

17-648

Choi v. Tower Research Capital LLC

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In the
United States Court of Appeals
For the Second Circuit

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AUGUST TERM, 2017

ARGUED: SEPTEMBER 20, 2017

DECIDED: MARCH 29, 2018

AMENDED: MAY 9, 2018

No. 17-648-cv

MYUN-UK CHOI, JIN-HO JUNG, SUNG-HUN JUNG, SUNG-HEE LEE,
KYUNG-SUB LEE, individually and on behalf of all others similarly
situated,
Plaintiffs-Appellants,

v.

TOWER RESEARCH CAPITAL LLC, MARK GORTON,
Defendants-Appellees.

—————
Appeal from the United States District Court
for the Southern District of New York.
No. 14-cv-09912 – Kimba M. Wood, *Judge.*

—————
Before: WALKER, POOLER, and LOHIER, *Circuit Judges.*
—————

1 Plaintiffs, five Korean citizens, transacted on a “night market”
2 of Korea Exchange (“KRX”) futures contracts. The KRX is a
3 derivatives and securities exchange headquartered in Busan, South
4 Korea. On the KRX night market, traders enter orders in Korea when
5 the KRX is closed for business, whereupon their orders are quickly
6 matched with a counterparty by an electronic trading platform
7 (“CME Globex”) located in Aurora, Illinois. The trades are then
8 cleared and settled on the KRX when it opens for business the
9 following morning.

10 Plaintiffs allege that Defendants Tower Research Capital LLC,
11 a New York based high-frequency trading firm, and its founder, Mark
12 Gorton, injured them and others by engaging in manipulative
13 “spoofing” transactions on the KRX night market in violation of the
14 Commodity Exchange Act (“CEA”), 7 U.S.C. §§ 1 *et seq.*, and New
15 York law. The district court dismissed the action principally on the
16 ground that the CEA does not apply extraterritorially as would be
17 required for it to reach Defendants’ alleged conduct. Because we
18 conclude Plaintiffs’ allegations make it plausible that the trades at
19 issue were “domestic transactions” under our precedent, we do not
20 agree that application of the CEA to Defendants’ alleged conduct
21 would be an impermissible extraterritorial application of the act. We
22 also disagree with the district court’s conclusion that Plaintiffs failed

1 to state a claim for unjust enrichment. Accordingly, we VACATE and
2 REMAND for further proceedings.

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4
5 MICHAEL EISENKRAFT, Cohen Milstein Sellers &
6 Toll PLLC, New York, NY (J. Douglas Richards,
7 Richard Speirs, Cohen Milstein Sellers & Toll
8 PLLC, New York, NY; Times Wang, Cohen
9 Milstein Sellers & Toll PLLC, Washington, DC, *on*
10 *the brief*), for *Plaintiffs-Appellants*.

11 NOAH A. LEVINE, Wilmer Cutler Pickering Hale
12 and Dorr LLP, New York, NY (Matthew T.
13 Martens, Albinas J. Prizgintas, Wilmer Cutler
14 Pickering Hale and Dorr LLP, Washington DC, *on*
15 *the brief*), for *Defendants-Appellees*.

16
17
18 JOHN M. WALKER, JR., *Circuit Judge*:

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21 derivatives and securities exchange headquartered in Busan, South
22 Korea. On the KRX night market, traders enter orders in Korea, when
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26 cleared and settled on the KRX when it opens for business the
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2 (“Tower”), a New York based high-frequency trading firm, and its
3 founder, Mark Gorton, injured them and others by engaging in
4 manipulative “spoofing” transactions on the KRX night market in
5 violation of the Commodity Exchange Act (“CEA”), 7 U.S.C. §§ 1 *et*
6 *seq.*, and New York law. The district court dismissed the action
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8 extraterritorially as would be required for it to reach Defendants’
9 alleged conduct. Because we conclude Plaintiffs’ allegations make it
10 plausible that the trades at issue were “domestic transactions” under
11 our precedent, we do not agree that application of the CEA to
12 Defendants’ alleged conduct would be an impermissible
13 extraterritorial application of the act. We also disagree with the
14 district court’s conclusion that Plaintiffs failed to state a claim for
15 unjust enrichment under New York law. Accordingly, we VACATE
16 and REMAND for further proceedings.¹

¹ After our initial disposition of this appeal, *see Myun-Uk Choi v. Tower Research Capital*, 886 F.3d 229 (2d Cir. 2018), defendants-appellees filed a petition for panel rehearing. We hereby GRANT the petition without the need for reargument, *see* Fed R. App. P. 40(a)(4)(A), withdraw our opinion of March 29, 2018, and issue this amended opinion in its place. We also DENY as moot, pursuant to Fed. R. App. P. 29(b)(2), amici’s motion to file a brief in support of rehearing.

BACKGROUND²

1
2 The KOSPI 200, a stock index akin to the S&P 500 or the Dow
3 Jones, consists of the weighted averaged of two hundred Korean
4 stocks traded on the KRX. The KRX also includes a KOSPI 200 futures
5 contract in its daytime trading, which allows traders to speculate on
6 the value of the KOSPI 200 index at various future dates. To facilitate
7 after-hours trading of KOSPI 200 futures, the KRX contracted with
8 CME Group, the product of a merger of the Chicago Mercantile
9 Exchange (“CME”) and the Chicago Board of Trade, to establish an
10 overnight market for futures trading. Pursuant to that agreement,
11 futures contracts on KRX’s “night market” are listed and traded on
12 “CME Globex, an electronic CME platform located in Aurora,
13 Illinois.” Amended Complaint (“AC”) ¶ 18. CME Globex “is the
14 same platform which CME [Group] utilizes to trade derivatives [of a
15 wholly domestic character] based on U.S. Treasury bonds, the S&P
16 500, the NASDAQ 100, the Dow Jones Industrial Average, grains,
17 livestock, weather and real estate.” AC ¶ 18. In 2012, the year
18 relevant to this action, approximately 7,000,000 trades of futures
19 contracts took place on the KRX night market. AC ¶ 20 n.8.

20 A KRX night market trade begins with the placement of a “limit
21 order” on the KRX system in Korea. Within seconds, the trader’s

² These facts derive from the amended complaint, and we accept them as true. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

1 order is matched with an anonymous counterparty on CME Globex
2 “using the multiple price a[u]ction method through which successful
3 bidders are required to pay for the allotted quantity of securities at
4 the respect price/yield at which they have bid.” AC ¶ 21 (internal
5 quotation marks omitted). Following matching, “settlement of all
6 trades occurs the day after on the KRX.” AC ¶ 22.

7 In 1998, Gorton founded Tower, a high-frequency trading firm.
8 “High frequency trading firms use computers to create and operate
9 algorithms and, by using those algorithms and technology, execute
10 trades faster than anyone else—making pennies on millions and
11 millions of trades executed in milliseconds.” AC ¶ 27. In 2012, Tower
12 aggressively brought its algorithm and technology to bear on the KRX
13 night market, executing nearly 4,000,000 trades of futures contracts,
14 approximately 53.8% of all KRX night market trades that year.
15 AC ¶ 31.

16 Plaintiffs allege that a significant number of these trades were
17 manipulative, in that Defendants “utilized their algorithmic flash
18 trading abilities to artificially and illegally manipulate prices of the
19 KOSPI 200 Futures during Night Market trading on the CME for their
20 own profit.” AC ¶ 31. Specifically, Plaintiffs allege that Tower’s
21 traders “created hundreds and hundreds of *fictitious* buys and sells
22 to artificially manipulate the price of the KOSPI 200 futures contracts
23 they were trading on the CME Globex.” AC ¶ 32.

1 The alleged scheme—which Plaintiffs describe as “spoofing”—
2 operated as follows. Tower’s traders would enter large volume buy
3 or sell orders on the KRX night market and then would use Tower’s
4 high-frequency technology to immediately cancel their orders or
5 ensure that they themselves were the counterparties on the trades.
6 They would do so because the intent was not to execute the trades but
7 to create a false impression about supply and demand and thereby
8 drive the market price either up or down. Once that was
9 accomplished, the traders would sell contracts at the artificially
10 inflated price or buy contracts at the artificially deflated price,
11 eventually reaping substantial profits either way. In 2012, Plaintiffs
12 allege, Tower’s traders used this spoofing practice hundreds of times,
13 earning more than \$14,000,000 in illicit profits. AC ¶ 35.

14 Plaintiffs, for their part, executed more than 1,000 KRX night
15 market trades in 2012. AC ¶ 24. Given the anonymity of CME Globex,
16 Plaintiffs cannot at the moment identify with precision whether they
17 were a counterparty on any of the allegedly manipulative Tower
18 trades, but they allege it to be a near statistical certainty that at least
19 one Tower trader was a direct counterparty with at least one Plaintiff
20 in a KRX night market trade in 2012. AC ¶ 31 n.13. In any event,
21 Plaintiffs allege that they traded at artificial prices during and due to
22 Defendants’ spoofing waves.

1 In May 2014, a Korean government regulator, the Financial
2 Services Commission (“FSC”), uncovered Defendants’ scheme and
3 referred Tower to Korean prosecutors. FSC publicly stated that
4 “traders of a U.S. based algorithmic trading specialty company
5 accessed the KOSPI 200 Overnight Futures Market and traded with
6 the use of the [sic] proprietary algorithmic trading technique, which
7 manipulated prices to build their buy and sell positions by creating
8 automatically and repeatedly fictitious trades.” AC ¶ 36. Several
9 media outlets also reported on the scheme and identified Tower as
10 the responsible entity. AC ¶¶ 37–40.

11 In December 2014, Plaintiffs filed a class complaint on behalf of
12 themselves and other individuals or entities that were allegedly
13 harmed by Defendants’ spoofing scheme when they traded in futures
14 on the KRX night market in 2012. Plaintiffs alleged that Defendants’
15 conduct violated several sections of the CEA and New York’s
16 prohibition on unjust enrichment.

17 Defendants moved to dismiss and the district court (Kimba M.
18 Wood, J.) granted the motion. Relying on *Morrison v. National*
19 *Australia Bank Ltd.*, 561 U.S. 247 (2010), the district court concluded
20 that application of the CEA to Defendants’ conduct would be an
21 impermissible extraterritorial application of the act. *Myun-Uk Choi v.*
22 *Tower Research Capital LLC*, 165 F. Supp. 3d 42 (S.D.N.Y. 2016). The
23 district court reasoned that, under *Morrison*, Defendants’ alleged

1 conduct was within the territorial reach of the CEA only if the
2 contracts at issue were (i) purchased or sold in the United States or
3 (ii) listed on a domestic exchange. *Id.* at 48. The district court
4 determined that the contracts were not purchased or sold in the
5 United States because the orders needed to “first be placed through
6 the KRX trading system [in Korea],” and because any trades matched
7 on CME Globex in Illinois were final only when settled the following
8 morning in Busan. *Id.* at 49. The district court then concluded that
9 although *CME* might be a “domestic exchange,” Plaintiffs did not
10 sufficiently plead that the same was true for *CME Globex*. *Id.* at 49–50.
11 Finally, the district court dismissed Plaintiffs’ unjust enrichment
12 claim on the ground that Plaintiffs did not allege “any direct dealing
13 or actual, substantive relationship with the Defendants.” *Id.* at 51.

14 Plaintiffs amended their complaint to add allegations about the
15 domesticity of KRX night market transactions, the nature of *CME*
16 *Globex*, and the likelihood that they were counterparties with
17 Defendants during the relevant period.

18 Defendants filed another motion to dismiss, which the district
19 court again granted. *Myun-Uk Choi v. Tower Research Capital LLC*, 232
20 F. Supp. 3d 337 (S.D.N.Y. 2017).³ The district court concluded that

³ The district court’s first decision rejected Defendants’ argument that Plaintiffs’ allegations are subject to Fed. R. Civ. P. 9(b)’s heightened pleading standard. 165 F. Supp. 3d at 46–48. Although Defendants raised

1 Plaintiffs still failed to sufficiently allege that CME Globex is a
2 “domestic exchange” under *Morrison* because it is not structured like
3 other exchanges, is not registered as an exchange with the
4 Commodity Futures Trading Commission, and is not subject to the
5 rules of a registered exchange. *Id.* at 341–42. The district court also
6 held that the amended allegations did not plausibly show that trades
7 on the KRX night market were “domestic transactions” because, in its
8 view, KRX rules suggest that transactions become final only when
9 they settle on the KRX, not when they match on CME Globex. *Id.* at
10 342. Finally, the district court again dismissed Plaintiffs’ unjust
11 enrichment claim on the ground that Plaintiffs needed “definitive
12 evidence of a direct relationship,” yet they “failed to prove that
13 buyers and sellers were direct counterparties under KRX rules.” *Id.*
14 at 343. Plaintiffs appealed.

15 DISCUSSION

16 “We review de novo the dismissal of a complaint for failure to
17 state a claim upon which relief can be granted.” *Reich v. Lopez*, 858
18 F.3d 55, 59 (2d Cir. 2017). “To survive a motion to dismiss, a

the argument again in their subsequent motion to dismiss, the district court did not address it or Defendants’ argument that, apart from *Morrison*, Plaintiffs failed to state a CEA claim. Defendants do not press either of these arguments on appeal and we do not address them. Nor do we address whether the specific allegations in the complaint constitute “spoofing” in violation of the CEA.

1 complaint must contain sufficient factual matter, accepted as true, to
2 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*,
3 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

4 Plaintiffs contend that the district court erred in dismissing
5 their CEA and unjust enrichment claims. Because we conclude
6 Plaintiffs sufficiently alleged that applying the CEA to Defendants'
7 conduct would not be an extraterritorial application of the act, and
8 that Plaintiffs' losses were sufficiently related to Defendants' gains for
9 purposes of their unjust enrichment claim, we agree.

10 I. Commodity Exchange Act

11 "The CEA is a remedial statute that serves the crucial purpose
12 of protecting the innocent individual investor—who may know little
13 about the intricacies and complexities of the commodities market—
14 from being misled or deceived." *Loginovskaya v. Batratchenko*, 764 F.3d
15 266, 270 (2d Cir. 2014) (internal quotation marks omitted). As relevant
16 to Plaintiffs' amended complaint, the CEA proscribes the use of "any
17 manipulative or deceptive device or contrivance" in connection with
18 a futures contract and prohibits the manipulation of the price of a
19 futures contract. 7 U.S.C. § 9(1), (3).

20 Defendants' argument is that, under *Morrison*, KRX night
21 market trades occur outside of the United States and are therefore
22 beyond the CEA's reach.

1 In *Morrison*, the Supreme Court set out to define the territorial
2 reach of § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b).
3 After discussing the presumption against extraterritoriality, 561 U.S.
4 at 255, the Court concluded that, given its text, § 10(b) (and Rule 10b-
5 5, promulgated thereunder) has only a domestic reach, and therefore
6 applies only to one of two types of transactions: (i) “transactions in
7 securities listed on domestic exchanges;” and (ii) “domestic
8 transactions in other securities,” *id.* at 267.

9 *Morrison* said nothing about the CEA, and we have only once,
10 in *Loginovskaya*, addressed *Morrison*’s effect on that act. There, we
11 concluded that *Morrison*’s “domestic transactions” test applies to the
12 CEA, but, because the plaintiff in *Loginovskaya* did not purchase
13 commodities on an exchange, we had no occasion to address the
14 “domestic exchange” prong. *See Loginovskaya*, 764 F.3d at 272–75. In
15 concluding that *Morrison*’s “domestic transactions” test applies to the
16 CEA, we adopted a rule established in the § 10(b) case of *Absolute*
17 *Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012).
18 *Loginovskaya*, 764 F.3d at 274. In *Absolute Activist*, we concluded that
19 a transaction involving securities is a “domestic transaction” under
20 *Morrison* if “irrevocable liability is incurred or title passes within the
21 United States.” 677 F.3d at 67. “[I]rrevocable liability” attaches
22 “when the parties to the transaction are committed to one another,”
23 or, “in the classic contractual sense, there was a meeting of the minds

1 of the parties.” *Id.* at 68 (internal quotation marks omitted); *see also*
2 *Vacold LLC v. Cerami*, 545 F.3d 114, 121–22 (2d Cir. 2008) (citing
3 *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 890–91 (2d Cir.
4 1972)).

5 Consequently, plausible allegations that parties to a transaction
6 subject to the CEA incurred irrevocable liability in the United States
7 suffice to overcome a motion to dismiss CEA claims on territoriality
8 grounds. We believe in this case that Plaintiffs’ allegations make it
9 plausible that parties trading on the KRX night market incur
10 irrevocable liability in the United States. This being a sufficient basis
11 to resolve the extraterritoriality question at this stage, there is no need
12 for us to address whether the CEA has a territorial reach on the basis
13 that the CME Globex is a “domestic exchange.”

14 In *Loginovskaya*, we took pains to heed *Morrison*’s mandate that
15 an extraterritorial analysis assess “the particular statutory provision”
16 at issue. *Loginovskaya*, 764 F.3d at 271 (citing *Morrison*, 561 U.S. at 266–
17 67); *see also Morrison*, 561 U.S. at 261 n.5. We have never concluded
18 however, as the district court and the parties seemed to assume, that
19 *Morrison*’s “domestic exchange” prong applies to the CEA either to
20 broaden or to narrow its extraterritorial reach. The section of the CEA
21 relevant to a territoriality analysis, *see Loginovskaya*, 764 F.3d at 272–
22 73, does not contain the language similar to the language in § 10(b)
23 that led *Morrison* to craft the “domestic exchange” prong: the

1 “purchase or sale of any security registered *on a national securities*
2 *exchange.*” 15 U.S.C. § 78j(b) (emphasis added). Rather, the CEA
3 speaks only of “registered entit[ies].” 7 U.S.C. § 25(a)(1)(D)(i).

4 * * *

5 We quickly dispatch Defendants’ contention that, under
6 *Morrison*, the CEA cannot apply to a commodity traded on a foreign
7 exchange. Leaving aside whether *Morrison*’s discussion of exchanges
8 is applicable to the CEA, *Morrison* itself refutes Defendants’
9 argument. *Morrison* clearly provided that the “domestic transaction”
10 prong is an independent and sufficient basis for application of the
11 Securities Exchange Act to purportedly foreign conduct. *Morrison*
12 summarized the standard in the disjunctive: “[W]hether the purchase
13 or sale is made in the United States, *or* involves a security listed on a
14 domestic exchange.” 561 U.S. at 269–70 (emphasis added). In
15 applying this standard, *Morrison* assessed the domestic nature of a
16 transaction of securities that were listed on an Australian exchange,
17 *see id.* at 273, which would have been an unnecessary endeavor under
18 Defendants’ view. Similarly, when we applied *Morrison* in *City of*
19 *Pontiac Policemen’s & Firemen’s Retirement System v. UBS AG*, 752 F.3d
20 173 (2d Cir. 2014), we specifically assessed, for trades made on foreign
21 exchanges, whether irrevocable liability attached. *Id.* at 181–82.
22 Plainly the reasoning of *Morrison* does not preclude the application of
23 the CEA to trades made on a foreign exchange when irrevocable

1 liability is incurred in the United States. We therefore turn to whether
2 Plaintiffs sufficiently alleged that the parties incurred irrevocable
3 liability for KRX night market trades in the United States.

4 The parties do not dispute that the trades at issue were
5 “matched” in the United States on CME Globex and were “cleared
6 and settled” in Korea. The issue is therefore whether the allegations
7 make it plausible that the parties incurred “irrevocable liability” upon
8 matching. Plaintiffs’ amended complaint alleges not only that KRX
9 night market trades bind the parties on matching, it also alleges that
10 the express view of CME Group is that “matches [on CME Globex]
11 are essentially binding contracts” and “[m]embers are required to
12 honor all bids or offers which have not been withdrawn from the
13 market.” AC ¶¶ 21–22. Nothing in the amended complaint or
14 elsewhere suggests that a trading party may unilaterally revoke
15 acceptance following matching on CME Globex. It follows from these
16 allegations that, in the “classic contractual sense,” *Absolute Activist*,
17 677 F.3d at 68, parties incur irrevocable liability on KRX night market
18 trades at the moment of matching.

19 Defendants’ arguments to the contrary are unavailing.
20 Defendants contend that irrevocable liability attaches only at
21 settlement on the KRX the morning after matching on CME Globex.
22 For this contention, they rely on the KRX rules, which, they assert,
23 “provide that KOSPI 200 futures trades become irrevocable *only* after

1 clearing and settlement.” Br. of Appellees at 47 (emphasis added).
2 We are not convinced. The KRX rules on which Defendants rely state,
3 in Defendants’ words, that “executions may be cancel[l]ed or restated
4 after matching due to errors by the exchange or by a market
5 participant.” Br. of Appellees at 47. Whether the exchange can cancel
6 or modify trades due to errors, by the exchange or by a market
7 participant, however, says nothing about whether either trading
8 party is free to revoke its error-free acceptance of a trade after
9 matching. Stated differently, that the exchange has the power to
10 rectify errors in the parties’ contracts does not render those contracts
11 “revocable” in any meaningful sense.

12 Defendants next point to a KRX website that, they assert,
13 provides that “‘assumption of liability’ occurs only during the
14 clearing process,” Br. of Appellee at 48 (alteration omitted), implying,
15 in Defendants’ view, that clearing is the first point at which any
16 liability attaches. Defendants expressed a similar view at oral
17 argument, where counsel contended that liability does not attach *at*
18 *all* between the buyer and seller of the futures contract, but, rather,
19 between each and the KRX. This view evinces a fundamental
20 misunderstanding of Plaintiffs’ allegations and exchange trading
21 generally. Although liability might ultimately attach between the
22 buyer/seller and the KRX upon clearing, that does not mean liability
23 does not *also* attach between the buyer and seller at matching prior to

1 clearing. The mechanics of the transaction support both: (i) the buyer
2 and seller enter a binding irrevocable agreement through matching
3 on CME Globex; and then, subsequently, (ii) through the KRX's
4 clearing process, the buyer and seller each transfer that liability from
5 each other to the exchange. Before this subsequent transfer of liability
6 takes place in Korea the next morning, trading counterparties are
7 bound to each other, and not to the exchange. This is analogous to
8 the traditional practice, prior to the advent of remote algorithmic
9 high-speed trading, in which buyers and sellers of commodities
10 futures would "reach[] an agreement on the floor of the exchange"
11 and then subsequently submit their trade to a clearinghouse for
12 clearing and settling. *Leist v. Simplot*, 638 F.2d 283, 287 (2d Cir. 1980);
13 *see also Ryder Energy Distribution Corp. v. Merrill Lynch Commodities*
14 *Inc.*, 748 F.2d 774, 776 (2d Cir. 1984). Just as the meeting of the minds
15 previously occurred on the exchange floor, Plaintiffs plausibly allege
16 that there is a similar meeting of the minds when the minds of the
17 KRX night market parties meet on CME Globex.

18 The KRX rules themselves acknowledge a pre-existing liability
19 between trading counterparties prior to the exchange's assumption of
20 liability. Specifically, the rules provide that after the KRX verifies a
21 trade, "the Exchange shall *assume the liability that the member has to the*
22 *member* who is the counterparty of [the] trade and the relevant
23 member bears the liability that the Exchange assumed for it." App'x

1 441 (emphasis added). This is consistent with the alleged view of
2 CME Group, which indicates in several sources identified in
3 Plaintiffs' amended complaint that matching on CME Globex creates
4 irrevocable liability (which later is *assumed* by the exchange).

5 At the least, Plaintiffs' allegations make it plausible that the
6 parties incurred irrevocable liability for their KRX night market trades
7 on CME Globex in Illinois, which is all that is required at this stage of
8 the litigation. Plaintiffs' CEA claims should not have been dismissed
9 on extraterritoriality grounds.

10 II. Unjust Enrichment

11 Plaintiffs brought a claim for unjust enrichment, a New York
12 common law quasi-contract cause of action requiring the plaintiff to
13 establish: "(1) that the defendant benefitted; (2) at the plaintiff's
14 expense; and (3) that equity and good conscience require restitution."
15 *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000).⁴ The district court
16 dismissed the claim, concluding that Plaintiffs failed to prove a
17 required "direct relationship" between themselves and the
18 Defendants to support their claim. *Myun-uk Choi*, 232 F. Supp. 3d at
19 343. We disagree.

⁴ Applying New York's conflict of laws principles, the district court concluded that, because there is no conflict between New York and Illinois law, New York law applies. See *Myun-Uk Choi*, 165 F. Supp. 3d at 50. Neither party contests this finding on appeal.

1 Contrary to the district court's view, a New York unjust
2 enrichment claim requires no "direct relationship" between plaintiff
3 and defendant. In *Cox v. Microsoft Corp.*, the Appellate Division
4 sustained an unjust enrichment claim brought against Microsoft by
5 "indirect purchasers of Microsoft's software products," *i.e.*, plaintiffs
6 who had no direct relationship with Microsoft. 8 A.D.3d 39, 40–41
7 (1st Dep't 2004). The court stated "'[i]t does not matter whether the
8 benefit is directly or indirectly conveyed.'" *Id.* at 47 (quoting *Mfrs.*
9 *Hanover Tr. Co. v. Chem. Bank*, 160 A.D.2d 113, 117–18 (1st Dep't 1990));
10 *see also Grund v. Del. Charter Guarantee & Tr. Co.*, 788 F. Supp. 2d 226,
11 251 (S.D.N.Y. 2011) ("Unjust enrichment does not require a direct
12 relationship between the parties.").

13 Rather, the requirement of a connection between plaintiff and
14 defendant is a modest one: "[A] claim will not be supported if the
15 connection between the parties is too attenuated." *Mandarin Trading*
16 *Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (concluding a
17 relationship was too attenuated where there was a complete "lack of
18 allegations that would indicate a relationship between the parties, or
19 at least an awareness by [defendant] of [plaintiff's] existence").

20 Plaintiffs' allegations easily establish a connection sufficient for
21 the unjust enrichment claim to proceed. Plaintiffs alleged it to be a
22 near statistical certainty that they directly traded with Defendants on
23 the KRX night market during the relevant period, in which

1 Defendants continually manipulated the market on which the trades
2 occurred. AC ¶ 31 n.13. Moreover, there remains a question arising
3 from Plaintiffs' allegations that Defendants' spoofing strategy
4 artificially moved market prices in a way that directly harmed
5 Plaintiffs while benefitting Defendants. We are not called on to
6 decide whether, if Plaintiffs bought higher or sold lower than they
7 would have absent Defendants' manipulation, Defendants would
8 have caused Plaintiffs harm and enriched themselves at Plaintiffs'
9 expense and "under such circumstances that in equity and good
10 conscience [they] ought not to retain [the funds]," *Simonds v. Simonds*,
11 45 N.Y.2d 233, 242 (1978) (internal quotation marks omitted), and
12 whether the connection between the parties in that situation would
13 be "too attenuated." Consequently, we vacate the district court's
14 dismissal of Plaintiffs' unjust enrichment claim.⁵

⁵ Defendants also assert that Plaintiffs' unjust enrichment claim must be dismissed as duplicative of Plaintiffs' CEA claims. Br. of Appellees at 55–56. Defendants did not raise this argument in their motion to dismiss the amended complaint and it is therefore waived. *See Medforms, Inc. v. Healthcare Mgmt. Sols., Inc.*, 290 F.3d 98, 109 (2d Cir. 2002). In any event, it appears to us that the elements of an unjust enrichment claim are distinct from the elements of a CEA manipulation claim. *Compare Mobarak v. Mowad*, 117 A.D.3d 998, 1001 (2d Dep't 2014), *with In re Amaranth Nat. Gas Commodities Litig.*, 730 F.3d 170, 173 (2d Cir. 2013). For example, Plaintiffs' CEA claim requires a showing that it was Defendants' intent to create artificial market prices, *see In re Amaranth*, 730 F.3d at 173, an element Plaintiffs need not establish for their unjust enrichment claim, *see Mobarak*, 117 A.D.3d at 1001.

1

CONCLUSION

2

For the reasons stated above, we VACATE the judgment of the

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district court and REMAND for further proceedings.