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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARK STOYAS; NEW ENGLAND)	Case No. CV 15-04194 DDP (JCx)
TEAMSTERS & TRUCKING)	
INDUSTRY PENSION FUND; and)	ORDER RE: DEFENDANT'S MOTION TO
AUTOMOTIVE INDUSTRIES)	DISMISS AND PLAINTIFFS' MOTION TO
PENSION TRUST FUND,)	STRIKE WADA DECLARATION
individually and on behalf)	
of all others similarly)	[Dkt. Nos. 44, 54]
situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
TOSHIBA CORPORATION,)	
)	
Defendant.)	
_____)	

Presently before the Court are (1) Defendant Toshiba Corporation's Motion to Dismiss and (2) Plaintiffs' Motion to Strike the Declaration of Ayumi Wada in Support of Defendant Toshiba Corporation's Motion to Dismiss. (Dkt. Nos. 44, 54.) After hearing oral argument and considering the parties' submissions, the Court adopts the following Order.

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1 **I. BACKGROUND**

2 **A. Procedural History**

3 This case is a putative securities class action lawsuit.
4 Plaintiff Mark Stoyas filed this case in June 2015, alleging
5 Defendant and two of its former Chief Executive Officers had
6 violated U.S. securities laws by selling stock with an inflated
7 price caused by Defendants' false profit reports. (See generally
8 Compl., Dkt. No. 1.) In August 2015, Plaintiff Mark Stoyas did not
9 oppose the Motion of Automotive Industries Pension Trust Fund to be
10 appointed Lead Plaintiff. (See Dkt. Nos. 10-20.) The Court
11 appointed Automotive Industries Pension Trust Fund as Lead
12 Plaintiff and its counsel as lead counsel for the class in
13 September 2015. (Dkt. No. 22.)

14 In December 2015, Plaintiffs filed a First Amended Complaint
15 ("FAC") that named a new plaintiff, New England Teamsters &
16 Trucking Industry Pension Fund, and that dismissed the two
17 individual Defendants under Federal Rule of Civil Procedure
18 ("FRCP") 4(a)(1)(A)(i). (FAC, Dkt. No. 34; Notice of Dismissal,
19 Dkt. No. 33.) Pursuant to a stipulation, the Court set a briefing
20 schedule for Defendant's response to the FAC, which would be a
21 Motion to Dismiss. (Dkt. Nos. 39, 40.) In February 2016,
22 Defendant filed its Motion to Dismiss under FRCP 12(b)(6), as well
23 as principles of comity and *forum non conveniens*. (Mot. Dismiss,
24 Dkt. No. 44.) Defendant also filed a Request for Judicial Notice
25 ("RJN") with twenty-one exhibits. (RJN, Dkt. No. 45.)

26 Plaintiffs opposed both the RJN and the Motion to Dismiss, as
27 well as filed a Motion to Strike the Declaration of Ayumi Wada in
28 support of Defendant's Motion to Dismiss. (Opp'n to Mot. Dismiss,

1 Dkt. No. 50; Mot. Strike Wada Decl., Dkt. No. 54; Obj. RJN, Dkt.
2 No. 56.) All three issues are now fully briefed before the Court.

3 **B. Factual Allegations in the FAC**

4 The FAC alleges Defendant violated the U.S. Securities
5 Exchange Act of 1934 and Japan's Financial Instruments & Exchange
6 Act ("JFIEA"). (FAC ¶ 1.) The proposed class is defined as: (i)
7 all persons who acquired Toshiba American Depositary Shares or
8 Receipts ("ADSs")¹ between May 8, 2012 and November 12, 2015 (the
9 proposed class period) and (ii) all citizens and residents of the
10 United States who otherwise acquired shares of Toshiba common stock
11 during the Class Period. (Id. ¶¶ 2, 270.) Plaintiffs refer to the
12 first group as the "ADS Purchasers" and the second group as the
13 "6502 Purchasers," the latter named after the ticker name of
14 Toshiba on the Tokyo Stock Exchange. (See id. ¶¶ 25, 270.)

15 According to Plaintiffs, "[t]his case arises from Toshiba's
16 deliberate use of improper accounting over a period of at least six
17 years to inflate its pre-tax profits by more than \$2.6 billion
18 . . . and conceal at least \$1.3 billion . . . in impairment losses

19
20 ¹ The Court notes that Defendant refers to these securities
21 as ADRs in its Motion. However, the FAC refers to the securities
22 as ADSs. Therefore, the Court will primarily use the term "ADS,"
but notes the terms are interchangeable references to the same type
of security. According to Plaintiffs,

23 Toshiba's common stock is publicly traded on the Tokyo
24 Stock Exchange under the ticker symbol "6502" and on the
25 Over the Counter ("OTC") market operated by OTCMarkets
26 Group in the United States under the ticker symbols "TOSBF"
27 and "TOSYY." One share of TOSBF represents ownership of
one share of Toshiba common stock sold under the ticker
symbol 6502 on the Tokyo exchange. One share of TOSYY
represents ownership of six shares of Toshiba common stock.
OTCMarkets Group identifies TOSYY as an ADS and TOSBF as
"Ordinary Shares" on its website.

28 FAC ¶ 25.

1 at its U.S. nuclear business, Westinghouse Electric Co." (Id. ¶
2 3.) The alleged accounting fraud "was orchestrated by three
3 successive CEOs of Toshiba and dozens of top executives who
4 directed the manipulation of financial results reported by scores
5 of Company subsidiaries and business units." (Id. ¶ 4.) This
6 fraud "was uncovered by a series of investigations that took place
7 beginning in February 2015" that "revealed numerous instances of
8 deliberate violations of generally accepted accounting principles
9 ("GAAP") carried out at the direction or with the knowledge and
10 approval of Toshiba's most senior executives." (Id. ¶ 5.)

11 Plaintiffs allege that these investigations "resulted in the
12 September 7, 2015 restatement of more than six years of reported
13 financial results that eliminated approximately one-third (\$2.6
14 billion) of the profits Toshiba had reported from 2008 to 2014."
15 (Id. ¶ 6.) Plaintiffs claim that "Toshiba assured investors that
16 there was no need to write down the \$2.8 billion . . . in goodwill
17 still carried on Toshiba's books as a result of its 2006
18 acquisition of Westinghouse, falsely claiming that its nuclear
19 business had strengthened since the acquisition, even after the
20 March 2011 meltdown of the Fukushima Daiichi nuclear reactor."
21 (Id.) But on November 6, 2015, Toshiba did admit that Westinghouse
22 "had written down goodwill in both FY12 and FY13," but that those
23 write-downs were not disclosed in financial statements at the time.
24 (Id.) Plaintiffs claim a business news report on November 12,
25 2015, "revealed that the secret write-downs had totaled \$1.3
26 billion: \$926 million in FY12 and \$400 million in FY13." (Id.)

27 Specifically, Plaintiffs allege that the investigation into
28 the accounting fraud showed that "Toshiba deliberately violated

1 GAAP by failing to timely record losses on unprofitable
2 construction contracts; channel stuffing manufacturing parts sold
3 at inflated prices; deferring operating expenses until they could
4 be reported without causing an earnings loss; failing to record
5 charges for obsolete inventory or impaired assets; manipulating
6 foreign conversion rates; and engaging in the other fraudulent
7 practices alleged herein." (Id. ¶ 7.) Plaintiffs claim that
8 Toshiba took these actions to prevent its stock price from dropping
9 to reflect the actual financial situation at Toshiba. (Id. ¶ 10.)
10 Plaintiffs state that "[b]etween April 3, 2015, when the internal
11 investigation into Toshiba's accounting practices was first
12 announced, and November 13, 2015, following the issuance of
13 Toshiba's restatement and the revelation of the impaired goodwill
14 at Westinghouse, the price of Toshiba securities declined by more
15 than 40%, resulting in a loss of \$7.6 billion . . . in market
16 capitalization that caused hundreds of millions of dollars in
17 damages to U.S. investors in Toshiba securities." (Id. (footnote
18 omitted).)

19 Plaintiffs have filed suit under U.S. federal securities laws,
20 making claims under sections 10(b) and 20(a) of the Securities
21 Exchange Act of 1934, codified at 15 U.S.C. §§ 78j(b), 78t(a), and
22 SEC rule 10b-5, codified at 17 C.F.R. § 240.10b-5. (FAC ¶ 11.)
23 Both of these claims for relief (those under § 10(b) and rule 10b-5
24 (First Claim for Relief) and those under § 20(a) (Second Claim for
25 Relief)) are made only on behalf of the ADS purchasers. (Id. at
26 100-04.) Plaintiffs also make claims under the JFIEA, over which
27 they argue the Court has diversity and supplemental jurisdiction.
28 (Id. ¶¶ 12-13.) This third claim for relief is made on behalf of

1 both ADS purchasers and 6502 purchasers. (Id. at 105-06.) These
2 claims all relate to the allegations of Defendant's fraudulent
3 accounting and misrepresentations. (Id. ¶ 273.)

4 Lead Plaintiff Automotive Industries Pension Trust Fund is a
5 member of the alleged class because it "acquired Toshiba common
6 stock during the Class Period through the purchase on March 23,
7 2015 of 36,000 shares of TOSYY ADSs in the United States." (Id. ¶
8 19.) Plaintiff New England Teamsters & Trucking Industry Pension
9 Fund is a member of the alleged class because it made seven
10 different purchases of Toshiba common stock on the Tokyo Stock
11 Exchange during the class period, totaling over 100,000 shares.
12 (Id. ¶ 20.) Plaintiff Mark Stoyas is an individual who "purchased
13 Toshiba securities at artificially inflated prices during the class
14 period." (Compl., Dkt. No. 1, ¶ 7; FAC ¶ 21 (citing Compl., Dkt.
15 No. 1).)

16 Defendant Toshiba Corporation is alleged to be "a worldwide
17 enterprise that engages in the research, development, manufacture,
18 construction, and sale of a wide variety of electronic and energy
19 products and services, including semiconductors, disc drives,
20 storage devices, computers, televisions, appliances, nuclear power
21 plants, elevators, lighting systems, and medical equipment." (Id.
22 ¶ 22.) Plaintiffs allege the headquarters of Toshiba is in Tokyo,
23 Japan. (Id.)

24 **II. LEGAL STANDARD**

25 **A. Motion to Dismiss**

26 12(b)(6) motion to dismiss for failure to state a claim upon
27 which relief can be granted requires a court to determine the
28 sufficiency of the plaintiff's complaint and whether it contains a

1 "short and plain statement of the claim showing that the pleader is
2 entitled to relief." See Fed. R. Civ. P. 8(a)(2). Under Rule
3 12(b)(6), a court must (1) construe the complaint in the light most
4 favorable to the plaintiff, and (2) accept all well-pleaded factual
5 allegations as true, as well as all reasonable inferences to be
6 drawn from them. See Sprewell v. Golden State Warriors, 266 F.3d
7 979, 988 (9th Cir. 2001), amended on denial of reh'g, 275 F.3d 1187
8 (9th Cir. 2001).

9 In order to survive a 12(b)(6) motion to dismiss, the
10 complaint must "contain sufficient factual matter, accepted as
11 true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (quoting Bell Atl.
12 Corp. v. Twombly, 550 U.S. 544, 570 (2007)). However,
13 "[t]hreadbare recitals of the elements of a cause of action,
14 supported by mere conclusory statements, do not suffice." Id. at
15 678. Dismissal is proper if the complaint "lacks a cognizable
16 legal theory or sufficient facts to support a cognizable legal
17 theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097,
18 1104 (9th Cir. 2008).

19 A complaint does not suffice "if it tenders 'naked
20 assertion[s]' devoid of 'further factual enhancement.'" Iqbal, 556
21 U.S. at 678 (quoting Twombly, 550 U.S. at 556). "A claim has
22 facial plausibility when the plaintiff pleads factual content that
23 allows the court to draw the reasonable inference that the
24 defendant is liable for the misconduct alleged." Id. The court
25 need not accept as true "legal conclusions merely because they are
26 cast in the form of factual allegations." Warren v. Fox Family
27 Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).
28

1 **B. Motion to Strike**

2 Rule 12(f) of the Federal Rules of Civil Procedure states that
3 the "court may strike from a pleading . . . any redundant,
4 immaterial, impertinent, or scandalous matter." Fed. R. Civ. P.
5 12(f). Immaterial matter is that which has no bearing on the
6 claims for relief or the defenses being pled. Whittlestone, Inc.
7 v. Handi-Craft Co., 618 F.3d 970, 974 (9th Cir. 2010). Impertinent
8 matter consists of statements that do not pertain and are not
9 necessary to the issues in question. Id. Under Rule 12(f), the
10 court has the discretion to strike a pleading or portions thereof.
11 MGA Entm't, Inc. v. Mattel, Inc., No. CV 05-2727 NM (RNBx), 2005 WL
12 5894689, at *4 (C.D. Cal. Aug. 26, 2005). Generally, motions to
13 strike are "disfavored" and "courts are reluctant to determine
14 disputed or substantial questions of law on a motion to strike."
15 Whittlestone, 618 F.3d at 1165-66; see also Miller v. Fuhu, Inc.,
16 No. 2:14-cv-06119-CAS (ASx), 2014 WL 4748299, at *1, (C.D. Cal.
17 Sept. 22, 2014). In considering a motion to strike, the court
18 views the pleadings in the light most favorable to the non-moving
19 party. See In re 2TheMart.com Secs. Litig., 114 F. Supp. 2d 955,
20 965 (C.D. Cal. 2000)).

21 **C. Requests for Judicial Notice**

22 "On a motion to dismiss, we may take judicial notice of
23 matters of public record outside the pleadings." MGIC Indem. Corp.
24 v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986). A court may take
25 judicial notice of "a fact that is not subject to reasonable
26 dispute because it: (1) is generally known within the trial court's
27 territorial jurisdiction; or (2) can be accurately and readily
28

1 determined from sources whose accuracy cannot reasonably be
2 questioned." Fed. R. Evid. 201(b)(1), (2).

3 **III. DISCUSSION**

4 Defendant makes two main arguments in its Motion: (1) there
5 are no facts pled – or that could be pled – to support a U.S.
6 Securities Exchange Act cause of action by Plaintiffs, or any other
7 potential class member, because there are no securities sold or
8 listed in the United States by Toshiba Corporation; and (2) the
9 Japanese law claim should be dismissed under principles of comity
10 and *forum non conveniens*.

11 First, however, the Court addresses Plaintiffs' Motion to
12 Strike and Objections to Defendant's Request for Judicial Notice.
13 (Dkt. Nos. 54, 56.) Plaintiffs object to Defendant's Request for
14 Judicial Notice because they argue that Defendant seeks to use
15 these exhibits to support factual arguments, not undisputed
16 adjudicative facts. (Obj. RJN, Dkt. No. 56, at 3.) Plaintiffs
17 object specifically to exhibits 1, 2, 3, 4, 9, 10, 13, 14, 15, 16,
18 17, 18, 19, 20. (Id. at 3-4.) Plaintiffs do not contest the RJN
19 with respect to exhibits 5-8 and 11. (Id. at 9.) The Court GRANTS
20 the RJN with respect to Defendant's exhibits 5-8 and 11 because
21 those exhibits are unopposed. The Court notes that none of the
22 other exhibits are argued by Plaintiffs to be inaccurate or
23 unauthentic. (See generally Obj. RJN.) However, none were
24 considered by the Court in making its decision on the Motion to
25 Dismiss.

26 As to the Motion to Strike, Plaintiffs argue that the Wada
27 Declaration offered in support of Toshiba's Motion to Dismiss
28 should be stricken because Defendant seeks to use the declaration

1 to establish facts contrary to the FAC, which is inappropriate at
2 the Motion to Dismiss stage. (Mot. Strike, Dkt. No. 54, at 1, 4-
3 5.) Further, Plaintiffs argue that the declaration lacks
4 foundation and is irrelevant. (Id. at 1, 5-10.) Defendant
5 responds that the Wada Declaration is properly before the Court as
6 support for Defendant's argument that the Japanese claims should be
7 dismissed under comity and *forum non conveniens* principles.
8 (Opp'n, Dkt. No. 59, at 1, 3-4.) Further, Defendant claims that
9 the Court can consider the declaration in the FRCP 12(b)(6) motion
10 because the general rule against extrinsic evidence is subject to
11 several exceptions relevant here. (Id. at 2; 5-16.)

12 Due to the nature of the assertions in the Wada Declaration
13 and the fact that these assertions are contested by Plaintiffs or
14 not in the FAC, the Court does not consider the declaration
15 appropriate to be used in making a determination on the FRCP
16 12(b)(6) motion. However, the Court will consider the assertions
17 in the Wada Declaration to the extent the declaration is relevant
18 to the *forum non conveniens* argument. See Van Cauwenberghe v.
19 Biard, 486 U.S. 517, 529 (1988) ("[T]he district court's inquiry
20 does not necessarily require extensive investigation, and may be
21 resolved on affidavits presented by the parties.").

22 **A. Whether Plaintiffs Can Allege a U.S. Securities Exchange**
23 **Act Cause of Action**

24 Plaintiffs have made claims under § 10(b) and § 20(a) of the
25 U.S. Securities Exchange Act of 1934 and SEC rule 10b-5. Section
26 20(a) extends liability for violations of U.S. securities law to
27 "controlling persons" as well as to the underlying person or entity
28

1 responsible for the violation. 15 U.S.C. § 78t(a). Section 10(b)
2 states:

3 It shall be unlawful for any person, directly or
4 indirectly, by the use of any means or instrumentality of
5 interstate commerce or of the mails, or of any facility of
6 any national securities exchange-

7

8 (b) To use or employ, in connection with the
9 purchase or sale of any security registered on a
10 national securities exchange or any security not
11 so registered, or any securities-based swap
12 agreement[,] any manipulative or deceptive
13 device or contrivance in contravention of such
14 rules and regulations as the Commission may
15 prescribe as necessary or appropriate in the
16 public interest or for the protection of
17 investors.

18 15 U.S.C. § 78j(b).

19 Rule 10b-5 states:

20 It shall be unlawful for any person, directly or
21 indirectly, by the use of any means or instrumentality of
22 interstate commerce, or of the mails or of any facility of
23 any national securities exchange,

24 (a) To employ any device, scheme, or artifice to
25 defraud,

26 (b) To make any untrue statement of a material fact
27 or to omit to state a material fact necessary in
28 order to make the statements made, in the light
of the circumstances under which they were made,
not misleading, or

(c) To engage in any act, practice, or course of
business which operates or would operate as a
fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

Defendant argues that Plaintiffs have not properly alleged a
U.S. Securities Exchange Act cause of action because Plaintiffs
have not (and cannot) allege that they purchased a Toshiba security
listed on a U.S. exchange and Plaintiffs have not (and cannot)

1 allege that Toshiba was involved in any domestic transaction. (See
2 Mot. Dismiss at 9-16.) Defendant relies fundamentally on the U.S.
3 Supreme Court's decision in Morrison v. National Australia Bank
4 Ltd., 561 U.S. 247 (2010). Defendant claims that Morrison
5 established that the U.S. Securities Exchange Act "does not apply
6 to securities-fraud claims against a foreign issuer that did not
7 list its securities on a U.S. exchange or otherwise trade its
8 securities in the United States." (Mot. Dismiss at 9.) Here,
9 Defendants argue, Toshiba is a foreign issuer and does not list its
10 securities on a U.S. exchange – only in Tokyo and Nagoya, according
11 to Defendant – and Toshiba does not otherwise trade securities,
12 including ADSs, in the United States. (Id.)

13 According to the Supreme Court in Morrison, the question it
14 was addressing was "whether § 10(b) of the Securities Exchange Act
15 of 1934 provides a cause of action to foreign plaintiffs suing
16 foreign and American defendants for misconduct in connection with
17 securities traded on foreign exchanges." Id. at 250-51. The
18 Australian bank traded its common stock on foreign security
19 exchanges, but not on any exchanges in the United States. Id. at
20 251. The bank did list ADSs on the New York Stock Exchange. (Id.)
21 The plaintiffs there were Australians who had purchased common
22 stock of the bank on foreign exchanges. Id. at 252. Therefore,
23 the Court was addressing whether the foreign plaintiffs who had
24 purchased securities abroad could raise their claims in the United
25 States.

26 The Court held that § 10(b) of the Securities Exchange Act did
27 not have an extraterritorial reach. Id. at 265. The plaintiffs
28 there argued that the Court's holding regarding extraterritoriality

1 did not resolve the case because the deceptive conduct alleged took
2 place in the United States. Id. at 266. However, the Supreme
3 Court held that "it is in our view only transactions in securities
4 listed on domestic exchanges, and domestic transactions in other
5 securities, to which § 10(b) applies." Id. at 267 (footnote
6 omitted); see also id. at 269-70 (referring to this as a
7 "transactional test"). This holding limited § 10(b)'s reach to
8 securities listed or transacted in the United States, thus avoiding
9 conflicts with foreign laws and procedures. Id. at 269. The Court
10 noted that "foreign countries regulate their domestic securities
11 exchanges and securities transactions occurring within their
12 territorial jurisdiction." Id. Further, "the regulation of other
13 countries often differs from ours as to what constitutes fraud,
14 what disclosures must be made, what damages are recoverable, what
15 discovery is available in litigation, what individual actions may
16 be joined in a single suit, what attorney's fees are recoverable,
17 and many other matters." Id. Therefore, the Court held that the
18 plaintiffs had not stated a claim because § 10(b) "reache[d] the
19 use of a manipulative or deceptive device or contrivance only in
20 connection with the purchase or sale of a security listed on an
21 American stock exchange, and the purchase or sale of any other
22 security in the United States." Id. at 273.

23 According to Defendant, the rule in this case means that
24 Plaintiffs cannot state a claim because Toshiba neither (1) lists
25 its stocks on a U.S. exchange nor (2) sells any other security in
26 the United States (or, as Defendant puts it, "transacts in
27 unsponsored ADRs in the United States (or anywhere else for that
28 matter)"). (Mot. Dismiss at 11-12.)

1 **1. First Prong: Transaction in Securities Listed on**
2 **Domestic Exchanges**

3 Defendant claims that OTC markets – where Plaintiffs here
4 bought the TOSYY ADSs – are not national stock exchanges under the
5 first prong of the rule in Morrison. (Id. at 12-13 (citing United
6 States v. Georgiou, 777 F.3d 125, 134-35 (3d Cir. 2015)).) The
7 Third Circuit in Georgiou noted that the Securities Exchange Act
8 “refers to ‘securities exchanges’ and ‘over-the-counter markets’
9 separately, which suggests that one is not inclusive of the other.”
10 Georgiou, 777 F.3d at 134-35. Thus, to the extent the Supreme
11 Court in Morrison was discussing “national securities exchange[s]”
12 and “American stock exchange[s],” the Third Circuit in Georgiou
13 held that OTC markets were not the exchanges contemplated by the
14 Court for satisfying the first prong. Id. According to Defendant,
15 because the only securities alleged in the FAC for this cause of
16 action are ADSs sold on OTC markets, § 10(b) cannot apply here
17 based on the first prong of Morrison because the ADSs were not
18 listed on national stock exchanges.

19 Plaintiffs disagree with this distinction between national
20 security exchanges and OTC markets. (Opp’n, Dkt. No. 50, at 6-9.)
21 Plaintiffs claim that Morrison drew a distinction between foreign
22 exchanges and domestic exchanges, not domestic stock exchanges and
23 domestic over-the-counter markets. (Id. at 6-7 (citing United
24 States v. Isaacson, 752 F.3d 1291, 1299 (11th Cir. 2014), cert.
25 denied, 135 S. Ct. 990 (2015); S.E.C. v. Ficeto, 839 F. Supp. 2d
26 1101, 1107-09 (C.D. Cal. 2011)).) Further, Plaintiffs point to the
27 definition of an “exchange” in the statute:

28 any organization, association, or group of persons, whether
 incorporated or unincorporated, which constitutes,

1 maintains, or provides a market place or facilities for
2 bringing together purchasers and sellers of securities or
3 for otherwise performing with respect to securities the
4 functions commonly performed by a stock exchange as that
5 term is generally understood, and includes the market place
6 and the market facilities maintained by such exchange.

7 15 U.S.C. § 78c(a)(1) (defining "exchange"). Lastly, Plaintiffs
8 argue that the Third Circuit's holding in Georgiou is not
9 persuasive authority in comparison to the courts' analyses in
10 Ficeto and Isaacson, but note that Georgiou did find that the ADSs
11 involved in that case survived the motion to dismiss under
12 Morrison's second prong. (Opp'n, Dkt. No. 50, at 7-8.)

13 In reply, Defendant argues that Plaintiffs' argument ignores
14 the plain language of the Court in Morrison, which referred not
15 simply to "exchanges," but to "national securities exchanges."
16 (Reply, Dkt. No. 63, at 3-5.) Defendant claims that any reference
17 in Morrison to "domestic exchanges" is "simply synonymous shorthand
18 for 'national securities exchanges.'" (Id. at 4.) Further, the
19 OTC market involved in this case is not an exchange as defined by
20 the statute, Defendant claims, because it does not satisfy the
21 requirement to register as a national securities exchange or obtain
22 an exemption from the SEC. (Id. at 5-6 (citing 15 U.S.C. § 78(e);
23 SEC Rule 3a1-1(a)).)

24 The Court notes that the Supreme Court in Morrison focused on
25 the purposes of the Securities Exchange Act in making its
26 determination that § 10(b) was not intended by Congress to be
27 applied extraterritorially. See Morrison, 561 U.S. at 263. The
28 statute's statement of purpose explicitly references over-the-
counter markets as well as securities exchanges, stating that both
"are effected with a national public interest which makes it

1 necessary to provide for regulation and control of such
2 transactions and of practices and matters related thereto." 15
3 U.S.C. § 78b ("Necessity for regulation"). The statute thus
4 recognizes a distinction between securities exchanges and OTC
5 markets. And looking to the plain language of the statute's
6 requirements for an "exchange" as cited by Plaintiffs, Plaintiffs
7 have not pled or argued that the OTC market at issue here satisfies
8 the requirements to be an "exchange," or that the OTC market
9 satisfies the SEC's regulatory exemptions from those requirements.
10 See 15 U.S.C. § 78c(a)(1); SEC Rule 3a1-1(a), codified at 17 C.F.R.
11 § 240.3a1-1. Thus, the OTC market at issue here is likely just
12 that – an OTC market, not an exchange as meant by Morrison or as
13 defined and regulated by the statute.

14 Plaintiffs' cases are also not entirely persuasive. The
15 Eleventh Circuit in Isaacson did not squarely address this question
16 and its analysis simply found "a U.S. nexus," whether based on the
17 OTC markets being exchanges or the fact that the purchase of the
18 securities at issue took place in the United States. See 752 F.3d
19 at 1299. The court in Ficeto noted that the Supreme Court in
20 Morrison was not addressing OTC markets at all because that was not
21 relevant to the facts in Morrison. 839 F. Supp. 2d at 1108-09,
22 1112-14. But the court in Ficeto did hold that OTC markets were
23 part of the purpose of the Securities Exchange Act and that case
24 law demonstrated that the two markets (OTC markets and stock
25 exchange markets) were meant to be protected under the law,
26 although ultimately holding that ADRs were foreign transactions.
27 Id. at 1110-12, 115. However, a statute protecting and mentioning
28 both kinds of markets does not mean the markets are the same,

1 particularly when applying Morrison's two pronged test. Instead,
2 by creating a distinction between listing stocks on a domestic
3 exchange or otherwise transacting in securities in the United
4 States, Morrison indicates to this Court that domestic securities
5 sales that are not listed on a securities exchange are analyzed
6 under the second prong.

7 Therefore, the Court holds that the OTC market in this case is
8 not a domestic exchange satisfying the first prong of Morrison.

9 **2. Second Prong: Domestic Transactions in Other**
10 **Securities**

11 For the second prong, purchases or sales of securities in the
12 United States, Defendant argues that any domestic transaction
13 alleged by Plaintiffs was not done by Toshiba and did not involve
14 Toshiba. (Mot. Dismiss at 14.) Instead, the underlying Toshiba
15 common stock was purchased by the depositary bank on a foreign
16 exchange (a foreign transaction), and the depositary bank then sold
17 ADSs based on those common stocks to Plaintiffs in the United
18 States. (Id.) Thus, the domestic transaction was between
19 depositary banks and ADS purchasers, not between Defendant and ADS
20 purchasers. (Id.)

21 Further, Defendant argues that the ADSs here "are unsponsored
22 and 'set up without the cooperation' of Toshiba" and that "ADR
23 holders have no direct relationship with, and no ownership in,
24 Toshiba." (Id. at 14 (citing Parkcentral Global Hub Ltd. v.
25 Porsche Auto. Holdings, SE, 763 F.3d 198, 207 n.9 (2d Cir. 2014);
26 Pinker v. Roche Holdings Ltd., 292 F.3d 361, 367 (3d Cir. 2002)).)
27 Defendant thus focuses on the distinction between "sponsored" and
28 "unsponsored" ADSs. As the Third Circuit explained in Pinker,

1 An ADR is a receipt that is issued by a depositary
2 bank that represents a specified amount of a foreign
3 security that has been deposited with a foreign branch or
4 agent of the depositary, known as the custodian. The holder
5 of an ADR is not the title owner of the underlying shares;
6 the title owner of the underlying shares is either the
7 depositary, the custodian, or their agent. ADRs are
8 tradeable in the same manner as any other registered
9 American security, may be listed on any of the major
10 exchanges in the United States or traded over the counter,
11 and are subject to the Securities Act and the Exchange Act.
12 This makes trading a ADR simpler and more secure for
13 American investors than trading in the underlying security
14 in the foreign market.

15 ADRs may be either sponsored or unsponsored. An
16 unsponsored ADR is established with little or no
17 involvement of the issuer of the underlying security. A
18 sponsored ADR, in contrast, is established with the active
19 participation of the issuer of the underlying security. An
20 issuer who sponsors an ADR enters into an agreement with
21 the depositary bank and the ADR owners. The agreement
22 establishes the terms of the ADRs and the rights and
23 obligations of the parties, such as the ADR holders' voting
24 rights.

25 Pinker, 292 F.3d at 367 (citations omitted). Defendant claims that
26 cases after Morrison have dismissed claims based on unsponsored
27 ADSs because those cases do not involve actions taken by the
28 alleged defendant in a domestic transaction; by contrast, other
29 cases (like Pinker) have been allowed to continue because they were
30 based on sponsored ADSs where the alleged defendant was involved in
31 the transaction. (Mot. Dismiss at 14-15 (citing Parkcentral, 763
32 F.3d at 198 (involving securities-based swap agreements); Pinker,
33 292 F.3d at 361 (involving sponsored ADRs, but examining personal
34 jurisdiction pre-Morrison); Copeland v. Fortis, 685 F. Supp. 2d
35 498, 506 (S.D.N.Y. 2010) (pre-Morrison case examining personal
36 jurisdiction with collateralized debt obligations and ADRs); In re
37 Société Générale Sec. Litig., No. 08 Civ. 2495 (RMB), 2010 WL
38 3910286, at *6 (S.D.N.Y. Sept. 29, 2010) (post-Morrison case
involving ADRs).)

1 Comparing Plaintiffs' unsponsored ADRs to the securities-based
2 swap agreements in Parkcentral, Defendant claims "the ADRs here are
3 'synthetic' investments, in that the security is 'a separate and
4 distinct financial instrument from the security it references.'" (Mot. Dismiss at 16 (quoting Parkcentral, 763 F.3d at 205-06).)
5 Thus, Defendant argues that as in Parkcentral, there is no basis
6 for a § 10(b) claim here, or a § 20(a) claim that relies on the
7 primary violation of a § 10(b) claim. (Id. (citing Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 990 (9th Cir. 2009)).)

10 Plaintiffs take issue with Defendant's understanding of
11 Morrison, as well as the focus on sponsored versus unsponsored
12 ADSs. (Opp'n, Dkt. No. 50, at 4-21.) First, Plaintiffs argue that
13 the Court in Morrison was expressly carving out sales and purchases
14 of ADSs in the United States from its holding, as the only U.S.
15 citizen plaintiff in that case, Morrison, had purchased ADSs in the
16 United States, but had been previously dismissed from the case on
17 other grounds. (Id. at 5-6 (citing Morrison, 561 U.S. at 253 n.1,
18 273).) According to Plaintiffs, the Court in Morrison contemplated
19 that domestic transactions subject to U.S. securities laws included
20 domestic sales and purchases of ADSs, even those not listed on a
21 national security exchange but instead on some kind of domestic
22 exchange or OTC market. (Id. at 6-7.) And Plaintiffs argue that
23 even if the OTC market is not considered a domestic exchange, the
24 ADS purchases here are domestic transactions under the second prong
25 of Morrison because the purchases and sales all took place in the
26 United States where the OTC market is located. (Id. at 9.)

27 Second, Plaintiffs state that the status of an ADS as
28 sponsored or unsponsored does not matter for determining the

1 applicability of § 10(b). Plaintiffs argue that Toshiba's claim
2 about the ADSs here being unsponsored raises factual issues not
3 appropriate for a motion to dismiss regarding Toshiba's involvement
4 in the ADSs' sale. (Id. at 9-10; 16.) Additionally, all ADSs,
5 whether sponsored or not, are held by a depository bank, which
6 ultimately holds the underlying security and sells the ADS. (Id.
7 at 10.) Plaintiffs cite cases where ADS sales by a depository bank
8 were held subject to § 10(b) claims, and Plaintiffs distinguish
9 Defendant's key cases, In re Société Générale Security Litigation
10 and Parkcentral. (Id. at 10 & n.10; 17-21.) Further, and contrary
11 to Defendant's argument, Plaintiffs claim that ADS holders have a
12 beneficiary interest in the underlying stock and "the right to
13 obtain the foreign shares on demand as well as other rights
14 providing indicia of ownership, such as the right to receive the
15 dividends payable to and obtain tax credits associated with the
16 underlying shares." (Id. at 11 (citing 17 C.F.R. § 239.36(a)).)

17 Lastly, Plaintiffs argue that the unsponsored nature of the
18 ADSs is irrelevant for the purposes of Morrison, particularly as
19 the difference between a sponsored and unsponsored ADS is somewhat
20 artificial. (Id. at 12-14.) Plaintiffs cite SEC Rule 12g3-2,
21 codified at 17 C.F.R. § 240.12g3-2, and its allowance of foreign
22 unsponsored ADS sales if "the issuer maintains its listing on a
23 foreign exchange and complies with the requirements to provide
24 American investors with electronic access to English-language
25 translations of the information provided to their foreign-
26 investors." (Opp'n, Dkt. No. 50, at 13.) To Plaintiffs, the only
27 difference between the sponsored and unsponsored ADSs, then, is
28 that an unsponsored ADS can be sold without a formal application by

1 the foreign issuer to establish a ADS program; the disclosure
2 requirements are otherwise the same. (Id.) Toshiba complied with
3 the disclosure requirements and never objected to the sale of its
4 securities in the United States. (Id. at 14.) Thus, Plaintiffs
5 argue that finding that Toshiba is subject to the U.S. securities
6 laws through the ADS sales in the United States would prevent
7 Toshiba from "evad[ing] liability by refusing to memorialize its
8 consent to the sale of ADSs," as was mentioned in Morrison and
9 section 30(b) of the Exchange Act. (Id. at 14 & n.15.)²

10 In reply, Defendant argues that Plaintiffs seek to extend the
11 reach of Morrison's second prong and U.S. securities laws to "a

12
13 ² Plaintiffs note that based on the opening Motion, evading
14 liability is what Toshiba appears to be seeking to do:

15 Toshiba's carefully-worded brief asserts only that the
16 **depository banks** that sold the ADSs to investors "**may**" have
17 a claim in Japan against Toshiba for the benefit of
18 investors who purchased Toshiba's ADSs, apparently meaning
19 to suggest that the ADS purchasers themselves have no such
20 claim. Toshiba ignores, in this regard, that the
21 depository agreements governing the sale of its stock as
22 ADSs specifically provide that the depository banks will
23 **not** institute or participate in any such action. Thus, in
24 Toshiba's view, American investors who purchased its shares
25 as ADSs should not have a remedy for fraud anywhere in the
26 world simply because those securities were "unsponsored."

27 (Opp'n, Dkt. No. 15, at 15 (citation and footnote omitted).)
28 However, Defendant states that this cannot be a relevant
consideration. (Reply, Dkt. No. 63, at 13.) To the extent that a
depository bank wants to, it can initiate litigation, Defendant
argues, because the language in the Form F-6 states that depository
banks "shall be under no obligation" to sue, not that they cannot
or may not sue. (Id.) Defendant also argues that the agreements
between the depository banks and ADS purchasers further demonstrate
that the relationship is between those two, not between ADS
purchasers and Toshiba. (Id. at 13-14.)

The Court notes that even if depository banks have the power
to sue on behalf of ADS purchasers, there is no indication why or
how the banks would do so. But Defendant correctly notes that
there is no contractual obligation preventing depository banks from
making claims for ADS purchasers based on the evidence Plaintiffs
provided or the allegations in the FAC.

1 foreign issuer . . . where the issuer . . . is not alleged to have
2 participated in securities transactions in the United States.”
3 (Reply, Dkt. No. 63, at 8-9.) That is, Defendant Toshiba did not
4 sell the ADSs to any Plaintiffs because the ADSs were sold by a
5 depositary bank without any connection to Toshiba; therefore,
6 Toshiba had no connection to any domestic transaction. (Id. at 8-
7 14.) “As *Morrison* states, the U.S. Exchange Act expressly does not
8 apply to ‘any person insofar as he transacts a business in
9 securities without the jurisdiction of the United States.’” (Id. at
10 8 (quoting Morrison, 561 U.S. at 268 (quoting Section 30(b) of the
11 Act, 15 U.S.C. § 78dd(b))).) Defendant argues that “every one of
12 the cases [Plaintiffs] cite in footnote 10 involved sponsored ADRs
13 (or similar instruments) registered on a national securities
14 exchange.” (Id. at 9-10.) And Defendant states that it is without
15 precedent to find that an entirely passive security issuer like
16 Toshiba waives objections or impliedly consents to ADS sales of its
17 securities or is subject to the full force of U.S. securities laws
18 simply because it is subject to SEC Rule 12g3-2. (Id. at 12-13.)

19 Further, Defendant argues that the court in Ficeto – one of
20 Plaintiffs’ cases – ultimately held that ADR transactions are
21 essentially foreign transactions outside the scope of § 10(b) and
22 the test in Morrison:

23

24 Cases have similarly held that § 10(b) does not reach
25 transactions in a foreign company’s shares that are traded
26 only on a foreign exchange but where American Depositary
27 Receipts (ADRs) representing those shares are listed and
28 traded on an American exchange. In these cases, courts have
held that ADRs are merely placeholders for the ordinary
shares traded on foreign exchanges, and thus allowing
§ 10(b) claims to survive would likewise be contrary to the
spirit of Morrison.

1 Ficeto, 839 F. Supp. 2d at 1115 (citing In re Vivendi Universal,
2 S.A. Sec. Litig., 765 F. Supp. 2d 512 (S.D.N.Y. 2011); In re
3 Société Générale Sec. Litig., No. 08 Civ. 2495 (RMB), 2010 WL
4 3910286, at *6 (S.D.N.Y. Sept. 29, 2010)); see also Reply, Dkt. No.
5 63, at 7-8.

6 The Court holds that the transactions at issue here do not
7 fall under the second prong of Morrison. Facially, the ADS
8 transactions are securities transactions that occurred
9 domestically: they were both sold and purchased in the United
10 States. However, Plaintiffs have not argued or pled that Defendant
11 was involved in those transactions in any way – or pointed to how
12 discovery could assist Plaintiffs in making such a claim.
13 Plaintiffs state that discovery might show that Toshiba was
14 involved in some fashion in the otherwise unsponsored ADSs. But
15 Plaintiffs must do more than speculate about what discovery might
16 yield in that regard.

17 Additionally, Plaintiffs' argument that the defendant does not
18 have to be involved in the domestic transaction under Morrison is
19 without support. The Court acknowledges that privity or some other
20 kind of direct transactional relationship is not required between a
21 plaintiff and a defendant in a § 10(b) case; a defendant security
22 issuer can be liable for fraud even if the issuer did not sell its
23 securities to the plaintiff. But while Morrison did not squarely
24 address the question, nowhere in Morrison did the Court state that
25 U.S. securities laws could be applied to a foreign company that
26 only listed its securities on foreign exchanges but whose stocks
27 are purchased by an American depositary bank on a foreign exchange
28 and then resold as a different kind of security (an ADR) in the

1 United States. In fact, all the policy and reasoning in Morrison
2 point in the other direction. Plaintiffs' proffered understanding
3 would create essentially limitless reach of § 10(b) claims because
4 even if the foreign defendant attempted to keep its securities from
5 being sold in the United States, the independent actions of
6 depositary banks selling on OTC markets could create liability.
7 This is inconsistent with the spirit and law of Morrison.

8 Instead, Morrison properly limited the reach of § 10(b) claims
9 based on the plain language of the statute, the presumption against
10 extraterritorial reach of U.S. laws, and comity concerns. The ADRs
11 that Morrison did not address were listed on the New York Stock
12 Exchange, unlike the unsponsored and unlisted ADRs here. See
13 Morrison, 561 U.S. 251. Thus while Morrison did not address the
14 sale of ADRs that are listed on domestic exchanges, even if the
15 Court in Morrison had addressed the sales, the securities at issue
16 in this case are not listed on a domestic exchange.

17 Most importantly, Plaintiffs have not alleged or provided any
18 evidence (or pointed to where Plaintiffs reasonably expect to find
19 evidence) of any affirmative act by Toshiba related to the purchase
20 and sale of securities in the United States. Some affirmative act
21 in relation to the purchase or sale of securities is required under
22 the Supreme Court's holding: "Section 10(b) reaches **the use of a**
23 **manipulative or deceptive device or contrivance only in connection**
24 **with** the purchase or sale of a security listed on an American stock
25 exchange, and **the purchase or sale of any other security in the**
26 **United States.**" Id. at 273 (emphasis added). There is no
27 allegation that Toshiba used a manipulative or deceptive device or
28 contrivance in connection with the purchase or sale of any security

1 in the United States. There are allegations that Toshiba committed
2 accounting fraud and misrepresented its profits to investors around
3 the world. But there is no allegation that those fraudulent
4 actions were connected to Toshiba selling its securities *in the*
5 *United States*. Plaintiffs have not pled that Toshiba listed its
6 securities in United States or sponsored, solicited, or engaged in
7 any other affirmative act in connection with securities sales in
8 the United States; thus, § 10(b) does not apply to Toshiba.

9 Therefore, Plaintiffs have failed to plead § 10(b), Rule 10b-
10 5, and § 20(a) causes of action in the FAC based on Morrison's two-
11 prong test because Toshiba neither lists its securities on a
12 domestic exchange nor was involved in the transaction of ADSs in
13 this country.

14 **B. Whether the Japanese Law Claim Is Properly in this Court**

15 Defendant argues that Plaintiffs' Japanese law claim should be
16 dismissed under principles of comity and *forum non conveniens*.

17 (Mot. Dismiss at 16.)

18 **1. Comity**

19 Comity was one of the major policy concerns underlying the
20 Supreme Court's holding in Morrison that Congress did not intend
21 for the extraterritorial application of the Security Exchange Act
22 in § 10(b) claims. Morrison, 561 U.S. at 267-70. "Comity
23 similarly rests on respect for the legal systems of members of the
24 international legal community – a kind of international federalism
25 – and thus 'serves to protect against unintended clashes between
26 our laws and those of other nations which could result in
27 international discord.'" Mujica v. AirScan Inc., 771 F.3d 580, 605
28 (9th Cir. 2014) (quoting E.E.O.C. v. Arabian Am. Oil, 499 U.S. 244,

1 248 (1991)). In determining whether comity concerns call for
2 dismissal, the Ninth Circuit has evaluated three factors as "a
3 useful starting point for analyzing comity claims": (1) the
4 strength of the United States' interest; (2) the foreign
5 government's interest; and (3) the adequacy of the alternative
6 forum. Id. at 603.

7 **(a) U.S. Interests**

8 "The (nonexclusive) factors we should consider when assessing
9 U.S. interests include (1) the location of the conduct in question,
10 (2) the nationality of the parties, (3) the character of the
11 conduct in question, (4) the foreign policy interests of the United
12 States, and (5) any public policy interests." Id. at 604.

13 Defendant claims that the United States' interests are "weak –
14 especially compared to Japan's interests." (Mot. Dismiss at 19.)
15 Defendant argues that Morrison explicitly warned against inserting
16 the United States into foreign securities regulation. (Id. (citing
17 Morrison, 561 U.S. at 269).) Further, Defendant claims all the
18 relevant statements and omissions were made in Japan, thus giving
19 U.S. interests less weight because the actions at issue in the suit
20 did not take place here. (Id.) Instead, U.S. investors who
21 purchased common stock can reasonably be expected to pursue their
22 claims in Japan, where they purchased that stock. (Id. at 19-20.)
23 Defendant argues that the court in In re Toyota Motor Corp.
24 Securities Litigation, No. CV 10-922 DSF (AJWx), 2011 WL 2675395,
25 at *6-7 (C.D. Cal. July 7, 2011), held that Japanese law claims
26 against Toyota were dismissed on the basis of comity to Japanese
27 courts and law. (Mot. Dismiss at 20-21.) That was true even
28 though Toyota sold ADRs in the United States, listed on the New

1 York Stock Exchange, filed disclosures with the SEC, and solicited
2 investors in the United States. (Id. at 20.) Thus, Defendant
3 claims that, even more so here, comity demands that the Japanese
4 law claim be heard in Japan. (Id.)

5 Plaintiffs first argue that "this action bears none of the
6 hallmarks of a case that is subject to dismissal under comity"
7 because "this case involves no issue of the extraterritorial
8 application of U.S. law to events taking place in Japan, nor any
9 risk that this case will interfere with the adjudication of any
10 past, present or anticipated civil, criminal, regulatory or
11 investigative proceeding in Japan." (Opp'n, Dkt. No. 50, at 22.)
12 Thus, Plaintiffs argue that this case is unlike Mujica and Toyota.
13 In Toyota, the court was faced with the question of whether to
14 exercise supplemental jurisdiction over a worldwide class of
15 investors, which is not the situation in this case, Plaintiffs
16 point out. (Id. at 23.)

17 In Mujica, the Ninth Circuit was also faced with a dissimilar
18 case: it "involved federal and California state law claims for
19 wrongful death, torture, war crimes and other acts arising from the
20 bombing of a Colombian village by members of the Colombian air
21 force allegedly acting on behalf of oil companies headquartered in
22 the U.S." (Id. at 24 (citing Mujica, 771 F.3d at 586).) The State
23 Department had provided the court with "two démarches . . . from
24 the Colombian government objecting to the prosecution of the case
25 in this country." (Id. (citing (Mujica, 771 F.3d at 584-86).)
26 Thus, Plaintiffs argue that comity is not appropriate here because
27 no such objection or claims are raised in this case as in Mujica.
28 (Id. at 24.) In contrast, Plaintiffs claim that "significant

1 aspects of Toshiba's fraud occurred with respect to business and
2 transactions in this country." (Id. at 28.) And unlike Mujica, a
3 suit in this country has not raised objections from the Japanese
4 government, courts, or other litigants. (Id. at 29.) As
5 Plaintiffs put it, "[e]ven Toshiba's own expert admits that 'the
6 ruling of the U.S. court would have no precedential weight in
7 Japan.'" (Id. at 30 (citing Ishiguro Decl. ¶ 21).)

8 Lastly, Plaintiffs argue that Defendant has failed to show
9 that "adjudicatory comity or 'comity among courts'" is needed here
10 because the Japanese cases are not brought by the same investors as
11 in this case. (Id. at 25.) Plaintiffs note that Toshiba does not
12 address whether the class members here, such as the ADS purchasers,
13 could even sue in Japan for their claims involving ADSs purchased
14 in the United States. (Id. at 25-26.) Plaintiffs argue that
15 Morrison also did not address the situation where Japanese law
16 would be applied to foreign transactions in a U.S. court, as would
17 be the case here for the 6502 purchaser class. (Id. at 26.)
18 Instead, the interests of the United States are strong here because
19 the class members are U.S. investors and the United States has a
20 strong interest in protecting such investments. (Id. at 28.)

21 **(b) Foreign Government Interests**

22 "The proper analysis of foreign interests essentially mirrors
23 the consideration of U.S. interests. Foreign states, no less than
24 the United States, have legitimate interests in regulating conduct
25 that occurs within their borders, involves their nationals, impacts
26 their public and foreign policies, and implicates universal norms."
27 Mujica, 771 F.3d at 607. The factors considered are essentially
28 the same: "the territoriality of the questioned activity, its

1 effects, the nationality of the parties, and the interests of the
2 foreign state." Id.

3 Defendant argues that "the public misstatements and omissions
4 were made in Japan by a Japanese corporation listed on Japanese
5 stock exchanges," and further that "the Toshiba executives
6 identified in the Amended Complaint and [the internal
7 investigation] Report appear overwhelmingly to be citizens and
8 residents of Japan," all of which shows that Japan has a very
9 strong interest in adjudicating this Japanese law claim. (Mot.
10 Dismiss at 17 (citing Wada Decl. ¶ 5).) Further, "[a]pproximately
11 75 percent of Toshiba stockholders are Japanese citizens,
12 companies, or institutions, while the remainder is dispersed
13 globally." (Id. at 18 (citing FAC ¶ 243(g)).) Defendant also
14 cites examples of the Japanese government speaking publicly about
15 the interest in and ramifications of Toshiba's accounting
16 revelations on Japan. (Id.) Japanese courts are "handling at
17 least three lawsuits against Toshiba involving a total of 52
18 investors" and Japanese courts are developing their interpretation
19 of the relevant part of the law, Article 21-2 of the Japanese
20 Exchange Act. (Id.)

21 Plaintiffs' response is the same as put forth above, primarily
22 focusing on the fact that this case involves the claims of U.S.
23 citizens and residents based on transactions subject to Japanese
24 law. (See generally Opp'n, Dkt. No. 50, at 22-31.) Thus,
25 Plaintiffs acknowledge that Japan has an interest in the case, but
26 they claim that it is weaker compared to the United States's
27 interest, and the interest would be respected by the application of
28 Japanese law in this Court. (Id.)

1 **(c) Adequacy of Alternative Forum**

2 "[C]ourts consider decisions rendered by the alternative forum
3 and ask (1) whether the judgment was rendered via fraud; (2)
4 whether the judgment was rendered by a competent court utilizing
5 proceedings consistent with civilized jurisprudence; and (3)
6 whether the foreign judgment is prejudicial and repugnant to
7 fundamental principles of what is decent and just." Mujica, 771
8 F.3d at 608 (internal quotation and alteration omitted).

9 "Typically, courts ask whether one side has presented specific
10 evidence that the judgment of the alternative forum was
11 significantly inadequate." Id.

12 Neither party disputes that Japan is a more than adequate
13 forum for these claims based on the above standard.

14 **(d) The Court's Analysis**

15 The Court holds that the comity issues raised in this case
16 weigh in favor of dismissal, as in Toyota, due to the cause of
17 action being based on Japanese securities law for actions of a
18 Japanese company that only lists its securities in Japan (which is
19 also where the fraudulent accounting primarily took place). As
20 Plaintiffs acknowledge, other cases have been filed in Japan
21 directly relating to this accounting fraud.

22 Plaintiffs' concern that ADS purchasers – who Plaintiffs
23 earlier argued engaged in domestic (U.S.) transactions – will not
24 be able to sue in Japan under Japanese securities laws is perhaps
25 based on the proper application of the Japanese securities laws,
26 not an indication that this Court should keep this cause of action.
27 Further, this Court may also have found that the ADS purchasers
28 would not have a Japanese cause of action; thus, the inclusion of

1 this potential class in the case does not sway the Court's comity
2 analysis.

3 In all, Morrison teaches U.S. courts to consider comity
4 carefully in determining the application of U.S. securities laws.
5 No less should the Court consider comity in deciding whether a
6 Japanese securities law claim is more properly heard here or in
7 Japan, particularly where this Court has already dismissed the U.S.
8 securities law causes of action based on the foreign issuer's
9 noninvolvement and lack of any affirmative act in any domestic
10 transaction. Thus, the Court holds that principles of comity lead
11 this Court to dismiss the Japanese law cause of action.

12 2. *Forum non Conveniens*

13 "[A] plaintiff's choice of forum should rarely be disturbed.
14 However, when an alternative forum has jurisdiction to hear the
15 case, and when trial in the chosen forum would 'establish . . .
16 oppressiveness and vexation to a defendant . . . out of all
17 proportion to plaintiff's convenience,' or when the 'chosen forum
18 [is] in appropriate because of considerations affecting the court's
19 own administrative and legal problems,' the court may, in the
20 exercise of its sound discretion, dismiss the case." Piper
21 Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (quoting Koster v.
22 Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)). As in the
23 comity analysis, courts consider private interest factors and
24 public interest factors in making this determination:

25 The factors pertaining to the private interests of the
26 litigants included the "relative ease of access to sources
27 of proof; availability of compulsory process for attendance
28 of unwilling, and the cost of obtaining attendance of
willing, witnesses; possibility of view of premises, if
view would be appropriate to the action; and all other

1 practical problems that make trial of a case easy,
2 expeditious and inexpensive."

3 The public factors bearing on the question included
4 the administrative difficulties flowing from court
5 congestion; the "local interest in having localized
6 controversies decided at home"; the interest in having the
7 trial of a diversity case in a forum that is at home with
8 the law that must govern the action; the avoidance of
9 unnecessary problems in conflict of laws, or in the
10 application of foreign law; and the unfairness of burdening
11 citizens in an unrelated forum with jury duty.

12 Id. at n.6 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09
13 (1947)) (internal citation omitted) (paragraphing added).

14 Defendant argues here that under the practical considerations
15 of *forum non conveniens*, this Court should dismiss Plaintiffs'
16 Japanese law claim. (Mot. Dismiss at 21.) Defendant argues that
17 there is an adequate alternative forum in Japan, where Toshiba is
18 "amenable" to suit. (Id. at 22.) Further, the private interest
19 factors weigh in favor of dismissal, Defendant claims. The
20 "overwhelming majority" of evidence is in Japan and relates to
21 accounting issues in Japan. (Id.) The key executives identified
22 in the FAC are no longer employees of Defendant and could not be
23 compelled to appear at trial in the United States under FRCP 45.
24 (Id. at 22-23.)

25 Additionally, unwilling Japanese witnesses require complicated
26 letters rogatory through Japanese government officials in order to
27 be required to testify, and that requirement is still at the
28 discretion of a Japanese court. (Id. at 23.) Depositions of
willing Japanese witnesses would still be costly and complicated;
among other things, Japan requires the use of a U.S. consulate or
embassy, with a consular officer presiding over the deposition and
a special deposition visa for the U.S. participants. (Id. at 23-

1 24.) These practical discovery problems weigh in favor of
2 dismissal, Defendant claims. (Id.)

3 Further, Defendant argues that the public interest factors
4 favor dismissal. The claim is brought under Japanese law, which
5 under Piper Aircraft Co. weighs toward dismissal. (Id. at 24.)
6 Defendant claims that Japanese courts are still developing the law
7 around Article 21-2, which means that the Court will have trouble
8 interpreting and applying it. (Id.) This also could result in
9 inconsistent judgments and duplicative recovery because Japanese
10 courts are already addressing claims against Toshiba under the same
11 law. (Id.)

12 Plaintiffs respond that Defendant has the burden in raising
13 *forum non conveniens* and that Defendant has failed to meet that
14 burden. First, Plaintiffs reassert their argument that ADS
15 purchasers will not have an adequate forum in Japan. (Id. at 32.)
16 Plaintiffs also claim that a plaintiff's choice of forum – even in
17 a class action – is entitled to deference and is presumptively
18 convenient, particularly for domestic plaintiffs choosing their
19 home forum. (Id.) Additionally, Plaintiffs argue that there will
20 be a “substantial” amount of discovery in the United States for
21 this case, including for events related to Westinghouse, U.S.
22 auditors at Ernst & Young, and U.S. transactions in Toshiba
23 securities. (Id. at 33-34.) Plaintiffs claim that the Japanese
24 evidence could be stipulated to and authenticated, as most of it
25 has been turned over to internal and governmental investigators.
26 (Id. at 34.) The depositions can also take place in Japan using
27 the method Toshiba identified. (Id. at 34-35.) And Toshiba has
28

1 not shown that any witness is unavailable or unwilling to come to
2 the United States for trial, Plaintiffs claim. (Id.)

3 Additionally, Plaintiffs argue that Toshiba has failed to
4 weigh the inconvenience to the American witnesses and parties if
5 they were required to litigate this case in Japan. (Id. at
6 36.) Further, Toshiba has its American headquarters in this
7 district, Plaintiffs argue, and is subject to personal jurisdiction
8 here and has information relevant to discovery here. (Id.)
9 Lastly, Plaintiffs argue that applying Japanese law in this case
10 would not be difficult. According to Plaintiffs, "Japanese law is
11 readily determinable by this Court, the relevant statutes have been
12 translated into English, and relevant case law and treatises are
13 available to this Court." (Id. at 37.) Plaintiffs point out that
14 the Court can appoint a special master or expert in Japanese law if
15 needed. (Id. (citing FRCP 44.1; Fed. R. Evid. 706).) Plaintiffs
16 also cite several cases where U.S. federal courts applied Japanese
17 law. (Id. at 38.) Thus, Plaintiffs argue that the Japanese law is
18 not so uncertain as to be impractical to apply in this Court. (Id.
19 at 38-39.)

20 As an alternative to the Court's holding on comity, the Court
21 also holds that the doctrine of *forum non conveniens* makes
22 dismissal proper for the Japanese law cause of action. Both the
23 private and public factors weigh in favor of dismissal. There are
24 many practical issues with fully litigating this cause of action in
25 this Court, particularly with taking discovery from and deposing
26 non-Toshiba employees that Plaintiffs have identified as key
27 witnesses and perpetrators of the accounting fraud. Even taking
28 discovery from and deposing willing witnesses will be a challenge.

1 Most of the evidence and witnesses identified by both parties as
2 material are in Japan, and Japan has the strongest factual
3 connection to the Japanese law claim. The Court recognizes its
4 duty to hear cases over which it has jurisdiction, but the Court
5 also finds that Japanese courts are more than competent to hear
6 these claims.

7 And while the Court is capable of determining and applying
8 Japanese securities law, such a challenge need not be surmounted in
9 this case because other considerations weigh in favor of a more
10 convenient forum being used for both the Court and the witnesses in
11 this case. Therefore, Plaintiffs' Japanese law cause of action is
12 dismissed with prejudice.

13 **IV. CONCLUSION**

14 For all the reasons discussed above, the Court GRANTS in part
15 and DENIES in part Plaintiffs' Motion to Strike the Wada
16 Declaration, as described above. The Court GRANTS Defendant's
17 Motion to Dismiss. The Court finds that leave to amend would be
18 futile; therefore, the case is dismissed with prejudice.

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20 IT IS SO ORDERED.

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22 Dated: May 20, 2016

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DEAN D. PREGERSON
United States District Judge