17-648-cv

In the United States Court of Appeals for the Second Circuit

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 AND MARK GORTON,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District Of New York
Case No. 14-cv-9912

BRIEF OF AMICUS CURIAE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DEFENDANTS'-APPELLEES' PETITION FOR PANEL REHEARING

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CORPORATE DISCLOSURE STATEMENT

The Securities Industry and Financial Markets Association has no parent corporation and no publicly held corporation owns 10 percent or more of its stock. *See* Fed. R. App. P. 26.1.

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INTEREST OF AMICUS CURIAE

The Securities Industry and Financial Markets Association (SIFMA) is an association representing the interests of hundreds of securities firms, banks, and asset managers.[1] SIFMA's mission is to foster a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and confidence in the financial markets. SIFMA regularly files amicus curiae briefs in cases that raise important issues under the securities or commodities laws. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016); *FDIC v. First Horizon Asset Sec., Inc.*, 821 F.3d 372 (2d Cir. 2016); *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015); *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120 (2d Cir. 2011).[2]

The Court's opinion in this case permits a plaintiff to plead unjust enrichment under New York law based on mere allegations of market manipulation without alleging a trading relationship with the defendant. That conclusion is inconsistent with New York law, conflicts with the black-letter law of unjust enrichment, is in tension with decades of federal district court precedent, and effectively lowers the

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[1] No party or counsel for a party authored this brief in whole or in part, and no one other than amicus curiae, its members, and its counsel funded the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

[2] SIFMA is filing a motion to obtain the Court's permission to file this brief. *See* Fed. R. App. P. 29(b)(2). Defendants-Appellees consent to the motion, and Plaintiffs-Appellants oppose it.

pleading standard for market manipulation claims. This Court's opinion has troubling implications for SIFMA's members, many of which are market participants.

ARGUMENT

The petition for panel rehearing in this case concerns a narrow but important issue—whether a plaintiff may adequately plead an unjust enrichment claim based on alleged market manipulation under New York law without alleging a trading relationship with the defendant. In this case, Plaintiffs claim that Defendants, a New York based trading firm and its founder, engaged in manipulative trade practices on a Korea Exchange (KRX) futures contracts night market. Plaintiffs sued under the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.*, and also alleged unjust enrichment under New York law. The district court dismissed the complaint, but this Court vacated and remanded.

In reinstating Plaintiffs' unjust enrichment claim, the Court first concluded that Plaintiffs had adequately pleaded a trading relationship with Defendants, because they "alleged it to be a near statistical certainty that they directly traded with Defendants on the KRX night market during the relevant period." Op. 19. That conclusion, on which SIFMA expresses no opinion, was sufficient to resolve the appeal on the unjust enrichment claim.

But this Court went further and concluded, in the alternative, that no trading relationship between the parties was required to plead unjust enrichment under New York law. The Court stated that "even if none of Plaintiffs' trades were executed directly with Defendants, that would not necessarily defeat Plaintiffs' claim at this stage" because "Plaintiffs plausibly allege that Defendants' spoofing strategy artificially moved market prices in a way that directly harmed Plaintiffs while benefitting Defendants." Op. 19. Instead, the Court required only that Plaintiffs allege market manipulation and causation: "If Plaintiffs bought higher or sold lower than they would have absent Defendants' manipulation, Defendants would have caused Plaintiffs harm and enriched themselves at Plaintiffs' expense." *Id.*

This Court erred in stating that, under New York law, a plaintiff can adequately plead unjust enrichment based on market manipulation without alleging a trading relationship with the defendant. Unjust enrichment under New York law requires a relationship between the parties that is sufficiently close to support equitable relief. That requirement follows from the nature of the unjust enrichment cause of action. Here, where Plaintiffs are claiming losses due to alleged market manipulation, the necessary relationship is a trading relationship with Defendants, as numerous federal district courts in this Circuit have recognized. The Court's opinion, if uncorrected, would encourage plaintiffs to use New York unjust

enrichment law to make an end-run around the federal securities and commodities laws.

I. The Court's Alternative Conclusion Conflicts With New York Law

To establish a claim for unjust enrichment under New York law, a plaintiff must show that the defendant "was enriched at . . . th[e plaintiff's] expense" and that "equity and good conscience" do not "permit the [defendant] to retain what is sought to be recovered." *Georgia Malone & Co. v. Rieder*, 973 N.E.2d 743, 746 (N.Y. 2012) (internal quotation marks omitted). But a plaintiff must satisfy an additional requirement: "[A] plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party." *Id.* A relationship that is "too attenuated" will not support equitable relief. *Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1018 (N.Y. 2007); *see Mandarin Trading Ltd. v. Wildenstein*, 944 N.E.2d 1104, 1111 (N.Y. 2011) (dismissing an unjust enrichment claim for "lack of allegations that would indicate a relationship between the parties").

Case law illustrates that a "sufficiently close relationship" means direct dealings. In *Sperry*, a purchaser of tires could not sue a chemical manufacturer for unjust enrichment based on a price-fixing theory, because "the connection between the purchasers of tires and the producers of chemicals used in the rubber-making process [was] simply too attenuated to support such a claim." 863 N.E.2d at 1013, 1018. In *Mandarin Trading*, an art purchaser could not claim unjust enrichment

against an appraiser who never interacted with the purchaser, because there was no relationship to demonstrate that the appraiser "was unjustly enriched at the expense of" the purchaser. 944 N.E.2d at 1110-11. In *Georgia Malone*, a real estate broker who compiled confidential information could not recover for unjust enrichment against a rival real estate broker who obtained the information from a third party and used it to close a sale, because the brokers "had no dealings with each other." 973 N.E.2d at 747.

The same is true here: If Plaintiffs did not trade with Defendants, they lack the necessary close relationship under New York law. The Court relied on *Cox v. Microsoft*, 8 A.D.3d 39 (N.Y. App. Div. 2004), to say that no "direct relationship" was required here. Op. 18. But *Cox* pre-dated *Sperry*, where the New York Court of Appeals first set out the relationship requirement. And as New York law makes clear, the mere fact that a defendant benefitted, even fraudulently, at the plaintiff's expense is not sufficient to support an unjust enrichment claim when the parties had no dealings with each other. The Court's alternative conclusion thus conflicts with New York law, as articulated by New York's highest court, and should be corrected.

II. The Court's Alternative Conclusion Is Inconsistent With The Theory Behind Unjust Enrichment

New York's requirement of a sufficiently close relationship between the parties follows from the nature of the unjust enrichment cause of action. Unjust enrichment is an equitable claim, designed for the situation when a plaintiff does not

have an "enforceable contract" with the defendant but the parties' dealings nonetheless justify equitable relief. 26 *Williston on Contracts* § 68:5 (4th ed. 1993 & Supp. 2017). Unjust enrichment is a "quasi-contract claim," "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 907 N.E.2d 268, 274 (N.Y. 2009) (internal quotation marks omitted). Unjust enrichment "implies a contract so that one party may recover damages from another" to be made whole. 66 Am. Jur. 2d *Restitution and Implied Contracts* § 3 (1964 & Supp. 2018). This implied-contract theory depends on there being a pre-existing relationship between the parties.

Further, the equitable theory behind unjust enrichment is that "a person shall not be allowed to enrich himself unjustly at the expense of another." *Miller v. Schloss*, 113 N.E. 337, 339 (N.Y. 1916). The reason courts allow recovery is because the defendant has a relationship with the plaintiff and has done something in the course of the relationship to unfairly profit at the plaintiff's expense. A plaintiff need not have privity of contract with a defendant to show unjust enrichment, but he must show a "sufficiently close relationship," *Georgia Malone*, 973 N.E.2d at 746, one in which the defendant has received a "specific and direct" benefit from the plaintiff, *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000). Without that direct relationship and benefit, the defendant cannot be said to have

enriched itself at the plaintiff's expense. *Id.* The Court's opinion overlooks the theory behind the unjust enrichment cause of action and the reasons why a close relationship between the parties is necessary to plead that cause of action under New York law.

III. The Court's Alternative Conclusion Conflicts With Decades Of Federal District Court Cases

In the context of claims premised on market manipulation, federal district courts in New York have routinely recognized that a trading relationship is necessary to support an unjust enrichment claim. *See, e.g.*, *In re Platinum & Palladium Antitrust Litig.*, No. 14-CV-9391, 2017 WL 1169626, at *38 (S.D.N.Y. Mar. 28, 2017); *In re London Silver Fixing, Ltd., Antitrust Litig.*, 213 F. Supp. 3d 530, 574-75 (S.D.N.Y. 2016); *Laydon v. Mizuho Bank, Ltd.*, No. 12-CV-3419, 2014 WL 1280464, at *13-*14 (S.D.N.Y. Mar. 28, 2014); *In re Amaranth Nat. Gas Commodities Litig.*, 587 F. Supp. 2d 513, 547 (S.D.N.Y. 2008), *aff'd*, 730 F.3d 170 (2d Cir. 2013); *see also* Reh'g Pet. 10-12 (discussing these and similar cases). Even before the New York Court of Appeals clarified the relationship requirement for unjust enrichment in *Sperry*, district courts in this Circuit recognized that unjust enrichment "is a quasi-contract claim[] [that] requires some type of direct dealing or actual, substantive relationship with a defendant." *Redtail Leasing, Inc. v. Bellezza*, No. 95-CV-5191, 1997 WL 603496, at *8 (S.D.N.Y. Sept. 30, 1997) (dismissing an unjust enrichment claim premised on an allegation of insider trading).

The reasoning of these cases is straightforward: "The essence of an unjust enrichment claim is that one party has received money or a benefit at the expense of another," and that is not true if the parties do not have a trading relationship with each other. *Platinum & Palladium Antitrust Litig.*, 2017 WL 1169626, at *38 (quoting *Kaye*, 202 F.3d at 616). A claim alleging market manipulation with no allegation of direct dealing does not involve the receipt of money or a benefit at the expense of another, so there is no equitable basis for finding unjust enrichment. *See id.* ("[B]ecause plaintiffs do not allege that they transacted directly with [d]efendants, they have not adequately pleaded that [d]efendants were enriched at their expense."). These courts therefore have dismissed unjust enrichment claims where plaintiffs "have not alleged that they had any direct dealings with Defendants." *Id.*

In this case, the parties agreed that Plaintiffs were required to allege a trading relationship with Defendants to sufficiently plead unjust enrichment based on market manipulation. The parties' dispute was about whether the amended complaint sufficiently alleged a trading relationship, not whether a trading relationship was required. The district court required a "direct relationship," meaning that Plaintiffs and Defendants were "direct counterparties" in trades. D. Ct. Op. 8-9. On appeal, Plaintiffs accepted that they must allege a "direct trading relationship" or "direct counterparty relationship." Choi C.A. Br. 6-7, 9, 45-46; Choi C.A. Reply Br. 22.

Defendants likewise agreed that Plaintiffs were required to allege that they traded with Defendants in order to support an unjust enrichment claim. Tower C.A. Br. 5-6, 17, 53-54. The parties agreed on this point because it is settled law.

IV. The Court's Alternative Conclusion Effectively Lowers The Pleading Standard For Market Manipulation Claims

The sufficiently close relationship limitation on unjust enrichment is particularly important in the securities and commodities context. Without that limitation, plaintiffs could plead unjust enrichment in New York simply by alleging that they traded in a market where the defendants had manipulated prices and the plaintiffs suffered losses. *See* Op. 19. Because federal law requires that plaintiffs plead significantly more than that, the Court's interpretation of New York law would encourage plaintiffs to use the watered-down state unjust enrichment claim to make an end-run around federal law.

Federal law sets forth causes of action for market manipulation in various contexts. For example, to state a claim for market manipulation under the Commodity Exchange Act, 7 U.S.C. § 9, a plaintiff must allege that "(1) [d]efendants possessed an ability to influence market prices; (2) an artificial price existed; (3) [d]efendants caused the artificial prices; and (4) [d]efendant specifically intended to cause the artificial price." *In re Amaranth Nat. Gas Commodities Litig.*, 730 F.3d 170, 173 (2d Cir. 2013). To state a claim for stock manipulation under SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, a plaintiff must allege "(1) manipulative acts; (2)

damage (3) caused by reliance on an assumption of an efficient market free of manipulation; (4) scienter; (5) in connection with the purchase or sale of securities; (6) furthered by the defendant's use of the mails or any facility of a national securities exchange." *Steginsky v. Xcelera Inc.*, 741 F.3d 365, 369 (2d Cir. 2014) (internal quotation marks omitted). Claims brought under Section 9(a) of the Securities and Exchange Act, 15 U.S.C. § 78i, similarly require (1) a manipulative trade practice (2) carried out with scienter (3) for the purpose of inducing others to buy or sell the security. *SEC v. Malenfant*, 784 F. Supp. 141, 144 (S.D.N.Y. 1992). Under the Court's decision, in contrast, a plaintiff could plead New York unjust enrichment simply by alleging that he traded in a market manipulated by the defendants and suffered losses as a result.

The fact that the Court's conclusion would allow plaintiffs to plead market manipulation claims with such meager allegations, especially in comparison to the detailed requirements of federal law, is strong evidence that the Court should not extend New York unjust enrichment law in that way. Unjust enrichment, after all, is an equitable doctrine, and it would not be equitable to expand that cause of action so broadly. The New York Court of Appeals has made just this point, explaining that "it is not appropriate to substitute unjust enrichment to avoid the statutory limitations on the cause of action created by the Legislature." *Sperry*, 863 N.E.2d at 1018.

In the context of an unjust enrichment claim alleging market manipulation, New York's relationship requirement serves the important purpose of limiting relief to the situation where the parties' course of dealings justifies equitable relief on a quasi-contract theory, such as when the parties were trading partners and the plaintiff actually relied on the defendant's misrepresentations to his detriment. *See IDT Corp.*, 907 N.E.2d at 274. But where there is no trading relationship, the issue is no longer one of (quasi-)contract law, but a broader question of market manipulation and reliability that federal law is better equipped to address.

Unjust enrichment "is not a catchall cause of action to be used when others fail"; it is "available only in unusual situations." *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (N.Y. 2012). This Court's interpretation, however, would encourage plaintiffs to attempt to transform any claim for market manipulation—even those in which the plaintiff and defendant never traded with one another—into an unjust enrichment claim. That would be an unjustified expansion of New York law in an area already comprehensively regulated by federal law.

CONCLUSION

For the foregoing reasons, SIFMA respectfully requests that this Court grant the petition for rehearing and remove the alternative unjust enrichment conclusion from its opinion.

Dated: April 19, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), because it contains 2,591 words, as determined by the word-count function of Microsoft Word 2016.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: April 19, 2018

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