prelim-
prints

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1132

REGINALD H. HOWE,

Plaintiff-Appellant,

v.

GOLDCORP INVESTMENTS LTD., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

JAMES R. DOTY
General Counsel

THOMAS L. RIESENBERG
Assistant General Counsel

JOSEPH A. FRANCO
Special Counsel

FELICIA H. KUNG
Attorney

Securities and Exchange Commission
Washington, D.C. 20549

Of Counsel
PAUL GONSON
Solicitor

April 1991

TABLE OF CONTENTS

TABLE OF CONTENTS (CON'T) PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES (CON'T) PAGE

STATUTES, RULES AND REGULATIONS

LEGISLATIVE MATERIALS

MISCELLANEOUS

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1132

REGINALD H. HOWE,

Plaintiff-Appellant,

v.

GOLDCORP INVESTMENTS LTD., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

STATEMENT OF THE ISSUES PRESENTED

1. Whether the special venue provisions of the federal securities laws, which govern venue in this action, precluded the district court from dismissing the action on the ground of forum non conveniens.

2. Whether the district court, in dismissing this class action on the ground of forum non conveniens, abused its discretion

(a) in determining that, because a majority of the stock of the principal defendant Canadian company was held by Canadian residents, it need not consider the interests of the 1000 U.S. resident shareholders of record who hold 28% of the defendant's stock;

(b) in looking only to the public interests of Massachusetts where the case was filed, rather than to the interests of the United States in protecting the U.S. securities markets and investors by vigorous enforcement of U.S. securities laws; and

(c) in according undue weight to the interests of Ontario (the principal defendant's jurisdiction of incorporation) under the internal affairs doctrine, even though the action is essentially one for securities fraud under U.S. law and primarily seeks money damages.

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND SUMMARY OF ITS POSITION

This private action brought on behalf of a class of U.S. shareholders (as well as non-U.S. shareholders) alleges violations of the antifraud and other provisions of the federal securities laws by a Canadian issuer of securities. The Securities and Exchange Commission is responsible for the administration and enforcement of the federal securities laws, including the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. 78a, et seq., and the Investment Company Act of 1940 (the "Investment Company Act"), 15 U.S.C. 80a-1, et seq. Private actions under the federal securities laws serve as a necessary supplement to the Commission's own enforcement of these securities laws. See Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988); J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

In this action, the district court indisputably had subject matter and personal jurisdiction. Similarly, it was conceded that venue properly lay in the District Court of Massachusetts. Nevertheless, the district court dismissed the action on the ground of forum non conveniens and, in doing so, relegated U.S. shareholders to pursue their federal securities laws claims in a foreign court. In the Commission's view, the district court's decision should be reversed both as a matter of law and as an abuse of discretion.

Venue under the federal securities laws is governed by special venue provisions. In United States v. National City Lines, 334 U.S. 573 (1948), the Supreme Court held that the Clayton Act's special venue provision precluded dismissal on the ground of forum non conveniens because, in enacting the provision, Congress expressly intended to broaden and liberalize venue in antitrust actions. The Clayton Act's special venue provision is similar to those found in the securities laws, yet the district court did not even consider the relevance of National City Lines to this case.

The special venue provisions of the federal securities laws evidence the same legislative purpose as the venue provisions of the Clayton Act. Indeed, Congress modeled the venue provisions of the securities laws after the key venue provision in the Clayton Act. To the extent that the statutes are different, the venue provisions of the federal securities laws afford plaintiffs an even more liberal choice of venue. Moreover, Congress vested

federal courts with exclusive jurisdiction over claims arising under the Exchange Act, precluding litigation of federal securities claims in non-federal forums. This grant of exclusive jurisdiction makes application of the forum non conveniens doctrine particularly inappropriate in federal securities fraud cases.

Even should this Court not agree that the securities laws' venue provisions render the district court's decision erroneous as a matter of law, the Court should nevertheless reverse the district court's decision as an abuse of discretion. The district court, in balancing the private and public interests, failed to consider the interests of the more than 1000 U.S. shareholders in prosecuting claims that arise under U.S. law in a U.S. forum. Instead, the court attached significance to the greater number of Canadian shareholders. But since the claims of U.S. shareholders are clearly governed by the federal securities laws and the interests of U.S. shareholders in this respect may be different from Canadian shareholders, the court was obligated, before dismissing their claims on the grounds of forum non conveniens, to consider separately the interests of U.S. shareholders as to the federal securities claims.

The importance of U.S. shareholder interests in balancing the litigants' private interests is reinforced by consideration of the interests of the U.S. in affording U.S. shareholders an opportunity to assert their claims in a U.S. forum. The court, while noting Massachusetts' minimal interest in the litigation,

failed to consider the independent interests of the U.S. This error resulted from the district court's mistaken premise that Canadian law would govern this dispute because the defendant was a corporation formed under Ontario law. In fact, however, the principal claims on behalf of U.S. shareholders arise under U.S. federal securities laws and only the pendent claims raise issues of Ontario law. Moreover, a foreign issuer's jurisdiction of incorporation is entitled to little weight in a balance of public interest factors where, as here, the primary relief sought is money damages for securities fraud.

Application of the doctrine of forum non conveniens in federal securities laws actions against foreign issuers could impair the ability of U.S. shareholders to obtain relief under the federal securities laws and could, therefore, undermine the effectiveness of private actions in enforcing those laws. This result would be particularly troublesome in view of the increasing amount of cross-borders securities trading and the correspondingly increased likelihood that, if the district court decision is not overturned, defrauded U.S. investors will find it more difficult to bring actions against foreign issuers in U.S. courts even where the requirements of subject matter and personal jurisdiction clearly are satisfied. Moreover, since the same venue provisions govern enforcement actions brought by the Commission as well as actions brought by private plaintiffs, the outcome of this appeal could also affect the Commission's ability to enforce the federal securities laws.

STATEMENT OF THE CASE

A. The Facts

This action was brought by a U.S. citizen on behalf of a class of U.S. and Canadian shareholders of Goldcorp Investments Ltd., an Ontario corporation, against Goldcorp and other Canadian defendants. 1/ Goldcorp is in the business of investing shareholder capital "in a managed portfolio of gold bullion and gold mining investments." App. I 160, App. I 10 ¶ 2. 2/ The plaintiff contends that Goldcorp operated as a closed-end investment company as defined under U.S. law. See App. I 10 ¶ 2.

Goldcorp's shares are listed on the Toronto Stock Exchange and the Montreal Stock Exchange. See App. I 13 ¶ 11. 3/ The shares are not listed for trading in the United States but, according to the plaintiff, in excess of 1000 U.S. residents hold a total of 4.8 million, or approximately 28 percent, of

---

1/ Besides Goldcorp, there are 18 defendants consisting of five Ontario corporations, one Ontario partnership and twelve Canadian citizens. These defendants are subsidiaries and affiliates of Goldcorp, its investment advisor, outside counsel, and various natural persons (officers, directors and partners) affiliated with those entities. See App. I 10-12 ¶¶ 2-8.

2/ "App. ___" refers to Plaintiff-Appellant's Appendix; "Br.(A) ___" refers to the Addendum to Plaintiff-Appellant's Brief.

3/ Goldcorp has two classes of equity securities: common shares and Class A shares. There are only 500 common shares, all of which are owned by Goldcorp's investment advisor. See App. I 13 ¶ 10. The Class A shares are publicly traded and have only limited voting power. See App. I 13 ¶ 10; App. I 15 ¶ 15. Reference to Goldcorp shares in this brief are to Class A shares.

Goldcorp's shares. See App. I 10 ¶ 2, App. I 13 ¶ 10. 4/ Goldcorp's records indicate that, at the time of the events at issue, a significant number of the recordholders of its public shares were located in the U.S., and the company regularly sent proxy materials and periodic financial reports to U.S. recordholders. See App. I 128-30 ¶¶ 3-5, App. I 13 ¶ 11.

Until 1987, Goldcorp's articles of incorporation contained several restrictions on the manner in which its capital could be invested, including restrictions relating to investment diversification and the use of margin. See App. I 15-16 ¶ 16. In January 1987, Goldcorp sought shareholder approval to amend its charter to remove certain of these restrictions. Specifically, Goldcorp sought authorization: (1) to own more than ten percent of any class of securities of a single issuer; (2) to invest more than ten percent of its assets in the securities of a single issuer; and (3) to use borrowed funds to purchase securities. See App. I 18-19 ¶ 21.

Proxy solicitation materials were sent to the plaintiff -- a Goldcorp shareholder -- in the U.S. (and presumably to all other recordholders, in the U.S. and elsewhere) and a meeting of

---

4/ The plaintiff estimates that there are approximately 2500 U.S. shareholders, based on 1000 holders of record. See App. I 128-29 ¶31. The complaint does not contain allegations of an offering of securities in the U.S. by the issuer, its underwriter or the issuer's affiliates. The complaint appears to allege that U.S. investors purchased their shares in the secondary market. See App. I 13 ¶ 11.

shareholders was held at which the amendments were approved. See App. I 19 ¶ 22. Plaintiff alleges that the materials used to solicit his vote and those of other shareholders were materially misleading because the materials failed to disclose that, as a result of the amendments to the corporate charter, the company would be able: (1) to invest over 50% of its net assets in a single gold mining company, (2) to transform itself from a diversified gold investment company into a parent holding company of operating companies, and (3) to borrow in excess of its ability to service the new debt (in acquiring the operating companies) from Goldcorp's current income. See App. I 19-20 ¶ 24. In addition, plaintiff alleges that Goldcorp failed to apprise shareholders that the effect of removing the investment restrictions would "materially increas[e] the risk of an investment in [the publicly traded] shares." App. I 19-21 ¶¶ 22-25.

Subsequent to the 1987 shareholder meeting, plaintiff acquired additional shares of Goldcorp stock. See App. I 20-21 ¶ 25, App. I 23 ¶ 31. In 1989, Goldcorp commenced tender offers for controlling interests in the defendants Dickenson Mines Ltd. and Kam-Kotia Mines Ltd. See App. I 26 ¶ 38. The two companies, based in Toronto, were publicly-traded Ontario corporations with gold mining operations in Canada and the U.S. 5/ See App. I 11

5/ Since Goldcorp's tender offers for the securities of Dickenson and Kam-Kotia included United States recordholders, Goldcorp filed with the Securities and

(continued...)

¶ 5. Upon consummation of the tender offers, almost 60 percent of Goldcorp's net equity was invested in controlling ownership positions of the two gold mining companies. See App. I 26 ¶ 38. Following completion of the offers, Goldcorp's net asset value declined steeply and, according to the plaintiff, the discount in its trading price relative to net asset value increased. See App. I 33 ¶¶ 54-55.

B. District Court Proceedings

1. The Complaint

The plaintiff, Reginald Howe, a resident of Massachusetts, filed this action in the U.S. District Court for the District of Massachusetts. See App. I 9-10 ¶ 1. He alleges that Goldcorp and the other defendants violated the antifraud provisions of the federal securities laws, principally in connection with the 1987 proxy solicitation and the company's change in investment objectives. See App. I 34-37 (Count 1), 37-38 (Count 2). 6/ He also alleges that Goldcorp was required, pursuant to Section 7(d) of the Investment Company Act, to register with the Securities

---

5/(...continued)
Exchange Commission a Schedule 14D-1 for each offering, pursuant to Section 14(d) of the Exchange Act and Rule 14d-3 thereunder. See App. I 14 ¶¶ 12-13.

6/ In addition, the defendant alleges common law claims for deceit and misrepresentation (see App. I 38-39 (Count 3), and breach of fiduciary duty (see App. I 39-41 (Count 4)), as well as claims under the Racketeering Influenced and Corrupt Organizations Act ("RICO") (see App. I 45-47 (Count 9)), Massachusetts consumer protection law (see App. I 47 (Count 10)), and the Ontario Business Corporation Act (see App. I 48 (Count 11)).

and Exchange Commission and that Goldcorp violated that Act by failing to comply with the Act's substantive provisions. See App. I 48-53 (Count 12). 7/

The action was brought on behalf of a putative class consisting of U.S. and Canadian shareholders of Goldcorp. See App. I 53-55 ¶¶ 114-17. The principal relief sought is monetary damages. See App. I 54-55. Venue in the District Court of Massachusetts was asserted under Section 27 of the Exchange Act, 15 U.S.C. 78aa, and Section 44 of the Investment Company Act, 15 U.S.C. 80a-43. See App. I 12 ¶ 9; App. I 49 ¶ 103.

2. The Magistrate's Recommendation and Findings

The defendants moved to dismiss the Amended Complaint on grounds of forum non conveniens. The motion was initially referred to a magistrate who recommended to the district court that the motion be granted and issued findings in support of her recommendation. In determining whether to recommend that the district court exercise its discretion to dismiss the action, the

---

7/ The substance of plaintiff's Investment Company Act claims are set forth with greater particularity in his motion for partial summary judgment. In addition to arguing that Goldcorp violated that Act by failing to register as an investment company (see App. I 149-50 ¶ 45), the plaintiff contended that violations resulted from the composition of Goldcorp's board (see App. I 152-54 ¶¶ 51-53), its issuance of the warrants (see App. I 147-49 ¶ 40-44), the change in its investment policy (see App. I 135-46 ¶¶ 16-39; App. I 151 ¶ 48), its use of margin to purchase securities (see App. I 154-55 ¶ 55), and certain arrangements and transactions between Goldcorp and its investment advisor (see App. I 151-52 ¶ 48). In addition, the plaintiff alleged breaches of fiduciary duty under the Act on the part of Goldcorp's officers, directors and its investment advisor (see App. I 151-52 ¶ 48).

magistrate, purporting to adhere to the balancing test prescribed in Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), and Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), considered two issues: (i) whether Canada offered an adequate alternative forum and (ii) whether, based on a balancing of private interest factors pertaining to the convenience of the litigants and public interest factors pertaining to the convenience of the forum, the interests favoring the Canadian forum outweighed those of the Massachusetts forum. See Br.(A) 61. The magistrate's conclusion that Canada offered an adequate alternative forum rested largely on the affidavits of defendants' experts, which averred that Canadian law provided rights and remedies generally analogous to the statutory and common law U.S. provisions invoked by plaintiff. See Br.(A) 63. The magistrate acknowledged, however, the existence of "dissimilarities" between Canadian and U.S. securities laws. See Br.(A) 61-63.

As to the private interests of the litigants, the magistrate regarded the relevant interests as being those of the entire proposed plaintiff class, that is, Canadian as well as U.S. recordholders. See Br.(A) 64. 8/ Since, as the magistrate noted, a majority of Goldcorp's shareholders were Canadian, and the named plaintiff's interests in litigating the classwide claims in Massachusetts constituted the interests of only a

---

8/ At the time of the motion's consideration, the district court had not ruled on any issues relating to class certification.

single class member, she determined that the named plaintiff's choice of a Massachusetts forum was entitled to little weight. In contrast, the magistrate found that allowing the case to proceed in Massachusetts would "substantially inconvenience and disadvantage" the Canadian defendants since all relevant documents and virtually all of the witnesses are located in Canada, including non-party witnesses whose attendance at trial cannot be compelled. See Br.(A) 63-64.

The magistrate also concluded that the public interest factors favored a Canadian forum because the action raised issues regarding "the internal workings of Canadian corporations, the trading of stock on Canadian exchanges and the takeover of Canadian corporations by other Canadian companies." Br.(A) 65. In contrast, the magistrate viewed "Massachusetts[']s interest in the dispute" as "tangential" since the "events at issue occurred in Canada, and Canadian laws regulate these alleged events." Br.(A) 65.

3. The District Court's Decision

After considering the plaintiff's objections to the magistrate's report, the district court adopted the magistrate's findings and recommendation. See Br.(A) 52. The district court separately considered an issue not considered by the magistrate: "whether the doctrine of forum non conveniens is made inapplicable by the 'special venue' provision of the Exchange Act." Br.(A) 54. The court made no mention of Investment Company Act claims or of that Act's special venue provision.

The court disregarded the significance of a special venue provision as a general matter, noting that several courts of appeals had concluded that the doctrine of forum non conveniens was applicable to claims under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1961, et seq., notwithstanding a special venue provision in that statute. See Br.(A) 55-56. In the court's view, in order to establish that a special venue provision was intended to preempt use of the forum non conveniens doctrine, "there [had to] be some indication by Congress, whether on the face of the statute itself, in the legislative history, or via some other reliable source, to show that it intended to make the Exchange Act immune from the effect of forum non conveniens." Br.(A) 58. In the case of the Exchange Act, the court concluded that there was no express evidence of legislative intent. See Br.(A) 55-58.

ARGUMENT

For purposes of this appeal, the factual allegations of the Amended Complaint are assumed to be true. 9/ Subject matter jurisdiction under the federal securities law and venue in the District of Massachusetts were not disputed. 10/

9/ Unlike a motion under Fed. R. Civ. P. 12(b)(6), a court in considering a motion to dismiss for forum non conveniens under Fed. R. Civ. P. 12(b)(3) is not limited to the allegations of the complaint. See generally Wright & Miller, Federal Practice and Procedure § 1352 (2d ed. 1990). For purposes of this motion, however, the district court did not consider (nor did the defendants dispute) the merits of plaintiff's factual allegations, although it did consider extrinsic evidence relating to the convenience of the parties. "Because the district court did not reach the merits" of the factual allegations, this court must "accept as true the well-pleaded factual averments contained in the [complaint]." Ochoa Realty Corp. v. Faria, 815 F.2d 812, 813 (1st Cir. 1987).

10/ Indeed, as the Supreme Court noted in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947), "the doctrine of forum non conveniens can never apply if there is an absence of jurisdiction or mistake of venue." In this case, subject matter jurisdiction was based on the direct and foreseeable effects of Goldcorp sending materials, which allegedly contained fraudulent misstatements, to the plaintiff and other U.S. shareholders located in the United States and, for purposes of venue, to plaintiff's home in Massachusetts. See Consolidated Gold Fields, PLC v. Minorco, S.A., 871 F.2d 252, 261-63, as modified, 890 F.2d 569 (2d Cir. 1989); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 990-92 (2d Cir.), cert. denied, 423 U.S. 1018 (1975); Schoenbaum v. Firstbrook, 405 F.2d 200, 206-09, rev'd on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969).

I. THE SPECIAL VENUE PROVISIONS OF THE FEDERAL SECURITIES LAWS PRECLUDED DISMISSAL IN THIS CASE ON THE GROUND OF FORUM NON CONVENIENS.

A. Under National City Lines, the Forum Non Conveniens Doctrine Cannot Be Applied to Actions Brought Under the Federal Securities Laws, Since Those Laws Contain Venue Provisions Evidencing a Legislative Purpose Which Is Inconsistent With Application of the Doctrine.

We submit that the special venue provisions of the federal securities laws preclude as a matter of law the application of the doctrine of forum non conveniens. To the best of our knowledge, this issue has not previously been presented directly to a court of appeals.

The district court, in dismissing this action, concluded that the doctrine of forum non conveniens did apply. The court, however, failed to note the Supreme Court's decision in United States v. National City Lines, Inc., 334 U.S. 573 (1948), where the Court held that the doctrine of forum non conveniens did not apply to actions under the Clayton Act because of that Act's special venue provisions. Under National City Lines, courts must determine "whether the legislative purpose [underlying a special venue provision] and the effect of the language used to achieve it" were intended to divest courts of the discretionary power to dismiss on the ground of forum non conveniens. Id. at 597. As the Court explained, for Congress to "have broadened the choice of venue for the reasons which brought about that action, only to have it narrowed again by application of the vague and discretionary power comprehended by forum non conveniens would have been incongruous, to say the least." Id. at 581.

Accordingly, "whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among [venues] which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine [of forum non conveniens] can have no effect." Id. at 596-97. 11/

The language and legislative history of the federal securities laws' venue provisions evidence a purpose no less inconsistent with the doctrine of forum non conveniens than the venue provisions of the Clayton Act. The venue (and service of process) provisions of the Securities Act of 1933 (the "Securities Act") and the Exchange Act have long been regarded as having been modeled on the specific provision at issue in National City Lines. See Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1340 n.10 (2d Cir. 1972). Indeed, the federal securities laws' venue provisions are, if anything, more permissive. 12/

11/ The Supreme Court had previously held that a state court could not enjoin a resident of the state from prosecuting a cause of action under the Federal Employers Liability Act ("FELA"), 45 U.S.C. 51 et seq., in a federal court of another state, even though prosecution in that district might be inequitable, vexatious and harassing to the defendant, because FELA's special venue provision was intended to give plaintiff a wide choice of forums. See Baltimore and Ohio R.R. Co. v. Kepner, 314 U.S. 44 (1941).

12/ Section 12 of the Clayton Act, 15 U.S.C. 22, provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district

(continued...)

The legislative history of the federal securities laws support the conclusion that the forum non conveniens doctrine has been displaced in actions arising under those laws. In its deliberations on the Securities Act, Congress rejected venue requirements that were more restrictive. 13/ The Exchange Act,

---

12/(...continued)
whereof it is an inhabitant, but also in any district wherein it may be found or transacts business * * *.

Section 22 of the Securities Act, 15 U.S.C. 77v, provides:

> Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein * * *.

Section 27 of the Exchange Act, 15 U.S.C. 78aa, provides:

> Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business * * *.

13/ As originally proposed, the House bill would have limited venue in actions brought to enforce civil liabilities to the district in which the defendant "is an inhabitant or has its principal place of business, or in the district where the sale took place." See H.R. 5480 (Section 21(a)), 73d Cong., 1st Sess. (1933) (as reported). In contrast, the Senate's bill provided for venue in districts where the defendant "is an inhabitant, but also in any district wherein such corporation or person may be found or transacts business." See S. 875 (Section 9) 73d Cong., 1st Sess. (1933) (as reported). In conference, it was the Senate's views that prevailed, reflecting Congress's legislative judgment that the broader venue provision was more suited to the Act's remedial purposes. See H.R. Rep. No. 152, 73d Cong., 1st Sess. 27 (1933) (Conference Report).

enacted one year later, went even further and significantly enlarged venue for Exchange Act claims by permitting suit in any district "wherein any act or transaction constituting the violation occurred," rather than, as in the Securities Act, where "the offer or sale took place." 14/

In addition, the special venue provision in the Exchange Act must be read in light of that Act's jurisdictional provision which vests federal courts with exclusive jurisdiction over

---

14/ In recognition of the greater breadth of the Exchange Act's venue provision, courts have held that Securities Act claims can be brought in districts where venue is lacking if pendent to a venue-conferring Exchange Act claim. See, e.g., Martin v. Steubner, 485 F. Supp. 88, 90 (S.D. Ohio 1979), aff'd, 652 F.2d 652 (6th Cir. 1981), cert. denied, 454 U.S. 1148 (1982); Puma v. Marriott, 294 F. Supp. 1116, 1121 (D. Del. 1969).

The venue provision governing actions brought under the Investment Company Act -- Section 44 -- is modeled after the venue provision in the Exchange Act. It provides:

> Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. A criminal proceeding based upon a violation of section 34, or upon a failure to file a report or other document required to be filed under this title, may be brought in the district wherein the defendant is an inhabitant or maintains his principal office or place of business. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business * * *.

15 U.S.C. 80a-43.

claims arising under the Act. In other contexts, the grant of exclusive jurisdiction has been construed as strong evidence of Congress' intent to prohibit federal courts from dismissing federal claims for purposes of enabling adjudication of those claims in a non-federal forum. 15/ The legislative judgment disfavoring non-federal forums which underlies a grant of exclusive jurisdiction is even more applicable when claims subject to such a grant are dismissed to bring about adjudication of the claims in a foreign forum.

We have found two reported decisions that have examined the forum non conveniens question in light of the venue provisions of the federal securities laws. In each of those cases, the court refused to dismiss the federal securities law actions in view of

---

15/ For example, in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817-19 (1976), the Supreme Court recognized a limited doctrine of abstention, closely analogous to the forum non conveniens doctrine, which permits federal courts in extraordinary circumstances to dismiss federal suits in the interests of "wise judicial administration" where there is parallel state litigation involving the same facts and subject matter. However, such abstention is clearly improper when "the action is brought to obtain relief for alleged violations of the Securities Exchange Act of 1934 * * * [,] an action exclusively within the jurisdiction of the federal courts." Finkielstain v. Seidel, 857 F.2d 893, 896 (2d Cir. 1988). See also, e.g., Andrea Theatres, Inc. v. Theatre Confections, Inc., 787 F.2d 59, 62 (2d Cir. 1986) (antitrust laws); Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 821 (9th Cir.) (antitrust laws), cert. denied, 456 U.S. 1011 (1982). Cf. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964) (noting that to compel litigant who has properly invoked federal jurisdiction to accept a state court's determination of his federal claims "would be at war with the unqualified terms in which Congress * * * has conferred specific categories of jurisdiction upon the federal courts").

the legislative purpose underlying the venue provisions. See Pioneer Properties, Inc. v. Martin, 557 F. Supp. 1354, 1362 (D. Kan. 1983), appeal dismissed, 776 F.2d 888 (10th Cir. 1985) (holding that the securities laws' venue provisions evidence a "federal legislative intent to confer upon a plaintiff broad power over choice of forum," thereby precluding the doctrine's application in such cases); SEC v. Wimer, 75 F. Supp. 955, 963 (W.D. Pa. 1948) ("[I]t was the intention of Congress to have the special venue provisions of the [Securities] Act free from the application of the doctrine of forum non conveniens.").

Viewing the special venue provisions as displacing forum non conveniens in federal securities laws actions also finds support in numerous court decisions which recognize that the provisions were intended to enhance the ability of potential plaintiffs to bring actions against securities laws violators. 16/ "Without question, the intent of the venue * * * provisions of the securities laws is to grant potential plaintiffs liberal choice in their selection of a forum." Leroy v. Great Western United Corp., 443 U.S. 173, 188 (1979) (White, J. dissenting) (quoting Ritter v. Zuspan, 451 F. Supp. 926, 928 (E.D. Mich. 1978)). 17/

16/ In addition, the Supreme Court, in construing the federal securities laws, has stated that the laws must be read "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." Herman & MacLean v. Huddleston, 459 U.S. 375, 386-87 (1983) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963)).

17/ The majority opinion, commenting on Justice White's reliance on Ritter, acknowledged the "breadth" of the Exchange Act's

(continued...)

Accord SIPC v. Vigman, 764 F.2d 1309, 1317 (9th Cir. 1985). 18/ In construing one aspect of the Exchange Act's venue provision, the Supreme Court confirmed its overarching remedial purpose, noting that the provision "was intended to facilitate [the] goal [of assuring that dealing in securities is fair and without undue preferences or advantages among investors] by enabling suits to enforce rights created by the Act to be brought where a defendant could be found." Radzanower v. Touche Ross & Co., 426 U.S. 148, 156 (1976).

B. The District Court's Decision Is Inconsistent With National City Lines.

The district court concluded that a special venue provision did not preclude application of the doctrine of forum non conveniens unless accompanied by "some indication" of congressional intent to make venue under the federal securities law "immune from the doctrine of forum non conveniens" -- "whether on the face of the statute itself, in the legislative history, or via some other reliable source." Br.(A) 57-88. In effect, the court required that Congress manifest an express

---

17/(...continued)
venue provision. See Leroy v. Great Western United Corp., 443 U.S. at 182-83 n.14.

18/ See also Zorn v. Anderson, 263 F. Supp. 745, 749 (S.D.N.Y. 1966)(action alleging violations of the securities laws, including the Investment Company Act)("The broad venue statutes in the various Acts regulating securities are designed to allow the alleged defrauded investor a wide choice of forum."); Fistel v. Beaver Trust Co., 94 F. Supp. 974, 976 (S.D.N.Y. 1950)(one of the purposes of Section 27 of the Exchange Act was "to do away with limitations on venue * * *.")

intent to prohibit application of the doctrine of forum non conveniens. The court failed to mention the Supreme Court's decision in National City Lines, but instead based its approach on Ferguson v. Ford Motor Co., 77 F. Supp. 425 (S.D.N.Y. 1948), a case decided prior to the Supreme Court's decision in National City Lines. 19/ The district court's "express intent" requirement cannot be reconciled with the Supreme Court's holding in National City Lines.

Neither the statutory language nor the legislative history of the Clayton Act make any reference to the doctrine of forum non conveniens. Nevertheless, the Court in National City Lines concluded that the doctrine's application was precluded by the purposes of the Clayton Act and Congress's express intent to enlarge venue for private plaintiffs under that Act. 20/

19/ We note that the district court in Ferguson concluded, unlike the district court here, that the special venue provision in question (in that case, Section 12 of the Clayton Act) did preclude application of the doctrine of forum non conveniens, even though the legislative history of the provision did not expressly refer to the doctrine.

20/ In National City Lines, the Court concluded that the purpose of the venue provision in question

> was to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of [the statute's overriding] policy. Insofar as convenience in bringing suit and conducting trial was involved, the purpose was to make these less inconvenient for plaintiffs or * * * to remove the "often * * * insuperable obstacle" thrown in their way by the existing venue restrictions.

(continued...)

Likewise, Congress's intent "to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations" (334 U.S. at 581) of the securities laws, coupled with the provisions' legislative history and the way courts have construed those provisions, make those venue provisions "altogether inconsistent" (id. at 580) with application of the doctrine of forum non conveniens.

C. Case Law Which Involves Different Federal Statutes or Which Fails to Apply National City Lines Does Not Support the District Court's Decision.

The district court relied on decisions of courts of appeals holding that RICO's special venue provision does not preclude dismissal on the ground of forum non conveniens. 21/ There are, however, significant differences between the RICO statute and the federal securities laws which make the holdings in those cases inapplicable here. The RICO venue provision is not as broad as the venue provisions of the Exchange and Investment Company Acts. 22/

20/(...continued)
334 U.S. at 581. Moreover, the Court emphasized that, preceding enactment of the provision, legislative amendments adopted by Congress "[were] designed to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a more effective, because more convenient, enforcement of" the Act's prohibitions. 334 U.S. at 586.

21/ E.g., Kempe v. Ocean Drilling & Exploration Co., 876 F.2d 1138, 1144-45 (5th Cir.), cert. denied, 110 S. Ct. 279 (1989); Transunion Corp. v. PepsiCo, Inc., 811 F.2d 127, 129 (2d Cir. 1987).

22/ The venue provision for RICO provides:

> Any civil action or proceeding under this chapter against any person may be instituted in the district (continued...)

Moreover, private securities law enforcement, like private antitrust enforcement, serves a different objective than civil actions under RICO. Private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'" Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)). 23/ In contrast, the "private attorney general role for the typical RICO plaintiff is simply less plausible * * *." Shearson/ American Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987). In addition, unlike the Exchange Act, Congress did not vest federal courts with exclusive jurisdiction over RICO claims. See Tafflin v. Levitt, 110 S. Ct. 792, 795-99 (1990).

There is also no basis for concluding, as suggested by the Second Circuit's discussion of RICO's venue provision in Transunion Corp. v. PepsiCo, Inc., 811 F.2d 127, 130 (2d Cir.

22/(...continued)
court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

18 U.S.C. 1965(a). Unlike the RICO venue provision, the Investment Company and Exchange Acts' venue provisions enable a plaintiff to bring an action in the district "wherein any act or transaction constituting the violation occurred."

23/ See also Globus v. Law Research Service, Inc., 418 F.2d 1276, 1288 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970) ("Civil liability under section 11 [of the Securities Act] and similar provisions was designed not so much to compensate the defrauded purchaser as to promote enforcement of the Act and to deter negligence by providing a penalty for those who fail in their duties.")

1987), that National City Lines has been effectively overruled by Congress's subsequent enactment of 28 U.S.C. 1404(a). Indeed, the Second Circuit's views have been expressly repudiated by the Fifth Circuit. See Kempe v. Ocean Drilling & Exploration Co., 876 F.2d at 1144. The transfer statute authorizes a district court to transfer civil actions to other United States district courts "[f]or the convenience of parties and witnesses, [and] in the interest of justice," where the action could have initially been brought in the transferee district court. Since, by its terms, Section 1404(a) applies only where transfer is sought to another United States district court, it has no bearing on cases in which a defendant seeks to compel the plaintiff to bring the action in a foreign forum. 24/ Moreover, the Supreme Court, in holding that the transfer statute superseded the Clayton Act's special venue statute in connection with the same National City Lines antitrust litigation, never suggested that the transfer statute would alter the rule applied in cases where a statutory transfer was not possible. United States v. National City Lines,

---

24/ See Industrial Investment Development Corp. v. Mitsui & Co., Ltd., 671 F.2d 876, 890 n.18 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007 (1983); Pioneer Properties, Inc. v. Martin, 557 F. Supp. 1354, 1362 (D. Kan. 1983); see generally Wright, Miller & Cooper, Federal Practice and Procedure §§ 1352 (2d ed. 1990) ("[T]he enactment of Section 1404(a) has not completely replaced the former forum non conveniens practice. A federal court will resort to * * * forum non conveniens in those instances in which the alternative forum is * * * the court of a foreign country."); id. at § 3828.

337 U.S. 78 (1949). 25/

Admittedly, there are district court decisions and dicta in court of appeals decisions which assume that the doctrine of forum non conveniens is available in federal securities law cases. However, like the district court here, those courts failed even to mention National City Lines or to consider the significance of the federal securities laws' special venue provisions. 26/ One such case is Schoenbaum v. Firstbrook, 405

25/ Defendants suggested in the district court that the Supreme Court's decision in Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) -- a diversity case which, as discussed below, addresses the circumstances under which a court should exercise its discretion to dismiss on the ground of forum non conveniens -- overruled National City Lines sub silentio. See App. I 243-44. Piper Aircraft, however, did not purport to address the significance of special venue statutes. Moreover, it marked an extension of the Court's private and public interest analysis originally articulated in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), a case in which the Court expressly recognized that a "plaintiff's choice of a forum cannot be defeated on the basis of forum non conveniens," notwithstanding the balance of public and private interest, where a "special venue act" appears to preclude such a result. Gulf Oil Corp., 330 U.S. at 505.

26/ Only two reported district court decisions have actually dismissed federal securities law actions on forum non conveniens grounds (and one of those technically dismissed the action on other grounds). The first -- Diatronics, Inc. v. Elbit Computers, Ltd., 649 F. Supp. 122 (S.D.N.Y. 1986), aff'd (mem.), 812 F.2d 712 (2d Cir. 1987) -- is clearly distinguishable because in that case the parties were bound by a forum selection clause. The district court in DeYoung v. Beddome, 707 F. Supp. 132 (S.D.N.Y. 1989), dismissed a federal securities law action on comity grounds (see below, note 29), but also suggested that dismissal might be justified on forum non conveniens grounds. The decision in that case is flawed by the court's failure to distinguish adequately between the factors relevant to a comity analysis and the factors relevant to a forum non conveniens analysis.

F.2d 200 (2d Cir.), rev'd on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969). Dictum in that case suggests that forum non conveniens is applicable to federal securities laws claims where "the wrong alleged also constitutes the basis for a cause of action under foreign law." Id. at 209 n.5. But that suggestion was based entirely on another case, Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir.), cert. denied, 352 U.S. 871 (1956), in which venue as to the relevant claim did not rest on a special venue provision. 27/

* * *

Because the manifest legislative purpose of the federal securities laws' venue provisions cannot be reconciled with dismissal on the ground of forum non conveniens, the doctrine of forum non conveniens -- rather than Congress's legislative purpose -- must give way. Accordingly, the district court, in

---

27/ Other cases also provide no support for the district court's position. In Fustok v. Banque Populaire Suisse, 546 F. Supp. 506 (S.D.N.Y. 1982), the court reasoned in reliance on the dictum in Schoenbaum that the doctrine of forum non conveniens was applicable to claims brought under the Commodity Exchange Act, 7 U.S.C. 1, et seq. The court did not mention the federal securities laws' venue provisions and, indeed, emphasized that the Commodity Exchange Act lacked such a provision. The court in Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1344 (2d Cir. 1972) assumed, as did the court in Schoenbaum, that the doctrine of forum non conveniens applied to federal securities laws claims, without considering the effect of those laws' venue provisions.

failing to give effect to the securities laws' venue provisions and dismissing this action, erred as a matter of law. 28/

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING THIS FEDERAL SECURITIES LAWS CLASS ACTION ON THE GROUND OF FORUM NON CONVENIENS, WHERE U.S. SHAREHOLDERS FORM A DISTINCT SUBCLASS AND MONEY DAMAGES ARE SOUGHT.

Even if the special venue provisions of the federal securities laws do not prohibit application of the doctrine of forum non conveniens in this case, the district court decision dismissing this action on the ground of forum non conveniens constituted an abuse of discretion. Although the district

---

28/ This is not to say that a district court could not dismiss a federal securities laws action where extraordinary circumstances militate in favor of deferring to a foreign forum or judgment on comity grounds, a concept much narrower than forum non conveniens. See, e.g., Kohn v. American Metal Climax, Inc., 458 F.2d 255, 269-70 (3d Cir.), cert. denied, 409 U.S. 874 (1972). Comity implicates concerns going to the jurisdiction of the court. See, e.g., Timberline Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 608-15 (9th Cir. 1976); Montreal Trading, Ltd. v. Amax, Inc., 661 F.2d 864, 869 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294-98 (3d Cir. 1979); see also 595 F.2d at 1301-02 n.9 (Adams J. concurring); see generally Restatement (Third) Foreign Relations Law §403 & comment a (1986) (e.g., "(f) the extent to which regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state."). In contrast, forum non conveniens "deals with the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Colum. L. Rev. 1, 1 (1929). Because this case does not implicate the national policies or affairs of a foreign government, a judgment of a foreign court, or entail conflicting regulation by a foreign sovereign, this case does not appear to raise any considerations that would arguably warrant dismissal on comity grounds.

court's determination is entitled to "substantial deference," see Piper Aircraft Co. v. Reyno, 454 U.S. at 257, that standard, of course, does not insulate a district court's decision from appellate review. See, e.g., Tramp Oil and Marine Ltd. v. M/V Mermaid I, 743 F.2d 48 (1st Cir. 1984) (district court abused its discretion in dismissing action on ground of forum non conveniens); Lony v. E.I. Du Pont de Nemours & Co., 886 F.2d 628 (3d Cir. 1989) (same); Manu International, S.A. v. Avon Products, Inc., 641 F.2d 62 (2d Cir. 1981) (same).

Here, while the district court (and the magistrate whose recommendation formed the basis for the district court's determination) applied the balancing test in Piper Aircraft, supra, and Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), it erred in two fundamental respects. First, the court treated this action as one involving essentially a Canadian class of shareholders (because a majority of Goldcorp's shareholders appear to be Canadian) without examining whether it was also appropriate to dismiss on forum non conveniens grounds the claims of a distinct and identifiable subclass of shareholders consisting entirely of U.S. residents. Second, the court assumed that the lawsuit itself was essentially a Canadian dispute because it involved a Canadian corporation. Not only was that

assumption incorrect, it ignored the federal securities law claims on which jurisdiction and venue are based. 29/

29/ The court probably erred in another respect as well. As a threshold matter, the party seeking dismissal must demonstrate that there is another forum that is "adequate," that is, one "where the plaintiff can litigate essentially the same claim[s]." Tramp Oil and Marine Ltd. v. M/V Mermaid I, 743 F.2d at 50-51 & n.2; accord Piper Aircraft, 454 U.S. at 254 n.22. An alternative forum is "clearly unsatisfactory" when it "does not permit litigation of the subject matter of the dispute." Piper Aircraft, 454 U.S. at 247, 254 n.22.

The magistrate (whose findings were adopted by the district court) concluded that "Canadian law provides rights and remedies generally analogous to the statutory and common law provisions upon which the plaintiff rests his amended complaint" and, therefore, offered an adequate alternative forum for plaintiff's claims. See Br.(A) 62-63. The court based this conclusion on affidavits of experts submitted by the defendants. In fact, however, those affidavits are limited to the plaintiff's claims of misrepresentation and do not make a prima facie showing that U.S. shareholders will enjoy rights and remedies under Canadian law comparable to the rights and remedies that they are afforded under the Investment Company Act. Canada does not have a statute which regulates the structure and operation of closed-end investment companies. Moreover, under Canadian conflicts of law principles, Canadian courts are unlikely to apply provisions of the Investment Company Act which reflect U.S. regulatory policies regarding the capital structure and diversification of investment portfolios of closed-end investment companies because Ontario does not have a comparable law. See McIntyre Porcupine Mines Ltd. v. Hammond, 31 O.R.2d 452 (Ontario High Court of Justice 1975) (declining to give extraterritorial effect to Section 16(b) of the Exchange Act in action against officer of Canadian issuer which was a registered company pursuant to Section 12 of that Act); J. Castel, Canadian Conflict of Laws 152-53 (1986).

As matters now stand, however, plaintiff has not adequately alleged a claim under the Investment Company Act. Section 7(d) of that Act requires foreign investment companies to register under the Act if the foreign company uses jurisdictional means, directly or indirectly, to offer for sale, sell, or deliver after sale, any security of which

(continued...)

A. The District Court Ignored Interests of the U.S. Class Shareholders in Prosecuting This Action in a U.S. Forum

A defendant may overcome a plaintiff's choice of forum "only when the private and public interest factors clearly point towards trial in the alternative forum." Piper Aircraft, 454 U.S. at 255; see also Gilbert, 330 U.S. at 508 ("[A] plaintiff's choice of forum should rarely be disturbed."). Lony v. E.I. Du Pont de Nemours & Co., 886 F.2d at 633. Plaintiff's choice of forum is entitled to even greater deference "when the plaintiff has chosen [his] home forum." See Piper Aircraft, 454 U.S. at 255. To overcome this deference, defendant must make a clear showing of facts which "establish * * * oppressiveness and vexation to [the] defendant * * * out of all proportion to plaintiff's convenience.'" Piper Aircraft, 454 U.S. at 241 (citing Koster v. (American) Lumbermens Mutual Casualty Co., 330 U.S. 518, 524 (1947)).

The magistrate's findings (adopted by the district court) suggest that the plaintiff's choice of forum was entitled to less deference because he sued on behalf of a class, a majority of

---

29/(...continued)
such company is an issue, "in connection with a public offering," in the U.S. As noted (see supra note 4), the complaint does not contain allegations of an offering in the U.S. The district court did not address this issue and we do not believe it is necessary for this Court to decide the merits of the Investment Company Act claim in order to resolve the forum non conveniens issue. If, however, this Court believes resolution of this issue is necessary, we urge that the Court remand the proceeding to the district court to provide the plaintiff with an opportunity to amend his complaint to satisfy, if he can, Section 7(d)'s "offering" requirement.

whose members appeared to be Canadian investors. See Br.(A) 65. Although the law is unsettled as to how much weight a putative class representative's choice of forum is entitled, 30/ the district court nonetheless erred in failing to consider the interests of the putative U.S. class members. 31/ The legal interests of the U.S. shareholders, as to the claims arising under the federal securities laws, are sufficiently distinct from those of Canadian shareholders as to require the court to treat Canadian and U.S. investors as separate classes or distinct subclasses. See Bersch v. Drexel Firestone, Inc., 519 F.2d 974

30/ Compare Williams v. Green Bay & Western Railroad, 326 U.S. 549 (1946)(deferring to named plaintiff's choice of forum in class action seeking money damages) and Koster v. (American) Lumbermens Mutual Casualty Co., 330 U.S. 518, 525 (1947) (plaintiff's choice of forum entitled to less deference in a derivative action where plaintiff's presence at trial is unnecessary).

31/ Courts consider factors analogous to those analyzed in the forum non conveniens context in determining whether an action should be transferred under 28 U.S.C. § 1404(a). See Supco Automotive Parts, Inc. v. Triangle Auto Spring Co., 538 F. Supp. 1187, 1190-91 (E.D. Pa. 1982). In that context, courts have noted that the interests of potential class members must be considered when determining the weight to be given to a putative class representative's choice of forum. See Harris v. American Investment Company, 333 F. Supp. 325, 326-27 (E.D. Pa. 1971) (considering the inconvenience to other potential class plaintiffs by the putative class representative's choice of forum); Impervious Paint Industries, Ltd. v. Ashland Oil, Inc., 444 F. Supp. 465, 467-68 (E.D. Pa. 1978) (noting that plaintiff's choice of forum should be considered in the context of the interests of the potential class members located throughout the country). In the forum non conveniens context, the interests of potential class members are even more important since dismissal of the action would require the plaintiff to bring the claim as a class action in a foreign jurisdiction which, as appears to be the case here, may not be hospitable to class claims.

(2d Cir.) (distinguishing between the class interests of U.S. and foreign investors), cert. denied, 423 U.S. 1018 (1975). 32/

The private interests of U.S. investors strongly favored maintaining the action in a U.S. forum. Unlike in the U.S., Canada's procedures with respect to class actions appear to be extremely restrictive. Indeed, as defendants' experts concede, U.S. shareholders would as a practical matter be unable to obtain a meaningful classwide damages remedy. See App. I 105-06 ¶ 36; see also M. Connelly, Multinational Securities Offerings: A Canadian Perspective, 50 Law & Contemp. Probs. 251, 267-68 & n.90 (1987) (noting restrictive interpretation of Canadian courts regarding the "same interest" standard in damage actions); General Motors of Canada Limited v. Naken et al., [1983] 1 S.C.R. 72. 33/ The inability to maintain this action on a classwide

---

32/ Indeed, where subject matter jurisdiction is based solely on "effects" in the U.S. rather than on "conduct" as here, it is doubtful that the U.S. court will even have subject matter jurisdiction with respect to claims of foreign class members. See Bersch, 519 F.2d at 987-90. Cf. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985) (holding that due process precluded application of Kansas law to claims asserted against the defendant by class members from other states and foreign countries in view of the absence of "significant aggregation of contacts" between Kansas and the claims of the non-resident class members).

33/ Although the Ontario Rules of Civil Procedure permit aggregation of claims by people who have the "same interest" (see Rule 12.01), proof of individual reliance and determination of individual damages required in fraud actions would appear to preclude use of the Canadian class action procedure. See App. I 105-06 ¶ 36; see generally Glenn, Class Actions in Ontario and Quebec, 62 Canadian Bar Rev. 247, 251 (1984); P. Anisman, 2 Proposals For A Securities Market Law For Canada 237 (1979).

basis would make it uneconomical to prosecute because of the small monetary damages that each individual class member could reasonably expect to recover. 34/

The inability of U.S. shareholders to obtain a meaningful classwide remedy in the alternative forum should have been decisive in balancing the private interests of the parties. See Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981) (ability of litigants to obtain procedural joinder of interested parties is a relevant factor to weigh in evaluating the private interests of the parties). 35/ The magistrate was swayed by certain

---

34/ Ontario law does permit an action to be brought by multiple plaintiffs who are represented by the same solicitor of record if they assert a claim arising out of the same transaction or series of transactions. See Ontario Rule of Civil Procedure 5.02(1). But Canadian law prohibits the use of contingency fee arrangements in this type of case. See Solicitors Act, 8 Ont. Rev. Stat. ch. 478, § 30 (1980). See also M. Connelly, Multinational Securities Offerings: A Canadian Perspective, 50 Law & Contemp. Probs. 251, 267-68 n.89 (1987). The prohibition of contingent fee arrangements would effectively prevent plaintiff and other prospective U.S. litigants from pursuing their class claims in a Rule 5.02(1) action, even if such a procedure could be used as a substitute for bringing a class action.

35/ See also De Melo v. Lederle Laboratories, 801 F.2d 1058, 1063 (8th Cir. 1986) (noting that the litigants' inability to implead potential third-party defendants was a significant private interest factor in determining whether dismissal on forum non conveniens grounds was warranted); Shepard Niles Crane & Hoist Corporation v. Fiat, S.P.A., 84 F.R.D. 299, 305 (W.D.N.Y. 1979).

The district court's decision in Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842, 851 (S.D.N.Y. 1986), aff'd as modified, 809 F.2d 195 (2d Cir. 1987), cert. denied, 484

(continued...)

countervailing interests of the defendants, such as the location of documents, the availability of witnesses and the hardship to the defendants in having to travel to the United States (all of which are likely to be present in any action brought by a U.S. shareholder against a foreign issuer). These interests, however, fall far short of the "oppressiveness" and "vexation" requirement that forum non conveniens movants must satisfy. 36/ This is especially true in this case, where the inconvenience to a Toronto-based issuer is not significantly greater than the burden that a Chicago-based corporation would face in defending against similar claims in Boston.

35/(...continued)
U.S. 871 (1987), is not to the contrary. There, the court suggested that the lack of an analogous class action remedy in India was irrelevant in determining whether to dismiss on the ground of forum non conveniens. But the court considered only whether the lack of a classwide remedy rendered the Indian courts an inadequate alternative forum, not whether the unavailability of classwide relief was a significant inconvenience to plaintiffs.

36/ Moreover, while the relative inconvenience to defendants is relevant under Gilbert, improvements in technology, transportation, and communication since Gilbert have diminished the significance in a forum non conveniens analysis of such factors as expense, accessibility, availability, and convenience. See Manu International, S.A. v. Avon Products, Inc., 641 F.2d 62, 65 (2d Cir. 1981) (quoting Calavo Growers of California v. Generali Belgium, 632 F.2d 963, 969 (2d Cir. 1980)(Newman, J. concurring) ("Jet travel and satellite communications have significantly altered the meaning of 'non conveniens'")).

B. The Public Interest of the United States as Expressed in the Federal Securities Laws Outweighed the Interests in Having this Case Litigated in the Principal Defendant's Jurisdiction of Incorporation.

1. Because This is an Action Under the U.S. Securities Law, the Interests of the U.S. Are Substantial.

In this case, the private interests of U.S. shareholders in prosecuting their claims in a U.S. forum are reinforced by the significant national interests of the United States. The district court (in adopting the magistrate's findings) viewed this case as a conflict between the interests of Canada (or more properly, Ontario) in the internal operation of an Ontario corporation and the local interests of Massachusetts. From the magistrate's perspective, it was "perspicuously clear" that "Canadian laws regulate[d] the[] alleged events," rather than the U.S. securities law. See BR.(A) 65. Focusing solely on Massachusetts' narrow interest in the "Canadian law" violations, the magistrate concluded that "this case does not have a sufficient nexus with Massachusetts to justify this forum's commitment of judicial time and resources." Br.(A) 65. In framing the issue in terms of Massachusetts' local interest and Canadian law, the magistrate -- and hence the district court in adopting her findings -- made two errors: she ignored the significant national interests of the U.S. in application of the federal securities laws and gave unwarranted emphasis to Ontario law.

Where a lawsuit in a U.S. district court raises issues implicating U.S. national interests, the U.S. interests in the litigation must be accorded significant weight. 37/ Securities fraud is an area where Congress has evinced a strong policy of protecting U.S. investors and "insur[ing] the maintenance of fair and honest [secondary securities] markets" in the U.S. See 15 U.S.C. 78b. Congress's purpose in affording broad judicial remedies to defrauded investors would be frustrated if U.S. courts did not provide a receptive forum for the adjudication of such claims. Cf. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 15 (1983) (federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them") (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)). 38/ In vesting U.S.

37/ See Friends For All Children, Inc. v. Lockheed Aircraft Corp., 717 F.2d 602, 610 (D.C. Cir. 1983)("Given the involvement of the United States * * * it seems to us impossible to say that there is not a strong national interest in the litigation and in seeing that justice is done.") (panel judges: Bork, Scalia and Bazelon).

38/ In other areas of federal law, must notably cases arising under the Jones Act, 46 U.S.C. 688(a) & (b), a number of courts of appeal have held that a determination that U.S. law applies requires a district court to deny a motion to dismiss on the ground of forum non conveniens. See Zipfel v. Halliburton Co., 832 F.2d 1477, 1485-87 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988); Needham v. Phillips Petroleum Company of Norway, 719 F.2d 1481, 1483 (10th Cir. 1983); Szumlicz v. Norwegian America Line, Inc., 698 F.2d 1192, 1195 (11th Cir. 1983). But see In re Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1163 (5th Cir. 1987) (en banc), vacated on other grounds, 109 S. Ct. 1928 (1988).

(continued...)

courts with exclusive jurisdiction over Exchange Act claims, Congress underscored its policy of affording U.S. investors a forum in U.S. district courts. 39/

2. The Interests of a Foreign Issuer's Jurisdiction of Incorporation Are Not Entitled to Significant Weight in a Securities Fraud Action for Money Damages.

Not only did the magistrate ignore the significant U.S. interests in providing a forum for the lawsuit, but she placed undue emphasis on the countervailing interests of the foreign forum. The magistrate incorrectly assumed that Ontario law would govern all of the plaintiff's claims and erroneously suggested that, because the litigation touched on issues regarding the internal affairs of a corporation organized under the laws of a foreign jurisdiction, all of the plaintiff's claims were more appropriately addressed in a forum in the jurisdiction of incorporation.

The fact that a corporation is incorporated in a foreign jurisdiction should not weigh as a significant public interest

---

38/(...continued)

39/ Courts have similarly recognized the significant U.S. interest in providing private litigants a forum for their claims under U.S. law in the context of the antitrust laws. See, e.g., Laker Airways Ltd. v. Pan American Airways, 568 F. Supp. 811, 818 (D.D.C. 1983) ("the antitrust laws of the United States embody a specific congressional purpose to encourage the bringing of private claims in the American courts in order that the national policy against monopoly may be vindicated"). The same considerations apply with equal force to the federal securities laws.

factor in a federal securities laws fraud action, at least where, as here, the action is essentially one for money damages. Such relief does not require "such detailed and continuing supervision that the matter could be more efficiently handled nearer home." Williams v. Green Bay & Western Railroad, 326 U.S. at 555-56. In Williams, the Supreme Court reversed a district court's determination to dismiss a corporate law action on grounds of forum non conveniens because the matter concerned the internal affairs of a corporation organized under the laws of another state. 40/ The reasoning of the Williams Court is, if anything, more applicable in cases brought under the federal securities laws, such as the one here, since Congress is the source of the legal requirements to be applied by the federal court.

Moreover, the Supreme Court has consistently "rejected the

40/ As the Williams Court explained:

> The fact that the corporation law of another State is involved does not set the case apart for special treatment. The problem of ascertaining the state law may often be difficult. But that is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it.

Id. at 553.

See also Hoffman v. Goberman, 420 F.2d 423, 427 (3d Cir. 1970) (holding that the district court abused its discretion in dismissing shareholder corporate law action involving a Netherlands Antilles corporation) ("It is settled that the mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court."); Burton v. Exxon Corp., 536 F. Supp. 617 (S.D.N.Y. 1982); Poe v. Marquette Cement Manufacturing Co., 376 F. Supp. 1054 (D. Md. 1974).

contention that where a trial would involve inquiry into the internal affairs of a foreign corporation, dismissal [is] always appropriate." Piper Aircraft Co., 454 U.S. at 249 (citing Koster, 330 U.S. at 527). "'[T]he need to apply foreign law is not in itself a reason to apply the doctrine of forum non conveniens.'" Manu International, S.A. v. Avon Products, Inc., 641 F.2d at 67 (citation omitted) ("we must guard against an excessive reluctance to undertake the task of deciding foreign law, a chore federal courts must often perform."). 41/ Here, it is not even clear that disposition of the federal securities law claims would require an inquiry into the internal affairs of the corporation.

The district court could not properly dismiss the federal securities laws claims merely because the pendent Ontario law claims were arguably more appropriately tried in an Ontario forum. Under such a view, the pendent claims would, in effect, displace the federal court's obligation to adjudicate the federal claims. Principles relating to pendent jurisdiction afford district courts sufficient discretion to decline jurisdiction of pendent claims where circumstances warrant such a result. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726

41/ Here, analysis of the issues of foreign law would be less taxing for a U.S. court than in most cases; because of the common language and similar legal traditions of Canada and the United States, the relevant corporate law principles in this case would likely be reasonably accessible to a U.S. court.

(1966). 42/

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted,

JAMES R. DOTY
General Counsel

THOMAS L. RIESENBERG
Assistant General Counsel

JOSEPH A. FRANCO
Special Counsel

FELICIA KUNG
Attorney

Securities and Exchange Commission
Washington, D.C. 20549

Of Counsel
PAUL GONSON
Solicitor

April 1991

42/ We express no view as to whether the district court should exercise pendent jurisdiction as to the Ontario law claims if it is determined that the district court was required to retain jurisdiction with respect to the federal securities laws claims.