No. 08-1191

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that they have no parent companies or non wholly owned subsidiaries.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Supreme Court Rule 15.8, Petitioners file this supplemental brief to bring to the Court's attention a recent decision by the United States Court of Appeals for the Eleventh Circuit, in which the Court affirmed a district court decision that Petitioners cited in their Petition for a Writ of Certiorari (the "Petition"). The recent Eleventh Circuit decision highlights the significant split of authority among the Circuit Courts of Appeals regarding the assertion of subject matter jurisdiction over foreign securities transactions under the Securities Exchange Act of 1934. *See In re CP Ships Ltd. Sec. Litig.*, No. 8:05-MD-1656-27T, 2008 WL 4663363 (M.D. Fla. Oct. 21, 2008), *aff'd*, No. 08-16334, __ F.3d __, 2009 WL 2462367 (11th Cir. Aug. 13, 2009) (copy appended as Appendix A).

In their Petition, Petitioners set forth the three divergent approaches among the Circuits to the widely used "conduct test" to determine the existence of subject matter jurisdiction in securities fraud cases: (1) the restrictive test of the District of Columbia Circuit, which requires that the domestic conduct at issue must *itself* constitute a securities fraud violation; (2) at the opposite end of the spectrum, the Third, Eighth and Ninth Circuits require only that *some* activity designed to further a fraudulent scheme occur within the United States; and (3) the Fifth and Seventh Circuits, and the Second Circuit prior to the decision in the instant case, which adopted a middle ground, and require that the domestic conduct in question be more than merely preparatory to the fraud and that it be a direct cause of the loss in question.

In *In re CP Ships Ltd. Sec. Litig.*, 2008 WL 4663363, at *2, the district court, following Second Circuit precedent prior to its decision in *Morrison v. National Austl. Bank*, 547 F. 3d 167 (2d Cir. 2008), asserted subject matter jurisdiction over a claim of securities fraud arising from a financial fraud that was perpetrated, like the one at issue here, in Florida, even though the resulting false financial statements were promulgated, as here, by a foreign corporation headquartered outside the United States (in that case in England; in the instant case, in Australia).

That decision has now been affirmed by the United States Court of Appeals for the Eleventh Circuit. *In Re CP Ships Ltd. Sec. Litig.*, 2009 WL 2462367 (11th Cir. Aug. 13, 2009). The Eleventh Circuit's decision is relevant for two reasons.

First, the Eleventh Circuit joined other Circuits in acknowledging the conflict among the Circuits, noting that the various Circuit Courts of Appeals had theretofore formulated three different and conflicting standards for the application of the "conduct test." *Id.* at *4 n.8 (court contrasted the Second Circuit's standard with the "Third, Eighth and Ninth Circuits . . ., [which] 'generally require some lesser quantum of conduct.'") (citation omitted).

The Eleventh Circuit, which had not yet adopted any of the three competing formulations, followed the parties' "agreement" that the Second Circuit's version of the "conduct test" would apply and, notwithstanding its reservations about the Second Circuit's decision in the instant case, analyzed the appeal according to Second Circuit precedent, including the decision herein, without

reaching the issue of whether the least stringent standard adopted by other Circuits would be more appropriate:

> [T]his case has been litigated by agreement of the parties pursuant to the Second Circuit's articulation of the conduct test. Because we conclude that the Second Circuit's articulation of the test has been met in this case, we need not decide if the less stringent formulation of the test (as used in the Third, Eighth and Ninth Circuits) would also suffice to establish subject matter jurisdiction.

2009 WL 242367, at *6 n.11; *see also id.*, at *4 n.8.

Then, turning to the Second Circuit's decision in the instant case, the Eleventh Circuit held that *CP Ships* was distinguishable from the instant case because in *CP Ships* the foreign corporation's Chief Executive Officer and accounting department worked out of the Florida office, so that the corporate employees charged with verifying the accuracy of the financial statements worked in the United States. In contrast, the Second Circuit found (*with absolutely no support in the record*) that the responsibility for verification of National Australia Bank's financial statements rested with employees in Australia. *See* 2009 WL 2462367, at *5-6.

Second, the Eleventh Circuit made clear its reservations about the Second Circuit's decision in *Morrison*. It noted that, in the instant case, the Second Circuit adopted a more stringent standard than it had

previously applied – but ruled that, owing to the distinctions it found on the facts between *CP Ships* and the instant case, the assertion of subject matter jurisdiction was warranted even under the more stringent standard the Second Circuit has now adopted. The Eleventh Circuit thus did not have to reach the issue of whether the Second Circuit's move to the more restrictive standard of the District of Columbia Circuit was appropriate:

> Moreover, the recent *Morrison* case in the Second Circuit may represent a somewhat more stringent application of the conduct test than was indicated in previous Second Circuit cases. Again, because we conclude that the facts in the instant case also satisfy the *Morrison* application of the Second Circuit test, we need not (and do not) decide whether we should adopt the *Morrison* application of the test. In other words, we need not decide whether to adopt the *Morrison* decision's emphasis on the location of the activities performed in ensuring the accuracy of the financial information to be provided to the public, and *that decision's consequent discounting of the significance of the location of the actual falsification of the relevant numbers.*

2009 WL 2462367, at *6 n.11 (emphasis added).

The Eleventh Circuit concluded:

> Because the facts alleged in the instant case satisfy even the very stringent application of the conduct test articulated in *Morrison*, we need not decide whether the *Morrison* opinion itself correctly denied subject matter jurisdiction *notwithstanding the fact that the false numbers at issue there were actually created in Florida.*

Id. (emphasis added).

The Eleventh Circuit's decision in *CP Ships* confirms that, notwithstanding Respondents' protestations to the contrary, the state of the law is precisely as set forth in Petitioners' Reply Brief. The Circuit Courts of Appeals have formulated three different and conflicting applications of the "conduct test." The Second Circuit, in the instant case, moved from the middle position to the most restrictive position, previously taken only by the District of Columbia Circuit.[1] The Second Circuit's decision below thus conflicts with precedent of the Fifth and Seventh Circuits (which occupy the middle position that used to be shared with the Second Circuit),[2] as well as

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[1] *See Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987) (domestic conduct must itself constitute a violation of securities laws).

[2] *See Robinson v. TCI/US W. Commc'ns, Inc.*, 117 F.3d 900, 905 (5th Cir. 1997) (Fifth Circuit adopted "[t]he more restrictive position that the domestic conduct must have been 'of material importance to' or have 'directly caused' the fraud complained of. . ."); *Kauthar SDN BHD v. Sternberg*,

of the Third, Eighth, and Ninth Circuits (which take the least restrictive view).[3] Meanwhile, the Eleventh Circuit's disinclination to take a position among this confused welter of possible standards itself shows that guidance from this Court is necessary.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition and Petitioners' Reply Brief, the petition for a writ of certiorari should be granted.

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149 F.3d 659, 667 (7th Cir. 1998) (Seventh Circuit holds that "[w]e believe, therefore, that federal courts have jurisdiction over an alleged violation of the antifraud provisions of the securities laws when the conduct occurring in the United States directly causes the plaintiff's alleged loss. . .").

[3] *See SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir.) (subject matter jurisdiction lies when "at least *some activity* designed to further a fraudulent scheme *occurs* within this country"), *cert. denied*, 431 U.S. 938 (1977); *Continental Grain (Austl.) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 415 (8th Cir. 1979) (Eighth Circuit adopts identical standard); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983) (Ninth Circuit adopts identical standard).

Respectfully submitted,

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