

Not Reported in F.Supp.2d, 2006 WL 3844465 (S.D.N.Y.)
(Cite as: **2006 WL 3844465 (S.D.N.Y.)**)

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United States District Court,
S.D. New York.

In re NATIONAL AUSTRALIA BANK SECURITIES LITIGATION.
No. 03 Civ. 6537(BSJ).

Oct. 25, 2006.

Order

[BARBARA S. JONES](#), United States District Judge.

INTRODUCTION

*1 The Consolidated Class Action Complaint (the "Complaint") in this action was filed by Russell Leslie Owen ("Owen"), Brian and Geraldine Silverlock (collectively, the "Lead Foreign Plaintiffs"), and Robert Morrison (the "Lead Domestic Plaintiff"), on their own behalf and on behalf of all others similarly situated (collectively, the "Plaintiffs"). Defendants National Australia Bank Limited ("NAB" or "Bank") and Frank Cicutto, Hugh Harris, Kevin Race, W. Blake Wilson, and Washington Mutual Bank, F.A., as successor in interest to HomeSide Lending, Inc. ("HomeSide"), move to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1), and for failure to state a claim under [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#).

The Complaint alleges that the Defendants violated section 10(b) of the Securities and Exchange Act of 1934 (the "Exchange Act"), [15 U.S.C. §§ 78j\(b\) and 78t\(a\)](#), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240-10b-5. As explained further below, the Complaint alleges that the Defendants made false and misleading statements concerning HomeSide's operations and its contributions to NAB's financial health in filings with the Securities and Exchange Commission ("SEC"), foreign securities exchanges, the domestic and international press, and in corporate documents. The Complaint further alleges that the fraudulent and misleading statements were intended to, and did, artificially inflate the prices of NAB's securities and eventually caused losses to Plaintiffs,

who are investors in NAB securities. The Complaint also alleges that certain of NAB's and HomeSide's officers, in their capacities as controlling persons, violated section 20(a) of the Exchange Act.

For the reasons explained below, the Complaint is DISMISSED, with leave to file an amended complaint with respect to domestic plaintiffs only.

BACKGROUND

Defendant NAB is Australia's largest bank, organized under the laws of Australia and headquartered there.^{FN1} "Ordinary shares" ^{FN2} of NAB's stock trade on Australian and other foreign exchanges, but not on any United States exchange. Only certain instruments called American Depositary Receipts ("ADRs"),^{FN3} which represent quantities of NAB ordinary shares, are traded on the New York Stock Exchange ("NYSE").

[FN1.](#) Defendant Cicutto was at all relevant times NAB's managing director and chief executive officer.

[FN2.](#) "Ordinary shares" are the equivalent in Australia of "common stock" in the United States.

[FN3.](#) "An ADR is a receipt that is issued by a depositary bank that represents a specified amount of a foreign security that has been deposited with a foreign branch or agent of the depositary, known as the custodian. The holder of an ADR is not the title owner of the underlying shares; the title owner of those shares is either the depositary, the custodian, or their agent. ADRs are tradable in the same manner as any other registered American security, may be listed on any of the major exchanges in the United States or traded over the counter, and are subject to the [federal securities laws.] This makes trading an ADR simpler and more secure for American investors than trading in the underlying security in the foreign market." [Pinker v. Roche Holdings Ltd., 292 F.3d](#)

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[361, 367 \(3d Cir.2002\)](#) (citations omitted).

NAB acquired HomeSide in 1998 as part of NAB's efforts to expand its international presence. HomeSide was then a mortgage service provider located in Jacksonville, Florida.^{FN4} Its principal source of income was the fees that it generated for servicing mortgages. The present value of those fees was calculated using an internal valuation model, and was booked by NAB on its balance sheet as an asset called Mortgage Servicing Rights ("MSR"). HomeSide itself had no publicly traded securities during the relevant period.

^{FN4}. NAB purchased HomeSide in 1998, then sold it to Washington Mutual Bank in December 2001. Defendants Harris, Race and Wilson were HomeSide's chief executive officer, chief operating officer, and chief financial officer, respectively, during the relevant period.

During the proposed class period, the NAB defendants allegedly made various statements in SEC filings, the Bank's annual reports and in other contexts, asserting HomeSide's profitability and its contribution to NAB's overall profitability. The HomeSide defendants also allegedly made various false public statements relating to HomeSide's prospects and economic health. A number of these statements are detailed in the Complaint.

*2 In July 2001, NAB announced that it would book a charge of \$450 million because of a fiscal year writedown of the value of HomeSide's MSR (the "July Writedown"). As a consequence of the July Writedown, NAB's ordinary shares and its ADRs each fell by more than 5% on their respective markets. Then, in September 2001, NAB announced it would incur a further \$1.75 billion writedown (the "September Writedown"), having determined that the carrying value of HomeSide's MSR exceeded its fair value. \$1.16 billion of the September Writedown was attributed to a combination of incorrect rate assumptions in HomeSide's MSR valuation model and changed assumptions in that modeling; the remaining \$590 million was attributed to a writedown of goodwill relating to HomeSide. In response to the September Writedown, NAB's ordinary shares fell by nearly 13% on the Australian market, and its ADRs fell by slightly more than 11.5% on the NYSE.

It is from these price drops that Plaintiffs claim a loss. The Lead Foreign Plaintiffs are residents of Australia, who purchased NAB's ordinary shares on an Australian exchange in 2001. The Lead Domestic Plaintiff is a United States resident who purchased the Bank's ADRs on the NYSE.

The Complaint alleges a fraudulent scheme, in that: (1) HomeSide, at the direction of the HomeSide officers, and at least with the knowing acquiescence of the NAB defendants, knowingly used unrealistic financial models in order to artificially inflate its MSR values; ^{FN5} (2) the Defendants' various statements as to HomeSide's profitability and its contribution to NAB's profitability were consequently false and intentionally misleading; and (3) the alleged fraud, when revealed, caused losses for the owners of NAB's securities.

^{FN5}. The Complaint sets out in some detail HomeSide's use, during several months of 2000, of certain financial assumptions in its MSR valuation models. These models diverged, in some instances rather sharply, from the assumptions published by Bloomberg Media Interactive, which are described in the Complaint as "an accepted industry standard." The Complaint alleges that it was HomeSide's knowing use of these non-standard assumptions that allowed it, and NAB to show unwarranted profitability.

DISCUSSION

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE LEAD FOREIGN PLAINTIFFS' CLAIMS

Defendants move to dismiss the Lead Foreign Plaintiffs from the Complaint for lack of subject matter jurisdiction, under [Fed.R.Civ.P. 12\(b\)\(1\)](#), on the ground that the transactions of which these plaintiffs complain is fundamentally foreign in nature, and thus beyond the scope of this Court's jurisdiction under the Exchange Act.^{FN6}

^{FN6}. Defendants do not advance the same jurisdictional defense against the Lead Domestic Plaintiff, who purports to represent a

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class of investors who purchased the Bank's ADRs during the proposed class period. There is no dispute that the securities law extends to protect domestic investors who purchase securities in domestic markets. See [Bersch v. Drexel Firestone, Inc.](#), 519 F.2d 974, 993, 997 (2d Cir.1975). However, as explained in Point II, *supra*, the Lead Domestic Plaintiff is dismissed from the action on other grounds.

A. Standard for [Rule 12\(b\)\(1\)](#) Dismissal

A plaintiff bears the burden of proving by a preponderance of the evidence that subject matter jurisdiction exists. See [McNutt v. General Motors Acceptance Corp.](#), 298 U.S. 178, 189, (1936); [Luckett v. Bure](#), 290 F.3d 493, 496-97 (2d Cir.2002). Jurisdictional allegations must be shown affirmatively, and may not be inferred favorably to the party asserting it. See [Shipping Fin. Servs. Corp. v. Drakos](#), 140 F.3d 129, 131 (2d Cir.1998). In resolving a factual challenge to subject matter jurisdiction, this court may consider evidence outside of the pleadings. See [Makarova v. United States](#), 201 F.3d 110, 113 (2d Cir.2000); see also [Kamen v. American Tel. & Tel. Co.](#), 791 F.2d 1006, 1011 (2d Cir.1986).

B. Subject Matter Jurisdiction Under the Exchange Act

*3 The Exchange Act itself is silent as to its extraterritorial reach. [Itoba Ltd. v. Lep Group PLC](#), 54 F.3d 118, 121 (2d Cir.1995); [Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London](#), 940 F.Supp. 528, 533 (S.D.N.Y.1996), *aff'd*, 147 F.3d 118 (2d Cir.1998). Consequently, “[w]hen, as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.” [Bersch v. Drexel Firestone, Inc.](#), 519 F.2d 974, 985 (2d Cir.1975); see also [In re Alstom S.A. Secur. Litig.](#), 406 F.Supp.2d 346, 375 (S.D.N.Y.2005) (“[I]nsofar as the Second Circuit’s subject matter jurisdiction doctrine viewed as a whole suggests an overlying principle ... it is one that, in the final analysis, is grounded on congressional policy as bounded by a standard of reasonableness.”). The presumption in

such a case is against extending jurisdiction. Cf. [Zoelsch v. Arthur Andersen & Co.](#), 824 F.2d 27, 31 (D.C.Cir.1987); [Europe & Overseas Commodity Traders](#), 147 F.3d at 131.

Guided by these principles, the Second Circuit developed two tests for determining whether district courts have subject matter jurisdiction over foreign plaintiffs alleging violations of the Exchange Act’s anti-fraud provisions: the “effects” test and the “conduct” test. See [Leasco Data Processing Equip. Corp. v. Maxwell](#), 468 F.2d 1326, 1336-37 (2d Cir.1972); [Schoenbaum v. Firstbrook](#), 405 F.2d 200, 206-09, *modified en banc on other grounds*, 405 F.2d 215 (2d Cir.1968).

Under the effects test, a district court may exercise jurisdiction over foreign plaintiffs where the alleged illegal activity causes a “substantial effect” on United States investors or markets. See [Alfadda v. Fenn](#), 935 F.2d 475, 478 (2d Cir.1991) (citations omitted). Because the effects in the United States must be substantial to confer jurisdiction under this test, it is not satisfied when predominantly foreign-based fraud only tangentially impacts the United States market, such as by affecting general investor confidence. See, e.g., [Bersch](#), 519 F.2d at 987-88.

Under the conduct test, a district court may exercise jurisdiction if a defendant’s conduct in the United States was more than “merely preparatory” to the fraud, and particular acts or culpable failures to act within the United States “directly caused” losses to foreign investors abroad. See [Bersch](#), 519 F.2d at 993; accord [Psimenos v. E.F. Hutton & Co.](#), 722 F.2d 1041, 1046 (2d Cir.1983); [SEC v. Berger](#), 322 F.3d 187, 193 (2d Cir.2003).

While articulation of the conduct test is easy, its application is not. Aside from the pertinent residence of the parties, the courts in this circuit generally look to the “the material elements of the conduct alleged to comprise the fraud at issue,” subdivided by the venue and the extent to which particular acts occurred in the United States versus abroad. See [Alstom](#), 406 F.Supp.2d at 371 (citations omitted). This analytical undertaking is complicated by the commercial realities that imbue modern international securities transactions. See *id.* at 372.

*4 [T]he conduct constituting the charged fraud

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causing the asserted financial losses is rarely a single act readily traceable in its entirety to a discrete time and place. Rather, more commonly, the alleged misdeeds may comprise but one aspect of a scheme on a larger scale, a link in a transactional chain forming a continuum that spreads out to multiple jurisdictions. Identifying where the charged fraud starts and where it culminates, and what comprises the numerous material points and participants in the transactions in between, inevitably presents formidable challenges.

Id. The complexity of the required analysis means that individual cases are decided on very fine distinctions. *See id.* at 374 (“[T]he 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 in future cases.” (quoting *IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir.1980))). In general, however, “a case in which the alleged fraud was committed by foreign defendants on foreign individuals in a foreign country” is not what the securities laws of this country were designed to remedy. *See Tri Star Farms Ltd. v. Marconi, PLC*, 225 F.Supp.2d 567, 578 (W.D.Pa.2002).

The Second Circuit has instructed that the effects and conduct tests may be considered collectively in determining jurisdiction. *See Itoha*, 54 F.3d at 22 (“[A]n admixture or combination of the two [tests] often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court.”). However, where the effects of an alleged fraud are predominantly foreign, the amount of domestic conduct and its nexus to the alleged injury required to sustain jurisdiction is at its greatest. *See generally Bersch*, 519 F.2d at 987-88. That is especially true in a class action involving both foreign and domestic plaintiffs, such as this, where the danger exists that a “very small tail” may be “wagging an elephant.” *See IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018, n. 31 (2d Cir.1975); accord *Bersch*, 519 F.2d at 996 (2d Cir.1975) (noting that “[t]he management of a class action with many thousands of class members imposes tremendous burdens on overtaxed district courts,” especially “when they are abroad.”).

C. The Foreign Plaintiffs Have Failed to Demonstrate Subject Matter Jurisdiction Over their Claims

Weighing the totality of the factors here, the Court finds that the Lead Foreign Plaintiffs have failed to meet their burden of demonstrating that subject matter jurisdiction exists.

To begin, the alleged fraud had very little-if any-demonstrable effect on the United States market. The Lead Foreign Plaintiffs do not appear to contend otherwise. At most, the alleged fraud *may* have adversely impacted domestic ADR purchasers. As explained *infra* in Point II, however, the Lead Domestic Plaintiff who represents the proposed ADR subclass has not even demonstrated any damage during the relevant period. Moreover, because the aggregate value of the ADRs represented a mere 1.1% of NAB's nearly one-and-a-half billion ordinary shares, any effect on the United States market from the alleged fraud pales in comparison to the effect on the foreign markets.

*5 Nor is the alleged domestic conduct sufficient to confer this Court with jurisdiction. The domestic conduct upon which the Plaintiffs rely consists of HomeSide's allegedly improper valuation of its future cash flow by using and/or manipulating a valuation model for its MDRs that HomeSide allegedly knew yielded unrealistic results. Plaintiffs contend that this conduct provides a basis for subject matter jurisdiction on the theory that the statements made by NAB in Australia and relied upon by NAB investors simply would not have been fraudulent but-for HomeSide's alleged impropriety.

Defendants maintain, however, that HomeSide's alleged misconduct (even if true) is insufficient to confer jurisdiction in that it did not “directly cause” the Lead Foreign Plaintiffs' alleged loss. Rather, Defendants claim, the alleged securities fraud was committed-if at all-only when NAB distributed the allegedly false information to the Lead Foreign Plaintiffs abroad. In support of their position, Defendants heavily rely on the Second Circuit's seminal and oft-cited “conduct test” decision in *Bersch*, 519 F.2d 974 (2d Cir.1975).

In *Bersch*, a Canadian company made a series of public offerings of its common stock to investors outside of the United States. *Bersch*, 519 F.2d at 979-80. The shares were purchased mostly by foreigners and traded on foreign exchanges, although some of the

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shares ended up in the hands of Americans. *Id.* Shortly after the offerings, the price of the shares plummeted. *Id.* at 981. The domestic plaintiff brought a proposed class action on behalf of all domestic and foreign purchasers of the Canadian company's stock. *Id.* In his complaint, he alleged that the offering materials failed to disclose material facts, and that a variety of conduct occurred in the United States. *Id.* Specifically, he claimed that the underwriters and their agents had met in New York on a number of occasions to plan the offering; that an American law firm and American accounting firm helped prepare the offering; that parts of the allegedly false prospectus were drafted and reviewed in New York; and that bank accounts were opened in New York in anticipation of deposits from the offering. *Id.* at 985, n. 24.

In reversing the district court, the Second Circuit in *Bersch* held that no subject matter jurisdiction existed as to the foreign purchasers because the alleged domestic conduct was merely preparatory and did not “directly cause []” the alleged loss. *Id.* at 987. The Court explained:

The fraud, if there was one, was committed by placing the allegedly false and misleading prospectus in the purchasers' hands. Here the final prospectus emanated from a foreign source Not only do we not have the case where all the misrepresentations were communicated in the nation whose law is sought to be applied ... or the case where a substantial part of them were ... but we do not even have the oft-cited case of the shooting of a bullet across a state line where the state of the shooting as well as of the state of the hitting may have an interest in imposing its law. At most the acts in the United States helped to make the gun whence the bullet was fired from places abroad

*6 *Id.* at 987 (emphasis added).

As applied to the facts of this case, Defendants claim that *Bersch* is controlling. Specifically, they argue that notwithstanding the alleged domestic conduct by HomeSide, the allegedly fraudulent statements were “fired” from Australia at predominantly foreign plaintiffs who purchased NAB stock on that country's stock exchange.

The Lead Foreign Plaintiffs attempt to distinguish *Bersch* on the ground that the alleged domestic con-

duct in that case was more far removed from the ultimate commission of the fraud than is the case here. Plaintiffs also point out that *Bersch* was not the last, or only, word on the issue. For example, in *Vencap*-decided the same day as *Bersch*-the Second Circuit explained that Congress did not intend “to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.” [Vencap, 519 F.2d at 1017](#). Moreover, in *Itoba*, the Second Circuit explained that the “situs of preparations for SEC filings should not be determinative of jurisdictional questions.” [54 F.3d at 124](#).^{FN7}

[FN7](#). As the court in *Alstom* explained:

[T]he Second Circuit has instructed that whether the alleged misrepresentations were actually made in the United States, or in another country, or whether a material domestic act directly caused the alleged harm, is not in and of itself determinative. Nor is the site of the preparation of registration statements filed in this country by itself a sufficient jurisdictional consideration..... In fact, the Circuit Court has cautioned against mechanical reliance on any particular factor as a sufficient decisional guide from one case to another.

[406 F.Supp.2d at 374-75](#) (citations omitted).

The Second Circuit applied these principles in *SEC v. Berger*, upon which Plaintiffs heavily rely. There, the defendant was a New York resident who had formed an offshore investment company (the “Fund”) organized under the laws of the British Virgin Islands. [Berger, 322 F.3d at 188](#). The Fund “invested ... in stocks on domestic securities exchanges” largely through a brokerage account at Bear Stearns in New York that “cleared all of its transactions” in New York City. *Id.* Ultimately, the Fund suffered significant financial losses as a result of investments which were made at the defendant's direction. *Id.* at 189. Rather than report the losses to investors, however, the defendant admittedly created fraudulent account summaries in New York to mask the shortfalls. *Id.* These summaries were used in two fraudulent ways: first, they were incorporated into “the Fund's annual financial statements, which were created ... in New

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York and made available for potential investors to review; and second, “the fictitious financial statements” prepared in New York were “sent offshore to the Fund’s administrators, and then calculations based on these statements were retransmitted back into this country and abroad” to prospective and then-existing shareholders. *Id.* at 189; *see also id.* at 194. The Second Circuit held that subject matter jurisdiction existed on these facts, explaining that “while operating entirely from New York, [the defendant] executed a massive fraud upon hundreds of investors involving transactions on United States exchanges.” *Id.* at 195. According to the Court, the fact that the statements that ultimately conveyed the fraudulent information to investors were prepared and mailed in Bermuda” was immaterial. *Id.* That was so because the preparation and mailing “was not itself fraudulent,” as “[t]he Fund [a]dministrator was simply acting under [the defendant’s] instruction,” who himself had concocted the scheme in New York. *Id.*

*7 The instant case can fairly be said to fall somewhere in between *Bersch* (upon which Defendants rely) and *Berger* (upon which Plaintiffs rely). While the amount and significance of the alleged domestic conduct is greater in this case than in *Bersch*, it falls far short of the alleged conduct in *Berger*. Unlike in *Berger*-and more like *Bersch*-the securities at issue here are predominantly foreign securities traded on foreign exchanges. And whereas in *Berger* “the fraudulent conduct was carried out *entirely*” in the United States, [322 F.3d at 195](#) (emphasis added), a significant, if not predominant, amount of the material conduct in this case occurred a half-world away.

That the allegedly false statements pertained to NAB’s domestically based subsidiary does not change the result. In this regard, the Court finds instructive Judge Owen’s decision in *Froese v. Staff*, which involved similar allegations as those presented here. *See Froese*, No. 02 CV 5744(RO), [2003 WL 21523979 \(S.D.N.Y. July 7, 2003\)](#). The plaintiffs in *Froese* were investors in a German clothing company, who incurred losses due to artificially inflated earnings statements the corporate defendant prepared and disseminated from Germany. *Id.*, at * 1. Those statements had been inflated because the defendant’s U.S. subsidiary had allegedly engaged in “channel stuffing,” a practice whereby “revenues [are] overstated by including amounts for products that the company delivered to and endeavored to force their

retail network to accept despite no demand, with perhaps secret assurances that the goods, if unsold, could be returned.” *Id.* Notwithstanding that the allegedly inflated financial information emanated from the United States, Judge Owen found that jurisdiction was absent because the allegedly fraudulent statements were “conceived, engineered and published in Germany,” and that it was “these misstatements and not any activity which [led] to the alleged misrepresentations which ‘directly caused’ the financial losses.” *Id.*, at *2.

Also instructive is Judge Pauley’s decision in [In re Bayer AG Secur. Litig., 423 F.Supp.2d 105 \(S.D.N.Y.2005\)](#). There, the putative class action plaintiffs were investors in the securities of German-based Bayer AG, which sold its securities primarily in foreign markets and, to a lesser extent, in the form of ADRs in the United States. *See id.* at 107. The plaintiffs attempted to premise jurisdiction over a subclass of foreign plaintiffs by alleging that Bayer AG’s wholly owned United States subsidiary made fraudulently aggressive projections about the profitability of a particular pharmaceutical, which projections formed the basis of misleading statements made by Bayer AG and were relied upon by the foreign plaintiffs abroad. *Id.* at 109, 111. In declining to extend jurisdiction to the foreign plaintiffs, the court gave significant weight to the “location from where [the] allegedly false statements emanated”-which was Germany-as such dissemination “embodie[d] the heart of the alleged fraud.” *Id.* at 111 (internal quotes, marks and citations omitted).^{FN8}

^{FN8}. This Court is mindful of decisions by other judges in this district which reached contrary results to *Froese* and *Bayer* in arguably similar cases. For example, in *Alstom*, Judge Marrero found that jurisdiction existed over a class of foreign plaintiffs, who alleged that: (i) “accounting improprieties” at a United States subsidiary led to significant errors in its financial statements; and (ii) that such statements were incorporated into the financial statements of the foreign parent, which were distributed and relied upon by investors abroad. [Alstom, 406 F.Supp.2d at 362-63, 387](#). And in *In re Gaming Lottery Secur. Litig.*, Judge Patterson found that jurisdiction existed over a class of foreign plaintiffs who alleged that:

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(i) the Canadian based Gaming Lottery Corporation (“GLC”) had acquired a United States subsidiary, Specialty Manufacturing Inc. (“SM”), without obtaining state regulatory approval; (ii) falsely represented to the investing public that this acquisition was completed when it had not been; (iii) consolidated SM’s financial results with those of GLC; and (iv) misled the plaintiffs by making announcements of other United States acquisitions that were certain to fail once those state regulators learned of GLC’s deception concerning SM. See [58 F.Supp.2d 62, 65 \(S.D.N.Y.1999\)](#). Regardless of the jurisdictional decisions in *Alstom* and *Gaming Lottery*, I believe that the allegations before me in this case warrant a different result.

*8 While the instant case presents a close call, the Court is ultimately left with the impression that the Lead Foreign Plaintiffs have not met their burden of demonstrating that Congress intended to extend the reach of its laws to the predominantly foreign securities transactions at issue here. As was the case in *Bersch, Froese* and *Bayer*, “[a]t most the acts in the United States helped to make the gun whence the bullet was fired” from-and at-places abroad. See [Bersch, 519 F.2d at 987](#).

HomeSide’s alleged conduct-however it may be classified-is not in itself securities fraud. It amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad. Thus, while Plaintiffs urge that there would have been no securities fraud but-for the domestic conduct, they fail to appreciate that the domestic conduct would be immaterial to its Rule 10b-5 claim but-for (i) the allegedly knowing incorporation of HomeSide’s false information; (ii) in public filings and statements made abroad; (iii) to investors abroad; (iv) who detrimentally relied on the information in purchasing securities abroad.^{FN9}

^{FN9}. While NAB filed certain forms with the SEC that incorporated the allegedly fraudulent representations disseminated in comparable filings abroad, that cannot provide a basis for jurisdiction as to the Lead Foreign Plaintiffs, who do not allege that they were even aware of the SEC filings, much less relied upon them. See, e.g., [In re](#)

[Baan Co. Secur. Litig., 103 F.Supp.2d 1, 10 \(D.D.C.2000\)](#) (“To establish jurisdiction, [foreign] plaintiffs must allege that the filings with the SEC or other fraudulent actions in the United States were “a substantial or significant contributing cause of the decision to purchase stock”) (internal marks and citations omitted); [Tri-Star Farms, 225 F.Supp.2d at 579 n. 13](#) (stating that “the inclusion of alleged misrepresentations in reports filed with the SEC ... are insubstantial in comparison to the conduct that allegedly occurred abroad and that this conduct could not have played a significant role in any losses sustained by the foreign investors.”); accord [Bayer, 423 F.Supp.2d at 112](#); [Nathan Gordon Trust v. Northgate, 148 F.R.D. 105, 108 \(S.D.N.Y.1993\)](#).

On balance, it is the foreign acts-not any domestic ones-that ‘directly caused’ the alleged harm here. See [Bersch, 519 F.2d at 993](#); see also [Froese, 2003 WL 21523979, at * 2](#); [Bayer, 423 F.Supp.2d at 111-12](#). Accordingly, the Lead Foreign Plaintiffs are dismissed from the action because this Court lacks subject matter jurisdiction over their claims. See [Bersch, 519 F.2d at 997](#) (“eliminat[ing] from the class action all purchasers other than [those] who were residents or citizens of the United States.”).

II. THE LEAD DOMESTIC PLAINTIFF LACKS STANDING AND HAS OTHERWISE FAILED TO STATE A CLAIM FOR RELIEF

The Defendants separately move to dismiss from the action the sole Lead Domestic Plaintiff-Mr. Morrison-who is the only named plaintiff purporting to assert damages on behalf of similarly situated purchasers of the Bank’s ADRs on the NYSE. Defendants maintain that Mr. Morrison lacks standing, and has otherwise failed to state a claim, because he has failed to allege that he suffered any damages from the alleged fraud. The Court agrees.

Pecuniary loss is an essential element of a Rule 10b-5 claim for money damages. See [Commercial Union Assur. Co. v. Milken, 17 F.3d 608, 613 \(2d Cir.1994\)](#). The measure of damages in private securities fraud actions are subject to the Private Securities Litigation Reform Act (“PSLRA”), [Pub.L. No. 104-67, 109 Stat. 737 \(1995\)](#) (codified in pertinent part at [15](#)

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[U.S.C. § 78u-4\(e\)\(1\)](#)). As relevant, [section 78u-4\(e\)\(1\)](#) provides that where a plaintiff purchases a security during a putative class period, his recovery is limited to the amount by which his purchase price exceeds the security's mean price during the 90-day period immediately following the correcting disclosure (the so-called "lookback period"). [15 U.S.C. § 78u-4\(e\)\(1\)](#).^{FN10}

FN10. Subject to an exception not pertinent here, [15 U.S.C. § 78u-4\(e\)\(1\)](#) provides in relevant part:

[I]n any private action arising under this chapter in which the plaintiff seeks to establish damages by reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.

[15 U.S.C. § 78u-4\(e\)\(1\)](#). This provision was in large part enacted to prevent putative plaintiffs from seizing upon short-term price swings in the market.

*9 By operation of this provision, "if the mean trading price of a security during the 90-day period following the correction is *greater* than the price at which the plaintiff purchased his stock then that plaintiff would recover nothing under the PSLRA's limitation on damages." [In re Mego Fin. Corp. Sec. Litig.](#), 213 F.3d 454, 461 (9th Cir.2000) (emphasis in original). That is the case here.

The Lead Domestic Plaintiff states in his PSLRA certification that his only purchase of NAB's securities during the proposed class period was a purchase of 125 ADRs on August 11, 2000, at a price of \$74 per security. The mean trading price during the statutory lookback period was \$75-one dollar more than what he originally paid for the securities. (See Declaration of George T. Conway III, Ex. W.)^{FN11} Because the Lead Domestic Plaintiff has failed to allege that

he was damaged in any way by the alleged fraud, he lacks standing in this action and has otherwise failed to state a claim for relief.

FN11. This Court is authorized to take judicial notice of publicly reported stock prices. E.g., [In re Merrill Lynch & Co. Research Reports Sec. Litig.](#), 272 F.Supp.2d 243, 245 n. 9 (S.D.N.Y.2003).

CONCLUSION

For the reasons explained in Parts I and II, *supra*, no named plaintiff remains in this action. Accordingly, the Complaint is DISMISSED. Plaintiffs' counsel, however, is granted leave to substitute a lead domestic plaintiff and to otherwise amend the pleadings with respect to ADR purchasers only.

SO ORDERED.

S.D.N.Y., 2006.
In re National Australia Bank Securities Litigation
Not Reported in F.Supp.2d, 2006 WL 3844465
(S.D.N.Y.)

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