17-2233

13-md-02475 (ALC)

In the

United States Court of Appeals

For the Second Circuit

PRIME INTERNATIONAL TRADING, LTD., ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, WHITE OAKS FUND LP, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, KEVIN MCDONNELL, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, ANTHONY INSINGA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, ROBERT MICHIELS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, JOHN DEVIVO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, NEIL TAYLOR, AARON SCHINDLER, PORT 22,LLC, ATLANTIC TRADING USA, LLC, XAVIER LAURENS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs - Appellants,

MICHAEL SEVY, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, GREGORY H. SMITH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PATRICIA BENVENUTO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, DAVID HARTER, ON BEHALF OF HIMSELF AND OTHER SIMILARLY SITUATED PLAINTIFFS, MELISSINOS EUPATRID LP, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, FTC CAPITAL GMBH, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, WILLIAM KARKUT, CHRISTOPHER CHARTIER, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PRAETOR

(Caption Continued)

17-2233

13-md-02475 (ALC)

CAPITAL CAYMAN LTD., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PRAETOR CAPITAL MANAGEMENT LTD., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PRAETOR VII FUTURES AND OPTIONS MASTER FUND LTD., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PRAETOR VII FUTURES & OPTIONS FUND LTD., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

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

ROYAL DUTCH SHELL PLC, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5, JOHN DOE 6, JOHN DOE 7, JOHN DOE 8, JOHN DOE 9, JOHN DOE 10, JOHN DOE 11, JOHN DOE 12, JOHN DOE 13, JOHN DOE 14, JOHN DOE 15, JOHN DOE 16, JOHN DOE 17, JOHN DOE 18, JOHN DOE 19, JOHN DOE 20, BP P.L.C. ROYAL DUTCH SHELL PLC, MORGAN STANLEY, JOHN DOES 1 THROUGH 50, SHELL TRADING AND SHIPPING COMPANY LIMITED, ("STASCO"), JOHN DOES 1 THROUGH 50,
Defendants.

17-2233

13-md-02475 (ALC)

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

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

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae the U.S. Commodity Futures Trading Commission is an agency of the United States government, has no parent corporation, and no publicly held corporation has an ownership interest in the CFTC.

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Commodity Futures Trading Commission ("CFTC" or "Commission") is the U.S. government agency charged with administering and enforcing the Commodity Exchange Act ("CEA"). 7 U.S.C. §§ 1-26 (2012). The CEA contains a statement of findings that "[t]he transactions subject to [this statute] are entered into regularly in interstate and international commerce" and "are affected with a national public interest," including in "liquid, fair, and financially secure trading facilities." 7 U.S.C. § 5 (2012). This national interest shall be protected by, among other things, "prevent[ing] price manipulation or any other disruptions to market integrity." *Id*.

In this private action under CEA Section 22, 7 U.S.C. § 25 (2012), the district court interpreted the CEA in a way that could implicate important aspects of the CFTC's mission to protect the public from market manipulation and other abusive practices. The Commission respectfully submits this *amicus curiae* brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure to explain the focus of congressional concern underlying the CEA's regulation of markets subject to the CFTC's jurisdiction.

INTRODUCTION

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

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

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

SUMMARY OF ARGUMENT

The district court erred in two principal ways:

First, the court incorrectly applied *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), and *Parkcentral*. Relying on those cases, it mischaracterized Plaintiffs' claims as impermissibly "extraterritorial," notwithstanding that a target of the alleged scheme is a CFTC-registered futures exchange located in New York. Nothing in the CEA, *Morrison*, or *Parkcentral* suggests that a person may intentionally manipulate contracts on a trading facility in the United States with impunity under U.S. law, and without incurring liability to victimized market participants, simply because that person and the means of manipulation were offshore. To the contrary, protecting U.S. markets and market participants from manipulation, including manipulation using transactions in international commerce, is a core stated purpose of the CEA. 7 U.S.C. § 5.

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

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

Second, the district court's opinion contains incorrect statements about the text of the CEA. For example, the opinion states that "[t]he CEA does not contain any statements suggesting that Congress intended the reach of the law to extend to foreign conduct." SPA-63. The court, however, overlooked a provision saying exactly that—CEA Section 2(i), which applies the CEA provisions regarding "swaps" to overseas activities with a "direct and significant connection" to U.S. commerce or that violate anti-evasion rules. 7 U.S.C. § 2(i) (2012). The Commission takes no position on whether or how Section 2(i) may apply here. That was not litigated below and would likely be fact-intensive. *Cf.* Interpretive Guidance & Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013) (interpretation and policy statement concerning application of Section 2(i) to swaps rules not at issue here).

It is important, however, for this Court to correct the district court's misstatements, so as to avoid further confusion.

BACKGROUND

I. CEA Regulation of Futures in Domestic and Foreign Commodities

1. The CEA regulates transactions in and markets for commodity "derivatives." A derivative is a financial instrument, the value of which depends on (*i.e.*, is derived from) the value of some underlying asset, index, or other measure. Market participants use these instruments to hedge business risks or speculate on price movements. The most common are "futures contracts" and "swaps." Derivatives markets are distinct from "cash" or "physical" markets in which the assets themselves are bought and sold, but the prices of cash commodities and derivatives are closely linked. At a high level, this is because if a price disparity arises, arbitrageurs will take advantage of the difference, and the gap disappears. This may involve cash market or derivatives transactions anywhere in the world.[2] If resulting price movements reflect legitimate market forces, the transactions have contributed to "price discovery," the mechanism by which supply and demand set the price of a commodity like the oil at issue here.

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

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

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

4. The first comprehensive federal legislation concerning the futures markets was the Futures Trading Act of 1921, Pub. L. No. 67-66, 42 Stat. 187 ("'21 Act"), followed shortly thereafter by the Grain Futures Act of 1922, Pub. L.

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

No. 67-331, 42 Stat. 998 ("'22 Act").[4] Both statutes applied to seven grain commodities and were to be administered principally by the Secretary of Agriculture. '21 Act §§ 2, 5, 42 Stat. 187-88; '22 Act § 2(a), 5, 42 Stat. at 998, 1000.

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

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

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

additional items to the definition of "commodity," thereby expanding the reach of the statute.

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

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

9. "All" includes foreign commodities. By 1974, U.S. exchanges offered many futures on overseas commodities, including coffee, cocoa, copper, and foreign currency. H.R. Rep. No. 93-975, at 41, 62. Exchanges that offered

contracts in foreign commodities lobbied against including them within the scope of the CEA, arguing that it was "inappropriate" for the U.S. to regulate them. *Id*. at 62. Congress, however, found it "abundantly clear that all futures trading must be brought under a single regulatory umbrella," *id*. at 41-42, and that whether the commodity "is produced in the United States or outside" of it matters little "to those in this country who buy, sell, [] process," or use "the commodity, or to the U.S. consumers whose prices are affected by the futures market in that commodity," S. Rep. 93-1131, at 19 (1974).

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

II. Anti-Manipulation Prohibitions

1. An original motivation for Congress to legislate in this area was that futures markets were persistently subject to manipulation and other malfeasance. The '22 Act states that the transactions subject to the statute "are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in

the prices thereof frequently occur as a result of such speculation, manipulation, or control." '22 Act § 3, 42 Stat. at 999. Both the '21 and '22 Acts prohibited manipulation and other bad acts affecting "the market price of any grain." '21 Act §§ 5(d), 6(b), 42 Stat. at 188-89, '22 Act §§ 5(d), 6(b), 42 Stat. at 1000, 1002-03. Similar to its predecessors, the modern CEA includes a statement of purpose to "deter and prevent price manipulation or any other disruptions to market integrity," 7 U.S.C. § 5, as well as broad prohibitions on all forms of manipulation, 7 U.S.C. §§ 6c, 9(1), 13(a)(2) (2012).

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

III. Swaps Regulation Under Dodd-Frank

1. A "swap" is a contract between two parties agreeing to make payments to each other on specified dates over an agreed time period, where the amount that each party has to pay is calculated on a different basis. Similar to futures contracts,

swaps shift risk between parties and can be used for hedging or speculation. Prior to the 2008 financial crisis, swaps were generally unregulated. Congress came to view this as an underlying cause of the crisis, and, in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 ("Dodd-Frank"), brought them within the CEA's coverage.

2. The swaps activities that catalyzed the 2008 financial crisis included activities that occurred overseas, but which contributed to economic turmoil in the United States. *See* Financial Crisis Inquiry Commission, THE FINANCIAL CRISIS INQUIRY REPORT 344-52 (January 2011). Thus, Congress established under CEA Section 2(i) that the Dodd-Frank reforms apply to swaps activities abroad that have "a direct and significant connection with activities in, or effect on, commerce of the United States," or that contravene CFTC anti-evasion rules. 7 U.S.C. § 2(i).

ARGUMENT

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

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

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

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

1. The plaintiffs in *Morrison* alleged that foreign and domestic defendants committed fraud in violation of the Exchange Act by making false statements, including from within the United States, about securities traded on foreign stock exchanges. 561 U.S. at 250-52. The Supreme Court held that those claims were impermissibly extraterritorial. First, it examined the text of Section 10(b) applying a "presumption against extraterritoriality," which can be rebutted only by a "clear indication" that Congress intended the statute to apply outside of United States. *Id.* at 255-56. The Court found no such indication regarding Section 10(b) and,

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

accordingly, held that it did not apply extraterritorially. *Id.* at 262, 265.

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

3. The Court observed that Section 10(b) by its terms does not punish *all* deceptive conduct, but only such conduct "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." *Id*. at 266 (quoting 15 U.S.C. § 78j(b) (2012)). The Court also cited what it called the "primacy of the domestic exchange" in "the very prologue of the Exchange Act, which sets forth as its object '[t]o provide for the regulation of securities exchanges.'" *Id*. at 267 (citation omitted). This suggested that Congress's focus was on the transactions themselves, "not upon the place where the deception originated." *Id*. at 266. The Court therefore adopted a "transactional test" for Section 10(b), which asks "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 269-70.

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

In the district court, no party argued that the CEA contains a "clear indication" that Congress intended the provisions at issue to apply

extraterritorially. SPA-63-64. The Commission therefore takes no position on whether there is any such CEA language that is relevant in this case. *See also* Part II, *infra* (discussing CEA Section 2(i)).

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

1. The text of the CEA provisions at issue here reflect several focuses of congressional concern. These include, but are not limited to, protecting participants in derivatives transactions and the integrity of trading facilities against market manipulation and other price disruptions. Of particular relevance here, the private right of action in Section 22(a) is available only to participants in four types of transactions, including exchange-traded derivatives. 7 U.S.C. § 25(a). Thus, in *Loginovskaya*, this Court held that the focus of Section 22(a) is "clearly transactional." 764 F.3d at 272. CEA Section 6(c)(1) prohibits the use or attempted use of a manipulative or deceptive device or contrivance "in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity," including through false reporting concerning "market information or conditions that affect or tend to affect the price of any commodity in interstate commerce." 7 U.S.C. § 9(1). CEA Section 9(a) prohibits manipulation of "the price" of the same products covered by Section 6(c)(1), as well as cornering of a physical commodity, and false reporting. *Id.* § 13(a)(2). Underscoring the congressional focus on, among other

things, transactions and exchanges, the statute declares a "national public interest" in aspects of commodity markets including "[t]he transactions subject to this Act" and "trading in liquid, fair and financially secure trading facilities." *Id.* § 5.

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

b. Plaintiffs' CEA Claims Satisfy *Parkcentral*.

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

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

issue in *Parkcentral* were "so predominantly German" as to pose an unacceptable "potential for regulatory and legal overlap and conflict." *Id.* The plaintiffs therefore failed to state a domestic claim. *Id.*

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

3. That is, however, what the district court did here. After agreeing that the relevant transactions for a private claim under CEA Section 22 likely were Plaintiffs' domestic trades, SPA-65, the court held that the claims were nevertheless extraterritorial based on high-level similarities it perceived with *Parkcentral*: In both cases the alleged wrongdoing occurred overseas, and the

court drew an analogy between the foreign exchange-traded security in *Parkcentral* and the London-generated Platts benchmark for oil that is at issue here. The district court expressed "concern," like this Court in *Parkcentral*, "that individuals and entities will be subject to multiple, and potentially incompatible, laws." SPA-67.

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

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

5. Second, the Court in *Parkcentral* emphasized that it was a "case of securities not listed on domestic exchanges." 763 F.3d at 216. That distinction matters, given the *Morrison* Court's emphasis on the "primacy of the domestic exchange." 561 U.S. at 267. In *Parkcentral*, where the wrongdoing centered on a

foreign stock exchange, it is perhaps unsurprising that this Court was reluctant to apply U.S. law. Here, the shoe is on the other foot—Plaintiffs claim manipulation of contracts on an exchange in the United States. SPA-54-55. To remove such cases from the protection of U.S. law conflicts with the primacy the CEA places on protecting the integrity of U.S. exchanges. 7 U.S.C. § 5.

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

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

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

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

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

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

The Supreme Court in *Morrison* stated that it wanted a "clear test." 561 U.S. at 269. It rejected a doctrine—the "conduct and effects" test—that required

courts and market participants to "guess anew in each case." *Id*. at 261. Yet the district court here went right down same rabbit hole. Although it did not use the label "conduct and effects test," the court's analysis was indistinguishable from that discredited line of cases.

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

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

3. That is what the district court did here. First, it determined that "the crux of" Plaintiffs' complaint was the allegedly "manipulative and misleading reporting to Platts in London" about oil transactions abroad. SPA-66. Because the "crux" as

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

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

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

1. The elements of the substantive provisions at issue here account for the problems the district court perceived with respect to Plaintiffs' claims. CEA Section 9(a), 7 U.S.C. § 13(a), contains a long-established prohibition on price manipulation, while Section 6(c)(1) is a newer provision that prohibits use of a manipulative device, *id*. § 9(1). The elements of traditional manipulation are "(1) that the accused had the ability to influence market prices; (2) that [the accused] specifically intended to do so; (3) that artificial prices existed; and (4) that the accused caused the artificial prices." *DiPlacido v. CFTC*, 364 Fed. App'x 657, 661 (2d Cir. 2009) (citation omitted). A claim under Section 6(c)(1), as implemented

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

2. With respect to the means, courts have observed that the "methods and techniques of manipulation are limited only by the ingenuity of man." *CFTC v. Kraft Foods Grp., Inc.*, 195 F. Supp. 3d 996, 1005 (N.D. Ill. 2016). Although the particulars of any given scheme can be unique, there is nothing novel about using cash-market transactions or disseminating false information as alleged in this case to manipulate exchange-traded derivatives. *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971) (discussing "one of the most common manipulative devices, the floating of false rumors"); *CFTC v. Parnon Energy, Inc.*, 875 F. Supp. 2d 233, 246 (S.D.N.Y. 2012) (upholding claim of manipulation where defendants "established their long futures position to profit from" misconduct "in the physical market"); *In re Soybean Futures Litig.*, 892 F. Supp. 1025, 1047 (N.D. Ill. 1995) (upholding claim of "manipulation of the [futures] market through a combination of market power and false reports"); *In re Ind. Farm Bureau Coop. Assoc., Inc.*,

CFTC No. 75-14, 1982 WL 30249, at *9 (CFTC Dec. 17, 1982) (describing manipulation "where there is evidence that the deliverable supply [of the cash commodity] was intentionally and significantly reduced by a market participant"); Philip M. Johnson & Thomas L. Hazen, *Derivatives Regulation* § 5.02[4] (Successor ed. 2004) (discussing the manipulative technique known as a "corner," which involves "control or domination of the available supply of a cash commodity" (emphasis omitted)).

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

4. To illustrate the district court's error in relying on geographic considerations, imagine a scenario in which traders in Turkey establish positions in Black Sea Wheat contracts on CME, under which the foreign wheat is deliverable only in Romania, Russia, and Ukraine. This group can also control or disrupt a significant portion of the physical supply of that wheat. They do so with the intent to distort the price of the Black Sea Wheat contract, and they are successful. This wrongdoing causes injury to other traders on CME, in Chicago. On that clean set of facts, there is no question that the overseas traders in the foreign commodity triggered all elements of manipulation, including for private damages. The target of the wrongdoing was in the United States, the CFTC would pursue those wrongdoers, and the Court in *Morrison* could not have intended to prevent that. *See* 561 U.S. at 266 (holding that the focus of Section 10(b) is "not upon the place where the deception originated").

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

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

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

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

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

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

> The provisions of this [Act] relating to swaps that were enacted by [Dodd-Frank] (including any rule prescribed or regulation promulgated under that Act), *shall not apply to activities outside the United States unless those activities—*
>
> (1) have a *direct and significant connection with activities in, or effect on, commerce of the United States*; or
>
> (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this [Act] that was enacted by [Dodd-Frank].

7 U.S.C. § 2(i) (emphases added).

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

2. The district court's errors in this regard rest in part on a mistaken reading of *Loginovskaya*. The district court stated that *Loginovskaya* established "that the CEA lacked any express statements regarding extraterritorial application." SPA-

62. However, that case involved only the pre-Dodd-Frank version of the CEA. *Loginovskaya*, 764 F.3d at 270 (applying 7 U.S.C. § 6*o*(1) (2008)). The Court emphasized that its holding was, therefore, limited to that now-superseded version of the statute:

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

Id. at 271 n.4.

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

4. This issue is critical to the CFTC. Section 2(i) is a lynchpin of the Dodd-Frank swaps-market reforms, given the cross-border swaps activities that catalyzed

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

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

CONCLUSION

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

Respectfully submitted,

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November 22, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2017, I caused this Brief of Amicus Curiae to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all CM/ECF users registered in this case. I further certify that on November 22, 2017, I caused the required number of bound copies of the Brief of Amicus Curiae to be filed with the Clerk of the Court via UPS Next Day Air.

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