RECORD NO.

17-2233

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, 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 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.

(Caption Continued Inside Cover)

RECORD NO.

17-2233

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,

***Defendants – Appellees*,**

ROYAL DUTCH SHELL PLC, STATOIL ASA, 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*.**

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE SOUTHERN DISTRICT OF NEW YORK (NEW YORK CITY)

BRIEF OF APPELLANTS

David E. Kovel
Andrew M. McNeela
KIRBY MCINERNEY LLP
825 3rd Avenue
New York, New York 10022
(212) 371-6600

Counsel for Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Fed. R. App. P. 26.1, Plaintiffs-Appellants Atlantic Trading USA, LLC, John Devivo, Anthony Insinga, Xavier Laurens, Kevin McDonnell, Robert Michiels, Port 22, LLC, Prime International Trading, LTD., Aaron Schindler, Neil Taylor, and White Oaks Fund LP ("Plaintiffs"), state that: (i) Atlantic Trading USA, LLC, Port 22, LLC, Prime International Trading, LTD., and White Oaks Fund LP are corporate entities; (ii) Atlantic Trading USA, LLC is 100% owned by Atlantic Trading Holdings, LLC (a non-public Illinois limited liability company); and (iii) no publicly held corporation owns 10 percent or more of any of the Plaintiffs' shares.

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TABLE OF ABBREVIATIONS

Term	Definition/Description
BFOE	Refers to the BNB, Forties, Oseberg, and Ekofisk Brent crude oil streams
Brent Futures	Brent-based futures and derivatives
Brent	Physical Brent crude oil
CBOT	Chicago Board of Trade
CEA	The Commodities Exchange Act
CFDs	Contracts for difference
CFTC	The Commodity Futures Trading Commission
Clearing Rules	ICE Clear Europe's Clearing House Rules
CME	The Chicago Mercantile Exchange
Corrected Culp Decl.	Corrected Declaration of Christopher L. Culp, Ph.D.
Culp Decl.	Declaration of Christopher L. Culp, Ph.D.
Defendants	Defendants-Appellants
Dodd-Frank	The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
Dr. Culp	Dr. Christopher L. Culp – Defendant Statoil ASA's expert economist
EFP Mechanism	The "exchange of futures for physical" mechanism
FBOTs	Foreign boards of trade
FCM	Futures Commission Merchant
FSIA	The Foreign Sovereign Immunities Act

Gaer Decl.	Declaration of Sam Gaer, Plaintiffs' Industry Expert
ICE Futures Europe	The Intercontinental Exchange Futures Europe
JA	Joint Appendix
Lumens Dep.	Videotaped Deposition of Armand Lumens, June 15, 2016
MOC Window	The half-hour period at the end of each trading day, which for Brent is between 4:00 p.m. and 4:30 p.m. London time
MOC	Market-on-close
NYMEX	The New York Mercantile Exchange
Osterwald Decl.	Expert Report of Edward Osterwald
OTC	Over-the-counter
PMR	Published Media Report
Professor Seyhun	Professor H. Nejat Seyhun – Plaintiffs' expert economist
PRAs	Price Reporting Agencies
RDS	Royal Dutch Shell plc
SPA	Special Appendix
SAC	Second Amended Consolidated Class Action Complaint
Seyhun Decl.	Rebuttal Report of H. Nejat Seyhun
STASCO	Defendant Shell International Trading and Shipping Company Limited
STUSCO	Shell Trading US Company

Statoil	Defendant Statoil ASA
Trading Rules	The Intercontinental Exchange Futures Europe's Trading Procedures
VPLT	Shell Trading's Vice President Leadership Team
WTI	West Texas Intermediate

PRELIMINARY STATEMENT

This appeal concerns claims under Sections 4 and 16 of the Clayton Act and Section 6(c)(1) and 9(a) of the Commodities Exchange Act ("CEA"). Plaintiffs-Appellants ("Plaintiffs") are traders who bought and sold various futures and derivatives contracts linked to Brent crude oil ("Brent") on the New York Mercantile Exchange ("NYMEX") and the Intercontinental Exchange Futures Europe ("ICE Futures Europe"). Defendants-Appellees ("Defendants") are producers, refiners and traders of Brent and Brent-based futures and derivatives ("Brent Futures"). Defendants were also submitters to Platts, a price reporting agency, which published a critical benchmark widely considered to represent the spot price for Brent, known as the "Dated Brent Assessment." During the Class Period, Defendants conspired to submit uneconomic trade data to Platts to manipulate the Dated Brent Assessment and thereby manipulate the price of Brent Futures to Plaintiffs' detriment.

Over the course of three separate Opinions and Orders, the district court (Carter, J.) dismissed Plaintiffs' claims in their entirety. The district court found that Plaintiffs: (i) failed to plead antitrust injury; (ii) asserted CEA claims that are impermissibly extraterritorial; (iii) failed to establish the commercial activities exception to the Foreign Sovereign Immunities Act ("FSIA") against Defendant Statoil ASA ("Statoil"); and (iv) failed to establish personal jurisdiction over Defendant Shell International Trading and Shipping Company Limited

("STASCO"). As summarized below, the district court's decisions are host to numerous errors and should be reversed.

First, in holding that Plaintiffs failed to plead antitrust injury, the district court: (i) *redefined* the relevant market to only include those Brent Futures that explicitly incorporated the Dated Brent Assessment as a pricing element; (ii) determined that the Brent Futures at issue in this case settled to a different benchmark known as the ICE Brent Index, which is calculated by ICE Futures Europe; and (iii) concluded that the ICE Brent Index did not incorporate the Dated Brent Assessment. Putting aside that the law does not require direct incorporation of a pricing benchmark, the district court ignored, *inter alia*, that: (i) Plaintiffs alleged that the Dated Brent Assessment is factored into the ICE Brent Index; (ii) ICE Futures Europe has stated that Brent Futures that settle to the ICE Brent Index are directly linked to the Dated Brent spot price (*i.e.*, the Dated Brent Assessment); and (iii) Defendant Statoil's expert witness admitted that the Dated Brent Assessment is factored into the ICE Brent Index.

Second, the district court held that Plaintiffs' CEA claims were impermissibly extraterritorial pursuant to this Court's decision in *Parkcentral Global Hub Ltd. v. Porsche Auto Holdings SE*, 763 F.3d 183 (2d Cir. 2014), even though it assumed that "the relevant transactions are those occurring on domestic exchanges." In so ruling, the district court simply misread *Parkcentral* and ignored other controlling

decisions of this Court. In short, claims arising from transactions on domestic exchanges are, by definition, not extraterritorial. *Parkcentral* only applies where a plaintiff asserts that a claim is domestic because irrevocable liability arose in the United States. And even if *Parkcentral* applied here, that case – which turned on the unusual nature of the investment at issue – is factually inapt, and the policy concerns that animated that decision are not present here.

Third, the district court held that Plaintiffs could not establish the "direct effect" clause of the FSIA's commercial activities exception because Platts purportedly excluded aberrant trades from the Dated Brent Assessment, which constituted an intervening third-party action that broke the causal chain. But the record demonstrates that Platts' standard practice *was not to* investigate and exclude trade data, even under circumstances where it was facially suspect. In fact, Statoil, its expert witness, and the district court were only able to identify *one instance* where Platts *appears* to have excluded a reported trade.

Finally, the district court concluded that specific jurisdiction over STASCO was improper even though two of its executives oversaw crude oil futures and derivatives trading in the United States, because those executives purportedly acted in their capacities as members of Shell Trading's Vice President Leadership Team ("VPLT"). In so ruling, the district court ignored that Shell Trading *is not a separate legal entity*, but rather an "umbrella" organization that Royal Dutch Shell plc

("RDS") created as an administrative convenience and for the mutual benefit of its various subsidiaries. As such, those STASCO executives were employees *of only one entity*: STASCO.

For these reasons, and for the additional reasons stated herein, this Court should respectfully reverse the district court's decisions in their entirety.

JURISDICTIONAL STATEMENT

This appeal concern violations of Sections 6(c)(1) and 9(a) of the CEA, 7 U.S.C. §§ 9, 13(a)(2), and Section 4 and 16 of the Clayton Act, 15 U.S.C. § 15(a). The district court's jurisdiction arose under 28 U.S.C. §§ 1331 and 1337, 15 U.S.C. §§ 15 and 26, and 28 U.S.C. § 1367.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291, because the district court's March 29, 2017 and two June 8, 2017 Opinion and Orders – which combine to dismiss the action in its entirety – constitute a final order. (Special Appendix "SPA" 1-81). The district court entered final judgment on June 29, 2017, and the Notice of Appeal was filed on July 20, 2017. (JA 2601-02).[1]

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in dismissing Plaintiffs' antitrust claims for lack of antitrust injury because the Dated Brent Assessment purportedly was not

[1] All references to "¶ __" are to the Second Amended Consolidated Class Action Complaint ("SAC") unless otherwise specified, which is found at pages 1940 to 2133 of the Joint Appendix ("JA").

directly incorporated into the price of Brent Futures, where the record establishes that the Dated Brent Assessment was, in fact, a pricing factor, where econometric analysis shows that the Dated Brent Assessment and Brent Futures prices are highly connected, and where the law does not require direct incorporation?

2. Did the district court err in dismissing Plaintiffs' CEA claims as impermissibly extraterritorial, where those claims were based on commodities transactions on *domestic* exchanges, and where trades were matched and irrevocable liability arose in the United States pursuant to the exchanges' rules?

3. Did the district court err in holding that Plaintiffs failed to establish the FSIA's commercial activities exception against Statoil because of intervening third-party actions, when the allegations and the record evidence establish that the third-parties *did not act*?

4. Did the district court err in concluding that it lacked personal jurisdiction over STASCO, when two of its executives oversaw all aspects of Shell Trading's crude oil trading activities in the United States?

STATEMENT OF THE CASE

I. The Brent Crude Oil Market, Pricing Benchmarks and Exchanges

Physical Brent crude oil comes from the North Sea and includes blends from four different oil fields (a/k/a "streams"): BNB; Forties; Oseberg; and Ekofisk (collectively, "BFOE"). (¶ 55). Brent prices serve as the *benchmark for two-thirds*

of the world's internationally-traded crude oil supplies, including oil supplies in the United States. (¶ 4). The Brent crude oil market includes various physical and financial over-the-counter ("OTC") contracts for Brent. (¶¶ 7, 9, 20, 523). It also includes on-exchange Brent Futures contracts. (*Id.*).[2]

Brent OTC transactions are mostly private, and the prices are not publicly available. (¶¶ 6, 104, 128 n.3). However, Brent prices are disseminated daily by Price Reporting Agencies ("PRAs"), and the most important of these PRAs is Platts, a division of New York-based McGraw Hill Financial. (¶ 4).

Platts reports prices for various physical and financial products in the overall Brent crude oil market, termed: "Brent," "Dated Brent," "Cash BFOE" (or "Forward Dated Brent"), "North Sea Dated Strip," and contracts for difference ("CFDs"). (¶ 88). The primary pricing benchmark for Brent is known as "Dated Brent" or the "Dated Brent Assessment." (¶ 89). The Dated Brent Assessment represents the price of "wet" physical cargos of Brent – *i.e.*, cargos that have been assigned a vessel and specific delivery date – and is widely regarded as the physical "spot" price. (¶¶ 6, 88-89).[3]

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[2] Brent Futures includes all exchange-traded futures and derivative options contracts that are based upon Brent. These contracts are described in more detail in Table 1 below.

[3] As explained by ICE Futures Europe, Dated Brent and Cash BFOE are "related" measures of the "underlying physical market." *See* ICE Brent Crude Oil,

Brent Futures are based on the price of Brent, and are traded on two primary exchanges: (i) NYMEX; and (ii) ICE Futures Europe. (¶¶ 2, 20, 133-141). NYMEX is headquartered in the United States, and buyers and sellers on that exchange matched their trades in domestic open outcry pits, as well as at the Aurora, Illinois data center of its parent company, the Chicago Mercantile Exchange ("CME"). (¶ 135); (*see also* JA 1691 at ¶ 5) (Declaration of Sam Gaer ("Gaer Decl.")).

ICE Futures Europe, which is headquartered in London, is a subsidiary of Intercontinental Exchange, Inc., a Delaware corporation with its principal place of business in Atlanta, Georgia. (¶ 137). ICE Futures Europe maintains its electronic infrastructure for futures contract formation entirely in Chicago, Illinois. (JA 1691 at ¶ 4) (Gaer Decl.). Pursuant to ICE Futures Europe's Rules, the Illinois trading platform is the hub where all buy and sell orders are received, processed and matched to form binding contracts. (JA 1692 at ¶ 9, JA 1699-1701 at ¶¶ 41-51).

The most heavily traded Brent Future is the "ICE Brent Futures Contract," which has a corollary contract on the NYMEX. (¶ 175). Notably, although these

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Frequently-Asked Questions, at 6, *available at*: https://www.theice.com/publicdocs/futures/ICE_Brent_FAQ.pdf (last visited Oct. 31, 2017). "'Cash BFOE' . . . is a 'paper' or forward' cargo (within a stated contract of delivery month, but without a vessel, date or number attached)," while "'Dated Brent' . . . has all three elements." *Id.* "Cargoes from a 'cash' contract month are progressively 'wetted,' until the 25th day before the end of that delivery month, at which point all cargoes must become 'Dated.'" *Id.*

contracts purport to measure the forward price of Brent Crude Oil, *i.e.*, Cash BFOE, they overlap temporally with the Dated Brent Assessment period for approximately 10 days when the futures contract expires. JA 1553-58 (Culp Dep. at 211:18-216:20). This means that at futures expiration the ICE Brent Futures Contract settles to a period that includes "wet" physical cargos, the prices of which are determined by the spot price, *i.e.*, the Dated Brent Assessment. (¶ 88).

II. Platts' Calculation of the Dated Brent Assessment and ICE Futures Europe's Calculation of the ICE Brent Index

Platts calculates the Dated Brent Assessment based on a methodology that incorporates the prices for Cash BFOE, North Sea Dated Strip and CFDs. (¶¶ 89, 107-20). Platts determines the Dated Brent Assessment using a market-on-close ("MOC") process. (¶¶ 7, 66). The MOC process is intended to be based on actual arms-length market bids, offers, and transactions made during the half-hour period at the end of each trading day, which for Brent is between 4:00 p.m. and 4:30 p.m. London time (the "MOC Window"). (¶¶ 94, 97). If there are no completed trades during the MOC Window, Platts looks to unmatched bids and offers. (¶ 100). Platts relies on Defendants and other large physical Brent traders who meet the submission requirements to voluntarily report trade data during the MOC Window. (¶¶ 5, 536).

Several Brent Futures, including the ICE Brent Futures Contract, settle to a related pricing index, the "ICE Brent Index." (¶¶ 128 n.3, 178). The ICE Brent Index is calculated based on, *inter alia*, a weighted average of first month cargo

trades in the "first month" 25-day BFOE market, and "[a] straight average of designated assessments published in media reports." (¶ 179). As noted above, because of the temporal overlap between first month 25-day BFOE market and the Dated Brent Assessment period, for approximately 10 days at the expiration of the ICE Brent Futures Contract, the ICE Brent Index considers "wetted" cargos.[4] As such, the Dated Brent Assessment is one of the published media reports ("PMRs") incorporated into the ICE Brent Index during that overlap. (¶¶ 123, 179).

Indeed, Defendant Statoil's expert economist, Dr. Christopher L. Culp ("Dr. Culp"), admitted in his initial report that the Dated Brent Assessment is used in determining the ICE Brent Index. (JA 529 at ¶¶ 33, 86). Moreover, although Dr. Culp later tried to recant that admission, he confirmed that as a result of the temporal overlap between the first month BFOE market and the Dated Brent Assessment period, the ICE Brent Index will measure the more nearby "wet cargo" Dated Brent market for at least 10 days at futures expiration. (JA 1553-58 at 221:3-216:20).

III. All Brent Futures Prices Are Directly Linked to the Dated Brent Assessment

The prices of the Brent Futures at issue in this action are directly linked to the Dated Brent Assessment (¶¶ 121-137):

[4] *See* ¶ 126; JA 1553-58 (Culp Dep. at 211:18-216:20); *see also* n.3, *supra* (ICE Brent Crude Oil, Frequently-Asked Questions, at 6).

First, the ICE Brent Futures Contract – the most heavily-traded Brent Future – settles based on the ICE Brent Index. (¶¶ 128, 136, 178). As previously noted, the ICE Brent Index is calculated, in part, based on a straight average of designated PMRs, which includes Platts' Dated Brent Assessment. (¶¶ 128, 179(c)). Indeed, Platts has noted that "[f]utures settlements are often tied to [the] spot market Platts covers" and that "[d]erivatives 'price out' against Platts spot price assessments or futures settlements." (JA 1893).

Second, ICE Futures Europe permits the ICE Brent Futures Contract to settle at expiry based on physical delivery through what is known as the "exchange of futures for physical" mechanism ("EFP mechanism"). (¶¶ 64, 176). That settlement is based on a differential between the futures market and the physical market "spot price," *i.e.* the Dated Brent Assessment. (*Id.*); (*see also* ¶ 178 (ICE Futures Europe explaining that the "ICE Brent futures contract is linked to . . . *the underlying Dated Brent market* . . . .")) (emphasis added). Thus, unsurprisingly, the SAC demonstrates that ICE Brent Futures Contracts prices rarely deviate from the Dated Brent Assessment by more than 1% at expiration. (¶ 131 & C.E.3).

The following chart sets forth the pricing relationship between Brent Futures highlighted in the SAC and the Dated Brent Assessment/ICE Brent Index:

Table 1 **Futures and Derivatives Contracts Impacted by Changes in Dated Brent Prices**	
ICE Brent Futures Contract	Settlement linked to ICE Brent Index. (¶176).
ICE Brent NX Brent futures	Settlement linked to ICE Brent Index, updated to respond to Platts 25-day time-frame for *Dated Brent Assessment*. (¶ 180).
ICE Brent-WTI Futures Spread	Settled based on, *inter alia*, ICE Brent Futures Contract prices, which are linked to the ICE Brent Index. (¶ 187).
ICE Calendar Spread	Settlement based on two different ICE Brent Futures Contracts for different times, which are linked to the ICE Brent Index. (¶¶ 189-93).
ICE Crack Spread	Contract is linked to spreads between the *Platts daily assessment* price for New York 1% fuel oil and *ICE Brent Futures Contracts*. (¶ 196).
ICE Brent Crude Futures Minute Markers	Calculated using *a weighted average of Brent Crude Futures trades* done during a one-minute period from 4:29pm to 4:30pm GMT, which intentionally coincides with Platts' MOC Window. (¶ 203).
ICE Dated-to-Frontline Contracts	Contract is based on the difference on the *Platts daily assessment price for Dated Brent and the ICE daily settlement price for Brent 1st Line Future.* (¶ 209).
ICE Brent Options	Options on Ice Brent Futures, tied to the ICE Brent Index. (¶ 211).
ICE Daily CFD – Brent CFD vs Second Month Swap	Cash settled swap based on the difference between *Platts Dated Brent* and the second listed Platts BFOE month. (¶ 223).

NYMEX Brent Crude Oil Last Day Financial Futures (BZ)	Settlement linked to ICE Brent Index. (¶ 136).
NYMEX Brent Financial Futures (CY)	Settled based on, *inter alia*, ICE Brent Futures Contract prices, which are linked to the ICE Brent Index. (¶ 136).
NYMEX Brent Crude Oil Penultimate Financial Futures (BB)	Settled based on, *inter alia*, ICE Brent Futures Contract prices, which are linked to the ICE Brent Index. (¶ 136).
NYMEX Brent Crude Oil vs. Dubai Crude Oil (Platts) Futures (DB)	Settled based on, *inter alia*, ICE Brent Futures Contract prices, which are linked to the ICE Brent Index. (¶ 136).
NYMEX WTI-Brent Financial Futures (BK)	Settled based on, *inter alia*, ICE Brent Futures Contract prices, which are linked to the ICE Brent Index. (¶ 136).
NYMEX Brent CFD: Dated Brent (Platts) vs. Brent Front Month (Platts) Daily Futures (1C)	Settled based on CFD assessment which, in turn, is based *on Dated Brent*. (¶ 136).
NYMEX Brent EFS	An on-exchange transaction by which a swap is exchanged for a futures contract, tied to the ICE Brent Index. (¶ 136).

Third, the record amply demonstrates that changes in the Dated Brent Assessment directly impacted Brent Futures prices. Plaintiffs' expert economist, Professor H. Nejat Seyhun ("Professor Seyhun"), analyzed the relationship between "spot, physical prices such as Platts Dated Brent," and Brent Futures. (JA 1740 at ¶ 9) (Declaration of Professor H. Nejat Seyhun ("Seyhun Decl.")). He opined that: (i)

"the future price of oil is based on the spot price of oil plus a term called cost-of-carry," which "tells us that spot and futures price cannot be independent from each other"; and (ii) "any manipulation of the spot would be transmitted approximately one-for-one into the futures prices." (JA 1740, 1743 at ¶¶ 12, 13, 17).

Professor Seyhun also performed several regression analyses, and concluded that "there is a strong contemporaneous relation between the [ICE] Brent Index and Dated Brent." (JA 1746 at ¶ 28). In particular, he found that: (i) approximately 78% of the variation in Dated Brent returns is reflected in the ICE Brent Index the same day (*id.*); (ii) 93% of the variation in Brent Futures prices "is explained by variation in the spot price" (JA 1747 at ¶ 32); and (iii) therefore spot prices are "the most important determinant of the variations in futures prices" (*id.*). This means that "if spot prices are distorted through manipulation, most, if not all, of these manipulations would be transmitted into the futures prices." (*Id.* at ¶ 33).

Statoil's expert, Dr. Culp, agreed that the "[t]he prices for Dated Brent contracts are often referred to as the 'spot' (*i.e.*, immediate) prices," and that the price of a futures contract is "based on," *inter alia*, "the current spot price [*i.e.*, Dated Brent price] of the same quality and stream of crude oil . . . ." (JA 970, 990 at ¶¶ 23, 83) (Corrected Culp Decl.).

IV. The MOC Process Is Highly Susceptible to Manipulation

Platts' MOC process is highly susceptible to manipulation for several reasons. First, there are relatively few trades made during the MOC Window due to its short duration. (¶¶ 376-77, 380). Second, there are few traders with the physical and financial resources necessary to accept the cargo sizes required to participate in the MOC. (¶¶ 104, 115, 128, 380). Third, because Dated Brent is pegged to the cheapest of the four BFOE streams, which is usually the Forties stream, the benchmark market is significantly smaller than the full BFOE production. (¶¶ 86-87). Fourth, trades are limited by the availability of ocean freight on short notice. Fifth, Platts has an incentive to turn a blind eye to manipulation to protect the Brent brand. (¶¶ 86-87).

In addition, Platts consistently failed to monitor, investigate and exclude suspicious trades from the Dated Brent Assessment. (JA 1709, 1711-12, 1715 at ¶¶ 18, 26-27, 45-46 (Expert Report of Edward Osterwald ("Osterwald Report")). Specifically, Platts "rarely obtains written confirmation (*e.g.*, contracts, loading documents, etc.)" from submitters, and instead simply relies "on the companies' own statements that a trade has taken place." (JA 1711 at ¶¶ 22-24). Consistent with its lack of oversight, Platts publicly disclaims any responsibility for the accuracy of the trade data underlying the Dated Bent Assessment. (*Id.* at ¶¶ 23-24).

V. Defendants Manipulated the MOC Process and Thereby Manipulated Brent Futures Prices

Defendants are producers, refiners and traders of Brent crude oil. (SPA 52). During the period of alleged manipulation, many Defendants engaged in the importation of massive amounts of physical Brent into the United States and all Defendants made extensive Brent Futures trades. (¶¶ 42-48, 476-77, 479, 491, 532).

During the Class Period – which covers 2002 through February 2015 (¶ 1) – Defendants variously conspired to take advantage of the MOC process's inherent manipulability, and repeatedly and episodically distorted the Dated Brent Assessment to benefit their physical Brent and Brent Futures positions. (¶¶ 251-419).[5] In particular, the SAC examines four "exemplary" periods: June 2010; January 2011; February 2011; and September 2012. (*Id.*). The examples provided during these exemplary periods establish that Defendants not only had the ability to artificially manipulate the price of the Dated Brent Assessment, but also did so to benefit their own trading books. (*Id.*). And while Defendants' manipulation took several forms – such as through "sham" or "wash" trades[6] – it had the common effect

[5] Plaintiffs do not allege a single overarching conspiracy among all Defendants for the full Class Period. Nor do they allege that the Brent physical market was monopolized by all Defendants simultaneously.

[6] Plaintiffs allege that the transactions described in the SAC were artificial, and use terms "sham" and "wash" trades to describe trades that are not, in fact done at arms-length, and for which other consideration changed hands outside of the MOC.

of distorting Brent Futures prices. (*Id.*). Several of Defendants' manipulations are highlighted below:

June 9-10, 2010 Sham Trade: Vitol traded physical Brent to BP on June 9, 2010, only to engage in the same trade in reverse the next day but at $0.19 lower per barrel than the previous day. (¶ 261).

June 15, 2010 Futures Expiry Manipulation/Sham Trades: On the June 15, 2010 expiry of the July ICE Brent Futures Contract, Statoil sold Shell *the same cargo* it had bought from Shell the prior week, in a collusive and manipulative transaction on June 8, 2010. (¶¶ 254, 270-71). Separately, Hetco sold Morgan Stanley a cargo at a depressed price for loading July 6-8. (¶ 270). Hetco intentionally withheld selling this cargo earlier in the day specifically so it could sell it during the MOC. (*Id.*).

January 13-14, 2011 Sham Trade and Manipulation at Futures Expiration: On January 13, 2011, Shell sold a Brent (BNB) cargo to Mecuria and then bought it back the next day, at a massive loss. There was no economic justification for this transaction other than to manipulate BNB prices. (¶¶ 286-87). Simultaneously, on the January 14, 2011 expiry day, Vitol, Hetco and Statoil engaged in a number of transactions designed to inflate the Dated Brent Assessment and ICE Brent Futures. (¶¶ 289-90, 303).

Late January 2011 Sham Trade and Manipulation: On January 27, 2011, Hetco drove down BNB prices by an astonishing $0.65 per barrel in one day, causing BNB to be the cheapest of the BFOE blends, which typically was the Forties blend. (¶ 310). As a result of this anomalous price movement, BNB instead of Forties was used in setting the Dated Brent Assessment on that day, contrary to customary market behavior. (*Id.*).

February 21, 2011 Spoof Orders: STASCO spoofed the market by offering 2.4 million barrels on terms that would have made it exceedingly difficult to obtain freight. The point of the offer was not to find a purchaser, but to move prices, in order to benefit its short CFD position. (¶¶ 337-39).

February 24, 2011 Suppression of Nearby Brent: STASCO (aided by Morgan Stanley) suppressed prices and manipulated the relationship between the North Sea Dated Strip and the Forties stream components of the Dated Brent Assessment to advantage its CFD position. (¶¶ 345-58).

September 17-18, 2012 Sham Trade: BP sold Phibro a Forties cargo, which Phibro immediately reoffered the next day at a significantly lower price. (¶ 397).

September 25-28, 2012 Sham Trades and Suppression: STASCO sold Trafigura a cargo, but then inexplicably reoffered *the same exact cargo* the next day. (¶¶ 399-400). This behavior is indicative of a sham trade intended solely to influence

the Dated Brent Assessment. (¶ 400). Remarkably, STASCO offered and withdrew *that same cargo* yet again on September 28, 2012. (¶ 404).

In addition to these specific examples of manipulation, Plaintiffs provided compelling statistical evidence showing that Defendants manipulated Brent Futures by manipulating Platts' MOC for the spot market. (¶¶ 232-33). Specifically, from January 4, 2010 to March 24, 2014, the trade data Defendants submitted during the MOC Window resulted in an *18.4% decrease* in ICE Brent Futures prices. (¶¶ 273, 249). However, when that MOC data is excluded, pricing trends during the remainder of the trading day would have resulted in a *64.6% increase* in ICE Brent futures over the same time-period. (¶ 233 & Charts C.E. 4-6). This strong divergence between non-MOC and MOC market trends underscores Defendants' substantial power to affect prices. (¶ 233 & Charts C.E. 4-6, ¶ 234).

Plaintiffs also show a statistically significant pricing phenomenon known as a "double reversal." Essentially, pre-MOC price trends reversed during the MOC, and then reversed back post-MOC to be in line with pre-MOC trends. (¶¶ 236-37, 249). This evidence further corroborates the conclusion that Brent crude oil prices did not behave as one would have expected under typical supply-demand conditions in a competitive market. (¶ 240). Notably, these double reversals substantially overlap with the dates of the Defendants' manipulation, as shown in the following table:

Examples of Double Reversals During Alleged Manipulation		
Date	*Direction of Manipulation*	*Defendants Involved*
6/10/2010 (¶ 261)	Suppression	BP, Vitol
6/15/2010 (¶¶ 276-77)	Suppression	BP, Hetco, STASCO, Statoil, Vitol
1/13/2011 (¶ 282)	Inflation	Vitol, Hetco, Statoil
1/28/2011 (¶ 316)	Suppression	Hetco, Shell, Statoil
2/21/2011 (¶ 343)	Suppression	STASCO, Morgan Stanley
9/27/2012 (¶¶ 403, 406)	Suppression	STASCO, Trafigura
9/28/2012 (¶¶ 404-06)	Suppression	STASCO, Trafigura, Vitol

Defendants' price manipulation directly injured Plaintiffs, who purchased and sold hundreds of thousands of Brent Futures. (¶ 429); (*see also* JA 1077-78 at ¶ 5) (Declaration of David E. Kovel).

VI. The District Court's Decisions on Defendants' Motions to Dismiss

A. The District Court Dismisses the Claims Against Statoil ASA Pursuant to the FSIA

In an Opinion and Order dated March 29, 2016, the district court dismissed Plaintiffs' claims against Statoil for lack of subject matter jurisdiction under the FSIA. (SPA 1-27). Among other rulings, the district court concluded that Plaintiffs had failed to satisfy the third clause of the commercial activities exception, because Defendants' misconduct purportedly did not cause a "direct effect" in the United States. (SPA 21-27). In particular, the Court found that Platts' and ICE Futures Europe's potential discretion to exclude aberrant trades from the Dated Brent

Assessment and the ICE Brent Index, respectively, constituted intervening third-party action that broke the causal chain. (SPA 23-35).

In so ruling, the district court largely ignored the expert report of Plaintiffs' industry expert, Mr. Edward Osterwald, who: (i) recounted that he had personally met with Platts representatives who informed him that Platts generally *does not* investigate submitted trades in order to exclude aberrant transactions; and (ii) provided several examples of manipulative trades that Platts did not investigate or exclude. (JA 1711-15 at ¶¶ 22-24, 26-46) (Osterwald Report). The district court similarly ignored that: (i) Statoil presented *no evidence* that that any of the aberrant trades identified in the SAC were ultimately excluded from the Dated Brent Assessment; and (ii) Statoil's expert, Dr. Culp, *had no knowledge* of whether Platts, in fact, investigates trade submissions prior to including them in the Dated Brent Assessment. (JA 1384-87 at 42:22-45:18). Nor did the district court acknowledge that the record was devoid of evidence that ICE Futures Europe excluded any data in determining the ICE Brent Index.

Rather, the district court premised its ruling *on a single instance*, not directly related to the transactions underlying Plaintiffs' claims, where it appeared that Platts excluded trade data. (SPA 24). In essence, the district court turned the one exception into the rule, in order to manufacture third-party conduct purportedly sufficient to disrupt the causal chain.

B. The District Court Dismisses the Claims Against STASCO for Lack of Personal Jurisdiction

1. STASCO's Structure and Contacts with the United States

STASCO, a British corporation, is part of the RDS conglomerate. (¶ 35). STASCO employees and executives run RDS' crude oil trading and financing operations, and have ultimate control of crude oil trading operations in the United States, through an internal arrangement known as Shell Trading. (JA 2190-91 at 13:7-14:1). Shell Trading is not a separate legal entity but an "umbrella organization" created by RDS to consolidate its global trading operations, which span fifteen RDS companies worldwide. (*Id.*). Shell Trading's purpose is to "provide one brand . . . a single face to the market." (JA 2267 at 90:15-17).

Shell Trading is not managed on a company-by-company basis, but on a product-by-product basis. (JA 2215 at 38:19-20). In this manner, Shell Trading is not run by a separate board of directors, but is managed by a committee of Vice Presidents known as Vice President Leadership Team, or VPLT. (JA 2234 at 57:8-11). Those Vice Presidents hail from various RDS companies – including STASCO – and represent specific product areas. (*Id.*).

STASCO's executives in London: (i) oversee all risk management and financing of Shell Trading, including crude oil trading in the United States, (JA 2229 at 52:2-22); and (ii) are in charge of crude oil traders at Shell Trading US Company ("STUSCO"), a United States company that is part of Shell Trading. (JA 2273 at

96:3-8). Among other trading activities, STUSCO employees under STASCO's supervision trade the relationship between West Texas Intermediate ("WTI") oil and Brent, by taking WTI positions on the NYMEX. (JA 2245-46 at 68:21-69:1). Additionally, STASCO trades Brent Futures on ICE Futures Europe. (¶ 470). Irrevocable liability for these contracts occurs in Chicago, Illinois, and those positions are taken in coordination with STUSCO's WTI NYMEX positions.[7] (JA 2245-56, 2245-50 at 68:18-69:1, 69:18-20, 72:20-73:4).

2. The District Court's Ruling

In an Opinion and Order dated June 8, 2017, the district court held that it lacked specific personal jurisdiction over STASCO because Plaintiffs purportedly did not "connect STASCO's contacts with the United States to the allegations in their Complaint," or show that STASCO expressly aimed its conduct at the United States. (SPA 37).

The district court discredited the evidence that a STASCO executive directed all crude oil trading activity, including trading in the United States, because the STASCO executive acted "in his capacity as a member of [Shell Trading's] VPLT." (SPA 38). In so ruling, the district court ignored that: (i) neither Shell Trading nor its VPLT is a separate legal entity, but is simply an amalgamation of employees from

[7] Notably, STATSCO and STUSCO have previously coordinated WTI crude oil trades on the NYMEX in violation of the CEA. (JA 2349-56).

various RDS entities; and (ii) another STASCO executive was responsible for risk management oversight and funding of, *inter alia*, STUSCO's crude oil trading activities in the United States. (JA 2190-91 at 13:7-14:1, JA 2229 at 52:2-11, JA 2273 at 96:3-8).

The district court also concluded that STASCO's manipulation of the Dated Brent Assessment was not directed towards the United States even though: (i) "[i]t is undisputed that STASCO is part of Shell Trading, and that other Shell Trading Entities, including STUSCO, trade Brent derivatives in the United States;" and (ii) "STASCO might have known its allegedly manipulative conduct may ultimately benefit the business of other RDS entities operating in the U.S." (SPA 41).

C. The District Court Dismisses Plaintiffs' CEA Claims as Impermissibly Extraterritorial and their Clayton Act Claims for Failure to Plead Antitrust Injury

In a separate Opinion and Order also dated June 8, 2017, the district court dismissed Plaintiffs' CEA claims as impermissibly extraterritorial, and their Clayton Act claims for failure to plead antitrust injury. (SPA 52-81).[8]

With respect to the CEA claims, the district court began its analysis by "assuming that the relevant transactions are those arising *on domestic exchanges* within the meaning of *Morrison*." (SPA 65) (emphasis added). Nonetheless, the

[8] This short decision, which disposed of all claims against all Defendants and rendered superfluous the district court's FSIA and personal jurisdiction decisions, took nearly 3 years to issue after full briefing on the motions to dismiss.

district court concluded that Plaintiffs' claims were impermissibly extraterritorial under this Court's *Parkcentral* decision, because "the crux of their complaints against Defendants does not touch the United States." (SPA 66). In so ruling, the district court did not address whether *Parkcentral* even applies to cases concerning transactions on domestic exchanges. (SPA 66-67).

Turning to Plaintiffs' Clayton Act claims, the district court concluded that Plaintiffs had not alleged antitrust injury because they alleged manipulation of the wrong benchmark. (SPA 71-75). The district court began its analysis by rewriting Plaintiffs' definition of the relevant market to include only "the physical Brent crude oil market and the market for any derivative instrument that *directly incorporates* Dated Brent as a benchmark or pricing element." (SPA 72) (emphasis added).

Based on its reworked market definition, the district court next concluded that Plaintiffs "have not alleged manipulation of the *relevant* benchmark," because the majority of Brent Futures at issue are pegged to the ICE Brent Index, which "does not incorporate dated Brent into its calculation." (*Id.*). In so ruling, the district court did not address Plaintiffs' contrary allegations and evidentiary submissions. (SPA 71-75).

Nor did the district court address that ICE Futures Europe stresses the interrelationship between the ICE Brent Index and the Dated Brent Assessment. (*Id.*). For example, ICE Futures Europe describes its most heavily traded product –

which settles to the ICE Brent Index – as "*linked to* . . . the underlying Dated Brent" benchmark price. (¶ 178) (emphasis added).

SUMMARY OF THE ARGUMENT

As discussed below, the district court erred in concluding that: (i) Plaintiffs failed to plead antitrust injury; (ii) Plaintiffs' CEA claims were impermissibly extraterritorial; (iii) it lacked subject matter jurisdiction over the claims asserted against Statoil under the FSIA; and (iv) it lacked personal jurisdiction over STASCO.

First, the district court erred in holding that Plaintiffs did not plead antitrust injury because the Dated Brent Assessment purportedly is not directly incorporated into Brent Futures prices. The SAC alleges, and the record establishes, that the Dated Brent Assessment is factored into the price of all Brent Futures, and, in any event, well established antitrust law does not require such a relationship to plead antitrust injury. *See* Point I, *infra*.

Second, Plaintiffs' CEA claims are not impermissibly extraterritorial because the transactions at issue occurred on domestic exchanges, and, in any event, irrevocable liability arose in the United States under the exchanges rules because that is where the trades were matched and the contracts were formed. *See* Point II, *infra*.

Third, the district court is wrong that Plaintiffs failed to establish the commercial activities exception because Platts' discretion to exclude aberrant trade data from the Dated Brent Assessment broke the causal chain. Plaintiffs' theory of the case – which is supported by the record – is that Defendants were able to manipulate the Dated Brent Assessment because Platts *did not exclude* their submission of false trade data. *See* Point III, *infra*.

Lastly, the district erred in attributing the jurisdictional contacts of STASCO's executives – which include oversight of all crude oil futures and derivatives trading in the United States – to Shell Trading. Shell Trading is not a separate legal entity, but an administrative convenience created by Royal Dutch Shell and overseen by employees of its constituent members, including STASCO. As such, the jurisdictional contacts of STASCO's executives are attributable solely to STASCO. *See* Point IV, *infra*.

ARGUMENT

I. The District Court Erred In Holding That Plaintiffs Failed To Plausibly Allege Antitrust Injury

A. Legal Framework and Standard of Review

The Supreme Court construes the Clayton Act to require a showing of antitrust injury. *See Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016). An antitrust injury is an injury of the type the antitrust laws were intended to prevent, and which flows from the defendant's violation. *See Brunswick Corp. v. Pueblo*

Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). An "antitrust injury 'should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.'" *Gelboim*, 823 F.3d at 772 (quoting *Brunswick Corp.*, 429 U.S. at 489). This Court reviews a district court's decisions to dismiss for failure to plead an antitrust injury *de novo*. *See id.* at 769-70.

B. Plaintiffs Have Pled Antitrust Injury

At its heart, the SAC alleges that Plaintiffs were injured because they traded Brent Futures at prices that did not reflect legitimate market forces, owing to Defendants' conspiracy to manipulate the price of the underlying commodity, *i.e.*, the Dated Brent Assessment. As the Court recently held, this is a paradigmatic antitrust injury: "when consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions, they suffer 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Gelboim*, 823 F.3d at 772 (quoting *Brunswick Corp.*, 429 U.S. at 489).

Accordingly, because Plaintiffs plausibly "identified an illegal anticompetitive practice (horizontal price-fixing), . . . claimed an actual injury placing [Plaintiffs] in a worse position as a consequence of the [Defendants'] conduct, and . . . demonstrated that their injury is one the antitrust laws were

designed to prevent," they have pled an antitrust injury. *Gelboim*, 823 F.3d at 775 (internal citation and quotation marks omitted).

C. The District Court's Decision Is Host to Numerous Errors Requiring Reversal

The primary rationale for the district court's ruling is as follows: (i) the relevant market, *as redefined by the district court*, is limited to those Brent Futures that "directly incorporates Dated Brent as [a] benchmark or pricing element"; (ii) the vast majority of the Brent Futures at issue purportedly are not priced pursuant to the Dated Brent Assessment, but settle to the ICE Brent Index; (iii) the ICE Brent Index "does not incorporate Dated Brent into its calculation"; and (iv) therefore Plaintiffs lack antitrust standing. (SPA 71-75). As discussed more fully below, the district court committed numerous factual and legal errors requiring reversal.

1. Contrary to the District Court's Holding, the Record Establishes that Dated Brent is Incorporated into Brent Futures Prices

Assuming *arguendo* that the district court was not only empowered to disregard Plaintiffs' definition of the relevant market, but also correctly redefined it, the district court simply ignored Plaintiffs' allegations and evidentiary submissions showing that Dated Brent is a direct factor in the ICE Brent Index.

The SAC makes clear that the ICE Brent Index is determined based, in part, on the Dated Brent Assessment. Among other allegations, the SAC plainly states: "A critical component of the Brent Index is the *Platts prices*. The settlement price

for the Brent futures therefore is determined by *the Platts Brent Crude Oil prices* [*i.e.*, Dated Brent]." (¶ 128) (emphasis added); (*see also* ¶¶ 176-80). Thus, the district court's conclusion that the SAC failed to connect Platts' Dated Brent Assessment and the ICE Brent Index is flat wrong.

The district court appears to have inferred that the Dated Brent Assessment is not factored into the ICE Brent Index because Dated Brent is not explicitly mentioned in the definition of the Index, which is calculated based on:

> a. A weighted average of first month cargo trades in the 25-day BFOE market;
>
> b. A weighted average of second month cargo trades in the 25-day BFOE market plus a straight average of the spread trades between the first and second months; and
>
> c. A straight average of designated assessments published in media reports [*e.g.*, Platts].

(¶ 179) (emphasis added). But, when given a fair reading, Plaintiffs' allegations yield the opposite inference, and establish that the Dated Brent Assessment is incorporated into the ICE Brent Index. *See Kavowras v. The New York Times Co.*, 328 F.3d 50, 54 (2d Cir. 2003) (district court erred when it did not read the complaint in the light most favorable to plaintiff in deciding a 12(b)(6) motion).

The ICE Brent Index considers "designated assessments published in media reports." (¶ 179). As the SAC explains, Platts' Dated Brent Assessment is not only *the most important* published media report, but it is also widely considered to be the

Brent spot price. (¶ 6). As such, clear inference arising from these allegations is that the Dated Brent Assessment is one of the published media reports that is considered in calculating the ICE Brent Index.[9]

Notably, the district court failed to address the fact that Defendant Statoil's expert economist, Dr. Culp, admitted in his initial report that Dated Brent was, in fact, one of the published media reports factored into the ICE Brent Index:

> The Platts price assessment that is incorporated into the overall ICE Brent Index is only one of several inputs. *The ICE Brent Index does not rely exclusively on Platt's Dated Brent price assessments that Plaintiffs allege were distorted by Defendants' trading activities.*

(JA 548 at ¶ 86) (emphasis added).

Although Dr. Culp sought to recant that admission in a corrected report prepared *three months later*, he still admitted that "[t]he prices for Dated Brent contracts are often referred to as the 'spot' (*i.e.*, immediate) prices for Brent crude cargoes" and that the price of a futures contract "*is based on the current spot price* [*i.e.*, Dated Brent] of the same quality and stream of crude oil . . . ." (JA 971, 990 at ¶¶ 23, 83) (Corrected Culp Decl.).

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[9] *See N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 121 (2d Cir. 2013) ("[T]he existence of other, competing inferences does not prevent the plaintiff's desired inference from qualifying as reasonable *unless at least one of those competing inferences rises to the level of an obvious alternative explanation*.") (internal quotation marks omitted and emphasis added).

Additionally, at deposition, Dr. Culp testified that the next month 25-day BFOE market – which is a component of the ICE Brent Index – overlaps temporally with the Dated Brent Assessment period for approximately 10 days at expiration of the ICE Brent Futures Contract (and its NYMEX equivalent). This means that, for those days, the cargos that fall within the expiring Brent Futures contract market are, in fact, "wetted" cargos that are priced pursuant to the Dated Brent Assessment. (JA 1553-58 at 211:18-216:20). Thus, the most relevant PMR the ICE Brent Index will consider for those days is the Dated Brent Assessment, *i.e.*, the spot price for wetted cargos.

In fact, the SAC provides a real-world example of this relationship. On June 15, 2010, the day of July 2010 futures expiry, Platts reported two cargo trades both with loading dates in July that were within the Dated Brent Assessment period. (¶¶ 269-70). Thus, on this day, the two cargos would be integral to the July price assessment of ICE Brent Futures, because the July market is partially "wet." The price for those cargos would determine Dated Brent, and would be incorporated into the ICE Brent Index for July futures expiration. (¶ 178).

Not only did the district court fail to credit these allegations – let alone read them in the light most favorable to Plaintiffs – it further ignored that ICE Futures Europe, the entity that calculates the ICE Brent Index, has repeatedly stressed the direct relationship between that index and the Dated Brent Assessment. (¶ 178).

This relationship is most aptly demonstrated by the fact that ICE Futures Europe allows expiring ICE Brent Futures Contracts – which settle to the ICE Brent Index – *to be satisfied by delivery of an equivalent Dated Brent position* through the EFP mechanism. In ICE Futures Europe's own words, this means that the "ICE Brent futures contract *is linked* to . . . *the underlying Dated Brent market*." (¶ 178) (emphasis added). Dr. Culp confirmed this relationship, testifying that:

> The underlying of the expiring futures contract is the 25-day one-month Brent forward contract, the BFOE . . . . So . . . depending on where you are in the month, *can become . . . deliverable into Dated Brent even immediately*, depending on the date of the expiration . . . .

(JA 1553-54 at 211:18-212:4 (emphasis added); *see also id.* at 213:10-11 (when an ICE Brent Futures Contract is near expiration "then you can EFP into the equivalent of a Dated Brent position")).

Finally, and further consistent with this relationship, the SAC includes a study showing that at futures expiration, Dated Brent and the ICE Brent Index correspond to such a degree that they rarely depart by more than 1%. (¶ 131 & C.E.3).

* * * * *

In sum, even if the district court correctly determined that the relevant market included only "derivative instruments that directly incorporate Dated Brent as a benchmark or pricing element," it is flat wrong that "the ICE Brent Index does not incorporate Dated Brent into its calculation." (SPA 72-73). Accordingly, the district court's decision must be reversed.

2. The District Court Misread and Failed to Credit Plaintiffs' Allegations in Artificially Narrowing the Relevant Market

Even if the Dated Brent Assessment is not directly incorporated into the ICE Brent Index, the district court's narrowing of the relevant market *to require* that relationship is based on a misunderstanding of Plaintiffs' theory of the case, and must be reversed. (SPA 71-76).

The district court began its analysis by correctly noting that Plaintiffs defined the relevant market as the "Brent Crude Oil Market, which comprises: (i) the Brent Crude Oil physical cargo market . . . ; (2) NYMEX Brent Futures, ICE Brent Futures and other Brent Crude Oil derivatives; and (3) the Platts market for various types of physical cargos and derivatives thereon." (SPA 70). The district court further correctly noted that "it [was] bound by the factual allegations" of the SAC. (SPA 71). Nonetheless, the district court proceeded to "examine the facts alleged in the [SAC] to determine what market or markets allegedly were restrained *based on Plaintiffs' theory of the case*." (SPA 71) (emphasis added).

With this warrant, the district court concluded that the SAC alleges only manipulation of Brent Futures that directly incorporate the Dated Brent Assessment as an express element of their settlement terms. (SPA 72-73). The district court then somehow read the exact *same* allegations purportedly yielding this narrower

definition of the relevant market to *exclude* virtually all the Brent Futures mentioned in those *same allegations*.[10] (*Id.*).

Putting aside that this odd analysis has all the hallmarks of working backwards to reach a preconceived result, the district court misstated Plaintiffs' theory of the case and read the SAC's allegations in the light least favorable to Plaintiffs. As discussed below, while the SAC does allege express incorporation, it also alleges a direct relationship between the Dated Brent Assessment and the price of Brent Futures *even in the absence of express incorporation.*

In fact, the district court conceded that Plaintiffs' allegations were not based solely on a direct incorporation theory. (SPA 71-72). Specifically, the district court recounted that Defendants' manipulation allegedly injured Plaintiffs "because the Dated Brent assessment is incorporated into certain futures and derivatives products *. . . and also closely correlates with the ICE Brent Index which serves as the benchmark for other Brent futures and derivatives products traded on the NYMEX and ICE*." (SPA 71) (emphasis added). However*, in the very next sentence* of its opinion, the district court erroneously jettisoned the second half of Plaintiffs' theory, to hold that the SAC spoke only to Brent Futures "that directly incorporate[] Dated

[10] Although the district court noted that Plaintiffs did "identify a handful of derivative contracts . . . that incorporate Dated Brent as a pricing benchmark," it held that the SAC "is devoid of any allegations that the Trader Plaintiffs or any of the Defendants, in fact, participated in this restrained market." (SPA 73).

Brent as a benchmark or pricing element." (SPA 72). The decision requires reversal on this obvious error alone.

Compounding its error, the district court also ignored numerous well-pleaded allegations establishing the close causal relationship between the Dated Brent Assessment and Brent Futures prices, *regardless of direct incorporation*. For example, Plaintiffs alleged that Brent Futures traders "rely on the prices published by Platts and the other PRAs for price discovery and for assessing price risks in the Brent Crude Oil market":

> An increase in the price published by Platts signals either stronger demand or weakened supply, and futures traders take account of both price movements and changes in the supply/demand balance when conducting their futures trading . . . . Generally and including during the Class Period, Brent Crude Oil futures and exchange-based derivatives prices derive their valuation from observable transactions.

(¶ 125).

Additionally, Plaintiffs alleged that: (i) "Brent Crude Oil spot and futures prices move in the same direction," which "is why futures markets are used to hedge price exposure"; (ii) "[p]ricing trends in the Brent Crude Oil spot market directly affect Brent Crude Oil futures"; (iii) Brent Futures prices are "linked to Platts' and other PRAs' pricing assessments of market participants' transactions"; and (iv) "reporting inaccurate or misleading Dated Brent and Brent Crude Oil transactional prices – as Defendants are alleged to have done – "also results in artificial prices for

the Brent Crude Oil futures contracts and other related derivative contracts." (¶¶ 126, 127).

The SAC also includes an analysis comparing Dated Brent prices and daily ICE Brent Futures Contract prices, which shows correlations that range between 85% and 100%, and often exceed 90%. (¶ 129). Moreover, at futures expiration the relationship is essentially 100%. (¶ 131, C.E.3). Those results indicate that price information was transferred through the Dated Brent Assessment to Brent Futures, and that any manipulation that distorted Platts' prices during the MOC Window was reflected in futures prices. (¶¶ 129-32). Additionally, the impact of the Dated Brent Assessment on ICE Brent Futures Contracts was further established by the SAC's "double reversal" study, showing aberrant price movements at 4:30 p.m. London Time at the end of the MOC Window. (¶¶ 263-37 & C.E. 7-9).

The district court also ignored Professor Seyhun's analyses showing that "that there is a strong contemporaneous relation between [the] Brent Index and Dated Brent." (JA 1746 at ¶ 28) (Seyhun Rebuttal Report). Among other findings, Professor Seyhun's regression analyses revealed that: (i) "[a]pproximately 78% of the variations in Dated Brent returns are reflected in Brent Index returns within the same day," (JA 1746 at ¶ 28 & Ex. 1); (ii) "crude oil spot and futures prices as well as [the] Brent Index represent a highly integrated market" (JA 1747 at ¶ 33); and (iii)

"if spot prices are distorted through manipulation, *most if not all of these manipulations would be transmitted into the futures prices*," (*id.*) (emphasis added).

Finally, Professor Seyhun also explained that the "cost-of-carry" relation directly links the Dated Brent Assessment with Brent Futures prices, including those settled based on the ICE Brent Index:

> [T]he price of a given cargo of crude oil for future delivery *is based on the current spot price* of the same quality and stream of crude oil, the physical cost of storing that oil until the future delivery date, the net benefit of having ownership . . . and the interest rate . . . . This relation is known as the "cost of carry" . . . .

(JA 1740 at ¶ 11) (quoting JA 546-47 at ¶ 83 (Culp Decl.)). Professor Seyhun concluded that, based on "th[e] structural (causal) relation between futures and spot prices" resulting from the "cost of carry relation," "spot and futures price cannot be independent from each other." (JA 1740 at ¶¶ 12, 13). Dr. Culp is in agreement. (JA 546-47 at ¶ 83) (Culp Decl.).

In sum, because the district court's antitrust injury determination was driven by its narrowing of the relevant market, which was based on a failure to credit, and a misreading of, Plaintiffs' allegations, the district court's decision must be reversed. *See Gelboim*, 823 F.3d at 771 ("Since appellants allege that the LIBOR 'must be characterized as an inseparable part of the price,' and since we must accept that allegation as true for present [pleading] purposes, the claim is one of price-fixing."); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 989 (9th Cir. 2000) ("The

defendants here contend that they are in one market (cheese) while the plaintiffs are in another (fluid milk). But the complaint's allegations unmistakably place all parties in the milk market . . . and even have them transacting business with each other. For present purposes those allegations must be accepted as true.").

3. The District Court's Antitrust Injury Analysis Is Contrary to Established Antitrust Precedents

As discussed below, even if Plaintiffs had not supplied the very allegations the district court claimed were lacking to adequately plead antitrust injury, the district court's overly restrictive view of the relevant market is contrary to well-established law.

The district court began its discussion of antitrust injury by correctly observing that "[c]ourts in this Circuit consider manipulation of a price benchmark to constitute restraint of the market which that *benchmark guides*." (SPA 72) (emphasis added). But then, without citation to any authority, the district court concluded that a pricing benchmark only guides those markets for which the benchmark is an expressly incorporated pricing element of the product at issue. (SPA 73-75).

But, the antitrust law is not so restrictive. To the contrary, "the machinery employed by a combination for price-fixing is immaterial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *see also Gelboim*, 823 F.3d at 775. Nor is there any "barrier to combining in a single market a number of different products

or services where that combination reflects commercial realities." *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966). Moreover, the Supreme Court has eschewed black-letter rules limiting what constitutes antitrust injury:

> There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause," and the struggle of federal judges to articulate a precise test to determine whether a party [is] injured by an antitrust violation . . . . *In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case*.

Assoc'd Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535-36 (1983) ("*AGC*") (emphasis added). The rigidity of the district court's approach should be a red flag in and of itself.

The crucial question for antitrust injury, however, is whether the plaintiff has suffered harm of the kind the antitrust laws seek to prevent: a reduction of competition in the market in which it operates. This is the true meaning of the market analysis in *McCready*, as explained by the Supreme Court in *AGC*:

> McCready alleged that she was a consumer of psychotherapeutic services and that she had been injured by the defendants' conspiracy to restrain competition in the market for such services. The Court stressed the fact that McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws.

459 U.S. at 538 (internal citation and quotation marks omitted). The *directness* of the relationship between the violation and the harm is addressed by the other *AGC* factors – not by the question of antitrust injury.

Thus, courts have long recognized that consumers of commodities derivatives make at least a threshold showing of antitrust injury when claiming manipulation of the price of the underlying commodity. *See, e.g.*, *Gelboim*, 823 F.3d at 774; *see also In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789, 2016 WL 5108131, at *6 (S.D.N.Y. Sept. 20, 2016); *In re Commodity Exch., Inc.*, 213 F. Supp. 3d 631, 652 (S.D.N.Y. 2016); *In re London Silver Fixing, Ltd., Antitrust Litig.*, 213 F. Supp. 3d 530, 551-52 (S.D.N.Y. 2016).

The Seventh Circuit's decision in *Sanner v. Bd. of Trade of the City of Chi.*, is instructive. There, a group of soybean farmers alleged that the Chicago Board of Trade ("CBOT") conspired to depress the prices of soybean futures by adopting a resolution that caused the prices of soybean futures – and, in turn, the cash market for soybeans – to decline. 62 F.3d 918, 921-22 (7th Cir. 1995). The district court rejected the plaintiffs' definition of the relevant market as the "market for soybeans," reasoning that "[w]hile a causal link between the soybean futures market and the soybean cash market exists," the "causal chain" was "too indirect and attenuated to support antitrust standing." *The Am. Agric. Movement, Inc. v. Bd. of Trade of the City of Chi.*, 848 F. Supp. 814, 823, 825 (N.D. Ill. 1994).

The Seventh Circuit reversed, holding that CBOT's challenge to antitrust injury, which "depend[ed] entirely upon the disjunction that it maintain[ed] exists between the cash market and the futures market for soybeans," was immaterial to

the standing analysis. *Sanner*, 62 F.3d at 928. Rather, because "both markets involve the same commodities to be delivered currently or in the future," and thus "tend[] to move in lockstep," participants in the cash market "can be injured by anticompetitive acts committed in the futures market." *Id.* at 929. The soybean cash and futures markets were thus "so closely related that the distinction between them is of no consequence to antitrust standing analysis." *Id.* (citation and internal quotation marks omitted).[11]

Sanner's reasoning exposes the district court's error here. Plaintiffs alleged that Dated Brent prices and Brent Futures prices effectively moved in lockstep during the Class Period, rendering it more than plausible that by manipulating the former, Defendants also manipulated the latter. Whether those Brent Futures expressly incorporated the Dated Brent Assessment, therefore, does not impact the antitrust-injury analysis.

In addition to alleging direct incorporation as discussed above, Plaintiffs have, at the very least, alleged Defendants' anticompetitive conduct "contributed to" an artificial price, which is all the Sherman Act requires:

> Although the price-fixing conspiracy [in *Socony-Vacuum*] was not solely responsible for the increased prices, "[t]here was ample evidence

[11] *See also Amarel v. Connell*, 102 F.3d 1494, 1512 (9th Cir. 1996) ("Given the close ties between the paddy rice market and the milled rice market . . . defendants' alleged predatory pricing in the market for milled rice 'predictably would have impacted' the price of paddy rice.") (quoting *Sanner*, 62 F.3d at 929).

> that the buying programs at least contributed to the price rise. . . . That other factors also may have contributed to that rise and stability of the markets is immaterial.

Gelboim, 823 F.3d at 773 (second alteration, emphasis, and ellipsis in original) (quoting *Socony-Vacuum*, 310 U.S. at 219).

Thus, because Plaintiffs are consumers injured by Defendants' manipulation of the price of Brent Futures through their manipulation of the Dated Brent Assessment, Plaintiffs are the very objects of the Sherman Act's solicitude. *See AGC*, 459 U.S. at 538; *see also Gelboim*, 823 F.3d at 777 (Sherman Act "safeguards consumers from marketplace abuses"). The district court's dismissal of Plaintiffs' claims is contrary to these bedrock antitrust principles.

Nor does the district court's decision make sense as a practical matter. Imagine two scenarios. Under the first, the manipulated pricing benchmark is one of 10 equally weighted, but unrelated, factors that are directly incorporated and averaged to determine the settlement price of a futures contract. In the second, the pricing benchmark is not directly incorporated into settlement price of the futures contract, but is widely considered by market participants for price discovery, and econometric analysis shows that a $1 swing in the price of the benchmark will invariably result in a similar $1 swing in the price of the futures contract. Under the district court's logic, only the first scenario will yield antitrust standing even though

a greater percentage of manipulation is transmitted from the benchmark to the future in the second scenario.

In sum, the district court got it right when it stated that a plaintiff alleges a viable antitrust injury when it participates in a market that *is guided by* a pricing benchmark the defendants manipulated. Because Plaintiffs have made this showing (and more), the district court's antitrust injury ruling must be reversed.

II. The District Court Erred in Concluding that Plaintiffs' Claims Required An Extraterritorial Application of the CEA

A. Applicable Legal Framework and Standard of Review

The presumption against extraterritoriality is a canon of statutory construction, which holds that when Congress has not "'clearly expressed'" its intent to give a statute extraterritorial effect, it is presumed to be "'primarily concerned with domestic conditions.'" *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). In the absence of a clear statement of extraterritorial effect, the inquiry becomes how the presumption affects the particular statutory provision in view of the "focus of the Congressional concern." *Morrison*, 561 U.S. at 266 (internal quotation marks omitted). That inquiry turns on an examination of the conduct Congress intended to be "the object of the statute's solicitude." *Id.* at 267.

In *Morrison*, the Supreme Court applied the presumption in the context of Section 10(b) of the Securities Exchange Act. After determining that the requisite

clear statement was lacking, the Court observed that, by its terms, the statute punished "only deceptive 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)). Because the focus of the statutory language was purchases and sales of securities in the United States, the Supreme Court limited Section 10(b)'s territorial scope to "transactions in securities listed on domestic exchanges, *and* domestic transactions in other securities." *Id.* at 267 (emphasis added). *Morrison*, however, left unanswered two key issues. First, it did not address the meaning of a "foreign exchange" outside the securities context. Second, the opinion did not clarify the meaning of a "domestic transaction" not involving a national exchange

While the first issue remains open, the Court answered the second issue, in the context of a Section 10(b) claim, in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012). There, the Court held that a transaction is "domestic," and therefore not impermissibly extraterritorial, if "irrevocable liability is incurred or title passes within the United States." *Id*. at 67. Under this approach, "'the time when the parties to the transaction are committed to one another . . . . in the classic contractual sense . . . . marks the point at which the parties obligated themselves . . . .'" *Arco Capital Corps. Ltd. v. Deutsche Bank AG*, 949 F. Supp. 2d 532, 542 (S.D.N.Y. 2013) (quoting *Absolute Activist*, 677 F.3d at 67-68).

In *Loginovskaya v. Batratchenko*, 764 F.3d 266 (2d Cir. 2014), the Court held that *Absolute Activist's* transaction-based approach applied equally to claims under the CEA. As such, where a given commodities transaction did not involve a domestic exchange, a plaintiff could still satisfy *Morrison* by demonstrating that "the transfer of title or the point of irrevocable liability . . . occurred in the United States." *Id.* at 274.

Here, Plaintiffs' CEA claims are brought under Section 22(a)(1)(D)(ii), which creates a private right of action for "any person who … purchased or sold a [derivatives] contract . . . [and] the violation constitutes a manipulation of the price of any such [derivatives] contract or swap the price of the commodity underlying such contract or swap." 7 U.S.C. § 25(a)(1)(D)(ii). Pursuant to *Loginovskaya*, it is Plaintiffs' "purchase" and "sales" of futures contracts affected by the alleged manipulation, and not Defendants' alleged manipulation, that creates a private right of action under Section 22(a)(1)(D)(ii) and that becomes the subject of *Morrison*'s transactional test. *See Loginovskaya*, 764 F.3d at 272.

This Court reviews a district court's dismissal of claims as impermissibly extraterritorial *de novo*. *See Liu Meng-Lin v. Siemens, AG*, 763 F.3d 175, 178 (2d Cir. 2014).

B. The CEA Contains an Express Statement of Extraterritorial Application with Respect to Swaps

Section 2(i) of the CEA, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"), provides that the CEA will apply to swap-related claims based on activities outside the United States if those activities had "a direct and significant connection with activities in, or effect on, commerce of the United States." *Id.* Thus, if the Defendants' conduct had "a direct and significant . . . effect on, commerce of the United States," the district court's dismissal of Plaintiffs' swap-related claims as impermissibly extraterritorial is erroneous.

The Commodity Futures Trading Commission's ("CFTC") interpretive guidance as to the cross-border applicability of CEA § 2(i) is directly relevant to this inquiry. *See* 78 Fed. Reg. 45292-01 (July 26, 2013). There, in interpreting the meaning of the word "direct," the CFTC distinguished both the FSIA and the Foreign Trade Antitrust Improvement Acts of 1982, based on certain textual differences, and concluded that Section 2(i) only requires "a reasonably proximate causal nexus" and does not "require foreseeability, substantiality, or immediacy." *Id.* at 45300 (internal quotation marks omitted).

Here, because the Plaintiffs have sufficiently alleged a "direct effect" in the United States under the FSIA, *see* Points III.C-D, *infra*, they necessarily have sufficiently alleged "a *reasonably* proximate causal nexus" between Defendants'

actions and United States commerce, since the latter standard is less stringent. *See* 78 Fed. Reg. 45292-01 at 45300. Accordingly, the district court's ruling must be reversed as to swap-related Brent transactions.

However, as discussed below, *see* Point II.C, *infra*, none of Plaintiffs' CEA claims are impermissibly extraterritorial – regardless of whether they involve swaps – because they satisfy both prongs of the *Morrison* test.

C. The District Court Erred in Holding that Plaintiffs' Claims Were Impermissibly Extraterritorial Despite Involving Transactions on Domestic Exchanges

Despite "[a]ssuming the relevant transactions are those occurring *on domestic exchanges* within the meaning of *Morrison*," the district court nonetheless concluded that Plaintiffs' claims were impermissibly extraterritorial. (SPA 65) (emphasis added). This is flat wrong. The law is clear that if Plaintiffs' claims involve commodities transactions on domestic exchanges, then such claims are within the CEA's "solicitude" and not extraterritorial. *See* Point C.1, *infra*. And because both NYMEX and ICE Futures Europe qualify as domestic exchanges, the district court's extraterritoriality ruling must be reversed. *See* Point C.2, *infra*.

1. CEA Claims Based on Transactions on a Domestic Exchange Are Not Extraterritorial

According to the district court, Plaintiffs' claims are beyond the CEA's territorial reach – even if the relevant transactions occurred on a domestic exchange – because "the crux of their complaints against Defendants does not touch the United

States." (SPA 66). The district court's novel ruling, however, misreads *Parkcentral* and is foreclosed by *Absolute Activist*.

Simply put, this Court has already ruled that an action is not impermissibly extraterritorial when it is based on transactions occurring on a domestic exchange. *Absolute Activist*, 677 F.3d at 69 n.4 ("*Of course*, pursuant to the first prong of *Morrison*, § 10(b) *does apply* to transactions in securities that are listed on a domestic exchange.") (emphasis added); *see also Loginovskaya*, 764 F.3d at 274 (adopting *Absolute Activist* test in CEA context).

The district court's contrary ruling turns on a misreading of *Parkcentral*: specifically, that transactions on a domestic exchange are necessary, but not sufficient in and of themselves to invoke a properly domestic claim. (SPA 65-67). But *Parkcentral* did not concern claims based on a domestic exchange, *i.e.*, the first prong of *Morrison*, but rather provided a limited gloss to the *Absolute Activist* test for determining whether a transaction *not involving a domestic exchange* qualifies as a domestic transaction, *i.e.*, the second prong of *Morrison*. Indeed, *Parkcentral* made clear that its ruling *did not involve* cases involving transactions on domestic exchanges:

> Because, *in the case of securities not listed on domestic exchanges*, a domestic transaction is necessary but not necessarily sufficient to make § 10(b) applicable, we need not decide whether the plaintiffs' transactions satisfy the standards of *Absolute Activist* for domestic transactions, because we think it clear that the claims in this case are so predominately foreign as to be impermissibly extraterritorial.

763 F.3d at 216 (emphasis added)

Accordingly, because, as discussed below, because Plaintiffs' claims concern transactions on domestic exchanges they are, by definition, not impermissibly extraterritorial and *Parkcentral* is inapt.

2. NYMEX and ICE Futures Europe Are Domestic Exchanges

Turning first to NYMEX, the district court correctly observed "no one disputes that NYMEX is a 'domestic exchange' within the meaning of *Morrison*." (SPA 65). This fact – which was not challenged by the Defendants below – requires reversal of the district court's dismissal of Plaintiffs' NYMEX-based claims on extraterritoriality grounds. *See In re Platinum and Palladium Antitrust Litig.*, No. 14 Civ. 9391, 2017 WL 1169626, at *28 (S.D.N.Y. Mar. 28, 2017) (holding that because NYMEX was a domestic exchange, CEA claims concerning derivatives listed on that exchange were not impermissibly extraterritorial); *see also In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 696 (S.D.N.Y. 2013) (holding that because plaintiffs' CEA claims involved manipulation of "futures contracts traded on domestic exchanges," they were not impermissibly extraterritorial).

Similarly, ICE Futures Europe is, at a minimum, a *de facto* domestic exchange within the meaning of *Morrison* – as the district court correctly assumed – despite being headquartered in London. (SPA 65 & n.5). As discussed more fully below,

ICE Futures Europe: (i) is a CFTC regulated board of trade that subjects itself to the U.S. regulatory framework, including the CFTC's oversight; and (ii) made the conscious choice to place all of its trading infrastructure in the United States, in order to have electronic trading occur here.

First, unlike in the case of non-national securities exchanges, Congress explicitly retains regulatory power over foreign boards of trade, such as ICE Futures Europe. As early as 1974, Congress expanded the extraterritorial reach of the CEA by extending the CFTC's jurisdiction to U.S.-based transactions executed on foreign boards of trade.[12] In 1999, the CFTC granted ICE Futures Europe permission to make its electronic trading and order matching systems available to its members in the United States, subjecting ICE to the CFTC's regulatory regime.[13] Dodd-Frank

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[12] *See* 7 U.S.C. § 2 ("The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving swaps or contracts of sale of a commodity for future delivery . . . traded or executed on a [designated] contract market . . . or a swap execution facility . . . or any other board of trade, exchange, or market"); 120 Cong. Rec. H34 (1974) ("I wish to emphasize that the words 'any other board of trade, exchange or market' were included . . . for the purpose of giving the Commodity Futures Trading Commission jurisdiction over future contracts purchased and sold in the United States and executed on a foreign board of trade, exchange, or market.").

[13] The CFTC has exercised regulatory oversight of ICE Futures Europe on numerous occasions. (*See, e.g.*, ¶¶ 147-48); *see also* 74 Fed. Reg. 3570-01, at 3571 (Jan. 21, 2009) (emphasis added) (explaining that the "[t]he purpose of the conditions [placed on future contract offered by ICE] is to ensure that ICE Futures Europe . . . [complied] with comparable principles or requirements . . . *as apply to the [U.S. Exchange] contract against which the linked contract settles.*") (emphasis added).

further extended the CFTC's jurisdiction over foreign boards of trade ("FBOTs") and requires them to formally register with the CFTC. *See* Dodd-Frank Act § 738, 7 U.S.C. § 6. This change was publicly embraced by ICE Futures Europe.[14] And soon thereafter, in October 2012, the CFTC approved ICE Futures Europe's request to allow both U.S. and non-U.S. energy futures to be commingled in the same segregated customer accounts, further increasing the degree of the CFTC's oversight of ICE Futures Europe.[15] In short, ICE Futures Europe is subject to almost all the same regulation of domestic exchanges except that it is exempt from Section 5 registration. (¶¶ 144-49).

Second, ICE Futures Europe's electronic exchange operations are in the United States. After securing electronic access to its U.S.-based members in 1999, ICE Futures Europe made a strategic decision to relocate all electronic trading and matching systems to the United States. (JA 1695 at ¶¶ 26-30) (Gaer Decl.). By 2003, the trading/matching of the Brent Crude Oil futures was transferred from

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[14] *See* Letter from Intercontinental Exchange Inc. to CFTC (Nov. 8, 2010), *available at* http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission14_110710-ice.pdf ("ICE welcomes this change and recommends that the CFTC replace the no action regime with registration. Registration gives FBOTs greater legal certainty *to operate in the United States*[.]") (emphasis added).

[15] *See* CFTC Order, Treatment of Funds Held in Connection with Clearing by ICE Clear Europe Limited of Contracts Traded on ICE Futures Europe and ICE Futures US (Oct. 9, 2012), *available at*: http://www.cftc.gov/idc/groups/public/@requestsandactions/documents/ifdocs/iceclreu4dorder3-26-15.pdf.

London to the ICE Platform located in Atlanta, Georgia. Since then, all electronic trades were processed through the ICE Platform in the United States. (JA 1699-1700 at ¶¶ 41, 49).

In 2008, the Intercontinental Exchange, Inc., ICE Futures Europe's Atlanta-based parent company, decided to move its primary matching engine from Atlanta, Georgia, to Chicago, Illinois. (JA 1696 at ¶¶ 31-33). The Chicago-based primary matching engine supports ICE Futures Europe, with all ICE Futures Europe's products being matched at that facility. (JA 1699 at ¶ 41). For all practical purposes the electronic matching engine is the exchange, *i.e.*, the place where anonymous buyers and sellers match their order and transact trades. Moreover, by placing its matching facility close to the dense community of high-speed trading firms based in and around Chicago, ICE Futures Europe capitalized on lucrative high-speed trading as well as more traditional trades in Brent Futures. (JA 1698-1701 at ¶¶ 37-51).

In sum, ICE Futures Europe is physically and functionally within the United States, and constitutes a "domestic exchange" within the meaning of *Morrison*.

D. Even If ICE Futures Europe Is Not a Domestic Exchange, Plaintiffs' Claims Are Not Impermissibly Extraterritorial Because Irrevocable Liability Arose in the United States

1. All Aspects of ICE Futures Europe Trades Are Domestic

Even if ICE Futures Europe was not a domestic exchange, Plaintiffs' CEA claims are not impermissibly extraterritorial pursuant to *Morrison*'s second prong.

To satisfy this prong at the pleading stage, a plaintiff need only "allege facts leading to the *plausible inference* that the parties incurred irrevocable liability within the United States." *Absolute Activist*, 677 F.3d at 68 (emphasis added); *Loginovskaya*, 764 F.3d at 274 (same).

In determining whether a particular transaction is domestic under *Absolute Activist*, a court must ascertain: (i) *when* "the parties to the transaction . . . commit[] to one another . . . in the classic contractual sense," *Arco Capital Corps.,* 949 F. Supp. 2d at 542; and (ii) *where* such commitment took place, *see Parkcentral Global Hub Ltd.,* 763 F.3d at 207 ("The location of certain key events, entities, and instruments is essential to our analysis."). So long as the location of the event triggering the creation of "irrevocable liability" or "transfer of title" is within the United States, *Morrison's* "domestic transaction" prong is satisfied. As discussed below, Plaintiffs easily make this showing,

A futures contract is a binding agreement to deliver a specified quantity of commodity at a specified future date, at a price to be paid at the time of delivery. (¶ 122). When a trader who participates in an electronic trade places an order, the trader manifests his/her intent to enter into a futures contract. Under contracts law, such "manifestation of willingness to enter into a bargain" represents a non-binding offer to enter into a futures contract. *See Restatement (Second) Contracts,* § 24 (1981). This non-binding offer is transmitted to the trader's broker, or a futures

commission merchant ("FCM"), who in turn transmits the trader's non-binding offer to the exchange's matching facility, the only place where the buyer's offer can be accepted, or, in the language of the exchange, "matched." Once accepted/matched, the order results in a contract that cannot be reneged without incurring liability. *See* Marvin A. Chirelstein, *Concepts and Case Analysis in the Law of Contracts*, 38 (3d ed. 1998). In fact, ICE Futures Europe rules expressly provide that "once a bid or offer has been matched in whole or in part and gives rise to a trade there is *no right of withdrawal*." (JA 1116) (annexing ICE Futures Europe's Trading Procedures ("Trading Rules")) (emphasis added).

The formation of the contract between the futures traders also triggers an immediate contract for clearing under the ICE Clear Europe Clearing House Rules. (JA 1120) (annexing ICE Clear Europe's Clearing House Rules ("Clearing Rules")). Clearing Rule 401 dictates *when* "the parties to the transaction . . . commit[] to one another . . . in the classic contractual sense." *Arco Capital Corps.*, 949 F. Supp. 2d at 542. Specifically, Clearing Rule 401 provides that "two contracts shall arise *automatically*, one between the [seller] and the Clearing House and the other between the Clearing House and the [buyer] . . . *at the moment that* . . . in the case of any . . . ICE Futures Europe [m]atched [t]ransaction, . . . *the relevant orders are matched* on . . . ICE Futures Europe." (JA 1120).

Clearing Rule 401 also dictates *where* such commitment occurs, and provides that, in the case of ICE Future Europe matched transactions, irrevocable contractual liability is created when the orders are matched "*on ICE Futures Europe*." (*Id.*). The ICE Futures Europe's matching engines are located in Chicago, Illinois. (JA 1696 at ¶ 31) (Gaer Decl.). The Chicago matching facility is the exact geographical locus where ICE's clearinghouse and the trader "obligate[] themselves to perform what they had agreed to perform . . . ." *Arco Capital Corps.*, 949 F. Supp. 2d at 542; *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 2 F. Supp. 3d 550, 560 (S.D.N.Y. 2014), *aff'd* 813 F.3d 98 (2d Cir. 2016) (irrevocable liability arose when and where "the order was filled and the transaction was completed").

Here, Plaintiffs placed orders in the United States for futures contracts that were transmitted to United States-based, CFTC-registered FCMs, who are members of ICE Futures Europe. (¶ 159). The FCMs, in turn, transmitted Plaintiffs' orders to ICE Futures Europe through various ICE Futures Europe electronic interfaces located in the United States. (¶ 160). The orders were then routed to ICE Futures Europe's primary data-center in Chicago, Illinois, for matching and execution. (JA 1139 (article entitled "ICE heads north")). Concurrently with Chicago-based matching, the corresponding binding contracts arose pursuant to Trading Rule 3.8 and Clearing Rule 401, thereby creating an "irrevocable liability" within the United States. *See In re Poseiden Concepts Sec. Litig.*, No. 13 Civ. 1213, 2016 WL

3017395, at *12 (S.D.N.Y. May 24, 2016) ("Once [plaintiff] entered his order to purchase Poseidon stock, *he no longer had the discretion to revoke acceptance and title was transferred to him*.") (emphasis added). Even ICE Brent futures bids and offers that originated outside the United States go through exactly the same matching process in Illinois.

Thus, the transactions at issue are undeniably "domestic" because the contract was formed and irrevocable liability arose in the United States.

2. The District Court Erred in Finding ICE Futures Europe Trades Impermissibly Extraterritorial Under *Parkcentral*

Although the district court did not dispute that irrevocable liability for Plaintiffs' ICE Futures Europe trades arose in the United States, it nonetheless concluded that Plaintiffs' related claims were impermissibly extraterritorial under *Parkcentral*. (SPA 67). But as discussed below, *Parkcentral* turned on the unique securities at issue in that case, is in tension with other decisions of this Court, and was animated by concerns not present here.

First, the Court emphasized that *Parkcentral* was essentially *sui generis*, and that the Court was not creating a new test under *Morrison*'s second prong. *See* 763 F.3d at 201-02 (emphasizing that the decision turned, in part, "on the particular character of the unusual security at issue," and cautioning that the Court "express[ed] no view as to whether [it] would have reached the same result if the suit were based on different transactions."). For this reason, several district court have declined to

extend *Parkcentral* beyond its specific factual confines. *See, e.g.*, *Atlantica Holdings, Inc. v. BTA Bank JSC*, No. 13 Civ. 5790, 2015 WL 144165, at *8 (S.D.N.Y. Jan. 12, 2015) ("The Court was careful, however, to cabin its holding its holding [in *Parkcentral*] to the facts of the case presented."); *Poseiden Concepts*, 2016 WL 3017395, at *13 ("*Parkcentral* was *tied* to the derivative security it addressed . . . .") (emphasis added).

Second, *Parkcentral* should be limited to its specific facts for the additional reason that it arguably conflicts with *Absolute Activist* and *Loginovskya*. Specifically, in *Parkcentral*, the Court stated that an off-exchange domestic securities transaction "is not alone sufficient to state a properly domestic claim under the statute." 763 F.3d at 215. However, in *Absolute Activist*, the Court quoted with approval the Eleventh Circuit's holding that "'*in order to survive a motion to dismiss* premised on *Morrison*, *it is sufficient* for the plaintiff to allege that title to the shares was transferred within the United States,'" thereby indicating that such allegations alone are sufficient at the pleading stage. 677 F.3d at 68 (quoting *Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada*, 645 F.3d 1307, 130-11 (11th Cir. 2011)) (emphasis added).

Furthermore, in *Loginovskaya* – which was issued after *Parckcentral* – the Court examined the presumption against extraterritoriality in the CEA context, and stated, without limitation or reference to *Parkcentral*, that "the CEA creates a private

right of action *for persons* anywhere in the world *who transact business in the United States*," including commodities transactions where "the transfer of title or the point of irrevocable liability for such [transaction] occurred in the United States." 764 F.3d at 273-74 (emphasis added).

Third, *Parkcentral* is simply inapt. The primary concern that animated *Parkcentral* was the application of U.S. securities laws "to wholly foreign activity . . . solely because a plaintiff in the United States made a domestic transaction, *even if the foreign defendants were completely unaware of it*." *Parkcentral Global Hub Ltd.*, 763 F.3d at 215 (emphasis added). But this is not a case where the plaintiffs' transactions – and the impact of defendants' misconduct thereon – were unknown to Defendants. To the contrary, the SAC makes clear that the Defendants traded Brent Futures on the same exchanges as the Plaintiffs, in order to profit from their manipulation of the Dated Brent Assessment. (¶¶ 460-88, 532-39).

Nonetheless, the district court concluded that *Parkcentral* warranted dismissal because Defendants' misconduct purportedly only "*indirectly* affected the price of futures and derivatives contracts traded on exchanges." (SPA 66) (emphasis added). According to the district court, this is because the Brent Futures are not priced by reference to the Dated Brent Assessment "but instead to derivations of the ICE Brent Index, *which does not incorporate* the Dated Brent assessment." (SPA 67) (emphasis added). But even if the district court was correct on the law, it is flat

wrong on the facts. As explained in Point I.C.1, *supra*, both Plaintiffs' allegations and the record evidence establish that the Dated Brent Assessment is directly factored into the ICE Brent Index.

Accordingly, even if ICE Futures Europe were not a domestic exchange, the district court's extraterritoriality determination must be reversed because Plaintiffs incurred irrevocable liability in the United States, and *Parkcentral* is inapt.

III. The District Court Erred in Concluding that it Lacked Subject Matter Jurisdiction Over Statoil ASA Under the FSIA

A. Legal Framework and Standard of Review

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign sovereign in the United States." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (internal quotation marks omitted). "The single most important exception to foreign state immunity under the FSIA, and the only one at issue in this case, is the commercial activity exception." *Atlantica Holding, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 106 (2d Cir. 2016) (internal citation and quotation marks omitted).

The third clause of the commercial-activity exception – and the one at issue in this case[16] – is known as the "direct-effect" clause. Under the direct-effect clause, a foreign state is not immune from suit if the plaintiff's action is based on act (i)

[16] Plaintiffs argued before the district court, and continue to maintain, that they also satisfied the first and second clauses of the commercial activities exception.

outside the United States, (ii) that was taken in connection with commercial activity, and (iii) that caused a direct result in the United States. *See id.* at 106-07.

"An effect is 'direct' if it follows as an immediate consequence of the defendant's activity; the effect need not to be substantial or foreseeable." *U.S. Fid. & Guar. Co. v. Brasperto Oil Servs. Co,*, 199 F.3d 94, 98 (2d Cir. 1999). This Court has defined an "immediate consequence" to mean that "between the foreign state's commercial and the effect there was no 'intervening element.'" *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 74 (2d Cir. 2010) (citations omitted). Thus, an effect is "direct" and "immediate" if it "flows in a straight line without deviation or interruption." *Skanga Energy & Marine Ltd. v. Arevenca S.A.*, 875 F. Supp. 2d 264, 271 (S.D.N.Y. 2012), *aff'd sub nom. Skanga Energy & Marine Ltd. v. Petroleos de. Venez. S.A.*, 522 F. App'x 88 (2d Cir. 2013).

Importantly, the fact that the causal chain between a defendant's act and its effect in the United States involves a third-party does not automatically render that effect indirect. *See Atlantica*, 813 F.3d at 113-14. Rather, "[t]he intervening actions of a third party *may sometimes* break the causal chain . . . where the defendant's actions *affect the third-party, who in turn takes some independent action* that causes a further effect in the United States." *Id.*at 114 (emphasis added).

This Court reviews the district court's legal conclusions *de novo* and the district court's factual findings for clear error. *See Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193 (2d Cir. 2016).

B. Defendants' False Reports to Platts Had a Direct Effect in the United States

In *Atlantica*, this Court held that where the commercial activity at issue under the "direct effects" clause sounds in tort, the "*locus delicti*, or place of wrong . . . is the place where the last event necessary to make an actor liable for an alleged tort takes place," and "[u]sually this is the location where the plaintiff was injured . . . ." 813 F.3d at 109 (internal quotation marks omitted). "Thus a determination that a tort's locus is the United States is, in effect, often a determination that the plaintiff has been injured in this country," meaning that the defendant's tortious conduct "caused a 'direct effect' (the plaintiff's injury) in this country." *Id.* As result, the Court concluded that "such a determination will ordinarily be sufficient . . . to confer FSIA jurisdiction . . . ." *Id.*

Here, the SAC alleges that Defendants' false/inaccurate Platts submissions were designed to and did directly impact the price of Brent Futures in the United States. (¶¶ 460-88, 532-39). Indeed, Statoil allegedly intended to benefit their Brent Futures trades that they undertook in the United States as part of the overall scheme, such as during the expiration of the July 2010 ICE Brent Futures Contract, a day

when Brent Futures experienced a statistically aberrant double reversal. (¶¶ 270-71).

Since Plaintiffs' CEA claims sound in tort, Defendants' misconduct had a "direct effect" in the United States because that is where Plaintiffs' suffered their injuries. *See Atlantica*, 813 F.3d at 10 (because plaintiff's Securities Exchange Act claims sounded in tort, defendant's misconduct had a direct effect in the United States where the plaintiffs were located and therefore suffered their injuries).[17]

As such, Plaintiffs have alleged a "direct effect" in the United States sufficient to confer jurisdiction under the FSIA. *See id.* at 112.

C. The District Court Is Incorrect that Platts' (Unexercised) Discretion to Exclude Aberrant Trade Data Rendered Statoil's Manipulation of Brent Futures Prices in the United States Too Attenuated

Rather than apply *Atlantica*, the district court concluded that the domestic effect of Defendants' misconduct was insufficiently direct because it purportedly "'falls at the long end of a chain of causation and is mediated by numerous actions by third parties.'" (SPA 22-23). The central conceit of the district court's holding is that Platts and ICE "not only had the ability to exercise independent judgment" to

[17] Moreover, as this Court held in *Atlantica*, the fact that some members of the putative class in this case may be foreign entities is irrelevant, because FSIA immunity need not be overcome on a plaintiff-by-plaintiff basis. *See Atlantica*, 813 F.3d at 111.

exclude aberrant data, "but in fact did so," thereby breaking the causal chain. (SPA 24). As discussed below, the district court's conclusion: (i) is irreconcilable with Plaintiffs' well-pleaded allegations explaining how Defendants' misconduct directly impacted Brent Futures prices; (ii) is flatly contradicted by the record; (iii) is based on a stilted reading of the SAC that draws all inferences in Defendants' favor; and (iv) is contrary to this Court's precedents.

First, the district court's ruling is flatly inconsistent with Plaintiffs' theory of the case, which is that Defendants were able to manipulate the price of Brent Futures because Platts and ICE *did not act* to exclude Defendants' false and manipulative reports. In other words, the link between Defendants' misconduct and its effect in the United States, by definition, is an unbroken straight-line because, it *is predicated on the absence of any intervening actions taken by third-parties*. The district court simply failed to credit Plaintiffs' allegations.

Second, and more critically, the district court's conclusion that Platts, in fact, excluded Defendants' aberrant trades is irreconcilable with the factual record. Notably, not even Platts claims that it excludes aberrant trades, or that is has any systematic approach to examining trades completed during the MOC. (JA 1312-19 (Platts 2010 publication). Rather, Platts has explained that it only "occasionally" conducts secondary checks on completed trades, and has expressly disclaimed responsibility for the inclusion of false trade data in the Dated Brent Assessment:

"Platts cannot make any guaranty in advance about how and whether market information received and published but not fully adhering to its defined methodology will be incorporated into its final assessments." (*Id.*).

Platts' description of its practices is entirely consistent with the findings of Mr. Osterwald, who explained that he personally observed the MOC process at Platts' London offices in 2012, at the time of some of the alleged misconduct, and that Platts informed him that beyond confirming the terms of a trade between counterparties, "*they normally do not carry out further verification*." (JA 1711 at ¶ 24) (Osterwald Report). Further still, Mr. Osterwald identified specific examples of manipulative and anomalous trading activity in June and September 2011 that Platts did not investigate, thereby confirming Platts' practice of passively including even highly dubious trading activity in the Dated Brent Assessment. (JA 1711-15 at ¶¶ 26-46).

In contrast, Statoil's expert, Dr. Culp, never spoke to anyone at Platts and has no knowledge of whether Platts generally exercised its discretion, or specifically excluded any of Statoil's trades. (JA 1384-87 at 42:22-45:18). When pressed, Dr. Culp admitted that he *did not know* what percentage of aberrant trades, if any, Platts removes, and was unaware of *a single example* of Platts investigating or removing Statoil, or any other market participant for that matter, from the MOC process leading to the Dated Brent Assessment. Rather, Dr. Culp simply assumed the

accuracy of Platts' aspirational – and entirely self-serving – statement that it occasionally investigates trades.

Simply put, aside from the SAC's identification of *a single instance* where Platts appears to have excluded a trade from the Dated Brent Assessment, neither Statoil nor the district court were able to identify any other examples of Platts exercising its discretion to exclude market activity during the MOC Window.

Third, the district court transformed Platts from a craven watchdog into a tireless sentry by contorting the record beyond recognition. Contrary to the district court's contention, Plaintiffs did not allege "that Platts applies judgment to the data it gathers." (¶ 99). Rather, Plaintiffs merely *quoted Platts' claim* that it applies judgment. (*Id.*) (quoting Platts' President). Compounding its error, the district court failed to appreciate that Platts' statement actually *downplays its exercise of judgment*, asserting that, in contrast to the highly subjective LIBOR process, Platts' process was "tied strictly to the underlying market." (*Id.*).

Next, the district court literally twisted one of Mr. Osterwald's *criticisms* of Platts' MOC process into an admission "that Platts does in fact investigate information before it reports it." (SPA 25 (citing Osterwald Report at ¶ 27)). But Mr. Osterwald's "surprise[e] that Platts reported" certain trades "without questioning the background *more thoroughly*," (*id.*) (emphasis added), refers to the fact that Platts' typical process was limited only to verifying the terms of a trade

before considering that data. (JA 1171 Osterwald Report at ¶¶ 23-24). By no means was it a concession that Platts regularly – let lone sporadically – investigated whether a given trade was economically legitimate prior to including it in the Dated Brent Assessment. (*Id.*).

The district court also erred in concluding that because certain Brent Futures settled "not to Platts Dated Brent assessment but to the ICE Brent Index," and because the "ICE Brent Index is assessed using a proprietary method," this added "another layer of third-party action." (SPA 24). As an initial matter, the district court simply repeated its primary error of disassociating the Dated Brent Assessment from the ICE Brent Index. *See* Point I.C.1-2, *supra*. The district court further erred in concluding that because ICE Futures Europe reserved the right to change its method of calculation, it actually exercised that authority to exclude trade data. (SPA 24-25). But as with Platts, there is absolutely no record evidence that ICE Futures Europe actually excluded the Dated Brent Assessment *even once* in setting the ICE Brent Index during the period of misconduct alleged in the SAC.

Fourth, the district court misapplied this Court's precedents governing when a third-party's actions will break the causal chain and render the domestic effect of a defendant's misconduct indirect. As discussed below, those precedents hold that the causal chain will be severed only where a defendant's purported wrongdoing

resulted in a third-party taking some independent action, which, in turn, injured the plaintiff. *Id.*

Thus, for example, in *Guirlando*, a United States citizen sued a Turkish bank for the theft of her funds, based on its misrepresentation that she could not open an individual account. *See* 602 F.3d at 75. The Court concluded that the causal chain between the bank's misstatement and the plaintiff's loss of funds was too indirect and attenuated, because it was her estranged husband's independent decision to withdraw and abscond with those funds that caused her injury. *See id.* at 80.

Similarly, in *Virtual Countries*, the plaintiff company complained that it was injured when the Republic of South Africa issued a press release stating that it might contest plaintiff's ownership of a web domain name, which purportedly "discouraged third-parties to invest in that company." *Virtual Countries, Inc. v. Republic of S. Afr.*, 300 F.3d 230, 237-38 (2d Cir. 2002). In finding that the defendant's had alleged at most an indirect effect in the United States, the Court stressed that the plaintiff's injury was premised entirely on third parties reviewing the press release, determining that it was negative, and "*declining to invest in or do business with* [the plaintiff company]." *Id.* at 237 (emphasis added); *see also Williams v. Romarm S.A.*, No. 17 Civ. 006, 2017 WL 3842595, at *4, 6 (D. Vt. Sept. 1, 2017) (FSIA did not confer jurisdiction over foreign gun manufacturers where plaintiff's injuries were due to third-party criminal acts involving defendant's guns).

This case presents the complete opposite scenario: There is a direct line between Defendants' manipulative trade data and Brent Futures prices in the United States, because *Platts did not act* to exclude them from the Dated Brent Assessment. Rather, Platts essentially served as a passive conduit for Defendants' false trade data, and *Atlantica* is directly on point.

In *Atlantica*, the defendants argued that the causal chain was too attenuated to support jurisdiction under the FSIA because the false offering documents at issue had been disseminated to U.S. investors *via* an intermediary. The court began its analysis by rejecting defendant's contention that the involvement of a third-party in bringing about the domestic effect of the defendant's foreign conduct necessarily breaks the causal chain. *Atlantica*, 813 F.3d at 114 ("[t]he intervening actions of a third party *may sometimes* break the causal chain") (emphasis added). The Court ultimately concluded that the causal chain was not broken, because the falsity or truthfulness of the offering documents had no impact on the third-parties' distribution of those documents: "In other words, third-party intermediaries . . . would have distributed the Information Memorandum regardless of whether it contained misrepresentations about [the defendant's] financial situation, so that the conduct of such intermediaries cannot have been an effect of any such misrepresentations." *Id.* at 115. So too here, Plaintiffs' theory of the case as well as the record evidence demonstrates that Platts incorporated Defendants' submissions

into the Dated Brent Assessment and disseminated that information irrespective of the trades' economic legitimacy.

* * * * *

Because the record clearly demonstrates that there was a straight-line between Statoil's Platts submissions and their effect on Brent Futures prices in the United States, Plaintiffs satisfied the third clause of the FSIA's commercial activities exception.

IV. The District Court Is Incorrect that it Lacked Personal Jurisdiction Over STASCO

A. Legal Framework and Standard of Review

To establish specific jurisdiction over a defendant, the defendant must be shown to have "purposefully directed his activities" at the forum and plaintiffs' claims must "arise out of or relate to those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted). Where, as here, a plaintiff has asserted claims under federal statutes that provide for nationwide service of process, this Court "has consistently held that the minimum-contacts test in such circumstances looks to contacts with the entire United States rather than with the forum state." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262, 2015 WL 4634541, at *18 (S.D.N.Y. Aug. 4, 2015) (quoting *SEC v. Straub*, 921 F. Supp. 2d 244, 253 (S.D.N.Y. 2013)).

On a motion to dismiss, the plaintiff bears the burden of making a *prima facie* showing that personal jurisdiction exists. *Eades v. Kennedy, PC Law Offices*, 799 F.3d 161, 167-68 (2d Cir. 2015). Where, as here, there has been jurisdictional discovery but no evidentiary hearing, that showing "must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant." *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 85 (2d Cir. 2013) (citation omitted).

This Court reviews the district court's decision to dismiss a defendant for lack of personal jurisdiction *de novo*. *See Porina v. Marward Shipping Co. Ltd.*, 521 F.3d 122, 126 (2d Cir. 2008).

B. STASCO's Purposeful Availment Supports Jurisdiction

First, STASCO executives are responsible for overseeing Shell Trading's global crude oil trading, including its trading activity in the United States. (JA 2270, 2273 at 93:2-5, 13-14; 96:1-2). Specifically, Mike Muller, a London-based STASCO executive, was a member of Shell Trading's VPLT, and was the sole member responsible for crude oil trading worldwide. (JA 2273 at 96:3-8). As such, STUSCO employees located in Houston, Texas, who traded crude oil futures and derivatives, reported to Mr. Muller. (JA 2273 at 96:3-8) ("The crude traders . . . in the trading desks at – *in Houston* . . . are part of [Mr. Muller's] organization.").

Moreover, STASCO's and STUSCO's crude oil traders worked in tandem for the overall benefit of Shell Trading. STASCO traded Brent Futures on ICE Futures Europe, and took positions based upon, *inter alia*, its view of changes in the spread between the price of Brent and WTI, which is primarily traded on the NYMEX by STUSCO.[18] (JA 2245-47 at 68:21-70:13). Therefore, in order for Shell Trading to benefit from STASCO's manipulation of the Dated Brent Assessment, traders at both STASCO and STUSCO had to work cooperatively to coordinate overall risk. (JA 2174, Kovel Decl. Ex. 1, RDS 2013 Form 20-F at 49). *See also* JA 2243-47 (Kovel Decl. Ex. 5, Shell Canada Letter at 2); JA 2229 at 52:2-11.

Second, STASCO employees oversaw the overall financing of the RDS entities comprising Shell Trading, including the crude oil trading activities of STUSCO in the United States. (JA 2190-91 at 13:1-14:12). Specifically, Mr. Armand Lumens, a STASCO executive helmed Shell Trading's "finance organization." (JA 2194 at 17:1-9). That finance organization has approximately 1,600 staff members worldwide, including in the United States, who are managed by several vice presidents who report directly to Mr. Lumens. Two of the managing

[18] Although STASCO claims that it does not trade on the NYMEX directly, the CFTC has previously concluded otherwise. (JA 2349-56, Kovel Decl. at Ex. 6, *In the Matter of Shell Trading US Company, Shell International Trading and Shipping Co., and Nigel Catterall*, CFTC Dkt. No. 06-02 at 3 (C.F.T.C. Jan. 4, 2006)).

vice presidents who report directly to Mr. Lumens are located in the United States, one of whom is employed by STUSCO. (JA 2193-94 at 17:6-18:1).

Third, Mr. Lumens also oversaw Shell Trading's centralized treasury department, which was vital to Shell Trading's global crude oil trading activities. The treasury department is "a separate function within Royal Dutch Shell" (JA 2229 at 52:2-11), that seeks "to manage credit exposures associated with [its] substantial cash, foreign exchange and commodity positions." (JA 2174, Kovel Decl. Ex. 1 at 20). Among other functions, when Shell Trading's crude oil traders – including STUSCO's traders in the United States – needed "money to be able to satisfy . . . margin calls, [they] would go to treasury and basically ask for money." (JA 2229 at 52:2-11).

In sum, STASCO's oversight of key aspects of crude oil trading – including trading activities in the United Sates – as part of the overarching Shell Trading structure, demonstrates a "desirability and lack of coincidence" that indicates "purposeful availment" sufficient to satisfy minimum contacts. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 168 (2d Cir. 2013).

C. Jurisdiction Also Arises Because STATSCO Expressly Aimed Its Conduct at the United States

Jurisdiction over STASCO is also appropriate under the "effects test," because it "expressly aimed its conduct at the [United States]." *Licci*, 732 F.3d at 173; *see*

also In re Term Commodities Cotton Futures Litig., No. 12 Civ. 5126, 2013 WL 9815198, at *31 (S.D.N.Y. Dec. 20, 2013).

STASCO and the other Defendants manipulated the Dated Brent Assessment, to benefit their futures and derivatives positions. (¶¶ 10, 237, 330, 335, 460, 470-73). And, as described above, STASCO and STUSCO traders – overseen by STASCO executive Muller and funded by STASCO executive Lumens – took advantage of that manipulation by coordinating their trading activities on the NYMEX and ICE Futures Europe. (¶¶ 7-8, 85-86, 133-36, 234, 470-71); (*see also* JA 2245-46, 2249-50 at 68:18-69:1, 69:18-20, 72:20-73:4).

District courts within this Circuit have frequently found personal jurisdiction under the "effects test" based on similar schemes. *See, e.g.*, *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789, 2016 WL 1268267, at *5-6 (S.D.N.Y. Mar. 31, 2016); *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 536 (S.D.N.Y. 2008); *In re Natural Gas Commodity Litig.*, 337 F. Supp. 2d 498, 517 (S.D.N.Y. 2004). So too here, because STASCO intended that its transactions would affect not only the price of Brent imported into the United States, but also Brent Futures traded in the United States, jurisdiction is proper under the "effects test."

D. The District Court Erred in Rejecting STASCO's Jurisdictional Contacts

The district court held that it lacked personal jurisdiction over STASCO primarily on the ground that the STASCO Executives that oversaw crude oil trading activities in the United States purportedly did so in their capacity as "member[s] of the VPLT, not in [their] capacity as [] STASCO executive[s]." (SPA 38).[19] But the district court's factual conclusion is irreconcilable with the record.

First, Shell Trading *is not a separate legal entity*. Rather, Shell Trading is simply an "umbrella" organization comprised of over 15 RDS companies, including STASCO. (JA at 2190 at 13:1-13 ("Shell Trading & Supply is an *umbrella name* for a *network of legal entities* that together work in the area of trading and supply of crude[,] petroleum products, gas and power all over the world.") (emphasis added)). And while Shell Trading is helmed by the VPLT, that team is not a board of directors. Rather, it is simply an admixture of Vice Presidents from the individual RDS companies under the Shell Trading banner. Thus, the STASCO executives responsible for all crude oil trading worldwide *are employees only of STASCO*, and no other legal entity.

[19] The district court only addressed Mr. Muller's oversight responsibilities, and not those of Mr. Lumens. Presumably, however, the district court would have applied the same erroneous reasoning.

Second, and relatedly, RDS formed Shell Trading as an administrative convenience and for the mutual benefit of its constituent companies, including STASCO. Specifically, Shell Trading permitted RDS to adopt an "integrated approach to physical trading, supply management, and financial hedging . . . to help manage risk and optimize the physical portfolio of commodity assets owned and controlled by the corporate group." (JA 2343, Kovel Decl. Ex. 5, "Shell Canada Letter" at 2). This, in turn, benefitted RDS' various companies, which now could represent just "one brand . . . *a single face to the market*." (JA 2267 at 90:15-17) (emphasis added).

Thus, the district court held that the actions of STASCO executives, who are employees of no entity other than STASCO, are not attributable to STASCO, but to a working group formed as an administrative convenience that has no independent legal status. (SPA 38). This cannot possibly be the law, and would permit foreign corporate entities to foist their executives' U.S. contacts onto a leadership club that is not itself a legal entity.

Finally, the district court held that even if STASCO knew that its "manipulative conduct may ultimately benefit the business of other RDS entities operating in the United States does not establish that STASCO 'expressly aimed' its conduct at the Unites States." (SPA 41). But the district court's *ipse dixit* again elides Plaintiffs' argument: STASCO manipulated the Dated Brent Assessment *for*

the purpose of aiding Shell Trading's overall crude oil transactions, including those of its sister company operating in the United States. *See generally In re Western States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 743-44 (9th Cir. 2013) ("AEP either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information . . . The purpose and effect of this was to collusively and artificially inflate the price of natural gas paid by commercial entities in Wisconsin.") (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, this Court respectfully should reverse the district court's decisions dismissing: (i) Plaintiffs' antitrust claims for lack of antirust injury and CEA claims for being impermissibly extraterritorial; (ii) the claims against Statoil for lack of subject matter jurisdiction under the FSIA; and (iii) the claims against STASCO for lack of personal jurisdiction.

Dated: November 1, 2017
New York, New York

Respectfully submitted,

KIRBY McINERNEY LLP

By: /s/ *David E. Kovel*

David E. Kovel
Andrew M. McNeela
825 Third Avenue, 16th Floor
New York, New York 10022
Tel.: (212) 371-6600
Fax.: (212) 751-2540
Email: dkovel@kmllp.com
amcneela@kmllp.com

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 1st day of November, 2017, I caused this Brief of Appellants, Special Appendix, and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

I further certify that on this 1st day of November, 2017, I caused the required number of bound copies of the Brief of Appellants, Special Appendix, and Joint Appendix to be filed with the Clerk of the Court via UPS Next Day Air.

/s/ David E. Kovel
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as modified by this Court's October 19, 2017 Order granting Plaintiffs permission to file an oversized brief up to 18,000 words, because this brief contains 17,925 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office in Times New Roman size 14-point font.

Dated: November 1, 2017
New York, New York

KIRBY McINERNEY LLP

By: /s/ *David E. Kovel*
David E. Kovel
825 Third Avenue, 16th Floor
New York, New York 10022
Tel.: (212) 371-6600
Fax.: (212) 751-2540
Email: dkovel@kmllp.com