No. 08-1191

In The
Supreme Court of the United States

MORRISON, ET AL., PETITIONERS,

v.

NATIONAL AUSTRALIA BANK LTD., ET AL.

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

BRIEF OF INFINEON TECHNOLOGIES AG AS AMICUS CURIAE SUPPORTING RESPONDENTS

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FEBRUARY 26, 2010

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

TABLE OF AUTHORITIES – Continued

BRIEF OF INFINEON TECHNOLOGIES AG AS AMICUS CURIAE SUPPORTING RESPONDENTS

Infineon Technologies AG respectfully submits this brief as amicus curiae in support of respondents.[1]

INTEREST OF AMICUS CURIAE

Amicus curiae Infineon Technologies AG is a leading semiconductor and system solutions company that addresses three central challenges to modern society: energy efficiency, communications, and security. In the 2009 fiscal year, Infineon reported sales of €3.03 billion with approximately 25,650 employees worldwide. Headquartered in Neubiberg, Germany, Infineon has a global presence and operates through its subsidiaries in the United States, Singapore, and Japan. Infineon is listed on the Frankfurt Stock Exchange (ticker symbol: IFX) and in the United States on the over-the-counter market OTCQX International Premier (ticker symbol: IFNNY). Before April 2009, Infineon also had its American Depository Shares listed on the New York Stock Exchange; the vast

[1] Pursuant to Rule 37.3(a), blanket letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

majority of its securities, however, were traded on the Frankfurt Stock Exchange. On April 3, 2009, Infineon announced that it had applied to voluntarily delist from that United States exchange effective April 24, 2009. *See* Press Release, Infineon Techs., *Infineon voluntary delists from New York Stock Exchange* (Apr. 3, 2009), *available at* http://tinyurl.com/ifxdelist (last visited Feb. 24, 2010).

Amicus, having been sued by foreign investors based upon transactions that occurred on a foreign exchange, possesses first-hand knowledge of the extraterritorial application of Section 10(b) by United States courts. In amicus's case, the district court certified a global class of investors, the vast majority of whom reside outside the United States and traded securities on the Frankfurt Stock Exchange. That case is now pending on appeal before the Ninth Circuit under Rule 23(f) of the Federal Rules of Civil Procedure. *In re Infineon Techs. AG Sec. Litig.*, No. 09-15857 (9th Cir. appeal granted Apr. 29, 2009).

While amicus recognizes the United States' interest in deterring and remedying securities fraud perpetrated against the United States capital markets and investors, amicus does not believe that Congress intended for foreign issuers to be subject to liability under United States securities laws in connection with transactions by foreign investors on foreign exchanges. As amicus has experienced, that result discourages foreign companies from seeking to raise capital in the United States. Under the reasoning of the ruling below, a foreign issuer's entrance into the United States capital markets not only subjects a foreign issuer to liability for transactions that occur on domestic exchanges, but it also potentially subjects the foreign company to liability for transactions by foreign investors that occur outside the United States. Indeed, although the court of appeals in the present case properly held that petitioners' securities fraud claims do not fall within the scope of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), the court below and several other courts of appeals employ an unpredictable and highly fact-specific approach to determine when Section 10(b) provides a private right of action in United States courts to foreign investors who purchased securities on foreign exchanges.

Accordingly, amicus has a strong interest in this Court's affirming the judgment below and in ensuring that the scope of the Securities Exchange Act's antifraud provisions do not encompass claims by foreign investors who purchased securities of foreign issuers on foreign exchanges.

SUMMARY OF ARGUMENT

A.1. As the court below recognized, the plain language of the Securities Exchange Act of 1934 is silent as to whether its antifraud provisions apply outside the United States. In such circumstances, this Court has long held that the laws of the United States are intended to apply only within the territorial jurisdiction of this nation, and the Court construes statutes that are ambiguous so as to avoid unreasonable conflict with the laws of other nations. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004). Congressional silence thus dictates that Section 10(b) of the Securities Exchange Act should not apply to claims against foreign issuers by foreign investors who purchased their securities on foreign capital markets; rather, such investors should be required to seek relief under the laws of their own countries or under the regulatory regimes that govern the foreign exchange.

Notwithstanding these principles, the court of appeals in this case, while correctly ruling that it could not adjudicate the securities fraud claims by these foreign investors, applied an unpredictable and fact-specific test that seeks to discern whether Congress would have intended Section 10(b) to apply to certain international transactions that have no effect on the United States capital markets or investors. But that result cannot be reconciled with the text or history of the act. Congress made clear in Section 30(b), 15 U.S.C. § 78dd(b), that it was concerned with securities transactions outside the United States only if they harmed the United States capital markets or investors. And, to the extent the implied private right of action under Section 10(b) should be expanded in scope as to "who" can sue, that is a decision for Congress, not the courts. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).

2. Even if this Court were to conclude that Section 10(b) applies to some claims by foreign investors who purchased securities of foreign issuers on foreign exchanges, the Court should limit such suits in a manner that minimizes interference with the sovereign authority of other nations and ensures that this nation's scarce judicial resources are used only when significant and material United States conduct is the direct cause of the harm that the foreign investors allege.

B. Other nations also have a strong interest in protecting their capital markets and investors. But foreign governments have adopted different means to prevent securities fraud that are often incompatible with the United States private securities class action model. Indeed, other nations, such as Germany where amicus is headquartered, have established exclusive jurisdiction in their courts over private securities fraud lawsuits to prevent such actions from being litigated outside of their courts. And these nations have their own rules of civil procedure that are often incompatible with the class action rules in Rule 23 of the Federal Rules of Civil Procedure.

The effect of this conflict of laws is not academic. Because many nations will not recognize or enforce a United States class action judgment, a judgment in the United States will almost never bind the absent foreign investors who purchased securities on foreign exchanges. Thus, even though the potential for claim preclusion underlies the fundamental due process issues inherent in every class action in the United States, private securities fraud class actions by foreign investors deprive defendants of the only real benefit of class certification: a single action to bind all class members.

C. Private securities fraud class actions by foreign investors who purchased securities on foreign exchanges also threaten harm to United States capital markets. Private securities class action litigation presents a unique form of vexatious litigation due to its high settlement value, significant discovery, and immense legal costs, without regard to the underlying merits of the plaintiffs' case. Amicus and other foreign corporations are aware of these dangers associated with United States securities fraud class actions. And amicus agrees with this Court's observation in *Stoneridge* that overseas firms with no other exposure to United States securities laws might very well be deterred from doing business here. Indeed, amicus's experience, like that of many other foreign companies, demonstrates that the costs associated with the United States legal system often outweigh the benefits of participating in the United States capital markets.

ARGUMENT

SECTION 10(B) OF THE SECURITIES EXCHANGE ACT CONFERS NO PRIVATE RIGHT OF ACTION WHERE THERE HAS BEEN NO HARM TO UNITED STATES MARKETS OR INVESTORS

At issue in this case is whether United States courts can adjudicate claims under the United States securities laws brought by foreign investors who traded securities of a foreign company on a foreign stock exchange. The courts of appeals have generally held, and amicus does not contest, that the implied private right of action under Section 10(b) of the Securities Exchange Act of 1934 applies whenever the fraud affects the United States capital markets or investors, even if it was conceived and executed outside the United States.

The lower federal courts have struggled, however, as to whether United States securities laws should apply to claims of foreign investors who purchased securities of foreign companies on foreign exchanges. In the absence of guidance from Congress or this Court, the courts of appeals over the past half-century have developed complicated and unpredictable tests to determine the circumstances in which United States securities laws apply to those claims by foreign investors. These courts have misread congressional silence on the extraterritorial scope of the Securities Exchange Act.

As discussed below, Section 10(b)'s implied private right of action does not extend to foreign purchasers of the securities of foreign issuers on foreign exchanges. Any result to the contrary would interfere with the policy decisions made by other nations and undermine foreign participation in United States capital markets.

A. Congress Did Not Intend For United States Courts To Adjudicate The World's Securities Fraud Actions

1. This Court's presumption against the extraterritorial application of federal law should preclude private securities fraud actions involving the transactions of foreign investors on foreign exchanges

a. This Court has long held "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) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). Because the laws of the United States are presumed to govern only domestically and are not meant to "rule the world," *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454 (2007), the Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164; *see also Foley Bros.*, 336 U.S. at 285 (explaining that the Court presumes "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, * * * based on the assumption that Congress is primarily concerned with domestic conditions"). These rules reflect ordinary principles of international comity—viz., basic respect for and recognition of the interests of other members of the international community. *Empagran*, 542 U.S. at 164; Restatement (Third) of the Foreign Relations Law of the United States § 403 cmt. g (1988). Accordingly, before a United States law is applied abroad, there must be some "indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *EEOC*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285).

In this case, there can be little doubt that Congress did not intend for Section 10(b) of the Securities Exchange Act to create a private right of action for foreign investors who have traded securities on foreign exchanges. The plain language of Section 10(b) provides no indication that it applies to those transactions. Rather, Section 10(b) makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security * * * , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." 15 U.S.C. § 78j(b). And, to the extent Congress expressed any view about such transactions on foreign exchanges, Congress explained that the act does not apply to "any person" who "transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter." 15 U.S.C. § 78dd(b). This provision "rather clearly implies that Congress was concerned with extraterritorial transactions only if they were part of a plan to harm American investors or markets." *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987).

b. The court below, as well as the other courts of appeals that have addressed this issue, have recognized that, at best, "the Securities Exchange Act is silent as to its extraterritorial application." Pet. App. 7a (quoting *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121 (2d Cir. 1995), *cert. denied*, 516 U.S. 1044 (1996)). But rather than follow this Court's presumption, in the face of statutory silence, against the extraterritorial application of United States law, these courts of appeals have created the "conduct" and "effects" tests that attempt to "discern whether Congress *would have wished* the precious resources of the United States courts and law enforcement agencies to be devoted to such transactions." *Id.* at 7a (quoting *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998) (internal quotation marks omitted and emphasis added), *cert. denied*, 525 U.S. 1139 (1999)). Federal courts thus have applied the Securities Exchange Act to the foreign transactions of foreign investors based on "policy considerations and the courts' best judgment." *Kauthar SDN BHD v. Sternberg*, 149 F.3d

659, 664 (7th Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999). In so doing, at least one court has "freely acknowledge[d] that if we are asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

Even if inferring what Congress "would have wished" were good judicial policy, those courts misread what Congress would have intended as a matter of legislative policy. The "conduct" and "effects" tests are based on the judicial view that the national legislature never considered the possibility that the international scope of the securities markets would become so extensive. *See, e.g.*, *Zoelsch*, 824 F.2d at 30 (noting that "Congress did not consider how far American courts should have jurisdiction to decide cases involving predominantly foreign securities transactions with some link to the United States" because the "international connections in the securities market w[ere] then not nearly as extensive or complex"); *Bersch*, 519 F.2d at 993 ("The Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of off-shore funds thirty years later."). But, as commentators have explained, Congress was well aware in 1933 and 1934 that "the securities markets of the 1920's were highly international." Margaret V. Sachs, *The Int'l Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum.

J. Transnat'l L. 677, 681 (1990); *see also id.* at 691-694. And, to the extent anything can be discerned from the legislative history, it is clear that Congress knew of the countless sums that had been invested and lost in foreign securities, S. Rep. No. 73-47 (1933), but chose to protect domestic, rather than foreign, investors and markets, Sachs, *supra*, at 694-713.

c. Finally, it would be particularly incongruous for this Court to further extend the scope of the implied private right of action under Section 10(b). The implied private right of action under Section 10(b) is entirely a creation by lower federal courts "that Congress did not enact in the text of the relevant statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). This Court has "sworn off the habit of venturing beyond Congress's intent" in discerning whether Congress intended a private right of action. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Thus, in *Stoneridge*, this Court explained that "[t]he determination of *who* can seek a remedy has significant consequences for the reach of federal power." 552 U.S. at 165 (emphasis added). Accordingly, any decision to further extend the scope of the implied private right of action under Section 10(b) "is for Congress," and absent some action by Congress "the § 10(b) private right of action should not be extended beyond its present boundaries." *Ibid*.

Significantly, Congress has not chosen to extend the implied private right of action. Notwithstanding the ample opportunities that Congress has had in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227], and the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745, to expand Section 10(b)'s scope, Congress has given no indication that it believes the implied private right of action applies to transactions by foreign investors abroad. Indeed, when presented with the opportunity to address private securities fraud claims, far from expanding the reach of the private antifraud provisions, Congress instead in the PSLRA "imposed heightened pleading requirements and a loss causation requirement." *Stoneridge*, 552 U.S. at 165 (citing 15 U.S.C. § 78u-4(b)). It thus would be incongruous for this Court, in the face of congressional inaction, to expand the extraterritorial scope of the implied cause of action under Section 10(b).[2]

[2] Nor should congressional silence be regarded as its acquiescence to the standards applied by the courts of appeals. It is evident that Congress believes that new legislation would be necessary for Section 10(b) to apply abroad. Indeed, Congress currently is considering whether to expand the extraterritorial scope of Section 10(b), *see* Investor Protection Act of 2009, H.R. 3817, 111th Cong., 1st Sess. § 215(b), demonstrating that it believes that the law does not currently allow foreign investors who traded securities on foreign exchanges to bring securities fraud actions in the United States.

2. Even if Section 10(b) applies to transactions by foreign investors on foreign exchanges, this Court should stringently limit such suits

To the extent this Court concludes that Section 10(b)'s implied private right of action can apply in some circumstances where there has been no harm to United States capital markets or investors, this Court should limit such suits in a manner that minimizes interference with the sovereign authority of other nations.

If this Court were to adopt a formulation of the approach suggested by the United States in its invitation brief at the certiorari stage, *see* U.S. Pet. Amicus Br. 12-15, the Court should stringently require, at a minimum, that foreign-investor plaintiffs demonstrate that their injury was *directly caused* by *significant* United States securities fraud conduct that formed a *material* component of the alleged violation of section 10(b). *Cf. Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988). Under the current approach used by lower federal courts, plaintiffs repeatedly allege (and courts sometimes permit) a wide range of suits where that standard could not be met.

Indeed, like many other foreign companies that have been sued, amicus has been sued by foreign investors who traded on a foreign exchange who cannot identify significant, material fraudulent domestic conduct that *directly caused* their losses. Instead, they point to the fact that amicus's Germany-drafted financial statements were translated into English and filed with the SEC or that the company's executives made a few brief appearances on cable television in the United States. *In re Infineon Techs. AG Sec. Litig.*, ___ F.R.D. ___, No. C 04-04156, 2009 WL 3647892, at *4 (N.D. Cal. Mar. 6, 2009). But these foreign-investor plaintiffs do not and cannot allege that they ever relied on any of that domestic conduct when they traded securities on foreign exchanges—let alone that they directly relied on the significant, material domestic conduct that this Court should at a minimum require. Congress could not have intended that foreign investors in the securities of a German company on the Frankfurt Stock Exchange, none of whom have any connection to the scant and immaterial United States conduct they allege, would be able to proceed with a securities class action in United States courts under Section 10(b).

B. Private Securities Fraud Actions Are Often Incompatible With The Laws Of Other Nations

The United States is not alone in its desire to prevent securities fraud. Other nations also have a strong interest in protecting their capital markets and investors.[3] But, as this Court has explained,

[3] For example, in amicus' home country, Section 38 of the German Securities Trading Act, *Wertpapierhandelsgesetz* ("WpHG") [Securities Trading Act], Sept. 9, 1998, *Bundesgesetzblatt, Teil* I ("BGB1. I") 3198 (F.R.G.), punishes insider trading and securities fraud with between one and five years in prison.

"'[f]oreign conduct is [generally] the domain of foreign law,'" *Microsoft*, 550 U.S. at 455 (second brackets in original), and different nations can and have adopted different means of preventing securities fraud. *See* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 61 (2007) ("Although the central concerns addressed by anti-fraud rules may be the same across systems, many differences remain in both specific rules and in the broader cultural approaches that infuse the regulatory choices of other countries.") (internal footnote omitted).

Judicial restraint on the extraterritorial application of Section 10(b) to claims by foreign investors is also warranted due to the manner in which such actions actually conflict with foreign law. As this Court has held, if United States "policies could not win their own way in the international marketplace for such ideas, Congress * * * would not have tried to impose them, in an act of legal imperialism, through legislative fiat." *Empagran*, 542 U.S. at 169. Indeed, this is particularly true with respect to massive securities fraud class actions in which plaintiffs—purporting to represent thousands of absent foreign investors who are citizens of other nations—often claim billions of dollars in damages from other nations' largest corporations.

1. Unlike the United States, many other nations do not encourage or permit private enforcement of their securities laws. Germany's securities regulatory

framework—which governs amicus's conduct—successfully emphasizes government enforcement over private litigation. To help further that deliberate policy choice, the German Code of Civil Procedures, *Zivilprozessordnung* ("ZPO") § 32b, establishes exclusive German court jurisdiction over private lawsuits against German issuers seeking compensation for misstatements in public disclosures. Indeed, United States private securities fraud actions contain many elements that are incompatible with German law, such as contingent fee arrangements, as opposed to Germany's "loser pay" fee-shifting provisions. Thus, "[i]t was the express aim of the German legislation to protect German corporations from undue forum shopping by plaintiffs in the United States and to channel capital market disputes involving German defendants to domestic courts." Moritz Bälz & Feliz Blobel, *Collective Litigation German Style: The Act on Model Proceedings in Capital Market Disputes*, *in* Conflict of Laws in a Globalized World 126, 144 (Eckart Gottschalk et al. eds., 2007).

Germany is not alone in its hostility to certain aspects of United States private securities fraud actions. Buxbaum, *supra*, at 61-64 (noting the aspects of United States securities fraud actions that are often incompatible with the laws of other nations).

2. One particularly acute example of this conflict between the laws of the United States and those of other nations is the availability of class actions.

Unlike other nations, courts in the United States entertain broad class actions that bind absent class members who do not affirmatively opt out. The due process concerns of defendants in such actions are minimized because of the potential for claim preclusion against absent class members if the defendant prevails. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985). But as commentators have recognized, not all nations recognize or will enforce a United States class action judgment. *See, e.g.*, Buxbaum, *supra*, at 61; Debra Lyn Bassett, *Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation*, 2004 Mich. St. L. Rev. 619, 624-625 (2004) ("In particular, the class action device is unique; most foreign nations do not have a similar procedure.").

Amicus and other German companies face this dilemma in every United States securities class action by unnamed foreign investors filed against them, because German courts, in particular, will neither recognize any judgment that purports to adjudicate the claims of absent class members nor enforce any such judgment. Bälz & Blobel, *supra*, at 129-131; Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions & the* Acquis Communautaire, 15 J. Transnat'l L. & Pol'y 281, 297 (2005-2006) (noting that German law "can be seen as an express rejection of U.S.-style class action mechanism by the *Bundesregierung* (German Federal Government) and the *Bundestag* (German Federal Parliament)"). For example, Germany does not permit opt-out class actions, as German law requires a plaintiff to affirmatively submit to the court's jurisdiction. *See* ZPO § 39. And, unlike the United States, German law requires that parties receive actual notice of a United States class action for a judgment to be recognized. Buxbaum, *supra*, at 62 ("Most foreign legal systems do not permit group litigation, and even those that have adopted some form of collective action mechanism do not recognize the validity of opt-out procedures.").

Because many other nations will not give preclusive effect to favorable class action judgments obtained by defendants in the United States, private securities fraud class actions by foreign investors deprive defendants of the only real benefit of class certification: a single action to bind all class members.

Accordingly, the laws of other nations are often incompatible with private securities fraud class actions, and some nations, such as Germany, have expressly sought to limit the use of such devices to vindicate securities fraud that is perpetrated on their markets and against their residents. But under reasoning used by several courts of appeals, foreign investors are permitted to maintain such actions even though any adverse judgment from such an action would not be recognized abroad and thus would not bind absent foreign-investor class members. Such a result creates "unintended clashes between our laws and those of other nations which would result in international discord." *EEOC*, 499 U.S. at 248. That is precisely what this Court's presumption against the extraterritorial application of United States law is meant to prevent. Indeed, "other countries may not view the United States as a 'good neighbor' when a billion-dollar class action settlement threatens the solvency of one of their major corporations." John C. Coffee, Jr., *Securities Policeman to the World? The Cost of Global Class Actions*, 240 N.Y.L.J. 5, 6 (2008).

C. The Extraterritorial Expansion Of Private Securities Fraud Class Actions Will Discourage Foreign Participation In United States Capital Markets

Not only do securities fraud actions by foreign investors in foreign companies on foreign exchanges create the possibility of international discord, but also threaten United States capital markets.

1. This Court has recognized that securities litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 80 (2006) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975)). "Even weak cases * * * may have substantial settlement value * * * because '[t]he very pendency of the lawsuit may frustrate or delay normal business activity.'" *Ibid.* (quoting *Blue Chip Stamps*, 421 U.S. at 740). Indeed, this Court has warned that such actions "can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs,*

Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007).

Moreover, once a securities case survives a motion to dismiss, the potential for the plaintiff to abuse the liberal discovery process is much greater than in other types of litigation. *See Blue Chip Stamps*, 421 U.S. at 741. As a result, it is often more economical for a defendant to settle than to incur costs associated with discovery, even when it is likely that the defendant will ultimately prevail at summary judgment or at trial.

But the direct costs (*i.e.*, legal fees) associated with abusive discovery are only one aspect of the wider problem. Depositions and other extensive discovery often draw the attention of key employees away from the business's day-to-day operations and its long-term strategies. *See* H.R. Rep. No. 104-369, at 37 (1995) (Conf. Rep.). Where a securities action that cannot succeed proceeds beyond dismissal, "it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value," and it exacts "a social cost rather than [providing] a benefit." *Blue Chip Stamps*, 421 U.S. at 741.

2. Like this Court, amicus and other foreign corporations are aware of these dangers associated with United States securities fraud class actions. And amicus agrees with this Court's observation in *Stoneridge* that overseas firms with otherwise "no other

exposure to our securities laws could be deterred from doing business here." *Stoneridge*, 552 U.S. at 164. The legal costs and judgment values of securities fraud class actions are factors that must be weighed by foreign companies deciding whether to list their securities on the United States capital markets. *Ibid.* (noting that these types of actions "may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets").

These risks are particularly acute because plaintiffs often contend that a foreign issuer's decision to list its securities on the New York Stock Exchange (NYSE) automatically grants *all the company's shareholders*, no matter where they purchased their securities, the right to bring claims in United States courts. These plaintiffs sometimes claim that the act of filing financial reports with the SEC is sufficient conduct to grant foreign investors on foreign exchanges the right to sue in the United States.

Last year, amicus voluntarily delisted from the New York Stock Exchange. Amicus explained that after "weigh[ing] the benefits of listing on the NYSE against the associated costs" it "reached the decision that continuing the listing * * * [wa]s no longer commercially justifiable." Press Release, Infineon Techs., *Infineon voluntary delists from New York Stock Exchange* (Apr. 3, 2009), *available at* http://tinyurl.com/ifxdelist (last visited Feb. 24, 2010). Amicus is not alone, as other foreign issuers have also delisted from the NYSE. In November 2009, Fairfax Financial

Holdings Limited voluntarily delisted from the NYSE, so its shares would be traded only on the Toronto Stock Exchange. *See* Press Release, Fairfax Fin. Holding Ltd., *Fairfax Voluntarily Delisting from NYSE* (Nov. 19, 2009), *available at* http://tinyurl.com/fairfaxdelist (last visited Feb. 24, 2010). Likewise, in December 2007, SCOR Holding (Switzerland) Ltd. voluntarily delisted from the NYSE, so its shares would be traded only on the Euronext Paris. *See* Press Release, SCOR SE, *SCOR announces intention of SCOR Holding (Switzerland) Ltd. to delist American Depositary Shares and to deregister in the US* (Dec. 14, 2007), *available at* http://tinyurl.com/scordelist (last visited Feb. 24, 2010). Before delisting, both Fairfax and SCOR Holding had been sued in securities class actions involving foreign investors who purchased their securities on foreign stock exchanges. *See, e.g.*, *In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556 (S.D.N.Y. 2008); *Parks v. Fairfax Fin. Holdings, Ltd.*, No. 1:06cv2820 (S.D.N.Y. filed Apr. 11, 2006). And, with the number of securities fraud class actions involving foreign investors proliferating, *see* Cornerstone Research, *Securities Class Action Filings, 2009: A Year in Review* at 11, *available at* http://tinyurl.com/cornerstonersch (last visited Feb. 24, 2010) (demonstrating that the number of securities class actions against foreign issuers has doubled in aggregate number *and* as a percentage of all class actions over the past decade), more companies that are dually listed (or are considering becoming dually listed) on United States and foreign exchanges will need to decide if their presence in the United States capital markets is worth the cost.

In amicus's view, based on its own experience, many will decide that the costs outweigh the benefits. As discussed above, securities fraud class actions are frequent, unpredictable, and costly. The average public company in the United States has nearly a 10 percent probability of facing at least one securities class action in any five-year period. Committee on Capital Markets Regulation, *Interim Report of the Committee on Capital Markets Regulation* 74 (2006) ("Interim Report"). And on average, securities class actions reduce the defendant company's equity value by 3.5 percent. Anjan V. Thakor, *The Unintended Consequences of Securities Litigation* 14 (U.S. Chamber Institute for Legal Reform 2005), *available at* http://tinyurl.com/ydxk4lz (last visited Feb. 24, 2010).

Moreover, a survey of more than 350 senior executives in the financial services sector revealed that "a fair and predictable legal environment was the second most important criterion determining a financial center's competitiveness." Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's & the US' Global Financial Services Leadership* 16 (2007) ("Bloomberg-Schumer Report"), *available at* http://tinyurl.com/nyfinalrpt (last visited Feb. 24, 2010). But the prevalence of securities class-action litigation and settlements contributed to the belief that "the US legal environment is less fair and less predictable than the UK environment." *Ibid.*[4] Here, the unpredictability of United States law is underscored by the ad hoc formulation adopted by many courts of appeals, under which "the presence or absence of any single factor which was considered significant in other cases dealing with the question of federal jurisdiction in transnational securities cases is not necessarily dispositive." *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 414 (8th Cir. 1979). And its unfairness is demonstrated by the fact that foreign-investor plaintiffs often get a free shot at the defendant because any adverse class action judgment against the plaintiffs will not bind absent class members in many of their home nations. *See* pp. 17-20 *supra*.

Empirical evidence supports the widespread perception that the enormous litigation costs of United States securities fraud class actions and the lack of predictability in the United States legal system are harming the economy. "A leading indicator of the competitiveness of U.S. public equity markets is the ability of the U.S. market to attract listings of foreign companies engaging in initial public offerings—so-called global IPOs." Interim Report at 29. The United States market share of global IPOs has been rapidly

[4] Only about 15 percent of survey respondents preferred the United States legal system, while more than 40 percent perceived the U.K. legal system as outperforming the United States in terms of predictability and fairness. Bloomberg-Schumer Report at 77.

declining throughout this decade. In 2000, approximately 50 percent of the funds raised through global IPOs was raised in the United States, but by 2005 that figure had steadily dropped to just 5 percent. *Id.* at 29-30. The trend continued in 2006, in which 9 of the 10 largest IPOs occurred outside the United States, and the United States' share of global IPO funds remained less than 10 percent. *Id.* at 30. And the phenomenon is not isolated to foreign companies; domestic companies have begun to "abandon[ ] the U.S. equity markets to list in London," where it is much less expensive to raise capital. *Id.* at 32. This drop in the domestic market share, unfortunately, is not the result of cyclical behavior but a symptom of declining competitiveness, *ibid.*, triggered in no small part by the burden of securities litigation in the United States.

While the public equity markets in the United States are in decline, the *private* equity market—where companies are shielded from most securities liability—has become the "market of choice," for foreign companies wishing to raise capital in the United States, even though the cost of doing so is more expensive. *Id.* at 45-46. The "regulatory and litigation burden is an important factor" driving the companies into the private market. *Id.* at 46. Because, "[g]enerally, only institutions and wealthy individuals can participate directly" in the private equity market, individual investors are losing opportunities to invest in these companies. *Id.* at 34. Consequently, "the average investor [is left] in increasingly less liquid and more expensive markets than those enjoyed by institutions and the wealthy." *Ibid.*

Amicus and many other foreign public companies understand that the United States has, as a matter of its own domestic policy, decided to permit the private enforcement of the securities fraud laws through the class action device. Foreign public companies are often willing to accept the possibility of such actions by United States investors when they list their securities on the NYSE. But costs associated with defending global class actions by foreign investors who have no connection with the United States often vastly exceeds the value of such listings, and, if left unabated by this Court, will discourage foreign participation in the United States capital markets.

CONCLUSION

For the reasons set forth above and in respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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FEBRUARY 26, 2010