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

REPLY 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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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.

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PRELIMINARY STATEMENT

In an effort to expand the extraterritorial reach of U.S. securities laws well beyond the limits established by Congress, this Court, and the Supreme Court, plaintiffs have dramatically overstated the factual record and misconstrued applicable jurisprudence. And plaintiffs cannot credibly argue that settlement through the Depository Trust Company ("DTC") renders every transaction a "domestic" one[1]—an argument that they failed to preserve for this Court's review and that had already been unequivocally rejected by Judge Rakoff in an earlier stage of the proceedings (a rejection plaintiffs barely acknowledge, much less address, before this Court). *In re Petrobras Sec. Litig.*, 150 F. Supp. 3d 337, 342 (S.D.N.Y. 2015); A-5182.

Nothing about plaintiffs' briefing comes close to demonstrating that they met their burden of proving—by developing a factual record before the district court—that absent class members, defendants, and the courts can ascertain "domestic transactions" through administratively feasible, objective criteria and without resort to "mini-hearings." Plaintiffs make vague references to a plethora of relevant trading documentation, but the district court record defies this: Over and over, the information plaintiffs deem ubiquitous is, in fact, missing. Plaintiffs' use of the complex legal term "domestic transactions" in the class definition—and

[1] Brief for Plaintiffs-Appellees ("Pl. Br.") 22–27.

Judge Rakoff's endorsement of that flawed definition—further exacerbates these problems by relegating significant legal determinations to post-trial "bureaucratic" administrative claims processes. If allowed to proceed under the current class definition, this case will inevitably devolve into countless mini-trials about the "domestic" nature of a particular transaction (whether in a U.S. court or judgment enforcement proceeding abroad), defeating the purposes of and prerequisites for the class action vehicle. And plaintiffs fail to confront the ways in which the certification of this unascertainable class would violate the due process rights of both absent class members (who must decide whether to exercise their opt-out rights) and defendants (who should be able to enforce a judgment in their favor against all class members).

In a final gambit, plaintiffs suggest that reversing class certification here would halt class actions everywhere and gut the protections of securities laws. Pl. Br. 36. Not so. This case—involving debt securities of a foreign, majority state-owned company, offered globally and traded in opaque over-the-counter aftermarkets around the world (but never on a U.S. exchange)—is especially unsuitable for a class definition that contains the unelaborated term "domestic transactions." Plaintiffs here also rest on a particularly threadbare class certification record. In any event, plaintiffs' purported policy concerns have been rejected by Congress's limitation of securities laws to "domestic transactions" and

by the rigorous requirements for class certification. Reversing Judge Rakoff's certification here would therefore involve the uncontroversial application of these well-settled legal principles.

ARGUMENT

I. THE CLASS IS NOT ASCERTAINABLE

A. The Record Does Not Demonstrate That Ascertaining Class Membership Would Be Administratively Feasible.

As plaintiffs must concede, Pl. Br. 32, class certification requires them to "actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). Yet, in a tell-tale sign of their discomfort with the factual record, plaintiffs' brief makes every effort to fudge their burden to prove that the class membership can be ascertained without mini-hearings. At times, they hypothesize (without citation to the record) what necessary facts might be "held by third parties." Pl. Br. 20. Elsewhere (and again without referring to the record), they speculate about what they might prove in the future. *Id.* at 32–33 ("If documents are required, prospective Class Members will have to produce them."). They even suggest that it was *defendants'* burden to marshal "factual support"

disproving the administrability of the proposed class. *Id.* 20.[2] One *amicus* supporting plaintiffs takes their lackadaisical approach to proof to an extreme, brushing off "mundane proof issues" and dispensing with plaintiffs' burden to demonstrate potential class members' access to information ascertaining their class membership because "common sense suggests" (to this *amicus*) that such information would materialize. Br. of *Amicus* Nat'l Conference on Public Employee Retirement Systems (hereinafter "National Conference *amicus*") 3, 8.

Plaintiffs' reticence about the class certification record is understandable: That record lacks the facts necessary to prove ascertainability—that is, to show that ascertaining class members is "administratively feasible" by reference to "objective criteria" and without the need for "mini-hearings." *Brecher v. Republic of Argentina*, 806 F.3d 22, 24–25 (2d Cir. 2015). Indeed, the record repeatedly *belies* plaintiffs' ascertainability claims.

Consider, for example, plaintiffs' most significant factual representation about the manner in which class members would feasibly ascertain whether they engaged in a domestic transaction: "Trading records . . . will show where and when the transaction was consummated, the price paid for the securities, where the

[2] Although plaintiffs refer to alleged "fraud," Pl. Br. 1, 37, no fraud-based claims are alleged against the Underwriter Defendants. In general, plaintiffs repeatedly refer to "Defendants" without distinguishing between the Petrobras Defendants and the Underwriter Defendants. *See, e.g.*, Pl. Br. 37, 41.

client and broker were located, and the area codes from which purchase confirmations were made." Pl. Br. 21. It is telling that this detailed factual account lacks any citation to the district court record—or, for that matter, to any other authority. Indeed, the class certification record was bereft of any evidence reflecting after-market trading records, even though those transactions are purportedly encompassed by the class definition.

Moreover, even a casual review of trading documents before the district court undermines nearly every word in plaintiffs' representation:

- *Documents that do not show where the transaction was consummated.* For example, named plaintiff USS provided a single trading record that lists no geographic information. *See* A-3040. Rather, that trading record notes that the account is "USSMC," the broker is "UPLOAD," and a note mentions "LGIM." *Id.* Meanwhile, USS also submitted an affidavit to help explain the trading record. The affidavit is from a UK-based employee, who spoke to another UK-based employee about having UK-based LGIM's US subsidiary transfer the notes on behalf of USS into a DTC account. *See* A-3042–43.

- *Documents that do not list where the client and broker were located or the area codes from which purchase confirmations were made. See* A-3040, 3042–43 (providing a trading record with no geographic information, an affidavit stating that the client and broker had both UK and US locations, and no area codes on either document); A-6991–92 (detailing the client, multiple employees of the client, and the broker, but providing the location of none of them and including no geographic information whatsoever).

- *Documents that provide seemingly inconsistent geographic information. See* A-3042–43 (attesting to UK and US locations for both the client and broker); A-3085–88 (providing German addresses and phone numbers but a depository country of "U.S.A."); A-6989

> (showing a "Brkr Office" of "n/a" but a "Custodian Bank" of "Hsbc Trinkaus," a German subsidiary of HSBC).

In fact, Judge Rakoff has already concluded at the motion to dismiss stage that many of the trading records lacked the very information plaintiffs claim they contain. *See* A-7122–26. For example, with respect to the deficiencies in one plaintiff's trading records, the district court noted that, "[p]articularly when a counterparty is part of an immense, multinational financial company, such as Citigroup Global Markets, Inc. or HSBC Securities (USA) Inc. here . . . a lone allegation that the counterparty has a United States address is insufficient to show that particular transactions occurred in the United States." A-7123–24. Regarding another individual plaintiff's trading records, Judge Rakoff noted, "Although some of these trade memoranda identify the broker for a transaction . . . others do not . . . . None of the memoranda provides any further locative details regarding counterparties or brokers." A-7124–25.

In short, the factual record defies the orderly panacea that plaintiffs postulate. Instead, it shows securities "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." Opening Brief for Underwriter Defendants-Appellants ("Op. Br.") 1. Determining the locus of even a simple transaction may require an infeasible search for documentary and testimonial evidence, followed by a mini-

hearing on whether each unique mix of found and missing information proves that a transaction was "domestic"—and therefore within the class definition. Indeed, in opposing defendants' discovery efforts directed to class membership, plaintiffs argued that class members "are not identifiable" at this stage and that the discovery necessary to obtain their identities would be "impracticable and unrealistic." A-6046, A-6048.

Of course, not all transactions are simple—which makes matters even worse for plaintiffs. Briefing by defendants and *amici*[3] has identified some of the many scenarios that could confound ascertainability of the class here: Did a "domestic transaction" occur when a hedge fund's London desk contacted the London desk of a U.S. broker-dealer to acquire non-exchange traded Petrobras Notes, and the transaction was executed through the broker-dealer's New York desk? Op. Br. 31. Did a "domestic transaction" occur when an aftermarket purchase had the requisite characteristics of domesticity, but the original purchase during the offering did not?[4] *Id*. at 30. Should "matching" transactions—two offsetting trades by two

[3] In general, plaintiffs do not acknowledge, much less respond to, any of the *amicus* briefs in support of Appellants' position.

[4] Apart from launching an *ad hominem* attack on the academic exponent of this "tracing" question—former SEC commissioner Joseph A. Grundfest—plaintiffs assert that his analysis contravenes *Demaria v. Andersen*, 318 F.3d 170 (2d Cir. 2003), and *Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967). Pl. Br. 33–34. But neither case addressed the intersection of securities tracing with the "domestic

(cont'd)

customers of the same dealer—be treated as one or two transactions for purposes of identifying their "domestic" characteristics, particularly given that such transactions are often "netted" for bookkeeping purposes? Br. of *Amicus* Securities Industry and Financial Markets Ass'n 10. The district court's certification order did not address these questions, and plaintiffs' briefing largely ignores them. But they are essential determinants of the extraterritorial reach of U.S. securities laws—issues that cannot be relegated (as Judge Rakoff's class certification order would do) to non-judicial "bureaucratic processes" of claims administration.

Confronted with a barren factual record, plaintiffs hang their case on a single sentence plucked from a filing by *defendants* earlier in this case: "Each of [the tests in *Absolute Activist Master Value Fund, Limited v. Ficeto*, 677 F.3d 60, 62 (2d Cir. 2012)] 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." Pl. Br. 6, 17–18 (citing A-4887). Defendants made this statement in a completely different context—when arguing that *Absolute Activist*'s "transfer of title" test should not be

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transaction" test because both had been decided before *Morrison* launched the transactional approach to extraterritorial application of securities laws. In any event, neither case would have required a "domestic transaction" analysis because both involved domestic public offerings of exchange-traded securities.

expanded to include the transfer of a beneficial interest, in part because doing so would undermine the clarity the Supreme Court sought in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). A-4887. Anticipating that plaintiffs would raise this diversion, the Underwriter Defendants explained in their opening brief in this Court that this out-of-context sentence *does not* say anything about classwide ascertainability through administratively feasible means, *does not* undermine the fact-intensive nature of the "domestic transaction" inquiry, and *does not* authorize the extraterritorial reach of U.S. securities laws to be determined in a claims administration process. *See* Op. Br. 24-25 n.11. Defendants also made clear that the location of the "domestic transaction" is "subject to proof"—and plaintiffs have not met their burden to show that this proof is administratively feasible for the class. Plaintiffs dispute none of this; they simply repeat defendants' sentence robotically, as if it relieves them of their burden of proof. It does not.

B. Plaintiffs Misstate This Court's Ascertainability Jurisprudence.

Just as plaintiffs' factual representations find no basis in the record, their legal assertions mischaracterize this Court's ascertainability and extraterritoriality jurisprudence.

First, plaintiffs' suggestion that the ascertainability standard articulated by this Court in *Brecher* applies only to the particular circumstance in that case—

where the class lacked "a temporal limitation," Pl. Br. 14—flouts this Court's established *stare decisis* principles. "To the extent the formulation [used in a prior case] explains why the court ruled in favor of the winning party, the explanation is part of the court's holding, to which the court is expected to adhere . . . ." *United States v. McGee*, 564 F.3d 136, 140 n.2 (2d Cir. 2009). The *Brecher* class was not defined by reference to a "domestic transaction," but *Brecher* has much to say about the folly of utilizing that unascertainable term in a class definition without elaboration.

Second, plaintiffs' contention that *Absolute Activist* "strongly suggests that demonstrating domesticity was administratively feasible" strains credulity. Pl. Br. 19. The Court in *Absolute Activist*, which was not a class action, allowed the plaintiffs to file an amended complaint attempting to allege a domestic transaction, based in part on their representation that they "possess[ed] trading records, private placement offering memoranda, and other documents indicating that [their] purchases became irrevocable upon payment and that payment was made . . . in the United States." 677 F.3d at 71. In other words, the Court held that *individual plaintiffs* could *attempt to allege* a domestic transaction based on *alleged* trading records demonstrating that irrevocable liability was incurred in the United States. Whether they succeeded would be adjudicated by a court. This part of the holding has no bearing on the issue before this Court: whether—under the particular

circumstances of this case—the "domestic" nature of transactions by *thousands of absent class members* can be demonstrated in an administratively feasible manner *without mini-hearings*.

Third, while plaintiffs do not dispute that manageability and ascertainability are "distinct legal concepts that serve different purposes," Op. Br. 32 n.15, they continue to rely on cases that address manageability—not ascertainability. This confusion arises no sooner than the first sentence of the summary of plaintiffs' argument. *See* Pl. Br. 13 (citing *In re VisaCheck/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001)); *see also* Pl. Br. 14, 37 n.20 (citing *Seijas v. Republic of Argentina*, 606 F.3d 53, 58 (2d Cir. 2010)).

Fourth, plaintiffs repeatedly rely on the ascertainability jurisprudence of the Seventh Circuit, which expressly departs from this Court's. *Compare Mullins v. Direct Digital, LLC*, 795 F.3d 654, 662 (7th Cir. 2015) (*cited at* Pl. Br. 30, 32) ("declin[ing]" to adopt the Third Circuit's ascertainability jurisprudence and to require that class membership be ascertained through administratively feasible means), *with Brecher*, 806 F.3d at 24 (endorsing the Third Circuit's ascertainability jurisprudence despite a submission alerting this Court to the *Mullins* decision, *see* No. 14-4385, Dkt. No. 71).

Fifth, plaintiffs exaggerate when they assert that "[c]ourts in this Circuit have little difficulty rejecting *Morrison*-type challenges at the class certification

stage." Pl. Br. 18. In fact, plaintiffs could only find *one* case doing so—*In re Facebook, Inc., IPO Sec. and Derivative Litig.*, 312 F.R.D. 332, 351 (S.D.N.Y. 2015). But, as the Underwriter Defendants explained in their opening brief, Op. Br. 33 n.16, *Facebook* has no relevance here because it involved securities traded on a U.S. exchange—and therefore "domestic transactions" did not need to be established. Plaintiffs mustered no response, but inexplicably continued relying on *Facebook* anyway. Pl. Br. 18, 22, 29.[5]

Plaintiffs also receive no support from cases certifying classes despite the need for individualized damages inquiries. *See* Pl. Br. 28–30. Those cases do not implicate the due process issues that ascertainability of the class definition poses for both absent class members and defendants. Unlike the legal and factual inquiries involved in determining whether a particular Petrobras Notes transaction was domestic, "[i]t is a rare case where computation of each individual's damages is so complex, fact-specific, and difficult" that it should prevent class certification. *In re U.S. Foodservice Inc. Pricing Litig.*, 2011 WL 6013551, at *16 (D. Conn.

[5] Of the nine cases plaintiffs reference in the context of certification of bond classes, Pl. Br. 15 n.5, none mentions *Morrison* and only two discuss ascertainability. As in *Facebook*, the court in *In re Winstar Comm. Sec. Litig.*, 290 F.R.D. 437, 443 n.6 (S.D.N.Y. 2013), addressed ascertainability in the context of exchange-traded shares and therefore did not discuss *Morrison*'s "domestic transactions" test. In *Bennett v. Sprint Nextel Corp.*, 298 F.R.D. 498, 504 (D. Kan. 2014), the court, while acknowledging the ascertainability requirement, never analyzed its application.

Nov. 29, 2011), *aff'd*, 729 F.3d 108 (2d Cir. 2013). The cases plaintiffs rely on demonstrate as much. In *Union Asset Management Holding A.G. v. Dell, Inc.*, for instance, the Fifth Circuit found ascertainable an Exchange Act class defined by reference to whether its members suffered damages in part because there was a "mechanical and objective standard" for making the requisite determination. 669 F.3d 632, 640 (5th Cir. 2012). And in the rare cases in which individualized damages determinations *are* extremely complex and fact-intensive, class certification is often unwarranted. *See, e.g.*, *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003).

Sixth, plaintiffs' claim that the records of over-the-counter market-makers/dealers will reflect "domestic transactions," Pl. Br. 20–21, is another red herring. Plaintiffs' argument hinges on *S.E.C. v. Ficeto*, an out-of-Circuit district-court opinion holding that the first, "exchange" prong of *Morrison* covers domestic over-the-counter markets. 839 F. Supp. 2d 1101, 1108 (C.D. Cal. 2011). That conclusion has been rejected by district courts in this Circuit (including Judge Rakoff in this case), as well as in the district where it had originally been drawn. *See* A-5176 (holding that "over-the-counter transactions are, by definition, those that do not occur on an exchange"); *In re Sanofi-Aventis Securities Litigation*, 293 F.R.D. 449, 457 (S.D.N.Y. 2013) (ruling out the first prong of *Morrison* for securities that "sometimes traded in off-exchange, over-the-counter

transactions"); *Stoyas v. Toshiba Corp.*, 2016 WL 3563084, at *7 (C.D. Cal. May 20, 2016) (holding that an over-the-counter market was not a domestic exchange under the first prong of *Morrison*).[6]

Finally, plaintiffs conflate two unrelated questions: whether some investors purchased the relevant securities in "domestic transactions" (a claim unrelated to ascertainability) and whether those investors are ascertainable without resort to individualized mini-hearings (a claim plaintiffs must prove to demonstrate ascertainability). Plaintiffs' assertion that dismissal on *Morrison* grounds was not sought in *every* individual case in Petrobras-related litigation, Pl. Br. 19-20, is only relevant to the first question—and thus not to this appeal. If anything, those individual cases belie plaintiffs' claim that mini-hearings could be avoided. After all, individual plaintiffs in three of the five actions with claims against the Underwriter Defendants initially had their claims dismissed on *Morrison* grounds.[7] *See* A-1939–40. And class plaintiffs' concession that it took multiple rounds of re-pleadings to unearth records needed to analyze whether their own transactions had

[6] In any event, to the extent plaintiffs purport to refer to information in the hands of OTC market-makers/dealers, Pl. Br. 20-21, they point to nothing in the record reflecting what information, if any, the dealers possess.

[7] Another plaintiff, Skagen AS, was given the opportunity to amend its complaint to allege domestic transactions and did not. A-1939–40. Its claim was accordingly dismissed. A-3808. Skagen's counsel now appears in this appeal as counsel for National Conference *amicus* in support of plaintiffs-appellees.

been "domestic," Pl. Br. 19, underscores that mini-hearings are inevitable. (Plaintiffs' implication that they had records available but sat on them, *id.*, defies belief.) Even then, the only records Plaintiffs unearthed were those of persons who purchased directly "in the offering," and half of the lead class plaintiffs were told by the district court that they made no "domestic transactions" at all. A-5178–84.

In short, plaintiffs' legal defenses of the district court's class certification misapply settled law and obscure core legal issues.

C. Plaintiffs' Reliance on DTC Settlement Is Procedurally Foreclosed and, in Any Event, Mistaken.

Plaintiffs also dust off an erroneous argument that settlement at DTC in New York renders a transaction a "domestic" one—an argument they *failed* to make to the district court during class certification proceedings. Pl. Br. 22–27. Plaintiffs had omitted it for a reason: Judge Rakoff had squarely and correctly rejected this very argument in the context of motions to dismiss.

Specifically, Judge Rakoff dismissed claims by certain Note purchasers, including lead plaintiff, USS, and concluded that "the operations of the DTC are insufficient to satisfy *Absolute Activist*, even assuming that DTC's bookkeeping affects a change in beneficial ownership in New York." A-5181–82. DTC "facilitate[s] the clearance and settlement of securities transactions between participants through electronic book-entry changes to accounts of its participants." *Id.* at 5181. As Judge Rakoff explained:

> Quite apart from *Absolute Activist*'s clear language requiring a transfer of [legal] title, *Absolute Activist*, 677 F.3d at 68, the Second Circuit has elsewhere indicated that domestic "actions needed to carry out . . . transactions, and not the transactions themselves[,]" are insufficient to satisfy *Morrison*. *Loginovskaya v. Batratchenko*, 764 F.3d 266, 275 (2d Cir. 2014). 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 nor the formal weight of a transfer of title necessary for its second.
>
> Moreover, assuming the parties are correct that most securities transactions settle through the DTC or similar depository institutions, the entire thrust of *Morrison* and its progeny would be rendered nugatory if all DTC-settled transactions necessarily fell under the reach of the federal securities laws. The laws would reach most transactions, not because they occurred on a domestic exchange but because they settled through the DTC. *This result cannot be squared with the plain language and careful reasoning of Morrison and Absolute Activist.*

Id. at 5182 (alterations in original) (emphasis added).

1. Plaintiffs' DTC Argument Has Been Waived and Is Precluded As an Improper Cross-Appeal.

Plaintiffs are precluded from reviving this issue on appeal. They did not raise it in class certification proceedings, and "[i]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Cortlandt St. Recovery Corp. v. Hellas Telecomms.*, 790 F.3d 411, 421 (2d Cir. 2015).

The Court is also precluded from considering this issue for other reasons. Under the cross-appeal rule, "an appellate court may not alter a judgment to benefit

a nonappealing party." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008); *see also, e.g.*, 15A Wright & Miller, Federal Practice and Procedure § 3904 (2d ed. West 2015) (a cross-appeal is required by "any party who wishes to argue for alteration . . . or modification of the judgment"). In order to find for plaintiffs on this issue, the Court would (1) expand the class to include all those who settled through DTC (clearly a broader group of class members than Judge Rakoff contemplated); and (2) effectively reverse the district court's dismissal of certain plaintiffs—a dismissal not cross-appealed here.[8] That would unquestionably expand the decisions below in favor of non-appealing parties—a result unavailable without a cross-appeal.

2. Plaintiffs' DTC Argument Is Inconsistent with *Absolute Activist* and *Morrison*.

These procedural hurdles should end this Court's consideration of plaintiffs' DTC argument. But even if this Court could consider the argument's merits, plaintiffs have not identified any basis for reaching a conclusion different from the one Judge Rakoff reached on the motion to dismiss. This Court squarely held in *Absolute Activist* that transactions in non-exchange traded securities are "domestic"

[8] Indeed, State Board of Administration of Florida, et al. (hereinafter "Florida *amici*"), in an *amicus* filing in support of plaintiffs-appellees, admit that the DTC argument they proffer aims to overturn the district court's dismissal ruling, which has not been appealed or cross-appealed here. Florida *amici* at 20 (complaining that "there is no guarantee that the district court's dismissal ruling will ever be appealed").

only if "either irrevocable liability was incurred" or "*title* was transferred within the United States." 677 F.3d at 62 (emphasis added). As plaintiffs concede, title to the Notes has *not* been transferred at any point after their initial issuance. Pl. Br. 27; A-4781–82. This alone is dispositive of plaintiffs' DTC-related argument. Even assuming, *arguendo*, that absent class members acquired a beneficial interest in the Notes (such as beneficial ownership) through bookkeeping entries that occurred at DTC,[9] title and beneficial ownership are legally distinct. *See*

[9] As defendants explained in a prior motion to dismiss, *see* A-4887–91, plaintiffs (and, by extension, absent class members) likely did not receive a beneficial interest in the Notes directly through a book-entry transfer that occurred at DTC. Typically, various intermediaries are situated between a buyer, seller, and institution with an account at DTC. A given transaction in a DTC-eligible security typically involves a "chain reaction of adjustments to book entries" reflecting the transfer of a beneficial interest in that security through each of those intermediaries. A-5181. The transfers within that chain may occur at different locations, domestic or foreign. In fact, because no plaintiff claims to be a DTC participant in this case, defendants previously relied on this chain of transfers to argue that "[t]he transaction that transferred beneficial interest to [plaintiffs] . . . occurred *not* at the DTC but at some other location." A-4888. Plaintiffs have not addressed these problems.

Relatedly, the intermediaries through whom class members transact (and if those intermediaries are not DTC members, then yet other intermediaries) report the net effect of their transactions—and not necessarily every transaction—to DTC. *See* U.C.C. art. 8 prefatory note, pt. I.C (Am. Law Inst. & Unif. Law Comm'n 1994). So, an order from a class member could have been filled from its broker's current inventory, or netted among multiple brokers—and therefore caused no settlement activity at DTC, likely without the class member's knowledge. The belated DTC argument does not, therefore, resolve the ascertainability problems in plaintiffs' class because potential class members will not know whether their transaction settled at DTC.

Beneficial, *Black's Law Dictionary* (10th ed. 2014) ("Consisting in a right that derives from something other than legal title.").

This Court has firmly declined to stretch *Absolute Activist* in the manner plaintiffs suggest. For example, in *Loginovskaya v. Batratchenko*, 764 F.3d 266, 274 (2d Cir. 2014), the plaintiff argued that she entered into a domestic transaction under *Absolute Activist* by purportedly acquiring title to an investment in the United States. This Court disagreed. It held that the interest plaintiff had acquired was distinct from title and that *Absolute Activist* requires showing "that the transfer of *title* . . . occurred in the United States." *Id*. (emphasis added).

Indeed, plaintiffs identify no authority—from *any* court—supporting their position that, under *Absolute Activist*, the transfer of a beneficial interest in a security is equivalent to the transfer of title. The district court's decision on remand in *Absolute Activist* does not help them. There, in deciding a motion to dismiss, the court determined that the plaintiff had alleged (incorrectly, as it happens) that "transfer of title" through DTC "occurred within the U.S." *Absolute Activist Master Value Fund, Ltd. v. Ficeto*, 2013 WL 1286170, at *18 (S.D.N.Y. Mar. 28, 2013). The court therefore had no occasion to consider whether the transfer of a beneficial interest is equivalent to the transfer of title.[10] *See id*.

[10] Although the district court also stated that "courts look at the place where a trade settles to determine where title is transferred," *Absolute Activist*, 2013 WL *(cont'd)*

Here—where plaintiffs must prove their assertions rather than merely allege them—it is undisputed that title does not, in fact, transfer through DTC. Pl. Br. 27.

Nor is *In re Sanofi-Aventis Securities Litigation* helpful to plaintiffs, Pl. Br. 25–26, as the district court in that case simply did not consider the "title" argument plaintiffs make here. *See* 293 F.R.D. 449, 458 (S.D.N.Y. 2013). The *Sanofi-Aventis* plaintiff did "not dispute that title passed outside of the U.S. and premise[d] its claim solely on the irrevocable liability prong of the *Absolute Activist* test." *Id.*[11]

Moreover, the definitions of "sale," "security entitlement," and "beneficial ownership" cited by plaintiffs do not establish that DTC settlement is equivalent to

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1286170, at *18, it relied solely on a single case that did not draw that general conclusion, that similarly accepted as true the plaintiffs' allegation that DTC settlement results in the transfer of title, and where the characterization of the DTC transfer was, in any event, dicta because the plaintiff was analyzing an irrelevant transaction, *S.E.C. v. Tourre*, 2012 WL 5838794, at *1, 4 (S.D.N.Y. Nov. 19, 2012). Decisions that, by virtue of their procedural posture, reasoned from assumed, but incorrect, allegations surely cannot set the precedent for cases in which the erroneous premise has been corrected or a contrary factual record developed. *See United States v. Landau*, 155 F.3d 93, 102 (2d Cir. 1998); *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1314 (2d Cir. 1988).

[11] *United States v. Balanovski*, 236 F.2d 298 (2d Cir. 1956) (Pl. Br. 26 and Florida *amici* 18)—where the locus of the sale for tax purposes was determined based on shipping documents—offers no guidance here. Whether a sale occurred for purposes of shipping law involves an entirely different set of legal principles than where a sale occurs under the federal securities laws, especially where the latter reflect a presumption against extraterritoriality.

the transfer of title. *See* Pl. Br. 23-24. As noted, dictionary definitions undermine plaintiffs' theory and, in any event, their argument obscures the practical reasons to distinguish between DTC settlement and transfer of title. As noted by Judge Rakoff, the "book-entry" transfer of a beneficial interest in a security does not carry "the formal weight of a transfer of title." A-5182. Adopting plaintiffs' position would also undermine the clarity the Supreme Court sought in *Morrison*. *See* 561 U.S. at 269 (noting Court's intent to create "clear test" to "avoid interference with foreign securities regulation"). As one commentator explained:

> The transfer on the corporation's books to [DTC's nominee] Cede & Co. and the transfer on the books of the DTC all occur as part of a larger process by which securities flow through the system. But that flow of undifferentiated interests in larger fungible pools of undifferentiated securities interests is different from the transfer of title associated with a specific transaction that represents a purchase or sale of a security entitlement. Indeed, the commingled and netted nature of the transfer, clearance, and settlement process make it impossible to correlate any of these intermediate transactions to any specific purchase or sale by any ultimate transactor.

Joseph A. Grundfest, *Morrison, the Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 J. Corp. L. 1, 37-38 (2015).

Finally, adopting plaintiffs' position would dramatically expand the extraterritorial scope of U.S. securities laws in a manner inconsistent with *Morrison* and its progeny. Because DTC holds title to a staggering number of

securities,[12] Judge Rakoff correctly concluded that "the entire thrust of *Morrison* and its progeny would be rendered nugatory if all DTC-settled transactions necessarily fell under the reach of the federal securities laws."[13] A-5182. As the Supreme Court warned, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Morrison*, 561 U.S. at 266.

Even less consistent with *Morrison* is the rule advocated by Florida *amici*. Under their proposal, a *foreign* buyer who negotiates (and agrees to) a transaction *abroad* with a *foreign* dealer to purchase a *foreign* company's debt security that does not trade on a U.S. exchange (such as the Petrobras Notes) nonetheless engaged in a "domestic transaction" for purposes of U.S. securities laws because title to the securities is immobilized at DTC. *Amici* would reach this incongruous

[12] *See* A-4890 ("[DTC's parent,] DTCC's global trade repositories record more than U.S. *$500 trillion* in gross notional value of transactions made worldwide. . . . Today, DTCC safely and securely clears more than U.S. *$1.6 quadrillion* in transactions every year.") (emphasis added).

[13] Conversely, declining to expand *Absolute Activist* by conflating title and beneficial ownership does not "render nugatory *Absolute Activist*'s first prong." Pl. Br. 27. There are ample circumstances when securities transactions involve the transfer of title; indeed, the laws of some jurisdictions may require it. *See* A-3006 (Notes Prospectus) ("The laws of some jurisdictions . . . may require some purchasers to take physical delivery of their notes . . . .").

result even if the transaction causes no action—not even a book entry—at DTC and is unknown by DTC. *See* note 9, *supra*.

Here, the district court did not even consider, much less adopt, *amici*'s proposal.[14] Indeed, no court has endorsed *amici*'s all-encompassing interpretation of "domestic transaction," which would dramatically expand the extraterritorial reach of U.S. securities laws and class action mechanism. There is also no indication that when this Court held that the "transfer of title" in the United States signified a "domestic transaction," *Absolute Activist*, 677 F.3d at 69, it intended to encompass a circumstance when title is immobilized and the transaction *does not* cause a transfer of title. Tellingly, the "transfer of title" aspect of *Absolute Activist*'s holding originated (as *amici* acknowledge, Florida *amici* 11) with *Quail Cruises Ship Management Ltd. v. Agencia de Viagens CVC Tur Limitada*, 645 F.3d 1307 (11th Cir. 2011), which involved an *actual* title transfer at closing.

Amici's interpretation would cause precisely what the Supreme Court in *Morrison* sought to avoid—"incompatibility with the applicable laws of other countries" that seek to "regulate . . . transactions occurring within their territorial

[14] Like plaintiffs' DTC arguments, the arguments of Florida *amici* are procedurally barred because the issue has not been preserved for appeal and the relief sought would have required a cross-appeal. *See, e.g.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001); *see also Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284, 300 (3d Cir. 2014) ("The Secretary cannot, as *amicus*, resurrect on appeal issues waived by Participants.").

jurisdiction." 561 U.S. at 269. Nor is there any evidence—and *amici* identify none—that Congress contemplated, let alone intended, this result. *Amici*'s assertion that DTC should be treated like a U.S. exchange, Florida *amici* 15–16, is another policy argument disconnected from statutory text; while the Supreme Court in *Morrison* relied on specific textual evidence that Congress sought to regulate trading on domestic exchanges, 561 U.S. at 266–68, *amici* identify no similar evidence of Congressional focus on DTC or similar institutions.

D. Plaintiffs Failed To Show That Their Class Definition Is Not Improperly "Fail-Safe."

Plaintiffs offer no coherent justification for certifying an improper "fail-safe" class. "Fail-safe" classes—which embed a merits inquiry into the class definition itself—have repeatedly been rejected in this Circuit. *See* Op. Br. 26–27. And plaintiffs do not dispute that the phrase "domestic transaction" embeds a merits inquiry into the class definition. *See id*. at 27. Indeed, all plaintiffs offer in defense of their class definition is a non-responsive factual account of trading documents supposedly available to class members, Pl. Br. 31—an account generally unaccompanied by citations to the record and (as described above) in fact contradicted by it.

Plaintiffs also cite a string of cases, Pl. Br. 32, but their significance is mostly elusive. Only four of those cases involved the issue of fail-safe classes.

Three of the four acknowledge that fail-safe classes are impermissible.[15] In the remaining case, the Fifth Circuit concluded, unlike courts in this Circuit, *see* Op. Br. 26-27, that fail-safe classes can be certified. *In re Rodriguez*, 695 F.3d 360, 369-370 (5th Cir. 2012) (affirming bankruptcy court's certification of 23(b)(2) class and refusal to certify 23(b)(3) class). Plaintiffs do not disclose that at least three other Circuits have disagreed with the Fifth Circuit's conclusion. *See Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011); *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 825–26 (7th Cir. 2012); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015).

E. Plaintiffs Mischaracterize Underwriter Defendants' Legal Positions.

Plaintiffs also inflate the implications of a ruling against them by complaining that it would "*eliminate* class action litigation for all after market

[15] *Byrd v. Aaron's Inc.*, 784 F.3d 154, 167 (3d Cir. 2015); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012); *Mullins*, 795 F.3d at 657. While these three cases each found the class at issue was not fail-safe, they do not come close to suggesting that the same is true here. *Byrd* mentioned, but did not analyze, a "fail-safe class." 784 F.3d at 167. *Young* found that the class definition's reference to fees which "were either not owed, or were at rates higher than permitted" did not qualify as fail-safe because the disputed legal question was whether defendants were "ultimately liable to a policyholder for an incorrect overcharge, not whether the policyholder was, in fact, so charged." 693 F.3d at 538–39. Here, by contrast, defendants have vigorously disputed—as early as the motion-to-dismiss stage—whether plaintiffs engaged in "domestic transactions." Finally, the definition in *Mullins*, unlike the definition here, did not involve a merits determination: It certified a class of all purchasers of a certain product within certain geographic and temporal limits. 795 F.3d at 660–61.

purchases that are not made on U.S. exchanges." Pl. Br. 36 (emphasis in original); *see also* National Conference *amicus* 4. This Court need not sweep so broadly. Rather, defendants have argued that "*[i]n 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." Op. Br. 17 (emphasis added). And plaintiffs do not dispute that the "factual context" here "involves securities of a foreign issuer traded worldwide among varied permutations of foreign and domestic parties and intermediaries in opaque over-the-counter aftermarkets"—a setting with "especially acute" challenges in identifying a "domestic transaction."[16] *Id*. at 17–18. Defendants also challenge the particularly threadbare class certification record here.

Similarly misguided is plaintiffs' hysterical concern that a denial of class certification "would apply equally to the majority of the corporate and municipal bond markets." Pl. Br. 15. Plaintiffs offer no supporting authority or analysis. And the proportion of foreign investors among the holders of U.S. municipal bonds

[16] Presumably in an effort to make this case appear relatively "domestic," plaintiffs rely on information (entirely outside the district court record) about a 2009 Petrobras bond issuance—but it confuses more than it informs. Pl. Br. 36. For one thing, the claims against Underwriter Defendants concern only bonds issued in 2013 and 2014. Plaintiffs also focus on the location of the note holder, which does not dictate whether the transaction was "domestic." *See Absolute Activist*, 677 F.3d at 70.

is likely to be exceedingly low—especially compared with the proportion of foreign investors in globally-offered debt securities of a Brazilian, majority state-owned company.

Plaintiffs also exaggerate by contending that "this class action is the only means by which most of Petrobras' defrauded investors can be recompensed." Pl. Br. 4. They give no consideration to relief available under foreign laws, flouting *Morrison*'s warning that the United States must not become "the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." *Morrison*, 561 U.S. at 270. In fact, *amici* Brazilian financial institutions have warned that the district court's sweeping class certification decision "interferes with Brazil's securities markets and regulation regime." Br. of *Amici* Associacao Brasileira de Bancos Internacionais, et al. 7. European issuers are likewise "at a loss as to which transactions are going to be part of the class in the end, and which should have been excluded under *Morrison* from the start." Br. of *Amicus* EuropeanIssuers aisbl 2–3. If plaintiffs believe that expanding the extraterritorial reach of U.S. securities laws (and thereby the class action mechanism) is good policy, they must seek this relief from Congress, whose intent is reflected in the "domestic transaction" test.

Nor is a class action the sole means of relief in the United States, where Judge Rakoff is presiding over more than 25 individual actions by approximately

500 individual plaintiffs who have chosen to bring similar allegations outside the class mechanism. A-1–170. In short, the reversal of class certification here on ascertainability grounds would not adversely affect protections afforded by securities laws.

II. THE CLASS FAILS TO MEET THE PREDOMINANCE AND SUPERIORITY REQUIREMENTS FOR CLASS CERTIFICATION

Plaintiffs inappropriately ignore their burden to prove *each* element of Rule 23(b)(3), including predominance of common issues and superiority of the class action vehicle. *See* § I.A., *supra*. Contrary to plaintiffs' assertion, Pl. Br. 34, "ascertainability of the class is an issue distinct from" those other elements of Rule 23. *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 45 (2d Cir. 2006), *clarified on denial of reh'g*, 483 F.3d 70 (2d Cir. 2007). While Judge Rakoff addressed predominance generally, he did so without giving any consideration to the need to establish "domestic transactions" on an individual basis. Plaintiffs do nothing to defend that omission—they simply ignore defendants' opening brief, Op. Br. 35–38, and summarily rest upon Judge Rakoff's determinations. Pl. Br. 34–35 (citing A-6000, A-6003–05). They take the same approach to the requirement to prove the superiority of a class action as a vehicle for adjudicating this case. Because neither plaintiffs nor Judge Rakoff grappled with the core failure to prove the predominance and superiority elements, this Court should vacate class certification.

CONCLUSION

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

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New York, New York

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 6,999 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.

September 8, 2016

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