12-4355-cv

United States Court Of Appeals
for the
Second Circuit

CITY OF PONTIAC POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, ("PONTIAC"), ARBEJDSMARKEDETS TILLAEGSPENSION, ("ATP"), UNION ASSET MANAGEMENT HOLDING AG, ("UNION"), COUNSEL OF THE BOROUGH OF SOUTH TYNESIDE ACTING IN ITS CAPACITY AS THE ADMINISTERING AUTHORITY OF THE TYNE AND WEAR PENSION FUND,

Plaintiffs-Appellants,

(*For Continuation of Caption See Next Page*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, 07-cv-11225

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CLEARING HOUSE ASSOCIATION L.L.C. AND NYSE EURONEXT AS *AMICI CURIAE* SUPPORTING DEFENDANTS-APPELLEES

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INTERNATIONAL FUND MANAGEMENT, S.A., (LUXEMBURG), WILLIAM L. WESNER, TEAMSTERS UNION LOCAL 500 SEVERANCE FUND, ("TEAMSTERS"),

Plaintiffs,

OREGON STATE TREASURER AND THE OREGON PUBLIC EMPLOYEE RETIREMENT BOARD, ALASKA LABORERS - EMPLOYERS RETIREMENT FUND,

Movants-Appellants,

v.

UBS AG, PETER A. WUFFLI, CLIVE STANDISH, DAVID S. MARTIN, MARCEL OSPEL, MARCEL ROHNER, MARCO SUTER, WALTER STUERZINGER, RAMESH SINGH, HUW JENKINS, JAMES STEHLI, JOHN COSTAS, MICHAEL HUTCHINS, DEUTSCHE BANK AG, BNP PARIBAS, CREDIT SUISSE, J.P. MORGAN SECURITIES LTD., MORGAN STANLEY & CO. INTERNATIONAL PLC, GOLDMAN SACHS INTERNATIONAL, DEUTSCHE BANK AG, LONDON BRANCH, UBS SECURITIES LLC, ERNESTO BERTARELLI, STEPHAN HAERINGER, GABRIELLE KAUFFMAN-KOHLER, SERGIO MARCHIONNE, ROLF A. MEYER, PETER VOSER, LAWRENCE A. WEINBACH, JOERG WOLLE, HELMUT PANKE, PETER SPUHLER,

Defendants-Appellees.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici curiae the Securities Industry and Financial Markets Association, the Chamber of Commerce of the United States of America, The Clearing House Association L.L.C. and NYSE Euronext state that they are not subsidiaries of any corporation, and no publicly held corporation owns more than 10% of their stock or membership interests.

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The Securities Industry and Financial Markets Association ("SIFMA"), the Chamber of Commerce of the United States of America (the "Chamber"), The Clearing House Association L.L.C. (the "Clearing House") and NYSE Euronext respectfully submit this brief as *amici curiae* in support of affirmance of the District Court's September 13, 2011 order dismissing claims by plaintiffs who purchased securities of Defendant-Appellee UBS AG ("UBS") through foreign securities exchanges (the "Foreign Purchaser Plaintiffs").

STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C. and London, and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. SIFMA has long played an active advocacy role in addressing the potential

[1] Under Fed. R. App. P. 29(c)(5), SIFMA, the Chamber, the Clearing House and NYSE Euronext certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person other than SIFMA, the Chamber or its members, the Clearing House or NYSE Euronext contributed money intended to fund the preparation or submission of the brief.

extraterritorial application of private rights of action under Section 10(b), including in *amicus* briefs submitted in *Morrison v. National Australia Bank Ltd.*, No. 08-1191 (U.S. 2010) and other cases. As a leading advocate in this field, SIFMA has a perspective that the parties to this appeal do not represent.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community. Like SIFMA, the Chamber has long played an active advocacy role in addressing the potential extraterritorial application of private rights of action under Section 10(b), including in *amicus* briefs submitted in *Morrison v. National Australia Bank Ltd.*, No. 08-1191 (U.S. 2010) and other cases. As a leading advocate in this field, the Chamber also has a perspective that the parties to this appeal do not represent.

The Clearing House was established in 1853 and is the United States' oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people and hold more

than half of all U.S. deposits. The Clearing House is a nonpartisan advocacy organization representing, through regulatory comment letters, *amicus* briefs and white papers, the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the U.S. *See* The Clearing House's web page at www.theclearinghouse.org.

NYSE Euronext is a leading global owner and operator of financial markets. In the United States, NYSE Euronext operates the New York Stock Exchange, the world's largest cash equities exchange, as well as NYSE Arca, NYSE MKT, and the NYSE Liffe U.S. futures market. In Europe, NYSE Euronext operates NYSE Euronext, a single market comprised of securities exchanges located in London, Paris, Amsterdam, Brussels and Lisbon; the NYSE Liffe derivatives markets in London, Paris, Amsterdam, Brussels and Lisbon; and NYSE Alternext, a listing market for emerging growth companies. As a major owner and operator of exchanges in the United States and Europe, NYSE Euronext also has a perspective that the parties to this appeal do not represent.

PRELIMINARY STATEMENT

This case presents a critical – and impermissible – attempt to circumvent the clear restrictions on extraterritorial application of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") established by the Supreme Court in *Morrison v. National Australia Bank Ltd.*, 561 U.S. __, 130 S. Ct. 2869 (2010) ("*Morrison*"). In *Morrison*, the Court adopted a bright line rule, grounded in the well-established presumption against extraterritorial application of U.S. law, that does not allow private actions under Section 10(b) based on transactions that take place on foreign exchanges or otherwise in foreign countries.

In the case of cross-listed securities, failure to adhere to *Morrison*'s bright line rule – prohibiting private actions based on foreign transactions – risks significant injury to the competitiveness of U.S. capital markets. Exposing cross-listed issuers to U.S. class action litigation based on non-U.S. transactions would create a substantial disincentive for companies to list their securities in our markets – markets which have faced notable competitive challenges in the past decade. Further, by discouraging U.S. listings, rejection of *Morrison*'s territorial rule would also reduce the choices available to U.S. investors – who might otherwise benefit from the ability to purchase and sell cross-listed securities on a U.S. exchange.

Morrison offers no legal or policy rationale to justify this potential harm to

U.S. markets and investors. On the contrary, the Supreme Court expressly concluded in its opinion that the focus of the Exchange Act is on "purchases and sales of securities in the United States." *Morrison,* 130 S. Ct. at 2884. Recognizing this unambiguous mandate, subsequent district court decisions have consistently held that, in the case of transactions effected abroad, *Morrison* does not permit actions based merely on a cross-listing on a U.S. exchange – as acknowledged by the U.S. Securities and Exchange Commission (the "SEC") in a congressionally mandated study of the issue.

Moreover, extending the private right of action under Section 10(b) to transactions abroad, based solely on the existence of a cross-listing in the United States, would undermine essential principles of regulatory comity fundamental to the *Morrison* decision. In *Morrison*, the Supreme Court recognized the authority of foreign countries, as well as the United States, to regulate their domestic securities exchanges and securities transactions occurring within their respective territories. The existence of a U.S. cross-listing does not diminish this important interest of foreign governments in regulating their own markets, nor does it lessen the "probability of incompatibility" with the laws of those countries identified by the Supreme Court. *Morrison*, 130 S. Ct. at 2885.

In 2010, recognizing the significant potential ramifications of altering the rule in *Morrison*, Congress made a legislative determination not to disturb the

Supreme Court's bright line test for private rights of action, and instead mandated further study of the issue. This Court should respect Congress's determination and the holding in *Morrison*: it should affirm the order of the District Court which correctly dismissed claims arising out of transactions on foreign exchanges.

ARGUMENT

POINT I

FAILURE TO ADHERE TO *MORRISON*'S BRIGHT LINE RULE IN THE CASE OF CROSS-LISTED SECURITIES WOULD INJURE U.S. CAPITAL MARKETS AND U.S. INVESTORS

U.S. capital markets have, for some years, faced significant competitive challenges from jurisdictions around the world – challenges widely recognized by Congress, regulators and academics. *See, e.g.*, Committee on Capital Markets Regulation, *Committee Study Shows Continued Competitive Weakness in U.S. Capital Markets* (Feb. 14, 2013), http://capmktsreg.org/wp-content/uploads/2013/02/2013.02.14_2012_Q4_press.release.pdf (finding "U.S. capital market competitiveness remained weak in 2012"); Michael Bloomberg & Charles Schumer, *Sustaining New York's and US' Global Financial Services Leadership* 10 (Jan. 22, 2007), http://www.nyc.gov/html/om/pdf/ny_report_final.pdf ("The threat to US and New York global financial services leadership is real"). Rejection of *Morrison*'s bright line territorial rule, focused on where a purchase and sale occurs, in the case of cross-listed securities would cause significant injury to U.S.

markets and investors, contrary to ongoing efforts by policymakers to enhance and strengthen the nation's financial industry.

Foreign issuers would face a substantial and unwarranted deterrent to listing their securities in the United States if, based merely upon that U.S. listing, they were to become subject to private liability under Section 10(b) for transactions effected on a foreign exchange. *Cf. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (noting that exposure to U.S. securities class actions could cause "[o]verseas firms with no other exposure to our securities laws [to] be deterred from doing business here"). Indeed, traditionally, fear of private securities class actions has been a primary reason that foreign issuers do not enter U.S. capital markets. *See* Stephen M. Bainbridge, *Corporate Governance and U.S. Capital Market Competitiveness* 7-8 (UCLA School of Law, Law-Econ Research Paper No. 10-13, 2010) ("The key problem [making U.S. capital markets less competitive] appears to be the prevalence of private party securities fraud class actions . . . ."); Committee on Capital Markets Regulation, *Committee on Capital Markets Regulation Completes Survey Regarding the Use By Foreign Issuers of the Private Rule 144A Equity Market* 3 (Feb. 2009), http://www.capmktsreg.org/pdfs/09-Feb-13_Summary_of_Rule_144A_survey.pdf (listing the risk of securities class actions targeting public issuers as a principal reason that foreign companies chose not to become U.S. public issuers); *accord* U.S. Dep't of Commerce, Int'l

Trade Admin., *Assessing Trends and Policies of Foreign Direct Investment in the U.S.* 7 (2008), http://trade.gov/publications/pdfs/fdi2008.pdf (noting joint report by U.S. Chamber of Commerce and Eurochambres finding European issuers ranked "fear of legal action" as the second largest barrier to investing in the United States).

Representatives of foreign issuers have made clear that extraterritorial application of U.S. securities laws "will cause [foreign] companies to reduce their U.S. contacts further, such as by terminating (or declining to establish) sponsored ADR programs, or limiting their investor communications programs in the United States." Letter from Susannah Haan, Sec'y Gen., EuropeanIssuers, to Elizabeth M. Murphy, Sec'y, Securities and Exchange Commission at 3 (Feb. 18, 2011), http://www.sec.gov/comments/4-617/4617-10.pdf. In contrast, precluding Section 10(b) claims by investors who purchase securities on a foreign exchange – as *Morrison* does – will decrease the litigation costs that foreign issuers face when they list securities in the United States, thereby strengthening U.S. capital markets by making the United States a more competitive venue for cross-listings. *See* Buckberg & Gulker, *Cross Border Shareholder Class Actions Before and After Morrison* 4, 29-33 (NERA Economic Consulting Dec. 16, 2011), http://www.sec.gov/comments/4-617/4617-82.pdf.

By discouraging U.S. listings, moreover, extraterritorial application of

Section 10(b)'s private right of action to foreign transactions in cross-listed securities would be at odds with the interests of U.S. investors. Cross-listings of securities enhance the trading opportunities available to U.S. investors by affording them a choice between trading on U.S. or non-U.S. exchanges. By exposing issuers to potential U.S. liability for all transactions in their securities around the world, Appellants' proposed rule would create an unnecessary and burdensome disincentive to U.S. listings – and thereby deprive U.S. investors of the benefits of choosing to trade in their home markets.

POINT II

MORRISON ESTABLISHED A BRIGHT LINE TERRITORIAL RULE THAT PROHIBITS PRIVATE ACTIONS BASED ON FOREIGN SECURITIES TRANSACTIONS, INCLUDING IN THE CASE OF CROSS-LISTED SECURITIES

The Supreme Court grounded its holding in *Morrison* on the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison*, 130 S. Ct. at 2873 (quoting *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), in turn quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)); *see also Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (reiterating the importance of scrupulously applying the presumption against extraterritorial application of U.S. law). In rejecting the "conduct and effects" test, the Supreme Court carefully analyzed the

Exchange Act in light of this territorial presumption, and unambiguously concluded that "the focus of the Exchange Act is not upon the place where the deception originated, but *upon purchases and sales of securities in the United States.*" *Morrison*, 130 S. Ct. at 2884 (emphasis supplied).

The Supreme Court adopted this territorial approach in the face of explicit arguments by plaintiffs' *amici* in *Morrison* that transactions that were executed through foreign securities exchanges – but which involved issuers whose securities were also listed in the United States – should be covered by Section 10(b). *See* SEC, *Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934* at 18 (Apr. 2012), http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf ("*SEC Morrison Study*") (citing Brief for Alecta Pensionsförsäkring, Ömsesidigt, AmpegaGerling Investment GmbH, APG Algemene Pensioen Groep N.V., *et al.*, as Amici Curae Supporting Petitioners at 25, *Morrison v. Nat'l Australia Bank Ltd.*, No. 08-1191 (Jan. 26, 2010), 2010 WL 342027). The *Morrison* court did not, however, accept this invitation to formulate the rule for which Appellants now advocate – essentially a variant of the traditional "effects" component of the now rejected "conduct and effects" test – and instead settled upon a clear territorial rule that does not include such an exception.

Morrison cannot be distorted, as Appellants would have this Court do, to create an exception to the territorial rule in cases where securities purchased on a foreign exchange are also listed in the United States. Indeed, if adopted, the exception urged by Appellants would open the door, despite *Morrison*'s unambiguous articulation of a territorial standard based on the location of the securities transaction, to "private class actions brought by foreign investors suing foreign issuers involving transactions on foreign exchanges." *SEC Morrison Study* at 65. Yet it was precisely this type of "foreign cubed" class action that was rejected in *Morrison*, not only by the Supreme Court, but also by this Circuit under the more expansive "conduct and effects" test. *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 175-76 (2d Cir. 2008).

District courts, subsequent to the *Morrison* decision, have consistently and correctly rejected efforts by plaintiffs to circumvent the Supreme Court's territorial rule based solely on the existence of a U.S. listing – relying on *Morrison*'s bright line rule to exclude claims arising from alleged fraud in connection with securities purchased and sold on foreign exchanges. *See, e.g.*, *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 531 (S.D.N.Y 2011) ("There is no indication that the *Morrison* majority read Section 10(b) as applying to securities that may be cross listed on domestic and foreign exchanges, but where the purchase and sale does not arise from the domestic listing . . . ."); *In re Royal Bank of Scotland Grp.*

PLC Sec. Litig., 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011) (noting that the Supreme Court's "concern [in *Morrison* was] on the true territorial location where the purchase or sale was executed"); *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 472-73 (S.D.N.Y. 2010) (concluding that the "most natural and elementary reading of *Morrison"* is that the transactions at issue "themselves must occur on a domestic exchange to trigger application of § 10(b)").[2] In doing so, these courts have rejected "selective and overly technical reading[s] of *Morrison* that ignore[ ] the larger point of the decision." *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d at 472. As one court succinctly observed, "[t]he idea that a foreign company is subject to U.S. Securities laws everywhere it conducts foreign transactions merely

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[2] *See also Cornwell v. Credit Suisse Grp.,* 729 F. Supp. 2d 620, 622-27 (S.D.N.Y. 2010) (holding U.S. resident plaintiffs that "made an investment decision and initiated a purchase [of a foreign issuer's securities] . . . from the U.S." could not assert a claim under Section 10(b) because the transaction was not executed on an exchange in the United States); *Plumbers Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166, 177-79 (S.D.N.Y. 2010) (concluding purchaser's U.S. citizenship, U.S. residency, location of a purchaser's decision to invest and location in which an order was placed or of the brokers through whom the transaction was placed were not relevant to the *Morrison* analysis because *Morrison* focuses on the territorial location of the exchange on which the securities transaction takes place); *In re Infeon Techs. AG Sec. Litig.*, No. 04-04156 JW, 2011 WL 7121006, at *3-4 (N.D. Cal. Mar. 17, 2011) (holding that issuer's listing on the New York Stock Exchange was not sufficient to support private claim under Section 10(b) where putative plaintiffs purchased their securities on the Frankfurt Stock Exchange); *In re BP P.L.C. Sec. Litig.*, 843 F. Supp. 2d 712, 794-97 (S.D. Tex. 2012) (dismissing claims by purchasers of issuer's ordinary shares "[b]ecause the ordinary shares traded only on the [London Stock Exchange]," and rejecting plaintiffs' arguments that transactions at issue were domestic transactions because the transactions involved U.S. investors and aspects of the transaction were facilitated by third-party market makers in the United States).

because it has 'listed' some securities in the United States is simply contrary to the spirit of *Morrison*." *In re Royal Bank of Scotland Grp. PLC Sec. Litig.*, 765 F. Supp. 2d at 336.

The SEC took notice of this clear trend in the lower courts in its congressionally mandated study analyzing *Morrison* and its effect on private actions under Section 10(b) pursuant to Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376, 1871 (2010). As the SEC explained, under post-*Morrison* case law, "an investor in a cross-listed security cannot maintain a Section 10(b) cause of action if he or she purchased or sold the security on the foreign exchange." *SEC Morrison Study* at 29 & n. 104 (collecting cases). Indeed, the SEC expressly concluded that, if investors were allowed to bring a private action whenever an issuer has registered a class of securities in the United States, without regard to the location of the actual transaction, "the *Morrison* litigation itself would have been decided differently . . . because defendant National Australia Bank's stock was registered in the United States." *SEC Morrison Study* at 66; *see also Morrison*, 130 S. Ct. at 2875 (noting that National Australia Bank registered its "American Depository Receipts (ADRs), which represent the right to receive a specified number of [the bank's] Ordinary Shares" on the New York Stock Exchange).

POINT III

EXTENDING THE SECTION 10(b) PRIVATE RIGHT OF ACTION TO FOREIGN TRANSACTIONS IN CROSS-LISTED SECURITIES WOULD UNDERMINE THE FUNDAMENTAL PRINCIPLES OF REGULATORY COMITY ON WHICH *MORRISON* WAS BASED

In *Morrison*, the Supreme Court also emphasized the importance of regulatory comity and the need to avoid interference with foreign countries' regulation of their own securities markets. As the Court explained, "[l]ike the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction." *Morrison*, 130 S. Ct. at 2885.

The *Morrison* court recognized that other countries have decided to exercise their regulatory authority in different ways: "the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters." *Morrison*, 130 S. Ct. at 2885. In light of those potential differences, the Supreme Court's limitations on Section 10(b)'s extraterritorial application were intended, as the District Court correctly concluded, to "avoid[] the 'probability of incompatibility with the applicable laws of other countries.'" *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 (RJS), 2011 WL 4059356, at *4 (S.D.N.Y. Sept. 13, 2011) (quoting *Morrison*, 130 S. Ct. at 2885).

In reaching its holding in *Morrison,* the Supreme Court gave substantial weight to the views expressed by numerous countries, including the United Kingdom of Great Britain and Northern Ireland, the Commonwealth of Australia and the Republic of France in their *amicus* briefing. *Morrison*, 130 S. Ct. at 2885-86. These and other foreign authorities have consistently emphasized that their systems for regulating securities and adjudicating disputes differ from American regulatory and adjudicative processes, and there is no reason to believe that *Morrison*'s respect for these systems should be abandoned by this Court. As the Australian government explained in a comment letter to the SEC, comity "requires recognition that other countries have put in place legal systems that deliberately differ in important respects to the system adopted in the United States." *See* Letter of the Government of Australia to the Securities and Exchange Commission ¶¶ 20, 24-28 (Feb. 18, 2011), http://www.sec.gov/comments/4-617/4617-34.pdf.[3]

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[3] *See also* Letter of the Government of France to the Securities and Exchange Commission at 1 (Feb. 17, 2011), http://www.sec.gov/comments/4-617/4617-29.pdf ("Foreign nations have a primary interest in protecting their citizens and residents, punishing their wrongdoers, and regulating their exchanges"; "Application of U.S. law to foreign securities transactions would undermine those interests and conflict with the regulatory policies and legal systems of other nations."); Letter of the Government of the United Kingdom to the Securities and Exchange Commission at 1-3 (Feb. 11, 2011), http://www.sec.gov/comments/4-617/4617-4.pdf ("The United Kingdom has made numerous important policy choices regarding securities regulation and litigation practices and procedures reflecting a balancing of interests and policies that sometimes differs from the balances that have been struck in the United States."); Letter of the European Commission to the Securities and Exchange Commission at 1 (Feb. 22, 2011),

The views of these jurisdictions are further supported by the admonitions of the Supreme Court that courts in this country must be careful not to unduly expand the reach of Section 10(b)'s private right of action lest they create a "Shangri-La" for foreign securities actions. *Morrison*, 130 S. Ct. at 2886. This admonition reflects the reality that private securities class actions present a unique potential for vexatious litigation, including "strike suits, and protracted discovery, with little chance of reasonable resolution by pretrial process," *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1105 (1991), such that "if not adequately contained, [the private right of action] 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); *see also Stoneridge Inv. Partners,* 552 U.S. at 163 ("[T]he potential for uncertainty and disruption . . . allow plaintiffs with weak claims to extort settlements from innocent companies.").

Notably, the existence of a cross-listing in the United States does not reduce

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http://www.sec.gov/comments/4-617/4617-49.pdf ("The European Union and United States have made legitimate policy choices which both ensure financial market integrity and transparency, but rest on different legal or business traditions and thus often differ in important substantive and procedural respects."); Letter of the Government of Switzerland to the Securities and Exchange Commission at 3 (Feb. 22, 2011), http://www.sec.gov/comments/4-617/4617-53.pdf ("Not every country has the same procedural mechanisms as the U.S. regime. National solutions to combat securities fraud are tailored to national legal environments and individual jurisdictions. Switzerland is convinced that the jurisdiction of the securities market in which a transaction took place will be best equipped to address questions of unfair trading.").

the need for comity recognized by the *Morrison* court, nor does it lessen the concerns expressed by the Supreme Court and foreign governments regarding the potential incompatibility of U.S. private actions with the applicable laws of foreign jurisdictions. On the contrary, cases involving cross-listed securities – where the authority of multiple jurisdictions inherently will come into play – are precisely the situations calling for the most careful attention to *Morrison*'s bright line rule. In these situations, the risk of potential incompatibility among listing jurisdictions is particularly high, as is the need to respect most rigorously the fundamental principles of comity articulated by the Supreme Court.

POINT IV

MORRISON DOES NOT PERMIT EXTRATERRITORIAL APPLICATION OF SECTION 10(b) TO SECURITIES TRANSACTIONS EFFECTED ON A FOREIGN EXCHANGE BASED ON THE LOCATION OF THE PURCHASER

The District Court correctly rejected Appellants' contention that *Morrison* permits application of Section 10(b) to transactions effected on a foreign exchange where a purchaser "made the decision" to invest and "initiated" the purchase of the securities from the United States by domestic means. As the District Court recognized, there is "nothing in the text of *Morrison* to suggest that the Court intended the location of an investor placing a buy order to be determinative of whether such a transaction is 'domestic' for purposes of § 10(b)." *In re UBS AG*, 2011 WL 4059356, at *7.

Indeed, applying *Morrison*, district courts in this Circuit and elsewhere have dismissed Section 10(b) claims based on conduct in the United States – including the act of placing an order – that resulted in a transaction on a foreign securities exchange because doing so would result in "nothing more than the reinstatement of the conduct test." *Cornwell*, 729 F. Supp. 2d at 624; *see In re BP P.L.C. Sec. Litig.*, 843 F. Supp. 2d at 796 (concurring that "carving out an exception [to *Morrison*'s territorial rule] for the purchase of securities [on a foreign stock exchange] because some acts that ultimately result in the execution of a transaction abroad take place in the United States would be to reinstate the conduct test"); *In re Satyam Computer Servs. Ltd. Sec. Litig.*, No. 09 MD 2027 (BSJ), 2013 WL 28053, at *16-17 (S.D.N.Y. Jan. 2, 2013) (rejecting application of Section 10(b) to transactions on a foreign securities exchange despite fact that buy orders were placed from the United States because plaintiffs' argument was "predicated on precisely the approach the Supreme Court rejected in *Morrison*").

The Supreme Court itself admonished that "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Morrison*, 130 S. Ct. at 2884 (emphasis in original). Moreover, there is nothing about merely placing an order from the United States – for a transaction *effected on a foreign exchange* – that would either alter the statutory analysis or reduce the regulatory

comity concerns articulated by the Supreme Court. *See Morrison*, 130 S. Ct. at 2885.

Appellants' reliance on *Absolute Activist Value Master Fund Ltd. v. Ficeto,* 677 F.3d 60, 69-70 (2d Cir. 2012), is misplaced. *Absolute Activist* did not involve purchases or sales of securities on an exchange – located in the United States or elsewhere. Rather, *Absolute Activist* involved direct sales of securities by U.S. companies to hedge funds based in the Cayman Islands. Those transactions fell within the second prong of the *Morrison* test – applicable to "domestic transactions in other [i.e., non-listed] securities" – and did not take place through a foreign securities exchange. *See Absolute Activist,* 677 F.3d at 69-70.

Further, even if the *Absolute Activist* test were applicable, Appellants' allegations that a U.S. entity "made the decision to invest in UBS stock and initiated the purchase of UBS stock from the U.S.," Appellants' Br. at 88-89, are plainly inadequate to demonstrate either that (1) "the parties incur[red] irrevocable liability to carry out the transaction within the United States" or (2) "title [was] passed within the United States." *Absolute Activist*, 677 F.3d at 69. On the contrary, merely placing an order to buy a stock is no assurance that a transaction will or will not be effected on an exchange, much less a guarantee of where and how title will pass. *See, e.g.*, SEC, *Investor Bulletin: Trading Basics, Understanding the Different Ways to Buy and Sell Stock* (Mar. 9, 2011),

http://www.sec.gov/investor/alerts/trading101basics.pdf (describing different types of orders to buy and sell stock, and conditions and circumstances that may cause an order not to be executed).

POINT V

CONGRESS ALONE HAS AUTHORITY TO MAKE THE POLICY DETERMINATION TO EXPAND EXTRATERRITORIAL APPLICATION OF SECTION 10(b)

Congress, not the courts, has responsibility for making the sensitive and important policy determination of whether to extend extraterritorial application of the private right of action beyond *Morrison*'s bounds. *See Morrison*, 130 S. Ct. at 2881. In this regard, Congress decided to provide the U.S. government and the SEC with the authority to bring actions under the prior "conduct and effects" test that would otherwise be precluded by *Morrison. See* 15 U.S.C. § 78aa(b), 124 Stat. 1865. Congress declined, however, to reinstate the "conduct and effects" test in cases involving private rights of action under Section 10(b), and instructed the SEC to conduct a study of potential expansion of the private right of action, *see* Dodd-Frank Act § 929Y, 124 Stat. 1871, including an assessment of the economic costs and benefits of extending the private right to "transnational securities frauds." Dodd-Frank § 929Y(c).

The SEC, consistent with its statutory mandate, solicited public input on the issue and prepared the study, which was completed in April 2012. Notably, the

SEC did not make any affirmative recommendation to overturn *Morrison* in private actions under Section 10(b) – even while it expressly acknowledged, as noted above, that post-*Morrison* case law has followed the territorial rule for cross-listed securities. *SEC Morrison Study* at 29 & n.104. More importantly, Congress has not, since the study's completion, acted to reinstate the "conduct or effects" test for private rights of action or otherwise responded to *Morrison*.

In adopting the distinction between private and governmental actions in Dodd-Frank, Congress struck a balance of competing policy interests and saw the need for further study before extending private rights of action to transactions outside the United States. That legislative balance, still in place after extensive further study by the SEC, must be respected until Congress chooses to alter it – and requires rejection of creative litigation theories, like those of Appellants, at odds with *Morrison*'s bright line distinction between U.S. and non-U.S. transactions.

CONCLUSION

For the foregoing reasons, SIFMA, the Chamber, the Clearing House and NYSE Euronext respectfully submit that the District Court's September 13, 2011 order dismissing the Foreign Purchaser Plaintiffs' claims should be affirmed.

Dated: New York, New York
May 17, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,962 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2010 in 14-point Times New Roman.

Dated: New York, New York
May 17, 2013

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