

[Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—S.D.N.Y.: Federal fraud claims against Brazilian company dismissed for lack of any domestic transaction, \(Jun. 19, 2019\)](#)

Securities Regulation Daily Wrap Up

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By Rebecca Kahn, J.D.

In a case by a Brazilian/Cayman Island plaintiff against Brazilian defendants regarding Brazilian bonds and claims relating to a Brazilian catastrophe, the federal case was dismissed because no domestic transaction could be shown.

A New York federal district court dismissed with prejudice a bank's claims of federal securities fraud because the bank failed, after a third try, to adequately plead a domestic transaction. Although the bank's counterparties and/or brokers were located in the U.S., relevant transactions were conducted through its accounts located in New York in U.S. dollars and reported to TRACE, none of these factors showed that "irrevocable liability was incurred within the United States" or title for the securities passed within the U.S. as required to show a domestic transaction. The bonds were never listed on a U.S. exchange and were principally offered and sold outside the U.S. (*Banco Safra S.A. – Cayman Islands Branch v. Samarco Mieracao S.A.*, June 18, 2019, Berman, R.).

Parties. Banco Safra S.A. – Cayman Islands Branch, is an offshore branch of a Brazilian bank that was established under the laws of the Cayman Islands. Samarco is a private Brazilian mining company that owns and operates iron ore mines in Brazilian states. Samarco is co-owned by defendants BHP Brasil and Vale, (collectively "Defendants") all three of which are headquartered in Brazil.

Fraud action. Banco Safra brought this action on behalf of all purchasers of Samarco Bonds in domestic U.S. transactions during the class period (October 31, 2012 to November 30, 2015). The Samarco Bonds purchased by Banco Safra were initially offered only outside the U.S. and Banco Safra acquired the overwhelming majority of bonds in the secondary market.

Fundao dam. Banco Safra alleged that "[t]his class action arises out of what is widely regarded as the worst environmental disaster in Brazil's history," when, on November 5, 2015, Samarco's Fundao "tailings" dam burst, "releasing more than 16,000 Olympic swimming pools' worth of wastewater... generated by Samarco's mining operations..." Banco Safra claims that during the class period, Defendants misled investors "about the safety of the Samarco's mining operations, including the Fundao dam and the tailings deposited at the dam, Samarco's iron ore production and related matters."

This was the plaintiff's third attempt to plead a domestic U.S. transaction under *Morrison v. Nat'l Australia Bank*, 561 U.S. 247 (2010). The court ruled that "merely alleging that [a] transaction took place in the United States or that a U.S. broker-dealer was involved is insufficient.... Plaintiff made no attempt to allege where its contracts were formed, where its purchase orders were placed, where title to the Notes passed, or where payment was exchanged." As such, the plaintiff yet again failed to allege facts required to plead a U.S. securities transaction: facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money.

On June 18, 2018, the plaintiff filed its opposition, contending that its third complaint supports a "plausible if not compelling inference of domesticity" because all counterparties to the transactions and their agents were located in the U.S.; all of the relevant transactions were conducted through Banco Safra's accounts located in New York; all transactions were consummated in U.S. dollars; and each after-market transaction was reported to TRACE, the automated system developed by FINRA.

The court noted that the Second Circuit has held the plaintiff's allegations insufficient: the location of the broker does not show where a contract was made; the involvement of U.S. bank accounts and U.S. dollars does not show a U.S. purchase; and the plaintiff offered no authority showing that only domestic transactions under *Morrison* are reported to TRACE. As such, the court granted the motion to dismiss with prejudice.

State claims dismissed without prejudice. The complaint was dismissed with prejudice as to the federal fraud claims because this was the plaintiff's third attempt to plead federal securities claims and had repeatedly failed to cure deficiencies in its prior filings. The plaintiff's state claims were dismissed without prejudice to their being filed in state court.

The case is [No. 16-cv-8800-RMB](#).

Attorneys: Adam G. Kurtz (Pomerantz LLP) for Banco Safra S.A.-Cayman Islands Branch. Mark Stewart Cohen (Cohen & Gresser LLP) for Samarco Mineracao S.A. Brendan Peter Cullen (Sullivan & Cromwell LLP) for BHP Billiton Ltd.

Companies: Banco Safra S.A.-Cayman Islands Branch; Samarco Mineracao S.A.; BHP Billiton Ltd

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