

1
2 In the
3 United States Court of Appeals
4 For the Second Circuit
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7 AUGUST TERM, 2017

8
9 ARGUED: SEPTEMBER 20, 2017

10 DECIDED: MARCH 29, 2018

11
12 No. 17-648-cv
13

14 MYUN-UK CHOI, JIN-HO JUNG, SUNG-HUN JUNG, SUNG-HEE LEE,
15 KYUNG-SUB LEE, individually and on behalf of all others similarly
16 situated,
17 *Plaintiffs-Appellants,*
18

19 *v.*

20
21 TOWER RESEARCH CAPITAL LLC, MARK GORTON,
22 *Defendants-Appellees.*
23

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25 Appeal from the United States District Court
26 for the Southern District of New York.
27 No. 14-cv-09912 – Kimba M. Wood, *Judge.*
28

29
30 Before: WALKER, POOLER, and LOHIER, *Circuit Judges.*
31

32
33 Plaintiffs, five Korean citizens, transacted on a “night market”
34 of Korea Exchange (“KRX”) futures contracts. The KRX is a

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

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

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14
15 JOHN M. WALKER, JR., *Circuit Judge*:

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17 of Korea Exchange (“KRX”) futures contracts. The KRX is a
18 derivatives and securities exchange headquartered in Busan, South
19 Korea. On the KRX night market, traders enter orders in Korea, when
20 the KRX is closed for business, whereupon their orders are quickly
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22 (“CME Globex”) located in Aurora, Illinois. The trades are then
23 cleared and settled on the KRX when it opens for business the
24 following morning.

25 Plaintiffs allege that Defendants Tower Research Capital LLC
26 (“Tower”), a New York based high-frequency trading firm, and its
27 founder, Mark Gorton, injured them and others by engaging in

1 manipulative “spoofing” transactions on the KRX night market in
2 violation of the Commodity Exchange Act (“CEA”), 7 U.S.C. §§ 1 *et*
3 *seq.*, and New York law. The district court dismissed the action
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5 extraterritorially as would be required for it to reach Defendants’
6 alleged conduct. Because we conclude Plaintiffs’ allegations make it
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8 our precedent, we do not agree that application of the CEA to
9 Defendants’ alleged conduct would be an impermissible
10 extraterritorial application of the act. We also disagree with the
11 district court’s conclusion that Plaintiffs failed to state a claim for
12 unjust enrichment under New York law. Accordingly, we VACATE
13 and REMAND for further proceedings.

14 **BACKGROUND¹**

15 The KOSPI 200, a stock index akin to the S&P 500 or the Dow
16 Jones, consists of the weighted averaged of two hundred Korean
17 stocks traded on the KRX. The KRX also includes a KOSPI 200 futures
18 contract in its daytime trading, which allows traders to speculate on
19 the value of the KOSPI 200 index at various future dates. To facilitate
20 after-hours trading of KOSPI 200 futures, the KRX contracted with
21 CME Group, the product of a merger of the Chicago Mercantile

¹ 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 Exchange (“CME”) and the Chicago Board of Trade, to establish an
2 overnight market for futures trading. Pursuant to that agreement,
3 futures contracts on KRX’s “night market” are listed and traded on
4 “CME Globex, an electronic CME platform located in Aurora,
5 Illinois.” Amended Complaint (“AC”) ¶ 18. CME Globex “is the
6 same platform which CME [Group] utilizes to trade derivatives [of a
7 wholly domestic character] based on U.S. Treasury bonds, the S&P
8 500, the NASDAQ 100, the Dow Jones Industrial Average, grains,
9 livestock, weather and real estate.” AC ¶ 18. In 2012, the year
10 relevant to this action, approximately 7,000,000 trades of futures
11 contracts took place on the KRX night market. AC ¶ 20 n.8.

12 A KRX night market trade begins with the placement of a “limit
13 order” on the KRX system in Korea. Within seconds, the trader’s
14 order is matched with an anonymous counterparty on CME Globex
15 “using the multiple price a[u]ction method through which successful
16 bidders are required to pay for the allotted quantity of securities at
17 the respect price/yield at which they have bid.” AC ¶ 21 (internal
18 quotation marks omitted). Following matching, “settlement of all
19 trades occurs the day after on the KRX.” AC ¶ 22.

20 In 1998, Gorton founded Tower, a high-frequency trading firm.
21 “High frequency trading firms use computers to create and operate
22 algorithms and, by using those algorithms and technology, execute
23 trades faster than anyone else—making pennies on millions and

1 millions of trades executed in milliseconds.” AC ¶ 27. In 2012, Tower
2 aggressively brought its algorithm and technology to bear on the KRX
3 night market, executing nearly 4,000,000 trades of futures contracts,
4 approximately 53.8% of all KRX night market trades that year.
5 AC ¶ 31.

6 Plaintiffs allege that a significant number of these trades were
7 manipulative, in that Defendants “utilized their algorithmic flash
8 trading abilities to artificially and illegally manipulate prices of the
9 KOSPI 200 Futures during Night Market trading on the CME for their
10 own profit.” AC ¶ 31. Specifically, Plaintiffs allege that Tower’s
11 traders “created hundreds and hundreds of *fictitious* buys and sells
12 to artificially manipulate the price of the KOSPI 200 futures contracts
13 they were trading on the CME Globex.” AC ¶ 32.

14 The alleged scheme—which Plaintiffs describe as “spoofing”—
15 operated as follows. Tower’s traders would enter large volume buy
16 or sell orders on the KRX night market and then would use Tower’s
17 high-frequency technology to immediately cancel their orders or
18 ensure that they themselves were the counterparties on the trades.
19 They would do so because the intent was not to execute the trades but
20 to create a false impression about supply and demand and thereby
21 drive the market price either up or down. Once that was
22 accomplished, the traders would sell contracts at the artificially
23 inflated price or buy contracts at the artificially deflated price,

1 eventually reaping substantial profits either way. In 2012, Plaintiffs
2 allege, Tower's traders used this spoofing practice hundreds of times,
3 earning more than \$14,000,000 in illicit profits. AC ¶ 35.

4 Plaintiffs, for their part, executed more than 1,000 KRX night
5 market trades in 2012. AC ¶ 24. Given the anonymity of CME Globex,
6 Plaintiffs cannot at the moment identify with precision whether they
7 were a counterparty on any of the allegedly manipulative Tower
8 trades, but they allege it to be a near statistical certainty that at least
9 one Tower trader was a direct counterparty with at least one Plaintiff
10 in a KRX night market trade in 2012. AC ¶ 31 n.13. In any event,
11 Plaintiffs allege that they traded at artificial prices during and due to
12 Defendants' spoofing waves.

13 In May 2014, a Korean government regulator, the Financial
14 Services Commission ("FSC"), uncovered Defendants' scheme and
15 referred Tower to Korean prosecutors. FSC publicly stated that
16 "traders of a U.S. based algorithmic trading specialty company
17 accessed the KOSPI 200 Overnight Futures Market and traded with
18 the use of the [sic] proprietary algorithmic trading technique, which
19 manipulated prices to build their buy and sell positions by creating
20 automatically and repeatedly fictitious trades." AC ¶ 36. Several
21 media outlets also reported on the scheme and identified Tower as
22 the responsible entity. AC ¶¶ 37–40.

1 In December 2014, Plaintiffs filed a class complaint on behalf of
2 themselves and other individuals or entities that were allegedly
3 harmed by Defendants' spoofing scheme when they traded in futures
4 on the KRX night market in 2012. Plaintiffs alleged that Defendants'
5 conduct violated several sections of the CEA and New York's
6 prohibition on unjust enrichment.

7 Defendants moved to dismiss and the district court (Kimba M.
8 Wood, J.) granted the motion. Relying on *Morrison v. National*
9 *Australia Bank Ltd.*, 561 U.S. 247 (2010), the district court concluded
10 that application of the CEA to Defendants' conduct would be an
11 impermissible extraterritorial application of the act. *Myun-Uk Choi v.*
12 *Tower Research Capital LLC*, 165 F. Supp. 3d 42 (S.D.N.Y. 2016). The
13 district court reasoned that, under *Morrison*, Defendants' alleged
14 conduct was within the territorial reach of the CEA only if the
15 contracts at issue were (i) purchased or sold in the United States or
16 (ii) listed on a domestic exchange. *Id.* at 48. The district court
17 determined that the contracts were not purchased or sold in the
18 United States because the orders needed to "first be placed through
19 the KRX trading system [in Korea]," and because any trades matched
20 on CME Globex in Illinois were final only when settled the following
21 morning in Busan. *Id.* at 49. The district court then concluded that
22 although CME might be a "domestic exchange," Plaintiffs did not
23 sufficiently plead that the same was true for CME Globex. *Id.* at 49–50.

1 Finally, the district court dismissed Plaintiffs' unjust enrichment
2 claim on the ground that Plaintiffs did not allege "any direct dealing
3 or actual, substantive relationship with the Defendants." *Id.* at 51.

4 Plaintiffs amended their complaint to add allegations about the
5 domesticity of KRX night market transactions, the nature of CME
6 Globex, and the likelihood that they were counterparties with
7 Defendants during the relevant period.

8 Defendants filed another motion to dismiss, which the district
9 court again granted. *Myun-Uk Choi v. Tower Research Capital LLC*, 232
10 F. Supp. 3d 337 (S.D.N.Y. 2017).² The district court concluded that
11 Plaintiffs still failed to sufficiently allege that CME Globex is a
12 "domestic exchange" under *Morrison* because it is not structured like
13 other exchanges, is not registered as an exchange with the
14 Commodity Futures Trading Commission, and is not subject to the
15 rules of a registered exchange. *Id.* at 341–42. The district court also
16 held that the amended allegations did not plausibly show that trades
17 on the KRX night market were "domestic transactions" because, in its

² 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 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 view, KRX rules suggest that transactions become final only when
2 they settle on the KRX, not when they match on CME Globex. *Id.* at
3 342. Finally, the district court again dismissed Plaintiffs' unjust
4 enrichment claim on the ground that Plaintiffs needed "definitive
5 evidence of a direct relationship," yet they "failed to prove that
6 buyers and sellers were direct counterparties under KRX rules." *Id.*
7 at 343. Plaintiffs appealed.

8 DISCUSSION

9 "We review de novo the dismissal of a complaint for failure to
10 state a claim upon which relief can be granted." *Reich v. Lopez*, 858
11 F.3d 55, 59 (2d Cir. 2017). "To survive a motion to dismiss, a
12 complaint must contain sufficient factual matter, accepted as true, to
13 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*,
14 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

15 Plaintiffs contend that the district court erred in dismissing
16 their CEA and unjust enrichment claims. Because we conclude
17 Plaintiffs sufficiently alleged that applying the CEA to Defendants'
18 conduct would not be an extraterritorial application of the act, and
19 that Plaintiffs' losses were sufficiently related to Defendants' gains for
20 purposes of their unjust enrichment claim, we agree.

21 I. Commodity Exchange Act

22 "The CEA is a remedial statute that serves the crucial purpose
23 of protecting the innocent individual investor—who may know little

1 about the intricacies and complexities of the commodities market—
2 from being misled or deceived.” *Loginovskaya v. Batratchenko*, 764 F.3d
3 266, 270 (2d Cir. 2014) (internal quotation marks omitted). As relevant
4 to Plaintiffs’ amended complaint, the CEA proscribes the use of “any
5 manipulative or deceptive device or contrivance” in connection with
6 a futures contract and prohibits the manipulation of the price of a
7 futures contract. 7 U.S.C. § 9(1), (3).

8 Defendants’ argument is that, under *Morrison*, KRX night
9 market trades occur outside of the United States and are therefore
10 beyond the CEA’s reach.

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

19 *Morrison* said nothing about the CEA, and we have only once,
20 in *Loginovskaya*, addressed *Morrison*’s effect on that act. There, we
21 concluded that *Morrison*’s “domestic transactions” test applies to the
22 CEA, but, because the plaintiff in *Loginovskaya* did not purchase
23 commodities on an exchange, we had no occasion to address the

1 “domestic exchange” prong. See *Loginovskaya*, 764 F.3d at 272–75. In
2 concluding that *Morrison*’s “domestic transactions” test applies to the
3 CEA, we adopted a rule established in the § 10(b) case of *Absolute*
4 *Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012).
5 *Loginovskaya*, 764 F.3d at 274. In *Absolute Activist*, we concluded that
6 a transaction involving securities is a “domestic transaction” under
7 *Morrison* if “irrevocable liability is incurred or title passes within the
8 United States.” 677 F.3d at 67. “[I]rrevocable liability” attaches
9 “when the parties to the transaction are committed to one another,”
10 or, “in the classic contractual sense, there was a meeting of the minds
11 of the parties.” *Id.* at 68 (internal quotation marks omitted); see also
12 *Vacold LLC v. Cerami*, 545 F.3d 114, 121–22 (2d Cir. 2008) (citing
13 *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 890–91 (2d Cir.
14 1972)).

15 Consequently, plausible allegations that parties to a transaction
16 subject to the CEA incurred irrevocable liability in the United States
17 suffice to overcome a motion to dismiss CEA claims on territoriality
18 grounds. We believe in this case that Plaintiffs’ allegations make it
19 plausible that parties trading on the KRX night market incur
20 irrevocable liability in the United States. This being a sufficient basis
21 to resolve the extraterritoriality question at this stage, there is no need
22 for us to address whether the CEA has a territorial reach on the basis
23 that the CME Globex is a “domestic exchange.”

1 In *Loginovskaya*, we took pains to heed *Morrison*'s mandate that
2 an extraterritorial analysis assess "the particular statutory provision"
3 at issue. *Loginovskaya*, 764 F.3d at 271 (citing *Morrison*, 561 U.S. at 266–
4 67); *see also Morrison*, 561 U.S. at 261 n.5. We have never concluded
5 however, as the district court and the parties seemed to assume, that
6 *Morrison*'s "domestic exchange" prong applies to the CEA either to
7 broaden or to narrow its extraterritorial reach. The section of the CEA
8 relevant to a territoriality analysis, *see Loginovskaya*, 764 F.3d at 272–
9 73, does not contain the language similar to the language in § 10(b)
10 that led *Morrison* to craft the "domestic exchange" prong: the
11 "purchase or sale of any security registered *on a national securities*
12 *exchange*." 15 U.S.C. § 78j(b) (emphasis added). Rather, the CEA
13 speaks only of "registered entit[ies]." 7 U.S.C. § 25(a)(1)(D)(i).

14 * * *

15 We quickly dispatch Defendants' contention that, under
16 *Morrison*, the CEA cannot apply to a commodity traded on a foreign
17 exchange. Leaving aside whether *Morrison*'s discussion of exchanges
18 is applicable to the CEA, *Morrison* itself refutes Defendants'
19 argument. *Morrison* clearly provided that the "domestic transaction"
20 prong is an independent and sufficient basis for application of the
21 Securities Exchange Act to purportedly foreign conduct. *Morrison*
22 summarized the standard in the disjunctive: "[W]hether the purchase
23 or sale is made in the United States, *or* involves a security listed on a

1 domestic exchange.” 561 U.S. at 269–70 (emphasis added). In
2 applying this standard, *Morrison* assessed the domestic nature of a
3 transaction of securities that were listed on an Australian exchange,
4 *see id.* at 273, which would have been an unnecessary endeavor under
5 Defendants’ view. Similarly, when we applied *Morrison* in *City of*
6 *Pontiac Policemen’s & Firemen’s Retirement System v. UBS AG*, 752 F.3d
7 173 (2d Cir. 2014), we specifically assessed, for trades made on foreign
8 exchanges, whether irrevocable liability attached. *Id.* at 181–82.
9 Plainly the reasoning of *Morrison* does not preclude the application of
10 the CEA to trades made on a foreign exchange when irrevocable
11 liability is incurred in the United States. We therefore turn to whether
12 Plaintiffs sufficiently alleged that the parties incurred irrevocable
13 liability for KRX night market trades in the United States.

14 The parties do not dispute that the trades at issue were
15 “matched” in the United States on CME Globex and were “cleared
16 and settled” in Korea. The issue is therefore whether the allegations
17 make it plausible that the parties incurred “irrevocable liability” upon
18 matching. Plaintiffs’ amended complaint alleges not only that KRX
19 night market trades bind the parties on matching, it also alleges that
20 the express view of CME Group is that “matches [on CME Globex]
21 are essentially binding contracts” and “[m]embers are required to
22 honor all bids or offers which have not been withdrawn from the
23 market.” AC ¶¶ 21–22. Nothing in the amended complaint or

1 elsewhere suggests that a trading party may unilaterally revoke
2 acceptance following matching on CME Globex. It follows from these
3 allegations that, in the “classic contractual sense,” *Absolute Activist*,
4 677 F.3d at 68, parties incur irrevocable liability on KRX night market
5 trades at the moment of matching.

6 Defendants’ arguments to the contrary are unavailing.
7 Defendants contend that irrevocable liability attaches only at
8 settlement on the KRX the morning after matching on CME Globex.
9 For this contention, they rely on the KRX rules, which, they assert,
10 “provide that KOSPI 200 futures trades become irrevocable *only* after
11 clearing and settlement.” Br. of Appellees at 47 (emphasis added).
12 We are not convinced. The KRX rules on which Defendants rely state,
13 in Defendants’ words, that “executions may be cancel[l]ed or restated
14 after matching due to errors by the exchange or by a market
15 participant.” Br. of Appellees at 47. Whether the exchange can cancel
16 or modify trades due to errors, by the exchange or by a market
17 participant, however, says nothing about whether either trading
18 party is free to revoke its error-free acceptance of a trade after
19 matching. Stated differently, that the exchange has the power to
20 rectify errors in the parties’ contracts does not render those contracts
21 “revocable” in any meaningful sense.

22 Defendants next point to a KRX website that, they assert,
23 provides that “‘assumption of liability’ occurs only during the

1 clearing process,” Br. of Appellee at 48 (alteration omitted), implying,
2 in Defendants’ view, that clearing is the first point at which any
3 liability attaches. Defendants expressed a similar view at oral
4 argument, where counsel contended that liability does not attach *at*
5 *all* between the buyer and seller of the futures contract, but, rather,
6 between each and the KRX. This view evinces a fundamental
7 misunderstanding of Plaintiffs’ allegations and exchange trading
8 generally. Although liability might ultimately attach between the
9 buyer/seller and the KRX upon clearing, that does not mean liability
10 does not *also* attach between the buyer and seller at matching prior to
11 clearing. The mechanics of the transaction support both: (i) the buyer
12 and seller enter a binding irrevocable agreement through matching
13 on CME Globex; and then, subsequently, (ii) through the KRX’s
14 clearing process, the buyer and seller each transfer that liability from
15 each other to the exchange. Before this subsequent transfer of liability
16 takes place in Korea the next morning, trading counterparties are
17 bound to each other, and not to the exchange. This is analogous to
18 the traditional practice, prior to the advent of remote algorithmic
19 high-speed trading, in which buyers and sellers of commodities
20 futures would “reach[] an agreement on the floor of the exchange”
21 and then subsequently submit their trade to a clearinghouse for
22 clearing and settling. *Leist v. Simplot*, 638 F.2d 283, 287 (2d Cir. 1980);
23 *see also Ryder Energy Distribution Corp. v. Merrill Lynch Commodities*

1 *Inc.*, 748 F.2d 774, 776 (2d Cir. 1984). Just as the meeting of the minds
2 previously occurred on the exchange floor, Plaintiffs plausibly allege
3 that there is a similar meeting of the minds when the minds of the
4 KRX night market parties meet on CME Globex.

5 The KRX rules themselves acknowledge a pre-existing liability
6 between trading counterparties prior to the exchange's assumption of
7 liability. Specifically, the rules provide that after the KRX verifies a
8 trade, "the Exchange shall *assume the liability that the member has to the*
9 *member* who is the counterparty of [the] trade and the relevant
10 member bears the liability that the Exchange assumed for it." App'x
11 441 (emphasis added). This is consistent with the alleged view of
12 CME Group, which indicates in several sources identified in
13 Plaintiffs' amended complaint that matching on CME Globex creates
14 irrevocable liability (which later is *assumed* by the exchange).

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

20 II. Unjust Enrichment

21 Plaintiffs brought a claim for unjust enrichment, a New York
22 common law quasi-contract cause of action requiring the plaintiff to
23 establish: "(1) that the defendant benefitted; (2) at the plaintiff's

1 expense; and (3) that equity and good conscience require restitution.”
2 *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000).³ The district court
3 dismissed the claim, concluding that Plaintiffs failed to prove a
4 required “direct relationship” between themselves and the
5 Defendants to support their claim. *Myun-uk Choi*, 232 F. Supp. 3d at
6 343. We disagree.

7 Contrary to the district court’s view, a New York unjust
8 enrichment claim requires no “direct relationship” between plaintiff
9 and defendant. In *Cox v. Microsoft Corp.*, the Appellate Division
10 sustained an unjust enrichment claim brought against Microsoft by
11 “indirect purchasers of Microsoft’s software products,” *i.e.*, plaintiffs
12 who had no direct relationship with Microsoft. 8 A.D.3d 39, 40–41
13 (1st Dep’t 2004). The court stated “[i]t does not matter whether the
14 benefit is directly or indirectly conveyed.” *Id.* at 47 (quoting *Mfrs.*
15 *Hanover Tr. Co. v. Chem. Bank*, 160 A.D.2d 113, 117–18 (1st Dep’t 1990));
16 *see also Grund v. Del. Charter Guarantee & Tr. Co.*, 788 F. Supp. 2d 226,
17 251 (S.D.N.Y. 2011) (“Unjust enrichment does not require a direct
18 relationship between the parties.”).

19 Rather, the requirement of a connection between plaintiff and
20 defendant is a modest one: “[A] claim will not be supported if the

³ 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 connection between the parties is too attenuated.” *Mandarin Trading*
2 *Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (concluding a
3 relationship was too attenuated where there was a complete “lack of
4 allegations that would indicate a relationship between the parties, or
5 at least an awareness by [defendant] of [plaintiff’s] existence”).

6 Plaintiffs’ allegations easily establish a connection sufficient for
7 the unjust enrichment claim to proceed. Plaintiffs alleged it to be a
8 near statistical certainty that they directly traded with Defendants on
9 the KRX night market during the relevant period, in which
10 Defendants continually manipulated the market on which the trades
11 occurred. AC ¶ 31 n.13. Moreover, even if none of Plaintiffs’ trades
12 were executed directly with Defendants, that would not necessarily
13 defeat Plaintiffs’ claim at this stage because Plaintiffs plausibly allege
14 that Defendants’ spoofing strategy artificially moved market prices in
15 a way that directly harmed Plaintiffs while benefitting Defendants. If
16 Plaintiffs bought higher or sold lower than they would have absent
17 Defendants’ manipulation, Defendants would have caused Plaintiffs
18 harm and enriched themselves at Plaintiffs’ expense and “under such
19 circumstances that in equity and good conscience [they] ought not to
20 retain [the funds].” *Simonds v. Simonds*, 45 N.Y.2d 233, 242 (1978)
21 (internal quotation marks omitted). In our view, the connection
22 between the parties in that situation would not be “too attenuated.”

1 Consequently, we vacate the district court's dismissal of Plaintiffs'
2 unjust enrichment claim.⁴

3 **CONCLUSION**

4 For the reasons stated above, we VACATE the judgment of the
5 district court and REMAND for further proceedings.

⁴ 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.