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

SECOND SUPPLEMENTAL BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Supreme Court Rule 15.8, Petitioners file this supplemental brief in response to the Brief For The United States As Amicus Curiae filed with the Court on October 27, 2009 ("Amicus Br."). In that brief, the

Solicitor General, on behalf of the Securities and Exchange Commission ("SEC"), advanced two arguments that strongly support Petitioners.

First, the Solicitor General found that Petitioners adequately alleged a substantive violation of Section 10(b) of the Securities Exchange Act of 1934 against defendants because the fraudulent scheme set forth in the complaint "involved significant conduct within the United States that is material to the fraud's success." Amicus Br. at 13.

Second, the Solicitor General found that the conduct of defendant HomeSide Lending, Inc. ("HomeSide") and the officer defendants of HomeSide "within the United States... was not peripheral or merely prepatory, but was in integral component of the overall scheme." *Id.*

Despite these findings, the Solicitor General opined that the Court should deny the petition for a writ of certiorari for the following reasons:

1. "[W]hile the approaches of the various courts of appeals have not been entirely uniform, petitioners identify no case indicating that any other circuit would have allowed their suit to go forward." *Id.* at 17.

2. "Because the scheme had a sufficient connection to the United States to bring it within Section 10(b)'s substantive prohibition, the SEC could have pursued an enforcement action based on the facts alleged in petitioners' complaint." *Id.* at 13. However, petitioners could not pursue this civil claims because "the link between HomeSide's alleged false statements and the

ultimate harm to petitioners are too indirect to support liability in a private suit." *Id.* at 15.

As more fully set forth below, the Solicitor General essentially concedes that there is a split among the circuits but seeks to minimize the split. The plain words of the circuits (*i.e.*, that "the circuits are divided" on this issue) belie and undercut the Solicitor General's attempt to minimize the issue.

Petitioners clearly would have prevailed under the "in furtherance test" adopted by the Third, Eighth and Ninth Circuits. The SEC itself noted in its amicus brief submitted to the Second Circuit that "the domestic conduct [alleged by Petitioners in the complaint] was an integral link in the chain of events to the overseas investors' losses." App. 75a-76a.

The Solicitor General's position that the alleged scheme to defraud would give rise to an SEC enforcement action but not a private Attorney General civil class action is not a principled distinction. Indeed, the position may be viewed as *sub silentio* adoption of the anti-class arguments advanced by respondents and their amici in this action.

DISCUSSION

A. The Solicitor General Concedes The Split Among The Circuits

The Solicitor General's comment that "the approaches of the various courts of appeals have not been entirely uniform" (Amicus Br. at 17) simultaneously concedes a split among the circuits while attempting to minimize the significance of the split is, at best, an understatement.

As Petitioners explained in the prior briefs, the Fifth Circuit explicitly held that "*[t]he circuits are divided* as to precisely what sort of activities are needed to satisfy the conduct test . . . ." *Robinson v. TCI/US W. Commc'ns, Inc.*, 117 F.3d 900, 905 (5th Cir. 1997)(emphasis added).

Similarly, the Seventh Circuit has held that "the circuits that have confronted the [conduct test] have articulated a *number of methodologies*." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665-66 (7th Cir. 1998)(emphasis added) (analyzing spectrum of holdings, with the District of Columbia Circuit taking the most restrictive approach, the Third, Eighth and Ninth Circuits taking the most permissive approach, and the Second and Fifth Circuits setting a "course between the two *extremes*")(emphasis added).

Also, Judge Bork in *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987), analyzed the split among the circuits and observed that "[t]he Second Circuit has set the most *restrictive* standard", *id.* at 303, while

"[t]he Third, Eighth and Ninth Circuits appear to have *relaxed* the Second Circuit's test." *Id.* at 304 (emphasis added).

The Solicitor General also ignores the position advanced by the SEC itself in the SEC's amicus brief submitted to the Second Circuit. In that brief, the SEC opined that there is a significant split among the circuits. App. 55a-56a (citing *Kauthar* and analyzing the distinct and competing conduct test methodologies adopted, respectively, by: (a) the District of Columbia Circuit; (b) the Second, Fifth and Seventh Circuits; and (c) the Third, Eighth and Ninth Circuits).

In sum, there is a significant split among that circuits that only this Court may resolve. As noted by a leading treatise, "[o]ne of the primary purposes of the certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal courts of appeals." E. Gressman et al., Supreme Court Practice § 4.4 (9th ed. 2007).

B. Petitioners Would Have Prevailed In The Third, Eighth *or* Ninth Circuits

The Solicitor General argues that "petitioners identify no case indicating that any other circuit would have allowed their suit to go forward." Amicus Br. at 17. That statement simply is not true. In their Petition For A Writ Of Certiorari and again in their Reply Brief, Petitioners explained how they would have prevailed under the "in furtherance of"/"but for" conduct test adopted by the Third, Eighth and Ninth Circuits.

As explained in *SEC v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977), this standard provides that "[t]he federal securities laws . . . grant jurisdiction in transnational securities cases where at least *some activity* designed to further a fraudulent scheme *occurs* within this country." *Id.* at 114. *See also Continental Grain (Austl.) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 415 (8th Cir. 1979) (Eighth Circuit adopted identical standard); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983) (Ninth Circuit adopted identical standard).

In particular, the Eighth Circuit in *Continental Grain (Austl.) Pty Ltd.* found subject matter jurisdiction under the conduct test because "[e]ven though the ultimate effect ... was felt in Australia, *the fraudulent scheme of nondisclosure was devised and completed in the United States. Then it was 'exported' to Australia.*" 592 F.2d at 420 (emphasis added).

In *SEC v. Wolfson*, No. 02:03CV914DAK, 2003 WL 23356418 (D. Utah Dec. 10, 2003), the court noted that the relaxed standard of the Third, Eighth and Ninth Circuits stands in direct contrast to "[t]he more restrictive position . . . that the domestic conduct must have been of 'material importance' or 'significant' to the fraud and have 'directly caused' the alleged loss [as] followed in the Second, Fifth, and District of Columbia Circuits." *Id.* at 15.

In *Wolfson*, defendants urged the court to follow the Second Circuit's approach, requiring the domestic conduct to have been of "material importance" to and

have "directly caused" the alleged fraud. *Id.* The court declined to adopt this restrictive approach and, instead, held that The Tenth Circuit was aligned with the more relaxed standard adopted by the Third, Eighth and Ninth Circuits. *Id.* Based on the conduct alleged by the SEC – defendants sold shares in five microcap companies to investors located primarily in the United Kingdom – defendants "engaged in conduct material to the completion of the fraud in the United States" and "jurisdiction is appropriate despite the fact that additional relevant conduct occurred abroad." *Id.* at *16-17 (citations omitted).

Here, the Florida-based individual defendants conceived the fraudulent scheme in Florida, perpetrated the fraud in Florida by manipulating the assumptions in HomeSide's MSR valuation models, generated the fraudulent financials using those models and then transmitted that fraudulent data to Australia knowing that it would be ministerially and automatically incorporated into its parent's financials. As the SEC found in its amicus brief to the Second Circuit, "the domestic conduct was an integral link in the chain of events to the overseas investors' losses." App. 75a-76a.

Accordingly, Petitioners would have prevailed had their complaint been analyzed under the standard adopted by the Third, Eighth and Ninth Circuits.[1]

[1] The Solicitor General argues that the transactional reach of Section 10(b) is not one of subject matter jurisdiction but an element of a federal securities fraud claim, citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006). Amicus Br. at 8-11. It appears that no court has applied the *Arbaugh* analysis to a federal securities fraud claim. *See, e.g., In re Parmalat Sec. Litig.*, 497 F. Supp. 2d 526, 529 (S.D.N.Y. 2007) ("Court need not decide the issue" because "movants here prevail in either event.") Similarly, here, Petitioners would have prevailed in either event had they been subject to the applicable standard in the Third, Eighth or Ninth Circuits. That is, the fraudulent scheme that occurred in Florida at HomeSide was of "material importance" or "significant" to the fraud and directly caused Petitioners' losses, thus allowing Petitioners to prevail in these circuits under a jurisdiction or merits-based standard. In addition, treating the issue as one *not* of subject matter jurisdiction, but rather the merits of the claim, and accepting the Solicitor General's analysis that Petitioners here state a claim, leads to a reversal and remand to determine the factual question of whether the United States-based conduct indeed "caused" the allegedly false representations to be issued. The Solicitor General's view that the SEC may have jurisdiction where private plaintiffs do not adds an unexpressed jurisdictional limitation not present in the statute or permitted under *Arbaugh*. *See Arbaugh*, 546 U.S. at 516 n.11.

C. The Link Between HomeSide's Fraud And The Ultimate Harm To Petitioners Is Sufficiently Direct To Support Liability

The Solicitor General also argues that the link between HomeSide's alleged false statements and the ultimate loss to Petitioners was too indirect to support liability in a private suit. Amicus Br. at 15. In support of that position, the Solicitor General cites to the Second Circuit opinion in which the court stated, *without any support to the record*, that "while HomeSide may have been the original source of the problematic numbers, those numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors." Amicus Br. at 15.

This "finding" by the Second Circuit *has no support in the record and simply is not true*. HomeSide and the individual defendants, based on documents produced by former HomeSide employees, deliberately undervalued HomeSide's mortgage portfolio. HomeSide's fraudulent financial information was transmitted to NAB in Australia, whereupon NAB incorporated this fraudulent information into its annual reports, reprinting the

fraudulent financial statements of HomeSide *line-by-line*.[2]

D. The Scheme To Defraud Had An Effect In The United States Since NAB's ADRs Were Sold On The New York Stock Exchange

The Solicitor General, in arguing an "indirect link" between the fraud and ultimate loss to the putative class, also ignores that NAB's American Depository Receipts ("ADRs") traded on the New York Stock Exchange ("NYSE"). Certain American purchasers of the ADRs stepped forward as plaintiffs in this action, but could not pursue their claims because the district court found that their trading records indicated that they had not suffered losses. Regardless of this result, the existence of ADRs trading on the NYSE establishes an effect in the United States.

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[2] For example, in each of NAB's Annual Reports issued during the Class Period, NAB listed the operating profits of HomeSide as a separate line item under its United States businesses. *See e.g.*, Joint Appendix filed with the Second Circuit at A-312. Similarly, NAB separately listed its Net Mortgage Servicing Fees in its Annual Reports (*id.* at A-307), which specifically itemized the amounts contributed by HomeSide, making clear that "fees from mortgage servicing," and thus by definition the capitalized Mortgage Servicing Rights, "[f]ollow[ed] the acquisition of Homeside" and were all "derive[d]" from HomeSide. *Id.* No mortgage servicing fees were "derive[d]" from other business units of NAB as reflected on its financial statements.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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