No. 19-

In the

Supreme Court of the United States

AER ADVISORS INC.; WILLIAM J. DEUTSCH; PETER E. DEUTSCH,

Petitioners,

v.

FIDELITY BROKERAGE SERVICES, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

To encourage banks, other financial institutions, and their employees to report actual or suspected criminal activity, Congress enacted the Bank Secrecy Act, 31 U.S.C. § 5318(g)(3)(A) ("Section 5318"), as part of the Annunzio-Wylie Anti-Money Laundering Act of 1992. Section 5318 states that any financial institution that "makes a disclosure of any possible violation of law or regulation to a government agency . . . shall not be liable under . . . any constitution, law, or regulation of any State . . . for such disclosure . . . ." Despite Section 5318's clear language and purpose, there is a well-defined split of opinion as to its meaning. The Court of Appeals for the First Circuit and the Court of Appeals for the Second Circuit have held the statute confers absolute immunity for disclosures of any possible (or even impossible) crimes. The Court of Appeals for the Eleventh Circuit and appellate courts in Arkansas, Louisiana, Texas, and California have instead limited the immunity to disclosures made in good faith, truthful disclosures, or disclosures about objectively possible crimes.

Petitioners initiated this case in the Eleventh Circuit. After it was transferred to the First Circuit, Respondents successfully invoked absolute immunity conferred by the transferee circuit before discovery was taken, which highlights the disorder caused by ambiguity over whether a federal transferee court must apply its own law or the law of the transferor court in a diversity case when the transfer is subject to 28 U.S.C. § 1404(a).

This Petition asks the Court to determine (1) whether Section 5318 confers (a) absolute immunity for <u>any</u> disclosure; or (b) immunity only if the disclosure:

(i) is an objectively "possible criminal violation"; and/or

(ii) is made in good faith; and/or

(iii) is not fraudulent.

This Petition also asks this Court to determine (2) whether in a diversity case, must the transferee court, which is receiving jurisdiction pursuant to 28 U.S.C. § 1404(a) (*i.e.*, only because of witness convenience), apply the law of the transferor court (including federal law allowing for an immunity defense), or the law of its own court?

PARTIES TO THE PROCEEDING

Petitioners AER Advisors Inc. ("AER"), William J. Deutsch, and Peter E. Deutsch (William J. Deutsch and Peter E. Deutsch, together, the "Deutsches") were the plaintiffs/appellants below in an action filed initially in the United States District Court in the Southern District of Florida and then transferred to the United States District Court in the District of Massachusetts.

Respondent Fidelity Brokerage Services LLC ("Fidelity") was defendant/appellee below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29.6, Petitioner AER Advisors, LLC states that: (1) it has no parent corporation; and (2) no publicly held company owns 10% or more of its stock.

DIRECTLY RELATED PROCEEDINGS

The following proceedings are directly related to the case in this Court:

AER Advisors Inc. et al v. Fidelity Brokerage Svcs., LLC, Case No. 9:17-CV-80809, U.S. District Court, Southern District of Florida (West Palm Beach), Order Granting Defendants' Motion To Transfer Venue, dated November 8, 2017;

AER Advisors Inc. et al v. Fidelity Brokerage Svcs., LLC, Case No. 1:17-CV-12214, U.S. District Court, District of Massachusetts (Boston), Memorandum And Order and Order Dismissing Case, dated August 22, 2018; and

AER Advisors Inc. et al v. Fidelity Brokerage Svcs., LLC, Case No. 18-1884, U.S. Court of Appeals for the First Circuit, Opinion and Judgment, dated April 17, 2019.

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I. Opinions Below

The opinion of the Court of Appeals for the First Circuit in *AER Advisors Inc. v. Fidelity Brokerage Servs., LLC* is reported at 921 F.3d 282 (1st Cir. 2019). (App. A to Pet. Cert. 1a-26a).

The decision of the United States District Court for the District of Massachusetts in *AER Advisors Inc. v. Fidelity Brokerage Servs., LLC* is reported at 327 F.Supp.3d 278, 284 (D. Mass. 2018). (App. B to Pet. Cert. 27a–44a).

II. Basis for Jurisdiction

The jurisdiction of this Court is based on 28 U.S.C. § 1254(1), which provides that "Cases in the courts of appeals may be reviewed by the Supreme Court …: (1) By writ of certiorari granted upon the petition of any party to any civil … case, before or after rendition of judgment or decree . . . ." The opinion of the First Circuit entered on April 17, 2019, and affirming the decision of the United States District Court for the District of Massachusetts entered on August 22, 2018, is a judgment within the meaning of Section 1254(1). *See Hiatt v. Brown*, 339 U.S. 103, 106 (1950).

On July 3, 2019, Petitioners filed an application to extend the time to file a petition for a writ of certiorari from July 16, 2019 to September 13, 2019. On July 8, 2019, Petitioners' application was granted by Justice Breyer, extending the time to file until September 13, 2019.

III. Statutory Provisions Involved

This case involves Section 1517(b) of the Annunzio-Wylie Act, 106 Stat. 4059-60 (1992), codified, as amended, at 31 U.S.C. § 5318(g)(3)(A).

Section 5318 provides that:

> Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.

31 U.S.C. § 5318(g)(3)(A).

This case also involves 28 U.S.C. § 1404(a) pursuant to which the District Court for the Southern District of Florida transferred Petitioners' initial action to the District of Massachusetts.

Section 1404(a) provides that: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

IV. Statement of the Case

This case illustrates the serious and dispositive impact on a litigant resulting from the colliding views of the Circuit Courts on two important issues. Petitioners instituted this case in the Eleventh Circuit alleging that: (i) the challenged disclosure constituted a fraudulent concealment of the financial institution's own criminal conduct; and (ii) that the fraudulently reported conduct did not satisfy the requirements of Section 5318 (i.e., the conduct was not "a possible violation of law or regulation"). Because the Eleventh Circuit does not confer absolute immunity, a complaint embodying such allegations would have unquestionably survived a dismissal motion. But, after the case was transferred under 28 U.S.C. § 1404(a) (for the convenience of the witnesses) to the First Circuit, the banking institution successfully invoked absolute immunity conferred by the transferee circuit so immunity was granted before discovery and without the testimony (by deposition or otherwise) of a single witness. This case therefore also illustrates the turmoil resulting from the ambiguity over whether a federal transferee court must apply its own law or the law of the transferor court in a diversity case when the transfer is for the convenience of witnesses.

A. Statutory Background

1. Section 5318 of the Annunzio-Wylie Act

Section 5318 is a potent tool that incentivizes financial institutions to disclose a possible violation of law. In exchange for such disclosure, the reporting institution is granted "immunity," *i.e.*, released from liability "to any person."

The rationale and policy behind Section 5318's broad immunity grant is not controversial: it is to aid law enforcement by incentivizing reports of violations of law. In furtherance of that purpose, the statute places a strict precondition upon the grant of immunity. The disclosure must be of a "possible violation of law or regulation." Said another way, the statutory purpose is *not* to incentivize the issuance of reports that will be of no use to law enforcement; *i.e.*, reported facts that could not possibly constitute a violation of law or were designed to deflect attention from the reporting institution's own unlawful activities.

The text of Section 5318 requires that a reporting institution identify a possible violation of law, rather than merely write down anything that would constitute a violation of written laws or regulations, irrespective of its possibility. Had the legislature intended to confer immunity for merely reporting an incident that qualifies as a violation of a law or regulation, without relation to whether the violation were objectively possible, it would have written "any. . . violation of law" in a report to a "governmental agency" will entitle the reporting institution to immunity. It did not. Rather, Congress was

clear that a reporting institution need identify a "possible violation of law or regulation to a governmental agency."

2. 28 U.S.C. § 1404(a)

Under Supreme Court precedent, where a federal court sitting in diversity is the transferee of a case for the convenience of witnesses it shall apply the substantive laws of the transferor jurisdiction. *Van Dusen v. Barrack*, 376 U.S. 612 (1964). The rationale behind this principle is clear:

> There is nothing, however, in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue.
>
> ***
>
> The legislative history of § 1404(a) certainly does not justify the rather startling conclusion that one might "get a change of law as a bonus for a change of venue." Indeed, an interpretation accepting such a rule would go far to frustrate the remedial purposes of § 1404(a). If a change of law were in the offing, the parties might well regard the section primarily as a forum-shopping instrument. And, more importantly, courts would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff who had initially selected a permissible forum. We believe, therefore, that both the history and purposes of § 1404(a)

> indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms.

Id. at 633-37 (footnotes omitted) (emphasis added).

B. Petitioners' Complaint

AER, a registered investment advisor, served clients nationwide with "discretionary investment management services." Second Am. Compl. ("SAC") ¶ 17, *AER Advisors Inc., et al. v. Fidelity Brokerage Svcs., LLC*, Case No. 17-civ-12214 (D. Mass Dec. 8, 2017), ECF No. 14. AER joined the Wealth Central platform of Fidelity in 2009 and exclusively relied on that platform to provide its investment services to clients. SAC ¶¶ 18-19. Fidelity promised to assist AER with business development and growth. SAC ¶ 21. In reliance on that promise, AER actively solicited business from clients nationwide. *Id.* In 2011, AER introduced the "China Gold" investment strategy and decided to make the strategy the focus of its business model. SAC ¶¶ 22,111. The China Gold strategy was based on the expectation that the anomalously low prices at which some Chinese securities were trading would "trigger a management buy-out or another privately driven exit transaction (*e.g.,* a strategic acquisition)." SAC ¶ 22. Fidelity supported China Gold and incorporated the strategy into its own investing. SAC ¶ 23.

William J. Deutsch is the Chairman of Deutsch Family Wine & Spirits, and his son Peter E. Deutsch serves as

the company's Chief Executive Officer. SAC ¶¶ 8-9. The Deutsches were clients of Fidelity's Family Office Services ("FFOS"), and eventually participated in AER's China Gold strategy. SAC ¶ 25.

After Peter Deutsch joined FFOS, the Deutsches decided to accumulate a large number of shares of China Medical Technologies Inc. ("China Medical"), and sell their position to a strategic buyer or private equity firm. SAC ¶¶ 29-30. Peter Deutsch began acquiring China Medical shares through his FFOS account in December 2011. SAC ¶ 33. The Deutsches had accumulated nearly 13 million shares of the company by June 30, 2012. SAC ¶ 34.

On March 5, 2012, Fidelity emailed AER with an offer for the Deutsches to join its "fully paid lending program" for their China Medical shares; participation in the program would permit Fidelity to loan those shares to the market in return for compensation and disclosure. SAC ¶ 35. AER replied to Fidelity's offer with a straightforward rejection: "Client is not interested in lending stock." SAC ¶ 37.

Despite the fact that Fidelity's request to lend those shares was denied, between May and early June of 2012, the company lent nearly 1.8 million of the Deutsches' China Medical shares to short sellers or their brokers. SAC ¶ 41. Fidelity made money from these loans, but the Deutsches did not receive those benefits they would have received had they consented to Fidelity's offer and participated in the fully paid lending program. They were not notified of the lending, were not paid any compensation for the loans, and did not receive any collateral. SAC ¶ 42.

On June 11, 2012, after "a routine monthly transfer of [China Medical] shares between the Deutsches' margin accounts," Fidelity's lending triggered a recall obligation. SAC ¶¶ 45-46.

On June 13, 2012, the company issued a recall for about 1.5 million China Medical shares, eventually recalling approximately 1.8 million China Medical shares over the next few days. *Id*.

On June 15, 2012, the Senior Vice President and head of the Securities Lending Desk of Fidelity Capital Markets, Ugyen Sass, anticipated a "market disruption" due to the company's loans and failed recalls of China Medical shares. *Id*.

Then, on June 18, 2012, Fidelity issued its final batch of recalls. *Id*. Because the recalls failed, Fidelity bought roughly 1.2 million shares of China Medical on the open market between June 19 and June 27, 2012. *Id*. As predicted by Fidelity, its own conduct resulted in a price spike driving the price from $4/share on June 13, 2012 to $11.80/share on June 29, 2012. Said another way, Fidelity's conduct on or before that date caused a "market disruption" on the 18th. By June 15, 2012 (three days earlier), Fidelity's senior management knew that its conduct was about to cause a price spike, and therefore Fidelity – with complete clarity – understood that what it had done on or before June 18th had precipitated a short squeeze.

On June 29, 2012, the Securities and Exchange Commission ("SEC") halted the trading of China Medical. *Id*.

Although there was no possibility that Petitioners had orchestrated a short squeeze (SAC ¶¶ 58-59) and Fidelity (as the culprit) knew that Petitioners did not do so (SAC ¶¶ 59-64), Fidelity filed a Suspicious Activity Report ("SAR")[1] on July 5, 2012, accusing Petitioners of attempting to influence a short squeeze. SAC ¶ 56.

As a result of the SAR filing, AER was investigated by the SEC and required to attend a five-hour interview. SAC ¶¶ 99-101. Ultimately, the SEC decided not to pursue an enforcement action against AER. SAC ¶ 102. AER spent hundreds of thousands of dollars to defend itself in these investigations and "could not, and did not economically recover." SAC ¶¶ 106, 115.

The SEC also investigated Peter Deutsch's trading activities related to China Medical. SAC ¶¶ 107-08. The SEC did not pursue an enforcement action, but Peter Deutsch expended hundreds of thousands of dollars in defending himself in the investigation, suffered emotional distress, and had his attention diverted from his business activities. SAC ¶¶ 109-10.

Petitioners brought this action against Fidelity seeking redress for Fidelity's fraudulent concealment of its own conduct, a cover-up of its illicit lending practices and market manipulation that created a short squeeze. As a result of being falsely accused by Fidelity in a SAR, Petitioners were subject to investigations by various

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1. A SAR is the document a "broker or dealer in securities" files with the Financial Crimes Enforcement Network ("FinCEN"), to report "any suspicious transaction . . . relevant to the possible violation of any law or regulation." 31 C.F.R. § 1023.320(a)(1), (b)(1).

state and federal securities-related agencies, and the Deutsches suffered additional business-related damages to their business – Deutsch Family Wine & Spirits – that negatively impacted the value of the equity in it.

This case was initially filed in the United States District Court for the Southern District of Florida in June 2017. Fidelity moved to dismiss the action for failure to state a claim upon which relief could be granted (based upon the immunity for suspicious activity report filings under Section 5318), lack of personal jurisdiction, and transfer for the convenience of witnesses. On November 8, 2017, the United States District Court for the Southern District of Florida transferred the case to the District Court of Massachusetts for the convenience of witnesses. In so doing, the court, accepting Fidelity's representations, explicitly found that discovery and trial would proceed most expeditiously and efficiently in Boston.

One month after the transfer for convenience of witnesses, Petitioners filed their Second Amended Complaint, asserting thirteen causes of action, all of which are primarily based on the SAR. The claims are for negligent reporting (Counts I and II), tortious interference with existing business relationships (Count III), tortious interference with prospective business relationships (Count IV), breach of contract and the covenant of good faith and fair dealing (Counts V and VI), promissory estoppel (Count VII), breach of fiduciary duty (Count VIII), unjust enrichment (Count IX), negligence or gross negligence (Count X), deceptive and unfair trade practices (Counts XI and XII), and prima facie tort (Count XIII).

Fidelity never answered the SAC. No discovery of any kind took place; no documents were exchanged and no testimony (by deposition or otherwise) was adduced from a single witness.

C. The Decisions Below

Fidelity moved to dismiss Petitioners' SAC pursuant to Fed. R. Civ. P. 12(b)(6), asserting that under Section 5318 it enjoys absolute immunity from liability for the wrongful conduct alleged in the pleadings; *i.e.*, Fidelity argued that First Circuit law applied to its claim of immunity under Section 5318. Petitioners opposed the motion, arguing that the § 1404(a) transfer left the applicable law – namely, Eleventh Circuit law – unaffected. After substantial briefing, on August 22, 2018, the District Court dismissed the SAC with prejudice. Pet. App. 27a-44a.

On September 13, 2018, Petitioners filed its notice of appeal to the First Circuit. In an opinion dated April 17, 2019, the First Circuit (Thompson, J.) affirmed the dismissal of Petitioners' SAC by the District Court for the District of Massachusetts. The First Circuit held that First Circuit law applied to Petitioners' case and that, under First Circuit law, a financial institution – here, Fidelity – receives Section 5318 immunity for SAR disclosures even for "malicious" or "willfully false" disclosures. Pet. App. 1a-26a.

V. Reasons For Granting The Petition

As will be discussed further below, this Petition should be granted for at least the following reasons:

a) There is a distinct split between Circuit Courts with respect to the scope of immunity under Section 5318 afforded to those who have filed SARs;

b) This battling interpretation of Section 5318, with some Circuit Courts interpreting Section 5318 to confer absolute immunity to financial institutions, and other Circuit Courts conditioning such immunity upon the SAR filer's good faith and/or the absence of fraud has resulted in confusion and further interpretive discrepancy among the state courts regarding the proper scope of the immunity;

c) This case perfectly illustrates the damaging impact of the split on a litigant alleging that a financial institution filed a SAR that was fraudulent, motivated by bad faith, and/or did not disclose a "possible criminal violation"; and

d) This case also illustrates the disorder caused by the current ambiguity over whether a federal transferee court must apply its own law or the law of the transferor court in a diversity case when the transfer is for the convenience of witnesses.

A. This Court must resolve the Circuit split over whether SAR filers are entitled to absolute or qualified immunity; courts holding that absolute immunity applies are misinterpreting Section 5318.

As stated above, Congress has granted financial institutions immunity from liability for filing SARs. *See*

31 U.S.C. § 5318(g)(3)(A). The statute granting immunity reads:

> Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency . . . shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure . . . .

Id. The scope of this statutory immunity varies from circuit to circuit, however.

1. The Eleventh Circuit: immunity applies when financial institution has "good faith suspicion that a law or regulation may have been violated"

The Eleventh Circuit was the first Circuit Court to find that the Act does not provide absolute immunity. *See Lopez v. First Union Nat'l Bank*, 129 F.3d 1186 (11th Cir. 1997). *Lopez* concerned two sets of plaintiffs. The first plaintiff, Lopez, alleged that the defendant bank had provided law enforcement officials access to information concerning his account, invoking its duty to report suspicious activity under the Act. *Id.* at 1188. After a judicial asset freeze and settlement of related forfeiture proceedings, Lopez sued the bank for alleged violations of several federal financial privacy acts and Florida law. *See id.* at 1188-89.

Pointing to Section 5318's safe harbor provision, the defendant bank moved to dismiss Lopez's lawsuit. The Eleventh Circuit refused to shield the bank from having to defend its filing of a SAR, holding that, "[i]n order to be immune from liability, it is sufficient that a financial institution have a good faith suspicion that a law or regulation may have been violated, even if it turns out in hindsight that none was." *Id.* at 1192-93.

Applying this good faith requirement to the case before it, the Eleventh Circuit concluded that because Lopez's complaint, standing alone, admitted to nothing suspicious about the transactions related to the account, the bank was not entitled to dismissal:

> The problem for First Union at this stage of the litigation is that it is stuck with the allegations of the complaint. Those allegations do not show that First Union had a good faith suspicion that a law or regulation may have been violated. <u>None of the allegations indicate that the transactions associated with Lopez's account were suspicious enough to suggest a possible violation of law.</u>

Lopez, 129 F.3d at 1193 (emphasis added). In short, the Eleventh Circuit refused to dismiss Lopez's claim (or the claims brought by the other set of plaintiffs) because the allegations did not support a good faith suspicion that the subject transactions amounted to a "possible violation of law." *See id.* at 1194-96.

2. The Second Circuit quarrels with the Eleventh Circuit's holding, finding instead that SAR filers enjoy absolute immunity

In contrast to the Eleventh Circuit, two federal courts of appeal – the First Circuit and the Second Circuit – have given Section 5318 an unusually broad reading as providing absolute immunity to claims based on the filing of a SAR.

The Second Circuit was the first court to hold that the Annunzio-Wylie Act provides absolute immunity, explicitly rejecting the Eleventh Circuit's reasoning in *Lopez*. *See Lee v. Bankers Trust Co.*, 166 F.3d 540 (2d Cir. 1999); *see also id.* at 544-45 (recognizing, but disagreeing with, *Lopez*). In *Lee*, a managing director was fired by the defendant bank following an investigation by the bank into the misallocation of escheatable funds in certain unclaimed trust accounts. *See id.* at 542-43. The former director sued the bank, alleging that the bank defamed him in SARs submitted to federal law enforcement officials; the claim was based on information and belief, as the former employee never saw the alleged SARs or even had their existence confirmed. *See id.* at 543.

The district court dismissed the lawsuit at the outset on the basis of the safe harbor provision. The Second Circuit affirmed, rejecting the former bank officer's argument that "there is immunity only where the disclosures in the SAR were made in good faith." *Lee*, 166 F.3d at 544. The court reasoned that:

> The plain language of the safe harbor provision describes an unqualified privilege, never

> mentioning good faith or any suggestive analogue thereof. The [Annunzio-Wylie] Act broadly and unambiguously provides for immunity from any law (except the federal Constitution) for any statement made in [a] SAR by anyone connected to a financial institution. There is not even a hint that the statements must be made in good faith in order to benefit from immunity. Based on the unambiguous language of the [Annunzio-Wylie] Act, Bankers Trust enjoys immunity from liability for its filing of, or any statement made in, an SAR.

Id.

3. The First Circuit concurs with the Second Circuit

In *Stoutt v. Banco Popular de Puerto Rico*, 320 F.3d 26 (1st Cir. 2003), the First Circuit considered cases on both sides of the split. In *Stoutt*, the defendant bank filed a "criminal referral form," a predecessor document to a SAR, with the Federal Bureau of Investigation ("FBI") on suspicion that a customer was engaged in a check-kiting scam. *See id.* at 27-28. The FBI conducted an investigation and a grand jury indicted Stoutt, though prosecutors dismissed the charges voluntarily for reasons that were "unclear" to the First Circuit. *See id.* at 28-29. Stoutt then sued the bank.

The First Circuit affirmed the district court's grant of summary judgment to the bank under the Annunzio-Wylie Act's safe harbor provision. In doing so, the First Circuit rejected both the Supreme Court of Arkansas's

"possible violation" analysis (*see infra* p. 20) and the Eleventh Circuit's "good faith" rule. As to the former, the First Circuit explained:

> Conceivably, Stoutt could argue that the report was not one of a possible violation, even though so termed and colorably disclosing a possible crime, if the Bank knew that there was (in reality) no violation. But this is a nonliteral reading of the statute, which speaks of "any possible violation," and we think it more straightforward to confront any requirement of good faith or due care as an implied qualification of immunity rather than an issue of initial scope. Here, whatever its internal beliefs, the Bank did by any objective test identify a "possible violation."

Stoutt, 320 F.3d at 30.

Turning to the question of whether good faith is required for immunity to attach, the First Circuit ultimately agreed with the Second Circuit that the immunity is absolute. *See id.* But even in so holding, the Court acknowledged that there were at least two "obvious arguments in this case for a good faith limitation":

> [T]hat a good faith requirement would not wholly (or perhaps even greatly) discourage the reports intended by Congress, *cf., United States v. Rodgers*, 466 U.S. 475, 483–84, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984), and that, without it, individuals like Stoutt could be left without any civil redress against malicious or wholly unfounded accusations. The former argument

> has some force at least as to "voluntary" reports. The latter argument for a good faith qualification has obvious weight.

Stoutt, 320 F.3d at 31.

As evidenced above, the battle among federal courts over whether the Annunzio-Wylie Act provides absolute or only qualified immunity to financial institutions that make SAR filings has created a sharp and well-defined conflict; moreover, as addressed below, this battling statutory interpretation has had serious impact upon other courts charged with enforcing the statute.[2]

B. Several state courts have interpreted Section 5318 to provide only qualified immunity.

State trial courts and intermediate state appellate courts have also had to contend with whether the Annunzio-Wylie Act provides absolute or only qualified immunity. Even before *Lopez*, in 1995, the Court of Appeals of Texas found that the legislative history of the Annunzio-Wylie Act did not support a finding of absolute immunity for SAR filers:

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2. It follows that the circuit split has left many district courts to grapple with whether Section 5318 provides qualified or absolute immunity. *Compare Shayesteh v. Cent. Bank*, No. 2:04-CV-488-CW, 2010 WL 417413, at *8 (D. Utah Jan. 29, 2010) (suggesting no immunity for a SAR filer if the SAR was submitted as a result of "racial [or] other bias") *with Martinez-Rodriguez v. Bank of Am.*, No. C 11-06572 CRB, 2012 WL 967030, at *12 (N.D. Cal. Mar. 21, 2012) ("[T]o impose a good faith requirement on top of this clear statutory text would result in a far narrower preemption provision.").

> Yet, even absent a good faith requirement in the statute, there is nothing in it or its legislative history to indicate the drafters intended to clothe banking institutions and their employees with impunity when falsely reporting [a] possible violation of the law. Such a notion, even aside from being foreign to our principles of law and sense of justice, was dispelled by the stated purpose of § 5318 'to provide the broadest possible exemption from civil liability for reporting of suspicious transactions.'

Walls v. First State Bank of Miami, 900 S.W.2d 117, 123 (Tex. App. 1995), writ denied (July 8, 1996) (emphasis added) (internal citation omitted). A subsequent Court of Appeals of Texas case – issued just months before *Lopez* – similarly held that there was no immunity when an "informant withholds critical facts that would cast the entire report to federal authorities in a different light." *Digby v. Texas Bank*, 943 S.W.2d 914, 926 (Tex. App. 1997). That court refused to grant immunity when the reported facts consisted of only those "tending to incriminate the bank's customer" while withholding other "critical facts." *Id.* at 927. The Court in *Digby* continued:

> We agree that the immunity afforded to financial institutions under 31 U.S.C. § 5318 was intended to be broad, but that federal lawmakers could not have contemplated disclosures made where critical mitigating information is deliberately withheld from federal authorities.

Id.

The Supreme Court of Arkansas likewise refused to grant absolute immunity under Section 5318. Just a few months following the First Circuit's decision in *Stoutt*, that court reasoned:

> The First Circuit's decision in *Stoutt v. Banco Popular De Puerto Rico*, 320 F.3d 26 (2003), relied upon by the Bank, is not to the contrary. In that case, a financial institution filed a 'report of apparent crime' report with the FBI and the U.S. Attorney in an abundance of caution. *See id.* at 30. Upon the discovery of new information that made it clear that no crime had occurred, the U.S. attorney dismissed the charges. *Id.* Here, unlike the Bank in *Stoutt*, which 'whatever its internal beliefs...did by any objective test identify a 'possible violation," id., the Bank of Eureka Springs engaged in a continuous course of conduct seeking the prosecution of Mr. Evans by misrepresenting material facts to the prosecutor.Nor did the *Stoutt* bank attempt to derive financial benefit from the criminal prosecution, as did the Bank of Eureka Springs when it attempted to settle the case. Quite simply, there was no objective identification of a possible violation in this case.

Bank of Eureka Springs v. Evans, 109 S.W.3d 672, 680 (Ark. 2003) (emphasis added). The Arkansas Supreme Court went on to explain that: "Importantly, the [Annunzio-Wylie] Act requires there to be a 'possible' violation of law – 'possible' being the operative word – before a financial institution can claim protection of the statute." *Id.*

The "split among the federal circuits as to whether the safe harbor provision has a 'good faith' requirement" was more recently considered by the Louisiana Court of Appeal. That court likewise rejected a bank's request for absolute immunity under Section 5318, choosing instead to follow the reasoning of the Eleventh Circuit in *Lopez* and the Supreme Court of Arkansas in *Bank of Eureka Springs*. *See Doughty v. Cummings*, 28 So.3d 580, 583 (La. Ct. App. 2009). Thus, the Louisiana court held that an ex-employee's claims for malicious prosecution and defamation survived an attack at the pleading stage because the petition alleged that the bank's disclosures to federal authorities and bank regulators were false and made for improper motives (to claim coverage under a D & O Liability Bond). *Id.* Assuming those allegations were true, the bank and its officer "were not reporting a possible violation, but were merely seeking financial benefit." *Id.*

More recently, the California Court of Appeal similarly held that Annunzio-Wylie Act immunity is not absolute; it shields a bank or employee from liability only for true disclosures. *Greene v. Bank of Am.*, 156 Cal. Rptr. 3d 901, 909 (Ct. App. 2013). Other state courts, however, have allied with the First and Second Circuits, holding that the Annunzio-Wylie Act provides SAR filers with absolute immunity. *See, e.g.*, *The Rachuy v. Anchor Bank*, No. A09-299, 2009 WL 3426939, at *2 (Minn. Ct. App. Oct. 27, 2009) ("Appellant's contention that respondent lacked good faith in reporting to law enforcement is irrelevant because [the Act] does not contain a good-faith requirement.").

All told, there is considerable confusion and division over this issue: whether financial institutions are granted absolute immunity with respect to SARs. Guidance from

this Court is required to erase that confusion and establish a uniform national rule governing this important question of federal immunity.

C. The decision below is incorrect and should be reversed; Petitioners' case perfectly illustrates the impact of the Circuits' battling interpretation of Section 5318 on a litigant.

Relying on *Stoutt*, the First Circuit (Thompson, J.) held that "the BSA immunizes financial institutions even if their 'disclosures [are] unfounded, incomplete, careless and even malicious," just so long as they identify "a possible violation" of law — something the bank had done there.'" Pet. App. 9a (quoting *Stoutt*, 320 F.3d at 32). Recognizing the split in authority on the issue of immunity, the First Circuit remarked that "*Stoutt* remains binding on us until (a) the Supreme Court or the First Circuit sitting en banc judicially overrules it; (b) Congress statutorily overrules it; or, in exceedingly infrequent situations, (c) non-binding but compelling caselaw convinces us to abandon it." *Id.* Now is the time for this Court to overrule the line of authority granting financial institutions absolute immunity, including the courts in the First Circuit, for disclosures of impossible violations of law or regulation.

Section 5318 explicitly states that the disclosure of actual or suspected criminal activity to a government agency must be concerning a "possible violation of law or regulation." In this case, it was <u>impossible</u> for the Petitioners to have engineered an alleged short squeeze caused by their account transfer. Instead, it was *Fidelity's* conduct (on or before June 18th) that caused a "market disruption" – and Fidelity knew it. *Id.* Indeed, only three

days earlier, Fidelity's Senior Vice President and head of the Securities Lending Desk of Fidelity Capital Markets anticipated just such a "market disruption" triggered by the company's unauthorized loans of the Deutsches' shares and failed recalls. *Id.* Under the law of the Eleventh Circuit, and the Supreme Court of Arkansas – to name just two jurisdictions – Petitioners' claims survive Fidelity's motion to dismiss because there was no objective identification of a possible violation of law or regulation. *See Lopez,* 129 F.3d at 1193; *Bank of Eureka Springs*, 109 S.W.3d at 680. But under the law of the First and Second Circuits, even knowing disclosure of impossible crimes grants immunity to the SAR filer.

Moreover, Petitioners allege that Fidelity incriminated Petitioners in the SAR in order to conceal Fidelity's own unlawful conduct (the violation of multiple securities laws and regulations), such that the SAR misrepresented material facts and omitted others for the purpose of distorting the truth. In those circuits and states where SAR filers have absolute immunity, Fidelity would be exempt from liability, regardless of the bad faith they are alleged to have exhibited in filing a false SAR. In circuits and states where SAR filers have only qualified immunity, however, Fidelity could be held liable, owing in part to the rationale articulated by the Texas Court of Appeals that while immunity afforded to financial institutions under Section 5318 was intended to be broad, "federal lawmakers could not have contemplated disclosures made where critical mitigating information is deliberately withheld from federal authorities." *Digby,* 943 S.W.2d at 927.

Furthermore, prior Supreme Court precedent clearly indicates that immunity analysis rests on functional

categories, not on the status of the defendant. *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). Absolute immunity flows not from rank or title or "location within the Government," but from the "special nature" of the responsibilities of the individual official (*see Butz v. Economou*, 438 U.S. 478, 511 (1978); *see also Briscoe*, 460 U.S. at 342), and it is granted extremely sparingly under the law. Importantly, while the immunity may be "absolute," it only extends to limited conduct. Judges are absolutely immune from liability for damages for acts committed within their judicial jurisdiction (*see Pierson v. Ray*, 386 U.S. 547, 553–554 (1967)), and the President enjoys absolute immunity from damages liability predicated on an official act (*see Nixon v. Fitzgerald*, 457 U.S. 731, 744–758 (1982)), in general, qualified immunity is the norm (*see Cleavinger v. Saxner*, 474 U.S. 193, 199 (1985)). The Supreme Court has rejected extending qualified immunity to private parties. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 168 (1992) (finding that immunity was not an available defense for private defendants with no connection to government interest because "the rationales mandating qualified immunity for public officials are not applicable to private parties"); *Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (holding that private prison guards could not use qualified immunity as a defense to a § 1983 claim because there was no historical basis for immunity and policy concerns did not weigh heavily enough in favor of the defendants).

Immunity for SAR filers whose disclosures are objectively not possible violations of the law or regulations, or were made in bad faith, or are fraudulent, does nothing to fulfill the purpose of Section 5318, which is to (among other things) make money laundering more difficult

to propagate, and to prevent banks from becoming unknowing intermediaries in illicit activity. *See Walls*, 900 S.W.2d at 123 ("there is nothing in it [Section 5318] or its legislative history to indicate the drafters intended to clothe banking institutions and their employees with impunity when falsely reporting possible violation of the law"). Instead, absolute immunity permits financial institutions such as Fidelity (as Petitioners allege) to act with impunity and wastes the resources of the government agencies involved in investigating SARs.

Lastly, it would be contrary to the most essential principles of our legal system to interpret the immunity afforded under Section 5318 in such a way that perpetrators of frauds and cover-ups escape liability. *See Yerdon v. Henry*, 91 F.3d 370, 376 (2d Cir. 1996) ("Where an examination of the statute as a whole demonstrates that a party's interpretation would lead to 'absurd or futile results ... plainly at variance with the policy of the legislation as a whole,' that interpretation should be rejected") (quoting *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120 (1988)). It is a particularly distorted reading in the context of Section 5318's policy goal of aiding law enforcement to uncover financial frauds and abuses.

D. The Supreme Court must also resolve the existing ambiguity over whether a federal transferee court must apply its own law or the law of the transferor court in a diversity case when the transfer is pursuant to 28 U.S.C. § 1404(a).

As stated above, this matter was transferred from the Eleventh Circuit (a "qualified immunity" jurisdiction)

to the First Circuit (an "absolute immunity" jurisdiction) for the convenience of witnesses pursuant to 28 U.S.C. § 1404(a). Thus, in a matter of first impression, the First Circuit was confronted with the issue of whether a transfer for the convenience of witnesses should result in a dispositive change in federal statutory law applicable to the defendant's affirmative defense. Pet. App. 13a-19a The First Circuit held that it would apply its own caselaw interpreting Section 5318 immunity. Pet. App. 20a-26a. – an irrational outcome caused by murkiness concerning over a federal transferee court must apply its own law or the law of the transferor court in a diversity case when the transfer is for the convenience of witnesses.

As discussed further below, 1) the Supreme Court's ruling in *Van Dusen* suggests that a transfer under § 1404(a) does not justify one party getting "a change of law as a bonus for a change of venue"; and 2) to the extent an ambiguity exists with respect to whether one federal court must apply another's interpretation of federal law after a case's transfer for the convenience of witnesses, that ambiguity must be finally resolved by the Supreme Court.

1. Under *Van Dusen*, in a diversity case, a transferee court receiving jur isdiction only because of witness convenience should apply the law of the transferor court

The Petition should be granted to clarify whether *Van Dusen* applies to an affirmative defense based on federal law in a diversity action. In *Van Dusen*, this Court established the following rule:

> We conclude, therefore, that in cases such as the present, where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms.

Van Dusen v. Barrack, 376 U.S. 612, 639 (1964).

The Supreme Court addressed the rule in *Van Dusen* in *Ferens v. John Deere Co.*, 494 U.S. 516 (1990), when the Court was asked to decide whether the rule in *Van Dusen* applied where the plaintiffs sought the § 1404(a) transfer rather than the defendants. The Supreme Court, relying on its decision in *Van Dusen*, expanded the rule in *Van Dusen* to apply regardless of which party sought the transfer of venue. *Ferens*, 494 U.S. at 523. The Court held that the transferee court must "apply the law of the transferor court, regardless of who initiates the transfer. A transfer under Section 1404(a), in other words, does not change the law applicable to a diversity case." *Id.* (emphasis added).

Here, there is no question that under the logic of *Van Dusen* and *Ferens*, the First Circuit should not have granted absolute immunity to Fidelity because the "law of the transferor court," *i.e.*, the law of the Eleventh Circuit, recognizes that SAR filers are only entitled to qualified immunity. By rejecting the reasoning articulated in *Van Dusen* and *Ferens*, and instead applying its own case law interpreting the immunity afforded to SAR filers under Section 5318, the First Circuit dismissed Petitioners' case with prejudice. Pet. App. 1a-26a.

The First Circuit's decision simply cannot be reconciled with the Supreme Court's decisions in *Van Dusen* and *Ferens*, and the intended purpose of § 1404(a). In support of the holdings in *Van Dusen* and *Ferens*, the Supreme Court stated:

> This legislative background supports the view that § 1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconvenience that flowed from the venue statutes by permitting transfer to a convenient federal court. The legislative history of § 1404(a) certainly does not justify the rather startling conclusion that one might get a change of law as a bonus for a change of venue. Indeed, an interpretation accepting such a rule would go far to frustrate the remedial purposes of § 1404(a).

Van Dusen, 376 U.S. at 635-36 (emphasis added). *See also Ferens*, 494 U.S. at 522. The Supreme Court has further reasoned that "[t]he decision to transfer venue under § 1404(a) should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law." *Ferens*, 494 U.S. at 523.

2. This case presents the Supreme Court with the opportunity to decide whether *Van Dusen* applies to defenses based on federal law

In arriving at its ruling, the First Circuit distinguished *Van Dusen* and *Ferens*, explaining that those cases dealt with the application of state law to questions of state law in diversity cases transferred under 28 U.S.C. § 1404(a), whereas our case involves the scope and application of a federal statutory defense under Section 5318. Indeed, to date, the Supreme Court has not explicitly addressed the question of whether the rule in *Van Dusen* applies to a federal statutory defense.

Moreover, while not directly on point, the Supreme Court has not yet decided whether the rule articulated in *Van Dusen* applies to federal claims. Writing for the District of Columbia Circuit, Justice Ruth Bader Ginsburg anticipated the importance of this issue:

> The question before us is whether the *Van Dusen* rule - that the law applicable in the transferor forum attends the transfer - should apply to transferred federal claims. It is a question meriting attention from Higher Authority. Congress, it appears, has not focused on the issue, nor has the Supreme Court addressed it.

In Re Korean Air Lines Disaster, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (Ginsburg, J.), aff'd on other grounds sub nom., *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

Once again, the Supreme Court is presented with the opportunity to address the issue that Justice Ginsburg considered a question "meriting attention from Higher Authority." *See id.* at 1174.

The intended purpose of a change of venue under § 1404(a) is to permit a transfer within the federal system for the convenience of the parties and witnesses or in the interest of justice. 28 U.S.C. § 1404(a) states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Fidelity moved to transfer the case to the US District Court for the District of Massachusetts under 28 U.S.C. § 1404(a). The Florida district court (that is, the transferor court) granted the motion because the locus of the operative facts in the case favored Massachusetts. (Order Granting Defs'. Mot. To Transfer Venue, *AER Advisors Inc., et al. v. Fidelity Brokerage Svcs., LLC*, Case No. 17-civ-80809 (S.D. Fla., Nov. 11, 2017), ECF No. 40.) Clearly, the District Court for the Southern District of Florida transferred this matter to the District Court for the District of Massachusetts to effectuate the very purpose of § 1404(a) – for the convenience of the witnesses.

After transfer to the Massachusetts district court (that is, the transferee court), the Petitioners filed an amended complaint. Fidelity moved to dismiss the Petitioners' amended complaint because the First Circuit recognized absolute immunity under Section 5318 for persons filing a SAR. Notably, they did so before any documents were exchanged or testimony was adduced from any witnesses

in discovery. The Petitioners opposed the motion, arguing that Eleventh Circuit law applied and therefore only persons filing a SAR in good faith had immunity. The Massachusetts district court agreed with Fidelity and granted the motion to dismiss. Pet. App. 27a-44a.

Petitioners appealed and the First Circuit affirmed the Massachusetts district court. As a matter of first impression, the First Circuit held that a district court to which a case has been transferred should apply its own circuit's cases interpreting federal law, rather than cases in the circuit of the court that transferred the action. Pet. App. 12a-19a.

The result is particularly unjust in light of the fact that while the transfer to the First Circuit was allegedly for the convenience of witnesses, Fidelity moved to dismiss before any discovery was taken, quite possibly to take advantage of the split circuit opinions on the degree of immunity afforded to SAR filers under Section 5318.

Accordingly, the First Circuit's Opinion conflicts with the intended purpose of a change of venue under § 1404(a). It also clashes with the reasoning of *Van Dusen* that a change of venue under § 1404(a) "certainly does not justify the rather startling conclusion that one might get a change of law as a bonus for a change of venue" and that such transfers generally should be (with respect to state law) "but a change of courtrooms." *Van Dusen*, 376 U.S. at 639.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 13, 2019

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED APRIL 17, 2019

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 18-1884

AER ADVISORS, INC.; WILLIAM J. DEUTSCH;
PETER E. DEUTSCH,

Plaintiffs, Appellants,

v.

FIDELITY BROKERAGE SERVICES, LLC,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF MASSACHUSETTS

Hon. Patti B. Saris, *U.S. District Judge.*

Before Thompson, *Circuit Judge*,
Souter,* *Associate Justice*,
and Lipez, *Circuit Judge*.

April 17, 2019, Decided

* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

THOMPSON, *Circuit Judge*. William and Peter Deutsch, father and son, together with their financial advisor, AER Advisors ("AER"), ask us to undo the district judge's decision dismissing their complaint against Fidelity Brokerage Services, LLC ("Fidelity") under Fed. R. Civ. P. 12(b)(6).[1] The judge had deemed Fidelity immune from suit here based on an immunity provision in the Bank Secrecy Act ("BSA"), 31 U.S.C. § 5318(g)(3)(A) — a provision that says, most pertinently, that a "financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency . . . shall not be liable to any person under any law or regulation of the United States, [or] any constitution, law, or regulation of any State . . ., for such disclosure." Seeing no reason to reverse the judge's thoughtful decision, we affirm.

How the Case Got Here

We draw the facts from the complaint's allegations, which at this stage of the litigation we must accept as true and construe in the light most favorable to plaintiffs. *See, e.g., Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012).

1. For convenience, we will sometimes refer to AER, William Deutsch, and Peter Deutsch, collectively, as "plaintiffs."

Parties' Dealings

At all times relevant to this suit, AER operated as a registered investment advisor, serving wealthy clients nationally. In 2009, AER joined Fidelity's Wealth Central platform, giving it access to Fidelity's investment technologies — technologies that AER relied on in advising its clients. William and Peter were two of AER's clients. And they were and are, respectively, chairman and chief executive officer of a billion-dollar company called Deutsch Family Wine & Spirits.

Starting in 2011 and continuing through part of 2012, the Deutsches pursued a "China Gold" investment strategy introduced by AER and supported by Fidelity — a strategy that resulted in their acquiring millions of shares of China Medical Technologies, Inc. ("China Medical"), all in the hopes of making a profit from an eventual management buy-out or a third-party acquisition of that company. In March 2012, Fidelity offered the Deutsches the chance to participate in its "fully paid lending program," in which they would lend Fidelity their China Medical shares for an interest-based fee. If they accepted Fidelity's offer, they probably would have been able to engineer a "short squeeze."[2]

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2. A "short squeeze" involves a

> situation when prices of a stock . . . start to move up sharply and many traders with short positions are forced to buy stocks or commodities . . . to cover their positions and prevent losses. This sudden surge of buying leads to even higher prices, further

> aggravating the losses of short sellers who have not covered their positions.

Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1277 n.3 (11th Cir. 2005) (quoting John Downes & Jordan Elliot Goodman, *Barron's Finance & Investment Handbook* 807 (6th ed. 2003)), *abrogated on other grounds by Merck & Co. v. Reynolds*, 559 U.S. 633, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010). To bring a little more clarity to the matter, we note that a "short position" — mentioned in the short-squeeze definition — is a technique used by some investors. As a leading treatise explains:

> A "short sale" is . . . any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller. Short selling can be a logical trading strategy for a trader who believes that the price of shares is likely to decline over the near-term. To sell short, the trader typically borrows the shares from a broker who obtains them either from its own reserves or from an external source. The trader then sells the borrowed shares in the open market. At this point, the trader has an "open short position" in the stock. At some point in the future, the trader "covers" the short position by purchasing an identical number of shares and returning them to the lender. [If,] as the trader hopes, the share price declines, the trader earns a profit equal to the difference between the price at which she sold short and the price at which she purchased the shares back to cover the short position (not taking into account fees or commissions). Short selling can be extremely risky because if the stock price rises, the trader must cover the short position at a loss.

23A Jerry W. Markham and Thomas Lee Hazen, *Broker-Dealer Operations Sec. & Comm. Law* § 9.7 (citations and some internal

But they declined, saying they had no interest in lending stock.

Apparently unwilling to take no for an answer, Fidelity lent about 1.8 million of the Deutsches' China Medical shares to short sellers or their brokers between May and early June 2012. Fidelity made money from these loans. But the Deutsches got nothing — no notice of what Fidelity was up to, no collateral to protect their interests, and no compensation.

On June 11, 2012, after "a routine monthly transfer of [China Medical] shares between the Deutsches' margin accounts," Fidelity's surreptitious lending triggered a recall obligation, basically because Fidelity had loaned more China Medical securities than legally permitted (fyi, all dates in the rest of this paragraph refer to 2012 as well). Over the next several days, Fidelity issued recall notices for about 1.8 million shares. The recalls for about 1.2 million shares failed, however, causing Fidelity to believe a short squeeze would occur. Ultimately, China Medical's stock price went from $4.00 per share on June 13 to $11.80 per share on June 29. Fidelity ended up buying roughly 1.2 million shares on the open market between June 19 and June 27. And the Securities and Exchange Commission ("SEC") halted trading in China Medical securities on July 29.

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quotation marks omitted) (quoting *SEC v. Colonial Inv. Mgmt. LLC*, 659 F. Supp. 2d 467, 470 (S.D.N.Y. 2009), *aff'd*, 381 F. App'x 27 (2d Cir. 2010)).

Investigations

Sometime around July 5, 2012, Fidelity filed a suspicious activity report ("SAR") with the federal Treasury Department's Financial Crimes Enforcement Network, accusing the Deutsches of manipulating China Medical's stock price. Plaintiffs base this allegation on an internal memo written by David Whitlock, an employee in Fidelity's Compliance Department, which they say "upon information and belief . . . reflects the contents" of the SAR.[3] Whitlock's memo recommended that Fidelity's Investigations, Evaluation and Response Department investigate the Deutsches' China Medical-related activities because they had "the appearance of attempting to influence a short squeeze in the stock of China Medical." And "a scheme to manipulate the price or availability of stock in order to cause a short squeeze is illegal," his memo added.

In August 2012, the SEC kicked off an investigation of both AER and Peter Deutsch for (in plaintiffs' words) "possible market manipulation in the equities of

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3. Because a major goal of the BSA is to help law enforcement react quickly to evidence of financial chicanery, federal law mandates that SARs be kept confidential so that the SARs' subjects do not learn that they have come under suspicion. In fact, federal law forbids financial institutions, government authorities, and their respective employees from disclosing SARs or even "any information that would reveal the[ir] existence." 31 C.F.R. § 1023.320(e)(1)(i); 31 U.S.C. § 5318(g)(2)(A). Indeed, federal law makes it a federal crime to willfully disclose the existence or contents of an SAR. *See* 31 U.S.C. § 5322(a).

China Medical." AER, for example, received one SEC subpoena and participated in one SEC interview. Peter also participated in one SEC interview. State securities agencies investigated AER as well. William was not investigated at all, apparently (he makes no allegation that he was). Ultimately, neither the SEC nor the state agencies pursued enforcement actions against AER or Peter. Still, AER had to spend hundreds of thousands of dollars in defending itself and did not "economically recover" from the ordeal. Peter had to spend hundreds of thousands of dollars too and suffered emotional distress as well.

Proceedings in the Southern District of Florida

Invoking diversity jurisdiction, the Deutsches and AER later sued Fidelity in Florida's federal district court. Their operative complaint contained an array of Florida-law claims, including claims predicated on the SAR — *e.g.*, negligent reporting and misrepresentation, fraud, and tortious interference with existing and prospective business relations.

Fidelity eventually moved to dismiss the complaint or to transfer the case to Massachusetts's federal district court. Most pertinently for our purposes, Fidelity's dismissal arguments pushed the idea that the BSA immunized it from any civil liability for filing the SAR. And its transfer arguments pushed the notion that all the events leading to the suit happened in or around Massachusetts. Plaintiffs opposed the motion, contending among other things that the BSA did not shield Fidelity from liability for its "bad faith" filing of the SAR and

that Florida was a reasonably convenient forum for all concerned.

Noting "the vast majority of the facts underpinning [p]laintiffs' cause[s] of action did not occur in . . . Florida," the federal district court in Florida held that "the locus of operative facts in this case favors a transfer to the District of Massachusetts." So that court transferred the action to Massachusetts under 28 U.S.C. § 1404(a) and denied Fidelity's "other arguments and requests" as moot.[4] To use some legalese, the Florida federal court here was the "transferor court" and the Massachusetts federal court was the "transferee court." *See Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 64-65, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013).

Proceedings in the District of Massachusetts

Again asserting diversity jurisdiction, plaintiffs filed an amended complaint after the transfer, alleging Florida-law claims for negligent reporting, interference with existing and prospective business relations, breach of contract, breach of good faith and fair dealing, promissory estoppel, breach of fiduciary duty, unjust enrichment, negligence or gross negligence, deceptive and unfair trade practices, and *prima facie* tort. A common theme in each claim was that Fidelity filed an SAR falsely

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4. Section 1404(a) states that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

accusing plaintiffs of trying to manipulate the market for China Medical stock, which sparked the governmental investigations.

Fidelity responded with a motion to dismiss the complaint. First Fidelity argued that First Circuit law applied to federal questions transferred here under § 1404(a). Then citing *Stoutt v. Banco Popular de Puerto Rico*, 320 F.3d 26 (1st Cir. 2003), Fidelity wrote "that the BSA provides a financial institution with *absolute immunity* from civil liability for filing a[n] SAR." The provision Fidelity relied on says (as we said earlier) that a "financial institution that makes a voluntary disclosure of *any possible violation of law* or regulation to a government agency . . . shall not be liable to any person under any law or regulation of the United States, [or] any constitution, law, or regulation of any State . . ., for such disclosure." *See* 31 U.S.C. § 5318(g)(3)(A) (emphasis added). Keep the italicized phrase "any possible violation of law" in mind.

Plaintiffs opposed the motion, arguing that the § 1404(a) transfer left the applicable law unaffected. Which meant Eleventh Circuit law, specifically *Lopez v. First Union National Bank of Florida*, 129 F.3d 1186 (11th Cir. 1997), controlled and (to quote their memo) holds "that immunity may be conferred in this case (transferred from Florida District Court) only with respect to a[n] SAR filing made in good faith." And, plaintiffs continued, because Fidelity used the SAR "as a smoke screen to camouflage [its] own contraventions of law" and did not "objective[ly] identif[y] a possible violation" by plaintiffs, Fidelity's "bad faith" filing precluded a grant of immunity under the BSA.

Taking up the motion, the district judge wrote that when federal-law questions arise, "the transferee court will apply the law of its own circuit" — a "general rule" that "applies with equal force where a transferee court is considering a federal statutory defense in a diversity case." *AER Advisors Inc. v. Fidelity Brokerage Servs. LLC*, 327 F. Supp. 3d 278, 284 (D. Mass. 2018). And with that, the judge applied this Circuit's interpretation of the BSA. *Id.*

Relying on *Stoutt*, the judge then wrote that the BSA grants financial institutions "absolute immunity from suit, even when [their] disclosures are fabricated or made with malice" — in other words, there is no "good faith qualification to [civil] immunity," meaning this immunity applies even to fraudulent SARs filed by an institution to "falsely point blame at others to cover up its own wrongdoing." *AER Advisors Inc.*, 327 F. Supp. 3d at 284-85 (discussing *Stoutt*, 320 F.3d at 30-33). The judge also rejected plaintiffs' theory that Fidelity's SAR could not have stated a "possible violation of law." *Id.* at 285. Even if Fidelity "'knew that there was (in reality) no violation,'" the judge reasoned, "[b]ased on [p]laintiffs' own allegations, the SAR . . . 'was cast' as a disclosure of a possible violation of securities law." *Id.* (quoting *Stoutt*, 320 F.3d at 30). Criminal law, the judge added, is the mechanism to deter and remedy false reports to the government, whose agents are quite capable of "filter[ing] out SARs reporting 'false charges' and decid[ing] not to pursue those investigations." *Id.* (quoting *Stoutt*, 320 F.3d at 32). So the judge dismissed the case under Rule 12(b)(6). *Id.* at 280.

The Parties' Principal Appellate Arguments

Unhappy with the judge's ruling, plaintiffs appeal, making two basic arguments (echoing their positions in the district court). One is that Eleventh Circuit precedent applies because the case came to our Circuit via a transfer order from a court in the Eleventh Circuit. And, plaintiffs say, Eleventh Circuit precedent holds that BSA immunity requires a good-faith filing — a requirement not met here because Fidelity filed "an intentionally misleading SAR . . . to cover up [its] own wrongdoing." The second argument is that even if First Circuit precedent applies, we (in their words) must not read the BSA as "immuniz[ing] an institution that filed a report disclosing an objectively impossible violation that falsely implicated the victim of the financial institution's *own* wrongdoing — leading the government to investigate the victim rather than the perpetrator." To let Fidelity escape scot-free would frustrate the congressional purpose behind the BSA, which is to help "law enforcement by incentivizing reports of violations of law" — "*not* to incentivize the issuance of reports that will be of no use to law enforcement; *i.e.*, reported facts that could not possibly constitute a violation of law" (quotations taken from their brief). And they insist that a trio of state-court opinions support their view of how BSA immunity should work.

Fidelity, for its part, thinks that plaintiffs are wrong across the board (repeating what they argued below). Courts of appeals, Fidelity writes, regularly hold "that a district court" must "appl[y] the law of its own Circuit to federal questions (such as whether BSA immunity applies

to Fidelity), including in cases transferred from another Circuit." So, Fidelity continues, *Stoutt* applies and gives "a financial institution . . . BSA immunity even if it files a[n] SAR that is 'wholly unfounded'" (the interior quotation is from *Stoutt*, 320 F.3d at 31). On the public-policy front, Fidelity writes that "[u]nqualified BSA immunity" is key to the SAR regime — to create an atmosphere that encourages financial institutions to report dishonest-looking activities without the fear of reprisals in civil lawsuits. And finally, Fidelity protests that the state-court cases plaintiffs champion cannot trump our *Stoutt* opinion.

The Standard of Review

We review the judge's dismissal decision with fresh eyes, knowing that she could grant Fidelity's BSA-immunity-based dismissal motion only if, after taking the complaint's well-pleaded facts as true and drawing every reasonable inference in plaintiffs' favor, *see Schatz*, 669 F.3d at 55, the facts establishing Fidelity's immunity "are clear on the face of . . . plaintiff[s'] pleading[]," *see Medina-Padilla v. U.S. Aviation Underwriters, Inc.*, 815 F.3d 83, 85 (1st Cir. 2016); *see also DeGrandis v. Children's Hosp. Boston*, 806 F.3d 13, 16 (1st. Cir. 2015).

Our Take

First Circuit Law Governs this Case

First up is plaintiffs' claim that the judge should have applied the Eleventh Circuit's interpretation of BSA immunity in *Lopez*, not our interpretation in *Stoutt*.

Unfortunately for plaintiffs, however, we — like Fidelity — side with the district judge on this issue. And we spill a bit of ink to explain why.

While we have yet to consider the subject, every Circuit to do so has concluded that when one district court transfers a case to another, the norm is that the transferee court applies its own Circuit's cases on the meaning of federal law — and for a good reason: as Justice (then Judge) Ginsburg pithily put it, in "the adjudication of federal claims," federal courts ordinarily "comprise a single system in which each tribunal endeavors to apply a single body of law," and if different circuits view federal law differently, then the Supreme Court can restore "uniformity." *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175, 1176, 265 U.S. App. D.C. 39 (D.C. Cir. 1987) (brackets and internal quotation marks omitted), *aff'd on other grounds sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989).[5] Notably, and as footnote 5 of our opinion shows,

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5. Cases from the Second, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits come out the same way. *See Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993) (noting that "a transferee federal court should apply its interpretations of federal law, not the construction of federal law of the transferor circuit"); *Bradley v. United States*, 161 F.3d 777, 782 n.4 (4th Cir. 1998) (explaining that "this court cannot and does not apply the law of another circuit simply because the case was transferred from the other circuit"); *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992) (emphasizing that "[w]hen a case is transferred from a district in another circuit, the precedent of the circuit court encompassing the transferee district court applies to the case on matters of federal law"); *In re TMJ Implants Prods. Liab. Litig.*,

even the Eleventh Circuit — the very Circuit whose law plaintiffs say should apply — flatly rejects the notion that a transferee court must always use the transferor Circuit's interpretation of federal law. *See Murphy*, 208 F.3d at 966 (concluding that in dealing with a federal common-law defense, the transferee court correctly applied its own Circuit's law instead of the transferor Circuit's law — the rationale being that "[s]ince the federal courts are all interpreting the same federal law, uniformity does not require that transferee courts defer to the law of the transferor circuit"). Persuaded by their legal analyses, today we join those Circuits and thus conclude that First Circuit law governs this case.

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97 F.3d 1050, 1055 (8th Cir. 1996) (agreeing that "[w]hen analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located"); *Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) (declaring that "when reviewing federal claims, a transferee court in this circuit is bound only by our circuit's precedent"); *Murphy v. FDIC*, 208 F.3d 959, 964, 966 (11th Cir. 2000) (holding that a "transferee court should apply its own interpretation of federal law"). And cases from the Seventh and Tenth Circuits reached the same conclusion, albeit in dicta. *See Eckstein v. Balcor Film Inv'rs*, 8 F.3d 1121, 1126 (7th Cir. 1993) (pointing out that although "Congress might require one federal court to apply another's interpretation of federal law, . . . § 1404(a) does not itself do so," and "agree[ing] with *Korean Air Lines* that a transferee court normally should use its own best judgment about the meaning of federal law when evaluating a federal claim"); *Olcott v. Del. Flood Co.*, 76 F.3d 1538, 1546 (10th Cir. 1996) (same). We will have more to say about *Eckstein* and *Olcott* later.

Hold on, plaintiffs insist: two Supreme Court opinions — *Van Dusen v. Barrack*, 376 U.S. 612, 636, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964), and *Ferens v. John Deere Co.*, 494 U.S. 516, 522-23 (1990), 110 S. Ct. 1274, 108 L. Ed. 2d 443— say that a transfer under § 1404(a) accomplishes "a change in courtrooms" only, not "a change of law." Which means, according to plaintiffs, the law of the transferor Circuit — here, Eleventh Circuit law — always follows the case. Though artfully presented, this argument is not a difference-maker.

Van Dusen and *Ferens* say that if a federal court transfers a diversity case under § 1404(a), the transferee court applies the *state law* that the transferor court would have applied to any questions of *state law*. *See Van Dusen*, 376 U.S. at 627; *Ferens*, 494 U.S. at 524-25. *Van Dusen*, for example, held that "where the defendants seek transfer, the transferee district court must be obligated to apply the *state law* that would have been applied if there had been no change of venue" — in other words, a venue change "under § 1404(a) generally should be, *with respect to state law*, but a change of courtrooms." *See* 376 U.S. at 639 (emphasis added). *Van Dusen* left open the question whether the same rule "would govern if a plaintiff," rather than a defendant, "sought transfer under § 1404(a)." *Id.* at 640. *Ferens* answered that question by holding "that the transferor law should apply regardless of who makes the § 1404(a) motion." 494 U.S. at 531.

Van Dusen and *Ferens* are diversity cases. And with diversity cases, federalism commands that federal judges apply state substantive law exactly as a state court would,

see Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), 58 S. Ct. 817, 82 L. Ed. 1188 — a rule that aims to accomplish two things: prevent forum-shopping, "which had been encouraged by a regime in which the choice of state or federal court might determine what substantive law would govern the litigation," *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 309 (7th Cir. 1995) (Posner, C.J.); and "avoid[]" the "inequitable administration of the laws," *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965).[6] Ultimately, and importantly here, the concern animating *Erie* — maintaining the dual dignity of our state and federal systems — animates *Van Dusen* and *Ferens* too. *See Van Dusen*, 376 U.S. at 638 (explaining that in "[a]pplying" *Erie*'s "analysis to § 1404(a)," courts "should ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed"); *Ferens*, 494 U.S. at 524 (stressing that "[t]he policy that § 1404(a) should not deprive parties of state-law advantages, although perhaps discernible in the legislative history, has its real foundation in *Erie*").

As for our situation, yes, plaintiffs filed a diversity complaint alleging scads of state-law claims. But as the parties recognize, the present appeal (to borrow from plaintiffs' brief) "devolves from a dispute surrounding the

6. Actually, though *Erie*'s rule comes into play most often in diversity cases, it also applies to state-law claims brought to federal court via supplemental jurisdiction. *See Felder v. Casey*, 487 U.S. 131, 151, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988).

scope and application" of a *federal* statutory defense — which makes this case unlike *Van Dusen* and *Ferens*. And we cannot say it any clearer than now-Justice Ginsburg did many years ago: "[n]othing" in *Van Dusen* compels one federal court to apply another's interpretation of *federal law* after a case's transfer. *See Korean Air Lines*, 829 F.2d at 1186. The same goes for *Ferens*, by the way. So plaintiffs' *Van Dusen/Ferens*-based arguments go nowhere.

Now, true, Congress sometimes tells a federal court to apply another's interpretation of federal law — like when "Congress . . . instruct[s] federal courts to adopt state law or federal law of individual circuits as of a given date," which implies that "some aspects of federal law will be 'geographically non-uniform.'" *See* 15 Charles Alan Wright et al., *Federal Practice and Procedure* § 3846 (4th ed. 2018). And in that situation, "some courts conclude that the transferee court should apply the law that would have been applied by the transferor court's circuit." *Id.*

Two cases plaintiffs cite to fall in that category: *Eckstein*, a Seventh Circuit opinion, and *Olcott*, a Tenth Circuit opinion. *See Eckstein*, 8 F.3d at 1126 ("agree[ing] with *Korean Air Lines* that a transferee court" should typically consider federal questions "independently and reach[] its own decision, without regard to the geographic location of the events giving rise to the litigation," but concluding that § 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1, "instructs us to act differently" on a statute-of-limitations issue); *Olcott*, 76 F.3d at 1545-

46 (same, quoting *Eckstein*).[7] Our situation, however, does not involve any congressional command compelling a transferee court to apply another Circuit's understanding of federal law. So despite plaintiffs' best efforts, they get no help from *Eckstein* and *Olcott*.

Plaintiffs' brief also hypes two district court opinions: *In re Fresenius Granuflo/NaturaLyte Dialysate Prods. Liab. Litig.*, 76 F. Supp. 3d 294 (D. Mass. 2015), and *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 241 F.R.D. 435 (S.D.N.Y. 2007). *Fresenius* did not involve a § 1404(a) transfer, however. The issue there was what *state* law should apply to plaintiffs' *state*-law consumer protection claim. *See* 76 F. Supp. 3d at 300-05. And nothing in *Fresenius* suggests the district court believed it had to apply the *federal* law of any Circuit other than the First Circuit. In *MTBE*, the judicial panel on multi-district litigation transferred plaintiffs' *state*-tort lawsuit to a single district court (the "MDL court") for consolidated pre-trial proceedings with other similar suits, knowing that once these proceedings concluded, each case not terminated would return to the original district court for trial. *See* 241 F.R.D. at 437-40; 28 U.S.C. § 1407. The

7. *See generally McMasters v. United States*, 260 F.3d 814, 819 (7th Cir. 2001) (emphasizing that "[o]nly where the law of the United States is specifically intended to be geographically non-uniform" — such as with § 27A — "should the transferee court apply the circuit precedent of the transferor court"). *But see Menowitz*, 991 F.2d at 40 (holding that because "federal law (unlike state law) is supposed to be unitary," a transferee court should use the law of its Circuit and not the law of the transferor court when dealing with a § 27A limitations issue).

MDL court held that "[i]n the context of pre-trial issues such as motions to dismiss . . . section 1407 requires the application of the law of the transferee circuit where the motions are being considered." *MTBE*, 241 F.R.D. at 439. But for "issues inherently enmeshed with the trial," the MDL court said that the law of the transferor courts should apply because the cases would have to go back to them for any trial. *Id.* at 440-41. That situation is nothing like the one before us. Plainly then, neither of these non-binding district court opinions helps plaintiffs' cause.[8]

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8. As a parting shot on this issue, plaintiffs fume that Fidelity pulled a fast one, convincing the Florida federal court to transfer the case (as they put it) for "the conveniences of administering discovery and trial," but then moving to dismiss their claims after the transfer (they make this argument under the heading blasting the Massachusetts federal court's use of First Circuit law). To their way of thinking, principles of judicial estoppel precluded Fidelity from asking the transferee court to jettison their claims, thus eliminating the need for discovery and trial. But their argument does not hold together.

Judicial estoppel applies "when a litigant is playing fast and loose with the courts, and when intentional self-contradiction is being used as a means of obtaining unfair advantage" — with "[u]nfair advantage generally" meaning the "party . . . succeeded previously with a position directly inconsistent with the one it currently espouses." *Franco v. Selective Ins. Co.*, 184 F.3d 4, 9 (1st Cir. 1999) (internal quotation marks omitted); *see also Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004) (emphasizing that "[t]he doctrine's primary utility is to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the justice system"). Nothing approaching that scenario happened here. Plaintiffs suggest that Fidelity kept the BSA-immunity theory under wraps

The long and the short of it is that First Circuit caselaw interpreting BSA immunity applies here, not Eleventh Circuit caselaw. And we trudge on.

First Circuit Law Bars Plaintiffs' Claims

Again, plaintiffs' basic theory is that Fidelity cannot get BSA immunity. And that is because, according to plaintiffs, Fidelity acted in "bad faith" by "intentionally" filing an SAR that accused them of manipulating the market to create a short squeeze — all the while knowing it was "objectively impossible" for them to have done so, since Fidelity knew its *own* misconduct had triggered the short squeeze. And plaintiffs make several arguments for why they are right and thus should get to bring their case to trial. But our *Stoutt* opinion — which involved a criminal referral form ("CRF"), a predecessor form to the SAR — pulls the rug out from under them.

The defendant bank in *Stoutt* filed a CRF with the FBI, accusing Palmer Stoutt of passing a check he knew he did not have cash to cover. 320 F.3d at 28. He alleged that the bank encouraged him to do what he did (for reasons not relevant here). *Id.* at 27-28, 32. The bank "cast" the CRF "as the disclosure of a possible case of bank fraud,"

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for later use in the transferee court. Yet, on this record, that is pure speculation — really, it is worse than that, since the record (don't forget) shows Fidelity invoked BSA immunity in the very same motion in which it alternatively argued for a transfer. Plus plaintiffs cite no authority (nor can we think of any) embracing their view that a litigant in Fidelity's shoes cannot later move to dismiss a case after securing a § 1404(a) transfer.

unquestionably "a possible" federal offense. *Id.* at 30. And after the FBI investigated and arrested him, a federal grand jury indicted him for that crime. *Id.* at 28-29.

But the government dismissed the charges (for reasons not revealed in the record). *Id.* at 29. Unwilling to let bygones be bygones, Stoutt (as relevant here) sued the bank in federal court, alleging only local-law torts. *See id*. As an affirmative defense, the bank claimed immunity from all of Stoutt's local-law claims under the BSA's "safe harbor provision," which "protects disclosures of 'any possible violation of law.'" *Id.* at 29, 30.[9] And the district court later granted the bank's BSA-immunity-based motion for summary judgment. *Id.* at 29.

Zeroing in on the "any possible violation of law" phrasing, Stoutt argued on appeal that the provision implicitly requires that "any suspicions conveyed to the authorities be held in good faith" — a prerequisite missing there "because the Bank knew that [he] was innocent of criminal conduct." *Id.* But we would have none of it. "Conceivably," we wrote, "Stoutt could argue that the report was not one of a possible violation, even though so termed and colorably disclosing a possible crime, if the Bank knew that there was (in reality) no violation." *Id.* at 30. "But," we added, "this is a non-literal reading of the statute, which speaks of 'any possible violation.'" *Id.* And, we noted, "whatever its internal beliefs" — Stoutt, again,

9. The version of the BSA that applied in *Stoutt* is slightly different from the one that applies now. *See id*. at 29 n.3. But the difference does not matter, because both grant civil immunity for a "disclosure of any possible violation of law."

claimed the bank was dead certain that he was guiltless — "the Bank did by any objective test identify a 'possible violation.'" *Id.*

As support for our position, we drove home these points: Congress could have easily added a good-faith requirement to the statute but did not. *Id.* at 31. Actually, such a "requirement . . . was at one time in the proposed immunity provision" but got pulled before passage. *Id.* Which makes sense, since the provision was (according to its congressional author) "intended to provide 'the broadest possible exemption from civil liability for the reporting of suspicious transactions.'" *Id.* (quoting 139 Cong. Rec. E57-02 (1993)). And as far as Congress's policy concerns, "*any* qualification" on the immunity created by the BSA "poses practical problems," including that imposing an "objective reasonableness" or a "subjective good faith" requirement on a filing would "obviously create[] a risk of second guessing" and discourage disclosure. *Id.* (emphasis added). More, the risk that an "unfounded" or "malicious" filing will result in "false charges" is slight since "ordinarily the disclosures will as a practical matter be made to the [government] authorities, who provide their own filter as to what investigations are pursued and made public." *Id.* at 32. More still, "remedies other than private damage actions are available for wilfully false reports: private sanctions such as employment termination, and government penalties such as fines and imprisonment."[10] *Id.* (citing 18 U.S.C. §§ 1001, 1517).

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10. "Wilfully" is the British spelling of the American "willfully." *See* Bryan A. Garner, *Garner's Modern American Usage* 864 (3d ed. 2009).

Given this compendium of considerations, we concluded that the BSA immunizes financial institutions even if their "disclosures [are] unfounded, incomplete, careless and even malicious," just so long as they identify "a possible violation" of law — something the bank had done there. *See id*. at 32 (internal quotation marks omitted). And in doing so, we rejected the Eleventh Circuit's view in *Lopez*, 129 F.3d at 1192-93 — the very opinion our plaintiffs urge us to follow — that immunity applies only when "a financial institution ha[s] a good faith suspicion that a law or regulation may have been violated." Instead, we accepted the Second Circuit's position in *Lee v. Bankers Trust Company*, 166 F.3d 540, 544 (2d Cir. 1999), that the "plain language of the safe harbor provision describes an unqualified privilege, never mentioning good faith or any suggestive analogue thereof." *See Stoutt*, 320 F.3d at 30 (siding with the Second Circuit over the Eleventh Circuit).

Now back to our case. Calling Fidelity's conduct "deceptive," "fraudulent," and "misleading" — words they use because Fidelity submitted the SAR to conceal its *own* crime — plaintiffs' brief argues at length that financial institutions cannot get BSA immunity if they acted in "bad faith." Which is simply another way of saying financial institutions can get BSA immunity only if they acted in "good faith." But that argument goes poof, given how it is just like the one we shot down in *Stoutt. See* 320 F.3d at 30-32.

Ditto for plaintiffs' contention that BSA immunity does not apply if the SAR accuses someone of an "objectively impossible" violation of law — "objectively impossible,"

the argument goes, because Fidelity caused the illegal short squeeze, not them. But, to repeat, *Stoutt* expressly refused to limit BSA immunity by splicing an "objective reasonableness" requirement into the statute. *See id.* at 31. Anyway, if an SAR discloses an "objectively impossible" violation of law — plaintiffs offer the hypothetical example of an SAR accusing the Deutsch family of "kill[ing] Abraham Lincoln in 2012" — we doubt the government would investigate or prosecute such an accusation. *Stoutt* also said with crystalline clarity that this immunity applies even if a financial institution files an SAR that is "wholly unfounded." *Id.* And we think that phrase is broad enough to encompass a situation where the SAR claims an "impossible" or "objectively impossible" violation of law.

Stoutt similarly precludes plaintiffs' argument "that an intentionally misleading SAR" prevents Fidelity from getting BSA immunity. After all, *Stoutt* firmly ruled that a financial institution receives BSA immunity for SAR disclosures even for "malicious" or "wilfully false" disclosures. *Id.* at 31-33.

And plaintiffs' argument about congressional policy is hardly a difference-maker either. That is so because *Stoutt* factored Congress's policy concerns into its decisional mix and reached a result that cuts against the very one plaintiffs push for here.

Having said all this, however, we think it equally important to reemphasize something *Stoutt* emphasized. Which is that even though private actions are off the table, financial institutions that file malicious or intentionally

false SARs are hardly untouchable. Among other things, and as *Stoutt* was at pains to explain, the federal government can go after them, with fines and prison time where appropriate. *Id.* at 32.

Undaunted by *Stoutt*, plaintiffs still believe they hold a winning hand, thanks to three state-court opinions that withheld BSA immunity from an SAR filer that twisted the truth in its report, just like Fidelity did by not disclosing that *it* — and not the Deutsches — had illegally manipulated the market. The three cases are *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (Ark. 2003), *Digby v. Tex. Bank*, 943 S.W.2d 914 (Tex. App. 1997), and *Walls v. First State Bank of Miami*, 900 S.W.2d 117 (Tex. App. 1995). The difficulty for plaintiffs is that a prior panel opinion like *Stoutt* remains binding on us until (a) the Supreme Court or the First Circuit sitting *en banc* judicially overrules it; (b) Congress statutorily overrules it; or, in exceedingly infrequent situations, (c) non-binding but compelling caselaw convinces us to abandon it. *See, e.g., United States v. Walker-Couvertier*, 860 F.3d 1, 8 (1st Cir. 2017), *cert. denied sub nom. Lugo-Diaz v. United States*, 138 S. Ct. 1303, 200 L. Ed. 2d 487 (2018), *and cert. denied*, 138 S. Ct. 1339 (2018). Exceptions (a) and (b) do not apply here. As for exception (c), *Digby* and *Walls* predate *Stoutt* and so lacked the benefit of *Stoutt*'s reasoning. And *Evans* misread *Stoutt* as requiring an objective basis for an SAR filing, *see* 109 S.W.3d at 680, when *Stoutt* rejected such a requirement, *see* 320 F.3d at 31-32. *Evans* also provoked a spirited dissent, which scolded the majority for "substitut[ing]" its "interpretation of a federal statute for that announced by the *great majority* of federal courts

interpreting that same statute." *See* 109 S.W.3d at 686-87 (Thornton, J., dissenting) (emphasis added). All of which is to say that we must — and do — follow *Stoutt*.[11]

Final Words

Having worked our way through the issues, we ***affirm*** the judgment entered below.[12] Each party shall bear its own costs on appeal.

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11. As a last gasp, plaintiffs suggest that because *Stoutt* decided the BSA-immunity issue on summary judgment after discovery, our judge acted "unprecedented[ly]" by kicking out their claims on a motion to dismiss. The easy answer to this contention is that the Second Circuit in *Lee* resolved a BSA-immunity issue in the context of a motion to dismiss. *See* 166 F.3d at 543. And we embraced *Lee* in *Stoutt. See* 320 F.3d at 30. Which means plaintiffs' suggestion does not change the outcome of this case.

12. One last matter. Fidelity also argues that we can affirm on an alternative ground — namely, that federal law bars it "from disclosing even whether a[n] SAR was filed, let alone its contents"; so "[p]laintiffs can never prove that [it] filed an inaccurate SAR"; and thus it "cannot be forced to defend against [their] claims while, at the same time, being prohibited from using key exculpatory evidence." But given our holding, we do not address that argument.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED AUGUST 22, 2018

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
17-12214-PBS

AER ADVISORS INC., WILLIAM J. DEUTSCH, and PETER E. DEUTSCH,

Plaintiffs,

v.

FIDELITY BROKERAGE SERVICES LLC,

Defendant.

August 22, 2018, Decided,
August 22, 2018, Filed

MEMORANDUM AND ORDER

Saris, C.J.

INTRODUCTION

Plaintiffs AER Advisors Inc. ("AER"), William J. Deutsch, and Peter E. Deutsch bring this action against Fidelity Brokerage Services LLC ("Fidelity"), alleging

that its unauthorized lending of the Deutsches' shares in China Medical Technologies Inc. ("China Medical"), caused a market disruption in June 2012. To cover up its role in the market disruption, Fidelity allegedly implicated Plaintiffs in a false Suspicious Activity Report ("SAR"), filed with the government. As a result of the SAR, Plaintiffs claim they were subject to investigations by various state and federal securities-related agencies.

On November 8, 2017, the United States District Court for the Southern District of Florida ordered that the case be transferred to this Court. *See* Docket No. 40. One month later, Plaintiffs filed their Second Amended Complaint ("SAC") (Docket No. 64), asserting 13 causes of action, all of which are primarily based on the SAR. The claims are for negligent reporting (Counts I and II), tortious interference with existing business relationships (Count III), tortious interference with prospective business relationships (Count IV), breach of contract and the covenant of good faith and fair dealing (Counts V and VI), promissory estoppel (Count VII), breach of fiduciary duty (Count VIII), unjust enrichment (Count IX), negligence or gross negligence (Count X), deceptive and unfair trade practices (Counts XI and XII), and prima facie tort (Count XIII).

Fidelity moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing first that it enjoys absolute immunity from liability for any SAR filed. Second, Fidelity maintains that any claims predicated on its alleged unlawful lending of the Deutsches' shares must be dismissed under the doctrine of claim preclusion. Finally, Fidelity

argues that AER's claim for tortious interference with existing business relationships is barred by the statute of limitations.

After a hearing, the Court ***ALLOWS*** Fidelity's motion to dismiss (Docket No. 66).

FACTUAL BACKGROUND

The following factual background comes from Plaintiffs' SAC. Plaintiffs' factual allegations must be accepted as true at this stage of the litigation. *See Foley v. Wells Fargo Bank, N.A.*, 772 F.3d 63, 71 (1st Cir. 2014).

I. The Parties

AER, a registered investment advisor, served clients nationwide with "discretionary investment management services." SAC ¶ 17. AER joined Fidelity's Wealth Central platform in 2009 and exclusively relied on that platform to provide its investment services to clients. SAC ¶¶ 18-19. Fidelity promised to assist AER with business development and growth. SAC ¶ 21. In reliance on that promise, AER actively solicited business from clients nationwide. SAC ¶ 21. In 2011, AER introduced the "China Gold" investment strategy and decided to make the strategy the focus of its business model. SAC ¶¶ 22, 111. The China Gold strategy was based on the expectation that the anomalously low prices at which some Chinese securities were trading would "trigger a management buy-out or another privately driven exit transaction (e.g., a strategic acquisition)." SAC ¶ 22. Fidelity supported

China Gold and incorporated the strategy into its own investing. SAC ¶ 23.

William Deutsch is the Chairman of Deutsch Family Wine & Spirits, and Peter Deutsch serves as the company's Chief Executive Officer. SAC ¶¶ 8-9. The Deutsches were clients of Fidelity's Family Office Services ("FFOS"), and eventually participated in AER's China Gold strategy. SAC ¶¶ 25-26. When Peter Deutsch decided to join FFOS in November 2011, he accepted Fidelity's service proposal, which offered him "seamless and flawless" strategy execution, institutional-quality brokerage services, and a "client first," "conflict-free environment." SAC ¶¶ 27-28. Peter Deutsch relied on Fidelity's promises about the services it would provide. SAC ¶ 28.

II. The China Medical Investment and Market Disruption

After Peter Deutsch joined FFOS, the Deutsches decided to accumulate a large number of shares of China Medical, gain control of the company, and sell it to a buyer or private equity firm. *See* SAC ¶¶ 29-30. Peter Deutsch began acquiring China Medical shares through his FFOS account in December 2011. SAC ¶ 33. By February 28, 2012, the Deutsches owned nearly 4.4 million shares of the company. SAC ¶ 34. They had purchased around 8.6 million additional shares by June 30, 2012. SAC ¶ 34.

Fidelity emailed AER on March 5, 2012, with an offer for the Deutsches to join its "fully paid lending program" for their China Medical shares. SAC ¶ 35. In the email,

Fidelity represented that its "securities lending desk in Capital Markets [was] paying a 5% rate . . . for these hard to borrow shares." SAC ¶ 35. The email also acknowledged that there was "a 100% requirement to hold this position" and that a "service agreement [would] need to be signed by the end client to enter into this program." SAC ¶ 35. If the Deutsches had accepted Fidelity's offer, they would have been in a good position to accomplish a short squeeze.[1] *See* SAC ¶ 36. However, AER replied to Fidelity's offer with a straightforward rejection: "Client is not interested in lending stock." SAC ¶ 37. After receiving AER's email, Fidelity never advised the Deutsches that they should move their shares and trade in a cash account, as required by Fidelity's internal policy. SAC ¶ 39.

Despite the fact that Fidelity had not received consent to lend, between May and early June of 2012, the company lent nearly 1.8 million of the Deutsches' China Medical shares to short sellers or their brokers. SAC ¶ 41. Fidelity made money from these loans, but the Deutsches were not notified of the lending, were not paid any compensation for the loans, and did not receive any collateral. SAC ¶ 42. When AER asked Fidelity whether it had lent the Deutsches' stock without their authorization, Fidelity

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1. A "short squeeze" is a "situation when prices of a stock . . . start to move up sharply and many traders with short positions are forced to buy stocks . . . to cover their positions and prevent losses. This sudden surge of buying leads to even higher prices." *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1277 n.3 (11th Cir. 2005) (quoting John Downes & Jordan Elliot Goodman, *Barron's Finance & Investment Handbook* 807 (6th ed. 2003)), *abrogated on other grounds*, 559 U.S. 633, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010).

responded that it could not disclose that information. *See* SAC ¶ 49. Peter Deutsch was also told by Amanda Topping at FFOS that the portion of China Medical stocks that Fidelity could lend out from his account was "very small." SAC ¶ 50.

The wine turned to vinegar in June 2012. On June 11, 2012, after "a routine monthly transfer of [China Medical] shares between the Deutsches' margin accounts," Fidelity's lending triggered a recall obligation. SAC ¶¶ 45-46. The company then issued a recall for about 1.5 million shares on June 13, 2012, eventually recalling approximately 1.8 million shares over the next few days. SAC ¶ 46. The Senior Vice President and head of the Securities Lending Desk of Fidelity Capital Markets, Ugyen Sass, anticipated a short squeeze due to the company's loans and failed recalls on June 15, 2012. SAC ¶ 46. Then, on June 18, 2012, Fidelity issued its final batch of recalls. SAC ¶ 46. Because the recalls failed, Fidelity bought roughly 1.2 million shares of China Medical on the open market between June 19 and June 27, 2012. SAC ¶ 46. The price of the stock increased from $4.00 per share on June 13, 2012, to $11.80 per share on June 29, 2012. SAC ¶ 46.

On June 29, 2012, the Securities and Exchange Commission ("SEC") halted the trading of China Medical. *See* SAC ¶ 46.[2]

2. Although the SAC states that trading was halted on July 29, 2012, the record suggests that trading was actually halted on *June* 29, 2012. *See* SAC ¶ 79 (alleging that the SEC lifted the trading halt on July 16, 2012); *see also* Docket No. 64-2 at 3 n.1 (noting that the SEC suspended trading from "6/29/2012 . . . through 07/13/2012").

III. The SAR and the January 2013 Letter

Fidelity filed a SAR on July 5, 2012. SAC ¶ 56. A SAR is the document a "broker or dealer in securities" files with the Financial Crimes Enforcement Network ("FinCEN"), to report "any suspicious transaction relevant to a possible violation of law or regulation." 31 C.F.R. § 1023.320(a)(1), (b)(1). The internal draft SAR reports that Fidelity observed suspicious activity in the Deutsches' and AER's accounts, "which ha[d] the appearance of attempting to influence a short squeeze in the stock of China Medical." Docket No. 64-2 at 3; SAC ¶ 56. The draft SAR also states:

> On June 18, 2012, 11,945,520 shares of China Medical (from five separate Deutsch accounts) were journaled from type 2 (margin), to type 1 (cash). . . . The result of this action caused previously loaned out shares to be recalled, and since they were not delivered, stock loan had to execute buy-in transactions.

Docket No. 64-2 at 4; SAC ¶ 57. Plaintiffs believe that this draft SAR reflects the contents of the SAR Fidelity actually filed. SAC ¶ 56.

Plaintiffs allege that the transfers between the Deutsches' accounts did not result in the recall of a single share of China Medical. SAC ¶ 60. Based on this fact, Plaintiffs allege that there was no possibility that they had orchestrated the short squeeze. SAC ¶¶ 58-59. Moreover, they allege that Fidelity knew that Plaintiffs did not initiate the short squeeze -- even though the SAR

accused them of it -- because Fidelity issued the recalls for the shares it had loaned. SAC ¶¶ 59-64. The SAC alleges that the SAR was simply a smokescreen intended to disguise the fact that Fidelity's unlawful lending had truly triggered the short squeeze. *See, e.g.*, SAC ¶ 59.

To cover up the SAR, Fidelity hid documents throughout an extended Financial Industry Regulatory Authority ("FINRA") arbitration. SAC ¶¶ 84-85. Only after the United States District Court for the Southern District of New York ordered documents to be produced on May 6, 2015 did Plaintiffs learn of Fidelity's internal draft of the SAR. *See* SAC ¶ 96.

After the SAR was filed, Fidelity attempted to "poach" AER's clients. SAC ¶ 114. "[I]n or around January 2013," Fidelity sent letters to AER's existing clients, which stated that the two companies no longer had a relationship and that Fidelity was no longer accepting instruction from AER on any accounts. SAC ¶ 114. The letter also gave clients options for managing their Fidelity accounts going forward. SAC ¶ 114.

IV. Investigations and Damages

As a result of the SAR filing, AER was investigated by the SEC and required to attend a five-hour interview. SAC ¶¶ 99-101. Ultimately, the SEC decided not to pursue an enforcement action against AER. SAC ¶ 102. Both the Florida Office of Financial Regulation, Division of Securities, and New Hampshire's Bureau of Securities Regulation also investigated AER's actions, but neither

pursued enforcement. SAC ¶¶ 103-06. AER spent hundreds of thousands of dollars on these investigations and "could not, and did not economically recover." SAC ¶¶ 106, 115.

The SEC also investigated Peter Deutsch's trading activities related to China Medical. SAC ¶¶ 107-08. He was required to attend an interview with the SEC, which focused on whether he "intended to artificially manipulate the market through moving his shares from margin to cash." SAC ¶ 108. The SEC did not pursue an enforcement action, but Peter Deutsch expended hundreds of thousands of dollars on the investigation, suffered emotional distress, and had his attention diverted from his business activities. SAC ¶¶ 109-10.

DISCUSSION

I. Legal Standard

To survive a Rule 12(b)(6) motion to dismiss, the factual allegations in a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556). In evaluating the sufficiency of a complaint, a court "may not disregard properly pled factual allegations, 'even if it strikes a savvy

judge that actual proof of those facts is improbable.'" *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (quoting *Twombly*, 550 U.S. at 556).

In some circumstances, affirmative defenses may form the basis of a motion to dismiss for failure to state a claim. *See Blackstone Realty LLC v. F.D.I.C.*, 244 F.3d 193, 197 (1st Cir. 2001). When a motion to dismiss is "premised on the inevitable success of an affirmative defense," the court must still look to the allegations in the plaintiff's complaint, as it does when considering any Rule 12(b)(6) motion. *Nisselson v. Lernout*, 469 F.3d 143, 150 (1st Cir. 2006). Dismissal is only appropriate when "(i) the facts establishing the defense are definitively ascertainable from the complaint and the other allowable sources of information, and (ii) those facts suffice to establish the affirmative defense with certitude." *Id.* (quoting *Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 12 (1st Cir. 2004)).

II. Fidelity's Immunity Under 31 U.S.C. § 5318(g)(3)

Congress has granted financial institutions immunity from liability for filing SARs. *See* 31 U.S.C. § 5318(g)(3)(A). The statute granting immunity reads:

> Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency . . . shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any

> contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure . . . .

Id. The scope of this statutory immunity varies from circuit to circuit, however. *Compare Stoutt v. Banco Popular de Puerto Rico*, 320 F.3d 26, 30-32 (1st Cir. 2003) (declining to read good faith requirement into statute), *and Lee v. Bankers Trust Co.*, 166 F.3d 540, 544-45 (2d Cir. 1999) (same), *with Lopez v. First Union Nat'l Bank of Fla.*, 129 F.3d 1186, 1192-93 (11th Cir. 1997) (holding that immunity applies when financial institution has "good faith suspicion that a law or regulation may have been violated").

Plaintiffs urge the Court to apply the Eleventh Circuit's good faith limitation to Fidelity's immunity defense because this case was transferred from a Florida federal court. *See* Docket No. 72 at 10-13; Docket No. 77 at 6-7. When questions of federal law must be decided, the transferee court will apply the law of its own circuit. *See Murphy v. F.D.I.C.*, 208 F.3d 959, 966 (11th Cir. 2000) ("Since the federal courts are all interpreting the same federal law, uniformity does not require that transferee courts defer to the law of the transferor circuit."); *Island View Residential Treatment Ctr., Inc. v. Bluecross Blueshield of Mass., Inc.*, Civ. No. 07-10581-DPW, 2007 U.S. Dist. LEXIS 94901, 2007 WL 4589335, at *9 (D. Mass. Dec. 28, 2007). This general rule applies with equal force where a transferee court is considering a federal statutory defense in a diversity case. The Court therefore will apply the First Circuit's interpretation of 31 U.S.C. § 5318(g)(3) in *Stoutt*.

The First Circuit has expressly rejected the idea of an implicit good faith requirement in § 5318(g)(3). *See Stoutt*, 320 F.3d at 30. And it has done so in sweeping language, indicating that the statute grants absolute immunity from suit, even when disclosures are fabricated or made with malice. *See id.* at 33. In the opinion, the First Circuit reasoned that Congress did not intend to include a good faith qualification to immunity because (1) it easily could have written the requirement into the statute; (2) it removed a good faith requirement from an earlier draft of the provision; and (3) any limitation on immunity would discourage disclosure. *See id.* at 31-32. Thus, the First Circuit concluded that § 5318(g)(3) immunizes financial institutions whose SAR disclosures are "wilfully [sic] false" or "unfounded, incomplete, careless and even malicious." *Id.* at 32 (internal quotation marks omitted).

Plaintiffs, however, focus on the fact that § 5318(g)(3) only grants financial institutions immunity when they report "any possible violation of law or regulation." *See* Docket No. 72 at 7-10; Docket No. 77 at 1-3. They claim that while Fidelity allegedly reported the Deutsches for market manipulation in the form of an illegal short squeeze, SAC ¶ 56, the Deutsches' activities could not possibly have caused the short squeeze, *see* Docket No. 72 at 8-10; Docket No. 77 at 3. Plaintiffs specifically point to paragraphs 45 through 47 and 60 through 64 in the SAC to show that Fidelity knew the Deutsches could not possibly be responsible for the market disruption because Fidelity itself had caused it. *See* Docket No. 91 at 41:21-42:5. Since Fidelity was not reporting an actual "possible violation of law," according to Plaintiffs, the conclusion follows that Fidelity has not met the threshold requirement for

immunity. But in light of *Stoutt*, the Court is not persuaded by this argument or by the state court cases Plaintiffs cite in their briefing.

Stoutt deals specifically with the "any possible violation" language. In that case, Banco Popular reported the plaintiff to the FBI for check kiting, or "knowingly writing a check against an account with insufficient funds," which can be a federal offense. *Stoutt*, 320 F.3d at 28. The First Circuit noted that the bank's report "was *cast* as the disclosure of a possible case of bank fraud, assuredly a possible violation of law." *Id.* at 30 (emphasis added). But the plaintiff said that the bank knew he was innocent all along because he had informed a bank official of his transactions and "was encouraged to draw on uncollected funds." *Id.* at 29, 32. In assessing the bank's motion for summary judgment, the First Circuit explained:

> Conceivably, Stoutt could argue that the report was not one of a possible violation, even though so termed and colorably disclosing a possible crime, if the Bank knew that there was (in reality) no violation. But this is a non-literal reading of the statute, which speaks of "any possible violation," and we think it more straightforward to confront any requirement of good faith or due care as an implied qualification of immunity rather than an issue of initial scope. Here, whatever its internal beliefs, the Bank did by any objective test identify a "possible violation."

Id. at 30.

Plaintiffs allege that Fidelity's SAR accused them of manipulating stock prices by orchestrating an illegal short squeeze. SAC ¶ 56. Based on Plaintiffs' own allegations, the SAR, on its face, "was cast" as a disclosure of a possible violation of securities law. Accordingly, Fidelity's SAR met the "possible violation" threshold for § 5318(g)(3) immunity.

Finally, Plaintiffs make an additional argument that fraudulent SARs intended to misdirect suspicion do not insulate financial institutions from civil liability. *See* Docket No. 72 at 3-7; Docket No. 77 at 3-6. This argument does not make it past *Stoutt* either. In its analysis, the First Circuit considered but discounted the fact that plaintiffs like Stoutt "could be left without any civil redress against malicious or wholly unfounded accusations." *Id.* at 31. Despite that reality, the court said that government authorities can filter out SARs reporting "false charges" and decide not to pursue those investigations. *Id.* at 32. The First Circuit also concluded that criminal law -- including 18 U.S.C. § 1517, which prohibits obstructing an examination of a financial institution -- was a means of remedying "wilfully [sic] false reports" by those financial institutions. *Id. Stoutt* therefore contemplated that a bank might falsely point blame at others to cover up its own wrongdoing and decided that civil immunity should still attach to the filing of that fraudulent SAR.

To the extent Counts I through XIII are founded on the alleged SAR, they are dismissed.

III. Claim Preclusion Based on FINRA Arbitration Award

Fidelity argues that Counts VI, VIII, IX, XI, XII, and XIII must be dismissed under the claim preclusion doctrine because they are based in part on the alleged unlawful lending of the Deutsches' China Medical stock. *See* Docket No. 67 at 12-15. According to Fidelity, the FINRA arbitration award resolved all of the Deutsches' unlawful lending claims and precludes their re-litigation here. *See* Docket No. 67 at 13-14.

The Court need not decide whether applying the claim preclusion doctrine would be appropriate in this case. On two occasions, Plaintiffs have expressly disavowed that any of their claims in the SAC are premised on unlawful lending and have reiterated that all claims are based on the SAR. *See* Docket No. 72 at 16 ("While claims in the Arbitration were predicated on the unlawful lending of the Deutsches' [China Medical] shares, the Second Amended Complaint asserts claims predicated on Fidelity's fraudulent cover-up scheme and SAR Referral."); Docket No. 77 at 10 n.10 ("The six counts Fidelity identified as [relating to unlawful lending] are expressly predicated on Fidelity's 'fraudulent scheme' including the filing of a bogus SAR . . . ."). According to Plaintiffs, the facts about unlawful lending are included only to provide "*background or context* to a different set of claims (those arising from Fidelity's bogus SAR and fraudulent cover-up scheme)." Docket No. 72 at 17 (emphasis in original).

Because Plaintiffs have disclaimed unlawful lending and reaffirmed the SAR as their foundation for all

asserted claims, the Court does not decide the claim preclusion issue. The Court dismisses Counts VI, VIII, IX, XI, XII, and XIII in their entirety, on the ground that Fidelity enjoys absolute immunity for its SAR filing.

IV. AER's Tortious Interference with Existing Business Relationships Claim (Count III)

The only count that remains to be discussed is Count III, AER's claim for tortious interference with existing business relationships. To succeed on this tort claim, a plaintiff must prove that (1) "a business relationship . . . of economic benefit" existed; (2) the defendant knew of that relationship; (3) the defendant intentionally and maliciously interfered with that relationship; and (4) the plaintiff suffered a "loss of advantage" as a direct result of the defendant's conduct. *Comey v. Hill*, 387 Mass. 11, 438 N.E.2d 811, 816 (Mass. 1982).[3]

The tortious interference claim is based in part on letters Fidelity sent to AER's existing clients in or around January 2013, which explained that Fidelity had terminated its relationship with AER and included options for clients to consider going forward. *See* Docket No. 64 ¶¶ 114, 132-39. Plaintiffs allege that these letters were attempts to "poach" AER's clients. Docket No. 64 ¶ 114. Fidelity has moved to dismiss Count III on multiple grounds, including that the tortious interference claim is time-barred. *See* Docket No. 67 at 15-17.

3. Under Florida law, the elements of the tort are very similar. *See Int'l Sales & Serv., Inc. v. Austral Insulated Prods., Inc.*, 262 F.3d 1152, 1154 (11th Cir. 2001).

Plaintiffs' position is that the letters are "intertwined with the SAR" and are "actually part and parcel of the entire fraudulent scheme by Fidelity which related to the SAR referral." Docket No. 91 at 46:5-18. They maintain that the discovery of the existence of the SAR in 2015 should count as the date of accrual because malicious intent was not clear until that time. Maybe so, but allowing AER to use the SAR to show bad intent as a basis for Fidelity's liability would violate 31 U.S.C. § 5318(g)(3). Again, to the extent Count III is based on the SAR or the discovery of its existence, Fidelity is immune from liability, even if the claim is timely.

If the Court were to focus solely on the January 2013 letters themselves, the tortious interference claim would be time-barred under the three-year Massachusetts statute of limitations, as AER's attorneys concede. *See* Docket No. 91 at 46:19-47:4; *see also* Mass. Gen. Laws ch. 260, § 2A; *Pagliuca v. City of Boston*, 35 Mass. App. Ct. 820, 626 N.E.2d 625, 628 (Mass. App. Ct. 1994). Moreover, even if the Court were to apply Florida's four-year statute of limitations, *see* Fla. Stat. § 95.11(3)(o); *Primerica Fin. Servs., Inc. v. Mitchell*, 48 F. Supp. 2d 1363, 1368 (S.D. Fla. 1999), Plaintiffs' complaint would still be time-barred, as it was originally filed on July 7, 2017 -- approximately four and a half years after the letters were sent. Accordingly, the Court need not engage in a choice-of-law analysis to determine which state's law actually applies. Count III is dismissed.

Appendix B

ORDER

For the foregoing reasons, the Court **ALLOWS** Fidelity's motion to dismiss (Docket No. 66).

/s/ PATTI B. SARIS
Patti B. Saris
Chief United States District Judge