UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of March, two thousand twenty-one.

PRESENT: ROBERT A. KATZMANN,
RAYMOND J. LOHIER, JR.,
MICHAEL H. PARK,
Circuit Judges.

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BANCO SAFRA S.A.-CAYMAN ISLANDS BRANCH,
Plaintiff-Appellant,

v. 19-3976-cv

SAMARCO MINERACAO S.A., BHP BILLITON LIMITED, BHP BILLITON PLC, BHP BILLITON BRASIL LTDA., VALE S.A.,
Defendants-Appellees.[*]

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[*] The Clerk of Court is directed to amend the caption as shown above.

For Plaintiff-Appellant Banco Safra S.A.:

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Brendan P. Cullen, *on the brief*, Sullivan & Cromwell LLP, Palo Alto, CA.

For Defendant-Appellee Vale S.A.:

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For *Amici Curiae* Law Professors in Support of Appellant:

Laurence M. Rosen, Brent LaPointe, *on the brief*, The Rosen Law Firm, P.A., New York, NY.

For *Amici Curiae* Washington Legal Foundation and Allied Educational Foundation in Support of Appellees:

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Appeal from a judgment of the United States District Court for the Southern District of New York (Berman, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED**.

Banco Safra S.A.-Cayman Islands Branch ("Banco Safra") brought this putative securities fraud class action alleging that several offshore companies connected to a Brazilian mining operation had violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the Exchange Act), 15 U.S.C. §§ 78j(b), 78t(a), and Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder.[1] As relevant here, the United States District Court for the Southern District of New York (Berman, *J.*) dismissed with prejudice Banco Safra's Second Amended Complaint (the "SAC" or the "Complaint") for failure to plausibly allege a domestic transaction under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), and *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012). Banco Safra appeals this dismissal as well as the District Court's denial of its motion for reconsideration and to amend the Complaint. We assume the parties' familiarity with the underlying facts, procedural history of the case, and issues on appeal, to which we refer only as necessary to explain our decision to affirm.

[1] Banco Safra also asserted various state law claims for common law fraud, negligent misrepresentation, and aiding and abetting fraud arising out of the same set of facts. Following its dismissal of Banco Safra's federal claims, the District Court declined to exercise supplemental jurisdiction over these state law claims and dismissed them without prejudice. Because we conclude that the District Court properly dismissed the federal claims, we affirm the dismissal of these state law claims. *See Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 124 (2d Cir. 2006) (remanding with instructions to dismiss without prejudice state law claims when federal claims were dismissed).

BACKGROUND

Banco Safra is a Cayman Islands branch of the Brazilian bank Banco Safra S.A. Between 2013 and 2015, it purchased $135,102,000 in debt securities issued by defendant-appellee Samarco Mineração S.A. ("Samarco"), a Brazilian mining company co-owned by two other defendants-appellees, BHP Billiton Brasil Ltda. and Vale S.A. In 2015, Samarco's Fundão "tailings" dam, designed to hold back waste materials produced by mining operations, collapsed, resulting in many tragic deaths and injuries as well as significant flooding, property damage, and other environmental impacts. Following this incident, the debt securities that Banco Safra had purchased plummeted in value.

At issue are "debt securities issued by Samarco between October 31, 2012 and November 30, 2015" (the "Samarco Bonds"). App'x 402 ¶ 1. The SAC alleges that in selling the Samarco Bonds the defendants-appellees made material misstatements and omitted important information about the safety and other aspects of their Brazilian mining operations. Samarco initially issued the securities under Regulation S, which provides an exemption from registration under Section 5 of the Securities Act of 1933 for securities offered and sold outside the United States. 17 C.F.R. §§ 230.901–905.

The SAC alleges that Banco Safra purchased most of its Samarco Bonds in secondary aftermarket transactions "from counterparties and/or broker dealers located in the United States." App'x 409 ¶ 25. The District Court dismissed the Complaint with

prejudice, however, on the ground that it failed to adequately plead a domestic transaction under the Exchange Act as required by *Morrison* and *Absolute Activist*. The District Court denied Banco Safra's motion for reconsideration, which included a request for leave to submit a Third Amended Complaint.

DISCUSSION

A. Dismissal of the Second Amended Complaint

We review *de novo* a district court's grant of a motion to dismiss. *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 99–100 (2d Cir. 2015). To survive a motion to dismiss under 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A private civil complaint that claims a violation of Section 10(b) must allege relevant "transactions in securities listed on domestic exchanges, [or] domestic transactions in other securities." *Morrison*, 561 U.S. at 267. Banco Safra does not allege that the Samarco Bonds traded on a domestic exchange. So the issue is whether Banco Safra has alleged "domestic transactions in other securities." *Id.* To establish such transactions, a plaintiff "must allege facts suggesting that irrevocable liability was incurred or title was transferred within the United States." *Absolute Activist*, 677 F.3d at 68. "[I]t is sufficient for a plaintiff to allege facts leading to the plausible inference that the parties incurred irrevocable liability within the United States: that is, that the

purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security." *Id.* Such allegations may include "facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money." *Id.* at 70. A conclusory assertion that securities transactions "took place in the United States" by itself will not satisfy the domestic transaction requirement. *Id.* Nor is it enough to allege that a United States entity was involved in a transaction. In *Absolute Activist*, we explained that "[w]hile it may be more likely for domestic transactions to involve parties residing in the United States, [a] purchaser's citizenship or residency does not affect where a transaction occurs; a foreign resident can make a purchase within the United States, and a United States resident can make a purchase outside the United States." *Id.* at 69 (quotation marks omitted). Thus, merely providing the physical location of a broker-dealer involved in the relevant transaction does not "necessarily demonstrate where a contract was executed"—at least without additional allegations "that the broker carrie[d] out tasks" in the United States "that irrevocably b[oun]d the parties to buy or sell securities." *Id.* at 68. This is because "territoriality under *Morrison* concerns where, physically, the purchaser or seller committed him or herself." *United States v. Vilar*, 729 F.3d 62, 77 n.11 (2d Cir. 2013).

Detailed factual allegations describing contract formation in the United States will typically satisfy the domestic transaction test. *See Giunta v. Dingman*, 893 F.3d 73,

76–77, 80 (2d Cir. 2018) (holding that plaintiffs adequately alleged a domestic transaction where one plaintiff accepted—over lunch meetings and phone calls in Manhattan—the defendant's offer to invest in a venture); *Vilar*, 729 F.3d at 76–78 (concluding that the trial evidence would have supported a jury finding that the underlying transactions were domestic where some fraud victims entered into and renewed their investment agreements in the United States—including one victim who executed the relevant documents "in her own New York apartment and handed those documents to a New York messenger").[2]

With these principles in mind, we consider the allegations contained in the SAC, and in particular the three sets of allegations that Banco Safra argues satisfy the domestic transaction requirement under *Morrison*.

First, Banco Safra alleges that it "purchased Samarco bonds in domestic (U.S.) transactions . . . and was damaged thereby. Specifically, [Banco Safra] purchased Samarco bonds from counterparties and/or broker dealers located in the United States." App'x 409 ¶ 25. An exhibit to the Complaint ("Exhibit A") lists Banco Safra's purchases and sales of Samarco Bonds—including, for each transaction, the name and U.S. address of each "Counterparty/Broker-dealer," the trade date, and the purchase or sale price in

[2] We note that a transaction is also domestic when the two sides of the transaction are "matched"—thus forming a binding contract—on an electronic exchange system within the United States. *Myun-Uk Choi v. Tower Rsch. Cap. LLC*, 890 F.3d 60, 63, 67–68 (2d Cir. 2018).

U.S. dollars. App'x 598–600. The Complaint further alleges that "all of the counterparties to the transactions and/or their agents were located in the United States." App'x 409 ¶ 27. Second, according to the Complaint, the transactions listed in Exhibit A were "consummated with U.S. dollars" and were "conducted by Banco Safra and/or its affiliates using $US dollars and through Banco Safra's bank accounts located in New York." App'x 409 ¶ 26. And third, Banco Safra alleges that most of the after-market transactions listed in Exhibit A were reported to the Trade Reporting and Compliance Engine ("TRACE"), an "automated system developed by the Financial Industry Regulatory Authority ('FINRA') that, among other things, accommodates reporting and dissemination of transaction reports where applicable in TRACE-Eligible Securities." App'x 410 ¶ 28. We take judicial notice of FINRA's rules governing TRACE.[3] *See* Fed. R. Evid. 201. "TRACE-Eligible Securities" are defined, as relevant here, as debt securities denominated in U.S. dollars and issued by certain specified issuers. FINRA R. 6710(a). A FINRA member that is a "Party to a Transaction"—that is, "an introducing broker-dealer, . . . an executing broker-dealer, or a customer,"—in a "TRACE-Eligible Security" must report that transaction on TRACE. *Id.* 6710(a); 6710(b); 6720(a); 6730(a), but FINRA does not require member firms to report "debt securities that are the subject of bona fide off-shore Regulation S transactions." FINRA, Trade

[3] FINRA is a "self-regulatory organization" registered with the SEC. *See Fiero v. Fin. Indus. Regul. Auth., Inc.*, 660 F.3d 569, 571 (2d Cir. 2011). Its rules are subject to approval of, 15 U.S.C. § 78s(b), and amendment by, 15 U.S.C. § 78s(c), the SEC.

Reporting Notice, Aug. 1, 2013, at 4, https://www.finra.org/sites/default/files/NoticeDocument/p314034.pdf.

We easily dispense with Banco Safra's argument that using U.S. dollars and New York bank accounts to purchase the Samarco Bonds is enough to establish a domestic transaction under *Morrison*. Because U.S. dollars can be exchanged outside of the United States, and a transacting party can decide and agree to use or accept dollars while abroad, the fact that U.S. dollars were used to purchase U.S.-dollar-denominated bonds is inadequate to show that either party here incurred liability in the United States to transact in the securities. Nor does the direction to transfer money using New York bank accounts to purchase the bonds suffice to demonstrate a domestic transaction. *See Loginovskaya v. Batratchenko*, 764 F.3d 266, 275 (2d Cir. 2014).

Similarly, the SAC's allegations about the location of the "counterparties/broker-dealers" do not suffice to demonstrate a domestic transaction. These allegations suffer from two defects. First, they are silent as to whether the "counterparties and/or broker-dealers located in the United States," App'x 409 ¶ 25, acted as principals who purchased the Samarco Bonds for their own accounts and then sold them to Banco Safra, or instead operated as agents who merely facilitated the sale and purchase of the bonds between the parties. Second, even if we were to liberally construe the terms "counterparties" and "broker-dealers" in the Complaint to mean that the broker-dealers acted as principal "sellers," the Complaint fails to allege that their agents acted in the United

States to incur liability for the sales. Banco Safra sought to cure this defect by listing the U.S. addresses for the broker-dealer entities themselves. But providing generic U.S. addresses for the broker-dealers without also listing where the individuals actually involved in negotiating the transactions were located when they negotiated the transactions "does not necessarily demonstrate where a contract was executed." *Absolute Activist*, 677 F.3d at 68.

Banco Safra next argues that the fact that most of its after-market transactions in the Samarco Bonds were reported to FINRA's TRACE system makes it plausible that the transactions were domestic. The SAC alleges that "[o]nly *U.S. (domestic) transactions* are reported to TRACE by FINRA member firms," App'x 410 ¶ 28 (emphasis in original), citing the 2013 FINRA Trade Reporting Notice for that proposition. *See* Trade Reporting Notice, *supra*, at 4. But the Trade Reporting Notice does not suggest that TRACE employs the same standard for identifying a domestic transaction as we established in *Absolute Activist*. Instead, the Trade Reporting Notice states that "if a debt security originally sold in a Regulation S transaction is subsequently purchased or sold as part of a U.S. transaction, the [subsequent transactions] must be reported to TRACE." Trade Reporting Notice, *supra*, at 4. The language of the notice does not prevent the reporting of non-domestic transactions or suggest that a "U.S. transaction" in a debt security for TRACE reporting purposes is necessarily domestic as defined by *Absolute Activist*. The TRACE reporting requirements do not appear to compel FINRA

members to consider where irrevocable liability was incurred or where title passed before reporting a transaction. On this record, that a transaction is reported to TRACE does not mean that either party to the transaction acted within the United States to incur irrevocable liability.[4]

We do not mean to suggest that the type of transaction at issue in this case can never constitute a domestic transaction that results in a broker-dealer incurring irrevocable liability in the United States, or that a broker-dealer acting in the United States as a principal for its own account may never incur liability in a transaction that is largely offshore. But the SAC does not plausibly allege a domestic securities transaction that satisfies the requirements of *Morrison* and *Absolute Activist*. Accordingly, we affirm the District Court's dismissal of the SAC and its denial of Banco Safra's motion to reconsider that conclusion.

B. Denial of Leave to Amend

The District Court also denied Banco Safra's request for leave to amend the SAC, citing Banco Safra's "repeated failures to cure" the *Morrison* deficiencies. We review the denial of leave to amend for abuse of discretion. *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 188 (2d Cir. 2014). Leave to amend should be "freely

[4] The existence of these FINRA reports *could* be relevant to the domestic transaction inquiry. But the SAC does not even allege that parties report transactions to TRACE only, or even mostly, when a party incurs irrevocable liability or title passes within the United States.

give[n] . . . when justice so requires," Fed. R. Civ. P. 15(a)(2), but "should generally be denied in instances of futility, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the non-moving party." *United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 28 (2d Cir. 2016) (quoting *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008)). We conclude that the District Court acted within its discretion in denying leave to amend.[5]

Contrary to Banco Safra's argument, a district court is not required to grant leave to amend when it grants a motion to dismiss based on pleading deficiencies. *Porat v. Lincoln Towers Cmty. Ass'n*, 464 F.3d 274, 276 (2d Cir. 2006); *City of Pontiac Policemen's & Firemen's Ret. Sys.*, 752 F.3d at 188. And Banco Safra had ample opportunity to amend its complaint to cure the *Morrison*-related deficiencies. It is thus "unlikely that the deficiencies . . . were unforeseen." *City of Pontiac Policemen's & Firemen's Ret. Sys.*, 752 F.3d at 188.

[5] Banco Safra argues that we should review the District Court's denial of leave to amend *de novo* because, it claims, the court determined that amendment would be futile. Because we uphold the denial of leave to amend on grounds unrelated to futility, we need not address this issue.

CONCLUSION

We have considered Banco Safra's remaining arguments and conclude they are without merit. For the foregoing reasons, the judgment of the District Court is **AFFIRMED.**

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk