Second Circuit Rejects “Listing” and “Foreign-Squared” Claims Under *Morrison v. National Australia Bank*

U.S. Securities Laws Do Not Apply to Transactions Abroad Merely Because the Security at Issue Is Dually Listed on a U.S. Exchange or Because the “Buy Order” Was Placed in the U.S.

Second Circuit Also Holds That an Issuer’s Aspirational Statements of Corporate Culture Are Inactionable “Puffery” That Cannot Trigger Liability Under the U.S. Securities Laws

**SUMMARY**

In *Morrison v. National Australia Bank*, the U.S. Supreme Court opined that U.S. securities laws apply only “in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.” Seizing on that language, plaintiffs sought to establish exceptions to *Morrison*’s clear holding that U.S. securities laws do not apply to non-U.S. transactions by contending that U.S. securities laws apply to (i) transactions in any security dually listed on both a U.S. and non-U.S. exchange, even when the transaction itself occurred on the non-U.S. exchange; and (ii) non-U.S. securities transactions that were initiated by an investor in the United States.

On May 6, 2014, in *City of Pontiac v. UBS AG*, the U.S. Court of Appeals for the Second Circuit—whose securities laws rulings are widely followed by courts across the United State—rejected both of these theories as a matter of first impression. (S&C partners Bob Giuffra, Matthew Schwartz, and Justin DeCamp represented UBS AG.) Under the Second Circuit’s ruling, issuers will be able to dually list their securities on a U.S. exchange without fear of exposing themselves to liability under U.S. securities laws.
for transactions occurring on non-U.S. exchanges. Issuers also will not be subject to liability under U.S. securities laws for orders initiated in the United States but transacted on a non-U.S. exchange.

The Second Circuit’s opinion also addressed plaintiffs’ claims that UBS’s statements about its “compliance, reputation, and integrity” were materially misleading, because UBS was not complying with certain U.S. tax laws. In rejecting this argument, the Second Circuit confirmed that these types of aspirational corporate statements are “inactionable ‘puffery,’” because they are “too general to cause a reasonable investor to rely upon them.” This holding should help resolve a conflict that has emerged among certain federal trial courts in New York about whether such statements are actionable.

BACKGROUND AND THE SECOND CIRCUIT’S DECISION IN UBS

In Morrison, the U.S. Supreme Court held that the antifraud provisions of Section 10(b) of the Exchange Act do not apply to purchases of securities of non-U.S. issuers by non-U.S. plaintiffs made outside the United States (“foreign-cubed” claims). In so holding, the Supreme Court overruled the multi-factored “conduct” and “effects” tests that lower courts, including the Second Circuit, previously had applied to assess whether U.S. courts should exercise subject matter jurisdiction over extraterritorial securities transactions. Plaintiffs in securities litigations contended that Morrison left open two critical issues: (i) how its holding applies to securities dually listed on both a U.S. and non-U.S. exchange and (ii) whether its holding applies to securities purchases by on a non-U.S. exchange by U.S. investors.

The Listing Theory

The Morrison court summarized its holding as follows:

Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.\(^2\)

Seizing on the “listed on an American stock exchange,” language, plaintiffs argued that Morrison does not preclude liability under U.S. law for the purchase of any security that is “listed” on a U.S. exchange whether or not the purchase or sale occurred in the United States or abroad. This interpretation of Morrison became popularly known as the “listing” theory, and, if adopted, would have represented a dramatic expansion of liability under the antifraud provisions of the securities laws for non-U.S. issuers that list their shares on both the U.S. and home country exchanges. Under this approach, issuers would have been subject to a “worldwide” class action under U.S. law whether or not the alleged misconduct had any connection to the U.S.

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\(^1\) 561 U.S. 247 (2010).
\(^2\) Id. at 273 (emphasis added).
In In re UBS Securities Litigation, a putative securities class action brought in the Southern District of New York, plaintiffs pushed the “listing” theory against UBS AG, which lists its shares on the Swiss, London, and New York stock exchanges. (Approximately 90% of the trading volume of UBS shares occurs on the Swiss exchange.)

Citing persuasive authority from other district courts, Judge Richard J. Sullivan rejected the listing theory as a “strained interpretation” of the Morrison decision, resting on a “hyper-technical parsing” of the language that was in “stark tension with the language of the opinion as a whole.” In Judge Sullivan’s view, Morrison’s statement that “the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States,” clearly foreclosed plaintiffs’ reading.

The Second Circuit unanimously affirmed Judge Sullivan’s decision, reasoning that plaintiffs’ “listing” theory was “irreconcilable with Morrison read as a whole.” Agreeing with the district court, the Second Circuit held that the Supreme Court in Morrison “evince[d] a concern with the location of the securities transaction and not the location of an exchange where the security may be dually listed.” The court noted that “most tellingly, in rejecting this Circuit’s ‘conduct and effects’ test in favor of a bright-line rule, Morrison rejected our prior holding that the Exchange Act applies to transactions regarding stocks traded in the United States which are effected outside the United States.” Thus, “Morrison does not support the application of Section 10(b) of the Exchange Act to claims by a foreign purchaser of foreign-issued shares on a foreign exchange simply because those shares are also listed on a domestic exchange.”

Foreign-Squared Claims

Judge Sullivan also had dismissed the “foreign-squared” claims at issue in UBS. One of the plaintiffs argued that, although it had acquired its UBS shares on the Swiss exchange, the actual “purchase” had occurred “in the United States” because that is where the “buy order” for the shares had originated. Judge Sullivan held that these claims were likewise barred by Morrison’s reasoning, because there was “nothing in the text of Morrison to suggest that the Court intended the location of an investor placing a buy order to be determinative of whether such a transaction is ‘domestic’ for purposes of § 10(b).”

The Second Circuit affirmed Judge Sullivan’s decision with respect to the foreign-squared claims as well, noting that, under the Second Circuit’s post-Morrison decision, Absolute Activist Value Master Fund Ltd.

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4 561 U.S. at 266.
5 City of Pontiac v. UBS AG, No. 12-4355-cv, slip op. at 12 (2d Cir. May 6, 2014) (“UBS”).
6 Id. (quotation omitted).
7 Id. at 13-14 (quotation and alterations omitted).
8 Id. at 14.

Second Circuit Rejects “Listing” and “Foreign-Squared” Claims Under Morrison v. National Australia Bank
May 6, 2014
SULLIVAN & CROMWELL LLP

v. Ficeto,10 a transaction is “domestic” when “parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States.”11 Here, the allegation that a plaintiff “placed a buy order in the United States that was then executed on a foreign exchange, standing alone, [does not] establish that [the plaintiff] incurred irrevocable liability in the United States.”12

Inactionable Puffery

Seizing on UBS’s entry into a deferred prosecution agreement with the U.S. Department of Justice concerning violations of U.S. tax laws, plaintiffs in UBS had alleged that UBS had misled investors by stating that:

“UBS aims to comply with all applicable provisions and to work closely and maintain good relations with regulators in all jurisdictions where the firm conducts business”;

UBS “employees should conduct themselves in a manner that is above reproach, as preserving UBS’s integrity is vital to its most valuable asset – its reputation”;

“UBS believes [long term value] can be best achieved by providing clients with value-added products and services and by promoting a corporate culture that adheres to high ethical standards”; and

“[UBS] strives to maintain an appropriate balance between risks and return while establishing and controlling UBS’s corporate governance processes, including compliance with relevant regulations”.

In affirming Judge Sullivan’s dismissal of plaintiffs’ claims as to these statements, the Second Circuit held that “general statements about reputation, integrity, and compliance with ethical norms are inactionable puffery, meaning that they are too general to cause a reasonable investor to rely upon them.”13 The Second Circuit noted that “this is particularly true where, as here, the statements are explicitly aspirational, with qualifiers such as ‘aims to,’ ‘wants to,’ and ‘should.’” The Second Circuit concluded by holding that “Plaintiffs’ claim that these statements were knowingly and verifiably false when made does not cure their generality, which is what prevents them from rising to the level of materiality required to form the basis for assessing a potential investment.”14

10 677 F.3d 60 (2d Cir. 2012).
11 UBS, slip op. at 12 (quoting Absolute Activist, 677 F.3d at 69).
12 Id. at 16.
13 Id. at 19 (citations omitted).
14 Id.

IMPLICATIONS

The Second Circuit’s decision rejecting the “listing” theory is a substantial victory for issuers, especially non-U.S. issuers, that dually list any of their securities for trading in U.S. capital markets. Prior to this decision, non-U.S. issuers faced the uncertainty of whether accessing U.S. capital markets by listing their shares on a U.S. exchange—where they expected only a portion of the trading volume in their shares to occur—would risk liability under U.S. laws for all of their shares, no matter where traded. The court’s rejection of the plaintiffs’ “foreign-squared” theory likewise will substantially curtail liability under the U.S. securities laws for non-U.S. issuers. The Second Circuit’s opinion thus forecloses securities litigation plaintiffs’ two best attempts to limit Morrison. Within the Second Circuit, Morrison now stands for the clear proposition that U.S. securities laws apply only to transactions actually made in the United States.

The Second Circuit’s holding on “puffery” should also reassure issuers that they may disclose their general goals of promoting strong corporate culture without exposing themselves to securities liability whenever the corporation or its employees arguably fail to meet those goals.

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