IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

YULIA TYMOSHENKO		
	Plaintiff,	
v.		Civil Action No. 11-02794 (AJN)
DMYTRO FIRTASH, et al.		
	Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)
OF PAUL MANAFORT, BRAD ZACKSON, CMZ VENTURES, LLC,
THE DYNAMIC GROUP, AND BARBARA ANN HOLDINGS LLC

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Plaintiff Yulia Tymoshenko is the former Prime Minister of the Ukraine. According to the Amended Complaint, Ms. Tymoshenko and her Batkivshchyna party were electorally ousted from power by a political opponent, current Ukrainian President Viktor Yanukovych. Following Mr. Yanukovych's election to office, Ms. Tymoshenko and a number of her allies were arrested, charged with various criminal offenses, and tried in Ukrainian courts. Rather than seeking redress in the Ukraine, either through the courts, the legislature, or the ballot box, Tymoshenko filed suit in New York against a number of Ukrainian government officials and Ukraine-based businesses (hereafter "the Ukrainian Defendants") seeking damages. In a transparent attempt to anchor the case in a court where it does not belong, Plaintiff threw in a number of U.S.-based defendants, including individuals Paul Manafort and Brad Zackson and business entities CMZ Ventures, LLC, the Dynamic Group, and Barbara Ann Holdings, LLC. Outside of a few vague, conclusory, and factually unsupported accusations, Plaintiff does not tie these five parties (hereinafter "the U.S. Defendants") to the allegedly tortious or illegal acts of

the Ukrainian Defendants. Instead, she seeks to create new federal common law, expand application of U.S. laws in ways the U.S. courts have already rejected, and trigger this Court's jurisdiction in contravention of Supreme Court and Second Circuit jurisprudence that is clearly contrary to the positions she attempts to articulate.

Plaintiff makes four claims for relief in her Amended Complaint (DE 23), each of which arises out of the same set of alleged facts. Plaintiff's varied citations to 28 U.S.C. § 1331; the Alien Tort Statute (ATS), 28 U.S.C. § 1350; the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c); and "state, federal, and international law" create confusion about the cause of action under which the Plaintiff is proceeding. DE 23 at 9 ¶ 24; *id.* at 17 ¶ 46.[1] A fair reading of the Amended Complaint, however, suggests that Plaintiff's claims arise out of a single, core allegation — that she was injured as a result of being "arrested, detained, and prosecuted on unfounded, politically-motivated criminal charges" in the Ukraine. *Id.* at 2 ¶ 2.

As discussed in Part I, the Amended Complaint must be dismissed as to the U.S. Defendants because formulaic recitations of labels and conclusions cannot suffice to state a claim upon which relief can be granted. But apart from the pleading flaws throughout the Amended Complaint, Plaintiff's claims against the U.S. Defendants suffer from other fundamental (and ultimately fatal) flaws. The primary statutory anchor of Plaintiff's claim is the

[1] *See also, e.g., Coakley v. Jaffe*, 49 F. Supp. 2d 615, 625 (S.D.N.Y. 1999) (characterizing plaintiffs' complaint — which "sets forth a potpourri of vague and conclusory allegations that for the most part are not explicitly linked to any specific factual assertions, making it extremely difficult to discern the precise nature of the claim" — as a "shotgun pleading" that "illustrates plaintiffs' utter disrespect for Rule 8"); *Maple Drive-In Theatre Corp. v. Radio-Keith-Orpheum Corp.*, 17 F.R.D. 226, 227 (S.D.N.Y. 1955) ("While technically, perhaps, the pleader has indicated a causal connection between these misdeeds and the specific injury he complains of, nevertheless the connection lacks genuine relevancy, and this shotgun type of pleading could be employed to raise innumerable issues utterly foreign to the gravamen of the complaint").

ATS, a jurisdictional statute that does not create a cause of action. As set forth in Part II, the ATS grants district courts original jurisdiction over a limited subset of claims arising out of clear and unambiguous rules of customary international law. Prior court decisions make clear that even if Plaintiff could prove she had been subjected to "arbitrary detention," as alleged, such a claim would fail to establish injury under the law of nations — leaving her without recourse to the ATS as a jurisdictional hook. The secondary statutory anchor of Plaintiff's claim is the RICO statute, and as explained in Part III that claim against the U.S. Defendants fails for three reasons: (1) it ignores the established rule that RICO does not apply extraterritorially, (2) it fails adequately to allege a predicate RICO offense by the U.S. Defendants, and (3) it fails adequately to allege that the U.S. Defendants' actions were the proximate cause of Plaintiff's injuries. As discussed in Parts IV and V, Plaintiff's claims under New York state law for breach of fiduciary duty and malicious prosecution, even if stretched beyond their current form to meet the relevant pleading standards, are not properly brought in a U.S. Court and the Court should decline to exercise supplemental jurisdiction over them.

For these reasons, each of Plaintiff's claims must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. In addition, as discussed in Part VI, the Amended Complaint should be dismissed as to Mr. Manafort on jurisdictional grounds because it does not allege that he has sufficient contacts with New York for the Court to properly exercise personal jurisdiction over him.

ARGUMENT

I. THE AMENDED COMPLAINT MUST BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(6) BECAUSE IT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In 2007, the Supreme Court

emphasized that a complaint must provide sufficient factual allegations to provide the defendants fair notice not only of the *nature* of the claim but also of the *grounds* on which the claim against them rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554 (2007). In *Twombly*, the Court explained:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Id. at 555 (citations omitted) (alteration in original). In other words, to avoid dismissal, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570 (dismissing plaintiff's complaint because they "have not nudged their claims across the line from conceivable to plausible"); *id.* (abandoning the "no set of facts" language from *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Two years later, the Supreme Court drew a clear distinction between allegations of fact and law. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). As the Court noted, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* at 678. So, when applying *Twombly*'s "plausibility" standard, reviewing courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (citations omitted). In *Iqbal*, the plaintiff had alleged that various U.S. government officials designed, adopted, and executed an illegal policy relating to the treatment of post-9/11 detainees. *Id.* at 670. In affirming the dismissal of the complaint, the Supreme Court reiterated that Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation" and that a complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* at 678 (citations omitted). Thus, Rule 8 "does not unlock the doors of

discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 678-79. Indeed, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Id.* at 679 (internal citations and quotations omitted.)

Judges of the Southern District of New York have dismissed a number of deficient complaints on the authority of *Twombly* and *Iqbal*. For example, in *Hopper v. Banana Republic, LLC*, No. 07 Civ. 8526 (WHP), 2008 U.S. Dist. LEXIS 13503, at *6 (S.D.N.Y. Feb. 25, 2008), the court, citing *Twombly*, dismissed a negligent hiring and retaining claim "[b]ecause the complaint includes only speculative and implausible facts concerning [accused employee's] propensities and Defendants' knowledge of them." *See also Alster v. Goord*, 05 Civ. 10883 (WHP), 2008 U.S. Dist. LEXIS 13827 (S.D.N.Y. Feb. 26, 2008) (applying *Twombly* to support dismissal of § 1983 claims under even less stringent review of *pro se* plaintiff's complaint because conclusory allegations regarding individual defendants' involvement in plaintiff's treatment were insufficient); *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008) ("at a bare minimum, the operative standard requires the 'plaintiff [to] provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'") (internal citations omitted).

In so doing, the courts have given proper heed to the Supreme Court's concern for the necessity of weeding out groundless complaints before the parties and courts waste their resources. According to the Supreme Court, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (internal citation and quotation omitted).

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries"; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.

Id. at 559 (internal citations omitted).

Plaintiff's allegations against the U.S. Defendants are even more deficient than those in the cases described above. *See* DE 23 at 13-14, 34-43 ¶¶ 33-35, 37, 100-133 (setting forth the only allegations specific to the U.S. Defendants). The Amended Complaint consists entirely of formulaic recitations and cursory conclusions unsupported by any facts. The majority of the Amended Complaint recites a litany of events that occurred in the Ukraine without even seeking to tie the U.S. Defendants to those events whatsoever. *See generally* DE 23 at 1-10 ¶¶ 1-25; *id.* at 18-32 ¶¶ 49-95; *id.* at 43-83 ¶¶ 134-260.

Political diatribe cannot substitute for the requisite specific factual support under the "plausibility test" set forth by the Supreme Court in *Twombly*. Indeed, even before *Twombly*, courts noted the particular risk in ATS litigation that allowing cases to proceed on "vague, conclusory, and attenuated allegations" will allow plaintiffs "to abuse the judicial process in order to pursue political agendas." *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1275 (S.D. Fla. 2006) (dismissing plaintiffs' Alien Tort Statute and Torture Victim Protection Act claims because the complaint provided only conclusory allegations of state action).

But even if Plaintiff's Amended Complaint satisfied the notice pleading requirements of Rule 8(a)(2), it nonetheless must be dismissed as to the U.S. Defendants on a variety of other

grounds. As discussed in the immediately following sections, Plaintiff fails to allege the basic elements of her claims brought pursuant to the ATS and RICO.

II. COUNT ONE OF THE AMENDED COMPLAINT MUST BE DISMISSED BECAUSE IT FAILS TO STATE A COGNIZABLE CLAIM UNDER THE ALIEN TORT STATUTE.

Count One of the Amended Complaint purports to state a claim for relief pursuant to the ATS, which grants a district court jurisdiction over a narrow set of claims arising out of violations of the law of nations. This count should be dismissed against the U.S. Defendants because the claim Plaintiff actually makes is not one the ATS recognizes, and it would be against established ATS jurisprudence to expand this Court's jurisdiction in the manner Plaintiff seeks.

A. Following the Supreme Court's Decision in *Sosa v. Alvarez-Machain*, It Is Not Clear That a Claim Arising Out of an Alleged "Arbitrary Detention" Can Be Validly Brought under the Alien Tort Statute

The ATS was passed in 1789 as part of the first congressional statute on the judiciary, and in the 170 years after its passage the statute provided jurisdiction in only one case. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004). Judge Friendly famously called the statute a "'legal Lohengrin'…no one seems to know whence it came…" *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). The ATS does not create a cause of action. Rather, it confers jurisdiction on a district court where (1) the a plaintiff is an alien, (2) the plaintiff claims damages for a tort only, and (3) the alleged damages result from a violation of the law of nations (i.e. customary international law) or a treaty of the United States. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 255 (2d Cir. 2009). This "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability" at the time of the ATS' enactment. *Id.* (quoting *Sosa*, 542 U.S. at 724). When the ATS was enacted, it "enabled federal courts to hear claims in a very limited category defined by the law of nations

and recognized at common law." *Sosa*, 524 U.S. at 712. Those "three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy" shared common traits — each was a rule "binding individuals for the benefit of other individuals[, which] overlapped with the norms of state relationships." *Id.* at 715 (citing 4 W. Blackstone, Commentaries on the Laws of England 68 (1769)). Given the narrowly defined universe of offenses recognized at the time of the ATS' passage, the Supreme Court held that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725.

In 2004, the U.S. Supreme Court construed the ATS for the first time in *Sosa*. To consider properly the implication of the Court's resolution of *Sosa*, especially as it relates to the allegations in the Amended Complaint in this case, it is important to understand the development of the ATS in the twenty-five years prior to the *Sosa* decision.

As previously mentioned, following the statute's passage, the ATS laid largely dormant for close to two centuries. Then, in 1980, the Second Circuit held the ATS provided federal subject matter jurisdiction over a tort claim arising out of a Paraguayan police inspector-general's torture and killing of a Paraguayan citizen. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In so holding, the court found that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations." *Id.* at 880. *Filartiga* started a period of expansion of the ATS, during which two courts in particular, the Second Circuit and the Ninth Circuit, "started the

Judiciary down [a] path the [Supreme] Court [would later] tr[y] to hedge in." *Sosa*, 542 U.S. at 747-748 (Scalia, J., concurring).

In 2003, the Ninth Circuit held that a "clear and universally recognized norm prohibiting arbitrary arrest and detention" granted a district court subject matter jurisdiction over a tort action by a Mexican national complaining of his abduction by fellow Mexicans working in coordination with the U.S. Drug Enforcement Agency. *Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003). The Supreme Court granted certiorari and reversed. *Sosa*, 542 U.S. 692. In so doing, the Supreme Court considered and rejected many of the arguments Plaintiff raises here in support of her claim for relief in Count One of the Amended Complaint.

After reviewing the legislative history of the Statute, the Court cautioned against giving the ATS a broad reading and instead set "a high bar to new private causes of action for violating international law." *Id.* at 727. Notably, the Court emphasized that the district court's inquiry "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732-33 (internal footnote omitted). Moreover, the Court articulated a "series of reasons [which] argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute." *Id.* at 725.

First, the Court noted that a district judge who decided a case "in reliance on an international norm will find a substantial element of discretionary judgment in the decision," given that common law is "made or created" and not merely "found or discovered." *Id.* at 725-26. Because the creation of a private right of action creates issues far beyond "the mere consideration of whether underlying primary conduct should be allowed," the Court recognized that the decision whether to create such a right "is one better left to legislative judgment in the

great majority of cases." *Id.* at 727 (citing whether to permit enforcement without the check imposed by prosecutorial discretion as an example of an issue beyond whether the alleged conduct should be allowed). In this instance, where the private right of action would necessarily implicate international issues, the Court expressed concern about district courts impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.

> It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits…Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.

Id. at 727-28 (internal citations omitted).

Finally, the Court noted that it had "no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." *Id.* at 728. These factors led the Court to articulate the following rule: "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted." *Id.* at 732. The Court then rejected the argument that an ATS claim could be sustained for "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment." *Id.* at 738.

Justices Scalia and Breyer wrote concurring opinions to Justice Souter's majority opinion. In his concurrence, Justice Breyer suggested that jurisdiction under the ATS should only exist where "consistent with those notions of comity that lead each nation to respect the

sovereign rights of other nations by limiting the reach of its laws and their enforcement." *Id.* at 761. This is because, Justice Breyer reasoned, only where international consensus exists regarding both the wrongfulness of the behavior and the propriety of universal jurisdiction over such behavior does "allowing every nation's courts to adjudicate foreign conduct involving foreign parties…not significantly threaten the practical harmony that comity principles seek to protect." *Id.* at 762. Justice Breyer found that the lack of such consensus "provides additional support for the Court's conclusion that the ATS does not recognize the claim at issue here – where the underlying substantive claim concerns arbitrary arrest, outside the United States, of a citizen of one foreign country by another." *Id.* at 763.

Justice Scalia articulated a different concern in his concurrence. While agreeing with the majority's holding and reasoning, Justice Scalia warned of the consequences of allowing even a narrow window for lower courts to create causes of action for the enforcement of international-law-based norms in any manner, as it "countenances judicial occupation of a domain that belongs to the people's representatives." *Id.* at 747. In a prescient warning, he wrote "[o]ne does not need a crystal ball to predict that this occupation will not be long in coming…" even though the majority rejected the "more assertive view of federal judicial discretion over claims based on customary international law" adopted by the Second and Ninth Circuits in the preceding decades. *Id.* at 747-48.

In the five years following *Sosa*, district judges in the Southern District of New York twice construed its holding narrowly as limited to the specific facts presented in that case. *See Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 382 n. 4 (S.D.N.Y. 2009); *Kiobel v.*

Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 466 (S.D.N.Y. 2006).[2] Plaintiff cites both of those cases, as well as language from various international declarations and conventions in support of her argument that this Court may properly exercise jurisdiction over her ATS claim because arbitrary detention has been incorporated into the law of nations and is therefore actionable under the ATS. DE 23 at 83-84 ¶¶ 263-66. In so doing, however, Plaintiff ignores both the reasoning set forth by the Supreme Court in reaching its decision in *Sosa* and specific findings the Court made in reaching its ultimate holding.

For example, Plaintiff claims the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) establish the status of "arbitrary detention" as a violation of international law. But in *Sosa*, the Court addressed both the UDHR and the ICCPR and held that both had "little utility under the standard [the Court] set out in [its] opinion."

> Alvarez cites two well-known international agreements that, despite their moral authority, have little utility under the standard set out in this opinion. He says that his abduction by Sosa was an "arbitrary arrest" within the meaning of the Universal Declaration of Human Rights (Declaration). And he traces the rule against arbitrary arrest not only to the Declaration, but also to article nine of the International Covenant on Civil and Political Rights (Covenant), to which the United States is a party, and to various other conventions to which it is not. But the Declaration does not

[2] Recent developments suggest that the Supreme Court is trending in the opposite direction. The *Kiobel* case reached the high court for argument this term, albeit on a different issue — whether a corporation could be sued under the ATS. Following argument on that narrow issue, the Court took the unusual step of ordering additional briefing on the following question: "[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 U.S. LEXIS 1998, at *270 (Mar. 5, 2012). The final briefing on that question is due June 29, 2012. It is the U.S. Defendants' position that this Court need not await the Supreme Court's resolution of that question because the Amended Complaint fails to state a valid ATS claim for the reasons set forth in Sections I and II of this memorandum. But the Supreme Court's request for additional briefing belies the notion that the reach of the ATS will *expand*, or that the Court will countenance novel theories of ATS growth such as that advanced by Plaintiff in this matter.

> of its own force impose obligations as a matter of international law. And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts. Accordingly, Alvarez cannot say that the Declaration and Covenant themselves establish the relevant and applicable rule of international law.

Sosa, at 734-735 (internal citations omitted). Nor are the other international conventions cited in the Amended Complaint sufficient to overcome the Supreme Court's reasoning in *Sosa* and validly establish "arbitrary detention" as akin to the historical paradigms recognized at the time the ATS was adopted. *Id.* at 732; *see* DE 23 at 84-85 ¶ 266(a)-(e) (citing various international conventions and declarations as "confirm[ation] that the prohibition against arbitrary detention is incorporated into the law of nations."). But the Court need not reach that question because even accepting the well-pleaded factual allegations in the Amended Complaint as true, as the Court must do at this stage, Plaintiff does not articulate an "arbitrary detention" claim.

B. Even if "Arbitrary Detention" Were Actionable under the Alien Tort Statute, the Amended Complaint Does Not Sufficiently Articulate Such a Claim

A fair reading of the Amended Complaint makes clear that Plaintiff complains of a politically motivated prosecution that included her arrest, indictment, and trial by Ukrainian prosecutors. A review of the limited case law on the ATS in the area of arbitrary detention makes clear that while Plaintiff repeatedly uses the legal term "arbitrary detention," what she alleges as a factual matter is not an "arbitrary" detention but rather a detention (with legal process) which she deems unjustified. That is not a complaint that states a valid claim under the ATS.

In *Sosa*, while rejecting the applicability of the ATS to Plaintiff's claim of "arbitrary detention," the Supreme Court focused on the plaintiff's warrantless abduction from his home, illegal overnight detention, and cross-border transport prior to judicial presentment. *Sosa*, 542

U.S. at 698, 738. *Wiwa*, meanwhile, involved allegations that Nigerian police and military officers beat, raped, shot and/or killed various individuals who protested the land development activities of various international oil and gas companies. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-cv-8386, 2002 U.S. Dist. LEXIS 3293, at *5 (S.D.N.Y. Feb. 28, 2002). In defining the relevant terms, the district court concluded "[u]nder international law, 'arbitrary detention' occurs when a person is detained without warrant or articulable suspicion, is not apprised of charges against him or her, and is not brought to trial." *Id.* at *20 (defining "arbitrary detention" and then dismissing plaintiff's complaint because it contained "only a cursory assertion that [plaintiff] 'had previously been arrested and detained without charges' at some undefined time in the past.").

In this case, Plaintiff does not allege that she was detained in an "arbitrary" fashion or without legal process. Instead, her complaints are mainly about the very process she was actually afforded in connection with her arrest, indictment, and trial. She complains of numerous "interrogations" following the launch of a criminal investigation against her. DE 23 at 58-59 ¶ 183. In some instances, she alleges that she was only given a few hours' notice to appear for those "interrogations." *Id.* at 59 ¶ 184. She claims that during the course of the investigation, her right to travel outside Kyiv was restricted by the prosecutor's office. *Id.* at 60 ¶ 185. And she complains that the investigation and trial that followed impaired her ability to earn money and caused financial injury. *Id.* at 60 ¶ 186. Not only are these allegations not the akin to the type of conduct that courts have cited as evidence of "arbitrary detention," but they are also complaints that U.S. courts have rejected when raised by defendants in U.S. criminal prosecutions. *See, e.g.*, *Stein v. New York*, 346 U.S. 156, 185 (1953) ("[W]e have never gone so

far as to hold that…extensive questioning of a prisoner automatically makes the evidence he gives in response constitutionally prohibited.").

The same analysis applies to Plaintiff's complaints about her trial. As evidence that prosecutions, arrest, and detentions have been "arbitrary," Plaintiff alleges that she and other officials have been detained on "nebulously defined criminal charges such as 'excess of authority' and 'causing state losses.'" DE 23 at 22 ¶ 63. Charging a defendant with an arguably vague or nebulous statutory law violation cannot reasonably be cast as a violation of established international law. *See United States v. Skilling*, 130 S. Ct. 2896 (2010) (limiting honest services fraud statute, 18 U.S.C. § 1346, which prohibits schemes to deprive another of the intangible right of honest services, in light of significant vagueness concerns). Plaintiff complains that during her trial, she was "subjected to an unjustified and politically-motivated arrest ordered by the [presiding] District Court…[because] the prosecutor claimed [Plaintiff] had been disrespectful while examining the Prime Minister." DE 23 at 61 ¶ 192. Again, this purported violation of international law has a clear legal corollary in U.S. criminal procedure. *See Frank v. United States*, 395 U.S. 147, 149 (1969) ("[A] person may be found in contempt of court for a great many different types of offenses, ranging from disrespect for the court to acts otherwise criminal"); *see also Illinois v. Allen*, 397 U.S. 337, 343-344 (1970) (listing constitutionally permissible ways for a trial judge to handle an obstreperous defendant including physical restraint and gag, contempt citation, and removal from the courtroom).

Finally, Plaintiff repeatedly complains about aspects of her trial such as judicial limits on cross-examination, DE 23 at 77-78 ¶ 243; denial of defense motions to admit evidence, *id.* at 77 ¶ 241; granting insufficient time to prepare for portions of trial, *id.* at 70-71 ¶¶ 218-223; and limitations on her counsel's ability to move throughout the courtroom. *Id.* at 72 ¶ 226. These

procedural complaints are simply not the basis for a viable claim of "arbitrary detention" in violation of the law of nations. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (trial judges retain wide latitude to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant).

Finally, and critically, these insufficient allegations are not tied to the U.S. Defendants in any meaningful or legally sufficient way. Not surprisingly, Plaintiff does not allege any involvement of the U.S. Defendants in the decision-making by Ukrainian officials about her indictment, arrest, trial, or detention. The sole attempt to tie the U.S. Defendants to the alleged flaws in the legal process afforded Plaintiff is the baseless and unsupported allegation that various Ukrainian officials "conspired with the remaining Defendants, who provided substantial assistance in bringing about the arbitrary arrests and detentions of Plaintiffs." DE 23 at 88 ¶ 275. For the reasons set forth in section I of this Memorandum, such "vague, conclusory, and attenuated allegations" cannot be allowed to provide an avenue for a plaintiff "to abuse the judicial process in order to pursue political agendas." *See In re Sinaltrainal Litig.*, 474 F. Supp. 2d at 1275.

III. COUNT TWO OF THE AMENDED COMPLAINT MUST BE DISMISSED BECAUSE IT FAILS TO STATE A COGNIZABLE CLAIM UNDER THE RACKETEERING INFLUENCED AND CORRUPT PRACTICES ACT.

Congress passed the RICO statute "to protect[] legitimate businesses from infiltration by organized crime," *United States v. Porcelli*, 865 F.2d 1352, 1362 (2d Cir. 1989), not simply to remedy general statutory criminal violations. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 245 (1989). In order to present a viable RICO claim, a plaintiff must adequately plead at least the following: "(a) the existence of a RICO enterprise, (b) commission of two predicate acts, (c) a pattern of racketeering activity, and (d) the causal link between the predicate

acts and the RICO injury." *Adelphia Commc'ns Corp. v. Bank of Am. (In re Adelphia)*, 2007 Bankr. LEXIS 2851 at *52-53 (Bankr. S.D.N.Y. 2007). Of key importance here, Congress did not articulate any intent for RICO to apply extraterritorially and without such expression, the statute lacks extraterritorial reach. *Norex Petroleum Limited v. Access Industries, Inc.*, 631 F.3d 29, 32-34 (2d Cir. 2010). For these reasons, Count II must be dismissed.

A. RICO Does Not Apply Extraterritorially and the Contacts with the U.S. Alleged in the Amended Complaint Are Insufficient to Support Application as Sought by Plaintiff

The slim contacts with the United States alleged by Plaintiff in her Amended Complaint are insufficient to support extraterritorial application of the RICO statute. As a result, Count II must be dismissed.

In *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), the Supreme Court held that absent an express intention by Congress of extraterritorial effect, a statute applies only domestically. *Morrison*, 130 S. Ct. at 2877-78. Directly following the *Morrison* decision, the Second Circuit had occasion to apply that holding to a RICO complaint involving an alleged "massive racketeering scheme to take over a substantial portion of the Russian oil industry." *Norex*, 631 F.3d at 31. The Second Circuit held that the RICO statute "is silent as to any extraterritorial application," and ordered the complaint dismissed for failure to state a claim. *Id.* at 32-33 (citing *North South Finance Corp. v. Al-Turki*, 100 F.3d 1046 (2d Cir. 1996)).

Notably, in so holding, the Second Circuit rejected the plaintiff's argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possessed the same. *Id.* at 33 (citing *Morrison*, 130 S. Ct. at 2882-83). The Circuit also held the plaintiff's

allegation that some domestic conduct[3] occurred did not support a claim of domestic application of the statute, because as the Supreme Court recognized "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Id.* (citing *Morrison*, 130 S. Ct. at 2884) (emphasis in the original). Under the same logic and reasoning, the slim domestic contacts alleged by Plaintiff in this case, *see* DE 23 at 34-43 ¶¶ 100-133, do not support extraterritorial application of the RICO statute and Count II of the Amended Complaint must be dismissed.

B. The Amended Complaint Does Not Adequately Plead the Elements of a RICO Offense

Moreover, even if the Court declines to dismiss Count II based on improper extraterritorial reach of the RICO statute, Count II nonetheless rests on a number of vague and unsupported allegations about "the defendants" generally without articulation of specific facts supporting the allegations and without delineation of what acts, if any, the U.S. Defendants are alleged to have taken. As such, it wholly fails to adequately plead the elements of a RICO offense.

The Amended Complaint makes a number of vague references to money laundering and mail and wire fraud in the RICO count. *See id.* at 88-90 ¶¶ 278-83. But, again, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."

[3] The domestic conduct alleged by the plaintiff in *Norex* consisted of the following: "first, general allegations that U.S. defendants 'masterminded, operated and directed' the illegal conduct; second, allegations that Defendants used money transferred through U.S. wires to bribe Russian officials and commit various violations of U.S. laws and statutes; third, that Defendants traveled between the U.S. and Russia in aid of various aspects of the alleged Illegal Scheme; fourth, that an extortion attempt was made by [a] Defendant [ ] while [plaintiff Company's owner] was in San Francisco; and fifth, that the 'final extortion' in Russia--namely the seizure of [a Russian oil company] -- violated the Hobbs Act." *Norex*, 540 F. Supp. 2d at 443.

Twombly, 550 U.S. at 555. Merely alleging the existence of a RICO enterprise does not suffice, and in the Amended Complaint, Plaintiff does not set forth sufficient facts from which the court could conclude that the U.S. Defendants were part of a RICO enterprise.

The factual detail in support of an allegation of predicate acts is similarly deficient. A complaint alleging mail and wire fraud must show (1) the existence of a scheme to defraud, (2) a defendant's *knowing or intentional participation* in the scheme, and (3) the use of the interstate mails or transmission facilities in support of the scheme. *S.Q.K.F.C., Inc. v. Bell Atlantic Tricon Leasing Corp.*, 84 F.3d 629, 633 (2d Cir. 1996) (emphasis added). If alleged as RICO predicate acts, the averments of mail and wire fraud must be stated with particularity. *In re Adelphia*, 2007 Bankr. LEXIS 2851, at *54-55 (citing Fed. R. Civ. P. 9(b)). Here, Plaintiff's allegations regarding the U.S. Defendants' knowing or intentional participation in a mail and wire fraud scheme are plainly insufficient. As to the U.S. Defendants, the allegations consist of a collection of references to New York-based real estate deals combined with unsubstantiated assertions that the true purpose of the deals was to conceal money derived in the Ukraine. DE 23 at 38-43 ¶¶ 113-133. But Plaintiff has not, because she cannot, produce any specific factual support suggesting that the U.S. Defendants either had fraudulent intent themselves or knowledge of an intent by other named defendants to engage in a scheme or conspiracy to defraud.

The money laundering allegations are similarly deficient. The substantive offense of "transaction money laundering" in violation of 18 U.S.C. § 1856 requires proof of knowledge that property involved in a financial transaction represents the proceeds of some form of unlawful activity and specific intent to enter into a transaction designed to conceal or disguise the nature of the proceeds of specified unlawful activity. *United States v. Huezo*, 546 F.3d 174 (2d Cir. 2008). The Second Circuit has interpreted the latter element, "knowing that the

transaction is designed in whole or in part to conceal or disguise," as requiring "proof of intent to conceal." *United States v. Stephenson*, 183 F.3d 110, 120 (2d Cir. 1999). Here, the Amended Complaint raises money laundering allegations in the context of the RICO claims, *see* DE 23 at 89-90 ¶¶ 280-81, but provides no specific factual allegations regarding the U.S. Defendants' knowledge of the nature of the allegedly laundered proceeds or intent to enter into financial transactions to conceal the nature or source of those proceeds. *See id.*

Moreover, the Amended Complaint fails to adequately allege that the actions of the U.S. Defendants were the proximate cause of those harms. Proximate cause, in this context, refers not to the foreseeability of harm to the plaintiff, but instead to the directness of the relationship between the purported enterprise's alleged criminal acts and the plaintiff's injuries. *McBrearty v. Vanguard Group, Inc.*, 353 Fed. Appx. 640, 641-42 & n.1 (2d Cir. 2009). Without such a tie, the Amended Complaint must fail because a plaintiff does not have standing to bring a RICO claim unless the defendant's injurious conduct is both the factual and proximate cause of the injury alleged. *Lerner v. Fleet Bank NA*, 318 F.3d 113, 120 (2d Cir. 2003).

Here, the Amended Complaint alleges that the U.S. Defendants engaged in potential financial dealings with individuals in the Ukraine who used their own money to fund political efforts that injured the Plaintiff. DE 23 at 34-43 ¶¶ 100-133. But this type of allegation, even if true, is insufficient to satisfy the proximate cause requirement. "Acts that merely 'furthered, facilitated, permitted or concealed an injury which happened or could have happened independently of the act' do not directly cause that injury, and thus do not proximately cause it." *Picard v. Kohn*, No. 11-cv-1181, 2012 U.S. Dist. LEXIS 22083, at *9 (S.D.N.Y. Feb. 22, 2012) (quoting *DeSilva v. North Shore-Long Island Jewish Health Sys., Inc.*, 770 F. Supp. 2d 497, 524 (E.D.N.Y. 2011)). Thus, in a case involving Bernard Madoff's bankruptcy, Judge Rakoff

concluded that a Bankruptcy Trustee's allegation that a purported criminal conspiracy "fed, perpetuated, and profited from [Madoff Securities'] Ponzi scheme" was "the kind of causal assertion that is too indirect to satisfy the proximate cause requirement" because the investors' injuries "'could have happened independently' of the 'flood of cash' by which defendants merely 'facilitated' Madoff Securities' operations…" *Id.* at *9-10. The same conclusion must apply to the Amended Complaint's conclusory allegations in Count II.

IV. THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S NON-FEDERAL CLAIMS

When a federal court has original jurisdiction over a claim, it has the power to hear any claim that is so related to the claim over which the court has original jurisdiction that it "form[s] part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Yet, the court need not exercise that power. "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). Thus, "[t]he exercise of supplemental jurisdiction is left to the discretion of the district court, and [appellate] review is limited to whether the district court abused its discretion." *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 182 (2d Cir. 2004).

A court may decline to exercise supplemental jurisdiction, when

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). Only one of the four prongs of § 1367(c) needs to be satisfied in order to decline to exercise supplemental jurisdiction. *Correspondent Servs. Corp. v. J.V.W. Invs.*, 205 F. Supp. 2d 191, 200 (S.D.N.Y. 2002). If the court determines that any of the prongs apply, the court also must consider the factors articulated in *Gibbs*: whether judicial economy, convenience, comity, and fairness to litigants favors the exercise of jurisdiction. *Shahriar v. Smith & Wollensky Rest. Group, Inc.*, 659 F.3d 234, 245 (2d Cir. 2011).

In particular, pursuant to section 1367(c)(3), if federal claims "are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *First Capital Asset Mgmt.*, 385 F.3d at 183. The Second Circuit has "repeatedly said" as much. *Oneida Indian Nation v. Madison Cty.*, 665 F.3d 408, 437 (2d Cir. 2011).[4] This is because in the usual case in which all federal-law claims are dismissed before trial, the balance of the *Gibbs* factors "will point toward declining to exercise jurisdiction over the remaining [non-federal] claims." *Id.* (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988)) (internal quotation marks omitted).

Here, section 1367(c)(3) warrants the Court's exercise of its discretion to decline to exercise supplemental jurisdiction over Plaintiff's non-federal law claims set forth in Count III

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[4] *See also, e.g., Ross v. Woods*, 412 Fed. Appx. 392, 393 (2d Cir. 2011) (holding that it is generally appropriate to dismiss pendent [non-federal] claims under circumstances in which the district court has dismissed all claims over which it has original jurisdiction); *Astra Media Group LLC v. Clear Channel Taxi Media, LLC*, 414 Fed. Appx. 334, 337 (2d Cir. 2011) ("[W]e have generally held that where all the federal claims have been dismissed at a relatively early stage, the district court should decline to exercise supplemental jurisdiction over pendent [non-federal] claims."); *Burgess v. Harris Beach PLLC*, 346 Fed. Appx. 658, 661 (2d Cir. 2009) ("In general, where the federal claims are dismissed before trial, the [non-federal] claims should be dismissed as well."); *Klein & Co. Futures, Inc. v. Bd. of Trade*, 464 F.3d 255, 262 (2d Cir. 2006) ("It is well settled that where, as here, the federal claims are eliminated in the early stages of litigation, courts should generally decline to exercise pendent jurisdiction over remaining [non-federal] claims.").

(breach of fiduciary duty and aiding and abetting breach of fiduciary duty) and Count IV (malicious prosecution). In the event that the Court dismisses Plaintiff's federal ATS and RICO claims, Plaintiff's non-federal claims should be dismissed as well. *First Capital Asset Mgmt.*, 385 F.3d at 182. Exercising supplemental jurisdiction over Plaintiff's non-federal law claims in this case would not promote economy, convenience, fairness, or comity. *Gibbs*, 383 U.S. at 726. Instead, it would increase the costs and burdens on the parties and the Court, especially with respect to such issues as the increased need for translation services for documents and witnesses. Moreover, the majority of those documents and witnesses are likely located overseas, where the vast majority of the events underlying Plaintiff's complaint allegedly occurred. Otherwise, aside from a short-lived motion to intervene filed by judgment creditor Universal Trading & Investment Co., Inc., which did not involve the U.S. Defendants, no motions have been filed (and certainly no substantive motions), discovery has not yet commenced, and the case is clearly not even close to being ready for trial.

Instead, as in *First Capital Asset Mgmt.*, "many of the litigants are foreign nationals, and this case is likely to go on for years." 385 F.3d at 183. There, the Second Circuit found that the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the plaintiffs' non-federal claims after it dismissed the plaintiffs' RICO claims prior to trial. *Id*.

Likewise, this Court should decline to exercise supplemental jurisdiction over Plaintiff's non-federal claims, and it should dismiss them for want of jurisdiction. Plainly, there are judicial economies to be achieved by declining to exercise supplemental jurisdiction, and doing so would permit this matter to be resolved where it more appropriately belongs: in Ukraine or in the European Court of Human Rights.

V. COUNTS III AND IV MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

In the event that the Court determines it should retain supplemental jurisdiction over Plaintiff's non-federal claims, the Court should nonetheless dismiss Counts III and IV pursuant to Federal Rule of Civil Procedure 12(b)(6) for failing to meet the pleading standards mandated by the Supreme Court in *Twombly* and *Iqbal*.[5]

Assuming *arguendo* that New York law applies to Plaintiff's non-federal claims, they fail for factual insufficiency. Plaintiff has simply failed to plead any involvement by any of the U.S. Defendants in their claims of breach of fiduciary duty and malicious prosecution. None of the U.S. Defendants are mentioned by name in either Count III or Count IV, *see* DE 23 at 91-93 ¶¶ 286-294, and the factual allegations that conceivably address the Defendants are so vague and conclusory that the U.S. Defendants are left guessing Plaintiff's theory as to their liability. *See id.* at 91-92 ¶ 288 ("Firtash and his affiliates, agents and co-conspirators not only had actual knowledge of the officials' breach of their fiduciary duty to Ukrainian citizens, but also actively

[5] In her Amended Complaint, Plaintiff states without explanation that her non-federal claims are "brought under the laws of the State of New York." DE 23 at 18 ¶ 47. In the normal course, a federal court adjudicating non-federal law claims that are pendent to a federal claim "must apply the choice of law rules of the forum state." *Rogers v. Grimaldi*, 875 F.2d 994, 1002 (2d Cir. 1989). This would entail determining whether Ukrainian law provides relief for Plaintiff's claims of breach of fiduciary duty and malicious prosecution and, if so, what the elements of such claims would be, whether they conflict with the elements of those claims under New York law, and, if so, which jurisdiction has the greater interest in this litigation. *See, e.g.*, *Hanly v. Powell Goldstein, LLP*, No. 05-cv-5089, 2007 U.S. Dist. LEXIS 17152, at *12 (S.D.N.Y. Mar. 9, 2007) ("In New[]York, the first question to resolve in determining whether to undertake a choice-of-law analysis is whether a conflict of laws exists), *aff'd* 290 Fed. Appx. 435 (2d Cir. 2008); *Tripodi v. Local Union No. 38*, 120 F. Supp. 2d 318, 321 (S.D.N.Y. 2000) (applying "interest" analysis in malicious prosecution case). The U.S. Defendants expressly reserve the right to fully litigate all relevant choice-of-law issues. But at this juncture in the case, when it is abundantly clear that the Court should dismiss Counts III and IV either on jurisdictional grounds or for failing to meet the applicable pleading standards, the expenditure of resources on such an endeavor would be unwise.

facilitated and enabled the breach by, among other things, paying substantial kickbacks to these officials for their assistance."); *id.* at 92 ¶ 291 ("The remaining Defendants directed, conspired with, and/or facilitated, aided and abetted these government officials' selective and malicious prosecution of Plaintiffs."). The Court should dismiss both counts.

A. Count III Fails to Allege a Cognizable Breach of Fiduciary Duty Claim against the U.S. Defendants

Under New York law, "[t]he elements of a breach of fiduciary duty claim are (1) that a fiduciary duty existed between plaintiff and defendant, (2) that defendant breached that duty, and (3) damages as a result of the breach." *Meisel v. Grunberg*, 651 F. Supp. 2d 98, 114 (S.D.N.Y. 2009). Plaintiff alleged that the relevant fiduciary relationship here was between "the Ukrainian government and Naftogaz officials" on the one hand, and Ukrainian citizens as a whole on the other. DE 23 at 91 ¶ 287. The U.S. Defendants are obviously not Ukrainian government officials or Naftogaz officials. Plaintiff has not alleged and cannot allege that these Defendants had a fiduciary duty to her, meaning that Plaintiff has not alleged that the U.S. Defendants directly breached such a duty.

To state a claim for aiding and abetting a breach of fiduciary duty under New York law, a plaintiff "must adequately plead (1) the existence of a violation by the primary wrongdoer, (2) knowledge of the violation by the aider and abettor[,] and (3) substantial assistance by the aider and abettor of the primary wrongdoer." *Hilton Head Holdings v. Peck*, No. 11-cv-7768, 2012 U.S. Dist. LEXIS 24984, at *11-12 (S.D.N.Y. Feb. 23, 2012). Plaintiff has stated that the Ukrainian government and Naftogaz officials "breached their fiduciary duty to represent and protect the financial interests of Ukrainian citizens, by securing a favored position for RUE in the Russia-Ukraine gas trade and not challenging Firtash and RUE's Stockholm arbitration claims." DE 23 at 91-92 ¶ 288. The Amended Complaint goes on to state that "Firtash and his affiliates,

agents and co-conspirators" had "actual knowledge" of this breach and "actively facilitated and enabled" it. *Id.*

First, it is unclear whether Plaintiff has adequately alleged the underlying primary violation.[6] In her Amended Complaint, Plaintiff states in conclusory fashion that because Ukrainian government officials were "charged with representing Ukrainian citizens' interests in the Russia-Ukraine gas trade and Stockholm arbitration," those officials had a "duty to act for the benefit of Ukrainian citizens given that Naftogaz is an entirely state-owned company." *Id.* at 91 ¶ 287. So, while the claimed fiduciary duty was purportedly owed to the entire Ukrainian citizenry and purportedly breached as to the entire Ukrainian citizenry, Plaintiff is claiming that the breach damaged her in particular — and not solely because of purported losses to Ukrainian citizens as a whole, but because of vague "financial loss and physical injury" purportedly "intertwined with the political persecution and arbitrary detentions to which [Plaintiff was] subjected." *Id.* at 91 ¶ 288. It is unnecessary to unpack this tangled theory, however, because as demonstrated *infra*, Plaintiff has altogether failed to plead that the U.S. Defendants had actual knowledge of any such breach or that they actively facilitated it.

It is also unclear whether Plaintiff even intends to characterize the U.S. Defendants as Firtash's "affiliates, agents and co-conspirators." But, assuming that Plaintiff did intend as much, their conclusory allegations concerning these Defendants' purported knowledge of the breach and active facilitation of that breach are insufficient as a matter of law. "To participate knowingly means to have actual knowledge, as opposed to merely constructive knowledge, and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew

[6] Again, to allege such a violation, Plaintiff must plead the existence of a fiduciary duty between herself and defendants, that defendants breached that duty, and that Plaintiff suffered damages as a result. *Meisel*, 651 F. Supp. 2d at 114.

or should have known about the primary breach of fiduciary duty." *Meisel*, 651 F. Supp. 2d at 115 (alterations and internal quotation marks omitted). Moreover, the "aider o abettor must also provide substantial assistance to the primary violator." *Id.* "Under New York law, substantial assistance may only be found where the alleged aider and abettor affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *Id.* (alterations and internal quotation marks omitted).

While Plaintiff has asserted that "Firtash and his affiliates, agents and co-conspirators" had "actual knowledge" of this breach and "actively facilitated and enabled" it, *she has pled no facts* from which it can be inferred that the U.S. Defendants had actual knowledge of the purported breach of fiduciary duty or any facts that would render plausible Plaintiff's claim that the U.S. Defendants provided substantial assistance to anyone with respect to an alleged breach. *See, e.g.*, DE 23 at 13-15, 34-43, 91-92 ¶¶ 33-37, 100-33, 286-89. At most, the Amended Complaint alleges that CMZ Ventures and the Dynamic Group are investment vehicles through which Firtash "and his associates…channel[ed] their illegal proceeds," *id.* at 13 ¶ 33; that Barbara Ann Holdings and Mr. Zackson "acted as agents for Firtash and his associates by covertly investing their money through CMZ Ventures, Kallista Investments, and the Dynamic Fund," *id.* at 13 ¶ 34; and that Mr. Manafort "assist[ed] Firtash to become a major 'investor' and silent partner in defendants CMZ Ventures…Group DF and their affiliated companies," *id.* at 14 ¶ 35. But there is nothing in those allegations to suggest — much less properly plead — that any of these Defendants had actual knowledge of the purported breach of fiduciary duty or that they provided substantial assistance in that regard.

Thus, while Plaintiff has recited the elements in support of her claim, her "allegations are nothing more than labels and conclusions that fail under *Iqbal*" and *Twombly*. *Hilton Head*

Holdings, 2012 U.S. Dist. LEXIS 24984, at *12; *see also Horvath v. Banco Comercial Portugues, S.A.*, No. 10-cv-4697, 2011 U.S. Dist. LEXIS 15865, at *24 (S.D.N.Y. Feb. 15, 2011) ("Other than baldly asserting that Millennium had actual knowledge, the Complaint does not allege any facts that allow this Court to infer that Millennium had such knowledge….For similar reasons, Plaintiff has failed to plead sufficient facts to establish that Millennium provided BCP substantial assistance.").[7]

In short, Plaintiff has not — and cannot — make any plausible allegations that Mr. Manafort, Mr. Zackson, Barbara Ann Holdings, CMZ Ventures, and Dynamic Fund actually knew about or were in any way involved in the alleged breach of fiduciary duty owed to "Ukrainian taxpayers" by "Ukrainian government and Naftogaz officials." *See* DE 23 at 91-92 ¶¶ 287-288. Accordingly, should the Court exercise supplemental jurisdiction over Count III,

[7] Plaintiff's only, albeit half-hearted, attempt to tie any of the U.S. Defendants to her breach-of-fiduciary-duty claim is to state that because Mr. Manafort had been "a key advisor to President Yanukovich and other Ukraine political figures since approximately 2003, he knew exactly how Firtash and his affiliated companies and associates were able to skim billions of dollars from the natural gas deals between Russia and Ukraine, and he knew that the monies were used to pay off political figures and government officials in Ukraine." DE 23 at 15 ¶ 37. Plaintiff fails to explain how Mr. Manafort's role as "a key advisor to President Yanukovich and other Ukraine political figures" possibly equates to knowledge as to "exactly how Firtash and his affiliated companies and associates were able to skim billions of dollars from the natural gas deal between Russia and Ukraine, and he knew that the monies were used to pay off political figures and government officials in Ukraine." There is no obvious connection between Mr. Manafort's advisory role and any actual knowledge of Firtash's money skimming or payoffs relating to the natural gas deal, and Plaintiff has not attempted to provide an explanation. Plaintiff's bald assertion amounts to nothing more than speculation. *See Glidepath Holding B.V. v. Spherion Corp.*, No. 04-cv-9758, 2010 U.S. Dist. LEXIS 33255, at *40-41 (S.D.N.Y. Mar. 26, 2010) ("[E]ven assuming arguendo that Thompson did breach his fiduciary duties…Plaintiffs have not pointed to any evidence aside from pure conjecture that Spherion knowingly induced or participated in that breach. Accordingly, Plaintiffs claims for aiding and abetting breach of fiduciary duty also fail for this reason."); *see also GEO Group, Inc. v. Cmty. First Servs.*, No. 11-cv-1711, 2012 U.S. Dist. LEXIS 45654, at *31-32 (E.D.N.Y. Mar. 30, 2012) ("GEO alleges only that Nelson-Dabo worked at both GEO and CFS at the same time…and that other individuals who also worked for both GEO and CFS committed torts. These facts alone do not raise an inference of actual knowledge…'above the speculative level.'").

the Court should nonetheless dismiss that count as to the U.S. Defendants for failure to state a claim upon which relief can be granted.

B. Count IV Fails to Allege a Cognizable Malicious Prosecution Claim against the U.S. Defendants

Similarly, the Court should dismiss Count IV, which purports to allege a claim of malicious prosecution. Should the Court exercise supplemental jurisdiction over Plaintiff's non-federal claims, and assuming *arguendo* that New York law applies to Plaintiff's malicious prosecution case, the reasons for dismissal are clear.[8]

To establish a claim for malicious prosecution under New York law, a plaintiff must show: "(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the accused; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice." *Hanly*, 2007 U.S. Dist. LEXIS 17152, at *16. As to the first element, the defendant must "play an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act." *Id.* (internal quotation marks omitted). As to the second element, "a criminal action is terminated in the accused's favor…where a judicial determination of the accused's innocence on the merits of the action has been made." *Ward v. Silverberg*, 85 N.Y.2d 994 (1995). All in all, "[t]he law in New York 'places a heavy burden on malicious prosecution plaintiffs.'" *Lawrence v. City Cadillac*, No. 10-cv-3324, 2010 U.S. Dist. LEXIS 132761, at *17 (S.D.N.Y. Dec. 8, 2010).

As with Plaintiff's breach-of-fiduciary-duty claim, she has not alleged that the U.S. Defendants directly committed the tort of malicious prosecution. *See* DE 23 at 92 ¶ 291 ("Defendant prosecutors Pshonka, Kuzmin, Nechvoglod, and Frolova selectively and maliciously

[8] *See* note 5, *supra*.

prosecuted Plaintiffs on politically-motivated and false charges, with the purpose of intimidating and diminishing meaningful political opposition to the Yanukovych Administration."). Instead, it appears that Plaintiff's theory is that the U.S. Defendants "directed, conspired with, and/or facilitated, aided, and abetted these government officials' selective and malicious prosecution of Plaintiffs." *Id.*; *see also id.* at 2 ¶ 2 ("These political persecutions have been carried out at the direction of Defendant Viktor Pshonka, Ukraine's Prosecutor General, with the knowledge, consent, and material support, if not at the request, of the remaining Defendants and their agents and co-conspirators, in an attempt to quash political opposition in Ukraine and unjustly enrich Defendants at the expense of Ukrainian citizens.").

Yet there are no facts alleged in the Amended Complaint tending to plead such a claim. Taking the elements somewhat out of order, Plaintiff has failed to assert anywhere in the entire Amended Complaint that any of the criminal proceedings terminated in her favor. *Id.* In fact, her complaint seems to be just the opposite — that she has been wrongfully detained without meaningful resolution of her case. Without pleading this essential element of malicious prosecution, any attempt by Plaintiff to plead that the U.S. Defendants "directed, conspired with, and/or facilitated, aided, and abetted" the prosecutors to commit malicious prosecution likewise fails.

Moreover, while Plaintiff has listed various criminal proceedings initiated against and arbitrary detentions of "Tymoshenko and her allies," *see id.* at 51-52 ¶ 160; *id.* at ¶¶ 17-22, 25, 63, 69, 75, 160, 169-70, 174-83, 189-92, 196, 200, 207, nowhere does she explain how the U.S. Defendants assisted or encouraged the authorities (or anyone else) to act in this regard. *See Hanly*, 2007 U.S. Dist. LEXIS 17152, at *16. At a more basic level, Plaintiff has alleged no facts indicating that these Defendants ever had contact with the prosecutors or any other

individuals within the Ukrainian law enforcement community — or that they encouraged or conspired with anyone else to play an active role in the prosecutions.

In sum, Plaintiff has altogether failed to allege any facts from which the Court could infer that the U.S. Defendants were in any way involved in any so-called malicious prosecution. As explained by the Second Circuit,

> [t]he line separating conclusory allegations from adequate ones is difficult to draw. But in our view, the relevant allegations in this case were clearly on one side of that line. Instead of alleging, for instance, what words were spoken or what actions were taken by Rawls to assist or encourage Zylberstein, the amended complaint asserts conclusions about how certain unspecified actions should be interpreted or labeled--that is, that these indeterminate acts meet the legal standard of "aiding and abetting" or qualify as "substantial assistance.["] Merely reciting labels does not satisfy Rule 8(a)(2).

Hanly v. Powell Goldstein, 290 Fed. Appx. 435, 440 (2d Cir. 2008). Plaintiff's Amended Complaint attempts to do precisely what the Second Circuit rejected in *Hanly* — it asks the Court to draw conclusions about how "certain unspecified actions should be interpreted or labeled." *Id*. Because "merely reciting labels" does not satisfy Plaintiff's burden, should the Court exercise supplemental jurisdiction over Count IV, the Court should nonetheless dismiss that count as to the U.S. Defendants for failure to state a claim upon which relief can be granted.

VI. PLAINTIFF'S AMENDED COMPLAINT AGAINST PAUL MANAFORT MUST BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(2) BECAUSE THE COURT LACKS PERSONAL JURISDICTION OVER MR. MANAFORT.

In the Amended Complaint, Plaintiff claims that the Court "has personal jurisdiction over all parties by virtue of their residence in New York, their business and/or tortious activities in this state, or by operation of Fed. R. Civ. P. 4(k)(1-2)." DE 23 at 17 ¶ 45. Despite this bald assertion, this Court lacks personal jurisdiction over Mr. Manafort. As a result, should the Court decline to dismiss the Amended Complaint against Mr. Manafort for failure to state a claim, it

should nonetheless dismiss the complaint against him for lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2).

On a Rule 12(b)(2) motion, the plaintiff bears the burden of establishing jurisdiction over a defendant. *Tamam v. Fransabank SAL*, 677 F. Supp. 2d 720, 725 (S.D.N.Y. 2010). Because no discovery has taken place, to survive such a motion the plaintiff must plead "factual allegations that constitute a *prima facie* showing of jurisdiction." *Id.* (internal quotation marks and alterations omitted). "A *prima facie* showing of jurisdiction does not mean that plaintiff must show only some evidence that defendant is subject to jurisdiction; it means that *plaintiff must plead facts which, if true, are sufficient in themselves to establish jurisdiction*." *Id.* (internal quotation marks omitted) (emphasis added). And while the court assumes the truth of the plaintiff's factual allegations for purposes of this analysis, the court "need not draw argumentative inferences in the plaintiff's favor, and conclusory non-fact-specific jurisdictional allegations or a legal conclusion couched as a factual allegation will not establish a *prima facie* showing of jurisdiction." *Id.* (internal quotation marks and citations omitted).

A. Plaintiff Has Failed to Meet the Requirements of Fed. R. Civ. P. 4(k)(1)

Plaintiff first asks the Court to exert personal jurisdiction over Mr. Manafort pursuant to Federal Rule of Civil Procedure 4(k)(1), *see* DE 23 at 17 ¶ 45, which provides that "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1). This jurisdictional inquiry is two-fold: (1) the court looks to the law of the forum state (here, New York) to determine whether it may exert personal jurisdiction over the defendant; (2) if so, the court then considers whether subjecting the defendant to personal jurisdiction comports with the requirements of due process. *Tamam*, 677 F. Supp. 2d at 726.

New York's long-arm statute confers personal jurisdiction over a foreign defendant who "transacts any business within the state" where the plaintiff's claim arises from that business activity. N.Y. CPLR § 302(a)(1). Here, Plaintiff seems to contend that Mr. Manafort "had the New York defendants act as [his] agents with regard to all activities of their racketeering enterprise that were conducted from the New York offices." DE 23 at 14 ¶ 35. Given this "agency" theory of personal jurisdiction, Plaintiff must adequately allege that Mr. Manafort "knew of, consented to, controlled, and benefitted from the business transaction." *Greenman-Pedersen, Inc. v. Berryman & Henigar, Inc.*, No. 09-cv-0167, 2009 U.S. Dist. LEXIS 72884, at *9 (S.D.N.Y. Aug. 18, 2009). Plaintiff has not done so, nor could she.

Plaintiff alleges that Mr. Manafort is a "well-known *Washington, D.C.* lobbyist and political consultant." DE 23 at 14 ¶ 35 (emphasis added). Yet, Plaintiff has alleged *no facts* that would establish personal jurisdiction over Mr. Manafort in New York. Despite her "agency" theory of personal jurisdiction, Plaintiff has not alleged that Mr. Manafort knew of any of the New York-based business transactions complained of in the Amended Complaint — much less that he had an agency relationship with any of the other individual defendants, consented to any business transactions undertaken by those defendants in New York, that he controlled those transactions, or that he benefitted from them. *Id.*; *Greenman-Pedersen, Inc.*, 2009 U.S. Dist. LEXIS 72884, at *9.[9] Instead, the Court is left with only "conclusory non-fact-specific"

[9] Indeed, no New York business transactions are the root cause of Plaintiff's claims. Instead, Plaintiff's complaint is with the Ukrainian Defendants' alleged actions in Ukraine. Even if funds from the natural gas transactions were ultimately invested in New York, *see* DE 23 at 14 ¶ 35, "a defendant may not be subject to personal jurisdiction under CPLR § 302(a)(1) simply because [his] contact with New York was a link in a chain of events giving rise to the cause of action." *Tamam*, 677 F. Supp. 2d at 728-29. Regardless, the Court need not address this issue, as it is clear that Plaintiff has not alleged sufficient facts (or any facts) establishing a *prima facie* showing of personal jurisdiction over Mr. Manafort.

allegations from which the Court is asked to draw "argumentative inferences" in Plaintiff's favor. *Tamam*, 677 F. Supp. 2d at 725. Thus, Plaintiff has failed to properly allege that the Court has personal jurisdiction over Mr. Manafort pursuant to Rule 4(k)(1).

B. Plaintiff Has Failed to Meet the Requirements of Fed. R. Civ. P. 4(k)(2)

Alternatively, Plaintiff asks the Court to assert personal jurisdiction over Mr. Manafort under Federal Rule of Civil Procedure 4(k)(2). *See* DE 23 at 17 ¶ 45. "Rule 4(k)(2) is designed to fill a gap in the enforcement of federal law for courts to exercise personal jurisdiction over defendants having sufficient contacts with the United States to justify the application of United States law…but having insufficient contact with any single state to support jurisdiction under state long-arm legislation." *Tamam*, 677 F. Supp. 2d at 731 (internal quotation marks omitted). Pursuant to this rule, personal jurisdiction is proper "where: (1) the plaintiff's cause of action arises under federal law; (2) the defendant is not subject to the jurisdiction of any one state; and (3) sufficient contacts with the United States exist such that the exercise of personal jurisdiction over the defendant is consistent with the requirement of due process." *Id*.

In this case, even if the Court were to decline to dismiss either of Plaintiff's federal claims, "Plaintiff[ ] ha[s] not certified that [Mr. Manafort is] not subject to jurisdiction in any other state." *Id*. Additionally, while Mr. Manafort arguably has sufficient contacts with the United States as a whole, Plaintiff has utterly failed to establish that haling Mr. Manafort into court in *New York* is at all reasonable. *See id*. Plaintiff "must establish that defendant had sufficient contacts with the forum such that 'maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "The minimum contacts test requires plaintiff to allege jurisdictional facts sufficient to show that defendants purposefully directed their activities at residents of the forum and the litigation results from alleged injuries that arise out of or related to those activities such

that defendants could reasonably foresee being haled into court in the forum." *Id.* (internal quotation marks and citations omitted).

As established above, Plaintiff has alleged no facts tending to show that Mr. Manafort had any contacts with the state of New York (*see* DE 23 at 14-15 ¶¶ 35, 37) — much less sufficient contacts such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co.*, 326 U.S. at 316. The Amended Complaint alleges not a single fact showing that Mr. Manafort purposefully directed his activities at residents of New York, or that he could reasonably foresee being haled into court in New York. Accordingly, the Court should find that it does not have personal jurisdiction over Mr. Manafort pursuant to Rule 4(k)(2).

CONCLUSION

For the above stated reasons, Paul Manafort, Brad Zackson, CMZ Ventures, LLC, the Dynamic Group, and Barbara Ann Holdings, LLC respectfully request that the Court grant their Motion to Dismiss.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 27th day of April, 2012, a true and genuine copy of the foregoing was filed by ECF, which will automatically send notification and a copy of such filing to the following:

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