16-1914-cv

United States Court of Appeals

for the

Second Circuit

UNIVERSITIES SUPERANNUATION SCHEME LIMITED, EMPLOYEES RETIREMENT SYSTEM OF THE STATE OF HAWAII, NORTH CAROLINA DEPARTMENT OF STATE TREASURER,

Plaintiffs-Appellees,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS BB SECURITIES LTD., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BANK OF CHINA (HONG KONG) LIMITED, BANCA IMI, S.P.A., SCOTIA CAPITAL (USA) INC., CITIGROUP GLOBAL MARKETS INC., ITAU BBA USA SECURITIES, INC., J.P. MORGAN SECURITIES LLC, MORGAN STANLEY & CO. LLC, MITSUBISHI UFJ SECURITIES (USA), INC., HSBC SECURITIES (USA) INC., STANDARD CHARTERED BANK AND BANCO BRADESCO BBI S.A.

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PETER KALTMAN, individually and on behalf of all others similarly situated, DIMENSIONAL EMERGING MARKETS VALUE FUND, DFA INVESTMENT DIMENSIONS GROUP INC., on behalf of its series Emerging Markets Core Equity Portfolio, Emerging Markets Social Core Equity Portfolio and T.A. World ex U.S. Core Equity Portfolio, DFA INVESTMENT TRUST COMPANY, on behalf of its series The Emerging Markets Series, DFA AUSTRIA LIMITED, solely in its capacity as responsible entity for the Dimensional Emerging Markets Trust, DFA International Core Equity Fund and DFA International Vector Equity Fund by Dimensional Fund Advisors Canada ULC solely in its capacity as Trustee, DIMENSIONAL FUNDS PLC, on behalf of its subfund Emerging Markets Value Fund, DIMENSIONAL FUNDS ICVC, on behalf of its sub-fund Emerging Markets Core Equity Fund, SKAGEN AS, DANSKE INVEST MANAGEMENT A/S, DANSKE INVEST MANAGEMENT COMPANY, NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, NEW YORK CITY POLICE PENSION FUND, BOARD OF EDUCATION RETIREMENT SYSTEM OF THE CITY OF NEW YORK, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT PENSION FUND, NEW YORK CITY DEFERRED COMPENSATION PLAN, FORSTA AP-FONDEN, TRANSAMERICA INCOME SHARES, INC., TRANSAMERICA FUNDS, TRANSAMERICA SERIES TRUST, TRANSAMERICA PARTNERS PORTFOLIOS, JOHN HANCOCK VARIABLE INSURANCE TRUST, JOHN HANCOCK FUNDS II, JOHN HANCOCK SOVEREIGN BOND FUND, JOHN HANCOCK BOND TRUST, JOHN HANCOCK STRATEGIC SERIES, JOHN HANCOCK INVESTMENT TRUST, JHF INCOME SECURITIES TRUST, JHF INVESTORS TRUST, JHF HEDGED EQUITY & INCOME FUND, ABERDEEN EMERGING MARKETS FUND, ABERDEEN GLOBAL EQUITY FUND, ABERDEEN GLOBAL NATURAL RESOURCES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, each a series of Aberdeen Funds, ABERDEEN CANADA EMERGING MARKETS FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE GLOBAL FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE INTERNATIONAL FUND, ABERDEEN CANADA FUNDS EAFE PLUS EQUITY FUND AND ABERDEEN CANADA FUNDS GLOBAL EQUITY FUND, each a series of Aberdeen Canada Funds, ABERDEEN EAFE PLUS ETHICAL FUND, ABERDEEN EAFE PLUS FUND, ABERDEEN EAFE PLUS SRI FUND, ABERDEEN EMERGING MARKETS EQUITY FUND, ABERDEEN FULLY HEDGED INTERNATIONAL EQUITIES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, ABERDEEN GLOBAL EMERGING MARKETS EQUITY FUND, ABERDEEN GLOBAL ETHICAL WORLD EQUITY FUND, ABERDEEN GLOBAL RESPONSIBLE WORLD EQUITY FUND, ABERDEEN GLOBAL WORLD EQUITY DIVIDEND FUND, ABERDEEN GLOBAL WORLD EQUITY FUND, ABERDEEN GLOBAL WORLD RESOURCES EQUITY FUND, ABERDEEN EMERGING MARKETS EQUITY FUND, ABERDEEN ETHICAL WORLD EQUITY FUND, ABERDEEN MULTI-ASSET FUND, ABERDEEN WORLD EQUITY FUND, ABERDEEN LATIN AMERICA EQUITY FUND, INC., AAAID EQUITY PORTFOLIO, ALBERTA TEACHERS RETIREMENT FUND, AON

HEWITT INVESTMENT CONSULTING, INC., AURION INTERNATIONAL DAILY EQUITY FUND, BELL ALIANT REGIONAL COMMUNICATIONS INC., BMO GLOBAL EQUITY CLASS, CITY OF ALBANY PENSION PLAN, DESJARDINS DIVIDEND INCOME FUND, DESJARDINS EMERGING MARKETS FUND, DESJARDINS GLOBAL ALL CAPITAL EQUITY FUND, DESJARDINS OVERSEAS EQUITY VALUE FUND, DEVON COUNTY COUNCIL GLOBAL EMERGING MARKET FUND, DEVON COUNTY COUNCIL GLOBAL EQUITY FUND, DGIA EMERGING MARKETS EQUITY FUND L.P., ERIE INSURANCE EXCHANGE, FIRST TRUST/ABERDEEN EMERGING OPPORTUNITY FUND, GE UK PENSION COMMON INVESTMENT FUND, HAPSHIRE COUNTY COUNCIL GLOBAL EQUITY PORTFOLIO, LONDON BOROUGH OF HOUNSLOW SUPPERANNUATION FUND, MACKENZIE UNIVERSAL SUSTAINABLE OPPORTUNITIES CLASS, MARSHFIELD CLINIC, MOTHER THERESA CARE AND MISSION TRUST, MOTHER THERESA CARE AND MISSION TRUST, MTR CORPORATION LIMITED RETIREMENT SCHEME, MYRIA ASSET MANAGEMENT EMERGENCE, NATIONAL PENSION SERVICE, NPS TRUST ACTIVE 14, OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM, WASHINGTON STATE INVESTMENT BOARD, ABERDEEN LATIN AMERICAN INCOME FUND LIMITED, ABERDEEN GLOBAL EX JAPAN PENSION FUND PPIT, FS INTERNATIONAL EQUITY MOTHER FUND, NN INVESTMENT PARTNERS B.V., acting in the capacity of management company of the mutual fund NN Global Equity Fund and in the capacity of management company of the mutual fund NN Institutioneel Dividend Aandelen Fonds, NN INVESTMENT PARTNERS LUXEMBOURG S.A., acting in the capacity of management company SICAV and its Sub-Funds and NN (L) SICAV, for and on behalf of NN (L) Emerging Markets High Dividend, NN (L) FIRST, AURA CAPITAL LTD., WGI EMERGING MARKETS FUND, LLC, BILL AND MELINDA GATES FOUNDATION TRUST, BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM, TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP, LOUIS KENNEDY, individually and on behalf of all others similarly situated, KEN NGO, individually and on behalf of all others similarly situated, JONATHAN MESSING, individually and on behalf of all others similarly situated, CITY OF PROVIDENCE, individually and on behalf of all others similarly situated, UNION ASSET MANAGEMENT HOLDING AG,

Plaintiffs,

– v. –

PETROLEO BRASILEIRO S.A. PETROBRAS, BB SECURITIES LTD., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BANK OF CHINA (HONG KONG) LIMITED, BANCA IMI, S.P.A., SCOTIA CAPITAL (USA) INC., THEODORE MARSHALL HELMS, PETROBRAS GLOBAL FINANCE B.V., PETROBRAS AMERICA INC., CITIGROUP GLOBAL MARKETS INC., ITAU BBA USA SECURITIES, INC., J.P. MORGAN SECURITIES LLC, MORGAN STANLEY & CO. LLC, MITSUBISHI UFJ SECURITIES (USA), INC., HSBC SECURITIES (USA) INC., STANDARD CHARTERED BANK, BANCO BRADESCO BBI S.A.,

Defendants-Appellants,

JOSE SERGIO GABRIELLI, SILVIO SINEDINO PINHEIRO, PAULO ROBERTO COSTA, JOSE CARLOS COSENZA, RENATO DE SOUZA

DUQUE, GUILLHERME DE OLIVEIRA ESTRELLA, JOSE MIRANDA FORMIGL FILHO, MARIA DAS GRACAS SILVA FOSTER, ALMIR GUILHERME BARBASSA, MARIANGELA MOINTEIRO TIZATTO, JOSUE CHRISTIANO GOME DA SILVA, DANIEL LIMA DE OLIVEIRA, JOSE RAIMUNDO BRANDA PEREIRA, SERVIO TULIO DA ROSA TINOCO, PAULO JOSE ALVES, GUSTAVO TARDIN BARBOSA, ALEXANDRE QUINTAO FERNANDES, MARCOS ANTONIO ZACARIAS, CORNELIS FRANCISCUS JOZE LOOMAN, JP MORGAN SECURITIES LLC, PRICEWATERHOUSECOOPERS AUDITORES INDEPENDENTES,

Defendants.

CERTIFICATION PURSUANT TO F.R.A.P. 26.1

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellants BB Securities Ltd., Citigroup Global Markets Inc., J.P. Morgan Securities LLC, Itau BBA USA Securities, Inc., Morgan Stanley & Co. LLC, HSBC Securities (USA) Inc., MUFG Securities Americas Inc.,[1] Merrill Lynch, Pierce, Fenner & Smith Inc., Standard Chartered Bank, Bank of China (Hong Kong) Limited, Banco Bradesco BBI S.A., Banca IMI S.p.A., and Scotia Capital (USA) Inc. (collectively, the "Underwriter Defendants") state that:

1) BB Securities Ltd. is a subsidiary of Brasilian American Merchant Bank – BAMB, which is a subsidiary of Banco do Brasil S.A., a publicly held company. Banco do Brasil S.A. has no parent company and no publicly held company owns 10% or more of its stock.

2) Citigroup Global Markets Inc. is a subsidiary of Citigroup Financial Products, Inc., which, in turn, is a subsidiary of Citigroup Global Markets Holdings Inc., which, in turn, is a subsidiary of Citigroup Inc., a publicly held company. Citigroup Inc. has no parent company and no publicly held corporation owns 10% or more of its stock.

[1] Effective July 1, 2016, Mitsubishi UFJ Securities (USA), Inc. changed its name to MUFG Securities Americas Inc.

3) J.P. Morgan Securities LLC is a subsidiary of JPMorgan Broker-Dealer Holdings Inc., which is a subsidiary of JPMorgan Chase & Co., a publicly held company. JPMorgan Chase & Co. has no parent company and no publicly held corporation owns 10% or more of its stock.

4) Itau BBA USA Securities, Inc. is a subsidiary of Itau USA Inc. Itau USA Inc. is 99.9% owned by Itaú Corretora de Valores S.A., which is a subsidiary of Itaú Unibanco S.A., which, in turn, is a subsidiary of Itaú Unibanco Holding S.A., a publicly held company. Itaú Unibanco Holding S.A. is controlled by Itaú Unibanco Participações S.A., which is controlled, in part, by Itaúsa - Investimentos Itau S.A., a publicly held company. Itaúsa- Investimentos Itau S.A. has no parent company and no publicly held company owns 10% or more of its stock.

5) Morgan Stanley & Co. LLC is a limited liability company whose sole member is Morgan Stanley Domestic Holdings, Inc., a corporation wholly owned by Morgan Stanley Capital Management, LLC, a limited liability company whose sole member is Morgan Stanley. Morgan Stanley is a publicly held corporation that has no parent corporation. Based on Securities and Exchange Commission Rules regarding beneficial ownership, Mitsubishi UFJ Financial Group, Inc., 7-1

Marunouchi 2-chome, Chiyoda-ku, Tokyo 100-8330, beneficially owns greater than 10% of Morgan Stanley's outstanding common stock.

6) HSBC Securities (USA) Inc. is a subsidiary of HSBC Markets (USA) Inc. HSBC Markets (USA) Inc. is a subsidiary of HSBC Investments (North America) Inc., which is an indirect subsidiary of HSBC Holdings PLC, a publicly held company. HSBC Holdings PLC has no parent company and no publicly held corporation owns 10% or more of its stock.

7) MUFG Securities Americas Inc. is a subsidiary of MUFG Americas Holdings Corporation ("MUAH"). MUAH is owned by The Bank of Tokyo-Mitsubishi UFJ, Ltd. and Mitsubishi UFJ Financial Group, Inc., a publicly held company. The Bank of Tokyo-Mitsubishi UFJ, Ltd. is a subsidiary of Mitsubishi UFJ Financial Group, Inc. Mitsubishi UFJ Financial Group, Inc. has no parent company and no publicly held corporation owns 10% or more of its stock.

8) Merrill Lynch, Pierce, Fenner & Smith Incorporated is a subsidiary of NB Holdings Corporation. NB Holdings Corporation is a direct subsidiary of Bank of America Corporation, which owns all of the common stock of NB Holdings Corporation. Bank of America Corporation is a publicly held company whose shares are traded on the

New York Stock Exchange. Bank of America Corporation has no parent company and no publicly held corporation owns more than 10% of Bank of America Corporation's shares.

9) Standard Chartered Bank is a subsidiary of Standard Chartered Holdings Limited, which, in turn, operates as a subsidiary of Standard Chartered PLC, a publicly held company. Temasek Holdings, an investment company organized under the laws of Singapore, holds an ownership interest of 10% or more in Standard Chartered PLC.

10) Bank of China (Hong Kong) Limited is a subsidiary of BOC Hong Kong (Holdings) Limited. BOC Hong Kong (Holdings) Limited is 33.94% publicly owned and 66.06% owned by BOC Hong Kong (BVI) Limited, an indirect subsidiary of Bank of China Limited, a publicly held company. Bank of China Limited is 64.02% owned by Central Huijin Investment Limited, a state-owned investment company established under the Company Law of the People's Republic of China, and no publicly held company owns 10% or more of its stock.

11) Banco Bradesco BBI S.A. is a subsidiary of Banco Bradesco S.A., a publicly held company. Banco Bradesco S.A. has no parent company and no publicly held corporation owns 10% or more of its stock.

12) Banca IMI S.p.A. is a subsidiary of Intesa Sanpaolo S.p.A., a publicly held company. No publicly held corporation owns 10% or more of Intesa Sanpaolo S.p.A.'s stock.

13) Scotia Capital (USA) Inc. is a U.S. registered broker-dealer owned by Scotia Capital Inc. Scotia Capital Inc. is a subsidiary of The Bank of Nova Scotia, a publicly held company. The Bank of Nova Scotia has no parent company and no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

This improperly certified class action threatens to undermine the jurisprudence of the Supreme Court and this Court on the limited extraterritorial reach of United States securities laws. The class consists of purchasers of debt securities of a foreign, majority state-owned company—securities that had been offered globally, then bought and sold in over-the-counter aftermarkets around the world, and never traded on a U.S. exchange. To enjoy the protection of U.S. securities laws, any such purchaser must demonstrate that it acquired the securities in a "domestic transaction[]." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010). This Court has made clear that such a showing requires a fact-intensive and context-specific inquiry to determine the location where the parties to a transaction incurred irrevocable liability or where title passed. *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67–69 (2d Cir. 2012).

In the context of the securities involved in this case—which traded worldwide among countless (known and unknown) counterparties in over-the-counter aftermarkets at countless (known and unknown) locations in a manner documented in countless (known and unknown) ways—the process of identifying a "domestic transaction" is both especially complex and inherently individualized. The procedural history of this case speaks volumes: It took highly motivated individual plaintiffs with sophisticated counsel multiple successive pleadings to

properly allege *any* domestic transactions. Even then, half of them could not proffer the requisite *allegations*—to say nothing of proof—and their claims were consequently dismissed by the district court. And the only two plaintiffs who could make the requisite allegations purportedly purchased the securities in their original offering, not in the secondary market. Moreover, where the district court found that a domestic transaction had been properly pleaded, it relied on such idiosyncratic evidence as area codes of brokers' telephone numbers printed on individual confirmation documents, which (again) only two of four plaintiffs could allege.

Despite these manifest challenges in identifying individual "domestic transactions," the district court approved a class definition that provides no administrable method for identifying them on a classwide basis under Federal Rule of Civil Procedure 23(b)(3). Instead, the district court simply defined class members as those who engaged "in domestic transactions"—without in any way clarifying the application of that legal term to the factual context of this case.

Class certification standards do not countenance such shortcuts, which render the membership of the class unascertainable. The ascertainability requirement ensures that potential class members can readily determine whether they are part of the class (and therefore must opt out or be bound by the judgment); it also vindicates defendants' rights to comprehend the membership of the class

they are litigating against. *See Brecher v. Republic of Argentina*, 806 F.3d 22, 24–26 (2d Cir. 2015).

Here, the bare recitation of the phrase "in domestic transactions" leaves both potential class members and defendants in the dark, without feasible means of ascertaining class membership—at least until future individual mini-trials draw the boundaries of a "domestic transaction" in the factual context of this case. The class includes numerous foreign and domestic entities that purchased securities from other foreign and domestic entities, possibly through foreign and domestic intermediaries, using different methods, under different circumstances, and reflected in different types of records (assuming any records of the purchases exist at all). The class definition makes it impossible to ascertain which of the many resulting permutations are encompassed by the phrase "domestic transactions." For similar reasons, the individualized nature of the "domestic transaction" inquiry guarantees that common issues do not predominate over individual ones and that class litigation is not superior to individual suits—two additional barriers to class certification under Rule 23(b)(3).

The district court's sole support for its shorthand approach to defining extraterritorial boundaries was its assertion that ample transaction confirmation documents exist to make identifying a "domestic transaction" a ministerial, "bureaucratic process[]." *In re: Petrobras Sec. Litig.*, 312 F.R.D. 354, 364

(S.D.N.Y. 2016). But the record before the district court did not support this assertion: It did not show that such confirmation documents are either widely available or consistently include information sufficient to discern "domestic transactions." If anything, plaintiffs' recurring struggles even to *allege* a domestic transaction belie the district court's analysis.

In short, plaintiffs failed to meet their burden of demonstrating the ascertainability, predominance, and superiority requirements of class certification. And the district court's decision to certify frustrates not only the standards of Rule 23 but also the Supreme Court's and this Court's instruction to avoid extraterritorial applications of securities laws. The district court may not relegate the task of policing rigorous extraterritorial limits of securities laws to non-judicial "bureaucratic processes" bereft of administrable standards.

JURISDICTIONAL STATEMENT

The district court has jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. § 1331.

Following the district court's order granting class certification, defendants-appellants timely petitioned for leave to appeal under Federal Rule of Civil Procedure 23(f) and Federal Rule of Appellate Procedure 5(a) on February 16,

2016. (A-6069–6404.)[2] This Court granted defendants' petition on June 15, 2016.[3] (A-7127.) This Court has jurisdiction over defendants' appeal pursuant to 28 U.S.C. § 1292(e).

ISSUES PRESENTED FOR REVIEW

The district court certified a class of purchasers of debt securities that were issued by a foreign company, bought and sold globally in over-the-counter aftermarkets, and never traded on a U.S. exchange.

(1) If the extraterritorial reach of such a class is limited only by the phrase "in domestic transactions," is the class ascertainable?

(2) Do questions of law or fact common to class members predominate over questions concerning the "domestic" nature of transactions, which must be resolved on an individual basis?

(3) Is a class action in this circumstance superior to other available methods for fairly and efficiently adjudicating the controversy?

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[2] Citations are as follows: "A-" refers to the Appendix.

[3] This Court granted Rule 23(f) review with respect to two questions. The first concerns the intersection of extraterritorial limitations on the reach of securities laws with the requirements of Rule 23. The second relates to efficient market theory and the presumptions afforded to a class of plaintiffs asserting claims under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"). The Underwriter Defendants are not parties to any claims arising under Section 10(b) and, therefore, confine this brief to the first issue.

STATEMENT OF THE CASE

This action was initiated by the filing of a complaint in the United States District Court for the Southern District of New York (Rakoff, J.) on December 8, 2014. (A-54.) The now operative fourth amended complaint was filed on November 30, 2015. (A-4593–4815.) On February 2, 2016, the district court certified two classes, including a class alleging violations of the Securities Act of 1933 (the "Securities Act") that is the subject of this brief. *In re: Petrobras Sec. Litig.*, 312 F.R.D. 354 (S.D.N.Y. 2016). On February 16, 2016, appellants filed a petition for leave to appeal under Federal Rule of Civil Procedure 23(f) (A-6069–6404), which this Court granted on June 15, 2016 (A-7127). Defendants moved to stay all proceedings in the district court pending appeal. On July 12, 2016, a judge of this Court entered a temporary stay, pending consideration of defendants' stay motion by a panel of this Court. *See* Order, *In re: Petrobras Securities*, No. 16-1914 (2d Cir. July 12, 2016), ECF No. 65.

I. PLAINTIFFS' INITIAL COMPLAINTS

Petrobras is a majority state-owned Brazilian oil-and-gas company that relies on the international capital markets for much of its financing. During the relevant time period, Petrobras was among the largest corporations in the world based on market capitalization, revenues, and workforce. In offerings made in May 2013 and March 2014 (the "Offerings"), Petrobras issued over $19 billion in global

notes to investors across four continents (the "Notes"). (A-4603–04; A-5790.) After the Offerings, the Notes were traded in a variety of over-the-counter transactions consummated throughout the world and conducted in a variety of currencies. (A-4769–70.) The Notes were not, however, traded on any exchanges located in the United States. (A-5176 (holding that "plaintiffs' allegations do not satisfy *Morrison*'s first prong").) Over-the-counter purchasers acquired only beneficial interests, rather than full title, which is held in the form of a single non-transferable global note at the Depository Trust Company ("DTC").[4] In writing to the SEC concerning similar transactions, lead plaintiff Universities Superannuation Scheme Limited ("USS") stated that "institutions increasingly trade large blocks of securities off-exchange in private markets known as 'dark pools'" and "investors typically do not know which exchange their order is directed through, assuming it even occurs on an exchange." (A-3533–34.)[5]

Late in 2014, Brazilian prosecutors revealed that Petrobras was the victim of an illegal bid-rigging and kickback scheme perpetrated by a cartel of construction

[4] The DTC is a securities depository that processes and settles trades in corporate securities. (A-4864–66.)

[5] This comment was made in response to an SEC study observing that "[d]etermining the location of non-exchange-based transactions has proved [sic] quite complicated." Securities & Exchange Comm'n, *Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934* 33 n.121 (2012).

companies. (A-4611.) The purported scheme involved fixing prices on Petrobras contracts and bribing former Petrobras executives. After the prosecutors' announcement, the prices of the Notes allegedly declined, and in response, various investors filed actions in the district court under U.S. securities laws. Their complaints principally alleged that Petrobras should have disclosed the scheme's existence, expensed the bribes paid pursuant to the scheme, and written down the assets Petrobras constructed at allegedly inflated prices. This class action is one such suit. Also before the district court are individual actions brought by hundreds of Notes purchasers and consolidated into more than 25 opt-out actions, which were filed after the March 2015 district court appointment of Pomerantz LLP ("Pomerantz") as lead class counsel. (A-172; A-5797–804.)

II. PLAINTIFFS' EFFORTS TO PLEAD A DOMESTIC TRANSACTION

In March 2015, lead plaintiff USS—along with additional plaintiffs Union Asset Management Holding AG ("Union") and Employees' Retirement System of the State of Hawaii ("Hawaii")—filed an amended class action complaint. Plaintiffs asserted claims against Petrobras and its affiliates (hereinafter referred to as "Petrobras Defendants") under Section 10(b) of the Exchange Act and Sections 11 and 12(a)(2) of the Securities Act. (A-177–357.) Plaintiffs also asserted claims against Petrobras' auditors and the Underwriter Defendants, but only under Section 11 of the Securities Act, alleging that the Offering documents contained certain

misstatements or omissions related to the bribery and kickback scheme implicating Petrobras. (A-177–357.)

In April 2015, defendants moved to dismiss the amended complaint, arguing (among other things) that plaintiffs had not sufficiently alleged purchasing the Notes in a "domestic transaction," as the Supreme Court required in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). (A-475–76.) The district court granted defendants' motion, but permitted plaintiffs to amend their complaint to correct this deficiency. (A-705–07; A-921.)

In a third amended complaint,[6] USS, Union, and Hawaii, along with newly added plaintiff North Carolina Department of State Treasurer ("North Carolina"), alleged that they purchased Notes in the United States and identified the CUSIP numbers[7] for the Notes purchased. (A-1114–16.) Union, Hawaii, and North Carolina further alleged that they purchased Notes directly in the Offerings and attached or incorporated by reference schedules of their purchases made on the Offering dates and at the Offering prices. (A-1115–16.)

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[6] Plaintiffs filed a second amended complaint after the district court dismissed the amended complaint but before it issued an opinion explaining that order. (A-708–880.) The third amended complaint was filed on the heels of the district court's opinion. (A-937–1153.)

[7] A CUSIP number is a unique identifier for most financial instruments that identifies a company or issuer and the type of instrument. *See, e.g.*, (A-4779 (listing CUSIP for a Note purchased by USS).)

Defendants again moved to dismiss plaintiffs' claims for failure to sufficiently allege a "domestic transaction" in the Notes. (A-1154–82.) As defendants argued in their motion, precedent from this Court required plaintiffs to plead that irrevocable liability was incurred or title was transferred within the United States by alleging, among other things, "facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money." (A-1167 (quoting *Absolute Activist*, 677 F.3d at 70).)

During oral argument on defendants' motion, the district court once again allowed plaintiffs to replead their claim for the purpose of alleging a "domestic transaction."[8] The court solicited supplemental briefing on whether (as plaintiffs argued) plaintiffs' transactions in the Notes were domestic by virtue of clearing and settling through the DTC. (A-5169–70.)

In the fourth amended class action complaint—the operative complaint at this stage of the case—each of the four named plaintiffs expanded on the allegations purporting to show that it transacted domestically in the Notes. (A-4593–4815.) For instance, USS alleged, among other things, the following discrete and specific facts about the course of its transaction:

[8] The court did not make a ruling on defendants' motion to dismiss the third amended complaint, stating instead that it would apply the arguments raised therein to the further amended complaint. (A-5169–70.)

> [O]n or about February 17, 2014, Legal & General Investment Management ("LGIM"), located in the United Kingdom, instructed its U.S. affiliate, Legal & General Investment Management America, Inc. ("LGIMA"), located in Chicago, Illinois, to transfer $210,000 of the 4.375% Note maturing May 20, 2023, CUSIP US71647NAF69, at $89.3550, into the account of USS. LGIMA had been managing in the United States various assets for LGIM, including the NAF69 Note. On or around February 14, 2014 at 1:06pm, the Note was transferred to USS, with a settlement date indicated as February 19, 2014, and a "Settlement Location: DTC."

(A-4779.) Hawaii, North Carolina, and Union similarly made various additional allegations of a domestic transaction. (A-4772–79.)

Defendants once again moved to dismiss plaintiffs' claims for failure to allege a domestic transaction. In December 2015, the district court granted in part and denied in part defendants' motion to dismiss. (A-5173–89.) The court determined that North Carolina and Hawaii—who purchased the Notes in the original offering—had sufficiently alleged that they incurred irrevocable liability to purchase the Notes in the United States, relying in part on the presence of "New York area code phone numbers on the confirmations" for the transactions. (A-5178.) But USS and Union, the court held, had not sufficiently alleged such facts. The court reasoned that their transactions in the Notes were not rendered "domestic" because title did not transfer in the United States and "actions needed to carry out . . . transactions, and not the transactions themselves[,] are insufficient to satisfy *Morrison*." (A-5182.) According to the district court, "the mechanics of DTC settlement are actions needed to carry out transactions, but they involve

neither the substantive indicia of a contractual commitment necessary to satisfy *Absolute Activist*'s first prong [which addresses irrevocable liability] nor the formal weight of a transfer of title necessary for its second." (A-5182 (quoting *Loginovskaya v. Batratchenko*, 764 F.3d 266, 275 (2d Cir. 2014)).)

The district court also easily rejected plaintiffs' argument that the fact that certain of the Notes were offered in the United States implied that all of the transactions in them were "domestic." (A-5182–83.) The Offering documents did not support that conclusion; indeed, they indicated that certain underwriters exclusively offered the Notes abroad. (A-5183; *see also* A-2884 ("Standard Chartered Bank will not effect any offers or sales of any notes in the United States unless it is through one or more U.S. registered broker-dealers . . . .").) The court thus dismissed with prejudice USS's and Union's claims involving their purchases of the Notes. (A-5188–89.)

Similarly, in a subsequent decision, the district court again highlighted the fact-intensive nature of the domestic purchase inquiry when it dismissed in part one of the individual actions in these consolidated proceedings on *Morrison* grounds. *Internationale Kapitalanlagegesellschaft mbH v. Petróleo Brasileiro S.A. (In re Petrobras Sec. Litig.)*, No. 15-cv-6618 (JSR), 2016 U.S. Dist. LEXIS 46570, at *9–11 (S.D.N.Y. Mar. 25, 2016). It stated, among other things, that "[p]articularly when [a plaintiff's counterparty in certain transactions] is part of an

immense, multinational financial company . . . a lone allegation that the counterparty has a United States address is insufficient to show that particular transactions occurred in the United States." *Id.* at *9.[9]

III. CLASS CERTIFICATION PROCEEDINGS

In October 2015, plaintiffs moved to certify two classes: (1) a class under the Exchange Act of all persons who purchased Petrobras American Depository Receipts on the New York Stock Exchange or the Notes pursuant to "domestic transactions"; and (2) a class under the Securities Act of all persons who purchased the Notes in "domestic transactions" "pursuant to and/or traceable to" the Offerings. (A-1183–215.) Only the second class asserts claims against the Underwriter Defendants and is addressed in this brief.[10]

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[9] The claims of another individual plaintiff, Skagen AS ("Skagen"), a Norwegian portfolio manager, are also illustrative. In October 2015, the district court dismissed the claims of various individual action plaintiffs, including Skagen, for failure to plead a domestic transaction, but granted them leave to amend. *In re: Petrobras Sec. Litig.*, No. 14-cv-9662 (JSR), 2016 WL 29229, at *2–3 (S.D.N.Y. Jan. 4, 2016). But Skagen did not amend its complaint, and its claims were dismissed with prejudice. (A-3808.)

[10] Of the individual actions, only five bring claims against any of the Underwriter Defendants: *New York City Employees' Retirement System, et al. v. Petróleo Brasileiro S.A. - Petrobras, et al.*, No. 15-cv-2192 (JSR); *Transamerica Funds, et al. v. Petróleo Brasileiro S.A. - Petrobras, et al.*, No. 15-cv-3733 (JSR); *Washington State Investment Board v. Petróleo Brasileiro S.A. - Petrobras, et al.*, No. 15-cv-3923 (JSR); *Lord Abbett Investment Trust – Lord Abbett Short Duration Income Fund v. Petróleo Brasileiro S.A. - Petrobras, et al.*, No. 15-cv-7615 (JSR); and *Discovery Global Citizens Master Fund, Ltd., et al. v. Petróleo*

(cont'd)

In opposing class certification, defendants argued that determining whether a purchaser of the Notes engaged in a domestic transaction within the meaning of *Morrison*—a mandatory showing for each plaintiff and class member seeking to invoke the protection of U.S. securities laws—would require individualized analyses not amenable to classwide resolution. (A-3779–3780.) Defendants maintained that a purported class that covered "domestic" purchases of the Notes—securities that were not traded on any U.S. exchange but, rather, were sold to investors on four continents and traded in aftermarket, over-the-counter transactions worldwide—would not be sufficiently ascertainable under Rule 23. In other words, the class definition included no clear, administratively feasible criteria by which the court, defendants, or the putative class members themselves could establish whether a putative class member could state a federal claim and belonged in the class. (A-3756–96.)

On February 2, 2016, the district court granted plaintiffs' motion for class certification and certified two classes of Petrobras investors under the Exchange Act and Securities Act, respectively. *In re: Petrobras Sec. Litig.*, 312 F.R.D. at 372–73. Each certified class definition addressed the limitations of *Morrison* by

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Brasileiro S.A. - Petrobras, et al., No. 15-cv-9126 (JSR). On April 25, 2016, plaintiffs in another individual action voluntarily dismissed with prejudice their claims against those Underwriter Defendants they named as defendants. *Ohio Public Employees Retirement System v. Petróleo Brasileiro S.A. - Petrobras, et al.*, No. 15-cv-3887 (JSR) (S.D.N.Y. April 25, 2016), ECF No. 65.

including—without further elaboration—the phrase "domestic transactions." Of particular relevance to the Underwriter Defendants, the Securities Act class is defined to include:

> all purchasers who purchased or otherwise acquired debt securities issued by Petroleo Brasileiro S.A. ("Petrobras"), Petrobras International Finance Company S.A. ("PifCo"), and/or Petrobras Global Finance B.V. ("PGF"), ***in domestic transactions***, directly in, pursuant and/or traceable to a May 15, 2013 public offering registered in the United States and/or a March 11, 2014 public offering registered in the United States before Petrobras made generally available to its security holders an earnings statement covering a period of at least twelve months beginning after the effective date of the offerings, and were damaged thereby.

Id. at 372 (emphasis added).

In certifying this class, the district court recognized that the class members were "dispersed across the globe" and that "billions of Petrobras securities traded vigorously around the world." *Id.* at 359. Yet the district court recited that the elements of Federal Rule of Civil Procedure 23(b)(3) had been satisfied, including that "questions of law or fact common to class members predominate[d] over any questions affecting only individual members" and that "a class action [was] superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* at 363.

The district court also stated that the class definition satisfied Rule 23's "stand-alone 'implied requirement'" of ascertainability—that the class must be "'[s]ufficiently definite so that it is administratively feasible for the court to

determine whether a particular individual is a member.'" *Id.* (quoting *Brecher*, 806 F.3d at 24). In explaining why the domestic nature of a given class member's transaction was "ascertainable and administratively manageable," the district court stated that the answer was "highly likely to be documented in a form susceptible to the bureaucratic processes of determining who belongs to a Class." *Id.* at 364. The court reasoned that "documentation of 'the placement of purchase orders' is the sort of discrete, objective record routinely produced by the modern financial system that a court, a putative class member, or a claims administrator can use to determine whether a claim satisfies *Morrison*." *Id.* The court made these statements without citing or otherwise identifying any evidence in the record that these purchase orders were "routinely" available—much less that they consistently contained sufficient information to demonstrate conclusively the domestic nature of a transaction. Nor did the court address whether individual plaintiffs' repeated failure to *plead* facts sufficient to conduct the *Morrison* inquiry cast doubt on absent class members' ability to *resolve* that inquiry through "bureaucratic processes"—and without recourse to mini-trials on disputed facts.

On February 16, 2016, defendants-appellants petitioned this Court for permission to file an interlocutory appeal pursuant to Rule 23(f). (A-6069–6404.) The petition raised questions regarding the district court's determinations of, *inter alia*, predominance, superiority, and ascertainability. With regard to the district

court's determinations of extraterritoriality-related issues, defendants' petition presented the following question:

> Whether this Court should review the district court's certification of a multi-year investor class seeking billions of dollars in damages in connection with purchases of a foreign issuer's non-exchange traded globally offered notes where the location of each purchase raises individualized issues that defeat ascertainability, predominance, and superiority?

(A-6087–88.)

On June 15, 2016, this Court granted defendants-appellants' petition and this timely interlocutory appeal follows. (A-7127.)

SUMMARY OF THE ARGUMENT

Plaintiffs have not met their burden of proving that the class is ascertainable. In the factual context of this case, a class defined by reference to "domestic transactions"—stripped of any additional guidance—does not articulate administratively feasible criteria for identifying class members. As the Supreme Court and this Court have established in a sequence of recent decisions, identifying "domestic transactions" in a security that has not been traded on a U.S. exchange requires a searching and fact-intensive inquiry into the place where irrevocable liability was incurred or where title passed. The need for that individualized inquiry is especially acute in this case, which involves securities of a foreign issuer traded worldwide among varied permutations of foreign and domestic parties and

intermediaries in opaque over-the-counter aftermarkets. Neither putative class members nor defendants have the guidance they need to determine which of the many variants of these transactions can constitute "domestic transactions." Under the circumstances, the district court could not abridge the individualized inquiry into the nature of each type of transaction through the shorthand of using the phrase "domestic transactions" in the class definition. And the class certification record did not support the district court's suggestion that sufficient transaction documents exist to make identifying "domestic transactions" a ministerial "bureaucratic process[]."

For similar reasons, plaintiffs have not satisfied their burden of proving that classwide issues predominate over individual ones and that a class action is a superior means of adjudicating this case.

The district court certified a class whose membership cannot be identified without future individual mini-trials on the scope of "domestic transactions." This approach is at odds with the Supreme Court's and this Court's jurisprudence on the extraterritorial application of U.S. securities laws—and Rule 23 does not permit it.

STANDARD OF REVIEW

This Court "review[s] the district court's class certification ruling for abuse of discretion and the conclusions of law that informed its decision to grant certification de novo." *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 538

(2d Cir. 2016). "Certification of a class is reviewed for abuse of discretion, i.e., whether the decision (i) rests on a legal error or clearly erroneous factual finding, or (ii) falls outside the range of permissible decisions." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 12-4671-cv(L), 2016 U.S. App. LEXIS 12047 at *15 (2d Cir. June 30, 2016).

ARGUMENT

I. THE CLASS IS NOT ASCERTAINABLE

The district court erred when it concluded that—in the factual context of this litigation—a class defined by shorthand reference to "domestic transactions" is ascertainable. This Court has recognized an "implied requirement of ascertainability in Rule 23 of the Federal Rules of Civil Procedure." *Brecher*, 806 F.3d at 24. Certification of a class is only appropriate under Rule 23 where classwide adjudication "would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997). "A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case." *Brecher*, 806 F.3d at 24–25.

The plaintiffs "bear[] the burden of establishing by a preponderance of the evidence that each of Rule 23's requirements has been met," *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010), including the implied requirement of ascertainability. *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 354 (3d Cir. 2013); *Ault v. J.M. Smucker Co.*, 310 F.R.D. 59, 64 (S.D.N.Y. 2015); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) ("Rule 23 does not set forth a mere pleading standard."). In short, "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23" prior to class certification. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) (emphasis in original).

The ascertainability requirement performs several indispensable functions. First, "it eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action by insisting on the easy identification of class members." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012); *see also Biediger v. Quinnipiac Univ.*, No. 3:09-cv-621 (SRU), 2010 WL 2017773, at *4 (D. Conn. May 20, 2010) ("[T]he plaintiffs' proposed class is sufficiently amorphous and unwieldy to upset the efficiency that a class action is supposed to achieve.").

Second, an ascertainable class "protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable." *Marcus*,

687 F.3d at 593. Without such protection, after judgment, defendants would likely be forced to engage in "satellite litigation . . . over who was in the class in the first place," thus thwarting the objectives of Rule 23. *Id.*; *see also Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 546-47 (1974) (Rule 23 was amended "to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments"). Indeed, "it would violate a defendant's due process rights to proceed with an unascertainable class if absent class members would not be bound by a judgment adverse to the plaintiffs while the defendant would be bound by a judgment adverse to the defendant." 1 McLaughlin on Class Actions § 4:2, para. 5 (12th ed.); *see also Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues.").

Third, ascertainability protects legal rights of absent class members. *Carrera*, 727 F.3d at 307; *Marcus*, 687 F.3d at 593. As a leading treatise explained, "[i]t would be unconstitutional to bind class members to an adverse judgment if they could not determine from the notice whether they were in the class and thus had no meaningful ability to opt out." 1 McLaughlin on Class Actions § 4:2, para. 5 (12th ed.). The class certified by the district court frustrated

these objectives—and plaintiffs have not carried their burden of establishing the ascertainability of the class—for the reasons described below.

A. Determining Whether a Transaction Is Domestic Requires a Fact-Intensive Merits Inquiry

This Court has observed that, for securities not traded on U.S. exchanges, the process of identifying a "domestic transaction" must be searching and fact-intensive—and attempts to abridge it with convenient shorthand will not do. "In the wake of *Morrison*," a number of courts, including those in this circuit, "have struggled to determine what exactly makes a transaction domestic" with respect to securities not traded on an exchange. *In re Satyam Comput. Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 473 (S.D.N.Y. 2013) (collecting cases); *see also Butler v. United States*, 992 F. Supp. 2d 165, 176 (E.D.N.Y. 2014) ("[*Morrison*'s transactional test] is fact specific and often does not admit of an easy answer."). In *Absolute Activist Value Master Fund Ltd. v. Ficeto*, this Court offered important guidance: For "transactions involving securities that are not traded on a domestic exchange" to be domestic, "irrevocable liability [must be] incurred or title [must] pass[] within the United States." 677 F.3d 60, 67 (2d Cir. 2012).

This Court has also explained that such readily apparent characteristics as "a party's residency or citizenship" are "irrelevant to the location of a given transaction." *Id.* at 70. Rather, courts must locate "the point at which the parties obligated themselves to perform what they had agreed to perform even if the

formal performance of their agreement is to be after a lapse of time." *Id.* at 68. This inherently individualized inquiry requires assessing (and resolving disputes about) facts "including, but not limited to, facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money." *Id.* at 70; *see also id.* ("[T]he mere assertion that transactions 'took place in the United States' is insufficient . . . ."); *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 209 (2d Cir. 2014) ("*Morrison* and *Absolute Activist* . . . comprise the principal case authority in this Circuit governing the application of § 10(b) and Rule 10b–5 to claims involving extraterritorial conduct.").

This Court's jurisprudence since *Absolute Activist* has made it even less plausible that the reach of domestic securities laws could be defined through ministerial—or as the district court put it, "bureaucratic"—determinations. This Court has clarified that a domestic securities transaction is "necessary but not necessarily sufficient" to invoke federal securities laws and requires further "careful attention to the facts of each case." *Id.* at 217; *see also City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 181 (2d Cir. 2014) ("mere placement of a buy order in the United States" is insufficient to demonstrate that irrevocable liability was incurred in the United States);

Loginovskaya, 764 F.3d at 275 (domestic "actions needed to carry out the transactions" are insufficient to demonstrate that transaction was domestic).

In a very recent decision interpreting the RICO statute, the Supreme Court likewise recognized the fact-intensive nature of the inquiry into whether an injury is foreign or domestic. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2111 (2016) (holding that a civil RICO plaintiff is required to prove a "domestic" injury to business or property, and that "[t]he application of this rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is 'foreign' or 'domestic'"). The inquiry into whether a securities transaction is domestic or foreign raises similar disputed factual issues—as the record of this litigation makes clear—and, therefore, is not amenable to "bureaucratic" determinations. This consistent body of precedent establishes that, for non-U.S.-exchange-traded securities, identifying a "domestic" transaction governed by U.S. securities laws is a fact-intensive, individualized inquiry—an inquiry not amenable to convenient generalizations or mechanical shortcuts.[11]

[11] There is nothing to the contrary in defendants' prior statement that *Absolute Activist* "establishes, as the site of the transaction that is of congressional concern, a single location that—although subject to proof—can be easily determined based on recognized and readily understood standards." (A-4887.) To begin with, the statement was responding to an unadministrable interpretation of *Absolute Activist* being advocated by plaintiffs. (A-4868–72.) In any event, nothing in defendants' statement suggests that the standards of *Absolute Activist* can routinely be satisfied on a classwide basis. Nor does the statement undermine the fact-intensive nature *(cont'd)*

Plaintiffs themselves have acknowledged the laborious nature of the inquiry required to identify a domestic transaction. (A-6046, A-6048 (arguing that class members "are not identifiable at this stage" and that the discovery necessary to obtain their identities would be "impracticable and unrealistic").) But their admissions only scratch the surface. They do not consider, for example, whether and how aftermarket purchasers—who are members of the class here—could trace the origins of their securities to domestic offerings. Without such tracing, courts would routinely create "springing section 11 right[s] of action"—rights based on allegedly flawed disclosures in non-domestic offerings (to which U.S. securities laws would not apply) suddenly "springing" into actionable domestic claims against the underwriters. Joseph A. Grundfest, *Morrison, The Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 Iowa J. Corp. L. 1, 5–6, 48–59 (2015). That would undercut "*Morrison*'s strong presumption against extraterritorial application" and "the rule of narrow construction of implied private rights of action," as well as Section 11's "structure, text, and legislative history." *Id.* at 6.

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of the analysis. Finally, by acknowledging that this Court's standards can be administered without difficulty by federal district courts, defendants certainly did not acquiesce in their "bureaucratic" application by class claims administrators.

In short, plaintiffs' burden of demonstrating an ascertainable class of domestic purchasers was considerable, as they conceded: "[W]hile it is feasible to determine temporally when a 'meeting of the minds' occurs, it can be significantly more difficult to pinpoint the location of such 'meeting' on a map." (A-4872.)

B. Plaintiffs Failed to Demonstrate That Investors Who Purchased the Notes in Domestic Transactions Are Ascertainable

Plaintiffs had not met their burden of showing that a class defined by reference to participants "in domestic transactions" meets this Court's exacting ascertainability requirements. In the factual context of this case, a class defined through an unadorned reference to "domestic transactions" offers no administrably feasible criteria for defendants or potential class members to ascertain the membership of the class.

As an initial matter, the shorthand reference to "domestic transactions" in a class definition cannot be a talismanic substitute for the *Morrison* inquiry—indeed, such "fail safe" class definitions are disfavored. *See, e.g.*, *Selby v. Principal Mut. Life Ins. Co.*, 197 F.R.D. 48, 55 (S.D.N.Y. 2000) ("A class's definition will be rejected when it requires addressing the central issue of liability in a case and therefore the inquiry into whether a person is a class member essentially require[s] a mini-hearing on the merits of each [plaintiff's] case."); *Spread Enters., Inc. v. First Data Merchant Servs. Corp.*, 298 F.R.D. 54, 69-70 (E.D.N.Y. 2014) (finding that defining the plaintiff subclasses in terms of those who "were charged

excessive [contractual] fees" was impermissible because the "subclasses [were] not neutral in that they already presuppose[d] that the subject fees were excessive, despite the fact that the Defendants dispute[d] this allegation"); *see also* Erin L. Geller, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 Fordham L. Rev. 2769, 2782 (April 2013) ("[F]ail-safe classes [are] one category of classes failing to satisfy the ascertainability requirement.").

Morrison makes clear that whether a security is purchased in a "domestic transaction[]" is a merits determination. *See Morrison*, 561 U.S. at 254. Thus, by certifying a class of investors who purchased Notes in a "domestic transaction," the district court defined the Class by reference to the merits of members' claims. Even without accounting for the unique facts of this case, this was improper. *See, e.g.*, *Eng-Hatcher v. Sprint Nextel Corp.*, No. 07 Civ. 7350 (BSJ), 2009 WL 7311383, at *7 (S.D.N.Y. Nov. 13, 2009) ("When a proposed class definition links class membership with the merits of the class members' claims, the class is not ascertainable."). "Using a future decision on the merits to specify the scope of the class makes it impossible to determine who is in the class until the case ends," *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 895 (7th Cir. 2012), and improperly forces defendants to engage in post-judgment "satellite litigation" to determine who is bound, *Marcus*, 687 F.3d at 593.

In any event, the class definition here offers no administrably feasible methods or standards for identifying a "domestic transaction" in a non-U.S.-exchange-traded security—that is, for determining whether "irrevocable liability [was] incurred or title passe[d] within the United States." *Absolute Activist*, 677 F.3d at 67. Plaintiffs failed to present sufficient evidence (i) that absent class members uniformly possessed transaction confirmation records; (ii) that those records uniformly contained sufficient information to determine whether irrevocable liability was incurred or title passed in the United States; or (iii) that making "domestic transaction" determinations on the basis of that information would be administrably feasible. To demonstrate that the class is ascertainable, plaintiffs had the burden of proving all three of these factual underpinnings for class certification. But the class certification record lacks evidence supporting any of them.[12]

This failure by plaintiffs to establish an adequate class certification record alone demonstrates that the class was erroneously certified—and the course of

[12] Plaintiffs' briefing papers simply asserted that "[t]rading broker records . . . will reflect factors such as where and when the transaction was consummated, the price paid for the securities, where the client and broker were located, and the area codes from which purchase confirmations were made." (A-5766.) Beyond this statement, plaintiffs have only offered transaction records for Union, USS, Hawaii, and North Carolina in response to a motion to dismiss. (A-2805–09.) And the district court has already held that the records for Union and USS were insufficient to plead domestic transactions. (A-5178–84.)

other proceedings in this case further highlights the unascertainable nature of the class. Two of the four plaintiffs who attempted to *plead* a domestic transaction using the records in their possession—Union and USS—failed to do so despite being represented by a team of sophisticated counsel and filing four amended complaints. (A-5178–84.) Having tried and failed to show that these entities engaged "in domestic transactions," plaintiffs cannot credibly maintain that other class members uniformly possess the information, let alone records, to make that showing.

Although the district court concluded that two entities—North Carolina and Hawaii—properly *pleaded* a "domestic transaction," that is a far cry from showing that absent class members could uniformly *prove* this. It bears noting that Hawaii and North Carolina required four amended complaints, three rounds of briefing, an extensive oral argument, and multiple decisions from the district court to successfully plead a "domestic transaction." This protracted judicial procedure belies any notion that "domestic transactions" could be identified through "bureaucratic" means.

For several additional reasons, the experiences of Hawaii and North Carolina do not help plaintiffs establish the ascertainability of the class. First, nothing in the record reflects that the absent class members possess the types of records Hawaii and North Carolina eventually produced.

Second, Hawaii and North Carolina are both U.S.-based entities that used U.S.-based brokerages to purchase their Petrobras securities in the Offerings *directly* from a U.S. underwriter. By contrast, the record is clear that the absent class members are scattered across the globe, throughout at least four continents. *In re: Petrobras Sec. Litig.*, 312 F.R.D. at 359. The information necessary for a foreign investor in the secondary market to prove whether "irrevocable liability [was] incurred or title passe[d]" within the United States, *Absolute Activist*, 677 F.3d at 67, may vary greatly from that of a domestic investor participating in an original offering through a U.S. underwriter.

Third, and relatedly, because Hawaii and North Carolina allegedly purchased the Notes during the Offerings, they did not face the traceability problems that other class members would confront in proving "domestic transactions." After all, the class includes aftermarket purchasers. Even if an aftermarket purchase bears indicia of a "domestic transaction"—for example, if both the purchaser and its broker are domiciled in the United States and all their negotiations occurred here—the particular Notes may not be traceable to a U.S. offering and thus are not "domestic transactions." *See* Grundfest, 41 Iowa J. Corp. L. at 37–38. Plaintiffs failed to establish—and the district court to define—any administratively feasible means of tracing the "domestic transactions" among such aftermarket purchases.

Finally, while some transaction records—such as the telephone numbers on confirmation slips provided by Hawaii—may help identify the location of a broker-dealer firm with which a class member transacted, that location is not a lawful litmus test for a "domestic transaction." As this Court explained in *Absolute Activist*, "the location of the broker could be relevant to the extent that the broker carries out tasks that irrevocably bind the parties to buy or sell securities," but it "alone does not necessarily demonstrate where a contract was executed." 677 F.3d at 68. For example, a hedge fund with offices around the world could ask its London desk to contact the London desk of a U.S. broker-dealer to acquire non-exchange traded bonds, such as the Petrobras Notes. The London desk of the U.S. broker-dealer, in turn, may then execute the transaction through its New York desk.[13] Although the resulting transaction record could bear the contact information of the broker-dealer's New York offices, that information alone would not establish that the transaction was a domestic one. Determining where the hedge fund incurred irrevocable liability may require an adjudicator to consider other documents from the hedge fund or broker-dealer, prior custom and practice, and perhaps testimony from the individuals involved. It was an error of law for the

[13] This Court has held that another permutation of this scenario failed the "domestic transaction" prong of *Morrison*. *See City of Pontiac*, 752 F.3d at 181 (affirming the district court's determination that no "domestic transaction" took place where a U.S.-based plaintiff placed a buy order in the United States that was ultimately transacted on a Swiss exchange with a Switzerland-based defendant).

district court to conclude that availability of transaction documents alone—even had widespread availability of such documents been established by the record before the district court, which it had not[14]—would make identifying "domestic transactions" a ministerial "bureaucratic" process.[15]

Defendants, like putative class members, do not have records indicating where irrevocable liability was incurred in connection with the trades of the Notes in the aftermarket. In all likelihood, such records do not exist. As acknowledged by lead plaintiff USS in a letter sent to the SEC, "institutions increasingly trade large blocks of securities off-exchange in private markets known as 'dark pools'" and "investors typically do not know which exchange their order is directed

[14] Indeed, the deposition record developed since the district court's class certification decision contradicts any notion that class members possess sufficient information to render identifying domestic transactions a ministerial "bureaucratic" process. *See* Reply to Opposition by Appellants-Defendants at 20–22, *In re: Petrobras Securities*, No. 16-1914 (2d Cir. July 15, 2016), ECF No. 74.

[15] The district court also stated that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and 'should be the exception rather than the rule.'" *In re: Petrobras Sec. Litig.*, 312 F.R.D. at 363 (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001)). Manageability and ascertainability are, however, distinct legal concepts that serve different purposes. Manageability implicates "concerns that a court might face *after* class members have already been identified—for example, concerns about whether particular class members are entitled to relief in light of individualized reliance, causation, and damages issues." *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 950 (11th Cir. 2015). Ascertainability, by contrast, "addresses whether class members can be identified at all, at least in any administratively feasible (or manageable) way." *Id.* The district court's failure to distinguish between these requirements was an error of law.

through, assuming it even occurs on an exchange" (and here the parties agree that no exchange trading occurred).[16] (A-3533–34.)

Accordingly, even if investors who acquired the Notes in "domestic transactions" could ever be identified, doing so would clearly "require the kind of individualized mini-hearings that run contrary to the principle of ascertainability." *Brecher*, 806 F.3d at 26 (decertifying class because, even if members could be identified by "tracing" bondholders' beneficial interests to a particular bond series, the individualized mini-hearings required to do so rendered the class unascertainable). Indeed, defendants are not aware of any case in which the *Morrison* inquiry—core to invoking the protections of U.S. securities laws—was relegated to a claims process after trial. Therefore, the district court's determination that the class is ascertainable was an abuse of discretion. *See In re Payment Card Interchange*, 2016 U.S. App. LEXIS 12047 at *15; *see also, e.g.*, *Hayes*, 725 F.3d at 355–56 (vacating class certification where plaintiff failed to demonstrate "reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition" and noting that

[16] This case is thus not at all similar to *In re Facebook, Inc., IPO Securities & Derivative Litigation*, 312 F.R.D. 332 (S.D.N.Y. 2015), on which plaintiffs relied before the district court. Unlike here, the district court in *Facebook* certified a class of purchasers of stock "in a strictly U.S. IPO of a U.S. company in order to receive shares registered in the United States with the SEC that [traded] exclusively on an American exchange." *Id.* at 351.

"the nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden to fulfill Rule 23's requirements"); *Ault*, 310 F.R.D. at 64–65 (declining to certify class where defendant had no records of purchasers of defective product and plaintiff offered no evidence to support claim that "records exist to identify many class members").[17]

C. The District Court's Decision Undermines the Policy Principles of *Morrison*

The district court's decision undermines *Morrison* and its progeny—jurisprudence designed to avoid "the interference with foreign securities regulation that application of [U.S. securities laws] abroad would produce." *Morrison*, 561 U.S. at 269–70. This Court has made clear that, after *Morrison*, federal securities laws generally should not be "applied to conduct in foreign countries" so as to prevent "international discord." *RJR Nabisco*, 136 S. Ct. at 2100-01.

The class certified by the district court fails to properly respect these boundaries. The court certified a worldwide class of investors in a foreign issuer without an adequate showing that domestic investors can be ascertained in an

[17] *See also Martin v. Pac. Parking Sys. Inc.*, 583 F. App'x 803, 804 (9th Cir. 2014) (affirming denial of class certification based on "difficulties identifying the members of the proposed class, and the fact that [plaintiff] proposed no plan to the district court for manageably determining which individuals are members"), *cert. denied*, 135 S. Ct. 962 (2015); *Carrera*, 727 F.3d at 306–07 ("A plaintiff may not merely propose a method of ascertaining a class without any evidentiary support that the method will be successful.").

administrably feasible manner. That determination has been left to absent class members—who plainly lack the information to make it—and to a claims administrator employing "bureaucratic processes" after liability has been determined at trial. By exposing the defendants to potential liability to an ill-defined class of global investors, the district court—in effect—has extended the extraterritorial reach of U.S. securities laws (with their *in terrorem* threat of large classwide damage awards) to foreign transactions. That is precisely the outcome that *Morrison* and this Court's post-*Morrison* jurisprudence have sought to avoid.

II. THE CLASS VIOLATES THE REQUIREMENTS OF PREDOMINANCE AND SUPERIORITY

For similar reasons, the district court erred in determining that the class meets the predominance and superiority requirements for certification. In addition to demonstrating that the class is ascertainable, plaintiffs "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Plaintiffs seeking to certify a class under Rule 23(b)(3) must establish that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). While "ascertainability of the class is an issue distinct from the predominance requirement," "the need for numerous individualized determinations of class membership" supports a

conclusion that individual issues predominate. *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 45 (2d Cir. 2006), *decision clarified on denial of reh'g*, *In re Initial Pub. Offering Sec. Litig.*, 483 F.3d 70 (2d Cir. 2007); *see also Glatt*, 811 F.3d at 539 (predominance requirement not satisfied if individual issues are "more substantial" than common issues); *Myers*, 624 F.3d at 549 ("[T]he main concern in the predominance inquiry [is] the balance between individual and common issues.").

Here, the district court ignored fact-intensive and complex individualized inquiries needed to determine whether each class member purchased the Notes in a "domestic transaction." It reasoned only that "with the exception of reliance and damages, plaintiffs' claims rest almost exclusively on class-wide questions of law and fact." *In re: Petrobras Sec. Litig.*, 312 F.R.D. at 364. One of the most substantial individualized issues in this case—whether transactions in the Notes were "domestic"—had not properly been taken into account by the district court's analysis.

Recent decisions by this Court confirm that the district court had erred and plaintiffs have not met their burden on Rule 23(b)(3)'s requirement of predominance. For example, this Court upheld a lower court's ruling that satisfying an affirmative defense provided by Section 11 of the Securities Act required "extensive individual proceedings" that necessarily predominated over the

class's common issues. *N.J. Carpenters Health Fund v. Rali Series 2006-QO1 Trust*, 477 F. App'x 809, 813 (2d Cir. 2012). Specifically, the lower court held (based on the record before it at that time) that—in order to determine whether the plaintiffs had knowledge of untruthful or material omissions in the issuer's disclosures—individual assessment of each purchaser's diligence on the deal would be required. As the district court noted, "the proposed class would therefore include investors with different levels of knowledge, and in this case those issues predominate over the common issues identified by the Plaintiffs." *N.J. Carpenters Health Fund v. Residential Capital, LLC*, 272 F.R.D. 160, 170 (S.D.N.Y. 2011), *aff'd sub nom.*, *N.J. Carpenters Health Fund v. Rali Series 2006-QO1 Trust*, 477 F. App'x 809 (2d Cir. 2012). In affirming, this Court found that variations in time of purchase among the plaintiffs "supported the judge's conclusion that individual knowledge inquiries would be required." *Rali*, 477 F. App'x at 814. Additionally, "because of the differences in purchase timing," this Court found the proposed class definition "also removed the possibility that the knowledge defense could be adjudicated on a class basis using common publicly available evidence." *Id.* Accordingly, the denial of class certification was upheld.

Likewise, this Court has held that where a court must individually determine each plaintiff's knowledge of the alleged fraud at time of purchase, such questions predominate over common classwide issues. *In re Initial Pub. Offerings*, 471 F.3d

at 43. As this Court reasoned in overturning the district court's grant of class certification, "the broad extent of knowledge of the scheme throughout the community of market participants and watchers . . . would precipitate individual inquiries as to the knowledge of each member of the class." *Id.* at 44.

Like the purchasers in those cases, plaintiffs here acquired their ownership interests in the Petrobras Notes throughout four continents through manifestly heterogeneous counterparty relationships and types of transactions. Determining whether a given transaction constitutes a "domestic" one requires a fact-intensive inquiry into the locations, dealings, and relationships among the parties. *See Absolute Activist*, 677 F.3d at 70. Accordingly, the need for individualized investigations into the domestic nature of class members' transactions in Petrobras Notes predominates over common issues.

The superiority requirement is not satisfied for substantially the same reasons. *See, e.g.*, *Ackerman v. Coca-Cola Co.*, No. 09 CV 395 (DLI)(RML), 2013 WL 7044866, at *21 (E.D.N.Y. July 18, 2013) ("The inquiries surrounding predominance of common facts and superiority of the class action are intertwined. The greater the number of individual issues, the less likely that a class action is the superior method of adjudication.").

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's class certification order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel hereby certifies that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 9,011 words, including headings, footnotes, and citations.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

July 21, 2016

/s/ Jay B. Kasner
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