13-1624-cv
Loginovskaya v. Batratchenko, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2013

(Argued: January 8, 2014 Decided: September 4, 2014)

Docket No. 13-1624-cv

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LUDMILA LOGINOVSKAYA,

Plaintiff-Appellant,

- v.-

OLEG BATRATCHENKO, THOR UNITED CORP., THOR UNITED CORP. (NEVIS), THOR ASSET MANAGEMENT INC., THOR REAL ESTATE MANAGEMENT LLC, THOR OPTI-MAX LLC, THOR CAPITAL LLC, THOR FUTURES LLC, THOR REALTY LLC, THOR GUARANT REAL ESTATE FUND, LTD. (BVI), THOR REAL ESTATE MASTER FUND, LTD., THOR OPTIMA LLC, THOR REALTY HOLDINGS LLC, JOHN DOES 1-20, TATIANA SMIRNOVA, THOR OPTI-MAX FUND, LTD.,

Defendants-Appellees.[*]

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[*] The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

Before: JACOBS, LOHIER and DRONEY, Circuit Judges.

Ludmila Loginovskaya appeals from a judgment of the United States District Court for the Southern District of New York (Oetken, J.), dismissing her Amended Complaint for failure to state a claim under the Commodities Exchange Act, 7 U.S.C. § 1 et seq., and declining to exercise supplemental jurisdiction over her remaining state law claims. We conclude that the presumption against extraterritorial effect and the domestic transaction test of Morrison v. National Australia Bank Ltd., 561 U.S. 247, 130 S. Ct. 2869 (2010), apply to a private right of action brought under Section 22 of the Commodities Exchange Act. Affirmed.

Judge LOHIER dissents in a separate opinion.

CHRISTOPHER M. EGLESON (Nancy Chung and Roxanne Tizravesh, on the brief), Akin Gump Strauss Hauer & Feld LLP, New York, N.Y., for Plaintiff-Appellant.

JUDITH M. WALLACE (Gary D. Sesser and Alexander Malyshev, on the brief), Carter Ledyard & Milburn LLP, New York, N.Y., for Defendants-Appellees.

DENNIS JACOBS, Circuit Judge:

Ludmila Loginovskaya appeals from a judgment of the United States District Court for the Southern District of New York (Oetken, J.), dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), her claims under the Commodities Exchange Act ("CEA"), 7 U.S.C. § 1 et seq., and declining to exercise supplemental jurisdiction over her state law claims. The district court held that the domestic transaction test announced in Morrison v. National Australia Bank Ltd., 561 U.S. 247, 130 S. Ct. 2869 (2010), applies to Loginovskaya's CEA claim, and that her Amended Complaint failed to adequately allege a domestic transaction. Because the district court dismissed Loginovskaya's only federal claim, it declined to exercise supplemental jurisdiction over her remaining state law claims. On appeal, Loginovskaya argues the district court erred in its application of Morrison.

Applying the reasoning of Morrison, we agree with the district court that a private right of action brought under CEA § 22 is limited to claims alleging a commodities transaction within the United States. Because Loginovskaya fails to allege a domestic commodities transaction, we affirm the district court's judgment. Because we affirm on the basis of § 22, we do not reach

Loginovskaya's argument regarding the territorial reach of the antifraud provision in CEA § 4o.

BACKGROUND[1]

The Thor Group, an international financial services organization based in New York, manages investment programs, chiefly in commodities futures and real estate. Among the Thor Group entities are: 1) Thor Guarant, which invests in real estate holdings and development; 2) Thor Optima, which invests in options, futures, securities, and financial instruments; and 3) Thor Opti-Max, which invests in the combined assets of Thor Guarant and Thor Optima. Also part of the Thor Group is Thor United, an entity that maintains "integrated accounts" through which it invests in Thor Guarant, Thor Optima, and Thor Opti-Max on behalf of investors. Several Thor entities are registered participants in the commodities markets as commodity pool operators or commodity trading advisors. Am. Compl., J.A. at 72-73.

[1] The following facts are derived entirely from the plaintiff's Amended Complaint, which we presume to be true at this stage of the proceeding. See, e.g., DeJesus v. HF Mgmt. Servs., LLC, 726 F.3d 85, 87 (2d Cir. 2013).

Defendant Oleg Batratchenko, a U.S. citizen resident in Moscow, is the Group's chief executive officer; in this role, he is a director for the three Thor programs. Defendant Tatiana Smirnova is a director for the Thor Opti-Max and Thor Guarant programs, and has served in various managerial capacities in the Thor entities.

Loginovskaya, a Russian citizen residing in Russia, was solicited by Batratchenko in January 2006 to invest in the Thor programs. Id. at 57. He provided her with brochures, investment memoranda, and other materials, written in Russian, describing the opportunity. Id. Batratchenko and his agents represented to her that she could withdraw her principal and returns at any time upon a set period of notice, that risk would be controlled, that the funds were managed by experienced experts in futures trading and investment (Peter Kambolin and Alexei Chekhlov), and that the programs would be audited regularly by reputable firms. Id. at 57-58.

Influenced by these representations, Loginovskaya entered into two investment contracts with Batratchenko and Thor United in 2006 and 2007. These contracts expressly incorporated the investment memoranda earlier provided to Loginovskaya. Pursuant to the contracts, Loginovskaya transferred a total of

$720,000 to Thor United's bank accounts in New York, which were subsequently drawn down to a remaining principal of $590,000.

Loginovskaya's account statements over ensuing years generally showed positive returns. Around May 2009, Loginovskaya sought to realize her gains and withdraw her remaining account funds. No money was forthcoming, and no further monthly account statement was dispatched until the statement dated November 2009, which reported for the first time that her investment had lost more than half its value since May. Loginovskaya again requested the return of her funds, unsuccessfully.

Investors were put off with false assurances that the programs were experiencing a temporary dip in liquidity, that cash would be available shortly, and that the Thor programs would be providing detailed financial statements to the investors. An April 2010 letter from Batratchenko falsely contended that, "due to onerous new regulations in the United States, investors could not withdraw their funds from the investment accounts without providing" burdensome documentation. Id. at 66 (emphasis omitted).

Since 2010, Loginovskaya has learned that the Thor programs used investors' funds in a manner inconsistent with the investment contracts. Between

2006 and 2009, Batratchenko caused the Thor entities to extend $40 million in unsecured loans to Atlant Capital Holdings LLC. Id. at 67. Atlant, which is not an affiliate of the Thor programs, makes equity investments in commercial and residential property in New York using funds loaned by Thor Real Estate Master Fund, Ltd. Atlant was undercapitalized, its real estate investments failed, the unsecured loans were defaulted, and the Thor entities could not recover Loginovskaya's funds. Batratchenko and Smirnova had personal financial interests in Atlant's real estate activity. See id. at 67-70.

This action was commenced in January 2012; the Amended Complaint, filed in June 2012, alleged that the defendants engaged in fraudulent conduct in violation of CEA § 4o, and in violation of state law. The district court granted defendants' motion to dismiss the CEA claim under Rule 12(b)(6) for failure to state a cause of action, on the ground that the CEA claim failed Morrison's domestic transaction test. See Loginovskaya v. Batratchenko, 936 F. Supp. 2d 357, 367-75 (S.D.N.Y. 2013). Because Loginovskaya failed to allege a plausible federal cause of action, the court declined to exercise supplemental jurisdiction over her state law claims. See id. at 375.

On appeal, Loginovskaya argues the district court erred in applying the Morrison test to her CEA claim.

DISCUSSION

"We review de novo the grant of a motion to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6)." Harris v. Mills, 572 F.3d 66, 71 (2d Cir. 2009). "We consider the legal sufficiency of the complaint, taking its factual allegations to be true and drawing all reasonable inferences in the plaintiff's favor." Id. "'To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" Cohen v. S.A.C. Trading Corp., 711 F.3d 353, 359 (2d Cir. 2013) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

I

The CEA is a "remedial statute that serves the crucial purpose of protecting the innocent individual investor--who may know little about the intricacies and complexities of the commodities market--from being misled or deceived." Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co., 310 F.3d 1321,

1329 (11th Cir. 2002). The CEA contains several anti-fraud provisions to fulfill this purpose. Among those is § 4o:

> (1) It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> > (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or
> >
> > (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

7 U.S.C. § 6o(1).

A private right of action is afforded by CEA § 22, see 7 U.S.C. § 25(a)(1), limited to four circumstances, each of them explicitly transactional in nature: receiving trading advice for a fee, making a contract of sale of any commodity for future delivery or the payment of money to make such a contract, placing an order for purchase or sale of a commodity, or market manipulation in connection with a swap or contract for sale of a commodity. See id.; Klein & Co. Futures, Inc. v. Bd. of Trade of N.Y., 464 F.3d 255, 262 (2d Cir. 2006) ("Congress enacted CEA § 22 but enumerated the only circumstances under which a civil litigant could assert a private right of action for a violation of the CEA or CFTA regulations.").

An aggrieved party otherwise may seek recovery through an administrative proceeding at the Commodity Futures Trading Commission ("CFTC"). See 7 U.S.C. § 18.

To ascertain the territorial scope of CEA §§ 4o and 22, we consult the Supreme Court's opinion in Morrison, which decided whether § 10(b) of the Securities Exchange Act of 1934 ("SEA") applies extraterritorially. See generally 130 S. Ct. 2869. The Morrison Court relied on this canon of statutory construction: "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" Id. at 2877 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)). Thus, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." Id. at 2878.

Prior to Morrison, this Circuit applied an "effects or conducts" test to determine whether SEA § 10(b) applied to transactions outside the United States. Id. at 2878-80. The Supreme Court rejected that test as unpredictable and because it neglected the presumption against extraterritoriality: "Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable

background against which Congress can legislate with predictable effects." Id. at 2881.

Morrison ascertained the territorial reach of § 10(b) in two steps. First, the Court considered whether Congress, by clear statement, overrode the presumption against extraterritoriality. Courts must presume a statute lacks extraterritorial effect "unless there is the affirmative intention of the Congress clearly expressed." Id. at 2877 (quotation marks omitted). The Court held there was no such "affirmative indication in the [SEA] that § 10(b) applies extraterritorially." Id. at 2883. The Court observed that references in text to "interstate commerce" or a "national public interest" in the global securities marketplace are insufficient to overcome the presumption. Id. at 2882. Moreover, "when a statute provides for *some* extraterritorial application, the presumption against extraterritoriality operates to limit *that provision* to its terms." Id. at 2883 (emphasis added).

As Morrison acknowledged, the applicability of the presumption at the first step is "not self-evidently dispositive," and "requires further analysis":

> For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it

> retreated to its kennel whenever *some* domestic activity is involved in the case.

Id. at 2884 (emphasis in original). Absent a clear statement by Congress that § 10(b) has extraterritorial effect, Morrison proceeded to a second inquiry: how the presumption affects the particular statutory provision in view of the "focus of congressional concern." Id. (quotation marks omitted).

As the Court observed, § 10(b) punishes "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. (quoting 15 U.S.C. § 78j(b)). The focus of congressional concern was thus "not upon the place where the deception originated, but upon purchases and sales of securities in the United States." Id. Accordingly, the Court limited the territorial scope of SEA § 10(b) to domestic transactions: "purchase[s] or sale[s] . . . made in the United States, or involv[ing] a security listed on a domestic exchange."[2] Id. at 2886.

The Court expressly rejected an alternative test offered by the Solicitor General that would have weighed whether significant domestic conduct was

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[2] Morrison did not further define a domestic transaction. This Circuit addressed that issue in Absolute Activist Value Master Fund Ltd. v. Ficeto. See generally 677 F.3d 60 (2d Cir. 2012).

material to a fraud's success. Id. Acknowledging that such a test would have admirable purposes, the Court found no support for it in the statutory text. Id. Not incidentally, extension of the territorial reach of the provision would lead to the United States becoming "the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." Id.

II

The CEA as a whole--and sections 4o and 22 in particular--is silent as to extraterritorial reach. See Starshinova v. Batratchenko, 931 F. Supp. 2d 478, 485-86 (S.D.N.Y. 2013) (compiling pre-Morrison case law and holding there is no basis to conclude the CEA applies abroad); In re LIBOR-Based Fin. Instruments Antitrust Litig., 935 F. Supp. 2d 666, 696 (S.D.N.Y. 2013) (stating no indication of extraterritorial effect in the text of the CEA nor its legislative history). Given the absence of any "affirmative intention" by Congress to give the CEA extraterritorial effect, we must "presume it is primarily concerned with domestic conditions." Morrison, 130 S. Ct. at 2877. We therefore proceed to consider the "focus of congressional concern." Id. at 2884.

III

Loginovskaya's suit must satisfy the threshold requirement of CEA § 22 before reaching the merits of her § 4o fraud claim. In determining *how* the presumption against extraterritorial effect applies, we look to the focus of § 22: domestic conduct, domestic transactions, or some other phenomenon localized to the United States. In § 22, the "focus of congressional concern," Morrison, 130 S. Ct. at 2884, is clearly transactional. Section 22 allows a private right of action against a person whose violation of the CEA "result[s] from one or more of the transactions" listed in the statute: receiving trading advice *for a fee*; making a *contract of sale* or deposit in connection with *any order* to make such a contract; the *purchase, sale, or order* for a commodity interest; and market manipulation in connection with a *swap or contract of sale*. 7 U.S.C. § 25(a)(1). "The common thread of these four subdivisions is that they limit claims to those of a plaintiff *who actually traded* in the commodities market." Klein, 464 F.3d at 260 (emphasis added). Given that CEA § 22 limits the private right to suits over transactions, the suits must be based on transactions occurring in the territory of the United States.

"Traditionally, courts have looked to the securities laws when called upon to interpret similar provisions of the CEA." Saxe v. E.F. Hutton & Co., 789 F.2d 105, 109 (2d Cir. 1986). Therefore, Morrison's domestic transaction test in effect decides the territorial reach of CEA § 22. A private right of action exists only when a plaintiff shows that one of the four transactions listed in § 22 occurred within the United States.

Loginovskaya argues that Morrison governs substantive (conduct-regulating) provisions rather than procedural provisions such as § 22. Morrison, however, draws no such distinction, and holds that the presumption applies generally to "statutes." See 130 S. Ct. at 2877-78; 2881. The broad thrust of Morrison is actually to the contrary: the majority opinion reins in lower courts that were "disregard[ing] . . . the presumption against extraterritoriality" that had been "long and often recited in [Supreme Court] opinions." Id. at 2878. Morrison thus simplified and reinforced this canon of construction, and thereby discouraged courts from making fussy distinctions in deciding whether or not the presumption applies. Loginovskaya's argument urges us to ignore

Morrison's course correction.[3]

Loginovskaya's proposed distinction in this context--between substantive provisions and those that only create a cause of action–-is also foreclosed by Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2013). Kiobel applied the presumption against extraterritoriality to the Alien Tort Statute, which "provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action"; "[i]t does not directly regulate conduct or afford relief." Id. at 1664. Thus Kiobel (like Morrison) recognizes that a statutory private right of action reflects congressional choices over the role of the federal courts in adjudicating some claims and not others.

Our reading of CEA § 22 is further consistent with this Court's precedent regarding extraterritoriality. Saying that a private right of action requires a domestic transaction is not the same thing as applying the presumption based on

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[3] In Blazevska v. Raytheon Aircraft Co., the Ninth Circuit decided whether the presumption against extraterritorial effect applied to a procedural statute that "only regulates the ability of a party to seek compensation from . . . airplane manufacturers in American courts." 522 F.3d 948, 953 (2008). Because the statute was merely procedural and "not a statute governing the substantive standards involved in tort claims," id. at 953, the court held that the presumption did not apply, id. at 954-55. Blazevska, however, was decided prior to Morrison and, therefore, carries little (if any) clout.

"the identity of the defendant."[4] Balintulo v. Daimler AG, 727 F.3d 174, 189-90, n.24 (2d Cir. 2013). Rather, to bring a suit under § 22, the transaction at issue--the *conduct* underlying the suit--must have occurred within the United States. Moreover, applying a canon of construction equally to all statutory provisions is not the same thing as "improperly conflat[ing] the question whether a statute confers a private right of action with the question whether the statute's substantive prohibition reaches a particular form of conduct." Gomez-Perez v. Potter, 553 U.S. 474, 483 (2008).

As Loginovskaya points out, applying Morrison to CEA § 22 draws a distinction between private litigion and enforcement actions by the government. Such a result is not remarkable. See Morrison, 130 S. Ct. at 2894 n.12, 2895 (Stevens, J., dissenting) (noting differences between the scope of actions that may be brought by the SEC and those by private parties). This division is consistent with CEA § 4o's apparent focus on the persons who are regulated without regard to where the resulting transaction occurs. See Alexander v. Sandoval, 532 U.S. 275, 289 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a

[4] *Pace* the dissent.

particular class of persons." (quotation marks omitted)); see also SEC v. Gruss, 859 F. Supp. 2d 653, 663 (S.D.N.Y. 2012). Nor does this distinction (as Loginovskaya contends) set up different substantive standards of conduct based on whether the plaintiff is a private party or the government; the *substantive* standards of § 4o are the same regardless of who brings the claim. See United States v. Vilar, 729 F.3d 62, 74-75 (2d Cir. 2013). Nothing in this opinion precludes relief for a private party in these circumstances; the inability to bring a cause of action in federal court does not restrict the ability to bring a claim before the CFTC. See 7 U.S.C. § 18(a)(1) ("Any person complaining of any violation of any provision [of the CEA] . . . may . . . apply to the Commission for an order awarding [damages].").

To summarize, the CEA creates a private right of action for persons anywhere in the world who transact business in the United States, and does not open our courts to people who choose to do business elsewhere.

IV

In the context of SEA § 10(b), we explained that there are two ways to allege a "domestic transaction." See Absolute Activist, 677 F.3d at 68. First, "it is

sufficient for the plaintiff to allege that title to the [security] was transferred within the United States." Id. Second, a plaintiff may allege facts showing "that the parties incurred irrevocable liability within the United States: that is, that the purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security." Id.

Given our holding that Morrison applies to a private right of action under CEA § 22--and the parallels between the CEA and SEA--there is no reason why Absolute Activist's formulation should not apply here. Loginovskaya alleges her claim arises from the purchase, sale, or placing an order for the purchase or sale of an interest or participation in a commodity pool.[5] See 7 U.S.C. § 25(a)(1)(C)(iii). She must therefore demonstrate that the transfer of title or the point of irrevocable liability for such an interest occurred in the United States.

Loginovskaya argues that the Amended Complaint shows that title to her interest in Thor Opti-Max was transferred in New York. We disagree.

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[5] Loginovskaya's Amended complaint also alleges she received trading advice for a fee. See 7 U.S.C. § 25(a)(1)(A). As the district court observed, however, there are no allegations in the complaint of Loginovskaya receiving trading advice. See 936 F. Supp. 2d at 373. We therefore consider only her allegations regarding the purchase or sale of an interest in a commodity pool.

Loginovskaya contracted directly with Thor United only. Am. Compl., J.A. at 60. According to the Investment Memoranda incorporated in the contract with Thor United, Thor United invested these assets in the Thor Programs and held them for the benefit of its investors. See S.D.N.Y. Dkt. No. 32 Ex. 1B ¶ 3.1. Thus title to the Thor programs was held by Thor United; title was not in the individual investor. See id. at ¶ 5.8.[6] All Loginovskaya purchased was an interest in Thor United. Nowhere does she allege that title to her Thor United shares was transferred within the United States.

Loginovskaya's complaint likewise fails to allege that Thor United incurred irrevocable liability within the United States. At all times, Loginovskaya resided in Russia. Batratchenko solicited her investment while in Russia using investment materials written in Russian. The investment contracts with Thor United were negotiated and signed in Russia. True, Thor United is incorporated

[6] Although the Investment Memoranda are not part of the complaint, we may consider documents which the complaint incorporates by reference or relies heavily upon. See, e.g., DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010). Loginovskaya acknowledges that her complaint incorporates the Investment Memoranda by reference, though she does not concede the accuracy of the translations. Appellant Br. at 14, n.47. Even if we did not rely on the Investment Memoranda, however, the only plausible inference permitted by the complaint is that Loginovskaya invested in Thor United and gave Thor United discretion over her investment.

in New York; but "a party's residency or citizenship is irrelevant to the location of a given transaction." Absolute Activist, 677 F.3d at 70.[7] Russia (not the United States) is where Loginovskaya and the defendants reached a "meeting of the minds." Id. at 68; see also Vilar, 729 F.3d at 77-78 (holding a transaction was domestic because the contract negotiations, correspondence, and execution occurred in the United States).

Loginovskaya emphasizes that she was required to wire transfer her funds to Thor's bank account in New York. These transfers, however, were actions needed to carry out the transactions, and not the transactions themselves--which were previously entered into when the contracts were executed in Russia. The direction to wire transfer money to the United States is insufficient to demonstrate a domestic transaction. See Vilar, 729 F.3d at 77 n.10.

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[7] Loginovskaya attempts to distinguish this portion of Absolute Activist by pointing out that the residency or citizenship of natural persons is different from corporate entities. See Appellant Br. at 60, n.185. She argues that, although natural persons can be physically present in a jurisdiction other than where they are resident, a corporation is only located in the jurisdiction where it exists as a creature of law. Taken to its logical conclusion, any transaction with a United States corporation would constitute a domestic transaction. We reject this argument because it would expand Morrison's transaction test beyond the scope of the "conduct and effects" test with which Morrison dispensed.

Similarly, the "safe harbor" provisions in the contracts were a part of the larger contract executed in Russia. These provisions permitted Loginovskaya fifteen days to freely withdraw her funds from Thor's New York bank account after her initial transfer. The end of the fifteen-day waiting period, however, was not the start of the transaction. Much like the direction to wire transfer the funds to Thor's New York account, these provisions merely implemented an aspect of a transaction that was executed in Russia.

V

Loginovskaya argues that grafting Morrison's domestic transaction test onto CEA § 22 is anomalous because § 4o reaches more broadly. The basis of her argument is that the "focus of congressional concern," Morrison, 130 S. Ct. at 2884, in CEA § 4o is on domestic commodities market participants--not domestic transactions. The contention that Morrison's transaction test is inapplicable to § 4o's antifraud protection is not without merit. See Loginovskaya, 936 F. Supp. 2d at 369 (observing that "Morrison's transaction test is not immediately applicable to § 4o"); c.f. CEA § 4o, 7 U.S.C. § 6o (protecting against "*prospective* clients or participants" (emphasis added)); Morrison, 130 S. Ct. at 2887

(distinguishing the wire fraud statute from SEA § 10(b) because the wire fraud statute has no requirement that the prohibited conduct be "'in connection with' any particular transaction or event"); Ebrahimi v. E.F. Hutton & Co., 852 F.2d 516, 519 (10th Cir. 1988) (noting that CEA § 4b, rather than § 4o, is "most closely analogous to the antifraud provision" of SEA § 10(b)); Gruss, 859 F. Supp. 2d at 662 (holding that Morrison's transaction test does not apply to Section 206 of the Investment Advisers Act of 1940 because its focus is on the investment advisor). But see Starshinova, 931 F. Supp. 2d at 486-87. Nevertheless, we do not have to decide how the presumption against extraterritorial effect defines the reach of § 4o. Our conclusion that Morrison's domestic transaction test applies to CEA § 22 is not anomalous; if § 4o regulates the conduct of domestic commodities market participants in other countries, it would seem Congress has allowed a remedy through the CFTC. See 7 U.S.C. § 18.

CONCLUSION

While the CEA may reach and regulate the conduct of the Thor defendants, Loginovskaya cannot pursue her cause of action in federal court because: the presumption against extraterritorial effect applies to CEA § 22; that provision

requires a commodities transaction; and Loginovskaya has not alleged a domestic commodities transaction. The judgment is affirmed.