No. 19-___

IN THE

Supreme Court of the United States

ATLANTIC TRADING USA, LLC, ET AL.,

Petitioners,

v.

BP P.L.C., ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247, 259-60 (2010), this Court severely criticized the Second Circuit's so-called "conduct-and-effects" test, and instead adopted a bright-line rule to determine whether a claim seeks a permissibly territorial application of U.S. law. As applied to the Securities Exchange Act, this simple "transactional test" asks "whether the purchase or sale" underlying the claim "[wa]s made in the United States, or involve[d] a security listed on a domestic exchange." *Id.* at 269-70.

The Second Circuit and Ninth Circuit now disagree about whether passing this test is merely necessary, or instead sufficient, to state a permissibly territorial claim. *See Stoyas v. Toshiba Corp.*, 896 F.3d 933 (9th Cir. 2018). And notwithstanding this disagreement—and direct criticism from the United States government—the Second Circuit below doubled down, and extended its holding that a domestic transaction is insufficient to claims brought under the Commodity Exchange Act, including claims based on transactions "on a domestic exchange." It purported to do so for two reasons: (1) first and foremost, because its doctrine correctly regards *Morrison*'s test as merely necessary; and (2) because, while this Court said in *Morrison* that the Securities *Exchange* Act is focused on the location of *the exchange*, the Commodity *Exchange* Act is not.

The questions presented are:

(1) Whether passing *Morrison*'s domestic-transaction test is sufficient or merely necessary.

(2) Whether the focus of the Commodity Exchange Act differs from the Securities Exchange Act's focus on the location of the exchange or transaction at issue.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs and Appellants in the courts below are Atlantic Trading USA, LLC, John Devivo, Anthony Insinga, Xavier Laurens, Kevin McDonnell, Robert Michiels, Port 22, LLC, Prime International Trading, Ltd., Aaron Schindler, Neil Taylor, and White Oaks Fund LP.

Respondents, who were Defendants and Appellees in the courts below are BP P.L.C., Trafigura Beheer B.V., Trafigura AG, Phibro Trading L.L.C., Vitol S.A., Mercuria Energy Trading S.A., Hess Energy Trading Company, LLC, Statoil US Holdings Inc., Shell Trading US Company, BP America, Inc., Vitol, Inc., BP Corporation North America, Inc., Mercuria Energy Trading, Inc., Morgan Stanley Capital Group Inc., Phibro Commodities Ltd., Shell International Trading and Shipping Company Ltd., Statoil ASA, and Royal Dutch Shell PLC.

Pursuant to this Court's Rule 29.6, petitioners declare as follows: (i) Atlantic Trading USA, LLC, Port 22, LLC, Prime International Trading, Ltd., and White Oaks Fund LP are corporate entities; (ii) Atlantic Trading USA, LLC is 100% owned by Atlantic Trading Holdings, LLC (a non-public Illinois limited liability company); and (iii) no publicly held corporation owns 10 percent or more of any of the petitioners' shares.

RELATED PROCEEDINGS

Proceedings directly on review:

Prime International Trading, Ltd., et al. v. BP p.l.c., et al., No. 17-2233 (2d Cir. Aug. 29, 2019; Oct. 23, 2019)

In re North Sea Rent Crude Oil Futures Litigation, No. 1:13-md-02475-ALC (S.D.N.Y. June 29, 2017)

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INTRODUCTION

This case concerns a direct disagreement between the Second and Ninth Circuits regarding the proper application of this Court's domestic-transaction test from *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). The Ninth Circuit holds that *Morrison*'s test is sufficient to establish a domestic application of U.S. law. *See Stoyas v. Toshiba Corp.*, 896 F.3d 933, 949-50 (9th Cir. 2018), *cert. denied sub nom. Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, 139 S. Ct. 2766 (2019). The Second Circuit disagrees and regards *Morrison*'s test as merely a necessary first step, and so continues to ask whether the conduct and effects associated with the claim are "predominantly foreign"—a test *Morrison* explicitly rejected. *See* Pet.App. 20; *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014). The primary question presented here is which court is right. And that question is so plainly suited for review that this Court has already expressed an interest in reviewing it.

When the Ninth Circuit precipitated this disagreement last Term, numerous foreign governments and business organizations encouraged this Court to grant review, prompting this Court to seek the Solicitor General's views. *See Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, No. 18-486 (U.S.). The United States sided with the Ninth Circuit, saying it had decided the issue "correctly" through "a straightforward application of this Court's decision in *Morrison*," and severely criticizing the Second Circuit for trying to "reintroduce the conduct-and-effects test." *See* U.S. Br. 8, 15, *Toshiba Corp.*, No. 18-486 (U.S. May 20, 2019) ("U.S. *Toshiba* Br."). But while it recognized the

circuits' "inconsistent" views, the government nonetheless suggested denying certiorari: Because the Second Circuit had not yet applied its "*Parkcentral*" rule to other cases, the government hoped that—particularly given this Court's subsequent decisions—the Second Circuit might yet "revisit *Parkcentral*'s contrary statements." *Id*. at 20.

The decision below demonstrates that the time for certiorari has come. Far from "revisit[ing] *Parkcentral*'s contrary statements," the Second Circuit below expanded *Parkcentral* and held that even claims about transactions *occurring on domestic exchanges* can constitute extraterritorial applications of U.S. laws focused on protecting exchanges. The Second Circuit thus held that, because the underlying manipulation occurred abroad, petitioners here sought an impermissibly extraterritorial application of the Commodity Exchange Act's private right of action when they claimed injury in transactions occurring on the New York Mercantile Exchange. And it did so even though the government below urged against expanding *Parkcentral* in just this way by pressing the same arguments the Solicitor General had said might convince the Second Circuit to reconsider.

Even before this development, there was a persuasive case to grant review. *See* Petition, *Toshiba Corp.*, No. 18-486 (U.S. Oct. 15, 2019). Indeed, many respondents here are themselves members of organizations that urged this Court to review the Ninth Circuit's decision in *Toshiba*. Now, however, the Second Circuit has not only entrenched this circuit conflict, but decisively raised the stakes.

That is because the Second Circuit below adopted a putative alternative basis for expanding the conduct-

and-effects test to the Commodity Exchange Act (CEA) that has enormous consequences not only for private actions like this one, but also for enforcement by the Department of Justice and Commodity Futures Trading Commission (CFTC). After reaffirming *Parkcentral*'s application to laws like Section 10(b) of the Securities Exchange Act (SEA)—and expanding it to the CEA's private right of action—the Second Circuit went on to hold that the substantive CEA provisions at issue here have a different "focus" for purposes of *Morrison*'s test. On its view, out of these two "*Exchange* Acts," only the former is focused on the location of *the exchange* (as *Morrison* holds). The effect of this remarkable holding is to foreclose even the government from pursuing criminals that intentionally use their foreign conduct to steal from Americans transacting on American exchanges. Indeed, for just this reason, the CFTC participated below to urge the court not to do *precisely* what it did.

As this petition explains, the first question presented is plainly certworthy, and the lack of any substantial basis for the alternative holding below would make it a bad reason to deny review even were it not so important. All the Second Circuit is really doing is finding ways to prop up the conduct-and-effects test that *Morrison* acerbically rejected. This Court should not delay review in such a situation, even if a lower court purports to offer an alternative reason for what amounts to thumbing its nose at this Court.

The more critical point, however, is that this second holding *is* vitally important, particularly given the Second Circuit's prominence in exchange-related cases. Putting aside that the second holding below equally devolves into a revival of the conduct-and-

effects test, it will also prevent the CFTC and DOJ from pursuing international frauds they have long prosecuted, involving matters central to our economy. *Morrison*'s domestic-transaction test was designed to keep *foreign* injury claims out of American courts, not to hamstring U.S. government enforcement that protects *American* markets from harm. This Court should thus grant certiorari on both questions and reverse.

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The district court's opinion (Pet.App. 36a) is published at 256 F. Supp. 3d 298. The Second Circuit's decision (Pet.App. 2a) is published at 937 F.3d 94.

JURISDICTION

The Second Circuit entered judgment (Pet.App. 2a) on August 29, 2019, and denied petitioners' timely rehearing request on October 16, 2019 (Pet.App. 74a). Justice Ginsburg extended this petition's deadline to March 13, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant provisions of the Securities Exchange Act of 1934 and Commodity Exchange Act are reproduced at Pet.App. 75a-85a.

STATEMENT

I. Legal Background

1. This Court employs a "two-step framework" to determine whether a claim under U.S. law raises impermissible "extraterritoriality issues." *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101 (2019). First, this Court considers whether Congress wrote the statute to apply extraterritorially, which requires finding that the "presumption against extraterritoriality has been rebutted." *Id.* "If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's 'focus.'" *Id.* "'If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application' of the statute, 'even if other conduct occurred abroad.'" *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018) (quoting *RJR Nabisco*, 136 S. Ct. at 2101).

The first step—not at issue here—is applied separately to each statutory section involved, and asks whether each overcomes the presumption against extraterritoriality. *See RJR Nabisco*, 136 S. Ct. at 2106, 2108. This analysis is categorical: "If [a provision does] apply abroad," this Court does "not need to determine which transnational [schemes] it applie[s] to" because "it would apply to all of them." *Morrison*, 561 U.S. at 267 n.9.

In contrast, the second step—which *is* at issue here—requires determining the "focus" of a "statute" through a more holistic analysis. As this Court has put it, if "the statutory provision at issue works in tandem with other provisions, it must be assessed in

concert with those other provisions …. to accurately determine whether the application of the statute in the case is a 'domestic application.'" *WesternGeco*, 138 S. Ct. at 2137. Moreover, this test considers not only the conduct the statute regulates, but also "the parties and interests it 'seeks to protec[t]' or vindicate." *Id.* (quoting *Morrison*, 561 U.S. at 267). This Court thus held in *Morrison* that the "focus" of Section 10(b) was on protecting domestic exchanges and transactions because, even though that section concerns deceptive *conduct*, it only prohibits such conduct "*in connection with*" those transactions and exchanges. This made the location of the manipulated transactions—and not the manipulation itself—the touchstone of territoriality.

2. Before *Morrison* and its progeny crystallized this jurisprudence, the Second Circuit had developed its own line of cases on when transnational securities frauds were subject to the Exchange Act. This approach was called the "conduct-and-effects test."

Morrison exhaustively details the evolution of the conducts-and-effects test before severely criticizing it. *See* 561 U.S. at 257-58. Among other things, it explains that the test was "not easy to administer" and became exceedingly factbound because every case boiled down to a gestalt judgment about whether specific fact patterns were so "predominantly foreign" that Congress would not have "wished the precious resources of United States courts and law enforcement agencies to be devoted to them." *Id.* at 257-58 (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975)). Unsurprisingly, this Court rejected the effort to "discern" in every case what Congress "would have wanted" had it considered a situation. *See id.* at

255, 261. But it reserved its most pointed criticism for the unpredictable, case-by-case outcomes the conduct-and-effects test produced. As this Court put it, "[t]here is no more damning indictment of the 'conduct' and 'effects' tests than the Second Circuit's own declaration that 'the presence or absence of any single factor which was considered significant in other cases … is not necessarily dispositive in future cases.'" *Id.* at 259-60 (quoting *IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980)). In contrast, *Morrison*'s transactional test was meant to be "clear" and thereby avoid "interference with foreign securities regulation" in a way the conduct-and-effects test did not. *Id.* at 269.

3. After interring the conduct-and-effects test and replacing it with the two-step inquiry above, *Morrison* went on to apply those steps to the Section 10(b) claims at issue. And finding no "clear indication" that Congress intended Section 10(b) to apply extraterritorially, this Court turned to the second step: determining the statute's "focus."

To that end, this Court found that Section 10(b) and the Exchange Act were focused on protecting U.S. exchanges and transactions. The driving insight was that the statute prohibits not "fraud *simpliciter*" but instead only fraud "*in connection with* the purchase or sale of any security registered on a national securities exchange or any security not so registered." *Morrison*, 561 U.S. at 271-72 (emphasis added). In other words, this Court held that when the Exchange Act bars manipulative *conduct* only "*in connection with*" something else, that something else represents the statute's "focus" or "the object[] of the statute's solicitude." *Id.* at 266-67. And so it is the location of those objects,

rather than the manipulative conduct, that determines whether a statutory application is territorial.

Beyond that, *Morrison*'s application of the test was straightforward. Because "all aspects of the purchases complained of" there "occurred outside the United States," this Court affirmed the dismissal on extraterritoriality grounds. *Id.* at 273.

4. For present purposes, three critical decisions followed *Morrison* in the Second Circuit—the "Mother Court" of securities law. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting).

First, because *Morrison*'s transactional test embraces transactions that occur "in the United States," the courts needed a rule to determine where a transaction "occurs." In *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012), the Second Circuit held that a plaintiff can establish a "domestic transaction" by showing "that irrevocable liability was incurred or that title was transferred within the United States." *Id.* at 62. This rule has been universally followed. *See United States v. Georgiou*, 777 F.3d 125, 135-36 (3d Cir. 2015) (collecting cases).

Second, in *Loginovskaya v. Batratchenko*, 764 F.3d 266 (2d Cir. 2014), the Second Circuit considered the "focus" of the CEA for purposes of determining whether a suit under its private right of action was a domestic claim. Given that, "[t]raditionally, courts have looked to the securities laws when called upon to interpret similar provisions of the CEA," *id.* at 272, and "the parallels between the CEA and SEA," *id.* at 274, the Second Circuit held that *Morrison*'s "transactional test" for SEA claims applied to CEA claims as

well. *See id.* at 272 ("*Morrison*'s domestic transaction test in effect decides the territorial reach of CEA §22."). So far, so good.

In *Parkcentral*, however, the Second Circuit suddenly abandoned its adherence to *Morrison*'s approach and held that, while a "domestic transaction" is necessary under *Morrison*, "such a transaction is not alone sufficient to state a properly domestic claim." *See* 763 F.3d at 215. Instead, the court considered itself free to reject a claim arising from a domestic transaction if it found that claim "so predominantly foreign" that "Congress could not have intended" to permit it. *Id.* at 216. The Second Circuit acknowledged that this "so predominantly foreign" standard would require a case-by-case inquiry, and did not provide "a test that will reliably determine when a particular invocation of [Section] 10(b) will be deemed appropriately domestic." *Id.* at 216-17. Instead, it thought courts should "carefully make their way with careful attention to the facts of each case and to combinations of facts that have proved determinative in prior cases." *Id.* at 217. Just as it sounds, this amounted to a direct rejection of *Morrison*'s teachings and a resuscitation of the conduct-and-effects test—provided the "necessary" but "not necessarily sufficient" element of a "domestic transaction" was present. *Id.* at 216.

II. Factual and Procedural History

This case involves a claim of injury under the CEA suffered in connection with domestic futures transactions. Much of the underlying conduct involved manipulating the cash market for a commodity that is extracted and traded abroad. But, importantly, plaintiffs alleged that defendants intended this cash-

market manipulation to affect domestic futures transactions so that defendants could profit from positions they took in those very transactions. *See* Pet.App. 7a.

1. Petitioners are traders of "Brent Futures," which are futures contracts linked to a commodity called Brent crude oil. *See* Pet.App. 4a-5a. Brent crude originates in the North Sea, and although it represents a relatively small fraction of world supply, it is extraordinarily important in crude-oil price setting. For example, the U.S. stock market's worst day in a decade was partly attributed to a dramatic fall in Brent crude prices,[1] which serve as the benchmark for two-thirds of world oil supplies. *See* Pet.App. 4a. The spot price, known as the "Dated Brent Assessment" or "DBA," serves as a price component of Brent Futures contracts. Pet.App. 4a-5a.

The DBA is published daily by a price-reporting agency in London called Platts. Pet.App. 4a. Platts calculates the DBA based on information from certain entities concerning their Brent sales and purchases. Pet.App. 5a. Those entities include respondents here, who are Brent producers, refiners, and importers, as well as traders of Brent Futures in the United States. *See* Pet.App. 3a & n.1. Plaintiffs allege that respondents manipulated the DBA in order to manipulate the price of Brent Futures traded in the United States, benefitting their own positions and hurting petitioners'. Pet.App. 7a-8a.

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[1] *See, e.g.*, Rosie Perper & Bill Bostock, *Oil Is Down 21% After Its Biggest Drop in Decades Following Saudi Price Cuts*, Business Insider (Mar. 9, 2020), https://www.businessinsider.com/oil-price-crash-market-drop-global-price-war-futures-coronavirus-2020-3.

More specifically, plaintiffs allege that, although respondents' submissions to Platts were supposed to reflect *bona fide* market activity, respondents frequently reported uneconomic trades to manipulate the DBA in their favor. Pet.App. 5a, 7a. This made sense because the Brent Futures contracts that petitioners and respondents themselves traded settled either directly to the DBA or to a benchmark known as the ICE Brent Index, which is itself calculated based, in part, on the DBA. *See* Pet.App. 4a-6a; C.A.App. A1948, A2003, A2042-A2043, A2072-A2073, A2095-A2105 (¶¶10, 224, 289-90, 389, 460-88). Plaintiffs supported these allegations with specific facts showing that respondents reported uneconomic trades to Platts in the immediate run-up to the closing dates for certain Brent Futures contracts traded in the United States, and demonstrated through detailed econometric analyses how such manipulation moved futures prices. *See* C.A.App. A2030, A2035-A2038, A2040, A2042-A2044, A2049, A2081 (¶¶254, 269, 270-72, 275, 278, 282, 288-91, 305, 412).

Petitioners and respondents traded Brent Futures on the New York Mercantile Exchange (NYMEX), among other places. Those transactions are undisputedly domestic. Petitioners also argued below that they incurred irrevocable liability in the United States on other transactions, and the lower courts.[2] *See* Pet.App. 16a, 52a n.5.

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[2] In particular, plaintiffs incurred irrevocable liability for trades on Intercontinental Exchange Futures Europe (ICE) in Chicago under ICE rules. *See* C.A.App. A1695-A1696, A1699 (Gaer Decl. ¶¶26-33, 41).

In sum, plaintiffs alleged that by manipulating the DBA, respondents manipulated the price of Brent Futures petitioners traded domestically, including on a U.S. exchange. Plaintiffs alleged, moreover, that respondents engaged in such misconduct *for the purpose* of benefitting their trading positions in the same domestic Brent Futures transactions, to petitioners' detriment. Pet.App. 7a. In fact, although futures contracts are anonymous and plaintiffs cannot immediately determine their counterparties, it is likely that defendants themselves were frequently on the other side of the very transactions in which plaintiffs lost money. *See* C.A.App. A2095-A2105.

Petitioners thus asserted claims under CEA Section 22 (7 U.S.C. §25)—a private-right-of-action provision for victims injured in certain transactions. Plaintiffs' claims alleged violations of two different substantive CEA provisions: (1) Section 6(c)(1), which prohibits the use of manipulative or deceptive schemes "in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity," *see* 7 U.S.C. §9(1); and (2) Section 9(a)(2), which more broadly prohibits any manipulation of "the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity," *see* 7 U.S.C. §13(a)(2). Notably, a "registered entity" is the CEA's direct analogue to the "national securities exchange" in SEA Section 10(b) and *Morrison*'s domestic-transaction test. *See* 7 U.S.C. §1a(40) (defining "registered entity" as various trading facilities designated or registered under CEA sections other than 7 U.S.C. §6); *id.* §6(b) (setting forth circumstances in

which *foreign* boards of trade must register with CFTC).

2. Applying the Second Circuit's *Parkcentral* test, the district court dismissed plaintiffs' CEA claims as impermissibly extraterritorial. The court first opined that, "[g]iven the noted similarities between the Exchange Act and the CEA," the question was whether the transactions giving rise to plaintiffs' claims were domestic under *Morrison*'s test. Pet.App. 51a. But the court then held that, even "[a]ssuming that the relevant transactions are those occurring on domestic exchanges within the meaning of *Morrison*," it was still permissible to dismiss the claims under *Parkcentral* as "predominantly foreign," because the Second Circuit had made *Morrison*'s domestic-transaction test only necessary, not sufficient. Pet.App. 52a-53a.

The district court then went on to use *Parkcentral* to deploy, essentially, the "conduct-and-effects" test. On the conduct side, it emphasized that the "claims are based on Defendants' allegedly manipulative and misleading reporting to Platts in London about physical Brent crude oil transactions conducted entirely outside of the United States." Pet.App. 53a. And on the effects side, it emphasized that this only "indirectly affected the price of Brent futures and derivative contracts" traded on domestic exchanges, because it viewed the connection between the DBA and the pricing of "*most* of the futures and derivatives contracts" at issue as too "attenuated." Pet.App. 53a-54a (emphasis added). The court did not explain why claims about the other "futures and derivatives contracts" that were priced directly to the DBA remained too foreign. Nor did the court find it material that defendants themselves were trading Brent Futures on

domestic exchanges, and thus intended to profit from their manipulation in domestic transactions. *See* Pet.App. 67a (mentioning, but never returning to, this allegation).

3. On appeal, the CFTC participated as *amicus curiae*. Pet.App. 86a. The CFTC specifically urged the Second Circuit to "reject the district court's holding that the CEA does not [reach] Plaintiffs' allegation that Defendants intentionally manipulated the price of futures contracts traded on a U.S. exchange." Pet.App. 87a. It stressed that: (1) "[n]othing … suggests that a person may intentionally manipulate contracts on a trading facility in the United States with impunity under U.S. law … simply because that person and the means of manipulation were offshore," Pet.App. 88a; and (2) the district court had essentially applied the "conduct-and-effects test" *Morrison* rejected. Pet.App. 103a-104a.

Three aspects of this argument are particularly noteworthy:

First, the CFTC put before the Second Circuit the same argument the Solicitor General advanced in recommending against certiorari in *Toshiba*—namely, that this Court's post-*Morrison* decisions required abandoning *Parkcentral*. The Commission thus explained that *RJR Nabisco* had "cast doubt on the holding in *Parkcentral* that a domestic transaction is 'necessary but not necessarily sufficient,'" because *RJR Nabisco* squarely stated that "[i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." Pet.App. 102a (quoting *RJR Nabisco*, 136 S. Ct. at 2101). As the CFTC (and Solicitor General) noted, this language

is wholly incompatible with the suggestion in *Parkcentral* that passing *Morrison*'s test does not "suffice" to establish an "appropriately domestic" application of the statute. Pet.App. 103a-104a; U.S. *Toshiba* Br. 14-15; *Parkcentral*, 763 F.3d at 216.

Second, the CFTC explained that refusing to apply *Morrison*'s transactional test to CEA claims would have dire consequences for public enforcement. The Commission thus warned that "manipulation from outside the United States is a frequent target of CFTC enforcement actions," listing several recent prosecutions and settlements regarding manipulation abroad that affected domestic transactions. Pet.App. 106a. The CFTC then included the following example of the kind of prosecution it currently brings and that *Morrison*—but not *Parkcentral*—quite clearly permits it:

> To illustrate the district court's error … imagine a scenario in which traders in Turkey establish positions in Black Sea Wheat contracts on CME, under which the foreign wheat is deliverable only in Romania, Russia, and Ukraine. This group can also control or disrupt a significant portion of the physical supply of that wheat. They do so with the intent to distort the price of the Black Sea Wheat contract, and they are successful. This wrongdoing causes injury to other traders on CME, in Chicago. On that clean set of facts, there is no question that the overseas traders in the foreign commodity triggered all elements of manipulation, including for private damages. The target of the wrongdoing was in the United States, the CFTC would pursue those wrongdoers, and the Court in *Morrison*

> could not have intended to prevent that. *See* 561 U.S. at 266 (holding that the focus of Section 10(b) is "not upon the place where the deception originated").

Pet.App. 106a-107a.

Finally, the CFTC repeatedly emphasized that, while a domestic transaction suffices to address extraterritoriality concerns, it does not suffice for *liability*, leaving many more safeguards against an overbroad extension of U.S. law. Accordingly, while "the overseas location and cash-market focus of the alleged means of manipulation and the perception that the injuries on NYMEX were too attenuated and indirect" might "go to Defendants' intent" or to proximate cause, it should "not go to the geographic reach of the CEA"—precisely because intent is an element of manipulation and foreign manipulative conduct is often intended to affect domestic markets. *See* Pet.App. 107a.

Remarkably, the Commission's request for oral argument time was denied. C.A.Doc. 239 at 1.

4. The Second Circuit affirmed, reaching two holdings relevant to the questions presented here.

First, the Second Circuit reaffirmed its commitment to *Parkcentral* and proceeded to hold that, even if all relevant transactions were domestic, that would not preclude finding them "predominantly foreign" under a repackaged conduct-and-effects test. Pet.App. 19a-20a. The court began this analysis by granting that the "focus" of the CEA's private action provision was clearly "transactional." Pet.App. 15a-16a. But it nonetheless affirmed the district court's use of *Parkcentral*, stressing that the underlying commodity "physically traded in Northern Europe," the

"manipulative trading activity [took] place in the North Sea," and the DBA is disseminated "by a foreign price-reporting agency." Pet.App. 20a. Accordingly, it did not matter that *Morrison*'s test was satisfied because passing *Morrison*'s test was merely necessary, and not sufficient, to establish a territory claim. *See* Pet.App. 19a ("[W]hile a domestic transaction … is 'necessary' to invoke the private remedy afforded by Section 22, it is not 'sufficient.'").

Next, the Second Circuit proceeded (unnecessarily) to address the substantive CEA provisions at issue and, without mentioning the CFTC's arguments, reached the very holdings the Commission warned against. It thus held that, unlike with Section 22, the focus of the substantive provisions at issue was on respondents' misconduct, not the manipulated transactions. Pet.App. 20a. While it acknowledged that the SEA language at issue in *Morrison* was "similar," the Second Circuit attempted to distinguish *Morrison* primarily by suggesting that, unlike Exchange Act Section 10(b), the relevant CEA provisions contain "no mention of a national securities exchange." Pet.App. 21a. The Second Circuit thus held that these sections reach only domestic manipulative *conduct*—what the CFTC called the "means of manipulation," Pet.App. 88a—regardless of where the transactions that give rise to plaintiffs' claims occurred.

Rehearing *en banc* was denied. This petition follows.

REASONS FOR GRANTING THE WRIT

This Court's intervention here is required for three reasons.

First, there is now a plain and entrenched disagreement between the preeminent courts of appeals on the primary question presented. The reasons the Solicitor General gave for why this split might resolve itself were squarely rejected below after being pressed by a government agency. The Second Circuit is doggedly committed to resuscitating the conduct-and-effects test by deeming *Morrison*'s test merely necessary to state a domestic application of U.S. law, while the Ninth Circuit holds the opposite. This disagreement is well presented here: The Second Circuit assumed away all interfering facts, squarely holding that *Morrison* would not decide the issue even if (1) the focus of the statute was on domestic transactions; and (2) all the relevant transactions were domestic. And the stakes of the Second Circuit's rule are highlighted by plaintiffs' allegations, which involve not only transactions *on a domestic exchange*, but even defendants' *intent* to affect those very transactions.

Meanwhile, more than just a circuit disagreement is at stake because the Second Circuit seems markedly unconcerned not only with other circuits' rulings, but this Court's decisions as well. It seems unlikely that this Court did not really mean to say in *RJR Nabisco*—and *repeat* in *WesternGeco*—that "***[i]f*** the conduct relevant to the statute's focus occurred in the United States, ***then*** the case involves a permissible domestic application." *WesternGeco*, 138 S. Ct. at 2137 (emphasis added); *RJR Nabisco*, 136 S. Ct. at 2101. But even assuming otherwise, this Court should not permit

lower courts to make that decision for themselves. The Second Circuit did not even venture an explanation for how *Parkcentral* can be squared with this Court's language, and it cannot. That is untenable: This Court may decide to change its test, but it cannot allow lower courts to flout it.

Second, both questions presented are vitally important. When the first question last arose, foreign governments and U.S. business groups (including groups that represent defendants) urged this Court to grant certiorari based on the issue's importance, and rightly so. Because questions of extraterritoriality implicate national relations, the uncertainty associated with a disagreement among prominent circuits in this area is particularly unacceptable—not to mention the uncertainty associated with the Second Circuit's case-by-case approach. Indeed, the uncertainty the Second Circuit's current approach invites was one of the root evils motivating *Morrison* itself.

Meanwhile, the sole objection that could be lodged to this case as a vehicle for the first question—namely, the presence of the second question—makes this case much *more* important, not less so. As an initial matter, although the Second Circuit purported to independently analyze the substantive CEA provisions underlying plaintiffs' claims, the end result is indistinguishable from its treatment of the private-right-of-action provision under the first question: The court's holding simply allows it to revive the conduct-and-effects test. The Second Circuit's dogged commitment to that test in the face of *Morrison*'s direct criticism thus remains a good reason to grant review, without regard to how the Second Circuit defends that result.

Moreover, the Second Circuit's alternative holding that the CEA's substantive provisions are focused on "manipulation" rather than "transactions" unambiguously cabins the government's ability to pursue overseas acts of manipulation aimed at disrupting U.S. commodities markets. Without even considering this consequence, the Second Circuit essentially barred the CFTC and DOJ from bringing major cases they have long brought, along with state enforcement as *parens patriae*. That is, at minimum, an issue of great national importance.

Third, and finally, the Second Circuit's holdings are obviously incorrect. As to whether *Morrison*'s test is sufficient or necessary, this Court's cases plainly describe it as sufficient, and the whole purpose of *Morrison* was to simplify away the conduct-and-effects test. Applying that test on top of *Morrison*'s—as the Second Circuit now does—only adds complication, vitiating both the text *and* purpose of this Court's decisions.

Nor should this Court sanction the Second Circuit's effort to misread the focus of the Commodity *Exchange* Act as somehow different from the Securities *Exchange* Act when it comes to protecting transactions on domestic *exchanges*. To reach that result, the Second Circuit both wholly ignored the U.S. government's objections and omitted critical statutory text. It thereby caused serious harm to public *and* private enforcement, to no end other than reviving the conduct-and-effects test this Court had attempted to inter. This Court should thus grant certiorari and reverse.

I. The Lower Courts Are Divided Over the Meaning of *Morrison*.

1. There is no need to dwell over the lower courts' disagreement on the primary question presented. The Ninth Circuit has rejected *Parkcentral* by name, saying the "principal reason that we should not follow the *Parkcentral* decision is because it is contrary to Section 10(b) and *Morrison* itself." *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 950 (9th Cir. 2018). It has pointed out that *Parkcentral* is grounded in "speculation about Congressional intent, an inquiry *Morrison* rebukes." *Id.* It has described *Parkcentral* as "an open-ended, under-defined multi-factor test, akin to the vague and unpredictable tests that *Morrison* criticized and endeavored to replace with a 'clear,' administrable rule." *Id.* There is thus no doubt that the Ninth Circuit has squarely rejected both *Parkcentral* and the theory that "a domestic transaction is necessary but not sufficient under *Morrison*." *Id.* at 949. And although other circuits have not squarely considered *Parkcentral* itself, some certainly have treated *Morrison*'s test as sufficient rather than merely necessary. *See, e.g.*, *Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada*, 645 F.3d 1307, 1310-11 (11th Cir. 2011) (vacating dismissal because "the Supreme Court in *Morrison* deliberately established a bright-line test based exclusively on the location of the purchase or sale").

To be sure, when *Toshiba* was decided, it remained possible that the Second Circuit would itself reconsider *Parkcentral*. As the Ninth Circuit noted, "no Second Circuit case, nor any other Circuit, ha[d] applied *Parkcentral*'s rule" at that time. 896 F.3d at 950 n.22. The United States recommended denying

certiorari for just this reason, even while siding with the Ninth Circuit on the merits, sharply criticizing the Second Circuit for trying to "reintroduce the conduct-and-effects test," and acknowledging that the two courts' views were "inconsistent." *See supra* pp.1-2, U.S. *Toshiba* Br. 8, 15, 20. *Toshiba* also presented unique vehicle problems, including a petitioner that had functionally prevailed below. *See* U.S. *Toshiba* Br. 16-20. This Court thus reasonably waited to see what the Second Circuit would do.

Now, we know. Not only has the Second Circuit refused to "revisit *Parkcentral*'s contrary statements" in light of *RJR Nabisco* and *WesternGeco*, U.S. *Toshiba* Br. 20, it instead plans to "extend[] *Parkcentral*'s holding" to new cases and similar statutes. *See* Pet.App. 18a-19a. As the Second Circuit put it:

> Given that courts "have *looked to the securities laws*" when asked "to interpret *similar provisions* of the CEA," *we do not hesitate* in applying *Parkcentral*'s gloss on domestic transactions under Section 10(b) to domestic transactions under Section 22 of the CEA. Therefore, while a domestic transaction … is "necessary" to invoke the private remedy afforded by Section 22, it is not "sufficient."

Pet.App. 17a (quoting *Loginovskaya*, 764 F.3d at 272). A large stretch of the opinion below is thus dedicated to comparing this case's facts to *Parkcentral*'s. Pet.App. 19a-20a. This not only entrenches the circuit conflict but promises to make it worse.

As the petition in *Toshiba* explained, the Second and Ninth Circuits handle more securities cases than

all other circuits combined, and this Court has accordingly granted several recent cases to resolve a disagreement between those courts alone. *See* Petition 32-33, *Toshiba*, No. 18-486 (U.S. Oct. 15, 2018) (collecting cases). This conflict is thus ripe for this Court's review.

2. Helpfully, the Second Circuit's opinion also isolates this conflict by assuming away any potentially interfering, case-specific facts. The court of appeals began by acknowledging that CEA Section 22, like SEA Section 10(b), is "clearly transactional," Pet.App. 15a, and then assuming that "Plaintiffs' trades … constituted 'domestic transactions' under Section 22." Pet.App. 16a. On those same assumptions, it is certain the Ninth Circuit would reach the opposite result.

This case's facts also highlight the stakes of the question presented. As noted, petitioners alleged that respondents manipulated the DBA *for the purpose* of manipulating—to their benefit and petitioners' detriment—the price of Brent Futures *traded on a U.S. exchange*. *See supra* pp.10-11. The Second Circuit thus reached the truly radical holding that even petitioners' CEA claims arising from trades on *a domestic* exchange are somehow impermissibly *extraterritorial*. As further explained below, *see infra* pp.27-29, the practical effect of this holding is that the entire world "has become the Barbary Coast for those perpetrating frauds on [U.S. commodities and futures] markets." *Morrison*, 561 U.S. at 270. This underlines what is at stake both in treating *Morrison*'s test as insufficient and in viewing the Commodity Exchange Act as somehow different from the Securities Exchange Act with respect to its focus on protecting U.S. exchanges.

3. Meanwhile, this case implicates more than just a disagreement between the Second and Ninth Circuits; it implicates this Court's authority over the lower courts as well. To an unusual degree, the Second Circuit appears unconcerned even with asking whether its continued commitment to the conduct-and-effects test can be squared with this Court's cases. And, meanwhile, it seems equally unconcerned with the U.S. government's arguments that its test is inconsistent with established practice and government enforcement regimes.

Begin with the tension with this Court's cases. In *Morrison*, this Court said: "There is no more damning indictment of the 'conduct' and 'effects' tests than the Second Circuit's own declaration that 'the presence or absence of any single factor which was considered significant in other cases … is not necessarily dispositive in future cases.'" 561 U.S. at 258-59. And yet the Second Circuit adopted the *Parkcentral* rule while trumpeting, *even after Morrison*, that it did

> not purport to proffer a test that will reliably determine when a particular invocation of §10(b) will be deemed appropriately domestic or impermissibly extraterritorial. We believe courts must carefully make their way with careful attention to the facts of each case and to combinations of facts that have proved determinative in prior cases.

Parkcentral, 763 F.3d at 217. The Second Circuit might as well have said that it just disagreed with *Morrison* about what makes for a wise test in this realm.

Notably, the Solicitor General criticized this aspect of *Parkcentral* in *Toshiba*, U.S. *Toshiba* Br. 14-15, and the CFTC below flagged this same problem in explicit terms. Pet.App. 87a-88a. Yet that urging did not even garner a response, let alone convince the Second Circuit to reconsider.

Perhaps even more striking is that the CFTC put before the Second Circuit the very language from *RJR Nabisco* and *WesternGeco* that the Solicitor General thought might lead that court to "revisit *Parkcentral*'s contrary statements," U.S. *Toshiba* Br. 20, and yet the Second Circuit ignored it. After quoting *RJR Nabisco*'s "If/Then" formulation—and observing that it was squarely contrary to statements about *Morrison* in *Parkcentral*— the CFTC explicitly argued that, for that reason, "*Parkcentral* must be recognized as at best the high-water mark for restrictions on applying U.S. law to transactions in the United States." Pet.App. 102a. And yet, shockingly, the Second Circuit acknowledged neither this argument nor the controlling language from this Court.

That approach to this Court's precedent cannot be condoned. If the lower courts are not going to follow this Court's controlling language, they should at least say why. And if this Court did not mean what it said, then it should grant certiorari and explain its meaning, rather than giving lower courts a green light to reinterpret this Court's precedents as they see fit. For unknowable reasons, the Second Circuit has shown a dogged commitment to its own longstanding precedents in this area in the face of decisions from this Court rejecting them. And it has evidently accepted the serious consequences of that approach for government enforcement without even allowing the

government to appear at argument or acknowledging its contrary views. This is squarely inconsistent with both the rule of law and the design of Article III, and alone represents an essential reason to grant review. *See, e.g.*, Stephen M. Shapiro et al., *Supreme Court Practice* 4-20 (11th ed. 2019) ("A *direct* conflict between the decision of the court of appeals … and a decision of the Supreme Court is one of the strongest possible grounds for … certiorari." (emphasis added)).

4. While no court has squarely rejected the Second Circuit's holding below on the second question presented, that is best explained by its utter lack of textual basis and evident inconsistency with *Morrison*. The Ninth and Eighth Circuits *have* directly held that parallel language in the CEA and SEA—including the language at issue here—should presumptively receive the same interpretation. *See CFTC v. Monex Credit Co.*, 931 F.3d 966, 976 (9th Cir. 2019) ("We presume that by copying §10(b)'s language and pasting it in the CEA, Congress adopted §10(b)'s judicial interpretations as well." (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006)); *Greenwood v. Dittmer*, 776 F.2d 785, 789 n.4 (8th Cir. 1985) (similar). And other courts of appeals routinely hold that, given their similarity, the SEA and CEA should be interpreted in parallel. *See, e.g.*, *CFTC v. Baragosh*, 278 F.3d 319, 333 n.5 (4th Cir. 2002) (cases interpreting SEA "are persuasive authority for interpreting" parallel provisions of CEA); *CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 76 n.9 (3d Cir. 1993) (same). Accordingly, the second holding below should be viewed as equally inconsistent with the decisions of this Court and other lower courts as well.

II. Both Questions Presented Are Important.

A. A uniform and predictable approach is essential in this area.

1. Given the Second Circuit's prominence in this area, uprooting the conduct-and-effects test remains important for all the reasons *Morrison* itself articulated. In particular, certainty around extraterritoriality issues is required, and yet market participants will now need once more to "guess anew in each case." 561 U.S. at 261. Notably, the Second Circuit's own district courts are now stumbling blind in both securities and commodities cases, reaching mutually inconsistent outcomes.[3] It is thus important to correct this unpredictable approach based on its unpredictability alone.

2. More broadly, the question presented is also important given the national relations concerns implicated by extraterritoriality issues. In *Toshiba*—where the Ninth Circuit correctly read *Morrison* as more friendly to U.S. enforcement—countless voices from the transnational investment community urged this Court to grant review on importance grounds. *See, e.g.*, Brief of *Amici Curiae* Inst. of Int'l Bankers & Swiss Bankers Ass'n 7-10, *Toshiba*, No. 18-486 (U.S. Nov. 30, 2018); Brief of *Amicus Curia* Org. for Int'l Inv.

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[3] *Compare, e.g.*, *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 182 (S.D.N.Y. 2018) (declining to apply *Parkcentral* to CEA claims even though "the "[mis]conduct alleged here largely occurred in Australia"), *with In re London Silver Fixing, Ltd., Antitrust Litig.*, 332 F. Supp. 3d 885, 917-18 (S.D.N.Y. 2018) (applying *Parkcentral* to CEA claims based on transactions on a domestic commodities exchange, and finding claims "predominately foreign" because they were based on "foreign bad acts").

13-16, *Toshiba*, No. 18-486 (U.S. Nov. 30, 2018); Brief of *Amicus Curiae* Japan Bus. Fed'n 14-19, *Toshiba*, No. 18-486 (U.S. Dec. 6, 2018). Defendants here are themselves members of many of those *amicus* groups. *See, e.g.*, OFII, *Membership*, https://www.ofii.org/about-us/membership (last visited Mar. 13, 2020). Foreign governments likewise stressed the possibilities of tension with foreign enforcement regimes, and the associated need for uniformity among U.S. courts and predictability in the U.S. approach. Brief of *Amicus Curiae* Japan 1, *Toshiba*, No. 18-486 (U.S. Nov. 2, 2018); Brief of *Amicus Curiae* United Kingdom 9-14, *Toshiba*, No. 18-486 (U.S. Dec. 4, 2018).

This Court no doubt viewed these as important concerns in calling for the Solicitor General's views. And even in recommending denial, the United States acknowledged that these "concerns are weighty, and the United States takes them seriously." U.S. *Toshiba* Br. 21. The government did note that some extraterritoriality concerns are alleviated by limits on personal jurisdiction. *See id.* 21-22. But, notably, where there is a circuit disagreement like this one, all that means is that the outcome of a weighty issue of international relations could come down to the happenstance of whether personal jurisdiction is available in California or New York.

B. The Second Circuit's alternative holding makes this case far more important.

Meanwhile, the Second Circuit's second holding only makes this case far more important than it already was. That holding significantly raises the stakes of the decision below, and represents a good

reason to grant review now, rather than waiting for multiple cases to present these questions separately.

As noted, *see supra* pp.17-18, the Second Circuit purported to hold here that *Morrison*'s analysis of the SEA as "focused" on protecting exchanges is inapplicable to the substantive CEA sections at issue, which (it said) are "focused" on "rooting out manipulation." Pet.App. 22a. That allowed the Second Circuit to hold that even CEA claims based on transactions *on U.S. exchanges* are not necessarily territorial.

As explained below, *infra* pp.30-36, that decision is indefensible and represents only the Second Circuit's refusal to faithfully apply *Morrison*'s reasoning to the CEA's admittedly "similar language." Pet.App. 21a. But the more important point for present purposes is that—right or wrong—this holding has enormous consequences for U.S. *public* enforcement that protects U.S. commodities and futures markets, and so only amplifies the points above.

In particular, the CFTC's hypothetical regarding Black Sea Wheat contracts, *see supra* pp.15-16, is all-too real. The CFTC and DOJ regularly pursue overseas actors whose behavior affects U.S. markets or exchanges—particularly when that effect appears intentional. *See, e.g.*, *United States v. Sindzingre*, 2019 WL 2290494, at *1-3 (E.D.N.Y. May 29, 2019) (prosecution based on banks' overseas manipulation of LIBOR); Pet.App. 106a (CFTC brief listing at least four recent examples). If the CEA's substantive provisions do not apply to overseas manipulation that impacts domestic commodities markets, the viability of such enforcement actions is in grave doubt.

In previous cases, this Court has been particularly attentive to the consequences of foreclosing governmental enforcement as compared to private actions. *See, e.g.*, *RJR Nabisco*, 136 S. Ct. at 2105-06 (permitting public prosecutions but not private actions). The Second Circuit's refusal even to acknowledge this consequence—let alone address the government's arguments, *see supra* pp.16, 20, 25—is inexplicable.

Importantly, while the entire point of *Morrison* and its progeny was to refocus U.S. laws around protecting domestic markets, the Second Circuit now regards manipulation *aimed at* investors in *U.S. markets* as not a U.S. crime at all under the CEA. That ironic result cannot be left in place and represents an independent reason to grant review.

III. The Decision Below Is Incorrect.

The foregoing suffices to grant review—the split is square enough, and the stakes high enough, that this Court should intervene to create a uniform national rule without regard to who is right. That said, the extent of the Second Circuit's error is an important consideration, especially with respect to the second question presented. In particular, the lack of any substantial basis for that outcome demonstrates both the importance of correcting it and the inappropriateness of allowing that holding to frustrate review of the clear circuit disagreement this case presents regarding the continued viability of the conduct-and-effects test.

1. As to the first question—whether *Morrison*'s test is sufficient for exchange-focused statutes—there are two "straightforward" reasons to conclude that the Ninth Circuit has it right. *See* U.S. *Toshiba* Br. 8-9.

a. First, *RJR Nabisco* and *WesternGeco* put the *Morrison* test in terms that unambiguously convey sufficiency. The language, which the Second Circuit omitted, is a classic If/Then statement of the rule: "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad …." *WesternGeco*, 138 S. Ct. at 2137. Meanwhile, the Second Circuit's view is that "if the conduct relevant to the statute's focus occurred in the United States, then the case [*might not*] involve a permissible domestic application [*if*] other conduct occurred abroad." Formal logic regards these formulations as literal opposites—as X and not X. So unless this Court misspoke, the Second Circuit's view is easily rejected.

b. Moreover, as the Ninth Circuit, Solicitor General, and CFTC have emphasized, the Second Circuit's *Morrison* + conduct-and-effects-test approach recreates the same uncertain, case-by-case outcomes that *Morrison* so severely criticized. *See supra* pp.1-2, 14-15, 21-22. Layering an opaque standard on top of a clear rule like *Morrison*'s just results in the same opacity one started with. It is rare to see a lower court reject both what this Court did *and* why it did it. This circumstance thus recommends strongly in favor of certiorari and reversal.

2. The Second Circuit's second holding is equally grounded in a refusal to follow *Morrison* on its own plain terms. *Morrison* articulated three principal reasons for concluding that Section 10(b) of the Securities *Exchange* Act was focused on regulating transactions and exchanges rather than manipulative conduct, and it is hardly surprising the Commodity *Exchange* Act would have a similar focus. But every time *Morrison*'s

analysis suggested a direct parallel between the text and context of the SEA and CEA, the Second Circuit simply omitted that point.

a. *Morrison*'s core reason for discerning that Section 10(b) focuses on transactions was that it "does not punish deceptive conduct, but only deceptive conduct '*in connection with* the purchase or sale of any security registered on a national securities exchange.'" *Morrison*, 561 U.S. at 266 (emphasis added). This established the "primacy of the domestic exchange" as the "object" of the SEA's "solicitude." *Id.* at 267. The Second Circuit acknowledged that the CEA uses "similar language," but mistakenly tried to distinguish it as "contain[ing] no mention of a 'national securities exchange.'" Pet.App. 21a.

This rationale is without substance. The sole reason the CEA does not mention "national securities exchanges" is that it does not call the exchanges it regulates "national securities exchanges." Instead, (as respondents conceded below, C.A.Doc. 154 at 35), it calls them "registered entities." CEA Section 6(c)(1) thus makes it unlawful to

> use or employ, … ***in connection with*** any … contract of sale … for future delivery on or subject to the rules of ***any registered entity***, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate ….

7 U.S.C. §9(1) (emphasis added). Meanwhile, SEA Section 10(b) makes it unlawful to

> use or employ, ***in connection with*** the purchase or sale of any security registered on ***a***

> ***national securities exchange***[,] … any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe.

15 U.S.C. §78j (emphasis added).

These provisions are not just "similar"—they are identical, and merely use different, defined terms for parallel constructs. One way to know that for certain is that some entities (like, say, the Chicago Board of Trade) are registered with both the CFTC and SEC under the parallel requirements of the CEA and SEA.[4]

b. The Second Circuit's account of *Morrison*'s second major rationale respecting Section 10(b) is even less substantial. *Morrison* found it telling that the "prologue of the Exchange Act … sets forth as its object '[t]o provide for the regulation of securities exchanges.'" 561 U.S. at 247. The Second Circuit contrasted that with the CEA's "statement of purpose," because the latter provides that "[i]t is further the purpose of this chapter to deter and prevent price manipulation or any other disruptions to market integrity … to ensure the financial integrity of all transactions subject to this chapter." Pet.App. 22a (quoting 7 U.S.C. §5) (omission in original). The court said this "suggests that the focus is on rooting out manipulation." *Id.*

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[4] *Compare* CFTC, *Trading Organizations – Designated Contract Markets (DCM),* https://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=TradingOrganizations (last visited Mar. 13, 2020) (listing CBOT as a Designated Contract Market); *with* SEC, *National Securities Exchanges*, https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html (last visited Mar. 13, 2020) (listing CBOT as a National Securities Exchange).

But this suggested difference is bizarre. Even the Second Circuit's own quote identifies "ensuring the financial integrity of all *transactions* subject to this chapter" as the statute's ultimate object. Indeed, that quote literally identifies "transactions" as the "subjects" of the CEA. Meanwhile, the Second Circuit failed to note that the *very first sentence* of this section is a congressional finding that "[t]he *transactions* subject to this chapter are entered into regularly in interstate and international commerce and are affected with a national public interest." *See* 7 U.S.C. §5(a) (emphasis added). No fair reading of this section suggests a focus on anything other than the "transactions" that are the "subject" of "this chapter." The Second Circuit's contrary conclusion demonstrates only its commitment to keeping the conduct-and-effects test alive by any means necessary.

c. Finally, *Morrison* noted that purporting to regulate foreign *transactions* based on domestic *conduct* was likely to precipitate conflict with foreign laws. That is obviously correct; the fact that behavior occurred here is a poor reason to interfere with foreign regulation of actions aimed at and affecting solely foreign futures exchanges. That would, for example, allow the United States to criminalize the conduct of two Japanese nationals, engaged in the manipulation of a Japanese commodity that is *legal* under Japanese law, solely because they were in New York at the time. That is the very inconsistency *Morrison* tried to avoid.

Meanwhile, *Morrison* explained that a "transactional test" does *not* entail "interference with foreign securities regulation." 561 U.S. at 269. That is undoubtedly right, because countries are entitled to protect their own markets, and to regulate conduct—

wherever it occurs—at least to the extent it *intentionally* targets those markets. And yet the Second Circuit identified just such a transactional test as causing the CEA to "rule the world." Pet.App. 23a-24a (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)). Once again, this reflects nothing more than a refusal to follow the teachings of this Court. And the government's long history of taking enforcement action against foreign manipulations that affect or are aimed at U.S. commodities prices and futures contracts certainly suggests that *Morrison* had it right, and the Second Circuit has it backwards.

What is no doubt going on here is that the Second Circuit views the chain of causation between the relevant foreign conduct and the domestic transactions at issue as too remote. Pet.App. 20a. Indeed, that is precisely the kind of question a reanimated conduct-and-effects test allows it to consider. But as the Solicitor General and CFTC have both now stressed, that is an issue of proximate cause or intent, not extraterritoriality. Pet.App. 88a (CFTC brief); U.S. *Toshiba* Br. 17. Suppose Congress chose to criminalize missile strikes on registered entities. That might not reach strikes that hit such exchanges only by accident or because of remote causes. But it certainly does prohibit—permissibly and territorially—firing a missile at a U.S. exchange on purpose, even if it was launched from abroad. The Second Circuit is simply confusing *what* the statute prohibits with *where* the statute applies. In that case, the domestic hook is the location of the registered entity. And so too here.

All this goes to show that—although the Second Circuit asserted that the CEA's substantive sections justified its search for "predominantly foreign"

conduct—there is no real substance here beyond the refusal to apply *Morrison* and its transactional test as sufficient to establish a domestic application of statutes unambiguously focused on domestic exchanges. The Ninth Circuit and U.S. government have correctly recognized that this refusal is in error, and contrary to *Morrison* itself. That circuit conflict needs addressing, as does the massive and unconsidered effect the Second Circuit's holding will have on U.S. public enforcement under the CEA. If any doubts persist in that regard, this Court should (as in *Toshiba*) ask the United States whether it believes this question now merits review.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 13, 2020

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 17-2233

PRIME INTERNATIONAL TRADING, LTD., WHITE OAKS FUND LP, KEVIN MCDONNELL, ANTHONY INSINGA, ROBERT MICHIELS, JOHN DEVIVO, NEIL TAYLOR, AARON SCHINDLER, PORT 22, LLC, ATLANTIC TRADING USA, LLC, AND XAVIER LAURENS,

Plaintiffs-Appellants,

v.

BP P.L.C., TRAFIGURA BEHEER B.V., RAFIGURA AG, PHIBRO TRADING L.L.C., VITOL S.A., MERCURIA ENERGY TRADING S.A., HESS ENERGY TRADING COMPANY, LLC, STATOIL US HOLDINGS INC., SHELL TRADING US COMPANY, BP AMERICA, INC., VITOL, INC., BP CORPORATION NORTH AMERICA, INC., MERCURIA ENERGY TRADING, INC., MORGAN STANLEY CAPITAL GROUP INC., PHIBRO COMMODITIES LTD., SHELL INTERNATIONAL TRADING AND SHIPPING COMPANY LIMITED, STATOIL ASA, AND ROYAL DUTCH SHELL PLC,

Defendants-Appellees.[+]

[+] The Clerk of Court is respectfully directed to amend the official caption as listed above.

ARGUED: DECEMBER 10, 2018
DECIDED: AUGUST 29, 2019

Before: JACOBS, SULLIVAN, *Circuit Judges*, and KORMAN, *District Judge*[*]

Appeal from a judgment of the United States District Court for the Southern District of New York (Carter, *J.*,) dismissing Plaintiffs-Appellants' claims for lack of personal jurisdiction as to Defendant-Appellee Shell International Trading and Shipping Company Limited, for lack of jurisdiction under the Foreign Sovereign Immunities Act as to Defendant-Appellee Statoil ASA, and for failure to state a claim as to all claims. Plaintiffs-Appellants argue that the district court erred in concluding that their claims under the Commodity Exchange Act were impermissibly extraterritorial. Plaintiffs-Appellants also contend that the district court erred in dismissing their Sherman Act claims, in concluding that the court lacked personal jurisdiction over Defendant-Appellee Shell International Trading and Shipping Company Limited, and in dismissing claims against Defendant- Appellee Statoil ASA under the Foreign Sovereign Immunities Act. We disagree. Accordingly, we **AFFIRM** the district court's dismissal of Plaintiffs-Appellants' Commodity Exchange Act claims in this opinion, and **AFFIRM** the dismissal as to all other Defendants-Appellees and all other claims in a separately filed summary order.

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[*] Judge Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

* * *

RICHARD J. SULLIVAN, *Circuit Judge*:

This appeal requires us to decide whether alleged misconduct tied to the trading of crude oil extracted from Europe's North Sea constitutes an impermissibly extraterritorial application of the Commodity Exchange Act. For the reasons set forth below, we find that it does, and therefore affirm the dismissal of Plaintiffs-Appellants' claims.

I. BACKGROUND

Plaintiffs-Appellants ("Plaintiffs")[1] are individuals and entities who traded futures and derivatives contracts pegged to North Sea oil – also known as Brent crude – on the Intercontinental Exchange Futures Europe ("ICE Futures Europe") and the New York Mercantile Exchange ("NYMEX") between 2002 and 2015 (the "Class Period").

Defendants-Appellees ("Defendants")[2] are a diverse group of entities involved in various aspects of the production of Brent crude. In addition to

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[1] Plaintiffs-Appellants are: Prime International Trading, Ltd., White Oaks Fund LP, Kevin McDonnell, Anthony Insinga, Robert Michiels, John Devivo, Neil Taylor, Aaron Schindler, Port 22, LLC, Atlantic Trading USA, LLC, and Xavier Laurens.

[2] Defendants-Appellees are: BP p.l.c., Trafigura Beheer B.V., Trafigura AG, Phibro Trading L.L.C., Vitol S.A., Mercuria Energy Trading S.A., Hess Energy Trading Company, LLC, Statoil US Holdings Inc., Shell Trading US Company, BP America, Inc., Vitol, Inc., BP Corporation North America, Inc., Mercuria Energy Trading, Inc., Morgan Stanley Capital Group Inc., Phibro Commodities Ltd., Shell International Trading and Shipping Company Limited ("STASCO"), Statoil ASA ("Statoil"), and Royal Dutch Shell Plc.

producing, refining, and distributing Brent crude, Defendants also purchase and sell Brent crude on the physical market and trade Brent-crude-based futures contracts on global derivatives markets.

A. Brent Crude Physical Market

Brent crude is extracted from the North Sea of Europe, and refers to oil pulled from four fields in the region: Brent, Forties, Oseberg, and Ekofisk (collectively, "BFOE"). The price of Brent crude serves as the benchmark for two-thirds of the world's internationally-traded crude.

Following extraction, Brent crude is delivered via pipeline to ports in Europe where it is loaded onto ships for delivery. These physical cargoes are bought and sold through private, over-the-counter ("OTC") transactions between producers, refiners, and traders. Because these physical transactions are private and do not occur on an open exchange, the price of Brent crude is not immediately available to the public. Instead, price-reporting agencies collect information about transactions from market participants and report it to the consuming public.

B. Platts and the Dated Brent Assessment

Platts is a prominent London-based price-reporting agency that collects information from market participants regarding their physical Brent crude transactions, analyzes that data to compute benchmark prices, and publishes those prices in real-time price reports as well as various end-of-day price assessments. The price reports track several different submarkets in the Brent crude market, but the "primary pricing benchmark"—widely regarded as the "spot" price for Brent crude – is the "Dated Brent Assessment."

The Dated Brent Assessment tracks physical cargoes of North Sea crude oil that have been assigned specific delivery dates. Rather than averaging the prices of the four grades of Brent crude, the Dated Brent Assessment is based on the lowest price among the four grades, and is calculated each day during the assessment period. Platts uses a Market-on-Close ("MOC") methodology, under which Platts tracks all Brent crude trading activity during the day, but weighs most heavily the bids, offers, and transactions that occur at the end of each trading day, from 4:00 to 4:30 P.M. GMT.

Although Platts relies on market participants to voluntarily self-report their private transactions in order to create and publish the Dated Brent Assessment, they do not just mechanically recite the reported trade activity. Instead, Platts exercises its own discretion to accept or reject transactional data, and makes this assessment based on the reliability, accuracy, and consistency of such data. At the end of the day, Platts' goal in publishing the Dated Brent Assessment is to accurately reflect market prices and to avoid distortion or artificiality.[3]

C. Brent Futures Market

Plaintiffs focus their claims on Brent-related futures and derivatives contracts ("Brent Futures"), which are primarily traded on two exchanges: NYMEX and ICE Futures Europe. NYMEX is a U.S.-based commodity futures exchange, while ICE Futures Europe is a London-based exchange. Plaintiffs and other

[3] Indeed, according to its website, Platts "makes every effort to detect anomalous market behaviors and act swiftly to ensure these do not undermine the integrity of its assessments." JA 735.

market participants trade on both exchanges. The most heavily traded Brent Futures contract is the "ICE Brent Futures Contract," which has a corollary contract on the NYMEX. These contracts stop trading, or "expire," approximately two weeks before the delivery month. If a futures contract is not offset before it expires, the contract is cash-settled. In other words, the in-the-money counterparty receives the cash value of the contract rather than the underlying asset itself.

Brent Futures traded on ICE Futures Europe ("ICE Brent Futures") are cash-settled based on an established benchmark known as the ICE Brent Index. Brent Futures traded on the NYMEX, in turn, settle at expiration to the price of ICE Brent Futures. Unlike the Dated Brent Assessment – which Platts calculates based on prices for the least expensive BFOE grade of Brent cargoes – the ICE Brent Index is calculated based on the *entire* BFOE market of physical Brent cargoes. In addition, the ICE Brent Index incorporates an average of certain designated price-reporting assessments, one of which, Plaintiffs allege, is the Dated Brent Assessment.

Beyond this incorporation, Plaintiffs provide several other points of support for their claim of a "direct[] link" between Brent Futures settlement prices and the Dated Brent Assessment. Specifically, they contend that the "ICE Brent Futures Contracts prices rarely deviate from the Dated Brent Assessment by more than 1% at expiration," and that "changes in the Dated Brent Assessment directly impact[] Brent Futures prices."

D. The Alleged Manipulation

Plaintiffs allege that Defendants conspired to manipulate, and did in fact manipulate, the market for physical Brent crude and Brent Futures by executing fraudulent bids, offers, and transactions in the underlying physical Brent crude market over the course of the Class Period. Defendants allegedly conducted these trades during the MOC window and then systematically reported the artificial transactions to Platts with the intention of manipulating the Dated Brent Assessment. According the Plaintiffs, Defendants' aim in doing so was "to benefit their physical Brent and Brent Futures positions," while the consequent manipulation of Brent Futures prices caused Plaintiffs to suffer economic loss because they transacted in Brent Futures during this time.

Plaintiffs' claim involves a causal chain that can be summarized as follows: Defendants engaged in artificial trades of physical Brent crude in foreign markets; Defendants systematically reported the artificial trade data to Platts; Platts reviewed and incorporated the fraudulent data into its calculation of the Dated Brent Assessment; ICE Futures Europe in turn incorporated the manipulated Dated Brent Assessment into the ICE Brent Index; the manipulated ICE Brent Index was used to settle Brent Futures that were traded on both the London-based ICE Futures Europe and the U.S.-based NYMEX; as a result, Brent Futures traded and settled at artificial prices, causing economic loss to traders such as Plaintiffs.

Plaintiffs – as they acknowledge – "do not allege a single overarching conspiracy among all Defendants for the full Class Period," nor do they allege that the physical Brent crude market was monopolized by all

Defendants simultaneously. Moreover, Plaintiffs do not assert that Defendants engaged in any manipulative trading on NYMEX or ICE Futures Europe. Rather, Plaintiffs limit the focus of their claim to Defendants' foreign physical market transactions, arguing that these transactions initiated a chain of events that caused ripple effects across global commodities markets.

B. Procedural History

In 2013, Plaintiffs filed various independent cases against Defendants. Those cases were consolidated and transferred to the Southern District of New York (Carter, *J.*) in October 2013. Defendants filed an Amended Complaint on July 3, 2014, and filed a Second Amended Complaint ("SAC") on February 27, 2015. In the SAC, Plaintiffs asserted claims under (1) Sections 6(c)(1) and 9(a)(2) of the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 9(1)(a), 13(a)(2), including derivative claims for *respondeat superior* and for aiding and abetting, *see* 7 U.S.C. §§ 2(a)(1)(B), 25(a)(1)[4]; (2) Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; and (3) the common law for unjust enrichment. On July 28, 2014, Defendants Statoil and STASCO individually filed motions to dismiss based, respectively, on lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). That same day, all Defendants moved to dismiss all claims made in the SAC pursuant to Federal Rule of Civil Procedure 12(b)(6).

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[4] Section 22 of the CEA, 7 U.S.C. § 25, gives Plaintiffs a private right of action to sue for these violations.

The district court granted Statoil's motion to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, and granted STATSCO's motion to dismiss for lack of personal jurisdiction. Additionally, the district court granted the remaining Defendants' joint motion to dismiss all the claims in the SAC on the grounds that (1) Plaintiffs did not allege antitrust standing on their Sherman Act claims, and (2) their claims under the CEA were impermissibly extraterritorial. Plaintiffs filed a timely notice of appeal.[5]

II. STANDARD OF REVIEW AND JURISDICTION

"We review *de novo* the grant of a motion to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6)." *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009). We have jurisdiction under 28 U.S.C. § 1291.

III. DISCUSSION

The CEA is a "remedial statute that serves the crucial purpose of protecting the innocent individual investor—who may know little about the intricacies and complexities of the commodities market—from being misled or deceived." *Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1329 (11th Cir. 2002). This case implicates two antifraud provisions of the CEA. Section 6(c)(1) of the CEA makes it "unlawful for any person ... to use or employ,

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[5] In this opinion, we only address Plaintiffs' appeal of the dismissal of their CEA claims. We separately address the dismissal of Plaintiffs' Sherman Act claims, as well as the dismissal of Statoil and STASCO on other grounds, in a summary order issued simultaneously with this opinion. Plaintiffs do not appeal the dismissal of their unjust enrichment claim.

... in connection with any swap, or a contract of sale of any commodity, ... any manipulative or deceptive device." 7 U.S.C. § 9(a)(1). Additionally, Section 9(a)(2) proscribes "manipulat[ing] or attempt[ing] to manipulate the price of any commodity in interstate commerce." 7 U.S.C. § 13(a)(2). Plaintiffs seek to enforce these substantive provisions of the CEA through the Act's private right of action, which permits a party to bring suit against a person whose violation of the CEA "result[s] from one or more of the transactions" listed in the statute. *See* 7 U.S.C. § 25(a)(1). At bottom, this case centers on our interpretation of the CEA – specifically, whether it permits suit against Defendants for alleged manipulative conduct that transpired in Europe.

We interpret the CEA in light of the presumption against extraterritoriality, a canon of statutory interpretation that is a "basic premise of our legal system." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016); *see also United States v. Palmer*, 3 Wheat. 610, 631 (1818) (Marshall, C.J.) ("[G]eneral words must ... be limited to cases within the jurisdiction of the state"); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 268 (2012). "Absent clearly expressed congressional intent to the contrary," federal laws must be "construed to have only domestic application." *RJR Nabisco*, 136 S. Ct. at 2100. This reflects the "commonsense notion that Congress generally legislates with domestic concerns in mind," *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993), and acts to "protect against unintended clashes between our laws and those of other nations which could result in international discord," *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

Generally, courts engage in a "two-step framework for analyzing extraterritoriality issues." *RJR Nabisco*, 136 S. Ct. at 2101. First, because there must be an "affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *Arabian Am. Oil*, 499 U.S. at 248), courts look to the text of the statute to discern whether there is a "clear indication of extraterritoriality," *id*. at 265; *see also WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018). If the statute lacks such a "clear statement" of extraterritorial effect, the statute does not apply abroad. *Morrison*, 561 U.S. at 265.

However, a claim may still survive if it properly states a "domestic application" of the statute. *See id*. at 266. As it is "a rare case ... that lacks *all* contact with the territory of the United States," *id.* (emphasis in original), many cases present a mixed bag of both domestic and foreign components. Accordingly, at the second step, courts must evaluate whether the domestic activity pleaded is the "focus of congressional concern." *Id*. In other words, because the presumption against extraterritoriality would be a "craven watchdog indeed" if it "retreated to its kennel whenever *some* domestic activity is involved," *id*. (emphasis in original), courts must evaluate whether the domestic activity involved implicates the "focus" of the statute.

Therefore, we first assess the text of each of the three provisions implicated by this suit – the two substantive regulations, Sections 6(c)(1) and 9(a)(2), and the private right of action, Section 22 – to determine if any of them contains a "clear indication of extraterritoriality." *Morrison*, 561 U.S.A at 265; *see RJR*

Nabisco, 136 S. Ct. at 2106–2111 (evaluating extraterritorial application of RICO's private right of action provision separately from substantive RICO provisions).

A. Affirmative Intention to Apply Extraterritorially

As to whether Congress intended Section 22 to apply to conduct abroad, circuit precedent provides the answer. In *Loginovskaya v. Batratchenko*, we held that since Section 22 of the CEA "is silent as to extraterritorial reach," suits funneled through this private right of action "must be based on transactions occurring in the territory of the United States." 764 F.3d 266, 271, 272 (2d Cir. 2014).[6]

The same is also true of Sections 6(c)(1) and 9(a)(2). Specifically, Section 6(c)(1) proscribes "us[ing] or employ[ing], ... in connection with any swap, or a contract of sale of any commodity, ... any manipulative or deceptive device." 7 U.S.C. § 9. Thus, on its face, Section 6(c)(1) – like Section 22 – "lacks ... a clear statement of extraterritorial effect." *Morrison*, 561 U.S. at 265. Section 9(a)(2), which prohibits "manipulat[ing] or attempt[ing] to manipulate the price of any commodity in interstate commerce," 7 U.S.C. § 13, likewise contains no affirmative, textual indication that it applies to conduct abroad. By contrast, as the Supreme Court noted in *Morrison*, other provisions in the securities laws, such as 15 U.S.C. § 78dd(a), "contain[] what [Sections 6(c)(1) and 9(a)(2)] lack[ ]: a clear

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[6] While the Dodd-Frank Wall Street Reform and Consumer Protection Act amended the CEA to apply extraterritorially to certain swap-related activities, *see* 7 U.S.C.A. § 2(i), that amendment does not affect our analysis here for reasons separately explained below.

statement of extraterritorial effect." *Morrison*, 561 U.S. at 265.

Plaintiffs make a last-ditch effort to establish that extraterritorial application of the CEA is proper by resorting to a separate provision – Section 2(i). Enacted pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), Section 2(i) of the CEA states:

> The provisions of this Act relating to swaps ... shall not apply to activities outside the United States unless those activities – (1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe ... to prevent the evasion of any provision of this Act.

7 U.S.C.A. § 2(i). Unlike Sections 6(c)(1) and 9(a)(2), Section 2(i) contains, on its face, a "clear statement," *Morrison*, 561 U.S. at 265, of extraterritorial application. If there were any lingering doubts about whether Sections 6(c)(1) and 9(a)(2) independently apply extraterritorially, Section 2(i) forecloses those doubts, because it shows that Congress "knows how to give a statute explicit extraterritorial effect ... and how to limit that effect to particular applications" within the CEA. *Morrison*, 561 U.S. at 265 n.8. Therefore, the existence of an enumerated extraterritorial command in Section 2(i) reinforces our conclusion that the lack of any analogous directive in either Section 6(c)(1) or Section 9(a)(2) bars their extraterritorial application here.

As for Plaintiffs' contention that Section 2(i) applies extraterritorially here because there is a "direct and significant connection" to the United States, even

a charitable reading of the docket reveals that Plaintiffs neglected to raise this argument until *after* the district court rendered its final judgment. Indeed, Plaintiffs did not even mention this argument in their opposition to Defendants' motion to dismiss. *See* Doc. No. 148 ("CFTC Amicus Br.") at 4 ("The Commission takes no position on whether or how Section 2(i) may apply here. That was not litigated below ...."). We have found an argument to be waived for purposes of appellate review where a litigant "failed to make any such argument in opposition to the defendants' motion." *Askins v. Doe No. 1*, 727 F.3d 248, 252 (2d Cir. 2013). Hence, Plaintiffs have waived the argument that Section 2(i) sustains claims encompassing "swap-related" Brent transactions. *See Morrison*, 561 U.S. at 254 (reiterating that a question regarding the extraterritorial reach of a federal statute presents a "merits question," not a question of subject-matter jurisdiction).[7]

B. Domestic Application of Sections 22, 6(c)(1), and 9(a)(2)

Plaintiffs urge that even if the relevant provisions of the CEA do not apply extraterritorially, the district court erred because the SAC alleges a proper "domestic application of the statute." *RJR Nabisco*, 136 S. Ct. at 2101 ("If the statute is not extraterritorial, then at

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[7] Even if we considered the applicability of Section 2(i), our conclusion would not change. The most recent acts of the alleged manipulation described by Plaintiffs occurred in September 2012, before Section 2(i) became effective, and the provision is silent as to retroactive application. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

the second step we determine whether the case involves a domestic application of the statute.").

Whether Plaintiffs' claims constitute a satisfactory domestic application of the CEA requires us to discern the "focus of congressional concern" in enacting the statute. *Morrison*, 561 U.S. at 266. To divine the CEA's "focus," we consider the "conduct" that the statute "seeks to regulate," as well as "the parties and interests it seeks to protect or vindicate." *WesternGeco*, 138 S. Ct. at 2137 (quoting *Morrison*, 561 U.S. at 267). Our inquiry is guided by the statute's text, *see Morrison*, 561 U.S. at 266–69, as well as how the "statutory provision at issue works in tandem with other provisions," *WesternGeco*, 138 S. Ct. at 2137.

Importantly, we must discern the "focus" of each provision individually, for even if Plaintiffs satisfactorily pleaded a domestic application for one of the conduct-regulating provisions – i.e., Sections 6(c)(1) and 9(a)(2) – they must also do the same for the CEA's private right of action provision, Section 22. *See Loginovskaya*, 764 F.3d at 272; *see also RJR Nabisco*, 136 S. Ct. at 2106 ("[W]e separately apply the presumption against extraterritoriality to RICO's [private] cause of action."). Because Plaintiffs' suit "must satisfy the threshold requirement of CEA § 22 before reaching the merits of [their] § [6(c)(1) and 9(a)(2)] fraud claim[s]," *Loginovskaya*, 764 F.3d at 272, we start by assessing whether Plaintiffs have pleaded a proper domestic application of Section 22.

1. Section 22

In *Loginovskaya*, we held that the focus of congressional concern in Section 22 is "clearly transactional," given its emphasis on "domestic conduct [and]

domestic transactions." *Id*. Thus, in order for Plaintiffs to state a proper domestic application of Section 22, the suit "must be based on transactions occurring in the territory of the United States." The "domestic transaction test" essentially "decides the territorial reach of [Section] 22."[8] *Id*.

To assess whether Plaintiffs pleaded permissibly domestic transactions under Section 22, typically we would apply a test first announced in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012). However, following the course we have taken in securities cases, *see Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014), we need not decide definitively whether Plaintiffs' transactions satisfy *Absolute Activist*, for (as discussed below) their claims are impermissibly extraterritorial even if the transactions are domestic. Thus, we assume without deciding that Plaintiffs' trades on NYMEX and ICE Futures Europe constituted "domestic transactions" under Section 22.

In *Parkcentral*, investors in equity swaps pegged to the price of Volkswagen stock sued under Section 10(b), alleging that defendants made misleading statements that sought to hide their intentions to take over Volkswagen. 763 F.3d at 201–02. All of defendants' misconduct occurred in Germany, and Volkswagen

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[8] In evaluating whether Plaintiffs' claims fit within the "focus" of Section 22, we must assess the "*conduct relevant* to the statute's focus." *WesternGeco*, 138 S. Ct. at 2137 (emphasis added) (quoting *RJR Nabisco*, 136 S. Ct. at 2101). Defendants do not dispute that the "relevant conduct" under Section 22 is the purchase and sale of Brent Futures. As such, for the purposes of our Section 22 analysis, we take those commodities transactions to be the relevant conduct.

stock only traded on European stock exchanges. *Id*. We assumed without deciding that the equity swaps at issue there were "domestic transactions" under Section 10(b), but nonetheless dismissed the claims because the facts in that case rendered the suit "predominately foreign." *Id*. at 216. The predicate to our conclusion in *Parkcentral* was the maxim that "a domestic transaction or listing is *necessary*" but "not alone sufficient" to state a claim under Section 10(b). *Id*. at 215–16 (emphasis in original). The question this case presents is whether *Parkcentral*'s rule carries over to the CEA. We hold that it does.

For starters, Section 22 creates no freestanding, substantive legal obligations; instead, it requires the "commission of a violation of this chapter." 7 U.S.C. § 25(a)(1); *see* Doc. No. 242 ("Chamber of Commerce *et al*. Amicus Br.") at 20. And as already discussed above, the conduct-regulating provisions of the CEA – particularly those at issue here – apply only to *domestic* conduct, and not to foreign conduct. *See supra* Section III.A. Put differently, while a domestic transaction is necessary to invoke Section 22, it is not *sufficient*, for a plaintiff must also allege a domestic violation of one of the CEA's substantive provisions. So *Parkcentral*'s insight – that a domestic securities transaction is necessary but not sufficient to state a claim under Section 10(b), *see Parkcentral*, 763 F.3d at 214 – is required by the text and structure of Section 22. To hold otherwise would be to divorce the private right afforded in Section 22 from the requirement of a domestic violation of a substantive provision of the CEA. *See WesternGeco*, 138 S. Ct. at 2137 ("If the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions.

Otherwise, it would be impossible to accurately determine whether the application of the statute in the case is a 'domestic application.'" (quoting *RJR Nabisco*, 136 S. Ct. at 2017)); *see also* Chamber of Commerce *et al*. Amicus Br. at 20–21. To state a proper claim under Section 22 in this case, Plaintiffs must allege not only a domestic transaction, but also domestic – not extraterritorial – *conduct* by Defendants that is violative of a substantive provision of the CEA, such as Section 6(c)(1) or Section 9(a)(2). *See WesternGeco*, 138 S. Ct. at 2137–38 (looking to "the type of infringement that occurred" in analyzing whether litigant stated a domestic application of the damages remedy provision of the Patent Act, and concluding that it did because "[t]he conduct in this case that is relevant to th[e] [statute's] focus clearly occurred in the United States").

Besides the structure of the CEA and the language of Section 22, the presumption against extraterritoriality also counsels in favor of extending *Parkcentral*'s holding to the instant case. Permitting a suit to go forward any time a domestic transaction is pleaded would turn the presumption against extraterritoriality into a "craven watchdog," *Morrison*, 561 U.S. at 266, and would fly in the face of the Supreme Court's clear guidance that the presumption against extraterritoriality cannot evaporate any time "*some* domestic activity is involved in the case," *id*. (emphasis in original). As *Morrison* notes, the mere fact that a domestic transaction – i.e., "some" domestic activity – is involved is insufficient to rebut the presumption against extraterritoriality in light of the fact that "[f]oreign conduct is generally the domain of foreign law," *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007).

Parkcentral recognized this very concern, reasoning that "a rule making [Section 10(b)] applicable whenever the plaintiff's suit is predicated on a domestic transaction," regardless of the "foreignness of the facts," would trample on *Morrison* by requiring us to apply the statute to "wholly foreign activity," *Parkcentral*, 763 F.3d at 215. In addition, potential "unintended clashes between our laws and those of other nations ... could result in international discord," *Arabian Am. Oil*, 499 U.S. at 248, if we "adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches," *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013) (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). Given that courts "have looked to the securities laws" when asked "to interpret similar provisions of the CEA," *Loginovskaya*, 764 F.3d at 272, we do not hesitate in applying *Parkcentral*'s gloss on domestic transactions under Section 10(b) to domestic transactions under Section 22 of the CEA. Therefore, while a domestic transaction as defined by *Absolute Activist* is "necessary" to invoke the private remedy afforded by Section 22, it is not "sufficient."

In order to close the gap between "necessary" and "sufficient," Plaintiffs' claims must not be "so predominately foreign as to be impermissibly extraterritorial." *Parkcentral*, 763 F.3d at 216. Here, the facts are remarkably similar to those in *Parkcentral*, and therefore leave little doubt that Plaintiffs' claims are "predominately foreign."

In both cases, plaintiffs traded derivatives – in *Parkcentral*, equity swaps, and here, futures contracts – which, by their nature, are pegged to the value of

another asset. Both underlying assets were foreign: *Parkcentral* involved the price of Volkswagen stock traded on European stock exchanges, and here Plaintiffs' transactions were based on the Dated Brent Assessment, which itself reflects, in part, the value of Brent crude physically traded in Northern Europe. The alleged misconduct in both instances was also entirely foreign. Indeed, *Parkcentral*'s facts are perhaps *less* predominantly foreign than those alleged here, since the misleading statements at issue in *Parkcentral* were "accessible in the United States and were repeated here by the defendants," *Parkcentral*, 763 F.3d at 201, whereas Plaintiffs in this case make no claim that any manipulative oil trading occurred in the United States. Moreover, in *Parkcentral*, the equity swaps traded in the United States were "directly tied to the price of Volkswagen's shares on foreign exchanges." Here, Plaintiffs rely on an even more attenuated "ripple effects" theory whereby (1) the alleged manipulative trading activity taking place in the North Sea (2) affected Brent crude prices – a foreign commodity – which (3) affected a foreign benchmark, the Dated Brent Assessment, which (4) was then disseminated by a foreign price-reporting agency, which (5) was then allegedly used (in part) to price futures contracts traded on exchanges around the world. Nearly every link in Plaintiffs' chain of wrongdoing is entirely foreign – in contrast to *Parkcentral*, where the alleged wrongdoing occurred on American shores at the second causal step, not the fifth. And yet even in *Parkcentral*, we deemed the conduct to be "so predominantly foreign" as to render the claims impermissibly extraterritorial. *Parkcentral*, 763 F.3d at 216. The same conclusion is warranted here. Therefore, we

conclude that Plaintiffs have failed to plead a proper domestic application of Section 22 of the CEA.

2. Sections 6(c)(1) and 9(a)(2)

Although "[Plaintiffs'] suit must satisfy the threshold requirement of CEA Section 22 before reaching the merits of [their] Section [6(c)(1) and 9(a)(2)] fraud claim," *Loginovskaya*, 764 F.3d at 272, Plaintiffs have, in any event, also failed to plead a proper domestic application of either Section 6(c)(1) or 9(a)(2).

Section 6(c)(1), in relevant part, makes it "unlawful for any person, directly or indirectly, to use or employ ... in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance." 7 U.S.C. § 9(a)(1). Plaintiffs urge this Court to ignore the plain text of the statute and suggest that the focus of this Section is the locus of the transaction. Plaintiffs point to *Morrison*, where the Supreme Court held that Section 10(b), which contains similar language, focused "not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Morrison*, 561 U.S. at 266. But the language of Section 6(c)(1) crucially differs from Section 10(b), as the latter prohibits "us[ing] or employ[ing], in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered[,] ... any manipulative or deceptive device," 15 U.S.C. § 78j, while Section 6(c)(1) contains no mention of a "national securities exchange." Thus, there is no great significance in this case to *Morrison*'s determination that Section 10(b) focused specifically on "deceptive conduct 'in connection with the purchase or sale of any

security registered on a national securities exchange or any security not so registered.'" *Morrison*, 561 U.S. at 266 (quoting 15 U.S.C. § 78j). There is nothing in Section 6(c)(1)'s text suggesting that it is focused on "purchases and sales of securities in the United States," *Morrison*, 561 U.S. at 266, and other available evidence in the CEA, such as that statute's statement of purpose, suggests that the focus is on rooting out manipulation and ensuring market integrity – not on the geographical coordinates of the transaction. *See* 7 U.S.C. § 5 ("[I]t is further the purpose of this chapter to deter and prevent price manipulation or any other disruptions to market integrity ... to ensure the financial integrity of all transactions subject to this chapter."); *see also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012) (noting that a statute's enumerated statement of purpose is relevant when interpreting a text). Therefore, we discern that Section 6(c)(1) centers on manipulation in commodities markets. All of the conduct relevant to *that* focus occurred abroad – Defendants are alleged to have manipulated the physical Brent crude market near Europe's North Sea by engaging in fraud there. And if "the relevant conduct occurred in another country, 'then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.'" *WesternGeco*, 138 S. Ct. at 2137 (quoting *RJR Nabisco*, 136 S. Ct. at 2101). As a result, Plaintiffs have failed to plead a proper domestic application of Section 6(c)(1).

Plaintiffs have also failed to plead a domestic application of Section 9(a)(2). That Section proscribes "manipulat[ing] or attempt[ing] to manipulate the price of any commodity in interstate commerce." 7

U.S.C. § 13(a)(2). The focus of Section 9(a)(2) is preventing manipulation of the price of any commodity. And all of the relevant conduct here relating to *that* focus occurred abroad – Plaintiffs contend that Defendants sought to manipulate the price of Brent crude, and did so by fraudulently transacting in the physical market in Europe. Plaintiffs make no allegation of manipulative conduct or statements made in the United States. To the contrary, they expressly rely on a "ripple effect" or chain of events that resembles a falling row of dominoes commencing in the North Sea. Accordingly, Plaintiffs fail to plead a proper domestic application of Section 9(a)(2) as well.[9]

IV. CONCLUSION

We do not lightly dismiss Plaintiffs' troubling allegations against Defendants, which include serious claims premised on manipulation, fraud, and deceit. Nonetheless, "the sole function of the courts is to enforce [the CEA] according to its terms," not to reinvent it. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). The presumption against extraterritoriality reflects the recognition that "[a]ll legislation is prima facie territorial." *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (Holmes, J.). That presumption has not been displaced here, and Plaintiffs have not pleaded a domestic application of the CEA by mere dint of the fact that – after a winding chain of foreign, intervening events – they purchased Brent Futures on exchanges. Were we to hold

[9] Because Plaintiffs have not pleaded a domestic application of either Section 6(c)(1) or 9(a)(2), we need not decide whether *Parkcentral* applies to those sections.

otherwise, the CEA would indeed "rule the world." *Microsoft*, 550 U.S. at 454.

Accordingly, the judgment of the district court is **AFFIRMED.**

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 17-2233

PRIME INTERNATIONAL TRADING, LTD., WHITE OAKS FUND LP, KEVIN MCDONNELL, ANTHONY INSINGA, ROBERT MICHIELS, JOHN DEVIVO, NEIL TAYLOR, AARON SCHINDLER, PORT 22, LLC, ATLANTIC TRADING USA, LLC, AND XAVIER LAURENS,

Plaintiffs-Appellants,

v.

BP P.L.C., TRAFIGURA BEHEER B.V., TRAFIGURA AG, PHIBRO TRADING L.L.C., VITOL S.A., MERCURIA ENERGY TRADING S.A., HESS ENERGY TRADING COMPANY, LLC, STATOIL US HOLDINGS INC., SHELL TRADING US COMPANY, BP AMERICA, INC., VITOL, INC., BP CORPORATION NORTH AMERICA, INC., MERCURIA ENERGY TRADING, INC., MORGAN STANLEY CAPITAL GROUP INC., PHIBRO COMMODITIES LTD., SHELL INTERNATIONAL TRADING AND SHIPPING COMPANY LIMITED, STATOIL ASA, AND ROYAL DUTCH SHELL PLC,

Defendants-Appellees.[+]

[+] The Clerk of Court is respectfully directed to amend the official caption as listed above.

AUGUST 29, 2019

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of August, two thousand nineteen.

PRESENT:

DENNIS JACOBS,
RICHARD J. SULLIVAN,
Circuit Judges

EDWARD R. KORMAN,

District Judge.[*]

*   *   *

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and hereby is **AFFIRMED**.

Plaintiffs-Appellants ("Plaintiffs") appeal from a judgment of the United States District Court for the Southern District of New York (Carter, *J.*,) dismissing (1) Plaintiffs' claims against Defendant-Appellee Shell International Trading and Shipping Company Limited ("STASCO") for lack of personal jurisdiction, (2) Plaintiffs' claims against Defendant-Appellee Statoil ASA ("Statoil") for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), and (3) Plaintiffs' remaining claims against all Defendants-Appellees ("Defendants") for failure to state a claim. In this summary order, we affirm the dismissal of all of Plaintiffs' Sherman Act antitrust claims, as well as the dismissal of Statoil for lack of subject-matter jurisdiction, and STASCO for lack of personal jurisdiction. We affirm the district court's dismissal of Plaintiffs' Commodity Exchange Act claims in a separately filed opinion ("Opinion").

For the purposes of this summary order, we rely on the facts set forth in the Opinion, and repeat only those facts necessary to explain our decision here.

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[*] Judge Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

I. SHERMAN ACT CLAIMS

Plaintiffs allege that Defendants engaged in price fixing, monopolization, and conspiracy to monopolize under the Sherman Act, 15 U.S.C. §§ 1, 2. The district court dismissed Plaintiffs' Sherman Act claims because they failed to plausibly allege antitrust standing. We review dismissal of a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) *de novo*. *See Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009).

Section 4 of the Clayton Act provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a). Section 4 has been construed to "require a showing of antitrust injury." *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016). Antitrust injury is "the type [of injury] the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977). Typically, only "participants in the defendants' market" can show antitrust injury, *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 158 (2d Cir. 2016), but there is a narrow exception for "parties whose injuries are 'inextricably intertwined' with the injuries of market participants," *Am. Ad Mgmt., Inc. v.*

Gen. Tel. Co. of Cal., 190 F.3d 1051, 1057 n.5 (9th Cir. 1999).

As is often the case with antitrust claims, the Court must first determine the "relevant market" for purposes of assessing antitrust injury. *See In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d at 159. As a general matter, the "relevant market" is the market that is "directly restrained" by Defendants' alleged anticompetitive activity. *See id*. at 162. There are two such relevant markets here. First, Plaintiffs allege that Defendants, as producers, refiners, and sellers of Brent crude oil, manipulated the price of physical Brent crude traded in the North Sea so as to increase Defendants' profit margins in their oil businesses. Accordingly, as the parties seem to agree, a "relevant market" for the purposes of this case must be, at a minimum, the physical Brent crude market. *See In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d at 162 (identifying the warehouse storage market as a relevant market because "[a]ll of th[e] conduct took place (if at all) in [that] market"). Second, Plaintiffs also claim that Defendants manipulated the price of Brent crude in order to affect the Dated Brent Assessment, which would in turn boost Defendants' profit on derivatives that were linked to, or otherwise tracked, that assessment. As such, we agree with the district court that a second relevant market is "the market for any derivative instrument that directly incorporates Dated Brent as benchmark or pricing element."

Plaintiffs do not suggest that they participated in the physical market for Brent crude oil. Accordingly, the question before the Court is whether Plaintiffs participated in the market for derivative instruments directly pegged to the Dated Brent Assessment. *See In*

re Aluminum Warehousing Antitrust Litig., 833 F.3d at 162. Plaintiffs have not made this showing. As an initial matter, Plaintiffs acknowledge that the operative pricing benchmark for Brent futures and derivative products is the ICE Brent Index, not the Dated Brent Assessment. And Plaintiffs further concede that the Dated Brent Assessment is not "express[ly] incorporat[ed]" into the ICE Brent Index. Instead, Plaintiffs rest their theory of incorporation on the fact that the Dated Brent Assessment "closely correlates" with the ICE Brent Index. But Plaintiffs could not have suffered an antitrust injury if they dealt in products that were not linked to the benchmark they complain of, for they would not be a "participant in the very market that is directly restrained." *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d at 161. Their efforts to re-write their complaint – in order to show that the ICE Brent Index directly incorporates the Dated Brent Assessment – does not save their claim. While Plaintiffs state in their complaint, for example, that a "critical component of the Brent Index is the Platts price," J. App'x 1980, there is no allegation that the "Platts price" and "Dated Brent Assessment" are synonymous – indeed, Platts publishes price reports across a variety of energy submarkets. As to the few products that Plaintiffs say directly incorporate the Dated Brent Assessment, such as the NYMEX Brent CFD, Plaintiffs make no specific allegations that they bought or sold these particular contracts. And a pleading that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" does not suffice. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, we affirm the district court's dismissal of Plaintiffs' Sherman Act claims on the ground that they have

not adequately pleaded an antitrust injury in the markets that Defendants allegedly directly restrained.

II. STATOIL AND THE FSIA

The district court concluded that it lacked subject-matter jurisdiction over Plaintiffs' claims against Statoil – an oil and gas company primarily owned by the Kingdom of Norway – because Plaintiffs failed to demonstrate that Statoil was subject to the commercial-activity exception under the FSIA. We review dismissal for lack of subject-matter jurisdiction under the FSIA *de novo*. *See Robinson v. Government of Malaysia*, 269 F.3d 133, 138 (2d Cir. 2001).

"The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court," *Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 175 (2d Cir. 2010), and, as such, a "foreign state is immune from federal court jurisdiction unless a specific exception to the FSIA applies," *id*. The FSIA's commercial-activity exception abrogates foreign sovereign immunity where:

> [T]he action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605. Because the Kingdom of Norway owns two-thirds of Statoil, Statoil is an "instrumentality of a foreign state" and thus subject to the FSIA. *See* 28 U.S.C. § 1603(b)(2). The district court determined

that the relevant "commercial activity" for purposes of evaluating this FSIA exception is the "allegedly manipulative transactions and reporting that allegedly gave rise to manipulation on NYMEX and ICE."

We agree with the district court that the manipulative trading and price reporting that occurred overseas is the applicable "commercial activity" here, because such activity is the "'but for' cause of the judgments that are the ground of this suit." *Kensington*, 505 F.3d at 155. In other words, because the overseas manipulation "serves as the basis for [P]laintiffs' claims," *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006), that manipulation serves as the commercial activity under the FSIA.

And we further agree with the district court that Statoil's activities overseas do not satisfy the FSIA's commercial-activity exception. To qualify as a "direct effect in the United States," the effect "[must] follow[] 'as an immediate consequence of the defendant's activity.'" *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (internal alterations omitted). We have described "immediate" to mean that there was no "intervening element" between the "foreign state's commercial activity and the effect." *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 74 (2d Cir. 2010).

There is plainly no "direct effect" here. The "ripple effects" that Plaintiffs complain of occurred "at the end of a long chain of causation." *Virtual Countries, Inc. v. Republic of S. Africa*, 300 F.3d 230, 237 (2d Cir. 2002). Statoil allegedly helped to manipulate the price of Brent crude in Europe, which was then reported to agencies such as Platts, whose price reports were then folded into the Dated Brent Assessment, which assessment was then indirectly incorporated into a

benchmark index – the ICE Brent Index – which was then used to price derivative and futures contract across the globe – contracts that Plaintiffs traded in. Even aside from the "long chain" of causal inferences, Statoil's "commercial activity" in Europe's North Sea was "mediated by numerous actions by third parties." *Virtual Countries, Inc.*, 300 F.3d at 237. Indeed, it was both an attenuated causal link, as well as the presence of independent intervening actors, that doomed plaintiffs' claims in *Virtual Countries, Inc.*, where the principal claim was that a press release issued by the Republic of South Africa discouraged third-parties from doing business in the United States. And like *Virtual Countries*, there are several layers of actors that "intervened between" Statoil's foreign, commercial activity and any direct effects in the United States. That is, there were other traders in the physical Brent crude market; there was Platts, which created and then disseminated price reports; and there were the exchanges themselves, which contained multitudes of other traders and settled contracts differently. Accordingly, "[t]his tangled causal web does not provide the requisite immediacy to establish jurisdiction," *id.* at 238, and we affirm the district court's dismissal of Statoil for lack of subject-matter jurisdiction.

III. PERSONAL JURISDICTION AND STASCO

Finally, the district court dismissed Plaintiffs' claims against STASCO because it lacked personal jurisdiction over that entity. In order to establish specific, personal jurisdiction, Plaintiffs must demonstrate that their claims against STASCO "arise out of or relate to [STASCO's] contacts" with the United

States.[1] *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923–24 (2011).

STASCO is a limited company incorporated under the laws of England and headquartered in London. Plaintiffs allegations against STASCO are limited to their "manipulative physical trades in Brent crude oil" in Europe. Plaintiffs make no allegations that STASCO manipulated markets in the United States or conducted any physical Brent trades in the United States – indeed, "no part of [STASCO's] course of conduct" occurred in the United States. *Walden v. Fiore*, 571 U.S. 277, 288 (2014). Plaintiffs suggest that STASCO "aimed" the effects of its European trading activities at the United States. *Calder v. Jones*, 465 U.S. 783, 789 (1984). But Plaintiffs do not allege anything more than STASCO's "mere knowledge that United States citizens might be wronged," which is plainly insufficient to confer specific, personal jurisdiction. *Waldman*, 835 F.3d at 338. And the idea that STASCO sought *benefits* in the United States from their conduct abroad does not permit specific, personal jurisdiction either, because it is the "suit-related conduct" that is crucial – in other words, "the conduct that could have subjected them to liability." *Id*. at 335. All of *that* conduct occurred abroad. Accordingly, we affirm the district court's dismissal of STASCO.

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[1] We assume without deciding that the "minimum contacts" inquiry here surveys STASCO's contacts with the United States as a whole, as opposed to contacts with a particular state. *See Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 329 (2d Cir. 2016). In any event, since Plaintiffs fail to demonstrate a critical mass of minimal contacts between STASCO and the United States, dismissal would be warranted even if we were to apply the narrower forum analysis.

IV. Conclusion

For the foregoing reasons, and for the reasons stated in the Opinion, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

s/________________

Catherine O'Hagan Wolfe, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 13-md-02475 (1:13-cv-08240-ALC)

In re: NORTH SEA BRENT CRUDE OIL FUTURES LITIGATION

This document applies to: ALL CASES

JUNE 8, 2017

OPINION AND ORDER ON MOTIONS TO DISMISS

ANDREW L. CARTER, JR., United States District Judge:

A putative class of futures and derivatives traders ("Trader Plaintiffs") and a putative class of the owners of landholding and lease-holding interests in United States oil-producing property ("Landowner Plaintiff," together with Trader Plaintiffs, "Plaintiffs") have asserted claims against a number of Brent crude oil producers, traders, and their selected affiliates. Plaintiffs allege that Defendants conspired to intentionally manipulate Brent crude oil prices and the prices of Brent crude oil futures and derivatives contracts traded on the New York Mercantile Exchange ("NYMEX") and the Intercontinental Exchange ("ICE Futures

Europe") in violation of the Commodity Exchange Act, the Sherman Act, and the laws of various states. Defendants have moved to dismiss both Complaints on a number of theories. For the reasons, and to the extent set forth below, Defendants' motions are granted and the Complaints are dismissed.

BACKGROUND

I. Factual Background

The following facts are taken from the allegations in Plaintiffs' Second Amended Complaints, which are presumed to be true for purposes of this motion to dismiss.

Plaintiffs allege that the Defendants, who are producers, refiners, and traders of Brent crude oil, or entities affiliated with these producers, refiners, and traders, "monopolized the Brent Crude Oil market and entered into unlawful combinations, agreements, and conspiracies to fix and restrain trade in, and intentionally manipulate Brent Crude Oil prices and the prices of Brent Crude Oil futures and derivatives contracts." ECF No. 308 (Traders' Second Amended Complaint ("Trader SAC")), at ¶ 2; *see also* Landowner ECF No. 96 (Landowner's Second Amended Complaint ("Landowner SAC")), at ¶ 3.[1]

The Trader Plaintiffs are United States individuals and entities who trade Brent futures and derivatives contracts on NYMEX and ICE Futures Europe. Trader SAC ¶¶ 24-34. The Landowner Plaintiff is a Louisiana resident who is a "landowner and/or leaseholder" of oil producing lands, as well as the owner of

[1] Unless otherwise noted, all references to "ECF" are to the electronic docket for Case No. 13-md-2475.

multiple royalty and working interests in oil leases in the State of Louisiana. Landowner SAC ¶ 10.

A. Brent Crude Oil

Brent crude oil is a variety of light, sweet crude oil pulled from the North Sea region of Europe. Trader SAC ¶ 4; Landowner SAC ¶ 30. Although Brent is one of the four fields from which crude oil is pulled in the North Sea (the others are Forties, Oseberg, and Ekofisk), reference to "Brent crude oil" encompasses oil from all four fields. Trader SAC ¶¶ 55, 76; Landowner SAC ¶ 30. Brent crude oil serves as a benchmark for two-thirds of the world's internationally-traded crude oil supplies. Trader SAC ¶ 4; Landowner SAC ¶ 30.

The Brent crude oil benchmarking function is facilitated by a number of price reporting agencies, including Platts, a London-based division of the New York-based McGraw Hill Financial. Trader SAC ¶ 4; Landowner SAC ¶ 64. The Brent crude oil physical market consists primarily of private ("over-the-counter") trades in cargoes of crude oil in the North Sea. Trader SAC ¶ 85; Landowner SAC ¶ 67. Because the trades are based on over-the-counter contracts, oil prices are not directly visible to the public; instead, Platts and other price-reporting agencies collect information on transactions from market participants and report them. *Id.*

Platts reports prices for a variety of submarkets in the Brent crude oil market, but the "primary benchmark" for Brent crude oil is "Dated Brent," physical cargoes of crude oil in the North Sea that have been assigned specific delivery dates. Trader SAC ¶¶ 88-89; Landowner SAC ¶¶ 69-70. To assess pricing for Dated

Brent, Platts uses the so-called Market-On-Close ("MOC") methodology. Trader SAC ¶ 92; Landowner SAC ¶ 74. This methodology limits the analysis of market-pricing data to transactions that occur during a half-hour window at the end of the trading day (4:00 p.m. to 4:30 p.m. London time). *Id.* Platts collects information regarding trades in, and bids and offers for, contracts for crude oil from the Brent, Forties, Oseberg, and Ekofisk ("BFOE") fields during this period, known as the MOC window. Trader SAC ¶¶ 95-96; Landowner SAC ¶¶ 77-78. It then "carefully analyses transactional data to determine its fitness for an assessment of market value ... appl[ying] judgment to the data it gathers" before publishing it. Trader SAC ¶ 99; Landowner SAC ¶ 82. In applying its independent judgment, Platts has, on occasion, declined to consider transactions reported to it by certain Defendants as not reflective of the market or otherwise anomalous. *See, e.g.*, Trader SAC ¶¶ 267,285, 325-26.

B. Brent Crude Oil Futures and Derivatives

Plaintiffs contend that Platts' and other price-reporting agencies' pricing assessments "are directly linked" to Brent crude oil futures and other derivative contract prices. Trader SAC ¶ 127; Landowner SAC ¶ 143. As a result, manipulation of Platts' Dated Brent assessment "has effects that ripple throughout the Brent Crude Oil and futures market." Trader SAC ¶ 126; Landowner SAC ¶ 142.

Plaintiffs focus specifically on futures and derivatives trading on NYMEX and ICE Futures Europe. Trader SAC ¶ 2; Landowner SAC ¶ 3. ICE Futures Europe is an electronic derivatives exchange headquartered in London that also conducts business out of offices in the United States. Trader SAC ¶ 141;

Landowner SAC ¶ 156. Trades on ICE Futures Europe are placed through member entities and are cleared through ICE Clear Europe, an entity wholly-owned by the same entity that owns ICE Futures Europe. Trader SAC ¶¶ 150-63; Landowner SAC ¶ 157. As the name implies, ICE Futures Europe is not a CFTC-designated contract market, but, since 1999, U.S. traders have been permitted to trade there due to a no-action letter the exchange received from the CFTC. Trader SAC ¶¶ 143-44; Landowner SAC ¶¶ 158-59. NYMEX is a U.S.-based physical commodity futures exchange. Trader SAC ¶ 133; Landowner SAC ¶ 148.

A variety of Brent crude oil futures and derivatives contracts trade on NYMEX and ICE Futures Europe. Trader SAC ¶¶ 136, 175-223; Landowner SAC ¶ 151. The Brent futures contracts on NYMEX settle to the price of ICE Brent futures, which, in tum, have a settlement price based on the ICE Brent Index. Trader SAC ¶ 123, 128, 179; Landowner SAC ¶ 139, 144. ICE calculates its Brent Index as an average of (1) the weighted average of the 25-day BFOE market for cargoes due for delivery one month out (that is, forward contracts); (2) the weighted average of the 25-day BFOE market for cargoes due for delivery two months out plus a straight average of the spread between the first and second month cargo trades; and (3) an average of certain designated published assessments. Trader SAC ¶¶ 128 n.3, 179. While Platts may be one of the sources for ICE Futures Europe's published assessments, Platts' Dated Brent assessment, a spot price, is not one of those considered. *Id.* Nevertheless, Plaintiffs allege a correlation of 85% or more between Platts' Dated Brent assessment and ICE Brent crude

oil futures prices. Trader SAC ¶ 129; Landowner SAC ¶ 146.

While Dated Brent does not factor into the ICE Brent Index, Platts' Dated Brent assessment is incorporated as a pricing element for a limited number of derivatives contracts traded on NYMEX and ICE Futures Europe. Trader SAC ¶¶ 136, 205-11. For instance, the Brent CFD (contract for difference) traded on NYMEX is a short-term swap agreement that represents the difference between Dated Brent and a forward month BFOE cash contract. *Id.* ¶ 136. Similarly, ICE Futures Europe offers a variety of dated-to-frontline contracts which capture the difference between Dated Brent and short-term ICE futures contracts. *Id.* ¶¶ 205-10.

C. U.S. Crude Oil

The United States produces a variety of crude oils. Like Brent crude oil, West Texas Intermediate ("WTI") and Light Louisiana Sweet ("LLS") are light, sweet crude oils. Trader SAC ¶ 79; Landowner SAC ¶¶ 28-29, 33-39. WTI and Brent are the two major benchmarks for the world's oil prices. Landowner SAC ¶ 29. The crude oil produced and sold in the United States in which the Landowner Plaintiff has an interest is priced to WTI. *Id.* ¶ 62. Although WTI and LLS are crude oil benchmarks distinct from Brent, the Landowner Plaintiff alleges that there is a close correlation between the prices of these three light, sweet crude oil varieties. *Id.* ¶¶ 40-41. With respect to WTI, specifically, the Landowner Plaintiff contends that the correlation is, in fact, causation, with Brent crude oil influencing the price of WTI crude, not vice versa. *Id.* ¶ 41-51. The Landowner Plaintiff does not contemplate the

possibility of an independent factor affecting the price for both WTI and Brent crude oil in the same manner.

D. Alleged Manipulations

Plaintiffs allege that Defendants conspired to manipulate the Brent crude oil market, including the market for Brent futures and derivatives contracts, by engaging in manipulative conduct and fraudulent physical trades and then deliberately and systematically submitting information about those trades to Platts during the MOC window. Trader SAC ¶ 224; Landowner SAC ¶ 90. Plaintiffs do not allege that any of the Defendants engaged in manipulative trading on NYMEX or ICE Futures Europe; rather, they allege that the manipulation of Platts' Dated Brent assessment, through manipulative physical trades and reporting, "has effects that ripple throughout the Brent Crude Oil and futures market, impacting a wide variety of derivative and futures contracts on NYMEX and ICE." Trader SAC ¶ 126; Landowner SAC ¶ 142.

Plaintiffs describe in great detail a number of specific transactions and transaction chains occurring between June 2010 and September 2012 alleged to be manipulative. Trader SAC ¶¶ 251-419; Landowner SAC ¶¶ 96-136. For purposes of these motions to dismiss, however, it suffices to say that, generally speaking, Defendants allegedly "selectively reported bids, offers, 'spoof orders and transactions with aberrant pricing" and engaged in "prohibited wash sale transactions" during the MOC window. Trader SAC ¶ 8; Landowner SAC ¶ 92. Plaintiffs explain that much of the conduct identified does not make economic sense for the Defendants participating in the transactions and can only be explained as part of a conspiracy to drive the price of Brent crude oil in a particular

direction. See, e.g., Trader SAC ¶¶ 380-81, 397; Landowner SAC ¶¶ 130, 133.

By way of example, both the Trader Plaintiffs and the Landowner Plaintiff identify two transactions involving Phibro Commodities in September 2012. Trader SAC ¶¶ 395-97; Landowner SAC ¶¶ 129-30. On September 17, 2012, Phibro Commodities purchased a Forties cargo from BP at a $0.05 premium, allegedly creating upward pressure on Forties prices. Then, the following day, Phibro Commodities offered for sale that same Forties cargo at a price $0.30 per barrel lower. *Id.* Plaintiffs allege that Phibro Commodities intended this artificially low offer, effectively a spoof offer,[2] to signal to the market that the price was heading lower, and that this offer was part of a scheme with other Defendants, including Shell International Trading and Shipping Company Limited, Trafigura, and Vitol, to move the price of Dated Brent downward at the end of September. Trader SAC ¶ 369; Landowner SAC ¶ 135.

II. Procedural History

After the various cases in this litigation were centralized and transferred to this Court in October 2013, ECF No. 1, the Trader Plaintiffs filed an Amended Complaint on July 3, 2014. ECF No. 166. The Landowner Plaintiff, proceeding in a related case, filed an Amended Complaint on April 28, 2014. Landowner

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[2] "Spoofing" involves bidding on, or offering for sale, a particular cargo with the intent to cancel the bid or offer prior to executing the trade. Trader SAC ¶ 70; Landowner SAC ¶ 236.

ECF No. 40.[3] Thereafter, all Defendants jointly filed three motions to dismiss: (1) a motion to dismiss the Trader Complaint (ECF Nos. 204 (Motion), 211, ("Defs.' Trader Memo."), 212 (Declaration of Daryl A. Libow)); (2) a motion to dismiss the Landowner Complaint (ECF Nos. 218 (Motion), 219 ("Defs.' Landowner Memo.")); and (3) a motion to dismiss both the Trader Complaint and the Landowner Complaint on the grounds that they exceeded the extraterritorial reach of United States law (ECF Nos. 200 (Motion), 201 ("Defs.' Extraterritoriality Memo."), 202 (Declaration of Douglas F. Curtis)).[4] Defendants also individually filed supplemental motions to dismiss advancing arguments specific to them, which are not addressed in this opinion.

Plaintiffs opposed the motions, although, with respect Defendants' extraterritoriality arguments, the Landowner Plaintiff merely incorporated by reference the Trader Plaintiffs' arguments. ECF Nos. 243 ("Trader Extraterritoriality Memo"), 252 ("Landowner Omnibus Memo."), 253 ("Trader Memo."). Defendants submitted reply briefs, and the Court considers the

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[3] Following stipulations by all parties, the Trader Plaintiffs filed a Second Amended Complaint on February 27, 2015, ECF No. 308 ("Trader SAC"), and the Landowner Plaintiff filed a Second Amended Complaint on April 30, 2015, Landowner ECF No. 96 ("Landowner SAC"). The Second Amended Complaints substituted certain defendants but did not affect any of the substantive claims.

[4] Defendants BP America Inc., BP Corporation North America Inc., Mercuria Energy Trading Inc., Shell Trading US Company, Trafigura Beheer B.V., Vitol S.A., and Vitol Inc. did not join in either of the motions to dismiss the Landowner Plaintiff's Complaint. *See* Defs.' Extraterritorial Memo. at n.2; Defs.' Memo. at n. l.

motions fully submitted. ECF Nos. 285 ("Defs.' Landowner Reply"), 286 ("Defs.' Extraterritoriality Reply"), 288 ("Defs.' Trader Reply").

LEGAL STANDARD

To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "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.* (citing *Twombly*, 550 U.S. at 556). The plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully," and accordingly, where the plaintiff alleges facts that are "'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

In considering a motion to dismiss, the court accepts as true all factual allegations in the complaint and draws all reasonable inferences in the plaintiff's favor. *See Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008). However, the court need not credit "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Instead, the complaint must provide factual allegations sufficient "to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) (citing *Twombly,* 550 U.S.

at 555). The court "may consider the facts as asserted within the four comers of the complaint together with the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (citation and internal quotation marks omitted).

DISCUSSION

I. The Trader Plaintiffs' Commodity Exchange Act Claims

Defendants argue that the Trader Plaintiffs' Commodity Exchange Act ("CEA") claims should be dismissed because application of the CEA to the facts alleged exceeds the territorial limitations of the statute. Because the Court agrees with Defendants that the Trader Plaintiffs' CEA claims are impermissibly extraterritorial, the Court need not reach Defendants' other arguments regarding further deficiencies in the Trader Plaintiffs' CEA claims.

A. Applicable Law

In *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), the Supreme Court articulated a new test for determining when a U.S. statute appropriately may be applied extraterritorially. In formulating this test, the Court relied on the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." 561 U.S. at 255 (citation and internal quotation marks omitted). Accordingly, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* To determine whether there is any indication of extraterritorial application, courts apply a two-

step process. First, a court must consider whether the relevant statute contains a clear statement of Congress' intent to overcome the presumption against extraterritoriality. *Id.* at 265-66. Second, recognizing that "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States," the Supreme Court advised lower courts to examine whether the focus of congressional concern in the particular statute suggests that extraterritorial application is appropriate. *Id.* at 266.

Applying that test to the facts at issue in *Morrison-fraud* based on securities traded on an Australian exchange-the Court found that § 1 0(b) of the Securities Exchange Act did not contain any congressional expression of extraterritorial effect. *Id.* at 262. The Court then examined the focus of the Exchange Act, which it found to be on securities purchase-and-sale transactions. *Id.* at 266-67. Accordingly, the Court held that the Exchange Act only reaches claims involving (1) "transactions in securities listed on domestic exchanges," or (2) "domestic transactions in other securities." *Id.* at 267.

In *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012), the Court of Appeals for the Second Circuit had occasion to analyze the second prong of the *Morrison* transactional test. As further clarified by this Circuit, a transaction that does not involve a security listed on a domestic exchange will be considered domestic in one of two circumstances: (1) "irrevocable liability" was incurred in the United States; or (2) "title was transferred within the United States." 677 F.3d at 68.

Two years later, the Court of Appeals again revisited *Morrison*'s application to an Exchange Act claim.

See Parkcentral Global Hub Ltd. v. Porsche Auto Holdings SE, 763 F.3d 198 (2d Cir. 2014). In that case, the court was presented with the question of whether, "under *Morrison*, a domestic transaction in a security (or a transaction in a domestically listed security)—in addition to being a *necessary* element of a domestic § 10(b) claim-is also *sufficient* to make a particular invocation of § 10(b) appropriately domestic." 763 F.3d at 214. The court assumed for purposes of the decision that the transactions at issue were domestic, and held that "a domestic transaction is necessary but not necessarily sufficient to make § 10(b) applicable." *Id.* at 216. The transactions at issue were securities-based swap agreements tied to the price of a foreign company's shares on a foreign exchange, and the court held that the Exchange Act could not reach defendants who allegedly made fraudulent statements abroad that impacted the foreign company's share price. To hold otherwise would subject those defendants to the potentially incompatible securities regimes of the United States and the countries in which the shares actually traded. *Id.*

After *Morrison*, district courts applied its transactional framework to cases involving the CEA as well. *See, e.g.*, *Loginovskaya v. Batratcheno*, 936 F. Supp. 2d 357 (S.D.N.Y. 2013); *Starshinova v. Batratchenko*, 931 F. Supp. 2d 478, 485-87 (S.D.N.Y. 2013). The Court of Appeals explicitly adopted *Morrison*'s framework for cases challenging the extraterritorial reach of the CEA in *Loginovskaya v. Batratcheno*, 764 F.3d 266 (2d Cir. 2014). Following *Morrison*, the court first determined that the CEA lacked any express statements regarding extraterritorial application. 764 F.3d at 271-72. Moving to the second step of the inquiry, the court

explained that, like § 10(b) of the Exchange Act, the relevant provision of the CEA has a "clearly transactional" focus. 764 F.3d at 272. In reaching its conclusion about the focus of congressional concern, the court looked at § 22, which gives plaintiffs a private right of action for violations of the CEA "only when a plaintiff shows that one of the four transactions listed in § 22 occurred within the United States." *Id.*

Given the transactional focus of § 22, the court also relied on *Morrison*'s description of the two ways in which a transaction might be considered to have occurred domestically. The transaction at issue in *Loginovskaya* did not involve a domestic commodities exchange, and so the court looked to *Absolute Activist* for its clarification of the second prong of *Morrison's* transactional test. *Id.* at 273-74. Accordingly, now both the framework laid out in *Morrison* and its test for domestic transactions, as amplified by the Court of Appeals in *Absolute Activist*, apply in private actions brought for violations of the CEA.

B. The Trader Plaintiffs' Commodity Exchange Act Claims Are Impermissibly Extraterritorial

Under the *Morrison* framework, the Court first must determine whether the relevant provisions of the CEA contain a clear statement of congressional intent to overcome the presumption against extraterritoriality. The CEA does not contain any statements suggesting that Congress intended the reach of the law to extend to foreign conduct. The Trader Plaintiffs have asserted claims under sections 6(c)(1) and 9(a) of the CEA, 7 U.S.C. §§ 9, 13(a)(2), as well as derivative claims for *respondeat superior* and aiding and abetting violations of the CEA. Trader SAC ¶¶ 531-68. Section

22 of the CEA, 7 U.S.C. § 25, gives the Trader Plaintiffs a private right of action to sue for these alleged violations. Examining § 6(c)(1) first, it prohibits the use of manipulative or deceptive devices "in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity." 7 U.S.C. § 9(1). Section 9(a) similarly provides that it is a crime to, among other things, "manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or of any swap...." 7 U.S.C. § 13(a)(2). Finally, section 22 provides a private right of action to plaintiffs who engaged in one of four commodities-based transactions. 7 U.S.C. § 25(a)(1). Each of these provisions is silent as to any extraterritorial application and the Trader Plaintiffs do not argue otherwise.

Having determined that the relevant portions of the CEA apply only domestically on their face, the Court next considers the "focus of congressional concern." Consistent with *Loginovskaya*, the Court starts with the purpose of § 22, giving a plaintiff the right to sue, which is "clearly transactional." 764 F.3d at 272. It is not necessary, and perhaps not appropriate, to evaluate the focus of the substantive provisions because, as the Court of Appeals noted, it is "not remarkable" that suits by private plaintiffs may be more limited in scope than actions by the CFTC. *Id.* at 273. A commodities transaction will be considered domestic if (1) the transaction occurred on a domestic exchange; or (2) the transaction itself is domestic. *Morrison*, 561 U.S. at 267. Here, the parties have a fundamental disagreement as to which "transactions" the Court must

consider under *Morrison* and *Loginovskaya.* The Trader Plaintiffs contend that it is their commodities transactions on NYMEX and ICE Futures Europe, *see* Trader Extraterritoriality Memo. at 5-13, while Defendants assert that the relevant transactions are those alleged to be manipulative-that is, their physical crude oil transactions in the North Sea and European loading ports, Defs.' Extraterritoriality Memo. at 13.

The overarching purpose of the CEA could be read to apply to either parties' definition of the relevant transaction. *See* 7 U.S.C. § 5 ("It is the purpose of this chapter to serve the public interests ... through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission."). However, as the Court of Appeals noted in *Loginovskaya*, the statute only provides a private right of action to plaintiffs who were part of "one of the four transactions listed in § 22," thereby directing the focus on the commodities transaction rather than the conduct that allegedly gives rise to a violation. 764 F .3d at 272. Further, in *Morrison*, the Court found that the Exchange Act, was focused "not upon the place where the deception originated, but upon purchases and sales of securities." 561 U.S. at 266. Given the noted similarity between the Exchange Act and the CEA, the better argument is that the commodities transaction giving rise to the private right of action is the relevant transaction for purposes of *Morrison*'s test. Therefore, the Court is inclined to agree with the Trader Plaintiffs on this point. However, for the reasons discussed

further below, the Court need not decide this question to resolve the present motion.[5]

Assuming that the relevant transactions are those occurring on domestic exchanges within the meaning of *Morrison*, the Court of Appeals' recent decision in

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[5] Assuming that the relevant transactions are those occurring on the commodities exchanges, no one disputes that NYMEX is a "domestic exchange" within the meaning of *Morrison.* The parties disagree, however, on the status of ICE Futures Europe. The Trader Plaintiffs argue that ICE Futures Europe is a *"de facto* domestic exchange." Trader Extraterritoriality Memo. 6-9. They also argue that activity on ICE Futures Europe constitutes domestic transactions, as further defined by *Absolute Activist*, on the basis of the domestic location of ICE Futures Europe's servers, where buy and sell orders are matched. *Id.* at 9-12 (citing Trader SAC ¶¶ 159-60). With respect to the first argument, Defendants assert that ICE Futures Europe is not a registered exchange to which the CEA antimanipulation rules apply. Defs.' Extraterritoriality Reply at 7. Defendants also contend that transactions on ICE Futures Europe are not domestic transactions because the two formulations the Court of Appeals provided in *Absolute Activist* apply only to "off exchange" transactions. *Id.* at 8. Although the facts of *Absolute Activist* arose in the context of a private investment transaction, nothing in that decision suggests that its holding is limited to such transactions. Rather, the decision provides a framework for determining when "the purchase or sale of a security that is not listed on a domestic exchange should be considered 'domestic' within the meaning of *Morrison."* 677 F.3d at 66-67. Accordingly, its guidance is applicable to any transaction not on a domestic exchange, whether because the transaction is a private one or because the exchange on which the transaction occurred is not a domestic one. *See, e.g.*, *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 181 (2d Cir. 2014) (applying *Absolute Activist* test to securities traded on foreign exchange); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13-cv-07789 (LGS), 2016 WL 5108131, at *26-27 (S.D.N.Y. Sept. 20, 2016) (same, in CEA claim) ("*FOREX*").

Parkcentral suggests that dismissal nevertheless is warranted on the facts presented. In *Parkcentral*, the Court of Appeals held that, "while *[Morrison]* unmistakably made a domestic securities transaction (or transaction in a domestically listed security) *necessary* to a properly domestic invocation of § 10(b), such a transaction is not alone *sufficient* to state a properly domestic claim under the statute." 763 F.3d at 215 (emphasis added). As a result, the court rejected plaintiffs' claims against foreign defendants who allegedly made misrepresentations that impacted the price of shares listed on a foreign exchange merely because plaintiffs may have domestically traded derivatives pegged to the price of the foreign-listed shares. Notwithstanding the alleged domestic transactions, the claims were "so predominantly foreign," that to apply § 10(b) to the facts of the case "would seriously undermine *Morrison's* insistence that § 10(b) has no extraterritorial application." *Id.* at 215-16.

While *Parkcentral* involved § 10(b) of the Exchange Act, the logic underlying the decision in *Parkcentral* is equally persuasive here in light of the parallels between § 10(b) and § 22 of the CEA. *See Loginovskaya*, 764 F.3d at 274. Here, while the Trader Plaintiffs may have purchased or sold Brent futures and derivatives on domestic exchanges or otherwise entered into domestic commodities transactions, the crux of their complaints against Defendants does not touch the United States. The Trader Plaintiffs' claims are based on Defendants' allegedly manipulative and misleading reporting to Platts in London about physical Brent crude oil transactions conducted entirely outside of the United States that indirectly affected

the price of Brent futures and derivatives contracts traded on exchanges.

The Court of Appeals in *Parkcentral* cautioned that its holding "depends in some part on the particular character of the unusual security at issue" there, but the connection between Defendants' conduct and the Trader Plaintiffs' alleged harm is as attenuated as in *Parkcentral*, if not more so. 763 F.3d at 202. In *Parkcentral*, the plaintiffs traded securities-based swap agreements directly tied to the price of Volkswagen's shares on foreign exchanges. *See id.* at 205-07. Porsche's alleged misrepresentations regarding its intentions with respect to a potential acquisition of Volkswagen impacted the company's share prices, which in tum directly affected the swap agreements. By contrast, here, most of the futures and derivatives contracts available on NYMEX and ICE Futures Europe are not priced by reference to the Dated Brent assessment published by Platts (which allegedly was inaccurate by virtue of Defendants' manipulative reporting), but instead to derivations of the ICE Brent Index, which does not incorporate the Dated Brent assessment. Trader SAC ¶¶ 123, 128 n.3, 179. The extension of U.S. commodity rules and regulations to Defendants' conduct raises the same concern motivating *Parkcentral* and *Morrison* that individuals and entities will be subject to multiple, and potentially incompatible, laws in the absence of clear congressional intent to do so. *Parkcentral*, 763 F.3d at 215 (discussing *Morrison*, 561 U.S. at 269). Accordingly, the Trader Plaintiffs have failed to state a claim under the CEA, and their first four causes of action are dismissed.

II. Plaintiffs' Sherman Act Claims

Defendants also argue that both the Trader Plaintiffs' and the Landowner Plaintiffs Sherman Act claims are impermissibly extraterritorial under the Foreign Trade Antitrust Improvement Act. However, before the Court reaches that question, which has been defined as a substantive, rather than jurisdictional, element of a Sherman Act claim, *see Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395,408 (2d Cir. 2014), the Court must determine whether Plaintiffs have antitrust standing. For the reasons that follow, the Court finds that Plaintiffs have not alleged that they suffered any antitrust injury, and accordingly, the Sherman Act claims are dismissed.

A. Applicable Law

Section 4 of the Clayton Act establishes a private right of action for "[a]ny person ... injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). The Supreme Court and the Second Circuit have interpreted this provision to require antitrust plaintiffs to demonstrate antitrust standing in addition to constitutional standing. *See Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 770 (2d Cir. 2016) (citing *Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983) ("*AGC*")). The question of antitrust standing is a "threshold inquiry resolved at the pleading stage." *Id.* When evaluating whether a plaintiff has antitrust standing, a court considers whether the plaintiff (1) has suffered an antitrust injury and (2) is an "efficient enforcer" of the antitrust laws. *Id.* at 772.

The first prong of this inquiry requires a plaintiff to "demonstrate that its injury is 'of the type the

antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157 (2d Cir. 2016) *("Aluminum JI")* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). "Generally, only those that are participants in the defendants' market can be said to have suffered antitrust injury." *Id.* at 157. However, in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the Supreme Court "carved a narrow exception to the market participant requirement for parties whose injuries are 'inextricably intertwined' with the injuries of market participants." *Aluminum II*, 833 F.3d at 159 (citation and internal quotation marks omitted).

In the years since *McCready*, courts have grabbed onto the "inextricably intertwined" language, but there is real meaning behind this pat phrase. As the Supreme Court explained in *McCready*, a plaintiff who is not a participant in the same market as the defendant may nevertheless suffer an antitrust injury where the defendant's anticompetitive scheme hinges on harm to the plaintiff or the plaintiff's market. 457 U.S. at 479-80. In *McCready*, the plaintiff's injury was considered a "necessary step" and "the very means by which" the defendants affected their anticompetitive scheme. *Id.* at 479. The Second Circuit Court of Appeals has clarified that the Supreme Court's "inextricably intertwined" language "does not erode the antitrust standing requirement that the putative plaintiff participate in the market that is directly manipulated by the collusive conduct. Rather, this observation supplies the *reason* defendants would bother to corrupt some market in which they do not participate." *Aluminum II*, 833 F.3d at 161. Stated differently,

"sometimes the defendant will corrupt a separate market in order to achieve its illegal ends, in which case the injury suffered can be said to be 'inextricably intertwined' with the injury of the ultimate target." *Id.*

Under the second prong of the antitrust standing inquiry, the court considers whether a plaintiff is an "efficient enforcer" of the antitrust laws by reference to four factors:

> (1) whether the violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to recover duplicative damages or that damages would be difficult to apportion among possible victims of the antitrust injury.

Gelboim, 823 F.3d at 772. The factors that make up the efficient enforcer analysis contemplate consideration of "the 'chain of causation' between the violation and the injury." *Id.* (quoting *AGC*, 549 U.S. at 540).

B. Plaintiffs Have Not Alleged that They Suffered an Antitrust Injury

Defendants argue that neither the Trader Plaintiffs nor the Landowner Plaintiff have suffered an antitrust injury. With respect to the Landowner Plaintiff, Defendants also argue that he is not an "efficient enforcer" of the antitrust laws. As described further below, the Court dismisses Plaintiffs' Sherman Act claims for failure to allege antitrust injury and does not reach the question of whether either the Trader

Plaintiffs or the Landowner Plaintiff are efficient enforcers of the antitrust laws.

In first arguing that Plaintiffs have not suffered an antitrust injury, Defendants largely focused on a theory from *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666 (S.D.N.Y. 2013) ("*LIBOR I*"), that subsequently was rejected by the Court of Appeals in *Gelboim.* Shortly after *Gelboim*, the Court of Appeals decided another case involving the contours of antitrust injury, *Aluminum II*, and the parties submitted supplemental letters briefing the applicability of this decision and the subsequent district court decisions relying on it. *See* ECF Nos. 402-04, 412-15. These new arguments center on whether Plaintiffs participated in the market directly restrained by Defendants' alleged conduct, either as participants in the same market as Defendants or as participants in a market where the harm is inextricably intertwined with harm to participants in Defendants' market.

The first point of contention is defining the market Defendants restrained by their alleged anticompetitive conduct. Defendants present a narrow vision of the relevant market—"the market for physical Brent Crude"—in which neither the Trader Plaintiffs nor the Landowner Plaintiff operate. ECF No. 402 (Defendants' letter dated Aug. 17, 2016 ("Defs.' Aug. Letter")). Plaintiffs, citing to the definition of "relevant market" in their Complaints, define the market broadly. ECF No. 403 (Trader Plaintiffs' letter dated Aug. 24, 2016) ("Trader Aug. Letter"))("The relevant market in this case is the Brent Crude Oil Market, which comprises: (1) the Brent Crude Oil physical cargo market, including all cargoes priced as a

differential to Brent Crude Oil; (2) NYMEX Brent Futures, ICE Brent Futures and other Brent Crude Oil derivatives; and (3) the Platts market for various types of physical cargoes and derivatives thereon.") (citing Trader SAC ¶ 523); *see also* Landowner SAC ¶ 257.[6] Given this expansive definition of the relevant market, Plaintiffs contend that they participated in the same market as Defendants, and there is therefore no need to engage in the "inextricably intertwined" analysis from *Mccready*. Trader Aug. Letter; ECF No. 404 (Landowner Plaintiff's letter dated Aug. 24, 2016) ("Landowner Aug. Letter")). While the Court is bound by the factual allegations in the Complaints, Plaintiffs' reliance on these particular paragraphs is misplaced; their definition of the relevant market is a legal conclusion, not a factual one. The Court must examine the facts alleged in the Complaints to determine what market or markets allegedly were restrained based on Plaintiffs' theory of the case.

Plaintiffs allege that Defendants conspired to manipulate the price of Brent crude oil, and they did so by engaging in a variety of misleading conduct and sham transactions in the physical oil market and then reporting those transactions to Platts during the MOC window, where they would be most impactful for the reporting agency's Dated Brent assessment. Trader SAC ¶¶ 224, 248-50; Landowner SAC ¶¶ 90-92. Plaintiffs posit that Defendants engaged in this anticompetitive behavior for two, potentially conflicting, reasons. First, because certain of the Defendants are producers,

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[6] The Landowner Plaintiff expressly adopted the arguments asserted by the Trader Plaintiffs in the supplemental letters. ECF No. 414 (Landowner Plaintiff's letter dated Oct. 19, 2016).

refiners, or sellers of Brent crude oil, these Defendants might want to drive the price of Brent upwards to increase their sales' profits, or downward where related entities are both producers and refiners, so as to increase the margin, making the refining business more profitable. Trader SAC ¶¶ 234, 536-38; Landowner SAC ¶¶ 168. And, second, because the Dated Brent assessment is incorporated into certain futures and derivatives products traded on NYMEX and ICE Futures Europe (where certain Defendants and Trader Plaintiffs trade) and also closely correlates with the ICE Brent Index which serves as benchmark for other Brent futures and derivatives products traded on NYMEX and ICE. Trader SAC ¶¶ 460-88, 537; Landowner SAC ¶ 168, 197-220.[7] Accordingly, the relevant markets for purposes of the antitrust standing analysis are the physical Brent crude oil market and the market for any derivative instrument that directly incorporates Dated Brent as benchmark or pricing element.

Courts in this Circuit consider manipulation of a price benchmark to constitute restraint of the market which that benchmark guides. *See, e.g.*, *Gelboim*, 823 F.3d at 776-77; *FOREX*, 2016 WL 5108131, at *6; *Alaska Elec. Pension Fund* v. *Bank of Am. Corp.*, 175 F. Supp. 3d 44, 59 (S.D.N.Y. 2016). In benchmark manipulation cases it is not necessary to evaluate whether harm to the plaintiffs market is "inextricably

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[7] The Landowner Plaintiff does not allege that Defendants participated in or intended to restrain trade in the U.S. crude oil market, only that Defendants' conduct led to suppressed prices for WTI and LLS. *See, e.g.*, Landowner SAC ¶¶ 3-4. As a result, the Landowner Plaintiff does not suggest any purported motivation by Defendants to influence U.S. crude oil prices.

intertwined" with the defendants' anticompetitive scheme because the market guided by the benchmark is the market directly restrained.[8] This is true regardless whether the alleged anticompetitive conduct causing the benchmark manipulation took place in the market guided by it so long as defendants also operate in that market. For the vast majority of the claims in this action, however, Plaintiffs have not alleged manipulation of the relevant benchmark.

While the Landowner Plaintiff asserts generally that Brent crude oil prices serve as a benchmark for much of the world's crude oil supplies, he does not allege that Brent crude oil was a benchmark for WTI, the U.S. crude oil benchmark that allegedly affected the prices of his own interests, or LLS. Landowner SAC ¶¶ 30, 33, 40-45, 62. The fact that WTI and LLS

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[8] *In re Commodity Exchange, Inc. Gold Futures and Options Trading Litig.*, No. 14-md-2548 (VEC), 2016 WL 5794776 (S.D.N.Y. Oct. 3, 2016) ("*Gold*") and *In re London Silver Fixing, Ltd., Antitrust Litig.*, No. 14-md-2573 (VEC), 2016 WL 5794777 (S.D.N.Y. Oct. 3, 2016) ("*Silver*") run somewhat counter to this conclusion. In the *Gold* and *Silver* cases, the district court held that harm to plaintiffs who traded gold, silver, and their derivatives was inextricably intertwined with the harm defendants intended to cause. In reaching this holding, the court expressed concern about defining the relevant market as the "Fixing," the process by which defendants set the benchmark prices for gold and silver, because it is "an artificially-constructed private 'auction' that was instituted for the sole purpose of allowing the Fixing Banks to set a market-wide benchmark." *Gold*, 2016 WL 5794776 at *10; *accord Silver*, 2016 WL 5794777, at *9. Defining the restrained market in this way would leave only the manipulating entities with standing to sue, an "absurd" result. *Id.* However, instead of defining the relevant market as those that incorporated the benchmark set at the Fixing, the district court turned to the "inextricably intertwined" test.

prices consistently have tracked Brent crude oil prices over time does not mean that Brent crude oil dictated WTI or LLS prices. Correlation is not the same as causation. Moreover, it is immaterial to this case that crude oil other than WTI may be priced as a differential to Brent because the Landowner Plaintiff only claims to have an interest in crude oil priced as a differential WTI. *Id.* ¶¶ 52, 62. Accordingly, the Landowner Plaintiff has not demonstrated that he participated in a restrained market, either by participating in the physical Brent crude oil market with Defendants or by virtue of Defendants manipulating the benchmark relevant to his crude oil interests.

The Trader Plaintiffs' claims are somewhat more complicated. With respect to much of the trading on NYMEX and ICE Futures Europe, the Trader Plaintiffs have not demonstrated that Defendants manipulated the relevant benchmark. By their own allegations, all of the Brent futures traded on NYMEX settle to ICE Brent futures, which in tum, are pegged to the ICE Brent Index. Trader SAC ¶¶ 123, 128 n.3, 179. The ICE Brent Index does not incorporate Dated Brent into its calculation. Trader SAC ¶¶ 128 n.3, 179. Similarly, many of the products traded on ICE Futures Europe also settle to the ICE Brent Index, not Dated Brent. *Id.* at ¶¶ 181-99; *see also id.* at ¶ 200-04 (minute marker contract does not settle to ICE Brent Index or Dated Brent). However, the Trader Plaintiffs identify a handful of derivative contracts traded on both ICE Futures Europe and NYMEX that incorporate Dated Brent as a pricing element. *Id.* at ¶ 136 (NYMEX Brent CFD), ¶¶ 205-11 (ICE dated-to-frontline and crude outright contracts); *see also* Trader Extraterritoriality Memo. at 26-27 & n.22. For this

limited subset of financial instruments only, Dated Brent is a relevant benchmark. However, the Trader SAC is devoid of any allegations that the Trader Plaintiffs or any of the Defendants, in fact, participated in this restrained market; that is, that they bought or sold these particular derivative products. This is fatal to their claim. Merely participating in the Brent derivatives market, generally, does not give rise to an antitrust injury here because the Trader Plaintiffs have not alleged facts showing anticompetitive harm to the derivatives market as a whole.

As a result, Defendants' reliance on *Aluminum II* is misplaced because the plaintiffs there did not allege manipulation of a relevant pricing element. The Court of Appeals upheld dismissal of Sherman Act claims asserted by plaintiffs who alleged that the impact of defendants' anticompetitive conduct in one market-warehouse services for aluminum-led to a higher regional premium for aluminum, which aluminum purchasers then passed down to plaintiffs, buyers of semi-fabricated aluminum and final aluminum products, in the form of increased prices. *Aluminum II*, F.3d at 155-56. Unlike the Dated Brent assessment, the allegedly manipulated regional premium was not incorporated as an element of the prices plaintiffs paid for their aluminum products.

Defendants further argue that the facts at issue in the motion to dismiss that followed the Court of Appeals' decision in *Aluminum II* are even more on point. ECF No. 412 (Defendants' Letter dated Oct. 12, 2016) (discussing *In re Aluminum Warehousing Antitrust Litig.*, No. 13-MD-2481 (KBF), 2016 WL 5818585 (S.D.N.Y. Oct. 5, 2016) ("*Aluminum III*")). However, the theory advanced by the plaintiffs in *Aluminum III*

make it distinguishable from this case. In *Aluminum III*, a group of direct aluminum purchasers alleged that they participated in the same market as defendants because they competed in the market for physical aluminum, which incorporated the excessively high regional premium. The district court found that plaintiffs' new theory was nonsensical because it "undermine[d] the alleged economic benefits of [defendants'] alleged scheme: on a corporate-wide basis, that which one arm is alleged to have done, the other arm would pay for." 2016 WL 5818585, at *7.[9] Here, by contrast, the Trader Plaintiffs allege a more complex scheme. They contend that because certain Defendants (or their affiliates) participated both in the physical and derivatives markets, they could take advantage of price swings in the Dated Brent assessment that allegedly resulted from Defendants' manipulative conduct. They further allege that Defendants, as a group, "must coordinate and compromise with each other on a daily basis" given their competing interests relative to physical oil and derivatives prices. Trader SAC ¶¶ 537-39.

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[9] To the extent that this issue did not form the sole basis of the district court's decision, the Court respectfully disagrees with the analysis. In an alternative holding, the district court relied on the Court of Appeals' rejection of the downstream purchasers' theory that defendants had conspired to manipulate the regional premium. 2016 WL 5818585, at *8. However, even if the downstream purchasers proved that defendants intended to manipulate the regional premium, that regional premium was not directly incorporated into the price those plaintiffs paid for aluminum products. By contrast, the direct aluminum purchasers alleged that the increased regional premium was an explicit component of the price they paid. *See* 833 F.3d at 155.

With respect to the NYMEX and ICE Futures Europe financial instruments that do not incorporate Dated Brent into the pricing, the Trader Plaintiffs have not demonstrated that their injuries are inextricably intertwined with the harm to Defendants' market participants. To do so, they would need to allege that the harm to Trader Plaintiffs in the derivatives market was "the very means by which" Defendants affected their anticompetitive scheme in the physical Brent crude oil market. *Aluminum II*, 833 F.3d at 162. That is contrary to the Trader Plaintiffs' theory, in which Defendants manipulated the price of Brent crude oil by engaging in manipulative and misleading physical oil trades amongst themselves that, in tum, impacted the price of certain derivatives. *See id.* (alleged anticompetitive acts "were within the defendants' power to do" without reliance on injury to plaintiffs)

III. Plaintiffs' State and Common Law Claims

Plaintiffs also assert a number of state and common law claims that Defendants seek to dismiss. The Trader Plaintiffs include a claim for unjust enrichment, *see* Trader SAC ¶¶ 590-98, and the Landowner Plaintiff claims injury under numerous states' unfair trade practices and antitrust statutes, *see* Landowner SAC ¶¶ 285-344. Defendants have moved to dismiss these claims for failure to state a cause of action. Defs.' Trader Memo at 39-40; Defs.' Landowner Memo. at 14-21. For the reasons described, the Court dismisses Plaintiffs' state law claims.

A. The Trader Plaintiffs' Unjust Enrichment Claim

To state a claim for unjust enrichment under New York law, a plaintiff must allege that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Georgia Malone & Co.* v. *Rieder*, 19 N.Y.3d 511, 516 (2012) (quoting *Mandarin Trading Ltd.* v. *Wildenstein*, 16 N.Y.3d 173, 182 (2011) (internal quotation marks omitted)).[10] While a plaintiff need not demonstrate that he is in privity with the defendant, a plaintiff still must show that there is a "sufficiently close relationship" with the defendant that "could have caused reliance or inducement" by the plaintiff. *Id.* at 516-17 (citation omitted). Where the plaintiff and defendant "simply had no dealings with each other," the relationship is "too attenuated" to support an unjust enrichment claim. *Id.* at 517-18.

The Trader Plaintiffs have failed to allege a relationship of any kind with any of the Defendants, let alone one that is "sufficiently close" to have caused reliance or inducement. The decisions cited by the Trader Plaintiffs, in fact, support dismissal of their unjust enrichment claim. *See* Trader Memo. at 50. To the extent any of the decisions are factually analogous to this action, they resulted in dismissal of the plaintiffs' unjust enrichment claims. For example, in *In re Amaranth Natural Gas Commodities Litig.*, 587

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[10] The Trader SAC does not specify pursuant to which state's common law the Trader Plaintiffs bring their unjust enrichment claim. Trader SAC ¶¶ 590-98. In briefing the motions to dismiss, the parties each assume New York law applies.

F. Supp. 2d 513,547 (S.D.N.Y. 2008), the court dismissed an unjust enrichment claim based on defendants' alleged manipulation of the relevant market. Even though plaintiffs participated in the same market as defendants, plaintiffs did not base their unjust enrichment claim on their status as counterparties to any transaction with defendants. 587 F. Supp. 2d at 547 & n.229; *see also Gold*, 2016 WL 5794776, at *29 (unjust enrichment claim dismissed against defendants who allegedly manipulated relevant market); *In re Term Commodities Cotton Futures Litig.*, No. 12-cv-5126 (ALC) (KNF), 2013 WL 9815198, at *27-28 (S.D.N.Y. Dec. 20, 2013) (same); *LIBOR I*, 935 F. Supp. 2d at 737-38 (same).

Similarly, here, the Trader Plaintiffs allege that Defendants manipulated the Brent crude oil futures and derivatives market and that certain of Defendants traded in those markets. Trader SAC ¶ 593. They have not alleged that Defendants were their counterparties on any trades involving Brent futures or derivatives, however. Accordingly, the Trader Plaintiffs' unjust enrichment claim is dismissed.

B. The Landowner Plaintiff's State Law Claims

Defendants move to dismiss the Landowner Plaintiff's state law claims on a number of grounds. Defs.' Landowner Memo. at 14-21.

As a preliminary matter, Defendants argue that the Landowner Plaintiff does not have standing to bring claims under any state laws other than those of Louisiana, where he lives and owns or has interest in property relevant to the dispute. As the parties note, courts in this Circuit are divided on the appropriate

reaction to challenges made to a named plaintiff's standing to bring claims under the laws of states to which his own claims have no connection. Defs.' Landowner Reply at 5-6; Landowner Memo. at 8-10.[11] The Court does not need to weigh in on the dispute, however, because Defendants concede that the Landowner Plaintiff has standing to bring claims under Louisiana law. Defs.' Landowner Memo. at 15-16. And, for the reasons described in this section, those claims are dismissed. Without any valid claims, the Landowner Plaintiff cannot serve as the sole named plaintiff in this action. *See, e.g.*, *Goldberger v. Bear, Stearns & Co.*, No. 98-cv-8677 (JSM), 2000 WL 1886605, at *1 (S.D.N.Y. Dec. 28, 2000) (citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) and *Warth v. Seldin*, 422 U.S. 490, 497-502 (1975)).

First, Defendants argue that the Landowner Plaintiffs state antitrust claims should be dismissed for the same reason as his federal antitrust claims. Louisiana does not have a statute requiring courts to interpret its antitrust laws as coterminous with

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[11] Some courts have addressed the issue of standing under each state's laws as a threshold question regardless of the plaintiff's status as the representative of a putative class. *See, e.g.*, *In re HSBC BANK, USA, NA., Debit Card Overdraft Fee Litig.*, 1 F. Supp. 3d 34, 48-50 (E.D.N.Y 2014); *Simington v. Lease Fin. Grp., LLC*, No. 10-cv-6052 (KBF), 2012 WL 651130, at *9 (S.D.N.Y. Feb. 28, 2012). Other courts have held that a named plaintiff need only have standing to bring a claim under the statute applicable to his own claim because the named plaintiff is serving as a representative for those who may have claims under other states' statutes. *See, e.g.*, *Blessing v. Sirius XM Radio Inc.*, 756 F. Supp. 2d 445, 450-52 (S.D.N.Y. 2010); *In re Bayer Corp. Combination Aspirin Prod. Mktg. & Sales Practices Litig.*, 701 F. Supp. 2d 356, 376-77 (E.D.N.Y. 2010).

federal law. However, both state and federal courts interpreting Louisiana's antitrust laws recognize that, due to the similarity between the two regimes, "Louisiana courts routinely look to federal anti-trust jurisprudence as 'a persuasive influence on interpretation of our own state enactments.'" *Free v. Abbott Labs.*, 982 F. Supp. 1211, 1214 (M.D. La. 1997) (quoting *La. Power & Light v. United Gas Pipe Line*, 493 So. 2d 1149, 1158 (La. 1986)). In particular, Louisiana courts have found that the provision giving rise to a private right of action for damages under the state antitrust statute, La. Stat. Ann. § 51: 13 7, is "virtually identical" to § 4 of the Clayton Act and therefore look to federal jurisprudence on questions of antitrust standing. *Free v. Abbott Labs., Inc.*, 176 F.3d 298, 299 (5th Cir. 1999), *aff'd*, 529 U.S. 333 (2000); *see also Lambert v. Bd. of Comm'rs of the Orleans Levee Dist.*, No. CIV A 05-5931, 2009 WL 152668, at *5 (E.D. La. Jan. 22, 2009).[12]

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[12] In the SAC, the Landowner Plaintiff is unclear as to whether he is seeking monetary damages, injunctive relief, or both, under state law. *See* SAC ¶¶ 344, XI.B (Prayer for Relief). If the Landowner Plaintiff is seeking injunctive relief for the alleged violation of Louisiana's antitrust law, that provision also mirrors the parallel portion of the Clayton Act. Louisiana law provides that "[a]ny person may sue for and have injunctive relief, in any court having jurisdiction over the parties, against threatened loss or damage by a violation of the provisions of this Part under the rules governing such proceedings." La. Stat. Ann. § 51:129. The Clayton Act similarly provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws ...." 15 U.S.C. § 26. In any

In dismissing the Landowner Plaintiffs Sherman Act claims, the Court found that the lack of antitrust injury was dispositive. The Landowner Plaintiff has not identified any Louisiana decisions that suggest the federal law on antitrust injury should not guide the Court's analysis on his state law claim. Given the similarities between the private rights of action in Louisiana and federal antitrust law, for the same reasons the Court found that the Landowner Plaintiff did not suffer a federal antitrust injury, the Court also dismisses the Landowner Plaintiffs claim under the Louisiana antitrust statute for lack of antitrust injury.

Second, for much the same reason that the Court has dismissed the Landowner Plaintiffs state and federal antitrust claims, the Landowner Plaintiffs unfair trade practices claim also must fail. The Louisiana Unfair Trade Practices Act, La. Stat. Ann. § 51:1401, *et seq*. ("LUTPA"), allows a plaintiff to bring a private cause of action if he "suffer[ed] any ascertainable loss of money or movable property … *as a result of* the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by R.S. 51:1405." La. Stat. Ann. § 51:1409(A) (emphasis added); *accord Carroll Insulation & Window Co. v. Biomax Spray Foam Insulation, LLC*, 180 So. 3d 518, 524 (La. App. 2 Cir. 2015) ("To sustain a cause of action under LUTPA, two things must be proved: (1) an ascertainable loss was suffered; and (2) the loss must result from another's use of unfair methods of

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event, a plaintiff is required to demonstrate antitrust injury whether seeking injunctive or monetary relief. *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.*, 467 F.3d 283,290 (2d Cir. 2006) (citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110-11 & nn.5-6 (1986)).

competition and unfair or deceptive acts or practices.") (citing *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 35 So. 3d 1053, 1057 (La. 2010)).[13]

The Landowner Plaintiff alleges that he suffered losses tied to suppressed WTI crude oil prices, but his factual allegations do not support the conclusory assertion that this alleged loss occurred as a result of Defendants' "unfair or deceptive acts or practices." *See* Landowner SAC ¶¶ 62, 109, 115, 131. Although he refers to WTI prices during the relevant time frame as "suppressed," which, in tum, affected the price of his crude oil interests priced to WTI, the Landowner Plaintiff is quite clear that Brent crude oil does not serve as a benchmark for WTI and that these two crude oil benchmarks merely have moved in tandem over time. *Id.* ¶¶ 40-51. Rather, the Landowner Plaintiff relies on the statistical correlation between Brent and WTI prices as proof that Brent crude oil prices dictated the changes in WTI prices, but fails to provide any factual support for that assertion.

CONCLUSION

For all of the foregoing reasons, the Landowner Plaintiffs Second Amended Complaint and the Trader Plaintiffs' Second Amended Complaint are dismissed. The motions filed by individual Defendants for dismissal of the Complaints as to them are denied without prejudice as moot.

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[13] The Landowner Plaintiff also is unclear about the relief sought in connection with his unfair trade practices claim. SAC ¶¶ 314, XI.B (Prayer for Relief). Under LUTP A, injunctive relief is limited to actions brought by the Louisiana State Attorney General. *See* La. Stat. Ann. § 51:1407.

The Court will hold a status conference in this matter on July 7, 2017, at 2:00 p.m. The parties (and/or counsel) should appear in person in Courtroom 1306 at the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, NY, on the date and time specified above.

SO ORDERED.

Dated:
June 8, 2017
New York,
New York

s/_______________________

ANDREW L. CARTER, JR.
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 17-2233

Prime International Trading, Ltd., White Oaks Fund LP, Kevin McDonnell, Anthony Insinga, Robert Michiels, John Devivo, Neil Taylor, Aaron Schindler, Port 22, LLC, Atlantic Trading USA, LLC, and Xavier Laurens,

PlaintiffsAppellants,

v.

BP P.L.C., Trafigura Beheer B.V., Trafigura AG, Phibro Trading L.L.C., Vitol S.A., Mercuria Energy Trading S.A., Hess Energy Trading Company, LLC, Statoil US Holdings Inc., Shell Trading US Company, BP America, Inc., Vitol, Inc., BP Corporation North America, Inc., Mercuria Energy Trading, Inc., Morgan Stanley Capital Group Inc., Phibro Commodities Ltd., Shell International Trading And Shipping Company Limited, Statoil ASA, And Royal Dutch Shell PLC,

DefendantsAppellees.

OCTOBER 16, 2019

ORDER

Appellants, Prime International Trading, Ltd., White Oaks Fund LP, Kevin McDonnell, Anthony Insinga, Robert Michiels, John Devivo, Neil Taylor, Aaron Schindler, Port 22, LLC, Atlantic Trading USA, LLC, and Xavier Laurens, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

s/____________________________

Catherine O'Hagan Wolfe, Clerk

APPENDIX E

7 U.S.C. § 5 provides:

§ 5. Findings and purpose

(a) Findings

The transactions subject to this chapter are entered into regularly in interstate and international commerce and are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.

(b) Purpose

It is the purpose of this chapter to serve the public interests described in subsection (a) through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission. To foster these public interests, it is further the purpose of this chapter to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to this chapter and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants.

7 U.S.C. § 9 provides in relevant part:

§ 9. Prohibition regarding manipulation and false information

(1) Prohibition against manipulation

It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after July 21, 2010, provided no rule or regulation promulgated by the Commission shall require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect.

* * *

7 U.S.C. § 13 provides in relevant part:

§ 13. Violations generally; punishment; costs of prosecution

(a) Felonies generally

It shall be a felony punishable by a fine of not more than $1,000,000 or imprisonment for not more than 10 years, or both, together with the costs of prosecution, for:

* * *

(2) Any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or of any swap, or to corner or attempt to corner any such commodity or knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6, section 6b, subsections (a) through (e) of subsection[1] 6c, section 6h, section 6o(1), or section 23 of this title.

* * *

7 U.S.C. § 25 provides:

§ 25. Private rights of action

(a) Actual damages; actionable transactions; exclusive remedy

(1) Any person (other than a registered entity or registered futures association) who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such violation to any other person—

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[1] So in original. Probably should be "section".

(A) who received trading advice from such person for a fee;

(B) who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity) or any swap; or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract or any swap;

(C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of—

(i) an option subject to section 6c of this title (other than an option purchased or sold on a registered entity or other board of trade);

(ii) a contract subject to section 23 of this title; or[1]

(iii) an interest or participation in a commodity pool; or

(iv) a swap; or

(D) who purchased or sold a contract referred to in subparagraph (B) hereof or swap if the violation constitutes—

(i) the use or employment of, or an attempt to use or employ, in connection with a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative device or contrivance in contravention of such

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[1] So in original. The word "or" probably should not appear.

rules and regulations as the Commission shall promulgate by not later than 1 year after July 21, 2010; or

(ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap.

(2) Except as provided in subsection (b), the rights of action authorized by this subsection and by sections 7(d)(13), 7a-1(c)(2)(H), and 21(b)(10) of this title shall be the exclusive remedies under this chapter available to any person who sustains loss as a result of any alleged violation of this chapter. Nothing in this subsection shall limit or abridge the rights of the parties to agree in advance of a dispute upon any forum for resolving claims under this section, including arbitration.

(3) In any action arising from a violation in the execution of an order on the floor of a registered entity, the person referred to in paragraph (1) shall be liable for—

(A) actual damages proximately caused by such violation. If an award of actual damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) of this title for the floor broker's violation, such futures commission merchant may be required to satisfy such award; and

(B) where the violation is willful and intentional, punitive or exemplary damages equal to no more than two times the amount of such actual

damages. If an award of punitive or exemplary damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) of this title for the floor broker's violation, such futures commission merchant may be required to satisfy such award if the floor broker fails to do so, except that such requirement shall apply to the futures commission merchant only if it willfully and intentionally selected the floor broker with the intent to assist or facilitate the floor broker's violation.

(4) CONTRACT ENFORCEMENT BETWEEN ELIGIBLE COUNTERPARTIES.—

(A) IN GENERAL.—No hybrid instrument sold to any investor shall be void, voidable, or unenforceable, and no party to a hybrid instrument shall be entitled to rescind, or recover any payment made with respect to, the hybrid instrument under this section or any other provision of Federal or State law, based solely on the failure of the hybrid instrument to comply with the terms or conditions of section 2(f) of this title or regulations of the Commission.

(B) SWAPS.—No agreement, contract, or transaction between eligible contract participants or persons reasonably believed to be eligible contract participants shall be void, voidable, or unenforceable, and no party to such agreement, contract, or transaction shall be entitled to rescind, or recover any payment made with respect to, the agreement, contract, or transaction under this section or any other provision of Federal or State law, based solely on

the failure of the agreement, contract, or transaction—

(i) to meet the definition of a swap under section 1a of this title; or

(ii) to be cleared in accordance with section 2(h)(1) of this title.

(5) LEGAL CERTAINTY FOR LONG-TERM SWAPS ENTERED INTO BEFORE JULY 21, 2010.—

(A) EFFECT ON SWAPS.—Unless specifically reserved in the applicable swap, neither the enactment of the Wall Street Transparency and Accountability Act of 2010, nor any requirement under that Act or an amendment made by that Act, shall constitute a termination event, force majeure, illegality, increased costs, regulatory change, or similar event under a swap (including any related credit support arrangement) that would permit a party to terminate, renegotiate, modify, amend, or supplement 1 or more transactions under the swap.

(B) POSITION LIMITS.—Any position limit established under the Wall Street Transparency and Accountability Act of 2010 shall not apply to a position acquired in good faith prior to the effective date of any rule, regulation, or order under the Act that establishes the position limit; provided, however, that such positions shall be attributed to the trader if the trader's position is increased after the effective date of such position limit rule, regulation, or order.

(6) CONTRACT ENFORCEMENT FOR FOREIGN FUTURES CONTRACTS.—A contract of sale of a commodity for future delivery traded or executed on or through the facilities of a board of trade, exchange, or market located outside the United States for purposes of

section 6(a) of this title shall not be void, voidable, or unenforceable, and a party to such a contract shall not be entitled to rescind or recover any payment made with respect to the contract, based on the failure of the foreign board of trade to comply with any provision of this chapter.

(b) Liabilities of organizations and individuals; bad faith requirement; exclusive remedy

(1) (A) A registered entity that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by section 7, 7a-1, 7a-2, 7b-3, or 24a of this title, (B) a licensed board of trade that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by the Commission, or (C) any registered entity that in enforcing any such bylaw, rule, regulation, or resolution violates this chapter or any Commission rule, regulation, or order, shall be liable for actual damages sustained by a person who engaged in any transaction on or subject to the rules of such registered entity to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaws, rules, regulations, or resolutions.

(2) A registered futures association that fails to enforce any bylaw or rule that is required under section 21 of this title or in enforcing any such bylaw or rule violates this chapter or any Commission rule, regulation, or order shall be liable for actual damages sustained by a person that engaged in any transaction specified in subsection (a) of this section to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaw or rule.

(3) Any individual who, in the capacity as an officer, director, governor, committee member, or employee of registered[2] entity or a registered futures association willfully aids, abets, counsels, induces, or procures any failure by any such entity to enforce (or any violation of the chapter in enforcing) any bylaw, rule, regulation, or resolution referred to in paragraph (1) or (2) of this subsection, shall be liable for actual damages sustained by a person who engaged in any transaction specified in subsection (a) of this section on, or subject to the rules of, such registered entity or, in the case of an officer, director, governor, committee member, or employee of a registered futures association, any transaction specified in subsection (a) of this section, in either case to the extent of such person's actual losses that resulted from such transaction and were caused by such failure or violation.

(4) A person seeking to enforce liability under this section must establish that the registered entity[3] registered futures association, officer, director, governor, committee member, or employee acted in bad faith in failing to take action or in taking such action as was taken, and that such failure or action caused the loss.

(5) The rights of action authorized by this subsection shall be the exclusive remedy under this chapter available to any person who sustains a loss as a result of (A) the alleged failure by a registered entity or registered futures association or by any officer, director, governor, committee member, or employee to enforce any bylaw, rule, regulation, or resolution referred to in

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[2] So in original. Probably should be preceded by "a".

[3] So in original. Probably should be followed by a comma.

paragraph (1) or (2) of this subsection, or (B) the taking of action in enforcing any bylaw, rule, regulation, or resolution referred to in this subsection that is alleged to have violated this chapter, or any Commission rule, regulation, or order.

(c) Jurisdiction; statute of limitations; venue; process

The United States district courts shall have exclusive jurisdiction of actions brought under this section. Any such action shall be brought not later than two years after the date the cause of action arises. Any action brought under subsection (a) of this section may be brought in any judicial district wherein the defendant is found, resides, or transacts business, or in the judicial district wherein any act or transaction constituting the violation occurs. Process in such action may be served in any judicial district of which the defendant is an inhabitant or wherever the defendant may be found.

(d) Dates of application to actions

The provisions of this section shall become effective with respect to causes of action accruing on or after the date of enactment of the Futures Trading Act of 1982 [January 11, 1983]: *Provided*, That the enactment of the Futures Trading Act of 1982 shall not affect any right of any parties which may exist with respect to causes of action accruing prior to such date.

15 U.S.C. § 78j provides in relevant part:

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

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[1] So in original. Probably should be followed by a comma.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 17-2233
13-md-02475 (ALC)

PRIME INTERNATIONAL TRADING, LTD., et al.
Plaintiffs-Appellants,

v.

BP PLC, et al.
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR AMICUS CURIAE
U.S. COMMODITY FUTURES TRADING
COMMISSION IN SUPPORT OF NEITHER PARTY

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* * *

INTRODUCTION

Plaintiffs allege that Defendants, operating overseas, intentionally manipulated the price of Brent oil derivatives traded on the New York Mercantile Exchange ("NYMEX"), a CFTC-regulated futures market

located in the United States.[1] SPA-52. While these claims may or may not have merit, there should be no question that U.S. law applies. An express purpose of the CEA is to protect the national interest in fair trading facilities that are free of market manipulation. 7 U.S.C. § 5. The statute contains no loophole that would permit such intentional and wrongful acts as Plaintiffs allege, based simply on the fact that the alleged wrongdoer was operating from a foreign country using a means located offshore. However, the district court held exactly that, based on a misapplication of this Court's decision in *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014).

The CFTC takes no position on whether Plaintiffs have stated a claim on which relief may be granted. However, this Court should reject the district court's holding that the CEA does not govern Plaintiffs' allegations that Defendants intentionally manipulated the price of futures contracts traded on a U.S. exchange.

SUMMARY OF ARGUMENT

The district court erred in two principal ways:

First, the court incorrectly applied *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), and *Parkcentral*. Relying on those cases, it mischaracterized Plaintiffs' claims as impermissibly "extraterritorial," notwithstanding that a target of the alleged

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[1] Plaintiffs also assert claims concerning transactions on ICE Futures Europe. The Commission takes no position regarding whether, in those transactions, irrevocable liability was incurred or title passed within the U.S., within the meaning of *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d. Cir. 2012).

scheme is a CFTC-registered futures exchange located in New York. Nothing in the CEA, *Morrison*, or *Parkcentral* suggests that a person may intentionally manipulate contracts on a trading facility in the United States with impunity under U.S. law, and without incurring liability to victimized market participants, simply because that person and the means of manipulation were offshore. To the contrary, protecting U.S. markets and market participants from manipulation, including manipulation using transactions in international commerce, is a core stated purpose of the CEA. 7 U.S.C. § 5.

The district court reached its erroneous conclusion by (a) stretching *Parkcentral*, a securities case, well beyond its stated limitations and without regard to important differences between commodities and securities markets, the applicable statutes, and the operative facts; and (b) in substance, erroneously resurrecting the "conduct and effects" test the Supreme Court repudiated in *Morrison*.

If the district court's concerns have relevance, at most they may relate to whether Plaintiffs have sufficiently pled that Defendants had the requisite intent and that their actions proximately caused Plaintiffs' claimed damages, both of which are necessary to sustain a private manipulation claim. The court's mistaken framing of these substantive issues under the rubric of extraterritoriality is an error that, if uncorrected, could have negative consequences that Congress did not intend—both in private actions and those brought by the CFTC to protect the public interest.

Second, the district court's opinion contains incorrect statements about the text of the CEA. For example, the opinion states that "[t]he CEA does not contain

any statements suggesting that Congress intended the reach of the law to extend to foreign conduct." SPA-63. The court, however, overlooked a provision saying exactly that—CEA Section 2(i), which applies the CEA provisions regarding "swaps" to overseas activities with a "direct and significant connection" to U.S. commerce or that violate anti-evasion rules. 7 U.S.C. § 2(i) (2012). The Commission takes no position on whether or how Section 2(i) may apply here. That was not litigated below and would likely be fact-intensive. *Cf.* Interpretive Guidance & Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013) (interpretation and policy statement concerning application of Section 2(i) to swaps rules not at issue here). It is important, however, for this Court to correct the district court's misstatements, so as to avoid further confusion.

BACKGROUND

I. CEA Regulation of Futures in Domestic and Foreign Commodities

1. The CEA regulates transactions in and markets for commodity "derivatives." A derivative is a financial instrument, the value of which depends on (i.e., is derived from) the value of some underlying asset, index, or other measure. Market participants use these instruments to hedge business risks or speculate on price movements. The most common are "futures contracts" and "swaps." Derivatives markets are distinct from "cash" or "physical" markets in which the assets themselves are bought and sold, but the prices of cash commodities and derivatives are closely linked. At a high level, this is because if a price disparity arises, arbitrageurs will take advantage of the difference, and the gap disappears. This may involve cash market or

derivatives transactions anywhere in the world.2 If resulting price movements reflect legitimate market forces, the transactions have contributed to "price discovery," the mechanism by which supply and demand set the price of a commodity like the oil at issue here.

2. A futures contract is a financial instrument in the form of a standardized agreement to purchase or sell a "commodity" in the future at a price determined at the contract's inception. The CEA uses the term of art "contract[] of sale of a commodity for future delivery." See, e.g., 7 U.S.C. § 2(a)(1)(A) (2012). In practice, it is atypical for delivery to actually occur, because all futures may be and usually are discharged by executing a contract that reverses the obligation to purchase or sell.

3. Under the CEA, a futures contract must be traded on a "Designated Contract Market," the statutory term for a registered futures exchange. 7 U.S.C. § 6(a) (2012).3 Futures markets first emerged in the U.S. at transportation hubs for agricultural products like grain, butter, and eggs. Over time, exchanges began to offer contracts for other physical commodities like metals, oil, and gas. Later, exchanges created futures with prices linked to less tangible measures like interest rates and price indices. Today there are 14

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[2] For example, if a derivative is available at a low price relative to the related cash market product, an arbitrageur could purchase the derivative and simultaneously sell the cash product at a higher price. The arbitrageur could then use the proceeds from the derivative purchase to satisfy their obligations in the cash market and lock in a risk-free profit. This behavior persists until the disparity is eliminated.

[3] The CEA generally refers to a futures exchange (regardless of registration status) as a "board of trade."

registered futures exchanges in the United States, including NYMEX.

4. The first comprehensive federal legislation concerning the futures markets was the Futures Trading Act of 1921, Pub. L. No. 67-66, 42 Stat. 187 ("'21 Act"), followed shortly thereafter by the Grain Futures Act of 1922, Pub. L. No. 67-331, 42 Stat. 998 ("'22 Act").4 Both statutes applied to seven grain commodities and were to be administered principally by the Secretary of Agriculture. '21 Act §§ 2, 5, 42 Stat. 187-88; '22 Act § 2(a), 5, 42 Stat. at 998, 1000.

5. From the outset, Congress recognized that the markets for these commodities were international. Section 3 of the '22 Act declared there to be a national public interest in futures markets in part because "prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining" the price of grain. '22 Act § 3, 42 Stat. at 999 (emphasis added). Both the '21 and '22 Acts empowered the Secretary to collect "information respecting the grain markets, together with information on supply, demand, prices, and other conditions, in this and other countries that affect the markets." '21 Act § 9, 42 Stat. at 191; '22 Act § 8, 42 Stat. at 1003 (emphasis added).

6. In 1936, Congress passed the CEA, which added six more agricultural commodities to the statute's coverage. Pub. L. No. 74-675, 49 Stat. 1491 (1936). Between 1936 and 1974, Congress amended the CEA several times to add additional items to the definition of

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[4] The Supreme Court struck down the '21 Act on Constitutional grounds, *Hill v. Wallace*, 259 U.S. 44 (1922), but upheld the '22 Act, *Bd. of Trade of Chicago v. Olsen*, 262 U.S. 1 (1923).

"commodity," thereby expanding the reach of the statute.

7. Over time, markets developed too quickly for Congress to keep up by continuously amending the CEA to add more commodities to the list. A bifurcated industry developed in which some futures contracts and markets were regulated, but some were not because the futures were based on assets not listed in the CEA definition of "commodity." H.R. Rep. No. 93-975, at 41 (1974). This made little sense and, along with other developments, led to the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 ("'74 Act").

8. The '74 Act was a "comprehensive rewrite of futures trading regulation." H.R. Rep. No. 93-975, at 39. It created the CFTC, Pub. L. No. 93-463 § 101(a)(3), 88 Stat. at 1389, and included a long-term fix to the problem of proliferating varieties of commodity futures: The definition of "commodity" was expanded to include virtually "all" goods and articles, "services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." Id. § 201(b), 88 Stat. at 1395. Today, all futures contracts on all commodities traded in the United States now fall within the scope of the CEA. 7 U.S.C. § 1a(9) (2012).

9. "All" includes foreign commodities. By 1974, U.S. exchanges offered many futures on overseas commodities, including coffee, cocoa, copper, and foreign currency. H.R. Rep. No. 93-975, at 41, 62. Exchanges that offered contracts in foreign commodities lobbied against including them within the scope of the CEA, arguing that it was "inappropriate" for the U.S. to regulate them. Id. at 62. Congress, however, found it "abundantly clear that all futures trading must be

brought under a single regulatory umbrella," id. at 41-42, and that whether the commodity "is produced in the United States or outside" of it matters little "to those in this country who buy, sell, [] process," or use "the commodity, or to the U.S. consumers whose prices are affected by the futures market in that commodity," S. Rep. 93-1131, at 19 (1974).

Today, futures exchanges offer scores of contracts based on foreign commodities. For example, the Chicago Mercantile Exchange ("CME") offers contracts based on Black Sea Wheat, Malaysian Palm Oil, and Swiss Francs. NASDAQ Futures offers contracts based on German and Nordic electricity. And NYMEX offers contracts based on Australian coal, Turkish scrap metal—and numerous contracts based on the price of Brent oil. All of these fall within the scope of the CEA. 7 U.S.C. § 1a(9).

II. Anti-Manipulation Prohibitions

1. An original motivation for Congress to legislate in this area was that futures markets were persistently subject to manipulation and other malfeasance. The '22 Act states that the transactions subject to the statute "are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control." '22 Act § 3, 42 Stat. at 999. Both the '21 and '22 Acts prohibited manipulation and other bad acts affecting "the market price of any grain." '21 Act §§ 5(d), 6(b), 42 Stat. at 188-89, '22 Act §§ 5(d), 6(b), 42 Stat. at 1000, 1002-03. Similar to its predecessors, the modern CEA includes a statement of purpose to "deter and prevent price manipulation or any other disruptions to market integrity," 7 U.S.C. § 5, as well as broad prohibitions

on all forms of manipulation, 7 U.S.C. §§ 6c, 9(1), 13(a)(2) (2012).

2. The breadth of these provisions is necessary because, as the Commission executes its mission to root out manipulation and other threats to market integrity, unscrupulous actors find new ways to distort markets to their unfair advantage. These include not only illegitimate activities on exchanges, but also false reporting, dissemination of false information, and wrongful behavior in cash markets. To account for this dynamic and encompass all forms of manipulation, the CEA does not define the term. "Sometimes the 'know it when you see it' test may appear most useful." *Frey v. CFTC*, 931 F.2d 1171, 1175 (7th Cir. 1991).

III. Swaps Regulation Under Dodd-Frank

1. A "swap" is a contract between two parties agreeing to make payments to each other on specified dates over an agreed time period, where the amount that each party has to pay is calculated on a different basis. Similar to futures contracts, swaps shift risk between parties and can be used for hedging or speculation. Prior to the 2008 financial crisis, swaps were generally unregulated. Congress came to view this as an underlying cause of the crisis, and, in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 ("Dodd-Frank"), brought them within the CEA's coverage.

2. The swaps activities that catalyzed the 2008 financial crisis included activities that occurred overseas, but which contributed to economic turmoil in the United States. *See* Financial Crisis Inquiry Commission, THE FINANCIAL CRISIS INQUIRY REPORT 344-52 (January 2011). Thus, Congress established under

CEA Section 2(i) that the Dodd-Frank reforms apply to swaps activities abroad that have "a direct and significant connection with activities in, or effect on, commerce of the United States," or that contravene CFTC anti-evasion rules. 7 U.S.C. § 2(i).

ARGUMENT

I. The District Court Incorrectly Applied *Morrison* and *Parkcentral* to Plaintiffs' CEA Claims.

In *Morrison*, a class action under Section 10(b) of the Securities Exchange Act ("Exchange Act"), the Supreme Court established a framework for determining whether a statute applies in cases involving a mix of foreign and domestic elements. 561 U.S. at 272. This Court has applied *Morrison* in, among other contexts, securities cases like *Parkcentral*, and one CEA case, *Loginovskaya v. Batratchenko*, 764 F.3d 266 (2d Cir. 2014), discussed *infra* at Part II.

As explained below, and as the district court for all intents and purposes agreed, Plaintiffs' private claims in this case satisfy *Morrison* because the transactions relevant to the CEA's private right of action, 7 U.S.C. § 25, occurred in the United States.[5] On the other hand, the court's application of *Parkcentral* to Plaintiffs' CEA claims did not sufficiently consider important differences in statutory and market contexts and the alleged facts of each case. Indeed, the analysis violated *Morrison* itself, because in substance it

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[5] While the district court noted that it was "not necessary, and perhaps not appropriate, to evaluate the focus of the substantive provisions" of the CEA at issue (*i.e.*, Sections 6(c) and 9(a)), SPA-64, the court's incorrect analysis could be read more broadly to apply to CEA claims under these and other provisions.

resurrected the "conduct and effects" test that the Supreme Court in that case struck down.

a. Plaintiffs' Private CEA Claims Satisfy *Morrison*.

1. The plaintiffs in *Morrison* alleged that foreign and domestic defendants committed fraud in violation of the Exchange Act by making false statements, including from within the United States, about securities traded on foreign stock exchanges. 561 U.S. at 250-52. The Supreme Court held that those claims were impermissibly extraterritorial. First, it examined the text of Section 10(b) applying a "presumption against extraterritoriality," which can be rebutted only by a "clear indication" that Congress intended the statute to apply outside of United States. *Id.* at 255-56. The Court found no such indication regarding Section 10(b) and, accordingly, held that it did not apply extraterritorially. *Id.* at 262, 265.

2. That did not resolve the case, however, because the allegations included some misstatements made in the U.S. The Court therefore considered whether that activity was sufficient to establish a *domestic* claim, which, the Court explained, required it to identify the "focus of congressional concern" underlying Section 10(b). *Id.* at 266-67 (alterations omitted).

3. The Court observed that Section 10(b) by its terms does not punish *all* deceptive conduct, but only such conduct "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." *Id*. at 266 (quoting 15 U.S.C. § 78j(b) (2012)). The Court also cited what it called the "primacy of the domestic exchange" in "the very prologue of the Exchange Act,

which sets forth as its object '[t]o provide for the regulation of securities exchanges.'" *Id*. at 267 (citation omitted). This suggested that Congress's focus was on the transactions themselves, "not upon the place where the deception originated." *Id*. at 266. The Court therefore adopted a "transactional test" for Section 10(b), which asks "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 269-70.

1. The CFTC Takes No Position Here on Whether the CEA Contains a Clear Indication of Extraterritoriality.

In the district court, no party argued that the CEA contains a "clear indication" that Congress intended the provisions at issue to apply extraterritorially. SPA-63-64. The Commission therefore takes no position on whether there is any such CEA language that is relevant in this case. *See also* Part II, *infra* (discussing CEA Section 2(i)).

2. Plaintiffs' Claims Are within the "Scope of Congressional Concern" under *Morrison*.

1. The text of the CEA provisions at issue here reflect several focuses of congressional concern. These include, but are not limited to, protecting participants in derivatives transactions and the integrity of trading facilities against market manipulation and other price disruptions. Of particular relevance here, the private right of action in Section 22(a) is available only to participants in four types of transactions, including exchange-traded derivatives. 7 U.S.C. § 25(a). Thus, in *Loginovskaya*, this Court held that the focus of Section 22(a) is "clearly transactional." 764 F.3d at 272. CEA

Section 6(c)(1) prohibits the use or attempted use of a manipulative or deceptive device or contrivance "in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity," including through false reporting concerning "market information or conditions that affect or tend to affect the price of any commodity in interstate commerce." 7 U.S.C. § 9(1). CEA Section 9(a) prohibits manipulation of "the price" of the same products covered by Section 6(c)(1), as well as cornering of a physical commodity, and false reporting. *Id.* § 13(a)(2). Underscoring the congressional focus on, among other things, transactions and exchanges, the statute declares a "national public interest" in aspects of commodity markets including "[t]he transactions subject to this Act" and "trading in liquid, fair and financially secure trading facilities." *Id.* § 5.

2. Plaintiffs allege that they were parties to derivatives transactions that took place in the United States on a CFTC-registered futures exchange. SPA-32, 41, 53-55, 70-71. The claims therefore directly implicate important focuses of congressional concern in a private action for manipulation, and they are domestic under Morrison.[6]

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[6] Other important focuses of congressional concern that may apply in a CFTC enforcement action include protection of the price discovery function, ensuring market integrity, and avoiding systemic risk. *See* 7 U.S.C. § 5.

b. Plaintiffs' CEA Claims Satisfy *Parkcentral.*

1. This Court's decision in *Parkcentral* should not change the outcome. In that case, the plaintiffs were parties to "securities-based swap agreements" executed in the U.S. 763 F.3d at 207. The underlying security traded only on European exchanges, and the allegedly fraudulent statements were made by a German company in Germany. Id. at 201-02. On those facts, the Court assumed, without deciding, that the claims would pass the *Morrison* transactional test. Id. at 214. It held, however, that a U.S. transaction was "necessary but not necessarily sufficient." Id. at 216. The Court expressed concern that the alleged events at issue in *Parkcentral* were "so predominantly German" as to pose an unacceptable "potential for regulatory and legal overlap and conflict." *Id*. The plaintiffs therefore failed to state a domestic claim. *Id.*

2. The Court did not elaborate much on its holding. It stated that it had "neither the expertise nor the evidence to allow [it] to lay down" a general rule and that it did not "purport to proffer a test." *Id*. at 217. It cautioned that "[t]he potential for incompatibility between U.S. and foreign law is just one form of evidence that a particular application of a statute is extraterritorial." *Id.* at 216-17. That potential "is neither a safe harbor nor the only relevant consideration." *Id.* at 217. Its decision, therefore, "in no way forecloses the application of § 10(b) … where the transactions are domestic and where the defendants are alleged to have sufficiently subjected themselves to the statute." *Id.* Pointedly, the Court warned that, given the complexity and variety of global financial markets and transactions, the facts of the case cannot "be perfunctorily applied

to other cases based on the perceived similarity of a few facts." *Id.*

3. That is, however, what the district court did here. After agreeing that the relevant transactions for a private claim under CEA Section 22 likely were Plaintiffs' domestic trades, SPA-65, the court held that the claims were nevertheless extraterritorial based on high-level similarities it perceived with *Parkcentral*: In both cases the alleged wrongdoing occurred overseas, and the court drew an analogy between the foreign exchange-traded security in *Parkcentral* and the London-generated Platts benchmark for oil that is at issue here. The district court expressed "concern," like this Court in *Parkcentral*, "that individuals and entities will be subject to multiple, and potentially incompatible, laws." SPA-67.

Under *Parkcentral*, however, that is not enough, and the district court ignored important differences.

4. First, and fundamentally, it is a stretch to apply *Parkcentral* to the CEA and commodity transactions at all. That case was about a small number of derivatives of a German exchange-traded security. When a company issues securities to be publicly traded, it selects an exchange, and the exchange normally has a physical location within a country's borders. That country then typically regulates the issuer, exchange, and market participants. A commodity like oil, on the other hand, exists throughout the world in fungible form, moving about with no meaningful situs like a stock exchange. Wrongdoing with respect to such a commodity may originate anywhere and impact the U.S., causing harms Congress intended the CEA to prevent.

5. Second, the Court in *Parkcentral* emphasized that it was a "case of securities not listed on domestic exchanges." 763 F.3d at 216. That distinction matters, given the *Morrison* Court's emphasis on the "primacy of the domestic exchange." 561 U.S. at 267. In *Parkcentral*, where the wrongdoing centered on a *foreign* stock exchange, it is perhaps unsurprising that this Court was reluctant to apply U.S. law. Here, the shoe is on the other foot—Plaintiffs claim manipulation of contracts on an exchange in the United States. SPA-54-55. To remove such cases from the protection of U.S. law conflicts with the primacy the CEA places on protecting the integrity of U.S. exchanges. 7 U.S.C. § 5.

6. Third, the plaintiffs in *Parkcentral* did not allege that the defendant "was a party to any securities-based swap agreements referencing [the underlying] stock, or that it participated in the market for such swaps in any way." 763 F.3d at 207. This was important to the Court, which expressed concern about a rule that would allow plaintiffs to hail foreign defendants into U.S. court "solely because a plaintiff in the United States made a domestic transaction, even if the foreign defendants were completely unaware of it." *Id.* at 215. Here, Plaintiffs allege that Defendants were aware of the Brent oil contracts on NYMEX—they allegedly participated in them. SPA-32, 41, 70-71. The Court in *Parkcentral* emphasized the potential importance of this factor, distinguishing it from a case in which "the defendants are alleged to have sufficiently subjected themselves to the statute." 763 F.3d at 217. Here, the allegations would establish that Defendants voluntarily and repeatedly subjected themselves to the CEA, both by allegedly targeting NYMEX for

manipulation and by their own trading of Brent contracts on that exchange. SPA-32, 41, 70-71.

7. Finally, the Supreme Court has recently cast doubt on the holding in *Parkcentral* that a domestic transaction is "necessary but not necessarily sufficient." 763 F.3d at 216. In *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090 (2016), the Court reasserted the simple binary test it established in *Morrison*:

> If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

Id. at 2101. In *Parkcentral*, this Court observed of *Morrison* that the Supreme Court "did not *say* that [a domestic] transaction was sufficient to make the statute applicable … *whenever* such a transaction is present." 763 F.3d at 215. However, the Supreme Court has said so now.

At a minimum, given that context, *Parkcentral* must be recognized as at best the high-water mark for restrictions on applying U.S. law to transactions in the United States. It should not be extended here to preclude claims that Defendants intentionally manipulated contracts traded on a CFTC-regulated futures exchange in New York.

c. The District Court Applied the Conduct-and-Effects Test the Supreme Court Repudiated in *Morrison*.

The Supreme Court in *Morrison* stated that it wanted a "clear test." 561 U.S. at 269. It rejected a doctrine—the "conduct and effects" test—that required courts and market participants to "guess anew in each case." *Id*. at 261. Yet the district court here went right down same rabbit hole. Although it did not use the label "conduct and effects test," the court's analysis was indistinguishable from that discredited line of cases.

1. Under the conduct-and-effects test, a court would first determine "what conduct comprises the heart," *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 174-75 (2d Cir. 2008), or "the crux of," *In re Vivendi Universal, S.A.*, No. 02 Civ. 5571 (RJH), 2004 WL 2375830, at *7 (S.D.N.Y. Oct. 22, 2004), the alleged scheme. If that conduct took place in the United States, U.S. law applied.

2. On the other hand, if the crux of the wrongdoing happened overseas, the court would perform a fact-specific proximate cause analysis to determine if those actions had effects sufficiently connected to injuries in the United States. *See, e.g.*, *Itoba Ltd. v. LEP Grp. PLC*, 54 F.3d 118, 123 (2d Cir. 1995) (determining whether damages were a "direct" result); *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir. 1989) ("remote and indirect effects" do not suffice); *Des Brisay v. Goldfield Corp*., 549 F.2d 133, 136 (9th Cir. 1977) (assessing whether misconduct "proximately" caused damages in the United States).

3. That is what the district court did here. First, it determined that "the crux of" Plaintiffs' complaint was

the allegedly "manipulative and misleading reporting to Platts in London" about oil transactions abroad. SPA-66. Because the "crux" as the court defined it resided entirely overseas, it then examined "the connection between Defendants' conduct" and the alleged injuries in the U.S. *Id.* It found that the alleged manipulation only "indirectly affected" the price of the Brent contracts because "most" did not settle to the Platts benchmark for Brent oil, but a different index calculated based on other Brent oil market data. SPA-66-67. The district court held that the alleged effects consequently were too "attenuated" from any wrongdoing. SPA-66.

If that were the test, no party could ever reliably predict whether U.S. law applied its business activities. That is one main reason the Supreme Court rejected this approach in *Morrison*. Accordingly, the district court erred in applying it here.

d. The District Court Should Have Analyzed These Issues as They Relate to the Elements of Plaintiffs' Claims.

1. The elements of the substantive provisions at issue here account for the problems the district court perceived with respect to Plaintiffs' claims. CEA Section 9(a), 7 U.S.C. § 13(a), contains a long-established prohibition on price manipulation, while Section 6(c)(1) is a newer provision that prohibits use of a manipulative device, *id.* § 9(1). The elements of traditional manipulation are "(1) that the accused had the ability to influence market prices; (2) that [the accused] specifically intended to do so; (3) that artificial prices existed; and (4) that the accused caused the artificial prices." *DiPlacido v. CFTC*, 364 Fed. App'x 657,

661 (2d Cir. 2009) (citation omitted). A claim under Section 6(c)(1), as implemented by CFTC regulation 17 C.F.R. § 180.1(a), requires in relevant part that the defendant "intentionally or recklessly" used or attempted "to use or employ[] any manipulative device, scheme, or artifice to defraud." CEA Section 22(a)(1), the private right of action, requires that the alleged violation have "caused" the plaintiff's damages. 7 U.S.C. § 25(a)(1). Under these statutes, if the elements are met, neither the means of manipulation nor the location of the wrongdoer is relevant.

2. With respect to the means, courts have observed that the "methods and techniques of manipulation are limited only by the ingenuity of man." *CFTC v. Kraft Foods Grp., Inc.*, 195 F. Supp. 3d 996, 1005 (N.D. Ill. 2016). Although the particulars of any given scheme can be unique, there is nothing novel about using cash-market transactions or disseminating false information as alleged in this case to manipulate exchange-traded derivatives. *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971) (discussing "one of the most common manipulative devices, the floating of false rumors"); *CFTC v. Parnon Energy, Inc.*, 875 F. Supp. 2d 233, 246 (S.D.N.Y. 2012) (upholding claim of manipulation where defendants "established their long futures position to profit from" misconduct "in the physical market"); *In re Soybean Futures Litig.*, 892 F. Supp. 1025, 1047 (N.D. Ill. 1995) (upholding claim of "manipulation of the [futures] market through a combination of market power and false reports"); *In re Ind. Farm Bureau Coop. Assoc., Inc.*, CFTC No. 75-14, 1982 WL 30249, at *9 (CFTC Dec. 17, 1982) (describing manipulation "where there is evidence that the deliverable supply [of the cash commodity] was intentionally

and significantly reduced by a market participant"); Philip M. Johnson & Thomas L. Hazen, *Derivatives Regulation* § 5.02[4] (Successor ed. 2004) (discussing the manipulative technique known as a "corner," which involves "control or domination of the available supply of a cash commodity" (emphasis omitted)).

3. It makes no difference if those actions occurred overseas. Congress deliberately included overseas commodities within the scope of the CEA. 7 U.S.C. § 1a(9); S. Rep. No. 93-1131, at 19; H.R. Rep. No. 93-975, at 41, 62-63. This serves the CEA's express purpose to protect the public interest in transactions that are "entered into regularly in interstate and international commerce." 7 U.S.C. § 5(a). As a result, manipulation from outside the United States is a frequent target of CFTC enforcement actions necessary to protect that public interest. *E.g.*, *Parnon Energy*, 875 F. Supp. 2d at 238 (manipulators located in the U.K., Switzerland and Australia); *In re Statoil ASA*, CFTC No. 18-04, 2017 WL 5517034 (CFTC Nov. 14, 2017) (far east propane) (settlement); *In re Barclays PLC*, CFTC No. 12-25, 2012 WL 2500330 (CFTC June 27, 2012) (LIBOR) (settlement); *In re Sumitomo Corp.*, CFTC No 98-14, 1998 WL 236520 (CFTC May 11, 1998) (copper on the London Metals Exchange) (settlement).

4. To illustrate the district court's error in relying on geographic considerations, imagine a scenario in which traders in Turkey establish positions in Black Sea Wheat contracts on CME, under which the foreign wheat is deliverable only in Romania, Russia, and Ukraine. This group can also control or disrupt a significant portion of the physical supply of that wheat. They do so with the intent to distort the price of the

Black Sea Wheat contract, and they are successful. This wrongdoing causes injury to other traders on CME, in Chicago. On that clean set of facts, there is no question that the overseas traders in the foreign commodity triggered all elements of manipulation, including for private damages. The target of the wrongdoing was in the United States, the CFTC would pursue those wrongdoers, and the Court in *Morrison* could not have intended to prevent that. *See* 561 U.S. at 266 (holding that the focus of Section 10(b) is "not upon the place where the deception originated").

5. The facts of this case are perhaps not as clean. But the issues the district court identified—the overseas location and cash-market focus of the alleged means of manipulation and the perception that the injuries on NYMEX were too attenuated and indirect—do not go to the geographic reach of the CEA. If anything, they go to Defendants' intent and whether their alleged conduct proximately caused the alleged injuries.

6. With respect to intent, although the district court noted at the start of the opinion that Plaintiffs allege intentional manipulation of Brent contracts in the United States, it excluded that allegation when it described the "crux" as "entirely outside the United States." Indeed, the court did not discuss Defendants' alleged intent anywhere in its analysis of whether U.S. law applies. SPA-63-67. That was error. As alleged, manipulating contracts on NYMEX *was* the scheme, at least in part. Under the district court's holding, that can be done intentionally without regard to U.S. law or injured U.S. traders, so long as the *means* remains offshore. Nothing in *Morrison* or *Parkcentral* countenances that result.

7. With respect to the finding that Defendants' alleged actions were an "indirect" and too "attenuated" cause of the alleged injuries, those relate to proximate cause, *see, e.g.*, *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) (citation omitted) (requiring "some direct relation between the injury asserted and the injurious conduct alleged"), which private plaintiffs must plead and prove, 7 U.S.C. § 25(a).

Given that these limitations exist within the CEA itself in private actions for manipulation, and that the statute deliberately encompasses overseas commodities, it makes little sense to say that the CEA does not apply at all simply because the alleged misconduct utilized offshore cash-market transactions to target the U.S. exchange.

II. The District Court Overlooked CEA Section 2(i).

1. The district court's opinion contains several incorrect statements to the effect that the CEA "lack[s] any express statements regarding extraterritorial application" or "suggesting that Congress intended the reach of the law to extend to foreign conduct." SPA-62-63. CEA Section 2(i) establishes the extraterritorial reach of the statute's swaps provisions:

> The provisions of this [Act] relating to swaps that were enacted by [Dodd-Frank] (including any rule prescribed or regulation promulgated under that Act), *shall not apply to activities outside the United States unless those activities—*
>
> (1) have a *direct and significant connection with activities in, or effect on, commerce of the United States*; or

> (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this [Act] that was enacted by [Dodd-Frank].

7 U.S.C. § 2(i) (emphases added).

"The plain text of this provision clearly expresses Congress's affirmative intention to give extraterritorial effect" to Dodd-Frank's swaps provisions "whenever the provision's jurisdictional nexus is satisfied." Sec. Indus. & Fin. Mkts. Ass'n v. CFTC, 67 F. Supp. 3d 373, 425-26 (D.D.C. 2014).

2. The district court's errors in this regard rest in part on a mistaken reading of *Loginovskaya*. The district court stated that *Loginovskaya* established "that the CEA lacked any express statements regarding extraterritorial application." SPA-62. However, that case involved only the pre-Dodd-Frank version of the CEA. *Loginovskaya*, 764 F.3d at 270 (applying 7 U.S.C. § 6o(1) (2008)). The Court emphasized that its holding was, therefore, limited to that now-superseded version of the statute:

> The Dodd-Frank [Act] amended CEA § 22 to cover swaps, and provided that its "provisions ... relating to swaps" may, under certain circumstances, "apply to activities outside the United States." 7 U.S.C. § 25(a)(1) (2010); *id.* § 2(i). The Court takes no view of the effect that the Dodd-Frank amendments may have on the extraterritorial reach of the CEA: no swaps or transactions involving swaps are at issue here.

Id. at 271 n.4.

3. Because of these errors, the district court's analysis is incorrectly worded as to the extraterritorial reach of CEA Sections 6(c)(1), 9(a), and 22, 7 U.S.C §§ 9(1), 13(a)(2), and 25. The decision states that "[e]ach of these provisions is silent as to any extraterritorial application." SPA-64. However, that fails to account for Section 2(i), which sets the extraterritorial reach of "[t]he provisions of [the CEA] relating to swaps that were enacted by" Dodd-Frank. 7 U.S.C. § 2(i). Dodd-Frank amended all three of these provisions to include references to swaps. *See* Dodd-Frank §§ 741(b), 749(h), 124 Stat. at 1731, 1748. Section 2(i) therefore establishes their extraterritorial reach with respect to swaps activities.

4. This issue is critical to the CFTC. Section 2(i) is a lynchpin of the Dodd-Frank swaps-market reforms, given the cross-border swaps activities that catalyzed the financial crisis in 2008. To curtail it would be "disruptive to the CFTC's mission and the purposes of the Dodd–Frank Act." *Sec. Indus. & Fin. Mkts. Ass'n*, 67 F. Supp. 2d at 436. Because of the Second Circuit's preeminence in the field of financial regulation, the district court's erroneous statements, if uncorrected here, may be cited by other courts and litigants or, at a minimum, lead to further confusion. It is important, therefore, that this Court correct those mistaken statements about the statute's text.

5. The Commission takes no position on what if any relevance Section 2(i) has here.

CONCLUSION

This Court should reject the district court's analysis on the issue of extraterritoriality.

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November 22, 2017

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