19-3976

United States Court of Appeals for the Second Circuit

BANCO SAFRA S.A.-CAYMAN ISLANDS BRANCH,

Plaintiff-Appellant,

v.

SAMARCO MINERACAO S.A., BHP BILLITON LIMITED, BHP BILLITON PLC, BHP BILLITON BRASIL LTDA., VALE S.A.,

Defendants-Appellees,

RICARDO VESCOVI DE ARAGAO, KLEBER LUIZ DE MENDONCA TERRA, MAURY SOUZA JUNIOR, JOSE CARLOS MARTINS, STEPHEN MICHAEL POTTER, JAMES JOHN WILSON, JEFFREY MARK ZWEIG, HELIO CABRAL MOREIRA, SERGIO CONSOLI FERNANDES, PEDRO JOSE RODRIGUES, MARGARET BECK,

Defendants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Neither Washington Legal Foundation nor Allied Educational Foundation has a parent corporation; neither of them issues stock; and no publicly held corporation owns a ten-percent or greater interest in either of them.

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INTEREST OF *AMICI CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It appears often as *amicus curiae* in important securities cases, see, e.g., *Liu v. SEC*, No. 18-1501 (U.S., argued Mar. 3, 2020); *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and in important cases on the presumption against extraterritorial application of American law, see, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

Allied Educational Foundation is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy. It has submitted many *amicus curiae* briefs arguing against undisciplined application of American law to foreign conduct, see, e.g., *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016).

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[*] No party's counsel authored any part of this brief. No one, apart from *Amici Curiae* and their counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

SUMMARY OF ARGUMENT

This securities-fraud case has all the marks of what is often called a "foreign-cubed" lawsuit. It has a foreign plaintiff; it has foreign defendants; and it involves foreign securities. The foreign plaintiff is the Cayman Islands branch of a Brazilian bank, Banco Safra. The foreign defendants are a Brazilian mining company, Samarco Mineracao, and its owners and affiliated entities. The foreign securities are unsecured notes issued by Samarco under Regulation S, an SEC rule that governs securities offered and sold abroad.

It is hard to bring a foreign-cubed securities-fraud suit in United States federal court. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), holds that a plaintiff may typically do so only if the alleged fraud connects to a domestic securities transaction. Such a transaction either "is made in the United States" or "involves a security listed on a domestic exchange." 561 U.S. at 269-70. Samarco's notes were not listed on a domestic exchange. Therefore Banco Safra tried to show that the securities transactions it is suing over were "made" here. The district court did not see things that way, and it granted a motion to dismiss. This Court should affirm.

I.A. Although Banco Safra is foreign and the defendants are foreign and the notes are foreign, Banco Safra contends that this case involves domestic transactions because money passed through domestic bank accounts, counterparties, and brokers. But that's true of many transactions that are clearly foreign. "It is the rare case," observes *Morrison*, "that lacks *all* contact with the territory of the United States." *Id.* at 266. Banco Safra never explains *how* domestic bank accounts, counterparties, or brokers participated in the transactions. Money may have simply boomeranged into, then out of, the United States during transactions between foreign entities. That is not enough to satisfy *Morrison*'s domestic-transaction test.

I.B. Banco Safra tries to bolster its case by asserting that the notes were bought and sold in U.S. dollars, and that the purchases and sales were reported to a federal agency's trade-reporting database. These facts do not suggest domesticity: U.S. dollars can be found all over the world, and nothing shows that banks are careful to weed foreign transactions from their reports. But in any event, these potentially domestic *elements* do nothing to establish that the *transactions* were domestic. *Morrison* requires Banco Safra to plead

that the transactions were "made in the United States." Facts that at most obliquely *suggest* domesticity, such as the currency of the transactions and non-parties' reporting practices, are utterly beside the point.

II. *Morrison*'s domestic-transaction rule serves many important purposes. Among other things, it ensures that our courts respect other nations' sovereign interests, avoid unnecessary clashes with other nations over public policy, uphold the presumption against extraterritorial application of American law, and adhere to the bar on creating private rights of action from the bench. Reversing the district court would imperil each of these principles. It would offend other nations by bringing much of the global securities trade—every transaction that merely *touches* these shores—within American jurisdiction. It would subject that trade to controversial American practices, such as the opt-out class action. It would contradict a vast body of judicial decisions declaring that our law "does not rule the world." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007). And it would violate the separation of powers, under which the legislature, not

the judiciary, decides what is wrongful, when it should be actionable in court, and who may sue over it.

ARGUMENT

I. BANCO SAFRA FAILED TO PLEAD A DOMESTIC TRANSACTION UNDER *MORRISON V. NATIONAL AUSTRALIA BANK*.

A. Under *Morrison*, A Plaintiff Cannot Plead A Domestic Transaction By Alleging Merely That Money Passed Through The United States.

Banco Safra's core allegation, in its effort to plead domestic transactions, is that money passed through bank accounts and counterparties or brokers in the United States. As the district court correctly understood, however, identifying American bank accounts, counterparties, and brokers does not establish a domestic transaction. Banco Safra simply listed entities and provided their American addresses; it said nothing whatsoever about their *role* in the transactions. (Dkt. 98 at 9-10.)

Banco Safra has pleaded, at most, that money entered, then exited, the United States as a foreign bank traded foreign notes with other foreign parties. One might call this the "boomerang" theory, under which a domestic transaction arises if during a transaction, money

leaves a foreign country, touches the United States, and then enters another foreign country.

As the defendants explain (ARB 15-19), the boomerang theory is foreclosed by this Court's precedents applying *Morrison*, 561 U.S. 247.

All the more does the theory fail under *Morrison* itself. *Morrison*'s domestic-transaction requirement arises from the presumption against extraterritorial application of American law. But that presumption "would be a craven watchdog indeed," *Morrison* notes, "if it retreated to its kennel whenever *some* domestic activity is involved in the case." 561 U.S. at 266. "It is the rare case," after all, "that lacks *all* contact with the territory of the United States." *Id*. *Morrison* therefore clarifies that a domestic transaction is a domestic *purchase* or *sale*. *Id*. at 267-68.

If *Morrison*'s "craven watchdog" line means anything, the boomerang theory must be invalid. The reason so many cases involve "*some* domestic activity," *id*. at 266, is that the United States is a global financial hub. It is precisely because so many foreign transactions pass money through American financial institutions that so few cases lack "*all* contact with the territory of the United States." *Id*. And that is why, "with regard to securities *not* registered on domestic exchanges, the

exclusive focus" of Rule 10b-5 is "on *domestic* purchases and sales." *Id.* at 268. Alleging that money kissed the United States in the course of a foreign sale or purchase—all that Banco Safra has, in effect, alleged—is not enough.

B. Under *Morrison*, A Plaintiff Cannot Plead A Domestic Transaction By Alleging Circumstantial Evidence Of Domesticity.

Banco Safra sought to give its transactions a domestic feel by alleging that they occurred in U.S. dollars and were reported to the Federal Industry Regulatory Authority's trade-reporting database.

These allegations get Banco Safra nowhere, for the reasons given by the defendants. (ARB 14-15, 20-22.)

What's more, these allegations, too, are thwarted by *Morrison*. *Morrison* substitutes the domestic-transaction test for "a collection of tests" that were "complex in formulation and unpredictable in application." 561 U.S. at 256. "These tests were not easy to administer." *Id.* at 258. In particular, *Morrison* faults the then-regnant "conduct and effects" test, under which "the presence or absence of any single factor . . . considered significant in other cases" was "not necessarily

dispositive in future cases." *Id.* at 259 (quoting *IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980)).

As their criticism of the old ways shows, the justices expected the domestic-transaction test to be more straightforward than the multifactor tests it replaced. It is, to be sure, impossible to squeeze every last drop of complexity from the concept of domesticity. See *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 220 (2d Cir. 2014) (Leval, J., concurring). This is true of any fact-bound inquiry. But in defining a transaction as occurring where the parties "enter[] into a binding contract to purchase or sell securities," this Court has honored *Morrison* by limiting that complexity to the bare minimum necessary. *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012). A transaction is domestic, this Court says, only if "title is transferred," or a party "incur[s] irrevocable liability," in the United States. *Id.* at 68.

Applied to this Court's definition of "domestic transaction," *Morrison* demands that a plaintiff plead *direct* facts establishing a domestic transfer of title or attachment of irrevocable liability. Pleading *circumstantial* facts *suggestive* of these things can't be enough.

Otherwise the test would become the same species of unpredictable multifactor investigation that *Morrison* explicitly denounces.

In seeking to plead domestic transactions, Banco Safra tries to get over the hump with highly tangential facts, facts by which a court can do no more than *guess* that a transaction was a domestic one. *Morrison* bars this gambit.

II. BANCO SAFRA'S LAWSUIT RAISES ALL THE PROBLEMS THAT COME WITH EXTRATERRITORIAL APPLICATION OF RULE 10B-5.

Morrison addresses several problems that accompany the extraterritorial application of American law. Its domestic-transaction test is supposed to ensure that our legal system avoids those problems when applying Rule 10b-5. Yet if the boomerang theory, along with a few circumstantial facts, is enough to establish domesticity, all of those problems return.

A. Foreign States' National Interests.

"Other nations," needless to say, have "legitimate sovereign interests." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). That being so, is it "reasonable to apply [our] laws to foreign conduct" that causes only "foreign harm"? *Id.* at 165. "Why should American law supplant, for example, Canada's or Great Britain's or

Japan's"—or, say, Brazil's—"own determination about how best to protect" their citizens and their interests? *Id*. Generally the answers to these questions are "no" and "it shouldn't." See *id*. at 166.

Cases that involve a foreign sale between foreign parties of a foreign security belong in foreign courts. Foreign nations have a greater interest in regulating the conduct at issue in these cases. To allow them to proceed in our courts is to trample on those nations' superior claim to jurisdiction and sow international discord. Yet Banco Safra brings just such a case. Its boomerang theory and circumstantial facts are simply a figleaf for a foreign securities case.

B. Foreign States' Public Policy.

Asserting jurisdiction over securities actions that belong abroad is not bad simply because it disregards foreign interests in an abstract sense (though it does, and the consequences of doing so can be quite real). It is also bad because other countries have reasonable objections to policies that underlie our legal system and our securities laws. Among other things:

- Our scheme of private civil legal enforcement is far from universal. Europe, for its part, generally prefers to enforce the

law through "state actions, not private ones, directed at imposing administrative or criminal sanctions." Richard H. Dreyfuss, *Class Action Judgment Enforcement In Italy: Procedural "Due Process" Requirements*, 10 Tul. J. Int'l & Comp. L. 5, 9 n.18 (2002). See Brief for the Republic of France as *Amicus Curiae* in Support of Respondents, pp. 2, 20, *Morrison v. Nat'l Australia Bank*, No. 08-1191 (U.S. Feb. 26, 2010).

- Our particular system of private enforcement is made uniquely expensive, cumbersome, and acrimonious by how our litigation is bankrolled. We impose the "American Rule" for attorneys' fees, allow contingency-fee agreements, and tolerate champerty. These practices are not international norms. See Brief of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents, pp. 9-11, *Morrison v. Nat'l Australia Bank*, No. 08-1191 (U.S. Feb. 25, 2010).
- Many countries disapprove of—indeed, recoil in horror at—our class-action mechanism. See Brief for the Republic of France,

supra, at 20, 24-25. "Most foreign legal systems do not permit group litigation, and even those that have adopted some form of collective action mechanism do not recognize the validity of [American-style] opt-out procedures." Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 32 (2007). Some foreign courts, in fact, would "almost certainly refuse to enforce a court judgment in a U.S. 'opt out' class action," because "the 'opt out' mechanism violates [their] "constitutional [due-process] principles and public policy." Brief for the Republic of France, supra, at 26.

- Our private right of action for securities fraud leaves many foreigners scratching their heads. Why, they wonder, do we allow securities class actions that "impose enormous penalties" yet "achieve little compensation and only limited deterrence"? Brief for the Republic of France, supra, at 21 (quoting John C. Coffee, Jr., *Reforming the Securities Class Action*, 106 Colum. L. Rev. 1534, 1534 (2006)). They see the "basic circularity underlying" such actions. *Id*. The typical securities class action

is no more than a suit by former shareholders against current shareholders. "In such cases, the result can be a mere transfer of wealth from one group of innocent investors to another, with large transaction costs in the form of legal fees and expenses." Brief of the United Kingdom, supra, at 18. Our system "benefits corporate insiders, insurers, and plaintiffs' attorneys, but not investors." Brief for the Republic of France, supra, at 21 (quoting Coffee, supra, 106 Colum. L. Rev. at 1534).

Those who engage in foreign securities transactions know, or should know, that in doing so they must accept the public policies of the nation or nations that have the greatest interest in regulating those transactions. Indeed, those public policies can be viewed as *part* of those transactions. In bringing its suit here, Banco Safra is asking this nation's courts to ignore that fact. It is asking our judiciary to claim for itself the role of global securities police, and to cast aside other nations' legitimate policy preferences.

C. The Presumption Against Extraterritoriality.

The problems that come with trying to impose our law on foreign events are not new. It has long been presumed, therefore, that "United

States law governs domestically but does not rule the world," *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007), and that a federal law applies extraterritorially only if Congress explicitly says so, see, e.g., *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020) ("We presume that statutes do not apply extraterritorially to ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . . . This canon of construction . . . serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."); *N.Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31-32 (1925) ("in a case of doubt" a statute should be construed "as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power").

When it passed the Securities Exchange Act of 1934, Congress did not expect § 10(b) to afford a private right of action even for *domestic*

securities fraud, see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729-30, 737 (1975), never mind for *foreign* securities fraud, see *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 31-33 (D.C. Cir. 1987) (Bork, J.), overruled on other grounds by *Morrison*, 561 U.S. 247. Congress's intent that § 10(b) *not* apply abroad is the main reason *Morrison* crafted the domestic-transaction test. 561 U.S. at 267 n.9. Banco Safra is seeking to smuggle a thinly veiled foreign securities suit into federal court, in defiance of the presumption against extraterritoriality that undergirds *Morrison*.

D. The Bar On Implied Private Rights Of Action.

The private right of action judicially read into § 10(b) and Rule 10b-5 is the product of an era when "the [Supreme] Court assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose." *Mesa*, 140 S. Ct. at 741 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017)). That era is over. The Supreme Court now "appreciate[s] . . . the tension between this practice and the Constitution's separation of legislative and judicial power." *Id.* "When a court recognizes an implied claim for damages on

the ground that doing so furthers the 'purpose' of the law, the court risks arrogating legislative power." *Id.*

"Concerns with the judicial creation of a private cause of action caution against its expansion." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 165 (2008). "Though it remains the law," therefore, "the § 10(b) private right should not be extended beyond its present boundaries." *Id.* *Morrison* was careful to maintain those boundaries. See 561 U.S. at 261 & n.5. Any argument that the Rule 10b-5 private right of action should cover foreign transactions—the attendant risks to comity, global capital flows, and America's status as an attractive financial hub be damned—must be taken to the legislature. "Congress is available to make any policy decisions that are required." *Zoelsch*, 824 F.2d at 32. Banco Safra's alternative approach, of trying to sneak foreign transactions into American courts with a boomerang theory here, some circumstantial facts there, must fail.

CONCLUSION

The judgment should be affirmed.

June 15, 2020

Respectfully submitted,

/s/ Corbin K. Barthold

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) and Local Rule 29.1(c) because it contains 2,947 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2010 in 14-point font.

June 15, 2020

/s/ Corbin K. Barthold
CORBIN K. BARTHOLD

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2020, a true and correct copy of the foregoing brief was filed and served on all registered counsel through the Court's CM/ECF system.

/s/ Corbin K. Barthold
CORBIN K. BARTHOLD