTIFICATION

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Docket Number: 07-0583-cv

I, Raceel Pascall, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 7/12/2007) and found to be VIRUS FREE.

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