No. 23-___

IN THE

Supreme Court of the United States

JEFFREY LAYDON ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

COOPERATIEVE RABOBANK U.A., 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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QUESTION PRESENTED

This Court has "repeatedly and explicitly held" that to decide whether a case involves a domestic application of a statute—as opposed to an impermissibly extraterritorial one—"courts must identify the statute's focus and ask whether the conduct relevant to that focus occurred in United States territory." *Abitron Austria GmbH v. Hetronit Intn'l, Inc.*, No. 21-1043, slip op. at 4 (June 29, 2023) (cleaned up). "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." *Id*. at 5 (cleaned up). The Second Circuit has read this precedent to establish a *necessary*, but not a *sufficient,* condition for domestic application of a law. In applying federal securities and commodities laws, the Circuit has held that even if the conduct relevant to the statute's focus occurred in the U.S., a claim may still be extraterritorial if other conduct occurred abroad and a court decides that, all things considered, the claim is "predominantly foreign." Other circuits read this Court's focus test as establishing a necessary and sufficient condition for a domestic application. And the First and Ninth Circuit—along with the SEC, the Commodity Futures Trading Commission, and the Solicitor General—have rejected the "predominantly foreign" test in particular as inconsistent with this Court's precedents. The question presented is:

Whether, to decide if a claim involves a domestic application of a statute, courts may consider factors other than whether the conduct relevant to the statute's focus occurred in the United States.

PARTIES TO THE PROCEEDING

1. Petitioner Jeffrey Laydon was the plaintiff in the district court and the appellant below.

2. Respondents Coöperative Rabobank U.A., Barclays Bank PLC, Société Générale S.A., The Royal Bank of Scotland Group PLC, UBS AG, Lloyds Banking Group PLC, UBS Securities Japan Co., Ltd., The Royal Bank of Scotland PLC, and RBS Securities Japan Limited, were defendants in the district court and appellees below.

3. Barclays Bank PLC, Citibank Japan Ltd., Citibank N.A., Citigroup Global Markets Japan, Inc., Citigroup Inc., Deutsche Bank AG, HSBC Bank PLC, HSBC Holdings PLC, J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, National Association, J.P. Morgan Securities PLC, Martin Brokers (UK) Ltd., Mitsubishi UFJ Trust and Banking Co., Ltd., Mizuho Corporate Bank, Ltd., R.P. Martin Holdings Limited, Credit Agricole CIB, Chuo Mitsui Trust & Banking Co. Ltd., ICAP plc, ICAP Europe Limited, Tullett Prebon PLC, Resona Bank Ltd., Shinkin Central Bank, Sumitomo Mitsui Banking Corporation, Sumitomo Mitsui Trust Bank, Ltd., The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Bank of Yokohama, Ltd., The Norinchukin Bank, The Shoko Chukin Bank, Ltd., and The Sumitomo Trust and Banking Co., Ltd. were defendants in the district court, but were not parties to the appeal.

4. Oklahoma Police Pension & Retirement System and Stephen Sullivan were plaintiffs to the proposed Third Amended Class Action Complaint, which the district court did not permit plaintiffs to file.

California State Teachers Retirement System sought leave to intervene as a plaintiff in the district court, which was denied.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

1. *Laydon v. Coöperative Rabobank U.A.,* Nos. 20-3626, 20-3775, 55 F. 4th 86 (2d Cir. decided Oct. 18, 2022, amended Dec. 8, 2022), *reh'g denied*, Order at 1 (2d Cir. Feb. 24, 2023).

2. *Laydon v. Mizuho Bank, Ltd.*, No. 12-CV-3419, 2020 WL 5077186 (S.D.N.Y. Aug. 27, 2020) (order granting motion for judgment on the pleadings).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey Laydon respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a–26a) is reported at 55 F.4th 86. An initial panel decision (Pet. App. 27a-54a) was originally reported at 51 F.4th 476, but later withdrawn. The district court's 2020 order (Pet. App. 55a-61a) is unreported but available at 2020 WL 5077186. The district court's 2015 order (Pet. App. 62a-78a) is unreported but available at 2015 WL 1515487. The district court's 2014 order (Pet. App. 79a-110a) is unreported but available at 2014 WL 1280464.

JURISDICTION

The Second Circuit issued its initial opinion on October 17, 2022. Pet. App. 27a. In response to a timely filed petition for rehearing, the court amended its decision on December 8, 2022. *Id*. 1a. The court denied a timely petition for rehearing en banc on February 24, 2023. *Id*. 111a. On May 18, 2023, Justice Sotomayor extended the deadline for filing this petition through July 24, 2023. 22A1003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant provisions of the Commodity Exchange Act and Securities Exchange Act of 1934 are reproduced in Appendix F to this petition (Pet. App. 113a-126a).

INTRODUCTION

Most statutes apply only domestically, but many violations of those statutes include at least some foreign activity. A defendant may, for example, defraud U.S. investors through false emails or telephone calls originated abroad. The question thus commonly arises whether the foreign aspects of a case make otherwise illegal conduct immune from challenge under U.S. law.

This Court confronted this kind of question in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), a case under the Securities Exchange Act (SEA), 15 U.S.C. § 78a *et seq*. To decide whether the plaintiffs in that case sought a domestic application of the statute, the Court looked to the "focus" of the Act, which it concluded was "not upon the place where the deception originated, but upon purchases and sales of securities in the United States." 561 U.S. at 266. In light of that focus, the Court adopted a "transactional test" for the SEA that 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.

This Court has since used *Morrison*'s approach as a universal framework. As the Court explained last term, to decide whether a case seeks a domestic application of federal law, "courts must identify the statute's focus and ask whether the conduct relevant to that focus occurred in United States territory." *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, No. 21-1043, slip op. 4 (June 29, 2023) (cleaned up).

The circuits are intractably divided over whether meeting this test is a sufficient, or merely necessary,

condition for domestic application of federal law. The Second Circuit holds that an SEA claim can be impermissibly extraterritorial even if it arises out of a transaction on a domestic security exchange. Pet. App. 6a. An application is still extraterritorial, the circuit holds, if other aspects of the case render the claims "predominantly foreign." *Ibid*. Applying this rule, the Second Circuit holds that federal securities laws provide no remedy for frauds involving transactions on U.S. securities markets when the fraudulent conduct principally took place overseas. *Id*. 17a. Other circuits treat the focus test as necessary and sufficient, with the First and Ninth Circuits rejecting Second Circuit precedent and the "predominantly foreign" test by name.

In a prior case, the Solicitor General told this Court that the Second Circuit's approach is inconsistent with *Morrison*, but recommended denying certiorari to review that precedent in the hopes that the Second Circuit would change its law on its own. *See* Br. U.S. as Amicus 14-15, 19-20, *Toshiba Corp. v. Automotive Indus. Pension Tr. Fund*, No. 18-486. In this case, the Commodity Futures Trading Commission filed an amicus brief urging the Second Circuit to grant rehearing en banc to do just that. *See* CTFC Amicus Br. 2, *available at* 2023 WL 370994 (arguing that the "panel decision should be reheard en banc because it relied on the . . . 'predominantly foreign' test which is inconsistent with Supreme Court precedent and deepens a circuit split"). But the Second Circuit denied the petition.

Accordingly, it is now clear that despite the Government's earlier hopes, nothing short of this

Court's intervention will resolve the circuit conflict over the basic framework for deciding when a statute applies domestically or the disagreement over the Second Circuit's "predominantly foreign" test in securities cases. The Court should take this opportunity to clarify its extraterritoriality rules and restore uniformity to the law.

STATEMENT OF THE CASE

I. Legal Background

1. "Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335 (2019). As noted, this Court considered the proper test for whether a statute is being applied domestically in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010). The Court began by forcefully rejecting the Second Circuit's "conduct and effects" test, under which courts decided whether plaintiffs sought an extraterritorial application of the SEA by considering "whether the wrongful conduct occurred in the United States" and whether that conduct "had a substantial effect in the United States." *Id.* at 257 (citations omitted). This Court explained that the test was untethered from the text of the statute, was indeterminate and difficult to apply, and led to "unpredictable and inconsistent" results. *Id.* at 258-60.

Instead, the Court held that whether a plaintiff seeks a domestic application of a statute turns on the relationship between the facts of the case and "the 'focus' of congressional concern." *Id.* at 266 (citation omitted). The focus of a statute can be "conduct,

parties, or interests that Congress sought to protect or regulate." *Abitron*, *supra*, at 11 (cleaned up). Thus, the focus need not be the defendant's conduct. *See, e.g.*, *RJR Nabisco*, 579 U.S. at 346 (focus of private RICO claim is the plaintiff's injury, which must be domestic); *United States v. Harris*, 991 F.3d 552, 559 (4th Cir. 2021) (focus of 18 U.S.C. § 2422(b) is protecting children from sexual exploitation). In *Morrison*, the Court held that the "focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Id*. at 266. Accordingly, the SEA applies domestically when the fraud involves "transactions in securities listed on domestic exchanges" or "domestic transactions in other securities." *Id*. at 267.

In later cases, the Court adopted *Morrison*'s focus-based approach as the general test for whether a claim requires extraterritorial application of federal law and made clear that so long as conduct relevant to the statute's focus occurred in the United States, the application is domestic. *See Abitron*, *supra*, at 5 ("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.") (cleaned up); *RJR Nabisco*, 579 U.S. at 325 (same); *see also WesternGeco LLC v. Ion Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (courts ask "whether the conduct relevant to [the statute's] focus occurred in United States territory. If it did, then the case involves a permissible domestic application of the statute.") (citations omitted).

2. Remarkably, in the years since *Morrison* the Second Circuit has not only persisted in applying a version of its "conduct and effects" test in cases under the SEA but has extended that approach to other indistinguishable provisions of federal law as well.

a. In *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198 (2d Cir. 2014), the Second Circuit acknowledged that it was "of course bound by *Morrison*," but concluded that while "a domestic securities transaction" is "necessary to a properly domestic invocation" of the SEA, "such a transaction is not alone sufficient." *Id*. at 214-15. Instead, the court held that the defendant's conduct must also not be "so predominantly foreign as to be impermissibly extraterritorial." *Id*. at 216. And even though *Morrison* insisted that the location of the deceptive conduct was not the focus of the SEA, the Second Circuit held that the case before it was impermissibly extraterritorial in significant part because the "complaints concern statements made primarily in Germany." *Ibid*.

Despite *Morrison*'s criticism of the indeterminacy of the "conduct and effects" test, the Second Circuit openly acknowledged that its "predominantly foreign" standard was not "a test that will reliably determine whether a particular invocation of [the statute] will be deemed appropriately domestic or impermissibly extraterritorial." *Id*. at 217. Rather, the Second Circuit "believe[d] 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, so as eventually to

develop a reasonable and consistent governing body of law on this elusive question." *Ibid*.

b. The Ninth Circuit subsequently rejected *Parkcentral*'s "predominantly foreign" standard as inconsistent with *Morrison*. *See Stoyas v. Toshiba Corp.*, 896 F.3d 933, 950 (9th Cir. 2018). When the defendant in *Toshiba* petitioned for certiorari, this Court called for the views of the Solicitor General. 139 S. Ct. 935 (2019). In its invitation brief, the United States agreed that the Second Circuit's test defied this Court's teaching in *Morrison* and "replicat[ed] several principal defects that this Court identified in earlier Second Circuit law." U.S. Br. 15. The Solicitor General nonetheless recommended the Court deny the petition, noting that the case was interlocutory and that the Second Circuit might reconsider its position in light of the Court's intervening extraterritoriality decisions in *RJR Nabisco* and *WesternGeco*. *Id*. at 18-20. The Court denied the petition. 139 S. Ct. 2766 (2019).

c. Since the denial in *Toshiba*, the Second Circuit has not only refused to reconsider *Parkcentral* but has extended its rule to the materially identical context of the Commodity Exchange Act (CEA), 7 U.S.C. § 1 *et seq*.

Like the SEA, the CEA "broadly prohibits fraudulent and manipulative conduct" with regard to a domestic security, here "commodity futures." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 836 (1986)*; see, e.g.*, 7 U.S.C. § 6 (establishing regulatory regime for U.S. futures exchanges); *id*. § 6b(a) (prohibiting fraud in the sale of futures

contracts on U.S. exchanges); *id.* § 6c(a) (prohibiting false or "wash sales" to manipulate prices); *id.* § 13(a) (prohibiting manipulation of prices on U.S. futures exchange). Section 22 of the CEA provides an express private right of action against "[a]ny person . . . who violates" the Act or "who willfully aids, abets, counsels, induces, or procedures the commission of a violation." 7 U.S.C. § 25(a)(1).

In *Prime International Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019), the Second Circuit recognized that like the SEA, the "focus of congressional concern" in the CEA's private right of action "is clearly transactional, given its emphasis on domestic conduct and domestic transactions." *Id.* at 104 (cleaned up). Finding no relevant distinction between the two statutes, the court held that "*Parkcentral*'s rule carries over to the CEA," and therefore required, in addition to a domestic transaction, that the allegedly illegal conduct "must not be 'so predominately foreign as to be impermissibly extraterritorial.'" *Id.* at 105, 106 (quoting *Parkcentral*, 763 F.3d at 216).

II. Factual And Procedural History

1. This case arises from a scheme to manipulate the price of futures contracts tied to two privately published benchmarks known as Yen-LIBOR and Euroyen TIBOR. Pet. App. 5a. The benchmarks are calculated on the basis of submissions from participating banks reporting the interest rate at which the submitters could borrow Yen outside of Japan. *Id.* 6a-7a. Euroyen-Tibor is calculated by the Japanese Bankers Association at 11am Tokyo time

each weekday based on submission from banks headquartered primarily in Japan. *Id.* 7a. Yen-LIBOR is set by the British Bankers' Association using submissions from its members (some of which also participate in setting Euroyen-Tibor) later in the day, at 11 a.m. London time. *Ibid*.

The market for financial instruments priced based on Yen-LIBOR and Euroyen TIBOR "is one of the largest and most active markets for such products in the world" with active trading by U.S. investors, including on the Chicago Mercantile Exchange (CME). *See* US Department of Justice Statement of Facts ¶ 21, C.A. J.A. 1766. During the relevant period, trillions of dollars' worth of financial instruments priced on Yen-LIBOR and Euroyen TIBOR were traded by U.S. investors, including futures on the CME. *See id*. ¶ 1; *In the Matter of UBS AG and UBS Securities Japan Co., Ltd.* at 6, 8, CFTC Docket No. 13-09 (Dec. 19, 2012) (C.A. J.A. 1816, 1818).

Respondents include banks that participated in setting these benchmark rates even while they and the respondent brokers also traded derivatives whose prices were directly tied to those rates. *Id.* at 8a. In many instances the same bank employees were responsible for rate submissions to the benchmark-setting bodies and for making trades whose profitability depended on the benchmark rates eventually set. *Id.* at 9a.

Starting in 2012, regulators from around the world, including the United States Department of Justice and the Commodity Futures Trading Commission (CFTC), discovered that respondents and

others were engaged in a conspiracy to manipulate these benchmarks to unlawfully profit in their trading operations. Third Am. Compl. (Complaint) ¶¶ 1-25.[1] Respondents would coordinate false submissions to the rate-setting boards and then cash in on the manipulation, including through trades of Euroyen-TIBOR futures contracts on U.S. futures exchanges. *Id*. ¶¶ 158-163. To date, regulators have collected $7 billion in fines and penalties from the conspirators. *Id*. ¶ 164. The U.S. Government brought a variety of criminal and administrative actions against the participants and obtained deferred prosecution agreements with substantial fines from many of the defendants in this case. *Id*. ¶¶ 3-14, 758.

2. Petitioner brought this proposed class action on behalf of investors who suffered losses from Euroyen TIBOR futures transactions on U.S. exchanges due to the conspiracy. Pet. App. 2a. He alleged violations of CEA and federal antitrust laws. *Ibid*.

Respondents moved to dismiss the CEA claims. Among other things, they argued that the manipulated benchmarks did not constitute "commodities" under the statute and that the Complaint failed to adequately allege causation. Pet. App. 88a. The district court denied the motion. It noted that the "CFTC has repeatedly found that Yen-LIBOR and Euroyen TIBOR each are a 'commodity'

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[1] The Complaint is reproduced at pages 1309-1751 of the Second Circuit Excerpt of Records.

within the meaning of the CEA." *Ibid.*[2] The court further found that the "allegations in the Complaint are sufficient to show" that the alleged manipulation of "Yen-LIBOR significantly impacted Euroyen TIBOR" and therefore proximately caused petitioner's alleged injuries. *Id.* 90a.[3]

Six years later, after the Second Circuit extended its "predominantly foreign" test to the CEA in *Prime*, respondents moved for judgment on the pleadings, arguing that petitioner's CEA claims required an impermissibly extraterritorial application of the statute because the bulk of the manipulative conduct took place overseas. *Id.* 57a. The district court agreed and dismissed. *Id.* 59a-60a.

3. The Second Circuit affirmed. The panel acknowledged that "the focus of the statute is transactional" and that *Morrison* therefore controlled. Pet. App. 15a. The court further accepted for purposes of the appeal that petitioner's injuries arose from domestic transactions. Pet. App. 16a. But applying *Prime*, the court held that "[s]imply pleading a domestic transaction" was "not enough." *Id.* 15a. The

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[2] Although the word "commodity" most immediately conjures up images of wheat or pork bellies, Congress defined the term more broadly in order to protect investors participating in the full breadth of modern futures markets. *See* 7 U.S.C. § 1a(9) ("commodity" defined to include "all services, rights and interests . . . in which contracts for future delivery are presently or in the future dealt with").

[3] The court dismissed petitioner's antitrust claims on the belief that "he would not be an 'efficient enforcer' of the alleged antitrust violation." Pet. App. 3a. In 2015, the court denied leave to amend to add racketeering claims. *Ibid.*

panel then concluded that petitioner's "CEA claims are impermissibly extraterritorial because the conduct he alleges is 'predominantly foreign.'" *Id*. 16a.

The court acknowledged petitioner's argument that "his claims must be domestic because they involve both core domestic transactions (*i.e.*, transactions on a domestic exchange) and manipulation of a domestic commodity market" (*i.e.*, manipulation of indices traded on a domestic exchange). *Id*. 17a (cleaned up). The court did not dispute either premise but decided that *Prime* nonetheless precludes any remedy for manipulation of a commodity trading on a U.S. exchange so long as the manipulative conduct took place outside U.S. borders. *Id*. 17a-19a.[4]

4. Laydon filed a petition for rehearing en banc, supported by an amicus brief from the CFTC. In addition to explaining that the "predominantly foreign" test conflicts with this Court's

[4] Originally, the panel held that benchmark indices are not "commodities" under the CEA. Pet. App. 44a-45a. But after the CFTC filed an amicus brief in support of rehearing, explaining that the panel decision "overlooked the operative text" and created a circuit conflict "on an issue of major national importance," the panel amended its opinion to delete the relevant passage. Br. Amicus Curiae U.S. CFTC Supp. Reh'g. 2, *Laydon v. Cooperative Rabobank U.A.*, No. 20-3626 (Nov. 29, 2022) (Second Cir. Docket No. 383). As explained below, and demonstrated by the fact that the CFTC filed a subsequent amicus brief requesting rehearing of the amended opinion as well, the revision did not resolve the conflict between the "predominantly foreign" test and the law of other circuits and this Court.

extraterritoriality precedents, the Commission argued that "Congress specifically intended the CEA to regulate U.S. futures contracts based on foreign commodities" and that "manipulation frequently involves conduct *off* of an exchange that profits the perpetrator by distorting prices *on* an exchange." CFTC Amicus Br. 8. Shielding such manipulation of a commodity on a U.S. exchange, the Commission argued, undermines the statute's central purpose, which "is to protect the integrity of prices in U.S. markets." *Id*. 7-8.

The court denied the petition for rehearing, Pet. App. 111a, and this petition followed.

REASONS FOR GRANTING THE PETITION

As recently as last June, this Court emphasized that it has "repeatedly and explicitly held" to decide whether a case presents a domestic application of a federal law, "courts must identify the statute's focus and ask whether the conduct relevant to that focus occurred in United States territory." *Abitron*, No. 21-1043 at 4 (cleaned up). The Second Circuit insists that the Court's repeated description of the test is incomplete and that even when the conduct relevant to a statute's focus occurs in the United States, the fact that *other* conduct related to the case occurred overseas can render the claims "predominantly foreign" and therefore impermissibly extraterritorial.

Four years ago, this Court seriously considered granting certiorari to decide whether the Second Circuit is correct, calling for the views of the United States on a petition arising from the Ninth Circuit's rejection of the Second Circuit's standard. The

Solicitor General told the Court that the question was important, that the Ninth Circuit's decision was correct, and that the Second Circuit appeared to have adopted "a repackaged version of the conduct-and-effects test that the *Morrison* Court had rejected." U.S. *Toshiba* Br. 8-9. But the Government recommended that the Court deny review because the case was interlocutory, there was some uncertainty as to what the Second Circuit's position was, and there was a prospect that the Second Circuit might change its views in light of this Court's intervening decisions in *RJR Nabisco* and *WesternGeco*. U.S. *Toshiba* Br. 8-9.

Since then, the Second Circuit has made clear that it meant what it said in *Parkcentral*. And it has maintained its position despite the Government repeatedly pointing out the conflict between its rule and *RJR Nabisco* and *WesternGeco*. Meanwhile, the First Circuit has joined the Ninth Circuit in directly rejecting the "predominantly foreign" test as inconsistent with *Morrison* and this Court's extraterritoriality framework. It is time for the Court to intervene.

This case provides an ideal vehicle for doing so. The Second Circuit accepted that the conduct relevant to the focus of the CEA claims occurred in the United States, and dismissed solely because it believed this fact was insufficient to establish a domestic application of federal law. That this case arises under the *Commodity* Exchange Act rather than the *Securities* Exchange Act is no impediment to review. The Second Circuit applies the same test to both statutes because there is no difference between them

material to the extraterritoriality analysis. But more importantly, the question presented and the circuit conflict are not limited to the application of a particular statute, but address a profound disagreement about this Court's general framework for deciding when a claim involves a domestic application of federal law. Deciding whether it is sufficient that conduct relevant to a statute's focus occurred in the United States will resolve the circuit conflict over the doctrine and also ensure uniform application of both the SEA and the CEA throughout the nation.

I. The Circuits Are Divided.

The circuits are intractably divided over the basic framework for deciding when a claim involves a domestic application of federal law and over the validity of the "predominantly foreign" test in particular.

1. The Second Circuit's position is no longer in doubt. In *Cavello Bay Reinsurance Ltd. v. Shubin Stein*, 986 F.3d 161 (2d Cir. 2021), for example, the court emphasized under circuit precedent, "the presence of a domestic transaction alone cannot satisfy the statute's geographic requirements; claims must not be 'so predominantly foreign as to be impermissibly extraterritorial.'" *Id*. at 165 (quoting *Parkcentral*, 763 F.3d at 216); *see also id*. at 266 ("*Morrison*'s 'domestic transaction' rule operates as a threshold requirement, and as such may be underinclusive.") (citation omitted). In both *Prime* and in this case, the Second Circuit assumed petitioners' claims involved domestic transactions but

nonetheless held them extraterritorial solely because it found the defendants' manipulative conduct was "predominantly foreign." *See Prime*, 937 F.3d at 105; Pet. App. 16a.[5]

Moreover, the Second Circuit has applied this rule despite parties—including the Solicitor General in *Toshiba* and the CFTC in this case and in *Prime*—pointing out the Court's intervening decisions in *RJR Nabisco* and *Western-Geco*. *See, e.g.*, U.S. *Toshiba* Br. 12; CFTC *Laydon* Amicus Br. 4; CFTC *Prime* Amicus Br. 19; *see also Cavello Bay*, 986 F.3d at 166 (citing *RJR Nabisco*); *Prime*, 937 F.3d at 102, 105 (citing *RJR Nabisco* and *WesternGeco*); Pet. App. 14a-15a (same).

2. At the same time, multiple circuits have rejected the Second Circuit's "predominantly foreign" test and the underlying premise that domesticity can turn on factors beyond where the conduct that is the focus of the statute occurred.

In *Toshiba*, the Ninth Circuit correctly perceived that the Second Circuit views *Morrison*'s domestic-transaction test as "necessary but not sufficient" and explained that this "turns *Morrison* and Section 10(b) on their heads." *Toshiba*, 896 F.3d at 949. In particular, the Ninth Circuit rejected the premise that

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[5] The Second Circuit also has not limited its rule to any special category of securities. *Compare* U.S. *Toshiba* Amicus Br. 20 (holding out that Second Circuit might limit rule to the "distinctive context" of "a security-based swap agreement") *with* Pet. App. 17a (applying rule to case involving standard futures contracts), *and Prime*, 937 F.3d at 98 (futures and derivatives), *and Cavello Bay*, 986 F.3d at 163 (standard equity shares).

domesticity depends on anything other than where the conduct relevant to the focus of the statute occurred: "because we are to examine the location of the transaction, it does not matter that a foreign entity was not engaged in the transaction." *Ibid*.

After the Court denied certiorari in *Toshiba*, the First Circuit reached the same conclusion. In *SEC v. Marrone*, 997 F.3d 52 (1st Cir. 2021), the First Circuit declared that "[l]ike the Ninth Circuit, we reject *Parkcentral* as inconsistent with *Morrison*." *Id*. at 60. This Court, the First Circuit observed, "explicitly said that, if a transaction is domestic, § 10(b) applies." *Ibid*. The court of appeals agreed with the SEC that the "existence of a domestic transaction suffices to apply the federal securities laws under *Morrison*. No further inquiry is required." *Ibid*.

Other circuits, while not rejecting Second Circuit precedent by name, likewise hold that a claim is domestic if conduct relevant to the statute's focus occurred in the United States, without any further inquiry or requirements. For example, the Eleventh Circuit has held that "*Morrison* deliberately established a bright-line test based *exclusively* on the location of the purchase or sale." *See Quail Cruise Ship Mgmt. Ltd. v. Agencia de Giagens CVS Tur Limitada*, 645 F.3d 1307, 1310-11 (11th Cir. 2011) (emphasis added).

Other circuits have adopted the same rule in the course of administering a range of other statutes. For example, in *Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904 (D.C. Cir. 2018), the D.C. Circuit rejected a defendant's claim that it could not

be liable under U.S. copyright law because it had distributed its pirated copies of television shows over the internet from servers in Poland. *Id.* at 914. The court explained that the focus of the statute was infringing performances, which took place here. "Accordingly, because 'the conduct relevant to the statute's focus occurred in the United States,' this case 'involves a permissible domestic application' of the Copyright Act, 'even if other conduct occurred abroad.'" *Ibid* (quoting *RJR Nabisco*, 579 U.S. at 337).

Similarly, the Fourth Circuit has held that because the focus of the federal wire fraud statute is use of the wires, a fraudulent scheme conducted by defendants from Israel involved a domestic application because the scheme involved internet communications and phone calls to victims in Maryland. *United States v. Elbaz*, 52 F.4th 593, 604 (4th Cir. 2022); *see also United States. v. Hussain*, 972 F.3d 1138 (9th Cir. 2020) (same where violations "stemmed from phone or video conference calls among participants in the United Kingdom and California" and "press releases distributed from England to California").

The Fourth Circuit has likewise found a domestic application of a federal criminal statute whose focus is "the production of a visual depiction of a minor engaging in sexually explicit conduct" where "the conduct relevant to the statute's focus occurred in Virginia." *United States v. Skinner*, 70 F.4th 219, 225 (2023) The "fact that [the defendant] was in New Zealand when he participated in the video calls and made the recordings of [the minor] does not prevent his case from qualifying as a domestic application of" the statute, the court held, because "the statute is

primarily concerned with the production or transmission of the visual depiction." *Id*. at 227. Given this focus, "the domestic application analysis does not depend on the defendant's location in recording the depiction and receiving the transmission." *Ibid*.

In none of these decisions did the courts consider whether other aspects of the case, including the location of the defendant's conduct, would nonetheless render the statute's application extraterritorial. Instead, these courts and others have understood this Court's cases to mean what they plainly say: "Only conduct relevant to the statute's focus determines domestic application of the statute." *Adhikari v. Kellog, Brown & Root, Inc.*, 845 F.3d 184, 194 (5th Cir. 2017). That understanding is irreconcilable with the Second Circuit's interpretation of the focus-test as a mere necessary condition and with that circuit's invention of the additional requirement that the location of the defendant's conduct not render the claims "predominantly foreign."

* * *

The Second Circuit acknowledges much of this. It admits that the First and Ninth Circuits reject its "predominantly foreign" test "as 'inconsistent with *Morrison*.'" *In re Platinum and Palladium Antitrust Litig.*, 61 F.4th 242, 267 n.7 (2d Cir. 2023) (quoting *Marrone*, 997 F.3d at 60, and citing *Stoyas*, 896 F.3d at 950). And it has recognized that the Eleventh Circuit views *Morrison* as adopting a "bright-line test" that turns exclusively on the location of the transaction. *Absolute Activist Value Master Fund Ltd.*

v. Ficeto, 677 F.3d 60, 68 (2d Cir. 2012) (quoting *Quail*, 645 F.3d at 1310-11).

II. The Question Presented Is Important And The Continuing Division Intolerable.

The Court should not delay resolving the circuits' conflicting understandings of its extraterritoriality framework any longer.

1. The conflict will not resolve itself. Since *Toshiba*, the Second Circuit has repeatedly reaffirmed its rule in SEA cases and extended it to the materially identical CEA context. It has done so even while recognizing that other circuits reject its reading of *Morrison* and in the face of the Government's calls to revisit its precedent. *See supra* at 12-13.

Nor is there any prospect that any (much less all) of the circuits on the other side of the split will reverse course and adopt the Second Circuit's rule. The Ninth Circuit has rejected *Parkcentral*'s holding root and branch. *See* 896 F.3d at 949-950 (cataloging the ways in which *Parkcentral* is "contrary to Section 10(b) and *Morrison* itself"). "Like the Ninth Circuit," the First Circuit "reject[ed] *Parkcentral* as inconsistent with *Morrison*," making clear that it lacks the power to change its precedent without further intervention from this Court. *Morrone*, 997 F.3d at 60. And since the split developed, the Second Circuit has provided no meaningful response to the other circuits' criticisms that could cause those courts to change their views.

2. To be sure, other circuits have yet to reject the Second Circuit's interpretation of *Morrison* in the specific context of a CEA claim. But that is no reason to allow the circuit conflict over the correct standard

for domestic application to persist. The circuits are avowedly in conflict over the basic question of whether this Court's extraterritoriality precedents permit an inquiry that extends beyond whether "the conduct relevant to the statute's focus occurred in the United States." *Abitron*, *supra*, at 4 (emphasis and citation omitted). That conflict would warrant review even if it had not spawned conflicting rulings on the scope of any particular statute. That the doctrinal dispute has led to an open conflict over how to apply the SEA provides added reason for the Court to intervene. But the dispute is not limited to—or even focused on—the meaning of that particular statute.

In any event, as the Second Circuit has explained, because there is no material difference between the SEA's and the CEA's "focus" (both are transactional), a circuit's rule for determining a domestic application of the SEA necessarily applies to the CEA as well. *See supra* at 8.[6] Accordingly, there is no genuine prospect that despite their avowed conflict in SEA cases, both the First and the Ninth Circuits will accept the "predominantly foreign" test in a future case under the

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[6] Other circuits have similarly acknowledged that the CEA was modeled on the SEA in relevant part. 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); *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).

CEA. Nor would any purpose be served by waiting for the inevitable CEA conflict to arise. Additional CEA decisions will not shed further light on the question presented, which turns on the meaning of this Court's extraterritoriality decisions, not on anything specific to the CEA. And in briefs filed by the Solicitor General, the SEC, and the CFTC, the Government has repeatedly made clear its view that, as applied to either statute, the "predominantly foreign" test is "inconsistent with Supreme Court precedent." CFTC Amicus Br. 1 (CEA case); *see also* CFTC *Prime* Amicus Br. 3 (same); SEC *Marrone* Amicus Br. 22 (arguing in SEA case that "*Parkcentral* has been expressly rejected by the Ninth Circuit as contrary to Section 10(b) and *Morrison* itself, has not been followed by another circuit, and should not be followed here.") (cleaned up).

Accordingly, this case presents the Court an opportunity to kill multiple birds with one stone, resolving a fundamental disagreement about the Court's basic extraterritoriality framework in a context that will align the circuits' application of both the SEA and the CEA.

3. At the same time, the cost of allowing the conflict to persist is significant.

As the Court clearly recognized in calling for the views of the Solicitor General in *Toshiba*, the proper application of the nation's securities laws is a matter of great national and international importance. Trillions of dollars pass through our nation's exchanges, due in significant part on their worldwide reputation as safe fora for investment and trading.

Futures markets in particular are integral to the overall U.S. financial market with the "main economic functions" of the futures market being "the stabilization of commodity prices, the provision of reliable pricing information, and the insurance against loss from price fluctuation." *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1173 (8th Cir. 1971). Allowing manipulation of those markets simply because the interference was conducted from abroad interferes with those important functions, threatens the international reputation of U.S. markets, and subjects U.S. investors to real injuries Congress intended to avoid.

At the same time, the question presented has significant implication for other nations as well, as illustrated by the outpouring of amicus briefs from international entities in *Toshiba*, urging the Court to settle the conflict over *Morrison*'s meaning. *See, e.g.*, U.S. *Toshiba* Br. 21 (addressing international briefs). In responding to the Court's calls for the views of the United States on the petition, the Solicitor General acknowledged that these "concerns are weighty" and it was important to get the balance right. *Ibid*.

The Second and Ninth Circuits' continued division on such a foundational question in the securities context is particularly intolerable. These two circuits decide the majority of federal securities claims and exert broad influence in the lower courts in the circuits that have yet to decide the question. *See* Cornerstone Research, *Securities Class Action Filings: 2022 Year in Review* ("The Second and Ninth Circuits made up 69%

of all core federal [securities] filings in 2022. . . .")[7]; TRAC Reports, *Securities and Commodities Exchange Litigation Reaches All-Time High in September 2020* (majority of SEA and CEA cases filed in district courts within Second and Ninth Circuits in 2020)[8]; *see also Morrison*, 561 U.S. at 260 (noting the Second Circuit's "preeminence in the field of securities law" and influence on other courts).

Finally, as discussed in greater detail below, the continued application of the Second Circuit's "predominantly foreign" test is also harmful for all the reasons that led this Court to reject the Circuit's predecessor "conduct and effects" test: it leaves litigants and lower courts at sea over whether U.S. securities laws apply to particular cases, leads to inconsistent and arbitrary results, and deprives Congress of "a stable background against which" it can "legislate with predictable effects." *Id*. at 258, 261.[9]

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[7] https://www.cornerstone.com/wp-content/uploads/2023/05/Securities-Class-Action-Filings-2022-Year-in-Review.pdf

[8] https://trac.syr.edu/tracreports/civil/632/.

[9] *Compare, e.g.*, *Dennis v. JPMorgan Chase & Co*., 343 F. Supp. 3d 122, 182 (S.D.N.Y. 2018) (finding CEA claims were domestic 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) (finding CEA claims arising from transactions on a domestic commodities exchange extraterritorial because they were based on "foreign bad acts").

III. The Decision Below Is Wrong.

Certiorari is also warranted because the Second Circuit has consistently defied this Court's extraterritoriality precedents in two distinct ways.

First, the Second Circuit's conclusion that a domestic transaction is merely a necessary, but not a sufficient, condition for a domestic application of the SEA is contradicted by *Morrison* and its progeny. Perhaps the "predominantly foreign" test could be reconciled with *Morrison* if the SEA had a second focus the Court forgot to mention, one directed at the defendant's deceptive conduct. But *Morrison* expressly rejected that possibility, holding that "focus of the Exchange Act is *not* upon the place where the deception originated." 561 U.S. at 266 (emphasis added).

The only other possibility is that even though the location of the deception was not the *focus* of the statute, it is still an important—indeed, often determinative—factor in deciding whether an application of the statute is domestic. But if the Court believed *that*, it surely would have said so in *Morrison*. After all, one of the *Morrison* plaintiffs' central contentions was that their claims were domestic because the defendants engaged in deceptive conduct from within the United States. *Ibid*. This Court acknowledged that argument but rejected it on the ground that the location of that conduct was simply irrelevant because it was not the focus of the statute. *Ibid*.

If there were any doubt, later cases removed it. Whether an application of the statute is domestic, the

Court has summarized, is answered by identifying "the statute's focus and asking whether the conduct relevant to that focus occurred in United States territory." *WesternGeco*, 138 S. Ct. at 2137 (cleaned up). "If it did, then the case involves a permissible domestic application of the statute." *Ibid*. Full stop. End of analysis. In *RJR Nabisco*, the Court drove the point home: "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*." 579 U.S. at 337. (citing *Morrison*).

Just last Term, the Court emphasized again that the test turns exclusively on whether "the *conduct relevant to the statute's focus* occurred in the United States." *Abitron*, *supra*, at 4 (citing, *e.g.*, *Morrison*); *see also id*. at 5 (Sotomayor, J., concurring in the judgment) ("An application is domestic when the object of the statute's focus is found in, or occurs in, the United States.") (citing *Morrison*). "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.'" *Id*. at 4 (majority opinion) (cleaned up). 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." *Ibid*. (cleaned up). It's that simple. There are no other factors.

The "predominantly foreign" test not only conflicts with what this Court has consistently *said* in these cases; it is irreconcilable with what the Court *did*. As

noted, *Morrison* held that the requested application of the SEA was extraterritorial despite the predominantly domestic nature of the deceptive conduct. Conversely, in *WesternGeco*, the Court found a domestic application of the Patent Act without giving any weight to the significant foreign conduct in that case. The Court identified the focus of the relevant provisions of the Patent Act as the "act of exporting components from the United States" to be used in creating a patent-infringing article abroad. 138 S. Ct. at 2138. Because the defendant had "suppl[ied] the components that infringed WesternGeco's patents" from the United States, the case involved a "domestic application of" the statute, even though the infringing product was assembled abroad and all of the plaintiff's damages arose from lost foreign sales. *Ibid*. The Court did not pause to consider whether these additional facts made the infringement "predominantly foreign." Instead, it held that these facts fell outside the statute's focus and, therefore, made no difference. *Id*. at 2138.

Second, even if the Court had left the door open to adding some further step to the analysis, it surely would not have contemplated the "predominantly foreign" standard the Second Circuit cribbed from its "conduct and effects" test. *Morrison*'s criticisms of that test were scathing and apply equally to the replacement standard. The Court denigrated the Second Circuit's prior handiwork as lacking a "textual or even extratextual basis," amounting to "judicial-speculation-made law," while being "not easy to administer" and "vague," leading to results that were "unpredictable and inconsistent." *Id*. at 258, 260.

Indeed, the Court wrote, there was "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 (citation omitted).

In creating the "predominantly foreign" standard, the Second Circuit likewise cited no textual (or atextual) source. *See Parkcentral*, 763 F.3d at 216. The test is equally indeterminate. Indeed, it is entirely question-begging, declaring that an application of the statute is impermissibly extraterritorial if the claims are "so predominantly foreign as to be impermissibly extraterritorial." *Ibid*. The court noted that the "potential for incompatibility between U.S. and foreign law" was a relevant factor but emphasized that this was "just one form of evidence" and not "the only relevant consideration." *Id*. at 216-17. The court did not identify any other relevant considerations or provide any guidance on how to weigh them. *Ibid*.

Indeed, despite *Morrison*'s "damning indictment" of the "conduct and effects" test for lacking any dispositive factors, the Second Circuit went out of its way to stress that the same is true of its "predominantly foreign" test. The *Parkcentral* court declared, "We do 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." 763 F.3d. at 217. Instead, "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." *Ibid*. In this way, the Second Circuit hoped, courts may "*eventually* . . . develop a reasonable and consistent governing body of law on this elusive question." *Ibid*. (emphasis added).

The Second Circuit's principal justification for all of this was that Congress would not have intended for the statute to apply when the illegal conduct took place principally overseas. *Parkcentral*, 763 F.3d at 215. But that is precisely the kind of "judicial-speculation-made-law" this Court displaced in favor of its focus test grounded in the language of the statute. *Morrison*, 561 U.S. at 261. Moreover, there is no conflict between *Morrison*'s transactional test and the Court's "insistence that § 10(b) has no extraterritorial application." *Parkcentral*, 763 F.3d at 215. The statute applies to foreign conduct that manipulates the price of a security traded on a U.S. exchange because "it is parties or prospective parties to those transactions that the statute seeks to protect." *Morrison*, 561 U.S. at 267 (cleaned up).

The Second Circuit's reliance on the supposed "potential for incompatibility between U.S. and foreign law" is also misplaced. *Parkcentral*, 763 F.3d at 216-17. The potential conflict the Court avoided in *Morrison* arose from on the assumption that "[l]ike the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within the territorial

jurisdiction." *Ibid*. *Morrison*'s transactional test is consistent with that international understanding.[10]

Indeed, it is far harder to understand how the Second Circuit's interpretation could be consistent with general congressional intent. Given the focus of the statutes, Congress surely did not intend that "defendants may deliberately manipulate the U.S. commodity and exchange markets by simply sitting in another country when they do so." *In re: London Silver Fixing, Ltd., Antitrust Litigation*, No. 1:14-MC-02573-VEC, slip op. 23 (S.D.N.Y May 22, 2023). But as a New York district court recently explained, that "is precisely . . . the rule established by *Prime* and *Laydon*." *Ibid*.

IV. This Case Provides An Ideal Vehicle.

This case is an ideal vehicle for resolving the conflict and clarifying the Court's extraterritoriality framework. The question was squarely presented below, and its resolution was outcome determinative—the only reason the Second Circuit gave for dismissing petitioner's CEA claims was their failure to satisfy the

[10] Given this understanding, the CFTC explained below, the "predominantly foreign" test "creates a risk that some manipulation might not be subject to legal action in any jurisdiction." CFTC Amicus Br. 5. When "persons in a foreign country engage in manipulative conduct targeted specifically at a U.S. exchange," the Commission wrote, "courts in that country might conclude it is not their business—particularly if they find *Morrison* persuasive." *Ibid*. At the same time, under the Second Circuit test, that conduct would be unactionable in the United States because the manipulating conduct was "predominantly foreign." *Ibid.*

Circuit's "predominantly foreign test." *See* Pet. App. 16a. The Second Circuit further had the benefit of extensive briefing on the question by both the parties and the CFTC as amicus, including briefs at the petition-for-rehearing stage that directly focused on the propriety of that test.

At the same time, this case does not present any of the features that led the Court to deny certiorari on similar questions in prior cases. As discussed, the Court declined review in *Toshiba* after the Solicitor General questioned whether the Second Circuit really meant what it said in *Parkcentral*, an uncertainty that has since been resolved. Nor is this case in the interlocutory posture the United States viewed as a reason to deny review in *Toshiba*. U.S. *Toshiba* Br. 18.

The Court also denied certiorari in *Prime*. 141 S. Ct. 113 (2020). But that case was complicated by the Second Circuit's alternative holding that even if the focus of the CEA's private right of action was "clearly transactional," the underlying substantive provisions at issue in that particular case had a different focus. 937 F.3d at 104, 107; *see Prime* BIO 24-25. That complication does not arise here. The sole basis for the Second Circuit's dismissal of petitioner's CEA claim in this case was its application of its "predominantly foreign" test to Section 22 of the CEA, whose focus, the court affirmed, "is transactional." Pet. App. 15a-16a (quoting *Loginovskaya v. Batratchenko*, 764 F.3d 266, 272 (2d Cir. 2014) ("In § 22, the focus of congressional concern is clearly transactional.") (cleaned up)). This was no oversight. Petitioners rely on *different* substantive provisions in this case and respondents made no claim that those provisions lacked a

transactional focus. *Compare Prime*, 937 F.3d at 107 (discussing focus of Sections 6(c)(1) and 9(a)(2)) *with* C.A. J.A. 1744-45 (Third Amended Complaint, alleging violations of Sections 4b(a), 4c(a), and 9(a)), *and* Resp. C.A. Br. 23-38 (raising no extraterritoriality argument regarding the substantive provisions in this case).[11]

In *Prime* the respondent also argued that the case presented a poor vehicle because the Second Circuit had independently dismissed the CEA claims on alternative causation grounds. *Prime* BIO 27-28. No such alternative ground is present here: the district court rejected the defendant's causation arguments regarding the CEA claims, Pet. App. 88a, and the Second Circuit did not disturb that ruling on appeal, *see id*. 16a-19a.[12]

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[11] In *Prime*, the Second Circuit held that Section 6(c)(1) lacked a transactional focus because it "contains no mention of a 'national security exchange.'" 937 F.3d at 107. As the CFTC has explained, that conclusion was clearly wrong. CFTC Amicus Br. 9. But regardless, here petitioners found their claims on provisions like Section 4b(a), which prohibits willfully making "any false report or statement" in "connection with . . . any contract of sale of any commodity in interstate commerce or future delivery that is *made, on or subject to the rules of a designated market*," a reference to a regulated domestic futures market. 7 U.S.C. § 6b(a)(2)(B) (emphasis added); *see id*. § 7b-1(a) (defining "designated market").

[12] The Second Circuit did discuss causation in dismissing petitioners' antitrust claims. Pet. App. 20a-21a. However, in that context, the court applied the circuit's "so-called 'first step rule'" under which only "'injuries that happen at the first step following the harmful behavior are considered proximately

V. At The Very Least The Court Should Call For The Views Of The Solicitor General Or GVR In Light Of *Abitron*.

If the Court entertains any doubts as to whether the circuit conflict is real or warrants review, or whether this case presents an appropriate vehicle for resolving the split, it should call for the views of the Solicitor General, as it did in *Toshiba*. At the very least, the Court should grant the petition, vacate, and remand for reconsideration in light of last Term's decision in *Abitron*, which made unmistakably clear that a claim is domestic if the conduct relevant to the focus of the statute occurred in the United States. *See supra* at 26. To be sure, the Second Circuit has refused to change its precedent in light of similar statements in *RJR Nabisco* and *WesternGeco*. But the Second Circuit has never before been ordered by this Court to reconcile its rulings with those authorities. A GVR in light of *Abitron* may prompt the Second Circuit to finally acknowledge that reconciliation is impossible and cause it to correct its precedent.

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caused by that behavior." *Id*. 20a (quoting *Schwab Short-Term Bond Market Fund v. Lloyds Banking Group PLC*, 22 F.4th 103, 116 (2d Cir. 2021)). As respondents effectively acknowledged below, however, the stringent "first step rule" does not apply under the CEA. *See* Resp. C.A. Br. 38 (explaining that to established causation under the CEA, plaintiff need only plead "with sufficient detail (1) that the defendant 't[ook] an action that had an impact on the [plaintiff's position],' and (2) that the impact was 'negative.'") (quoting *Harry v. Total Gas & Power N.A., Inc.*, 889 F.3d 104, 112 (2d Cir. 2018)).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

[PUBLISH]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2021
Argued: May 24, 2022
Decided: October 18, 2022
Amended: December 8, 2022

Nos. 20-3626(L), 20-3775 (XAP)

JEFFREY LAYDON,
on behalf of himself and all others similarly situated,
Plaintiff-Appellant-Cross-Appellee,

v.

COÖPERATIEVE RABOBANK U.A., BARCLAYS BANK PLC,
Société Générale S.A.,
Defendants-Appellees-Cross-Appellants,

THE ROYAL BANK OF SCOTLAND GROUP PLC, UBS AG, LLOYDS BANKING GROUP PLC, UBS SECURITIES JAPAN CO., LTD., THE ROYAL BANK OF SCOTLAND PLC, RBS SECURITIES JAPAN LIMITED,

Defendant-Appellees,[*]

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

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Before POOLER, PARK, and LEE, *Circuit Judges*.

Plaintiff Jeffrey Laydon brought this putative class action against more than twenty banks and brokers, alleging a conspiracy to manipulate two benchmark rates known as Yen-LIBOR and Euroyen TIBOR. He claimed that he was injured after purchasing and trading a Euroyen TIBOR futures contract on a U.S.-based commodity exchange because the value of that contract was based on a distorted, artificial Euroyen TIBOR. Plaintiff brought claims under the Commodity Exchange Act ("CEA"), 7 U.S.C. § 1 *et seq*., and the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*., and sought leave to assert claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962, 1964(c). The district

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[*] The Clerk of Court is respectfully directed to amend the caption accordingly.

court (Daniels, J.) dismissed the CEA and antitrust claims and denied leave to add the RICO claims. Plaintiff appeals, arguing that the district court erred by holding that the CEA claims were impermissibly extraterritorial, that he lacked antitrust standing to assert a Sherman Act claim, and that he failed to allege proximate causation for his proposed RICO claims.

We affirm. The alleged conduct — *i.e.*, that the bank defendants presented fraudulent submissions to an organization based in London that set a benchmark rate related to a foreign currency — occurred almost entirely overseas. Indeed, Plaintiff fails to allege any significant acts that took place in the United States. Plaintiff's CEA claims are based predominantly on foreign conduct and are thus impermissibly extraterritorial. *See Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, 106 (2d Cir. 2019). The district court also correctly concluded that Plaintiff lacked antitrust standing because he would not be an efficient enforcer of the antitrust laws. *See Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC*, 22 F.4th 103, 115–20 (2d Cir. 2021). Lastly, we agree with the district court that Plaintiff failed to allege proximate causation for his RICO claims. The judgment of the district court is thus **AFFIRMED**.

ERIC F. CITRON, Goldstein & Russell, P.C., Bethesda, MD (Vincent Briganti, Margaret MacLean, Lowey Dannenberg, P.C., White Plains, NY, *on the brief*), *for Plaintiff-Appellant-Cross-Appellee Jeffrey Laydon*.

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Scotland Group plc, and RBS Securities Japan Ltd.

PARK, Circuit Judge:

Plaintiff Jeffrey Laydon brought this putative class action against more than twenty banks and brokers, alleging a conspiracy to manipulate two benchmark rates known as Yen-LIBOR and Euroyen TIBOR. He claimed that he was injured after purchasing and trading a Euroyen TIBOR futures contract on a U.S.-based commodity exchange because the value of that contract was based on a distorted, artificial Euroyen TIBOR. Plaintiff brought claims under the Commodity Exchange Act ("CEA"), 7 U.S.C. § 1 *et seq*., and the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*., and sought leave to assert claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962, 1964(c). The district court (Daniels, J.) dismissed the CEA and antitrust claims and denied leave to add the RICO claims. Plaintiff appeals, arguing that the district court erred by holding that the CEA claims were impermissibly extraterritorial, that he lacked antitrust standing to assert a Sherman Act claim, and that he failed to allege proximate causation for his proposed RICO claims.

We affirm. The alleged conduct—*i.e.*, that the bank defendants presented fraudulent submissions to an organization based in London that set a benchmark rate related to a foreign currency—occurred almost entirely overseas. Indeed, Plaintiff fails to allege any

significant acts that took place in the United States. Plaintiff's CEA claims are based predominantly on foreign conduct and are thus impermissibly extraterritorial. *See Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, 106 (2d Cir. 2019). The district court also correctly concluded that Plaintiff lacked antitrust standing because he would not be an efficient enforcer of the antitrust laws. *See Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC*, 22 F.4th 103, 115–20 (2d Cir. 2021). Lastly, we agree with the district court that Plaintiff failed to allege proximate causation for his RICO claims. The judgment of the district court is thus affirmed.

I. BACKGROUND

A. Factual Background

1. *Yen-LIBOR and Euroyen TIBOR*

Plaintiff alleges the manipulation of two benchmark rates known as Yen-LIBOR and Euroyen TIBOR, which reflected the interest rates at which banks can lend Japanese Yen outside of Japan.[1] There

[1] The names are short for "Yen London Interbank Offered Rate" and "Euroyen Tokyo Interbank Offered Rate," respectively. The Euroyen, also known as offshore yen, refers to deposits denominated in Japanese Yen held outside of Japan. Yen-LIBOR and Euroyen TIBOR are based on "the interest rates at which banks offer to lend unsecured funds denominated in Japanese Yen to other banks in the offshore wholesale money market (or interbank market)." Third Am. Compl. ¶ 122.

were two key differences between Yen-LIBOR and Euroyen TIBOR. First, different entities set the rates. During the relevant period, the Japanese Bankers Association ("JBA") set Euroyen TIBOR by accepting submissions from a panel of banks headquartered primarily in Japan. Each bank submitted to the JBA the interest rate at which it could borrow offshore Yen. The JBA then calculated Euroyen TIBOR for various maturities by discarding the two highest and two lowest submissions and averaging the remaining ones. Yen-LIBOR, on the other hand, was a London-based benchmark set by the British Bankers' Association ("BBA"). Each bank sitting on a panel of London-based banks submitted to the BBA the rate at which it could borrow Yen outside of Japan. The BBA calculated Yen-LIBOR by discarding the highest and lowest 25% of submissions and determining the average of the remaining 50%. The second major difference between the rates was that they were set at different times. "Euroyen TIBOR [was] calculated on each business day as of 11:00 a.m. Tokyo time," while "Yen-LIBOR [was] calculated each business day as of 11:00 a.m. London time." Third Am. Compl. ¶¶ 126, 130.

2. *The Alleged Conduct*

Plaintiff Laydon is a U.S. resident who traded three-month Euroyen TIBOR futures contracts between January 1, 2006 and June 30, 2011 (the "Class Period"). This type of contract is an "agreement to buy or sell a Euroyen time deposit having a principal value of 100,000,000 Japanese Yen with a

three-month maturity commencing on a specific future date." Third Am. Compl. ¶ 134.[2] Plaintiff placed these trades on the Chicago Mercantile Exchange ("CME"), a U.S.-based futures exchange. Specifically, he "initiated a short position by selling five . . . Euroyen TIBOR futures contracts on July 13, 2006 at a price of $99.315 per contract" and then "liquidated that position by purchasing five long . . . futures contracts on August 3, 2006 at a price of $99.490 per contract for loss of $2,150.35." *Id.* ¶ 911. Defendants-Appellees served as panel banks for the BBA in setting Yen-LIBOR during the relevant period.[3] Plaintiff also sued several derivatives brokers who allegedly helped Defendants manipulate Yen-LIBOR and Euroyen TIBOR.[4]

Plaintiff maintains that Defendants conspired to manipulate Yen-LIBOR and Euroyen TIBOR by giving false Yen-LIBOR submissions to the BBA,

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[2] Unlike an "ordinary bank deposit" that is "payable on demand," a time deposit cannot be withdrawn from the bank before a set date. *See* 10 Am. Jur. 2d Banks and Fin. Insts. § 641.

[3] These include UBS AG and UBS Securities Japan Co., Ltd. ("UBS"); the Royal Bank of Scotland Group plc, The Royal Bank of Scotland plc, and RBS Securities Japan Limited ("RBS"); Lloyds Banking Group plc ("Lloyds"); Barclays Bank PLC ("Barclays"); Société Générale S.A. ("SocGen"); and Coöperatieve Rabobank U.A. ("Rabobank") (collectively, "Defendants").

[4] The broker defendants who initially joined this appeal were ICAP plc and ICAP Europe Limited (collectively, "ICAP") and Tullett Prebon plc. We granted Plaintiff's motion to sever and stay the appeal with respect to ICAP and Tullett Prebon and remanded to allow the district court to consider a proposed class-action settlement between Plaintiff and these parties.

which affected the price of Plaintiff's three-month Euroyen TIBOR futures. Although Defendants did not serve as panel banks for the JBA in setting Euroyen TIBOR, Plaintiff alleges that their purported manipulation of Yen-LIBOR—which is set earlier in the day—affected Euroyen TIBOR. *See* Third Am. Compl. ¶¶ 844, 845 (alleging that "[c]hanges in Yen-LIBOR will be immediately reflected in Euroyen TIBOR rates . . . once Euroyen TIBOR opens" and that "the reporting of false and inaccurate Yen-LIBOR rates . . . cause[d] artificial Euroyen TIBOR rates and artificial Euroyen TIBOR futures prices").

He further asserts that the "driving force[s] behind Defendants' manipulation" were conflicts of interest. *Id*. ¶ 167. Namely, Plaintiff claims that Defendants held their own "Euroyen-based derivatives positions" and that their traders' "compensation was based in part on the profit and loss calculation" of Defendants' trading books. *Id.* And "even very small movements in Yen-LIBOR . . . would have a significant positive impact on the profitability of" trading positions, so Defendants' traders had incentives to manipulate Yen-LIBOR. *Id.*

To support these allegations, Plaintiff relies on information revealed in various domestic and foreign enforcement proceedings. He points to Defendants' admissions concerning actions taken by their employees at overseas trading desks. These allegations describe Defendants' foreign-based employees submitting false rates to the BBA, as well as traders asking other employees responsible for sending submissions to the BBA to move the benchmark rate in a direction that would benefit the

trader's trading position.[5] As for domestic conduct, Plaintiff primarily relies on a handful of communications sent from Defendants' foreign-based employees through or to servers located in the United States.[6] Plaintiff does not allege that Defendants' employees sent artificial submissions to the BBA from within the United States.

On behalf of a putative class, Plaintiff sought an unspecified amount in regular and treble damages, as

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[5] For example, Plaintiff alleges that RBS Yen traders "attempted to manipulate Yen-LIBOR by making hundreds of manipulative requests of RBS' Primary Submitter, Paul White, and London-based traders." Third Am. Compl. ¶ 267 ("RBS' derivatives traders' requests for artificial Yen-LIBOR submissions were common and made openly on the trading floors in Asia and London."). Similarly, Plaintiff asserts that UBS began tendering "false Yen-LIBOR and Euroyen TIBOR" submissions as early as 2006. *Id.* ¶ 241. Plaintiff focuses on the actions of UBS Yen Traders Tom Hayes and Roger Darin, who operated from UBS desks in Tokyo, Singapore, and Zurich, and were prosecuted in the United States and the United Kingdom for manipulating Yen-LIBOR.

[6] Plaintiff cites a criminal complaint brought by U.S. prosecutors against UBS Yen Trader, Tom Alexander William Hayes, which alleges that Hayes "caused confirmations . . . to be transmitted from outside the United States to a counterparty based in Purchase, New York, for transactions involving interest rate derivative products tied to a benchmark interest rate which [Hayes] was secretly manipulating." Joint App'x at 2036. Plaintiff also relies on the testimony of a Rabobank employee, Anthony Allen, from his trial for wire fraud stemming from manipulation of Yen-LIBOR, reflecting that Allen knew that some of the counterparties to Rabobank's transactions were in the United States. *See* Third Am. Compl. ¶¶ 92–93.

well as an injunction prohibiting Defendants from continuing their alleged unlawful conduct.

B. Procedural Background

Plaintiff filed this action in 2012. On April 15, 2013, before the district court resolved any substantive motions, Plaintiff filed the Second Amended Complaint, alleging claims under the CEA, 7 U.S.C. § 1 *et seq.*, and Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*.[7]

Over nearly a decade of litigation, the district court issued several orders dismissing various claims and defendants. First, on March 28, 2014, the court granted Defendants' motion to dismiss Plaintiff's antitrust claims, finding that Plaintiff lacked antitrust standing in part because he would not be an "efficient enforcer" of the alleged antitrust violation. The court allowed the remaining CEA claims to proceed.

Plaintiff next sought leave to file the Third Amended Complaint to add RICO claims and additional defendants. On March 31, 2015, the district court allowed Plaintiff to file the new pleadings but denied leave to add the RICO claims, finding that Plaintiff did "not show a sufficiently direct connection between the alleged misconduct and the injury to support a RICO claim." Special App'x at 58. That

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[7] Plaintiff also brought an unjust-enrichment claim and a CEA vicarious-liability claim, but he does not appeal the dismissal of those claims.

same day, the court also dismissed several defendants for lack of personal jurisdiction, rejecting Plaintiff's conspiracy theory of personal jurisdiction.

Two years later, on March 10, 2017, the district court dismissed several new defendants named in the Third Amended Complaint—including the broker Defendants ICAP and Tullett Prebon plc—for lack of personal jurisdiction, finding that their alleged conduct did not create a substantial connection with the United States and once again rejecting Plaintiff's "'conspiracy theory' of jurisdiction." Special App'x at 73–79. Finally, on August 27, 2020, the court dismissed the surviving CEA claims against the remaining defendants, finding the claims impermissibly extraterritorial because "Defendants' alleged wrongful conduct . . . is almost entirely foreign." *Id.* at 86. Plaintiff filed a timely notice of appeal.[8]

II. **DISCUSSION**

Plaintiff argues that the district court erred by dismissing his CEA claims as impermissibly

[8] Defendants Barclays, SocGen, and Rabobank filed a cross-appeal, challenging the district court's November 10, 2014 order denying them leave to file a motion to dismiss based on lack of personal jurisdiction. We severed the main appeal and the cross appeal as to Barclays and ordered a limited remand for the district court to consider the approval of a proposed class action settlement between Plaintiff and Barclays. As to SocGen and Rabobank, we need not reach the issues in their cross-appeal — which concern whether the district court properly found that they forfeited or waived their personal jurisdiction arguments — because we affirm the district court's dismissal orders on the merits.

extraterritorial. He also challenges the district court's decisions to dismiss his antitrust claims for lack of standing and to reject his RICO claims for lack of proximate causation. [9] "We review de novo the dismissal of a complaint for failure to state a claim upon which relief can be granted." *Myun-Uk Choi v. Tower Rsch. Cap. LLC*, 890 F.3d 60, 65 (2d Cir. 2018) (citation omitted). "The denial of leave to amend is similarly reviewed *de novo* because the denial was based on an interpretation of law, such as futility." *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 769 (2d Cir. 2016) (cleaned up).

We agree with the district court that Plaintiff failed to state a claim under the CEA because the alleged conduct occurred predominantly outside the United States. We also agree that Plaintiff lacks antitrust standing and failed to allege proximate causation for his RICO claims.

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[9] Plaintiff also argues that the district court erred by dismissing several defendants for lack of personal jurisdiction. We do not reach this issue because our decision on the merits provides an alternative ground for affirmance. *See Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 n.17 (2d Cir. 2012); 4 C. Wright & A. Miller, Fed. Prac. and Proc. § 1067.6 (4th ed. 2022) ("[A] court simply may avoid the issue [of personal jurisdiction] by resolving the suit on the merits when they clearly must be decided in favor of the party challenging jurisdiction, thereby obviating any need to decide the question.").

A. <u>Commodity Exchange Act Claims</u>

1. *Legal Principles*

The CEA prohibits "manipulat[ing] or attempt[ing] to manipulate the price of any commodity in interstate commerce." 7 U.S.C. § 13(a)(2). Section 22 of the CEA provides a private right of action, permitting a party to sue "[a]ny person . . . who violates this chapter" and hold that person liable "for actual damages resulting from one or more of the transactions" listed in the statute. *Id.* § 25(a)(1).

"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."' *Prime*, 937 F.3d at 102 (quoting *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335 (2016)). "This canon helps avoid the international discord that can result when U.S. law is applied to conduct in foreign countries" and "reflects the commonsense notion that Congress generally legislates with domestic concerns in mind." *In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC*, 917 F.3d 85, 95 (2d Cir. 2019) (cleaned up).

We decide questions of extraterritoriality using a two-step framework. First, we "ask[] whether the presumption against extraterritoriality has been rebutted" by "text [that] provides a clear indication of an extraterritorial application." *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (cleaned up). "Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco, Inc.*,

579 U.S. at 335; *see also Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none."). Second, if we conclude that the presumption against exterritoriality has not been rebutted, we decide "whether the case involves a domestic application of the statute." *RJR Nabisco, Inc.*, 579 U.S. at 337. To do so, we determine whether "the conduct relevant to the statute's focus occurred in the United States." *Id.* "[I]f 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.*

Section 22 of the CEA lacks any "affirmative intention by Congress to give [it] extraterritorial effect." *Loginovskaya v. Batratchenko*, 764 F.3d 266, 272 (2d Cir. 2014) (cleaned up). A claim relying on Section 22 must thus involve a domestic application of the statute. And the focus of the statute is transactional, *see id.* at 272, so "suits funneled through [the CEA's] private right of action must be based on transactions occurring in the territory of the United States," *Prime*, 937 F.3d at 103 (cleaned up).

Simply pleading a domestic transaction, however, is not enough. Section 22 is a general provision affording a cause of action to private litigants. Instead of prohibiting certain, specified conduct, it applies when a defendant commits "a violation of this chapter." 7 U.S.C. § 25(a)(1). A private plaintiff pleading a CEA claim under Section 22 must thus invoke a substantive provision of the CEA. *See Prime*, 937 F.3d at 105. And allowing a plaintiff to state a

domestic application of Section 22 based merely on a domestic transaction "would . . . divorce the private right afforded in Section 22 from the requirement of a domestic violation of a substantive provision of the CEA." *Id.* A plaintiff must thus plead not only a domestic transaction, but also sufficiently domestic conduct by the defendant. In other words, "Plaintiffs' claims must not be 'so predominantly foreign as to be impermissibly extraterritorial.'" *Id*. (quoting *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014)).

2. *Analysis*

Plaintiff's CEA claims are impermissibly extraterritorial because the conduct he alleges is "predominantly foreign." *Prime*, 937 F.3d at 106. First, Plaintiff traded a derivative that is tied to the value of a foreign asset. The complaint alleges that he was injured after purchasing and trading a Euroyen TIBOR futures contract, which is "an agreement to buy or sell a Euroyen time deposit having a principal value of 100,000,000 Japanese Yen with a three-month maturity commencing on a specific future date." Third Am. Compl. ¶ 134. As alleged, the value of this asset is, in part, determined by Yen-LIBOR and Euroyen TIBOR because these rates are meant to capture the prevalent interest rates at which banks lend such time deposits. So the value of this asset is based on rates set by foreign entities (*i.e.,* JBA and BBA) in foreign countries (*i.e.*, Japan and the United Kingdom).

Second, the alleged manipulative conduct occurred almost entirely abroad. Plaintiff's conspiracy allegations describe conduct and communications that occurred overseas on foreign trade desks.[10] Indeed, Plaintiff focuses on the actions of employees who worked in foreign offices. *See* Joint App'x at 2040, 2739.

Plaintiff's arguments to the contrary are meritless. His main contention is that he purchased a Euroyen TIBOR futures contract on the CME, a U.S.-based exchange. He argues that his "claims must be domestic because they involve both core domestic transactions (i.e., transactions on a domestic exchange) and manipulation of a domestic commodity market." Appellant's Br. at 36 (emphasis added). Plaintiff also points to several instances of communications that were made from or went through

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[10] *See, e.g.,* Third Am. Compl. ¶¶ 231–33 (Rabobank's employees, Anthony Allen and Tetsuya Motomura, made requests to contribute false submissions from "Rabobank's money market desk in London" and Rabobank's trading desk in Tokyo, respectively); *id.* ¶ 296 (a Rabobank employee "made regular requests to Rabobank's London-based Yen setters" to transmit manipulated submissions); *id*. ¶ 269 ("a Euroyen-based derivatives trader employed by RBS Japan sent requests for favorable Yen-LIBOR submissions to a Yen derivatives trader in London"); i*d*. ¶ 243 ("UBS managers in Tokyo and Zurich" were aware of false submission requests and "encouraged and allowed" such conduct to occur); *id.* (a UBS "Yen Desk Manager in Tokyo" engaged and encouraged the contribution of false submissions); *id.* ¶ 250 ("the manager of one of the [UBS] Yen derivatives trading desks in Tokyo exerted pressure on Yen-LIBOR submitters to take derivatives traders' positions into account when setting Yen-LIBOR").

the United States. For example, Plaintiff alleges that UBS trader Tom Hayes sent an email in furtherance of the conspiracy while on a brief, two-day trip in Las Vegas.

Our precedent mandates dismissal of Plaintiff's CEA claims. In *Prime*, the plaintiffs traded futures on a U.S.-based exchange that were pegged to the Dated Brent Assessment, a rate that "reflect[ed], in part, the value of Brent crude physically traded in Northern Europe." 937 F.3d at 106. The plaintiffs alleged that the defendants manipulated the market for Brent crude and Brent futures by "systematically report[ing] . . . artificial transactions" to a foreign entity responsible for setting the Dated Brent Assessment rate. *Id.* at 100. We held that the plaintiffs' CEA claims were impermissibly extraterritorial because the derivatives at issue were "pegged to the value of" foreign assets and the alleged misconduct was foreign because the plaintiffs made "no claim that any manipulative oil trading occurred in the United States." *Id.* at 106.

Here, as in *Prime*, Plaintiff purchased a futures contract on a domestic market that incorporated an index tied to a foreign market, with that index being set by a foreign entity. According to Plaintiff, the crude index in Prime would have been a commodity and, because the futures contract traded in the United States, any claims concerning that future would have been domestic. But we rejected this theory and held that the claims in *Prime* were impermissibly extraterritorial because the defendants in that case were "alleged to have manipulated the physical Brent crude market" in Europe "by engaging in fraud there."

Id. at 107–08. So too here, Plaintiff alleges that Defendants conspired to manipulate Euroyen TIBOR (an index tied to a foreign market) by giving false Yen-LIBOR submissions to the BBA from foreign trading desks (conduct abroad). We thus affirm the district court's dismissal of Plaintiff's CEA claims.[11]

B. Antitrust Claims

1. *Legal Principles*

To state an antitrust claim, a plaintiff must first "show . . . antitrust standing." *Gelboim*, 823 F.3d at 770; *see generally Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983) ("AGC") (discussing the requirements of antitrust standing). Standing to bring an antitrust claim requires a plaintiff to show that (1) he has "suffered antitrust injury," and (2) he is an "efficient enforcer[ ] of the antitrust laws." *Gelboim*, 823 F.3d at 772. We look to four factors to determine whether a plaintiff is an efficient enforcer:

> (1) the directness or indirectness of the asserted injury, which requires evaluation of the chain of causation linking appellants' asserted injury and the [defendants'] alleged

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[11] We are also unpersuaded by Plaintiff's argument that dismissal of his claims will "fatally undermine the ability of U.S. law and U.S. regulators to protect domestic markets and investors." Appellant's Br. at 38. The extraterritorial reach of Section 22, which concerns private rights of action, has nothing to do with government enforcement. *See* 7 U.S.C. § 25.

> price-fixing; (2) the existence of more direct victims of the alleged conspiracy; (3) the extent to which appellants' damages claim is highly speculative; and (4) the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.

Id. at 778 (cleaned up) (citing *AGC*, 459 U.S. at 540–44).

2. *Analysis*

We agree with the district court that Plaintiff failed to allege antitrust standing because he is not an efficient enforcer of the antitrust laws.

Causation. "For the purposes of antitrust standing, proximate cause is "determined according to the so-called 'first-step rule,'" under which "injuries that happen at the first step following the harmful behavior are considered proximately caused by that behavior." *Schwab Short-Term Bond Mkt. Fund*, 22 F.4th at 116 (quoting *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127, 140 (2d Cir. 2021)). This inquiry "require[s] drawing a line between those whose injuries resulted from their direct transactions with [the defendants] and those whose injuries stemmed from their deals with third parties." *Id.*

Plaintiff here failed to allege that his injury was proximately caused by Defendants. He did not assert that he transacted directly with any Defendants or

that Defendants controlled the Euroyen TIBOR futures contract that Plaintiff purchased. Instead, Plaintiff traded his futures contract with unknown third parties before the contract's maturity date. *See* Third Am. Compl. ¶ 57.

Further, Plaintiff's theory of liability depends on a series of causal steps that separate Defendants' conduct and his purported injury. Plaintiff asserts that (1) Defendants submitted fraudulent rates to the BBA; (2) the BBA then used these artificial submissions to set Yen-LIBOR; (3) the manipulated Yen-LIBOR affected Euroyen TIBOR during the Class Period; and (4) any distorted benchmark rate also affected the market's perception of the value of Plaintiff's Euroyen TIBOR futures contract. Plaintiff's injury thus occurred far from "the first step following" Defendants' "harmful behavior." *Schwab Short-Term Bond Mkt. Fund*, 22 F.4th at 116 (citation omitted).

Existence of More Direct Victims. Direct victims of an alleged antitrust conspiracy are situated to enforce the antitrust laws because their "self-interest would normally motivate them to vindicate the public interest in antitrust enforcement." *AGC*, 459 U.S. at 542. When only indirect victims bring suit, "it is difficult to understand why the[ ] direct victims of the conspiracy have not asserted any claim in their own right." *Id.* at 542 n.47; *see also Gatt Commc'ns, Inc. v. PMC Assocs.*, L.L.C., 711 F.3d 68, 79 (2d Cir. 2013) ("If the 'superior' plaintiff has not sued, one may doubt the existence of any antitrust violation at all.") (internal quotation marks omitted) (quoting Phillip Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law*, § 3.01c, at 3–9 to 3–10 (4th ed. 2011)).

Plaintiff here is an indirect victim of the alleged conspiracy. Direct victims might include traders of interest-rate swaps—contracts in which a party exchanges one stream of fixed interest-rate payments for another flow of payments based on a variable, "floating" rate, such as Yen-LIBOR or Euroyen TIBOR. *See Sonterra Cap. Master Fund Ltd. v. UBS AG*, 954 F.3d 529, 532–33 (2d Cir. 2020) (explaining interest rate swaps that incorporate Yen-LIBOR). Such a swap trader betting on the movement of benchmark rates like Yen-LIBOR and Euroyen TIBOR would be more directly harmed if Defendants had engaged in an antitrust conspiracy to manipulate Yen-LIBOR and Euroyen TIBOR.

Speculative Damages. We next consider whether the "asserted damages are speculative," because "a high degree of speculation in a damages calculation suggests that a given plaintiff is an inefficient engine of enforcement." *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 66–67 (2d Cir. 2019) (citations omitted). Damages are speculative "where countless other market variables could have intervened to affect . . . pricing" and the "theory of antitrust injury depends upon a complicated series of market interactions." *Reading Indus., Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 13–14 (2d Cir. 1980). A district court should not be required to entertain "multiple layers of speculation" and "create[] . . . an alternative universe" to calculate damages. *IQ Dental Supply*, 924 F.3d at 67 (cleaned up).

Here, Plaintiff failed to plead any injury. He alleges that he entered and closed a short position in a Euroyen TIBOR futures contract in 2006. In other

words, he bet that there would be "an increase in Euroyen TIBOR rates." Third Am. Compl. ¶ 138. Plaintiff alleges two acts occurring in August 2006 involving three-month Euroyen TIBOR futures, both of which involved Defendants' alleged attempts to manipulate Yen-LIBOR upwards. But if true and Euroyen TIBOR rates did increase, Plaintiff would have benefited from Defendants' conduct. *See id.* (explaining that a trader who "go[es] short" would "profit from an increase in Euroyen TIBOR rates").

In any event, Plaintiff's theory of damages is also highly speculative. As explained above, his allegations rely on an attenuated chain of causation that would complicate if not render impossible any damages calculation. *See supra* at [20a].

Duplicative Recovery and Complex Damage Apportionment. Finally, we consider "the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries." *Volvo N. Am. Corp. v. Men's Int'l Pro. Tennis Council*, 857 F.2d 55, 66 (2d Cir. 1988). The focus of this factor is on "keeping the scope of complex antitrust trials within judicially manageable limits." *AGC*, 459 U.S. at 543.

Here, apportionment of any damages would be difficult and there would be a risk of duplicative recovery because Plaintiff's theory of liability is indirect and imprecise. Plaintiff had no direct dealings with Defendants but asserts an injury based on alleged conduct that impacted the marketplace generally. Damages would thus have to be calculated based on specific transactions between third parties

that were indirectly impacted by Defendants' alleged manipulation of benchmark rates. To the extent that Plaintiff seeks damages based on trading volume, *see* Third Am. Compl. ¶ 124 ("Billions in notional value . . . in Euroyen futures contracts were transacted during the Class Period"), such an approach would be vastly overbroad. *Cf. Gelboim*, 823 F.3d at 779 ("Requiring the [defendant] [b]anks to pay treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative . . . would . . . also vastly extend the potential scope of antirust liability in myriad markets where derivative instruments have proliferated."). The district court thus correctly concluded that Plaintiff failed to allege antitrust standing.

C. RICO Claims

1. *Legal Principles*

The RICO statute criminalizes certain conduct arising from "a pattern of racketeering activity." 18 U.S.C. § 1962(a)-(c). Congress defined "racketeering activity" through numerous state and federal offenses, commonly known as predicates. *See id*. § 1961(1). RICO also provides "a private civil cause of action that allows '[a]ny person injured in his business or property by reason of a violation of section 1962' to sue in federal district court and recover treble damages, costs, and attorney's fees.'" *RJR Nabisco, Inc., 579*

U.S. at 331, 136 S.Ct. 2090 (quoting 18 U.S.C. § 1964(c)) (alteration in original).

"To establish a RICO claim, a plaintiff must show: (1) a violation of the RICO statute, 18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of [§] 1962." *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120 (2d Cir. 2013) (citation omitted). As for this last requirement, "a plaintiff must . . . establish that the underlying § 1962 RICO violation was the proximate cause of his injury." *Empire Merchs., LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 140 (2d Cir. 2018) (cleaned up). "[T]he central question . . . is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). As with proximate causation in the antitrust context, we "rarely 'go beyond the first step'" in the causal chain. *Empire Merchs.*, LLC, 902 F.3d at 141 (citation omitted); *see also Anza*, 547 U.S. at 459–60 (looking to the directness of injury, "speculative nature of the proceedings," risk of duplicative recoveries, and existence of more immediate victims when analyzing proximate causation in the civil RICO context).

2. *Analysis*

Plaintiff failed to allege that his proposed RICO claims, premised on wire fraud, *see* 18 U.S.C. § 1343, proximately caused his injury. As noted above, *see supra* at 2[0a] Plaintiff's alleged injury does not flow directly from the first step in the causal chain. Not only does Plaintiff fail to allege any direct dealings with Defendants, but his asserted injury (a change in

the value of his domestically traded Euroyen TIBOR futures contract) is several steps removed from Defendants' alleged conduct (sending fraudulent Yen-LIBOR submissions to the BBA). *See id.* Plaintiff thus cannot establish proximate causation for purposes of his RICO claims for the same reason that he fails to do so for his antitrust claim.[12]

III. CONCLUSION

For these reasons, the district court properly dismissed Plaintiff's CEA and antitrust claims and denied leave to add civil RICO claims. We thus affirm the judgment and orders of the district court and dismiss the cross-appeal.

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[12] The parties agree that Plaintiff's RICO claims fall or stand with this Court's causation analysis for antitrust standing.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2021

Argued: May 24, 2022

Decided: October 18, 2022

Nos. 20-3626(L), 20-3775 (XAP)

JEFFREY LAYDON,

on behalf of himself and all others similarly situated,

Plaintiff-Appellant-Cross-Appellee,

v.

COÖPERATIEVE RABOBANK U.A., BARCLAYS BANK PLC,
Société Générale S.A.,

Defendants-Appellees-Cross-Appellants,

THE ROYAL BANK OF SCOTLAND GROUP PLC, UBS AG,
LLOYDS BANKING GROUP PLC, UBS SECURITIES JAPAN
CO., LTD., THE ROYAL BANK OF SCOTLAND PLC, RBS
SECURITIES JAPAN LIMITED,

Defendant-Appellees,[*]

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

Before: POOLER, PARK, and LEE, *Circuit Judges*.

Plaintiff Jeffrey Laydon brought this putative class action against more than twenty banks and brokers, alleging a conspiracy to manipulate two benchmark rates known as Yen-LIBOR and Euroyen TIBOR. He claimed that he was injured after purchasing and trading a Euroyen TIBOR futures contract on a U.S.-based commodity exchange because the value of that contract was based on a distorted, artificial Euroyen TIBOR. Plaintiff brought claims under the Commodity Exchange Act ("CEA"), 7 U.S.C. § 1 *et seq.*, and the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, and sought leave to assert claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962, 1964(c). The district court (Daniels, *J.*) dismissed the CEA and antitrust claims and denied leave to add the RICO claims. Plaintiff appeals, arguing that the district court erred by holding that the CEA claims were impermissibly

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[*] The Clerk of Court is respectfully directed to amend the caption accordingly.

extraterritorial, that he lacked antitrust standing to assert a Sherman Act claim, and that he failed to allege proximate causation for his proposed RICO claims.

We affirm. The alleged conduct—*i.e.*, that the bank defendants presented fraudulent submissions to an organization based in London that set a benchmark rate related to a foreign currency—occurred almost entirely overseas. Indeed, Plaintiff fails to allege any significant acts that took place in the United States. Plaintiff's CEA claims are based predominantly on foreign conduct and are thus impermissibly extraterritorial. *See Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, 106 (2d Cir. 2019). The district court also correctly concluded that Plaintiff lacked antitrust standing because he would not be an efficient enforcer of the antitrust laws. *See Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC*, 22 F.4th 103, 115–20 (2d Cir. 2021). Lastly, we agree with the district court that Plaintiff failed to allege proximate causation for his RICO claims. The judgment of the district court is thus **AFFIRMED**.

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DAVID S. LESSER, King & Spalding LLP, New York, NY; Robert G. Houck, Clifford Chance US LLP, New York, NY, *for Defendants-Appellees The Royal Bank of Scotland plc, The Royal Bank of Scotland Group plc, and RBS Securities Japan Ltd*.

Park, Circuit Judge:

Plaintiff Jeffrey Laydon brought this putative class action against more than twenty banks and brokers, alleging a conspiracy to manipulate two benchmark rates known as Yen-LIBOR and Euroyen TIBOR. He claimed that he was injured after purchasing and trading a Euroyen TIBOR futures contract on a U.S.-based commodity exchange because the value of that contract was based on a distorted, artificial Euroyen TIBOR. Plaintiff brought claims under the Commodity Exchange Act ("CEA"), 7 U.S.C. § 1 *et seq.*, and the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*., and sought leave to assert claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962, 1964(c). The district court (Daniels, *J.*) dismissed the CEA and antitrust claims and denied leave to add the RICO claims. Plaintiff appeals, arguing that the district court erred by holding that the CEA claims were impermissibly extraterritorial, that he lacked antitrust standing to assert a Sherman Act claim, and that he failed to allege proximate causation for his proposed RICO claims.

We affirm. The alleged conduct—*i.e.*, that the bank defendants presented fraudulent submissions to an organization based in London that set a benchmark rate related to a foreign currency—occurred almost entirely overseas. Indeed, Plaintiff fails to allege any significant acts that took place in the United States. Plaintiff's CEA claims are based predominantly on foreign conduct and are thus impermissibly extraterritorial. *See Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, 106 (2d Cir. 2019). The district

court also correctly concluded that Plaintiff lacked antitrust standing because he would not be an efficient enforcer of the antitrust laws. *See Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC*, 22 F.4th 103, 115–20 (2d Cir. 2021). Lastly, we agree with the district court that Plaintiff failed to allege proximate causation for his RICO claims. The judgment of the district court is thus affirmed.

I. BACKGROUND

A. Factual Background

1. *Yen-LIBOR and Euroyen TIBOR*

Plaintiff alleges the manipulation of two benchmark rates known as Yen-LIBOR and Euroyen TIBOR, which reflected the interest rates at which banks can lend Japanese Yen outside of Japan.[1] There were two key differences between Yen-LIBOR and Euroyen TIBOR. First, different entities set the rates. During the relevant period, the Japanese Bankers Association ("JBA") set Euroyen

[1] The names are short for "Yen London Interbank Offered Rate" and "Euroyen Tokyo Interbank Offered Rate," respectively. The Euroyen, also known as offshore yen, refers to deposits denominated in Japanese Yen held outside of Japan. Yen-LIBOR and Euroyen TIBOR are based on "the interest rates at which banks offer to lend unsecured funds denominated in Japanese Yen to other banks in the offshore wholesale money market (or interbank market)." Third Am. Compl. ¶ 122.

TIBOR by accepting submissions from a panel of banks headquartered primarily in Japan. Each bank submitted to the JBA the interest rate at which it could borrow offshore Yen. The JBA then calculated Euroyen TIBOR for various maturities by discarding the two highest and two lowest submissions and averaging the remaining ones. Yen-LIBOR, on the other hand, was a London-based benchmark set by the British Bankers' Association ("BBA"). Each bank sitting on a panel of London-based banks submitted to the BBA the rate at which it could borrow Yen outside of Japan. The BBA calculated Yen- LIBOR by discarding the highest and lowest 25% of submissions and determining the average of the remaining 50%. The second major difference between the rates was that they were set at different times. "Euroyen TIBOR [was] calculated on each business day as of 11:00 a.m. Tokyo time," while "Yen-LIBOR [was] calculated each business day as of 11:00 a.m. London time." Third Am. Compl. ¶¶ 126, 130.

2. *The Alleged Conduct*

Plaintiff Laydon is a U.S. resident who. traded three-month Euroyen TIBOR futures contracts between January 1, 2006 and June 30, 2011 (the "Class Period"). This type of contract is an "agreement to buy or sell a Euroyen time deposit having a principal value of 100,000,000 Japanese Yen with a three-month maturity commencing on a specific future

date." Third Am. Compl. ¶ 134.[2] Plaintiff placed these trades on the Chicago Mercantile Exchange ("CME"), a U.S.-based futures exchange. Specifically, he "initiated a short position by selling five . . . Euroyen TIBOR futures contracts on July 13, 2006 at a price of $99.315 per contract" and then "liquidated that position by purchasing five long . . . futures contracts on August 3, 2006 at a price of $99.490 per contract for loss of $2,150.35." *Id.* ¶ 911. Defendants-Appellees served as panel banks for the BBA in setting Yen-LIBOR during the relevant period.[3] Plaintiff also sued several derivatives brokers who allegedly helped Defendants manipulate Yen-LIBOR and Euroyen TIBOR.[4]

Plaintiff maintains that Defendants conspired to manipulate Yen-LIBOR and Euroyen TIBOR by giving false Yen-LIBOR submissions to the BBA, which affected the price of Plaintiff's three- month Euroyen

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[2] Unlike an "ordinary bank deposit" that is "payable on demand," a time deposit cannot be withdrawn from the bank before a set date. *See* 10 Am. Jur. 2d Banks and Fin. Insts. § 641.

[3] These include UBS AG and UBS Securities Japan Co., Ltd. ("UBS"); the Royal Bank of Scotland Group plc, The Royal Bank of Scotland plc, and RBS Securities Japan Limited ("RBS"); Lloyds Banking Group plc ("Lloyds"); Barclays Bank PLC ("Barclays"); Société Générale S.A. ("SocGen"); and Coöperatieve Rabobank U.A. ("Rabobank") (collectively, "Defendants").

[4] The broker defendants who initially joined this appeal were ICAP plc and ICAP Europe Limited (collectively, "ICAP") and Tullett Prebon plc. We granted Plaintiff's motion to sever and stay the appeal with respect to ICAP and Tullett Prebon and remanded to allow the district court to consider a proposed class-action settlement between

TIBOR futures. Although Defendants did not serve as panel banks for the JBA in setting Euroyen TIBOR, Plaintiff alleges that their purported manipulation of Yen-LIBOR — which is set earlier in the day — affected Euroyen TIBOR. *See* Third Am. Compl. ¶¶ 844, 845 (alleging that "[c]hanges in Yen-LIBOR will be immediately reflected in Euroyen TIBOR rates . . . once Euroyen TIBOR opens" and that "the reporting of false and inaccurate Yen-LIBOR rates . . .cause[d] artificial Euroyen TIBOR rates and artificial Euroyen TIBOR futures prices"). He further asserts that the "driving force[s] behind Defendants' manipulation" were conflicts of interest. *Id.* ¶ 167. Namely, Plaintiff claims that Defendants held their own "Euroyen-based derivatives positions" and that their traders' "compensation was based in part on the profit and loss calculation" of Defendants' trading books. *Id.* And "even very small movements in Yen- LIBOR . . . would have a significant positive impact on the profitability of" trading positions, so Defendants' traders had incentives to manipulate Yen-LIBOR. *Id.* To support these allegations, Plaintiff relies on information revealed in various domestic and foreign enforcement proceedings. He points to Defendants' admissions concerning actions taken by their employees at overseas trading desks. These allegations describe Defendants' foreign-based employees submitting false rates to the BBA, as well as traders asking other employees responsible for sending submissions to the BBA to move the benchmark rate in a direction that

would benefit the trader's trading position.[5] As for domestic conduct, Plaintiff primarily relies on a handful of communications sent from Defendants' foreign-based employees through or to servers located in the United States.[6] Plaintiff does not allege that Defendants' employees sent artificial submissions to the BBA from within the United States.

On behalf of a putative class, Plaintiff sought an unspecified amount in regular and treble damages,

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[5] For example, Plaintiff alleges that RBS Yen traders "attempted to manipulate Yen-LIBOR by making hundreds of manipulative requests of RBS' Primary Submitter, Paul White, and London-based traders." Third Am. Compl. ¶ 267 ("RBS' derivatives traders' requests for artificial Yen- LIBOR submissions were common and made openly on the trading floors in Asia and London."). Similarly, Plaintiff asserts that UBS began tendering "false Yen-LIBOR and Euroyen TIBOR" submissions as early as 2006. *Id.* ¶ 241. Plaintiff focuses on the actions of UBS Yen Traders Tom Hayes and Roger Darin, who operated from UBS desks in Tokyo, Singapore, and Zurich, and were prosecuted in the United States and the United Kingdom for manipulating Yen-LIBOR.

[6] Plaintiff cites a criminal complaint brought by U.S. prosecutors against UBS Yen Trader, Tom Alexander William Hayes, which alleges that Hayes "caused confirmations . . . to be transmitted from outside the United States to a counterparty based in Purchase, New York, for transactions involving interest rate derivative products tied to a benchmark interest rate which [Hayes] was secretly manipulating." Joint App'x at 2036. Plaintiff also relies on the testimony of a Rabobank employee, Anthony Allen, from his trial for wire fraud stemming from manipulation of Yen-LIBOR, reflecting that Allen knew that some of the counterparties to Rabobank's transactions were in the United States. *See* Third Am. Compl. ¶¶ 92–93.

as well as an injunction prohibiting Defendants from continuing their alleged unlawful conduct.

B. Procedural Background

Plaintiff filed this action in 2012. On April 15, 2013, before the district court resolved any substantive motions, Plaintiff filed the Second Amended Complaint, alleging claims under the CEA, 7 U.S.C. § 1 *et seq.*, and Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*.[7]

Over nearly a decade of litigation, the district court issued several orders dismissing various claims and defendants. First, on March 28, 2014, the court granted Defendants' motion to dismiss Plaintiff's antitrust claims, finding that Plaintiff lacked antitrust standing in part because he would not be an "efficient enforcer" of the alleged antitrust violation. The court allowed the remaining CEA claims to proceed.

Plaintiff next sought leave to file the Third Amended Complaint to add RICO claims and additional defendants. On March 31, 2015, the district court allowed Plaintiff to file the new pleadings but denied leave to add the RICO claims, finding that Plaintiff did "not show a sufficiently direct connection between the alleged misconduct and

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[7] Plaintiff also brought an unjust-enrichment claim and a CEA vicarious-liability claim, but he does not appeal the dismissal of those claims.

the injury to support a RICO claim." Special App'x at 58. That same day, the court also dismissed several defendants for lack of personal jurisdiction,

Two years later, on March 10, 2017, the district court dismissed several new defendants named in the Third Amended Complaint — including the broker Defendants ICAP and Tullett Prebon plc — for lack of personal jurisdiction, finding that their alleged conduct did not create a substantial connection with the United States and once again rejecting Plaintiff's "'conspiracy theory' of jurisdiction." Special App'x at 73–79. Finally, on August 27, 2020, the court dismissed the surviving CEA claims against the remaining defendants, finding the claims impermissibly extraterritorial because "Defendants' alleged wrongful conduct . . . is almost entirely foreign." *Id.* at 86. Plaintiff filed a timely notice of appeal.[8]

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[8] Defendants Barclays, SocGen, and Rabobank filed a cross-appeal, challenging the district court's November 10, 2014 order denying them leave to file a motion to dismiss based on lack of personal jurisdiction. We severed the main appeal and the cross appeal as to Barclays and ordered a limited remand for the district court to consider the approval of a proposed class action settlement between Plaintiff and Barclays. As to SocGen and Rabobank, we need not reach the issues in their cross-appeal — which concern whether the district court properly found that they forfeited or waived their personal jurisdiction arguments — because we affirm the district court's dismissal orders on the merits.

II. DISCUSSION

Plaintiff argues that the district court erred by dismissing his CEA claims as impermissibly extraterritorial. He also challenges the district court's decisions to dismiss his antitrust claims for lack of standing and to reject his RICO claims for lack of proximate causation.[9] "We review de novo the dismissal of a complaint for failure to state a claim upon which relief can be granted." *Myun-Uk Choi v. Tower Rsch. Cap. LLC*, 890 F.3d 60, 65 (2d Cir. 2018) (citation omitted). "The denial of leave to amend is similarly reviewed *de novo* because the denial was based on an interpretation of law, such as futility." *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 769 (2d Cir. 2016) (cleaned up). We agree with the district court that Plaintiff failed to state a claim under the CEA because the alleged conduct occurred predominantly outside the United States. We also agree that .Plaintiff lacks antitrust standing and failed to allege proximate causation for his RICO claims.

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[9] Plaintiff also argues that the district court erred by dismissing several defendants for lack of personal jurisdiction. We do not reach this issue because our decision on the merits provides an alternative ground for affirmance. *See Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 n.17 (2d Cir. 2012); 4 C. Wright & A. Miller, Fed. Prac. and Proc. § 1067.6 (4th ed. 2022) ("[A] court simply may avoid the issue [of personal jurisdiction] by resolving the suit on the merits when they clearly must be decided in favor of the party challenging jurisdiction, thereby obviating any need to decide the question.").

A. Commodity Exchange Act Claims

1. *Legal Principles*

The CEA prohibits "manipulat[ing] or attempt[ing] to manipulate the price of any commodity in interstate commerce." 7 U.S.C. § 13(a)(2). Section 22 of the CEA provides a private right of action, permitting a party to sue "[a]ny person . . . who violates this chapter" and hold that person liable "for actual damages resulting from one or more of the transactions" listed in the statute. *Id.* § 25(a)(1).

"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.'" *Prime*, 937 F.3d at 102 (quoting *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335 (2016)). "This canon helps avoid the international discord that can result when U.S. law is applied to conduct in foreign countries" and "reflects the commonsense notion that Congress generally legislates with domestic concerns in mind." *In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC*, 917 F.3d 85, 95 (2d Cir. 2019) (cleaned up).

We decide questions of extraterritoriality using a two-step framework. First, we "ask[] whether the presumption against extraterritoriality has been rebutted" by "text [that] provides a clear indication of an extraterritorial application." *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (cleaned up). "Absent clearly expressed congressional intent to the contrary, federal laws

will be construed to have only domestic application." *RJR Nabisco, Inc.*, 579 U.S. at 335; *see also Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none."). Second, if we conclude that the presumption against exterritoriality has not been rebutted, we decide "whether the case involves a domestic application of the statute." *RJR Nabisco, Inc.*, 579 U.S. at 337. To do so, we determine whether "the conduct relevant to the statute's focus occurred in the United States." *Id.* "[I]f 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.*

Section 22 of the CEA lacks any "affirmative intention by Congress to give [it] extraterritorial effect." *Loginovskaya v. Batratchenko*, 764 F.3d 266, 272 (2d Cir. 2014) (cleaned up). A claim relying on Section 22 must thus involve a domestic application of the statute. And the focus of the statute is transactional, *see id.* at 272, so "suits funneled through [the CEA's] private right of action must be based on transactions occurring in the territory of the United States," *Prime*, 937 F.3d at 103 (cleaned up).

Simply pleading a domestic transaction, however, is not enough. Section 22 is a general provision affording a cause of action to private litigants. Instead of prohibiting certain, specified conduct, it applies when a defendant commits "a violation of this chapter." 7 U.S.C. § 25(a)(1). A private plaintiff pleading a CEA claim under Section

22 must thus invoke a substantive provision of the CEA. *See Prime*, 937 F.3d at 105. And allowing a plaintiff to state a domestic application of Section 22 based merely on a domestic transaction "would . . . divorce the private right afforded in Section 22 from the requirement of a domestic violation of a substantive provision of the CEA." *Id.* A plaintiff must thus plead not only a domestic transaction, but also sufficiently domestic conduct by the defendant. In other words, "Plaintiffs' claims must not be 'so predominantly foreign as to be impermissibly extraterritorial.'" *Id.* (quoting *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014)).

2. *Analysis*

Plaintiff's CEA claims are impermissibly extraterritorial because the conduct he alleges is "predominantly foreign." *Prime*, 937 F.3d at 106. First, Plaintiff traded a derivative that is tied to the value of a foreign asset. The complaint alleges that he was injured after purchasing and trading a Euroyen TIBOR futures contract, which is "an agreement to buy or sell a Euroyen time deposit having a principal value of 100,000,000 Japanese Yen with a three-month maturity commencing on a specific future date." Third Am. Compl. ¶ 134. As alleged, the value of this asset is, in part, determined by Yen-LIBOR and Euroyen TIBOR because these rates are meant to capture the prevalent interest rates at which banks lend such time deposits. So the

value of this asset is based on rates set by foreign entities (*i.e.*, JBA and BBA) in foreign countries (*i.e.*, Japan and the United Kingdom).

Second, the alleged manipulative conduct occurred almost entirely abroad. Plaintiff's conspiracy allegations describe conduct and communications that occurred overseas on foreign trade desks.[10] Indeed, Plaintiff focuses on the actions of employees who worked in foreign offices. *See* Joint App'x at 2040, 2739.

Plaintiff's arguments to the contrary are meritless. His main contention is that he purchased a Euroyen TIBOR futures contract on the CME, a U.S.-based exchange. He argues that his "claims must be domestic because they involve both core domestic transactions (*i.e.*, transactions on a domestic exchange) *and* manipulation of a domestic commodity

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[10] *See, e.g.*, Third Am. Compl. ¶¶ 231–33 (Rabobank's employees, Anthony Allen and Tetsuya Motomura, made requests to contribute false submissions from "Rabobank's money market desk in London" and Rabobank's trading desk in Tokyo, respectively); *id*. ¶ 296 (a Rabobank employee "made regular requests to Rabobank's London-based Yen setters" to transmit manipulated submissions); *id*. ¶ 269 ("a Euroyen-based derivatives trader employed by RBS Japan sent requests for favorable Yen- LIBOR submissions to a Yen derivatives trader in London"); *id*. ¶ 243 ("UBS managers in Tokyo and Zurich" were aware of false submission requests and "encouraged and allowed" such conduct to occur); *id.* (a UBS "Yen Desk Manager in Tokyo" engaged and encouraged the contribution of false submissions); *id*. ¶ 250 ("the manager of one of the [UBS] Yen derivatives trading desks in Tokyo exerted pressure on Yen-LIBOR submitters to take derivatives traders' positions into account when setting Yen-LIBOR").

market." Appellant's Br. at 36 (emphasis added). Plaintiff also points to several instances of communications that were made from or went through the United States. For example, Plaintiff alleges that UBS trader Tom Hayes sent an email in furtherance of the conspiracy while on a brief, two-day trip in Las Vegas. These arguments fail for several reasons.

First, the subjects of the alleged manipulation, Yen-LIBOR and Euroyen TIBOR, are not commodities traded on a domestic exchange. The CEA defines the term "commodity" to include "all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(9). It would not make sense to say that the purchaser of a benchmark-based futures contract receives a "delivery" of a price index like Euroyen TIBOR on the maturity date.[11] Here, the asset to be delivered was a "time deposit having a principal value of 100,000,000 Japanese Yen with a three-month maturity commencing on a specific future date." Third Am. Compl. ¶ 134. Just as the purchaser of a copper or wheat future may receive those commodities upon maturity, the purchaser of a Euroyen TIBOR future may receive a 100,000,000 Japanese Yen time

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[11] Upon maturity, most modern contracts are resolved through "cash settlement," which "gives the right to payments based on future change in the value of the [underlying asset] [the contract] references, rather than any right or obligation to delivery of the [asset] itself." *Parkcentral*, 763 F.3d at 206–07; *see Prime*, 937 F.3d at 100. But regardless of the settlement method chosen by the transacting parties, futures contracts still deal with commodities that are usually deliverable by the seller to the purchaser.

deposit in a foreign commercial bank. Euroyen TIBOR affects the value of that time deposit, but that does not make Euroyen TIBOR itself a commodity.[12]

Also unlike commodities, benchmark rates do not themselves have any value. And unlike a copper or wheat future, in which the purchaser receives "rights" or "interests" in the copper or wheat, 7 U.S.C. § 1a(9), the purchaser of a Euroyen TIBOR future does not receive "rights" or "interests" in Euroyen TIBOR itself, but in the product based on that rate—*i.e.*, the underlying 100,000,000 Japanese Yen deposit. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 962 F. Supp. 2d 606, 612 (S.D.N.Y. 2013) (rejecting the argument that U.S. dollar LIBOR is a commodity underlying a Eurodollar future because "LIBOR is a price index," there is no "price of LIBOR independent from LIBOR itself," and because the underlying commodity of such a future is instead a time deposit in a foreign bank).[13]

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[12] Just like the price of 500 bushels of wheat depends on the cash price of wheat at the date of maturity, the price of the 100,000,000 Japanese Yen deposit depends in part on Euroyen TIBOR. But in the example, the wheat itself is the commodity rather than the price of wheat.

[13] Plaintiff cites several CFTC settlement orders in which the Commodity Futures Trading Commission ("CFTC") referred to such benchmark rates as commodities. But these remarks are not formal acts of rulemaking or adjudication and are entitled to no deference, especially because the quoted statements are conclusory and fail to provide any supporting analysis. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) ("The weight [accorded to an administrative] judgment in a particular

Second, our precedent mandates dismissal of Plaintiff's CEA claims. In *Prime*, the plaintiffs traded futures on a U.S.-based exchange that were pegged to the Dated Brent Assessment, a rate that "reflect[ed], in part, the value of Brent crude physically traded in Northern Europe." 937 F.3d at 106. The plaintiffs alleged that the defendants manipulated the market for Brent crude and Brent futures by "systematically report[ing] . . . artificial transactions" to a foreign entity responsible for setting the Dated Brent Assessment rate. *Id.* at 100. We held that the plaintiffs' CEA claims were impermissibly extraterritorial because the derivatives at issue were "pegged to the value of" foreign assets and the alleged misconduct was foreign because the plaintiffs made "no claim that any manipulative oil trading occurred in the United States." *Id.* at 106.

Here, as in *Prime*, Plaintiff purchased a futures contract on a domestic market that incorporated an index tied to a foreign market, with that index being set by a foreign entity. According to Plaintiff, the crude index in *Prime* would also have been a commodity and, because the futures contract traded in the United States, any claims concerning that future would have been domestic. But we rejected this theory and held that the claims in *Prime* were impermissibly extraterritorial because the defendants

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case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, . . . and all those factors which give it power to persuade, if lacking power to control.") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (first alteration in original)).

in that case were "alleged to have manipulated the physical Brent crude market" in Europe "by engaging in fraud there." *Id.* at 107–08. So too here, Plaintiff alleges that Defendants conspired to manipulate Euroyen TIBOR (an index tied to a foreign market) by giving false Yen-LIBOR submissions to the BBA from foreign trading desks (conduct abroad). We thus affirm the district court's dismissal of Plaintiff's CEA claims.[14]

B. Antitrust Claims

1. *Legal Principles*

To state an antitrust claim, a plaintiff must first "show . . . antitrust standing." *Gelboim*, 823 F.3d at 770; *see generally Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*") (discussing the requirements of antitrust standing). Standing to bring an antitrust claim requires a plaintiff to show that (1) he has "suffered antitrust injury," and (2) he is an "efficient enforcer[] of the antitrust laws." *Gelboim*, 823 F.3d at 772. We look to four factors to determine whether a plaintiff is an efficient enforcer:

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[14] We are also unpersuaded by Plaintiff's argument that dismissal of his claims will "fatally undermine the ability of U.S. law and U.S. regulators to protect domestic markets and investors." Appellant's Br. at 38. The extraterritorial reach of Section 22, which concerns private rights of action, has nothing to do with government enforcement. *See* 7 U.S.C. § 25.

> (1) the directness or indirectness of the asserted injury, which requires evaluation of the chain of causation linking appellants' asserted injury and the [defendants'] alleged price-fixing; (2) the existence of more direct victims of the alleged conspiracy; (3) the extent to which appellants' damages claim is highly speculative; and (4) the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.

Id. At 778 (cleaned up) (citing AGC, 459 U.S. at 540–44).

2. *Analysis*

We agree with the district court that Plaintiff failed to allege antitrust standing because he is not an efficient enforcer of the antitrust laws.

Causation. "For the purposes of antitrust standing, proximate cause is determined according to the so-called 'first-step rule,'" under which "injuries that happen at the first step following the harmful behavior are considered proximately caused by that behavior." *Schwab Short-Term Bond Mkt. Fund*, 22 F.4th at 116 (quoting *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127, 140 (2d Cir. 2021)). This inquiry "require[s] drawing a line between those whose injuries resulted from their direct transactions with [the defendants] and those whose injuries stemmed from their deals with third parties." *Id.*

Plaintiff here failed to allege that his injury was proximately caused by Defendants. He did not assert that he transacted directly with any Defendants or that Defendants controlled the Euroyen TIBOR futures contract that Plaintiff purchased. Instead, Plaintiff traded his futures contract with unknown third parties before the contract's maturity date. *See* Third Am. Compl. ¶ 57.

Further, Plaintiff's theory of liability depends on a series of causal steps that separate Defendants' conduct and his purported injury. Plaintiff asserts that (1) Defendants submitted fraudulent rates to the BBA; (2) the BBA then used these artificial submissions to set Yen-LIBOR; (3) the manipulated Yen-LIBOR affected Euroyen TIBOR during the Class Period; and (4) any distorted benchmark rate also affected the market's perception of the value of Plaintiff's Euroyen TIBOR futures contract. Plaintiff's injury thus occurred far from "the first step following" Defendants' "harmful behavior." *Schwab Short-Term Bond Mkt. Fund*, 22 F.4th at 116 (citation omitted).

Existence of More Direct Victims. Direct victims of an alleged antitrust conspiracy are situated to enforce the antitrust laws because their "self-interest would normally motivate them to vindicate the public interest in antitrust enforcement." *AGC*, 459 U.S. at 542. When only indirect victims bring suit, "it is difficult to understand why the[] direct victims of the conspiracy have not asserted any claim in their own right." *Id.* at 542 n.47; *see also Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 79 (2d Cir. 2013) ("If the 'superior' plaintiff has not sued, one may doubt

the existence of any antitrust violation at all.") (internal quotation marks omitted) (quoting Phillip Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law*, § 3.01c, at 3–9 to 3–10 (4th ed. 2011)).

Plaintiff here is an indirect victim of the alleged conspiracy. Direct victims might include traders of interest-rate swaps—contracts in which a party exchanges one stream of fixed interest-rate payments for another flow of payments based on a variable, "floating" rate, such as Yen-LIBOR or Euroyen TIBOR. *See Sonterra Cap. Master Fund Ltd. v. UBS AG*, 954 F.3d 529, 532–33 (2d Cir. 2020) (explaining interest rate swaps that incorporate Yen-LIBOR). Such a swap trader betting on the movement of benchmark rates like Yen-LIBOR and Euroyen TIBOR would be more directly harmed if Defendants had engaged in an antitrust conspiracy to manipulate Yen-LIBOR and Euroyen TIBOR.

Speculative Damages. We next consider whether the "asserted damages are speculative," because "a high degree of speculation in a damages calculation suggests that a given plaintiff is an inefficient engine of enforcement." *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 66–67 (2d Cir. 2019) (citations omitted). Damages are speculative "where countless other market variables could have intervened to affect . . . pricing" and the "theory of antitrust injury depends upon a complicated series of market interactions." *Reading Indus., Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 13–14 (2d Cir. 1980). A district court should not be required to entertain "multiple layers of speculation" and "create[]

. . . an alternative universe" to calculate damages. *IQ Dental Supply*, 924 F.3d at 67 (cleaned up).

Here, Plaintiff failed to plead any injury. He alleges that he entered and closed a short position in a Euroyen TIBOR futures contract in 2006. In other words, he bet that there would be "an increase in Euroyen TIBOR rates." Third Am. Compl. ¶ 138. Plaintiff alleges two acts occurring in August 2006 involving three- month Euroyen TIBOR futures, both of which involved Defendants' alleged attempts to manipulate Yen-LIBOR *upwards*. But if true and Euroyen TIBOR rates did increase, Plaintiff would have benefited from Defendants' conduct. *See id*. (explaining that a trader who "go[es] short" would "profit from an increase in Euroyen TIBOR rates").

In any event, Plaintiff's theory of damages is also highly speculative. As explained above, his allegations rely on an attenuated chain of causation that would complicate if not render impossible any damages calculation. *See supra* at 20.

Duplicative Recovery and Complex Damage Apportionment. Finally, we consider "the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries." *Volvo N. Am. Corp. v. Men's Int'l Pro. Tennis Council*, 857 F.2d 55, 66 (2d Cir. 1988). The focus of this factor is on "keeping the scope of complex antitrust trials within judicially manageable limits." *AGC*, 459 U.S. at 543.

Here, apportionment of any damages would be difficult and there would be a risk of duplicative

recovery because Plaintiff's theory of liability is indirect and imprecise. Plaintiff had no direct dealings with Defendants but asserts an injury based on alleged conduct that impacted the marketplace generally. Damages would thus have to be calculated based on specific transactions between third parties that were indirectly impacted by Defendants' alleged manipulation of benchmark rates. To the extent that Plaintiff seeks damages based on trading volume, *see* Third Am. Compl. ¶ 124 ("Billions in notional value . . . in Euroyen futures contracts were transacted during the Class Period"), such an approach would be vastly overbroad. *Cf. Gelboim*, 823 F.3d at 779 ("Requiring the [defendant] [b]anks to pay treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative . . . would . . . also vastly extend the potential scope of antirust liability in myriad markets where derivative instruments have proliferated."). The district court thus correctly concluded that Plaintiff failed to allege antitrust standing.

C. <u>RICO Claims</u>

1. *Legal Principles*

The RICO statute criminalizes certain conduct arising from "a pattern of racketeering activity." 18 U.S.C. § 1962(a)-(c). Congress defined "racketeering activity" through numerous state and federal

offenses, commonly known as predicates. *See id.* § 1961(1). RICO also provides "a private civil cause of action that allows '[a]ny person injured in his business or property by reason of a violation of section 1962' to sue in federal district court and recover treble damages, costs, and attorney's fees.'" *RJR Nabisco, Inc.*, 579 U.S. at 331 (quoting 18 U.S.C. § 1964(c)) (alteration in original).

"To establish a RICO claim, a plaintiff must show: (1) a violation of the RICO statute, 18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of [§] 1962." *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120 (2d Cir. 2013) (citation omitted). As for this last requirement, "a plaintiff must . . . establish that the underlying § 1962 RICO violation was the proximate cause of his injury." *Empire Merchs., LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 140 (2d Cir. 2018) (cleaned up). "[T]he central question . . . is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). As with proximate causation in the antitrust context, we "rarely 'go beyond the first step'" in the causal chain. *Empire Merchs., LLC*, 902 F.3d at 141 (citation omitted); *see also Anza*, 547 U.S. at 459–60 (looking to the directness of injury, "speculative nature of the proceedings," risk of duplicative recoveries, and existence of more immediate victims when analyzing proximate causation in the civil RICO context).

2. *Analysis*

Plaintiff failed to allege that his proposed RICO claims premised on wire fraud, *see* 18 U.S.C. § 1343, proximately caused his injury. As noted above, *see supra* at[49a], Plaintiff's alleged injury does not flow directly from the first step in the causal chain. Not only does Plaintiff fail to allege any direct dealings with Defendants, but his asserted injury (a change in the value of his domestically traded Euroyen TIBOR futures contract) is several steps removed from Defendants' alleged conduct (sending fraudulent Yen-LIBOR submissions to the BBA). *See id.* Plaintiff thus cannot establish proximate causation for purposes of his RICO claims for the same reason that he fails to do so for his antitrust claim.[15]

III. CONCLUSION

For these reasons, the district court properly dismissed Plaintiff's CEA and antitrust claims and denied leave to add civil RICO claims. We thus affirm the judgment and orders of the district court and dismiss the cross-appeal.

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[15] The parties agree that Plaintiff's RICO claims fall or stand with this Court's causation analysis for antitrust standing.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT OF
THE SOUTHERN DISTRICT OF NEW YORK

JEFFREY LAYDON,
on behalf of himself and all others similarly situated,
Plaintiff,

v.

MIZUHO BANK, LTD. ET AL,
Defendants,

No. 12 Civ. 3419 (GBD)

August 27, 2020

MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, United States District Judge:

Defendants Barclays Bank PLC, Cooperatieve Rabobank U.A., RBS Securities Japan Limited, The

Royal Bank of Scotland Group PLC, The Royal Bank of Scotland PLC, Societe Generale, UBS AG, and UBS Securities Japan Co., Ltd. (collectively, "Defendants") move to dismiss Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(c), all of which Plaintiff has brought under the Commodity Exchange Act ("CEA"), 7 U.S.C. § 1 *et seq.*, as asserted in the Third Amended Complaint ("TAC"). (Notice of Defs.' Mot. for J. on the Pleadings, ECF No. 974.)[1] Defendants' motion to for judgment on the pleadings is GRANTED.

I. FACTUAL BACKGROUND

This case involves Defendants' alleged manipulation of Euroyen TIBOR (the Tokyo Interbank Offered Rate), Yen LIBOR (the London Interbank Offered Rate for Japanese Yen), and the prices of Euroyen TIBOR futures contracts from January 1, 2006 to December 31, 2010 (the "Class Period"). Plaintiff brings this action to recover for losses that he allegedly suffered when he initiated short positions in Euroyen TIBOR futures contracts on the Chicago Mercantile Exchange ("CME") during the Class Period, claiming that Defendants' manipulation of Yen LIBOR and Euroyen TIBOR affected the prices of his Euroyen TIBOR futures contracts. (Third Amended Class Action Complaint ("TAC"), ECF No. 580, at ¶ 56.) Specifically, according to Plaintiff, Defendants made artificial Yen LIBOR and Euroyen TIBOR submissions to the British Bankers' Association ("BBA") in London and the Japanese Bankers'

[1] Given the lengthy procedural history and factual background, this Court assumes familiarity and repeats only those details relevant to the instant motion.

Association ("JBA") in Tokyo in order to profit from derivatives involving Japanese Yen. (*Id.*) Defendants argue that the alleged conduct at issue is so predominantly foreign as to render Plaintiff's claims impermissibly extraterritorial. (Defs.' Mem. of Law in Supp. of Mot. for J. on the Pleadings ("Mem. in Supp."), ECF No. 975, at 1–2.)

II. LEGAL STANDARD

A party may move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial[.]" Fed. R. Civ. P. 12(c). "Judgment on the pleadings is appropriate if, from the pleadings, the moving party is entitled to judgment as a matter of law." *Burns Int'l Sec. Servs., Inc. v. Int'l Union, United Plant Guard Workers of Am. (UPGWA) & Its Local 537*, 47 F.3d 14, 16 (2d Cir. 1995). The standard for addressing a motion for judgment on the pleadings pursuant to Rule 12(c) is the same as the standard used in evaluating a motion to dismiss under Rule 12(b)(6). *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 429 (2d Cir. 2011). Accordingly, to survive a Rule 12(c) motion, "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)). In assessing such a motion, a court may consider "the complaint, the answer [and] any written documents attached to them." *L-7 Designs*, 647 F.3d at 422 (cleaned up).

III. PLAINTIFF FAILS TO ALLEGE CEA CLAIMS

Since the inception of this action, there has been an intervening change of controlling law regarding the extraterritorial application of the CEA. Indeed, the Second Circuit in *Prime Int'l Trading, Ltd. v. BP P.L.C.* unequivocally held that a private plaintiff asserting claims under Section 22 of the CEA "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." 937 F.3d 94, 105 (2d Cir. 2019), *cert. denied sub nom. Atl. Trading USA, LLC v. BP P.L.C.*, No. 19-1141, 2020 WL 3146710 (U.S. June 15, 2020) (emphasis added). The Circuit explained that allowing an action to proceed "any time a domestic transaction is pleaded would turn the presumption against extraterritoriality into a 'craven watchdog'" and "fly in the face of the Supreme Court's clear guidance that the presumption against extraterritoriality cannot evaporate any time" *some* domestic activity is implicated in the action. *Id.* at 106 (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010)). The fact that a domestic transition is implicated is insufficient to rebut the presumption against extraterritoriality because "[f]oreign conduct is generally the domain of foreign law." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007). The Circuit further reasoned that "potential unintended clashes between our laws and those of other nations . . . could result in international discord if [it] adopts an interpretation of U.S. law that carries foreign policy consequences not clearly

intended by the political branches." *Prime Int'l Trading*, 937 F.3d at 106 (cleaned up).

For instance, the Circuit in *Prime International Trading* affirmed the district court's dismissal of CEA claims on the basis that the plaintiffs asserted:

> 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.

Id. at 106–07. The Circuit concluded that in addition to the trades at issue being pegged to the value of a foreign asset, almost every link in the plaintiffs' "chain of wrongdoing is entirely foreign" as to render their claims impermissibly extraterritorial. *Id.* at 107. Indeed, a plaintiff alleging a CEA claim must show that (1) the transactions at issue are domestic and (2) the conduct affecting such transactions was sufficiently domestic so to warrant a proper domestic application of the CEA. *Id.* at 105–06.

Here, Defendants' alleged wrongful conduct, however, is almost entirely foreign, rendering it impermissibly extraterritorial. *See Prime Int'l Trading*, 937 F.3d at 107. In particular, instead of alleging any relevant conduct by Defendants in the United States, Plaintiff merely relies on the

attenuated "ripple effects" effects theory the Circuit in *Prime International Trading* rejected as predominantly foreign. More specifically, Plaintiff claims that (1) the alleged manipulative Yen LIBOR submissions occurred abroad, which (2) affected the setting of Yen LIBOR determined abroad, which (3) was then disseminated by the BBA in London, which (4) essentially affected Euroyen TIBOR, which, in turn (5) impacted the trading prices of Euroyen TIBOR futures contracts traded on the CME. (TAC ¶¶ 1–2.)

As this Court has previously determined, Plaintiff cannot point to any direct, traceable ways in which Defendants' alleged manipulation of Yen LIBOR caused a loss to him on futures contracts associated with an entirely different benchmark, Euroyen TIBOR. *Laydon v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419 (GBD), 2014 WL 1280464, at *9 (S.D.N.Y. Mar. 28, 2014). Indeed, Plaintiff's "ripple effects" theory is unavailing because the disconnect between Yen LIBOR and Euroyen TIBOR renders Plaintiff's causal chain more attenuated than that rejected by the *Prime International Trading* court. *See Prime Int'l Trading*, 937 F.3d at 107. Accordingly, Plaintiff's remaining CEA claims—alleging manipulation of Japanese Yen benchmark rates, by foreign financial institutions, on foreign soil—is "predominantly foreign" as to render them impermissibly extraterritorial and are thus not actionable under the CEA. *See id.* at 106.

IV. CONCLUSION

Defendants' motion to for judgment on the pleadings, (ECF No. 974), is GRANTED. Accordingly, Plaintiff's Third Amended Complaint, (ECF No. 580),

is dismissed. The Clerk of Court is directed to close the motion accordingly.

Dated: New York, New York
August 27. 2020

SO ORDERED.

/s/

GEORGE B. DANIELS

United States District Court Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

March 31, 2015

JEFFREY LAYDON,
on behalf of himself and all others similarly situated,
Plaintiff,

v.

MIZUHO BANK, LTD. ET AL,
Defendants,

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12 Civ. 3419 (GBD)

MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, District Judge:

Plaintiff Jeffrey Laydon moves this Court for leave to file a Proposed Third Amended Class Action Complaint ("PTAC"). Specifically, Plaintiff seeks to add two plaintiffs and four defendants, a Racketeer Influenced and Corrupt Organizations Act ("RICO") claim, and a claim for breach of the implied covenant of good faith and fair dealing. In addition, Plaintiff attempts to cure certain pleading deficiencies

identified by this Court in the March 28, 2014 decision granting in part Defendants' motions to dismiss the Second Amended Class Action Complaint ("SAC"). (*See* Mem. Decision & Order, dated March 28, 2014 ("March 28 Decision"), (ECF No. 270).)

Plaintiffs motion for leave to amend to add four defendants is GRANTED. Plaintiffs motion for leave to amend the SAC is otherwise DENIED.

PROCEDURAL HISTORY[1]

Plaintiff filed his initial complaint on April 30, 2012. (*See* Compl., (ECF No. 1).) Plaintiff filed the Corrected First Amended Class Action Complaint on December 3, 2012, (FAC, (ECF No. 124)), and the SAC on April 15, 2013. (SAC, (ECF No. 150).) The SAC alleges that Defendants manipulated prices of Euroyen TIBOR (the Tokyo Interbank Offered Rate) futures contracts and other Euroyen derivatives through their deliberate and systematic submission of false Euroyen TIBOR and Yen-LIBOR (the London Interbank Offered Rate for Japanese yen) rates to the Japanese Bankers Association ("JBA") and British Bankers Association ("BBA"), respectively, throughout

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[1] The relevant procedural history and background facts provided in this Court's decision on Defendants' motions to dismiss the SAC are incorporated by reference. (*See* March 28 Decision, (ECF No. 270), at 1-6.) Plaintiff brought this action on behalf of himself and all those similarly situated to recover for losses that he allegedly suffered when he initiated short positions in Euroyen TIBOR futures contracts. Plaintiff alleges that his losses are due to the presence of artificial Euroyen TIBOR futures prices proximately caused by Defendants' unlawful manipulation and restraint of trade. (*See* SAC 56.)

the Class Period of at least January 1, 2006 through at least December 31, 2010. (SAC 11 1-3, 135.) To support these allegations, Plaintiff cites government settlements, Defendants' admissions and guilty pleas, pending investigations and related proceedings, and other evidence of Defendants' conduct. (*Id*. 117-49.)

On June 14, 2013, Defendants moved to dismiss the SAC. (*See* Mot. to Dismiss SAC, (ECF No. 204).) On March 28, 2014, this Court held that Plaintiff adequately pied a claim under the Commodity Exchange Act ("CEA") for price manipulation and aiding and abetting against all defendants. (*See* March 28 Decision at 7-13, 24.) This Court granted Defendants' motions to dismiss Plaintiffs vicarious liability, antitrust, and unjust enrichment claims. (*Id.* at 24.).

On June 17, 2014, Plaintiff brought the instant motion seeking leave to amend to: (1) add two plaintiffs, Oklahoma Police Pension & Retirement System ("OPPRS") and Stephen P. Sullivan ("Sullivan") (together, the "Proposed Plaintiffs"); (2) add four defendants, ICAP Europe Limited, Lloyds Banking Group, PLC, Tullett Prebon, PLC, and Martin Brokers (UK) Ltd.; (3) add a RICO claim; (4) add a claim for breach of the implied covenant of good faith and fair dealing; and (5) cure certain pleading deficiencies identified by this Court in the March 28 Decision. (Mot. to Amend/Correct, (ECF Nos. 301 (motion) & 302 (memorandum)).) On August 15, 2014, Defendants filed a joint memorandum opposing the instant motion. (*See* Def. Opp. Mem., (ECF No. 361).) Plaintiff filed a reply memorandum on September 22, 2014. (Pl. Reply Mem., (ECF No. 387).) Defendants

filed a joint sur-reply on September 29, 2014. (Def. Sur-Reply Mem., (ECF No. 391).)

STANDARD OF REVIEW

Courts should freely permit plaintiffs leave to amend when justice so requires. Fed. R. Civ. P. 15(a)(2). By its terms, however, this rule is not absolute. The Supreme Court has identified reasons "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." that justify denying a movant leave to amend. *Farnan v. Davis*, 371 U.S. 178, 182 (1962). Leave to file an amended pleading should be denied when the amendment would be futile. *Absolute Activist Value Master Fund Ltd. v. Ficet*o, 677 F.3d 60, 71 (2d Cir. 2012) (citing *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 127 (2d Cir. 2007)). A proposed amendment is futile when it "could not withstand a motion to dismiss pursuant to [Rule] l 2(b)(6)." *Lucente v. Int 'l Bus. Machs. Corp.,* 310 F.3d 243,258 (2d Cir. 2002) (citing *Dougherty v. N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002)).

"To survive a motion to dismiss, 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)). This plausibility standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation omitted).

Rather, to state a facially plausible claim, *Iqbal* requires a party to "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citations omitted). For purposes of a Rule 12(b)(6) motion, the plaintiff's well-pleaded facts are assumed to be true, and all reasonable inferences therefrom are construed in the light most favorable to the plaintiff, the non-moving party. *Arar v. Ashcroft*, 585 F.3d 559, 567 (2d Cir. 2009) (citing *Roth v. Jennings*, 489 F.3d 499, 501 (2d Cir. 2007)). Where the claims are premised on allegations of fraud, the heightened pleading standard of Rule 9(b) applies. *Rombach v. Chang,* 355 F.3d 164, 171 (2d Cir. 2004); *see also* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

PROPOSED THIRD AMENDED COMPLAINT

I. NEW PARTIES[2]

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[2] For the first time in a footnote in his reply memorandum, Plaintiff seeks to add California State Teachers' Retirement System as a named Plaintiff. (Pl. Reply Mem. at 1 n.2 & 17 n.29.) Defendants oppose this application in a footnote in their sur-reply memorandum on the grounds that it was raised for the first time in the reply brief and that such an amendment would be futile. (Def. Sur-Reply Mem. at I n.2.) Plaintiff's application is denied without prejudice. Plaintiff may renew this application by letter

Plaintiff seeks leave to add two plaintiffs, Sullivan and OPPRS, as additional class representatives. The PTAC alleges a CEA claim on behalf of Sullivan and two claims on behalf of OPPRS: (1) breach of the implied covenant of good faith and fair dealing, and (2) unjust enrichment. In addition, Sullivan and OPPRS join Plaintiffs proposed RICO claim. *(See infra* Section II.) Leave to amend is denied as to the Proposed Plaintiffs' claims. Therefore, leave to amend the SAC to add Sullivan or OPPRS as named plaintiffs is denied.

Plaintiff also seeks to add four defendants: (1) ICAP Europe Limited; (2) Lloyds Banking Group, PLC; (3) Tullett Prebon, PLC; and (4) Martin Brokers (UK) Ltd. (collectively, the "Proposed Defendants"). Plaintiffs motion to amend the complaint to include the Proposed Defendants is granted.

A. Proposed Plaintiff Sullivan's CEA Claim Is Time-Barred

Sullivan alleges that he traded Yen currency futures contracts during the Class Period. (PTAC 11651-53.) Defendants argue that Sullivan's CEA claim is time-barred under the CEA's two-year statute of limitations period. Sullivan was put on notice of his

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within thirty (30) days of this order. Defendants may fully respond by letter within fourteen (14) days of Plaintiff's letter application.

claims no later than July 26, 2011.[3] (See Def. Opp. Mem. at 4 (citing PTAC 1 726).) Sullivan's CEA claim therefore expired in July 2013, unless either the tolling doctrine announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), or Federal Rule of Civil Procedure 15(c)'s relation back doctrine applies. Neither doctrine applies. Sullivan's CEA claim is therefore time-barred.

1. *American Pipe* Tolling

"The commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." *Am. Pipe*, 414 U.S. at 554 (emphasis added); *see also Matana v. Merkin*, 957 F. Supp. 2d 473,488 (S.O.N.Y. 2013) (finding that "to take advantage of the toll, a plaintiff must have been a member of the purported class").

The parties' dispute as to tolling turns primarily on whether Sullivan is an "asserted member" of the class proposed in Plaintiffs prior pleadings. Plaintiff argues that "CME Yen currency futures contracts . . . were included in the class definition." (Pl. Reply Mem. at 8.) Defendants contend that "[t]hrough the evolution of the purported class definition, one thing remained constant: the claims at issue in the case involved *only* exchange-based transactions in *Euroyen*

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[3] "[A] discovery accrual rule [i]s applicable to claims under the CEA wherein discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 11-MD-2262 NRB, 2014 WL 2815645, at *471 (S.D.N.Y. June 23, 2014) (internal quotation marks omitted)(quoting *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 149 (2d Cir. 2012))

TIBOR futures contracts." (Def. Opp. Mem. at 3 (emphasis in original).) Defendants argue that, under the broadest reading of the class definition taken from the originally-filed complaint, membership is limited to persons or entities that transacted in "exchange-traded Euroyen futures and option contracts" for which "Euroyen Tibor and Yen Libor serve as the pricing benchmark." (*Id*. at 5-6 (citing Compl. ¶¶ 14, 98).) Because Sullivan transacted in Yen currency futures contracts priced with reference to the U.S. Dollar-Japanese Yen exchange rates, (*see* PTAC, ¶ 638). Defendants argue that tolling under *American Pipe* is not available to Sullivan.

The original complaint asserted CEA claims on behalf of Plaintiff and all persons or entities "who purchased or sold exchange-traded Euroyen futures and option[] contracts on the [CME]." (Compl. at 1.)[4] Plaintiff therefore argues that he alleged claims for "[a]ll Euroyen-based CME futures contracts affected by Yen-LIB OR." (Pl. Reply Mem. at 9.) Defendants are correct, however, that the original complaint states that "Euroyen Tibor and Yen Libor serve as the pricing benchmark (or 'underlying commodity') for Euroyen-based futures and options contracts traded on the CME." (*See* Compl. ¶14.) As mentioned, the transaction giving rise to Sullivan's CEA claim does not fit this description. (*See* PTAC, ¶ 638.) Defendants' position is bolstered by the fact that

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[4] (*See* also Compl. ¶ 98 ("Plaintiff brings this action . . . on his own behalf and as representative of a class defined as all persons, corporations and other legal entities . . . that transacted in exchange-traded Euroyen futures and option contracts.").)

Plaintiff has twice amended his complaint-both times specifying that the class consists of persons and entities that transacted in "Euroyen TIBOR futures contract[s]." (*See* FAC ¶ 254; SAC ¶ 704.) Therefore, Sullivan is not included in the class as defined in the FAC.[5] At least one district court has held that when "a purported class member for any reason cease[s] to be a member of the putative class, the toll ends by operation of law and the limitations period begins to run immediately." *Sontro v. Cendant Corp., Inc.*, 223 F. Supp. 2d 563, 581 (D.N.J. 2002) (citation omitted); *cf In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 11-MD-2262, 2014 WL 2815645, at *21 (S.D.N. Y. June 23,2014) (citation omitted) ("[P]laintiffs filed their [FAC], which superseded the previous complaints of the class members . . . and was legally operative.").

Sullivan is not a member of the putative class defined in Plaintiffs prior pleadings, and his claim does not arise out of the same transactions that are the basis for Plaintiffs claims. Plaintiffs three prior complaints limited the proposed class to persons and entities that transacted in derivatives for which Euroyen TIBOR and Yen LIBOR serve as the pricing benchmark. Plaintiff cites to various paragraphs in the original complaint to argue that the class was more broadly defined than Defendants contend. (*See*

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[5] Plaintiff essentially concedes this point by "seek[ing] to add a conforming amended class definition to include the specific categories of additional Euroyen-based derivatives traded by OPPRS and Sullivan." (*See* Mot. to Amend/Correct at 4 (citing PTAC ¶ 714).)

Pl. Reply Mem. at 8-9 (citing Compl. ¶¶ 651-53, 64, 86, 98).) In his prior pleadings, however, Plaintiff has not defined the putative class to include persons that traded in Yen currency futures contracts priced with reference to the U.S. Dollar-Japanese Yen exchange rate. (Compare Compl. ¶¶ 65, 68 (defining CME Euroyen futures contracts in the context of the putative class), with PTAC 638 (defining CME Yen currency futures contracts).)

Sullivan is not a member of the putative class because he alleges that he traded in a Yen currency futures contract, which is not a derivative for which "Euroyen Tibor and Yen Libor serve as the pricing benchmark." (*See* Compl. 14, 98.) Even if this Court were to credit Plaintiffs overly-broad reading of the original complaint's putative class to include Sullivan, Sullivan was not a member of the putative class as described in the FAC (or SAC).[6] Therefore, Sullivan does not get the benefit of *American Pipe* tolling, and his CEA claim is time-barred unless it "relates back" pursuant to Rule 15(c), which it does not.

2. Relation Back Doctrine

In the alternative, Plaintiff argues that Sullivan's claim is timely because Rule 15(c)'s relation back

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[6] As Defendants correctly explain: "Even assuming that the statute (l) began running on July 26, 2011 after UBS' disclosure, (2) was tolled on April 30, 2012 when the original Complaint was filed, and (3) resumed on December 3, 2012 when the FAC (clearly excluding Sullivan from the putative class) was filed, the limitations period still would have expired on February 27, 2013-almost four months before Sullivan sought to join this action." (Def. Opp. Mem. at 7 n.2.)

doctrine applies. Under Rule 15(c), amendment to add a new named plaintiff is proper if: (1) the amendment asserts a claim that "arose out of the conduct, transaction, or occurrence set out-or attempted to be set out-in the original pleading"; (2) the defendant "received such notice of the action that it will not be prejudiced in defending on the merits" and (3) the defendant "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."[7] Fed. R. Civ. P. 15(c)(l)(B)-(C);[8] *see also Slayton v. Am. Express Co.*, 460 F.3d 215, 228 (2d Cir. 2006) (citation and internal quotation marks omitted) ("[T]he central inquiry is whether adequate notice of the matters raised in the amended pleading has been given to the opposing party within the statute of limitations by the general fact situation alleged in the original pleading."); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 290 (S.D.N.Y. 2009) (citation and internal quotation marks omitted) ("[T]he question is whether the late addition of a plaintiff would surprise and frustrate reasonable

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[7] "In this Circuit, courts have rejected the 'mistake' requirement when adding new named plaintiffs in a class action and focus on whether the new plaintiff's claims were reasonably foreseeable and whether their addition would prejudice the defendants." *Beach v. Citigroup Alt. Inv. LLC*, 12-CIV-7717, 2014 WL 904650, at* 19 (S.D.N.Y. Mar. 7, 2014) (citation omitted).

[8] Rule 15(c)(l)(C) only addresses the addition of new defendants. Nevertheless, the Advisory Committee Note states that the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs." *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 290 (S.D.N.Y. 2009) (internal quotation marks omitted).

possibilities for a defense."); *In re Chaus Sec. Litig.*, 801 F. Supp. 1257, 1264 (S.D.N.Y. 1992) (citing *Tri-Ex Enters., Inc. v. Morgan Guar. Trust Co. of NY*, 586 F. Supp. 930, 932 (S.D.N.Y. 1984)) ("The rationale underlying the relation-back doctrine is that one who has been given adequate notice of litigation concerning a given transaction or occurrence has been provided with all the protection that statutes of limitations are designed to afford.").

In *Beach v. Citigroup Alternative Investments LLC*, a court in this District noted that the "[t]he Second Circuit has not addressed whether the claims of a newly named plaintiff will relate back to the original time of filing in the class action context." 2014 WL 904650, at* 19. The court there held:

> When an action is filed as a putative class action, defendants are on notice as to the extent and nature of the claims. As such, allowing relation back of the newly named plaintiffs claims under Rule 15(c), as long as they are identical to the claims already asserted and would have been timely at the time of filing, would not unduly surprise or prejudice the defendants.

Id. at *20 (citing *In re Cmty. Bank of N Va.*, 622 F.3d 275, 297-98 (3d Cir. 2010); *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787-88 (7th Cir. 2006)). The court in *Beach* noted that the addition of a new named plaintiff did not prejudice or surprise the defendants because "the allegations . . . remained substantially the same." 2014 WL 904650, at *20.

Plaintiff alleges manipulation of Euroyen TIBOR and Yen LIBOR throughout the PTAC. In its previous pleadings, however, Plaintiff did not indicate that it intended to include claims related to financial products for which neither Yen LIBOR nor Euroyen TIBOR serves as the pricing benchmark. Unlike in *Beach*, Sullivan is not a member of the class; his claim differs from Plaintiffs and that of the class; and Defendants therefore were not on notice. As discussed, (*see supra* Section I.A.), allowing amendment to include Sullivan and his claim will have the effect of significantly expanding the class. Thus, Rule 15(c)'s relation back doctrine also does not apply to Sullivan's claim. Sullivan's CEA claim is therefore time-barred. Plaintiffs motion for leave to amend the SAC to bring a CEA claim on behalf of Sullivan is denied.

B. Proposed Plaintiff OPPRS's Claims Are Time-Barred[9]

Plaintiff seeks leave to amend the SAC to add OPPRS as a plaintiff. In addition, Plaintiff seeks leave to amend the SAC to bring two claims on behalf of OPPRS: (1) breach of the implied covenant of good faith and fair dealing,[10] and (2) unjust enrichment. Plaintiff previously brought an unjust enrichment claim that was dismissed by this Court in the March 28 Decision because Plaintiff did not allege any

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[9] Plaintiff is not seeking leave to amend to assert a CEA claim on behalf of OPPRS. (Pl. Reply Mem. at 5 n.9.)

[10] Plaintiff only seeks leave to assert this claim as to five defendants: Barclays, Citibank, Deutsche Bank, J.P. Morgan, and UBS. (*See* PTAC 806.)

relationship between himself and any of the defendants, or allege how Defendants benefitted at Plaintiffs expense. (*See* March 28 Decision at 22.) Defendants argue that OPPRS is barred from bringing either of these claims, in part because the statute of limitations has expired. (Def. Opp. Mem. at 31-33.) This Court agrees.

OPPRS's breach of contract and unjust enrichment claims are technically time-barred under New York's six-year statute of limitations.[11] *See* N.Y. C.P.L.R. § 213(2). Plaintiff raises two arguments for why the statute of limitations period is not dispositive here. First, Plaintiff argues that OPPRS's claims "relate back" under Rule 15(c) for the same reasons he raises as to Sullivan's CEA claims.[12] Second, Plaintiff argues that Defendants are equitably estopped from raising a statute of limitations defense.

1. Relation Back Doctrine

OPPRS transacted in Yen currency forward agreements that were purchased over-the- counter,

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[11] Defendants argue that the latest date when the statute of limitations on OPPRS's proposed claims could have begun to run is June 4, 2008, the date OPPRS entered into the last alleged Japanese Yen currency forward agreement. (*See* Def. Opp. Mem. at 32 (citing PTAC 4i) 655).)

[12] The New York corollary to Rule 15(c)'s relation back doctrine is New York C.P.L.R. § 203(f). "Although there are minor differences in the language between Rule 15(c)(2) and Section 203(f), courts have not focused on any distinction and have typically cited both rules and applied the federal rule." *Kitrosser v. CIT Grp./Factoring, Inc.,* 177 B.R. 458, 474 (S.D.N.Y. 1995) (citing *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 125 (2d Cir. 1994)).

rather than on any registered exchange. (PTAC 655.) Thus, for the reasons discussed, (*see supra* Section I.A.), OPPRS is not a member of the putative class identified in any of the three previously-filed complaints. Moreover, its proposed claims do not arise out of the same transactions as Plaintiffs claims, nor can it be argued that Defendants were somehow on notice that an entity outside of the putative class would bring claims related to a different type of transaction years after the initial complaint was filed. Thus, OPPRS's claims do not "relate back.

2. Equitable Estoppel

"Under New York law, the doctrines of equitable tolling or equitable estoppel may be invoked to defeat a statute of limitations defense when the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action." *Abbas v. Dixon*, 480 F.3d 636, 642 (2d Cir. 2007) (quoting *Doe v. Holy See (State of Vatican City)*, 17 A.D.3d 793, 794 (3d Dep't 2005)). Equitable estoppel only applies where Plaintiff has exercised due diligence in bringing the action. *Id.; see also Simcuski v. Saeli*, 44 N.Y.2d 442, 450 (1978) (citation omitted) ("The preferable analysis, however, holds that due diligence on the part of the plaintiff in bringing his action is an essential element for the applicability of the doctrine of equitable estoppel, to be demonstrated by the plaintiff when he seeks the shelter of the doctrine."). The Second Circuit has explained that:

> A plaintiff may not rely on the same act that forms the basis for the claim- the later fraudulent misrepresentation must be for the

> purpose of concealing the former [act giving rise to the claim]. The uncommon remedy of equitable estoppel is triggered by some conduct on the part of the defendant after the initial wrongdoing; mere silence or failure to disclose the wrongdoing is insufficient.

Bisson v. Martin Luther King Jr. Health Clinic, 399 F. App'x 655, 656 (2d Cir. 2010) (citation omitted) (applying New York law); *see also Tenamee v. Schmukler*, 438 F. Supp. 2d 438, 445 (S.D.N.Y. 2006) (citation omitted) ("New York law is clear that the same act of non-disclosure cannot underlie both the argument for estoppel and the related cause of action.")

Plaintiff does what the Second Circuit has held is impermissible: he relies on the same allegations giving rise to OPPRS's proposed claims to argue that Defendants engaged in some activity that prevented OPPRS from timely filing. *See id.* ("[E]quitable estoppel applies only when a defendant covers up an earlier wrongdoing to prevent plaintiff from suing on the initial wrong.").

Plaintiff cites to allegations in the PTAC to demonstrate that Defendants sought to "conceal their collusion." (*See* Pl. Reply Mem. at 16 n.28 (citing PTAC ¶¶ 322, 437, 438, 443, 722).) It was OPPRS's burden, however, to perform due diligence in an effort to bring these claims in a timely manner. The allegations in the PTAC demonstrate that as of July 2011, OPPRS was on notice that it may have grounds to bring the claims at issue. (*See* PTAC ¶¶ 726-27.) At a minimum, had OPPRS performed due diligence, it

would have learned of the instant suit filed in 2012 with ample time to bring its own claims before expiration of the statute of limitations period.[13] As in *Abbas*, OPPRS has failed to show that any action by Defendants prevented it from timely joining in Plaintiffs original complaint, FAC, or even SAC. Thus, OPPRS 's tolling arguments are without merit. Leave to amend the SAC to bring OPPRS's breach of contract claim and to reallege a previously-dismissed unjust enrichment claim is denied.[14]

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[13] Applying the statute of limitations under CPLR § 213(2), OPPRS had six years from June 4, 2008-the date the last alleged agreement was entered into-to bring the instant claims. (*See* PTAC ¶ 655.) There is no valid explanation offered in the PTAC or elsewhere as to why OPPRS waited until after the statute of limitations expired to file.

[14] Because the motion for leave to amend to add the Proposed Plaintiffs' claims is denied on statute of limitations grounds, this Court need not reach the merits of those claims to determine if amendment would be futile.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
OF THE SOUTHERN DISTRICT OF NEW YORK

March 28, 2014

JEFFREY LAYDON,
on behalf of himself and all others similarly situated,
Plaintiff,

v.

MIZUHO BANK, LTD. ET AL,
Defendants,

12-Civ.-3419 (GBD)

MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, District Judge.

This case involves the alleged manipulation of Euroyen TIBOR (the Tokyo Interbank Offered Rate), Yen–LIBOR (the London Interbank Offered Rate for Japanese Yen) and the prices of Euroyen TIBOR

futures contracts during the period from January 1, 2006 through December 31, 2010 (the "Class Period") by the Defendants. The Defendants are various banks and financial institutions. Plaintiff brings this action to recover for losses that he suffered when he initiated short positions in Euroyen TIBOR Futures contracts during the Class Period, and on behalf of all those similarly situated, allegedly due to the presence of artificial Euroyen TIBOR future prices proximately caused by Defendants' unlawful manipulation and restraint of trade. Plaintiff brings claims under the Commodity Exchange Act, 7 U.S.C. § 1 *et seq* ("CEA"), Section 1 of the Sherman Act, 15 U.S.C. § 1, and a state law claim for unjust enrichment. Plaintiff alleges five causes of action against all Defendants: (1) manipulation in violation of the Commodity Exchange Act, 7 U.S.C. §§ 1, et seq.; (2) principal-agent liability in violation of the Commodity Exchange Act, 7 U.S.C. §§ 1, et seq.; (3) aiding and abetting manipulation in violation of the Commodity Exchange Act, 7 U.S.C. §§ 1, et seq; (4) violation of Section 1 of the Sherman Act, 15 U.S.C. §§ 1, et seq.; and (5) unjust enrichment. Defendants jointly move to dismiss Plaintiff's Second Amended Class Action Complaint (ECF 204).[1]

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[1] Defendants that move to dismiss are: The Bank of Tokyo–Mitsubishi UFJ, Ltd.; Mitsubishi UFJ Trust and Banking Corporation; The Bank of Yokohama, Ltd.; Barclays Bank PLC; Citibank, N.A.; Citigroup Inc.; Cooperatieve Centrale Raiffeisen–Boerenleenbank B.A.; Deutsche Bank AG; HSBC Holdings plc; HSBC Bank plc; ICAP plc; JPMorgan Chase & Co.; JPMorgan Chase Bank, N.A.; J.P. Morgan Securities plc; Mizuho Corporate Bank, Ltd.; Mizuho Bank, Ltd.; Mizuho Trust & Banking Co.,

Plaintiff has adequately pled a claim under the Commodity Exchange Act for price manipulation and aiding and abetting against all defendants. Defendants' motion to dismiss those claims is denied. Defendants' motion to dismiss Plaintiff's vicarious liability, antitrust and unjust enrichment claims is granted.

BACKGROUND

Euroyen TIBOR is set through the JBA by its member banks (Compl.¶ 90). The JBA designates a minimum of 8 reference banks to provide daily rate quotes for the calculation of Euroyen TIBOR rates (*Id.*). According to the JBA, [t]he selection of reference banks is based on four factors: 1) market trading volume, 2) Yen asset balance, 3) reputation, and 4) track record in providing rate quotes (the selection also takes into account JBA TIBOR continuity and the variety of financial sectors to which reference banks belong) (*Id.*). Euroyen TIBOR is calculated on each business day as of 11:00am Tokyo time (Compl.¶ 91). Each Euroyen TIBOR reference bank quotes Euroyen TIBOR rates for 13 maturities (1 week and 1–12 months) (*Id.*). In calculating Euroyen TIBOR rates, quotes are discarded from the two highest and two lowest financial institutions and the remaining rates

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Ltd.; The Norinchukin Bank; Resona Bank, Ltd.; R.P. Martin Holdings Limited; Shinkin Central Bank; Societe Generale; The Shoko Chukin Bank, Ltd.; Sumitomo Mitsui Banking Corporation; and Sumitomo Mitsui Trust Bank, Ltd; Royal Bank of Scotland Group, plc; Royal Bank of Scotland plc; RBS Securities Japan Limited; UBS AG; UBS Securities Japan Co., Ltd (ECF 204).

are then averaged (Compl.¶ 92). The reference banks quote what they deem to be the prevailing market rates, assuming transactions between prime banks on the Japanese offshore market as of 11:00am, unaffected by their own positions (Compl.¶ 93).

Yen–LIBOR is set through the BBA by its member banks (Compl.¶ 94). Yen–LIBOR is calculated each business day as of 11:00am London time (Compl.¶ 95). Each Yen–LIBOR reference bank quotes Yen–LIBOR for 15 maturities (*Id.*). In calculating Yen–LIBOR, contributed rates are ranked in descending order and the arithmetic mean of only the middle two quantities is used to formulate the resulting BBA Yen–LIBOR calculation (Compl.¶ 96). The contributor banks respond to the BBA's question: "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?" (*Id.*).

A three-month Euroyen TIBOR futures contract is an agreement to buy or sell a Euroyen time deposit having a principal value of 100,0000,000 Japanese Yen with a three-month maturity commencing on a specific future date (Compl.¶ 98). Three-month Euroyen TIBOR futures contracts are exchange-listed financial instruments that are traded within the United States on the floor of the CME and electronically on the CME's Globex platform, as well as on boards of trade and exchanges accessible by U.S. investors from within the United States, including the Tokyo Financial Exchange Inc. ("TFX"), Singapore Exchange ("SGX"), and NYSE Euronext LIFFE ("LIFFE") (Compl.¶ 99). Three-month Euroyen TIBOR futures contracts are standardized contracts,

which are identical to one another except for the trading hours (Compl.¶ 100).

The CME and SGX operate pursuant to a Mutual Offset System which allows Three-month Euroyen TIBOR futures contracts that are opened on one exchange to be liquidated on or held at the other (Compl.¶ 101). Three-month Euroyen TIBOR futures contracts are quoted in terms of 100 minus the Three-month Euroyen TIBOR rate on an annual basis over a 360 day year (Compl.¶ 102). The contract months for a Three-month Euroyen TIBOR futures contract are March, June, September, and December, extending out 5 years (Compl.¶ 104). The third Wednesday of those months are the four quarterly dates of each year in which most futures and options contracts use as their scheduled maturity date or termination date (*Id.*). Euroyen TIBOR futures contracts terminate trading at 11:00am Tokyo Time of the second Tokyo bank business day immediately preceding the third Wednesday of the contract's named month of delivery (Comp ¶ 105).

The final settlement price of a Three-month Euroyen TIBOR futures contract is defined as cash settlement to 100 minus the Three-month TIBOR rate published by the JBA at 11:00am Tokyo time on the second Tokyo bank business day immediately preceding the third Wednesday of the contract month's named month of delivery (Compl.¶ 106).

Plaintiff alleges that Defendants manipulated prices of Euroyen TIBOR futures contracts and other Euroyen derivatives through their deliberate and systematic submission of false Euroyen TIBOR and

Yen–LIBOR rates to the JBA and BBA, respectively, throughout the Class Period (Compl.¶ 135). In support of this, Plaintiff cites many governmental investigations and settlements (Compl. pp. 38–213).

Defendants move to dismiss Plaintiff's CEA claims (causes of action one through three) on the grounds that: (i) Plaintiff lacks standing to bring claims based on alleged manipulation of Yen–LIBOR or Euroyen TIBOR because these benchmarks are not the commodities underlying the Euroyen TIBOR futures contracts Plaintiff claims to have held; (ii) Plaintiff fails to allege the required proximate causation between Defendants' alleged conduct and supposedly artificial prices in Euroyen TIBOR futures contracts; (ii) Plaintiff cannot plead specific intent to manipulate Euroyen TIBOR futures prices because the only factually allegations to specific intent pertain to Yen–LIBOR; and (iv) Plaintiff fails to plead a plausible claim for aiding and abetting or vicarious liability (Def. Supp. Br. 1 at 3–7). Defendants move to dismiss Plaintiffs antitrust claim (cause of action four) on four grounds: (i) Plaintiff does not have antitrust standing because he has failed to allege an antitrust injury and is not an "efficient enforcer" of the antitrust law; (ii) Plaintiff fails to allege a restraint of trade, as required by Section 1 of the Sherman Act; (iii) Plaintiff is barred by the Foreign Trade Antitrust Improvements Act ("FTAIA"); (iv) Plaintiff fails to plausibly allege an antitrust conspiracy (Def. Supp. Br. 2 at 2–5). Finally, Defendants move to dismiss Plaintiff's unjust enrichment claim (cause of action five) on the grounds that Plaintiff has failed to allege

sufficient facts to state a claim for unjust enrichment (Def. Supp. Br. 2 at 5).

Additionally, various Defendants filed nine supplemental memoranda in support of the motion to dismiss (*see* ECF 210, 211, 212, 213, 214, 217, 218, 220, 221). In each, a certain subset of the Defendants argues that the Plaintiff fails to plead sufficient facts to support their claims against those Defendants.

Plaintiff argues that he has sufficiently alleged a CEA claim because he: (i) does have proper standing; (ii) pleads manipulative intent sufficiently; (iii) pleads proximate cause sufficiently; and (iv) states claims for aiding and abetting and vicarious liability sufficiently under the CEA (PL Opp. Br. at 3–5). Plaintiff further argues that he sufficiently alleged an antitrust claim because he: (i) has proper antitrust standing; (ii) sufficiently pleads a "restraint of trade" as required by the Sherman Act; (iii) is not barred by the FTAIA; and (iv) properly pleads a conspiracy under *Twombly* (Pl. Opp. Br. at 5–7). Plaintiff also argues that he sufficiently alleged an unjust enrichment claim (Pl. Opp. Br. at 7). Additionally, Plaintiff disputes the arguments advanced in the supplemental memoranda and argues that he has pled facts sufficient to support his claims against all Defendants (Pl. Opp. Br. At 86–92).

MOTION TO DISMISS STANDARD

"To survive a motion to dismiss," a complaint subject to Federal Rule of Civil Procedure 8(a) 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 Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)); *see also* Fed.R.Civ.P. 8(a), 12(b)(6). A complaint must include more than "a formulaic recitation of the elements of a cause of action," *Twombly,* 550 U.S. at 555; it must include "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal,* 556 U.S. at 678. Although a court should assume the truth of factual allegations that are "well-pleaded," it should not accept as true any "legal conclusion couched as a factual allegation." *Id.* at 678–79. Accordingly, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* Complaints containing only "conclusory, vague, or general allegations," and thus supported by only "speculation and conjecture," "cannot withstand a motion to dismiss." *Gallop v. Cheney,* 642 F.3d 364, 368–69 (2d Cir.2011) (internal quotation marks omitted).

Where the claims are premised on allegations of fraud, the heightened pleading standard of Rule 9(b) applies. *Rombach v. Chang,* 355 F.3d 164, 171 (2d Cir.2004). Rule 9(b) states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b). However, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.* The elements of a claim for fraud are: "(1) a misrepresentation or a material

omission of fact which was false and known to be false by [plaintiff]; (2) made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury." *Major League Baseball Properties, Inc. v. Opening Day Prods., Inc.,* 385 F.Supp.2d 256, 269 (S.D.N.Y.2005) (quoting *G & R Moojestic Treats, Inc. v. Maggiemoo's Int'l, LLC,* No. 03 Civ. 10027, 2004 WL 1110423, at *9 (S.D.N.Y. May 19, 2004)).; *see also AUSA Life Ins. Co. v. Ernst & Young,* 206 F.3d 202, 208 (2d Cir.2000).

PLAINTIFF SUFFICIENTLY PLED CEA CLAIMS

Section 22 of the CEA grants a private plaintiff who purchased or sold a futures contract standing to sue for "manipulation of the price of any such contract . . . or the price of the commodity underlying such contract," among other conditions precedent. 7 U.S .C. § 25(a)(1)(D) (2012) (emphasis added). To survive a motion to dismiss a claim for direct violations of the CEA under Section 22, a private plaintiff must plead facts to show both that the defendant violated the CEA and that the defendant "'stand[s] in an appropriate relationship to the plaintiff with respect to' the alleged CEA violation." *In re MF Global Holdings Ltd. Inv. Litig .,* 11 Civ. 7866 VM, 2014 WL 667481, at *10 (S.D.N.Y. Feb. 11, 2014) (quoting *Nicholas v. Saul Stone & Co. LLC,* 224 F.3d 179, 186 (3d Cir.2000).

To establish price manipulation in violation of the CEA, a Plaintiff must demonstrate that: "(i) the accused had the ability to influence market prices; (ii)[he] specifically intended to do so; (iii) artificial

prices existed; and (iv) the accused caused the artificial prices." *DiPlacido v. Commodity Futures Trading Comm'n,* 364 F. App'x 657, 661 (2d Cir.2009) (internal citations omitted); *see also In re LIBOR–Based Fin. Instruments Antitrust Litig. ("USD LIBOR Litig.),* 935 F.Supp.2d 666, 713 (S.D.N.Y.2013).

To recover on an aiding and abetting claim under the CEA, a Plaintiff must prove that the Defendant (1) had knowledge of the principal's intent to violate the CEA; (2) intended to further that violation; and (3) committed some act in furtherance of the principal's objective. *In re Platinum & Palladium Commodities Litig.,* 828 F.Supp.2d 588, 599 (S.D.N.Y.2011) (citations omitted).

Defendants move to dismiss Plaintiff's CEA claims on the grounds that: (i) Plaintiff lacks standing under the CEA to bring claims for manipulation of Yen–LIBOR and Euroyen TIBOR as a "commodity underlying" Euroyen TIBOR futures contracts because these benchmarks are not the "commodities underlying" the Euroyen TIBOR futures contracts Plaintiff claims to have held; (ii) Plaintiff fails to state a CEA manipulation claim because his allegations regarding the second element (specific intent) and the fourth element (causation) are deficient; and (iii) Plaintiff fails to state a claim for aiding and abetting liability under the CEA.

Plaintiff has standing to sue under the CEA. The CFTC has repeatedly found that Yen–LIBOR and Euroyen TIBOR are each a "commodity" within the meaning of the CEA, and that Defendants' false reporting of same violated Sections 6(c), 6(d), and

9(a)(2) of the CEA, 7 U.S.C. §§ 9, 13b, and 13(a)(2) (2006). *See e.g.,* UBS Order, CFTC Docket No. 13–14 at 41 ("UBS regularly attempted to manipulate the official fixings of and knowingly delivered false, misleading or knowingly inaccurate reports concerning Yen–LIBOR, Swiss Franc LIBOR, Sterling LIBOR, Euro LIBOR, Euribor and Euroyen TIBOR, *which are all commodities in interstate commerce."*) (emphasis added); *see also id.* at 4, 52–53, 56; RBS Order, CFTC Docket No. 13–14 at 31, 33, 36. Furthermore, Section 22(a) of the CEA provides Plaintiff with standing to sue under the CEA not for manipulation of the commodity itself (according to Defendants, an offshore Japanese Yen deposit) but for manipulation of the price of (*i.e.,* interest on) that commodity (deposit), which is none other than Euroyen TIBOR and Yen–LIBOR. As a purchaser of a Euroyen TIBOR futures contract, Plaintiff has shown that he stands in an appropriate relationship to the Defendants with respect to the alleged CEA violation. *In re MF Global Holdings Ltd. Inv. Litig.,* 11 Civ. 7866 VM, 2014 WL 667481, at *10 (S.D.N.Y. Feb. 11, 2014).

Plaintiff adequately alleges a CEA manipulation claim. A CEA Plaintiff must demonstrate a causal relationship between the purportedly manipulative conduct and the alleged market response. *In re Commodity Exch., Inc., Silver Futures & Options Trading Litig.,* No. 11 MD 2213 RPP, 2012 WL 6700236, at *15 (S.D.N.Y. Dec. 21, 2012) (citing *DiPlacido,* 364 F. App'x at 661). Defendants' argument that Plaintiff does not allege facts to support a finding that any purported artificiality in the price of Euroyen TIBOR futures contracts was proximately

caused by alleged manipulation of the separate Yen–LIBOR benchmark fails. Euroyen TIBOR and Yen–LIBOR both represent the rate of interest charged on short-term loans of unsecured funds denominated in Japanese yen between banks in the offshore interbank market. The allegations in the Complaint are sufficient to show that during the Class Period Yen–LIBOR significantly impacted Euroyen TIBOR. Plaintiff alleges that economic analyses show that Yen–LIBOR impacted Euroyen TIBOR prices during the Class Period and that false reporting of Yen–LIBOR caused artificial Euroyen TIBOR rates (Compl. ¶ 619); the financial markets use Euroyen TIBOR and Yen–LIBOR interchangeably and have a very high correlation (Compl.¶ 620); changes in Yen–LIBOR are immediately reflected in Euroyen TIBOR rates once Euroyen TIBOR opens and the subsequent Euroyen TIBOR JBA rate (Compl.¶ 624); price discovery in the Euroyen market begins with the daily setting of Yen–LIBOR such that movements in Yen–LIBOR impact changes in the following day's Euroyen TIBOR fix (Compl.¶ 625); and analyses comparing the Euroyen TIBOR and Yen–LIBOR submissions with the prevailing Euro Yen Deposit Rate demonstrates artificiality (Compl.¶¶ 643, 646).

Plaintiff adequately alleges scienter. Plaintiffs may demonstrate scienter "either (a) by alleging facts to show that Defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *In re Crude Oil Commodity Litig.,* 2007 WL 1946553, at *8 (quoting *Lerner v. Fleet Bank, N.A.,* 459 F.3d 273, 290–

91 (2d Cir.2006)) (internal quotation marks omitted). On motive, the Complaint contains sufficient allegations that Defendants stood to gain tremendous profits from manipulating Euroyen TIBOR and Yen–LIBOR, *i.e.,* hundreds of millions (if not billions) in ill-gotten trading profits from Euroyen derivatives positions held by the Contributor Bank Defendants (translating into hundreds of millions in illegitimate bonus and other compensation paid to the banks' traders and submitters) (*see, e.g.,* Compl. ¶¶ 14, 16, 18–19, 28–31, 148, 195, 197–98, 202–13, 218–19, 245, 252, 277, 328–29, 332, 384–85, 393, 408, 417, 472–75, 478). Additionally, individual traders had the motive to commit fraud because their compensation was tied to success in trading financial products (Compl.¶¶ 328, 384, 389, 393, 472). On opportunity, Defendants' roles as: (i) JBA Euroyen TIBOR and/or BBA Yen–LIBOR Contributor Banks (Compl.¶¶ 78–80); (ii) members, directly or through their affiliates, of the CME and/or other exchanges upon which Euroyen TIBOR futures contracts actively trade (Compl. ¶¶ 129 (clearing members of SGX), 130 (clearing members of CME); and (iii) intermediaries to other Euroyen market participants in the case of both the Broker and Contributor Bank Defendants gave them the ability to influence Yen–LIBOR, Euroyen TIBOR and the prices of Euroyen TIBOR futures contracts.

The Complaint also includes overwhelming factual content from which this Court could infer manipulative intent, particularly based on direct evidence from certain Defendants' communications (*see* Compl. ¶¶ 148–49, 157–58, 172–75, 199, 218, 223–29(UBS), ¶¶ 327–30, 353–54, 384(RBS), ¶¶ 469–72

(Barclays), ¶¶ 2, 4–5, 17, 78–81, 137, 358, 417, 606–18, 623, 629–47, 720, Figures 29–63 (Yet–Non–Settling Contributor Banks, generally), ¶¶ 197–98, 280–84, 526, 529, 571, 604–05 (ICAP), ¶¶ 25, 526, 529, 603, 682, 712 (R.P. Martin). For example, Defendants allegedly permitted traders—whose compensation was directly connected to their success in trading financial derivative products tied to Yen–LIBOR and/or Euroyen TIBOR—to directly or indirectly exercise improper influence over that Defendant's Yen–LIBOR and/or Euroyen TIBOR submissions, thus creating inherent conflicts of interest and an environment ripe for its derivatives traders and trader-submitters to abuse (Comp ¶¶ 148–49, 218(UBS); ¶¶ 327–30, 353–54, 384; ¶¶ 469–72 (Barclays)); and Defendants are alleged to have actively concealed their violations of law from regulators and innocent market participants by, *inter alia:* (i) avoiding discussing the rigging of Yen–LIBOR and/or Euroyen TIBOR in public forums as well as following instructions to curb internal written communications of same (Compl.¶¶ 434–36); (ii) agreeing to stagger their submission of false reports over successive trading days (e.g., agree that an artificially low rate would be submitted by manipulator A today, by manipulator B tomorrow and manipulator C the next day, etc.) in order to exert greater and longer-lasting manipulative pressure and to mask such false reporting from other market players (Compl.¶¶ 25, 211); (iii) concocting false stories they could give if questioned about their false rate submissions (Compl.¶ 414); (iv) lying to attorneys and others during internal investigations of rate

manipulation (Compl.¶ 175); (v) using cash and derivatives brokers to disseminate false rate information (Compl.¶¶ 176–96, 260, 269–75); and (vi) engaging in wash trades and other illicit, non-bona fide trades to surreptitiously pay and facilitate corrupt brokerage payments to broker co-conspirators (Compl.¶¶ 260, 314, 395, 422, 428–33).

Plaintiff pleads sufficient facts to support a claim of aiding and abetting.[2] The Complaint contains numerous allegations giving rise to an inference that Defendants knew of the other Defendants' unlawful and manipulative conduct and assisted each other in the furtherance of the violation. These allegations include: (i) false reporting of Yen–LIBOR and Euroyen TIBOR was epidemic and done openly during the Class Period (*see* Compl. ¶¶ 199, 233, 243, 246–47, 317–18, 354, 417, 446, 485); (ii) Defendants are sophisticated market participants who were responsible for the global setting of Yen–LIBOR and Euroyen TIBOR during the Class Period (*see* Compl. ¶¶ 4, 78–81, 221, 387, 479, 720); (iii) Defendants, either directly or through their securities subsidiaries/affiliates, traded Euro yen-based derivatives, including Euroyen TIBOR futures contracts, for profit (*see* Compl. ¶¶ 2, 5, 119, 125, 129–

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[2] Defendants also move to dismiss Plaintiff's claim for vicarious liability (second claim for relief). Plaintiff has not alleged: (1) the principal's manifestation of intent to grant authority to the agent; (2) agreement by the agent; and (3) the principal must also maintain control over key aspects of the undertaking. *In re Amaranth,* 587 F.Supp.2d at 531. Accordingly, Plaintiff's second claim for relief is dismissed.

30, 137, 146, 151, 222, 417); (iv) Defendants had a large financial incentive to manipulate Yen–LIBOR, Euroyen TIBOR, and the prices of Euroyen TIBOR futures contracts (*see* Compl. ¶¶ 197–98, 218, 245, 328, 332, 384, 408); (v) Defendants were in continuous communications with each other with respect to Yen–LIBOR and/or Euroyen TIBOR rates (*see* Compl. ¶¶ 24–33, 178–96, 202–15, 285–97, 357–81); (vi) Defendants worked to report misinformation specifically intended to manipulate Yen–LIBOR, Euroyen TIBOR, and the prices of Euroyen TIBOR futures contracts (*see* Compl. ¶¶ 15, 17, 202–215, 236–259, 269–272, 274, 275); (vii) Defendants furthered the manipulation by reporting false Euroyen TIBOR and Yen–LIBOR rates to financially benefit their Euroyen derivatives positions rather than rates reflective of prevailing (true) Euroyen interbank borrowing costs (*see* Compl. ¶¶ 14, 16, 18–19, 24, 218, 259, 393); (viii) Defendants traded Euroyen based derivatives, including Euroyen TIBOR futures contracts, at times when prices were being manipulated (*see* Compl. ¶¶ 137, 221–22); and (ix) Broker Defendants, including ICAP and RP Martin, knowingly facilitated the manipulation of Yen–LIBOR, Euroyen TIBOR, and Euroyen TIBOR futures contract prices during the Class Period (*see* Compl. ¶¶ 25–31, 176–201, 211, 260–274, 426–433, 577, 604, 605).

PLAINTIFF'S ANTITRUST CLAIMS ARE DISMISSED

Plaintiff asserts a cause of action for violation of section 1 of the Sherman Act (Compl.¶¶ 736–742). Section 1 of the Sherman provides that "[e]very contract, combination in the form of trust or otherwise,

or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2006).

Plaintiff claims that he was injured when Defendants engaged in collusive rate-setting of Euroyen TIBOR and Yen–LIBOR (Compl.¶¶ 736–742). This, he argues, is a conspiracy in restraint of trade, in violation of Section 1 of the Sherman Act. Accordingly, Plaintiff brings suit pursuant to Section 4 of the Clayton Act. 15 U.S.C. § 15 (2006). Defendants move to dismiss this claim on four grounds: (i) Plaintiff does not have antitrust standing because he has failed to allege an antitrust injury and is not an "efficient enforcer" of the antitrust law; (ii) Plaintiff fails to allege a restraint of trade, as required by Section 1 of the Sherman Act; (iii) Plaintiff is barred by the Foreign Trade Antitrust Improvements Act; (iv) Plaintiff fails to plausibly allege an antitrust conspiracy[3] (Def. Supp. Br. at 2–5).

1. Plaintiff Does Not Have Antitrust Standing

In order for a private party Plaintiff to bring suit pursuant to Section 4 of the Clayton Act, that Plaintiff must have proper standing. *See Associated General Contractors of Calif. Inc. v. Calif. State Council of Carpenters ("AGC"),* 459 U.S. 519, (1983). To establish standing, an antitrust Plaintiff must show (1) an antitrust injury, and (2) that he is a proper Plaintiff in

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[3] As the antitrust claim is dismissed for lack of antitrust standing and restraint of trade, the remaining issues are not decided

light of four "efficient enforcer" factors. *In re DDVAP Direct Purchaser Antitrust Litig.,* 585 F.3d 677, 688 (2d Cir.2009) (citations and internal quotations omitted).

a. Antitrust Injury

The requirement that Plaintiffs demonstrate antitrust injury when bringing a private antitrust action "ensures that the harm claimed by the Plaintiff corresponds to the rationale for finding an antitrust violation in the first place." *Atlantic Richfield v. USA Petroleum Co.,* 495 U.S. 328, 342 (1990). The rationale behind the antitrust laws is evidenced by the legislative history of the Sherman Act. The Court in *AGC* notes that the legislative history behind § 7 of the Sherman Act indicates that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated interstate markets. *AGC,* 459 U.S. 519 (1983). Thus, the antitrust laws were enacted "for the protection of *competition,* not *competitors." Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,* 429 U.S. at 488 (emphasis in original) (quoting *Brown Shoe v. United States,* 370 U.S. 294, 320 (1962). It is important to note that the question of whether an antitrust violation occurred is different from whether the Plaintiff has standing to pursue it. *Daniel v. American Bd. of Emergency Medicine,* 428 F.3d 408 (2d Cir.2005).

The Second Circuit recently described a three-step process for determining whether Plaintiff has sufficiently alleged an antitrust injury:

> (1) The party asserting that it has been injured by an illegal anticompetitive practice must identify the practice complained of and the reasons such a practice is or might be anticompetitive; (2) the court must identify the actual injury the Plaintiff alleges, which requires looking to the ways in which the Plaintiff claims it is in a worse position as a consequence of the Defendant's conduct; (3) the court compares the anticompetitive effect of the specific practice at issue to the actual injury the Plaintiff alleges. It is not enough for the actual injury to be causally linked to the asserted violation. Rather, in order to establish antitrust injury, the Plaintiff must demonstrate that its injury is of the type the antitrust laws were intended to prevent and that flows from that which makes [or might make] Defendants' acts unlawful.

Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C. ("Gatt"), 711 F.3d 68, 76 (2d Cir.2013) (citations and internal quotation marks omitted).

Plaintiff fails to plead an antitrust injury. Plaintiff alleges only that he "initiated short positions in CME Euroyen TIBOR futures contracts during the Class Period and suffered net losses on such contracts due to the presence of artificial Euroyen TIBOR future prices proximately caused by Defendants' unlawful manipulation and restraint of trade" (Compl.¶ 56). Plaintiff fails to plead facts sufficient to establish that this "is or might be anticompetitive." *Gatt,* 711 F.3d at 76. The Complaint does not allege facts that competition was harmed in any way.

At most, Plaintiff alleges that prices were distorted. Plaintiff, however, does not allege that this was a result of a reduction in competition. "[I]t is not sufficient that the plaintiffs paid higher prices because of defendants' collusion; that collusion must have been anticompetitive, involving a failure of defendants' to compete where they otherwise would have." *USD LIBOR Litig.,* 935 F.Supp.2d 666, 688–89 (S.D.N.Y.2013). As Judge Buchwald recognized in the *USD LIBOR Litig.,* the setting of the USD LIBOR benchmark rate is not competitive; rather it is a cooperative effort wherein otherwise competing banks agreed to submit estimates of their borrowing costs to facilitate calculation of an interest rate index. *Id.* at 688.

Furthermore, Plaintiff's allegations are insufficient because they "do not demonstrate an adequate connection between the alleged misconduct and the effect" on the market, and "the alleged injury is too attenuated from the source of the alleged misconduct." *In re Digital Music Antitrust Litig.,* 812 F.Supp.2d 390, 402 (S.D.N .Y.2011). Specifically, Plaintiff fails to provide any detail about the short positions he initiated, such as when they were initiated, how long they were held, and whether he exited those positions by entering into offsetting transactions or held them until their settlement dates. Plaintiff does not allege the prices at which he entered into these short positions, the prices of any offsetting positions he may have taken, or the prices of the futures contracts on their settlement dates. Plaintiff does not identify or describe a single actual transaction underlying his claim, and does not

indicate whether it was an increase or a decrease in the price of Euroyen TIBOR futures contracts that caused his purported losses.

b. "Efficient Enforcer"

The four "efficient enforcer" factors are: (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries. *In re DDAVP,* 585 F.3d at 688 (citations omitted). The factors are balanced to determine whether Plaintiff is an "efficient enforcer" of the alleged antitrust violation. *Id* at 689.

Defendants argue that the first and third factors weigh heavily against Plaintiff. As to the first factor—the directness or indirectness of the asserted injury—an examination of the causation between the asserted injury and the alleged restraint is necessary. *See, e.g., AGC,* 459 U.S. at 540. Where the chain of causation between the asserted injury and the alleged restraint in the market "contains several somewhat vaguely defined links," the claim is insufficient to provide antitrust standing. *Id.* Moreover, where the causal relationship between the Defendants' actions and the Plaintiff's injury is too attenuated, the claim is too indirect to support an antitrust claim. *Reading Industrial, Inc. v. Kennecott Copper Corp., et al.,* 631 F.2d 10, 12–13 (2d Cir.1980); *see also Ocean View Capital, Inc. v. Sumitomo Corp. of America,* No. 98–

cv4067 (LAP), 1999 WL 1201701, at *5 (S.D.N.Y. Dec. 15, 1999); *DeAtucha v. Commodity Exchange, Inc.,* 608 F.Supp. 510, 516–18 (S.D.N.Y.1985).

Plaintiff alleges a causal chain with at least four discrete links, requiring a complicated series of market interactions, including: (i) that Defendants allegedly conspired to make artificial Euroyen TIBOR and Yen–LIBOR submissions to the banking associations that publish Euroyen TIBOR and Yen–LIBOR; (ii) the banking associations compiled those submissions, threw out certain high and low submissions, and then calculated Euroyen TIBOR and Yen–LIBOR benchmark rates that were also allegedly artificial; (iii) the artificial Euroyen TIBOR and Yen–LIBOR current benchmark rates then impacted the market's perception of what Euroyen TIBOR benchmark rates would be at various times in the future; and (iv) perception impacted the prices of Euroyen TIBOR futures contracts that were bought and/or sold by Plaintiff. Plaintiff cannot point to any direct, clearly traceable means by which Defendants' alleged manipulation of one benchmark led to a loss to him on contracts linked to an entirely separate benchmark.

Plaintiff's argument that the banks had control over the prices in the Euroyen futures market via their submissions does not establish the directness of the injury (Compl.¶ 224). First, the allegations of collusive submissions involve two different benchmarks, the Euroyen TIBOR and the Yen–LIBOR. Plaintiff alleges that the Yen–LIBOR was manipulated, which in turn affected Euroyen TIBOR which in turn resulted in the prices of Euroyen TIBOR

futures contracts being artificially manipulated (Compl.¶¶ 619–28). But the degree to which these different rates actually influenced prices is uncertain. Further, Euroyen TIBOR futures contracts are traded based on what Euroyen TIBOR is expected to be in the future (Compl.¶ 110). Plaintiff's injury is thus dependent upon perception of what the rate would be in the future. Furthermore, consumers were free to take various positions in the market, including long and short. This attenuated causation between the alleged conspiracy and the asserted injury is too indirect to support antitrust standing. *See Reading,* 631 F.2d at 13; *Ocean View Capital* at *4; *DeAtucha,* 608 F.Supp. at 518.

The third factor—the speculativeness of the alleged injury—involves an inquiry into the calculation of damages. *See, e.g. AGC,* 459 U.S. 519; *Reading,* 631 F.2d 10. Indirectness of damages and independent factors contributing to the effect on the Plaintiff are two considerations indicative of damages being too speculative to support antitrust standing. *ACG,* 459 U.S. at 542. Where the "theory of antitrust injury depends upon a complicated series of market interactions," the damages are speculative. *Reading,* 631 F.2d at 13. This is because "countless other market variables" could affect pricing decisions. *Id.* at 13–14.

Analysis of Plaintiff's injury would require the reconstruction of hypothetical "but-for" Euroyen TIBOR and Yen–LIBOR benchmark rates during the period Plaintiff held his positions. The Court cannot hypothesize the impact of these "but-for" benchmark rates on the perceptions of the market participants

whose activities would have influenced the prices of Euroyen TIBOR futures contracts. Plaintiff's alleged injury is too remote and speculative. First, the injury is indirect. Second, Plaintiff's theory of antitrust injury involves a complicated series of market interactions. There are many independent factors that could influence perceptions in the market, and pricing decisions. The speculative nature of the derivatives market, based on what the interest rate is and where it will be in the future, compounded with consumers own beliefs of where they expect the interest will be in the future make the but-for test difficult.

Because Plaintiff has failed to allege an antitrust injury, and because the efficient enforcer factors weigh against Plaintiff, Plaintiff lacks antitrust standing. Yet, even if Plaintiff had established antitrust standing, Plaintiff's antitrust claims still fail because Plaintiff failed to allege a restraint of trade.

2. Plaintiff Has Failed to Allege a Restraint of Trade

Section 1 of the Sherman Act prohibits only conspiracies "in restraint of trade or commerce." 15 U.S.C. § 1. Under the Act, only those restraints that are unreasonable are prohibited. *Bhan v. NME Hospitals, Inc.,* 929 F.2d 1404, 1409 (9th Cir.1991). "To establish a claim under section 1, the Plaintiff must establish that the Defendants contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets, that the objects of and conduct

pursuant to that contract or conspiracy were illegal and that the Plaintiff was injured as a proximate result of that conspiracy." *Crane & Shovel Sales Corp. v. Bucyrus–Erie Co.,* 854 F.2d 802, 804 (6th Cir.1988) (quoting *Davis–Watkins Co. v. Service Merchandise,* 686 F.2d 1190, 1195–96 (6th Cir. 1982). "The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a Defendant's 12(b)(6) motion." *Crane & Shovel Sales Corp.,* 854 F.2d at 804.

There are two tests that courts use in analyzing antitrust claims: *per se* and rule of reason. *FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447, 457–58 (1986). *Per se* illegality "is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. *Burtch v. Milberg Factors, Inc.,* 662 F.3d 212, 222 (3d Cir. 2011) (quoting *Deutsher Tennis Bund. v. ATP Tour, Inc.,* 610 F.3d 820, 830 (3d Cir. 2010). Once applied, "no consideration is given to the intent behind the restraint, to any claimed pro-competitive justifications, or to the restraint's actual effect on competition." *In re Cardizem CD Antitrust Ltiig.,* 332 F.3d 896, 907 (6th Cir. 2003) (quoting *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 768 (1984). This standard, however, is applied infrequently and only where other courts have reviewed the same type of restraint. *In re Southeastern Milk Antitrust Litig.,* 739 F.3d 262, 271 (6th Cir. 2014).

"Unless the restraint falls squarely into a *per se* category, the rule of reason should be used." *Id.* Under the rule of reason analysis, "the Plaintiff 'bears

the initial burden of showing that the alleged [agreement] produced an adverse, anticompetitive effect within the relevant geographic market.'" *Burtch,* 662 F.3d at 222 (quoting *Ins. Brokerage Antitrust Litig.,* 618 F.3d 300, 317 (3d Cir.2010). For a restraint to be unreasonable, there must be some anticompetitive aspect of it. *Moore v. Boating Industry Associations,* 819 F.2d 693, 696 (7th Cir.1987). Where, however, the conduct is only unfair, impolite or unethical, there can be no liability under the Sherman Act. *See Indiana Grocery, Inc. v. Super Valu Stores, Inc.,* 864 F.2d 1409, 1413 (7th Cir. 1989). For instance, an agreement among industry participants to create a policy benchmark that nonetheless leaves members free to compete in the marketplace does not restrain trade. *See Schchar v. American Academy of Ophthalmology, Inc.,* 870 F.2d 397, 399 (7th Cir. 1989); *see also United States v. Am. Soc'y of Anesthesiologists, Inc.,* 473 F.Supp. 147, 155 (S.D.N.Y. 1979).

Defendants argue that Plaintiff cannot allege that the challenged Euroyen TIBOR or Yen–LIBOR submissions are sold in commerce or that they constitute trade (ECF 206 at 30–31). They argue that the Euroyen TIBOR and Yen–LIBOR were merely informational benchmarks that were not binding on the actual price of Euroyen TIBOR futures contracts (*Id.*). Furthermore, Defendants argue that Plaintiff has not alleged that trades in Euroyen TIBOR futures contracts were in any way restrained by the challenged conduct (*Id.*). Finally, defendants argue that each Defendant remained fully incentivized to compete against other banks and other market

participants for transactions in the Euroyen TIBOR futures market, if it so chose (*Id.*).

Plaintiff, in opposition, argues that their allegations involve collusive benchmark price-fixing (ECF 226 at 65–66). Plaintiff argues that in submitting agreed-upon rates, Defendants restrained trade (*Id.*). Plaintiff argues that the collusion affected billions of dollars of derivatives (*Id.*).

There is no evidence that Defendants' conduct was *per se* illegal. The alleged collusion is not so clearly anticompetitive to justify using the *per se* test. Instead, the rule of reason is applied. Plaintiff must show that the alleged conduct had anticompetitive effects.

Plaintiff fails to sufficiently plead that Defendants have restrained trade under the Sherman Act. Plaintiff claims that the collusive rate setting restrained trade across a variety of channels of competition (Compl.¶ 691). Plaintiff argues that the collusion: (i) restrained the competition to influence the final Euroyen TIBOR and Yen–LIBOR rates; (ii) skewed the Euroyen interbank lending market away from what the rates were supposed to berates set by supply and demand; and (iii) affected prices of Euroyen TIBOR futures contracts that were traded, price settled and benchmarked to the collusively-set Euroyen TIBOR and Yen–LIBOR (Compl.¶¶ 691).

Plaintiff alleges that the panel banks "competed with one another when they submitted rates" (Compl.¶ 693). However, the evidence shows that the rate-setting process was not competitive. In no way did the panel banks compete in making their

submission. Rather, each bank was supposed to independently contribute its submission to be evaluated collectively with other bank submissions.

Plaintiff also alleges that "the collusively-set Euro TIBOR and Yen–LIBOR rates had a reverberatory anticompetitive effect on the Euroyen interbank lending market, the Euroyen TIBOR and Yen–LIBOR future rate setting submission and on the enormous number of derivative instruments, including Euroyen TIBOR futures contracts" (Compl.¶ 694). Plaintiff alleges that supply and demand factors were altered on the determination of price for Euroyen interbank lending prices which are incorporated into the Euroyen rate-setting process (Compl.¶ 694). Plaintiff further alleges that the alleged rate setting collusion harmed competition among sellers and buyers of Euroyen derivatives, including Euroyen TIBOR futures contracts. These allegations, however, are also conclusory. *See Crane & Shovel Sales Corp.,* 854 F.2d at 810 (finding that supported conclusory allegations are not given a presumption of truthfulness). The alleged collusion occurred in the rate setting process of the benchmark, not in the actual Euroyen TIBOR futures market. Plaintiff merely alleges that prices may have been different. Plaintiff does not, however, allege that trades in Euroyen TIBOR futures contracts were in any way restrained by the alleged misconduct.

Moreover, Plaintiff does not plead facts sufficient to support any anticompetitive aspect or effect of Defendants' alleged conduct. There are no allegations that banks competed less, or were forced out of any of these markets. Nor is there any allegation that output of Euroyen futures contracts was eliminated or

diminished. Absent any such allegations, Plaintiff's claim does not sufficiently plead a violation of the Sherman Act.

PLAINTIFF'S UNJUST ENRICHMENT CLAIM IS DISMISSED

To state a claim for unjust enrichment under New York law, Plaintiff must allege (1) that the Defendant received a benefit; (2) at the Plaintiff's expense; and (3) that "equity and good conscience" require restitution. *Kaye v. Grossman,* 202 F.3d 611, 616 (2d Cir.2000). Plaintiff thus must plead facts showing how each of the Defendants has been enriched at Plaintiff's expense. *See, e.g., In re Amaranth Natural Gas Commodities Litig.,* 587 F.Supp.2d 513, 532 (S.D.N.Y.2008).

Under New York law, "[t]here is no requirement that the aggrieved party be in privity with the party enriched at his or her expense." *See Sperry v. Crompton Corp.,* 8 N.Y.3d 204, 215 (2007). An unjust enrichment claim, however, "requires some type of direct dealing or actual, substantive relationship with a Defendant." *Reading Int'l, Inc. v. Oaktree Capital Mgmt.,* 317 F.Supp.2d 301, 334 (S.D.N.Y. 2003). Where the connection between the purchaser and the seller of a product is too attenuated, the claim for unjust enrichment must be dismissed. *Sperry v. Crompton Corp.,* 8 N.Y.3d 204, 215 (2007); *see Georgia Malone & Co., Inc. v. Rieder,* 19 N.Y.3d 511, 519 (2012).

Defendant argues that Plaintiff fails to plead sufficient facts showing how each of the Bank Defendants has been enriched at Plaintiff's expense

(*see* ECF 206 at 55–56). Additionally, Defendant contends that Plaintiff does not allege any direct dealing or relationship with any of the Defendants (*see id.*).

Plaintiff asserts that privity between the aggrieved party and enriched party is not required under New York unjust enrichment law (*see* ECF 226 at 84–86). Plaintiff further contends that he has sufficiently alleged a direct relationship between himself and Bank Defendants.

However, Plaintiff's conclusory assertions that Bank Defendants "financially benefited from the unlawful manipulation" and that "[t]hese unlawful acts caused Plaintiff . . . to suffer injury," (Compl.¶¶ 745–47), fail to satisfy Plaintiff's pleading burden.

In USD LIBOR Litig., 2013 WL 1285338, at *61, Judge Buchwald held:

> [T]he relationship between Plaintiffs and Defendants, to the extent that there was any relationship, is surely too attenuated to support an unjust enrichment claim. Although Plaintiffs have alleged that they "purchased standardized CME Eurodollar futures contracts" and that "Defendants . . . manipulated and directly inflated CME Eurodollar futures contract prices to artificially high levels," they have not alleged that they purchased Eurodollar contracts from Defendants or that they had any other relationship with Defendants. In other words, even if Plaintiffs are correct that "the direct and foreseeable effect of the Defendants'

> intentional understatements of their LIBOR rate was to cause Plaintiffs and the Class to pay supra-competitive prices for CME Eurodollar futures contracts," this does not establish a relationship, of any sort, between Plaintiffs and Defendants.

See also In re Amaranth, 587 F.Supp.2d at 547 (dismissing unjust enrichment claim based on alleged market manipulation that impacted prices of natural gas futures contracts because Plaintiffs did not "allege[ ] any direct relationship, trading or otherwise, between themselves and any [Defendant]"); *Georgia Malone & Co., Inc. v. Rieder,* 19 N.Y.3d 511,516–19 (2012) (where Plaintiff and Defendant "simply had no dealings with each other," their relationship is "too attenuated" to support an unjust enrichment claim); *Sperry v. Crompton Corp.,* 8 N.Y.3d 204, 215–16 (N.Y. App. 2007) (affirming dismissal of unjust enrichment claim where plaintiff alleged that chemical manufacturers entered into a price fixing agreement to overcharge tire manufacturers for certain chemicals, and that the overcharges "trickled down the distribution chain to consumers" such as the plaintiff).

Because Plaintiff does not allege any relationship between himself and any of the Defendants or how Defendants benefitted at Plaintiff's expense, Plaintiff has failed to plead facts to support an unjust enrichment claim.

CONCLUSION

Plaintiff has adequately pled a claim under the Commodity Exchange Act for price manipulation, and

aiding and abetting against all defendants. Defendants' motion to dismiss those two claims is DENIED. Plaintiff's vicarious liability, antitrust and unjust enrichment claims against all defendants are dismissed. Defendants' motion to dismiss those claims is GRANTED.

Dated: March 28, 2014
New York, New York

SO ORDERED

/s/
GEORGE B. DANIELS
United States District Court

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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 24th day of February, two thousand twenty-three.

JEFFREY LAYDON,

on behalf of himself and all others similarly situated,

Plaintiff-Appellant-Cross-Appellee,

v.

COÖPERATIEVE RABOBANK U.A., BARCLAYS BANK PLC, Société Générale S.A.,

Defendants-Appellees-Cross-Appellants,

THE ROYAL BANK OF SCOTLAND GROUP PLC, UBS AG, LLOYDS BANKING GROUP PLC, UBS SECURITIES JAPAN CO., LTD., THE ROYAL BANK OF SCOTLAND PLC, RBS SECURITIES JAPAN LIMITED,

Defendant-Appellees

Nos: 20-3626 (L), 20-3775 (XAP)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Appellant-Cross-Appellee, Jeffrey Laydon, 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'Hagen Wolf, Clerk

United States Court of Appeals,
Second Circuit

APPENDIX F

7 U.S.C. § 1a provides in relevant part:

As used in this chapter:

. . .

(9)Commodity

The term "commodity" means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions (as provided by section 13-1 of this title) and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.

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. § 6b provides in relevant part:

(a) Unlawful actions

It shall be unlawful—

. . .

(2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, or swap, that is made, or to be made, for or on behalf of, or with, any

other person, other than on or subject to the rules of a designated contract market--

. . .

(B) willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record; . . . .

7 U.S.C. § 6c provides in relevant part:

(a) In general

(1) Prohibition

It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction described in paragraph (2) involving the purchase or sale of any commodity for future delivery (or any option on such a transaction or option on a commodity) or swap if the transaction is used or may be used to--

(A) hedge any transaction in interstate commerce in the commodity or the product or byproduct of the commodity;

(B) determine the price basis of any such transaction in interstate commerce in the commodity; or

(C) deliver any such commodity sold, shipped, or received in interstate commerce for the execution of the transaction.

(2) Transaction

A transaction referred to in paragraph (1) is a transaction that--

(A) (i) is, of the character of, or is commonly known to the trade as, a "wash sale" or "accommodation trade"; or

(ii) is a fictitious sale; or

(B) is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price. . . .

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:

(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. . . .

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

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—

(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 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

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

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

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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.

enforce any bylaw, rule, regulation, or resolution referred to in 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.

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