

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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YULIA TYMOSHENKO, SCOTT SNIZEK,
CHRISTY GREGORY RULLIS, and JOHN
DOES 1 through 50, *On Behalf of Themselves*
and All Those Similarly Situated,

Plaintiffs,

11-CV-2794 (KMW)
OPINION AND ORDER

-against-

DMYTRO FIRTASH, et al.,

Defendants.

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KIMBA M. WOOD, District Judge:

The Second Amended Complaint (“SAC”) in this action alleges that several Ukrainian defendants, led by businessman Dmytro Firtash, financed a domestic racketeering enterprise (the “U.S. Enterprise”) conducted primarily by defendant United States citizens and corporations. Plaintiff Yulia Tymoshenko is the former Prime Minister of Ukraine and a longstanding critic of Firtash’s energy company, RosUkrEnergo (“RUE”). Money laundered by the U.S. Enterprise was allegedly used to finance Tymoshenko’s “persecution” in Ukraine, in retaliation for her hostility to RUE while in office. Plaintiffs Scott Snizek and Christy Gregory Rullis, meanwhile, are former employees of several defendant U.S. corporations that allegedly participated in the U.S. Enterprise. According to the SAC, those corporations failed to provide wages and other benefits promised to Snizek and Rullis. The SAC claims that the defendants’ conduct violated the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961–1968, and state fraud law.

Several defendant U.S. corporations and citizens — CMZ Ventures, LLC (“CMZ”); the Dynamic Group (“Dynamic”); Barbara Ann Holdings, LLC; Vulcan Properties, Inc. (“Vulcan”); Paul Manafort; and Brad Zackson (collectively, the “Moving Defendants”) — have moved to dismiss the SAC with prejudice pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6).¹ For the reasons set forth below, the Court GRANTS the motions to dismiss the SAC, but with leave for Plaintiffs to amend.

I. BACKGROUND

A. *The Amended Complaint*

On December 19, 2011, Tymoshenko filed the Amended Complaint (“AC”) in this action on behalf of herself, unnamed former members of her administration, and all those similarly situated. *See* [Dkt. No. 23]. The Court’s opinion in *Tymoshenko v. Firtash*, No. 11-CV-2794, 2013 WL 1234821 (S.D.N.Y. Mar. 26, 2013) (Wood, J.) (“*Tymoshenko I*”), describes the AC’s factual allegations in detail. To summarize briefly here, the AC claimed that Firtash and his associates directed Ukrainian officials to unlawfully persecute and arbitrarily detain the plaintiffs, in retaliation for the plaintiffs’ political opposition to RUE. *See* AC ¶¶ 15, 93–94, 160–162, 279. The Ukrainian officials did Firtash’s “bidding” because he had secured their loyalty through the payment of “illegal kickbacks.” *Id.* ¶ 94, 279. Firtash financed those kickbacks, in turn, with money he laundered through transactions with a “labyrinth” of defendant U.S. corporations and citizens. *Id.* ¶ 105.

The AC brought federal claims under RICO and the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, as well as state law claims for breach of fiduciary duty and malicious

¹ Vulcan filed a separate motion to dismiss in which it “joins, adopts and incorporates the arguments” made by the other Moving Defendants. Mem. of Law in Supp. (Vulcan) [Dkt. No. 93] at 3. Consequently, the Court considers the motions together.

prosecution. *See id.* ¶¶ 261–294. The AC claimed that the defendants had violated RICO by laundering Firtash’s money, and had violated the ATS by using some of that money to orchestrate and implement arbitrary detentions in Ukraine. *See id.* Several defendants moved to dismiss the AC in its entirety, arguing primarily that the AC failed to state any claim upon which relief could be granted. *See* [Dkt. Nos. 45, 50, 57].

On March 26, 2013, this Court dismissed the AC. *See Tymoshenko I*, 2013 WL 1234821, at *1. In keeping with this District’s jurisprudence at the time, the Court dismissed the AC’s RICO claim as impermissibly extraterritorial because the alleged enterprise and pattern of racketeering were both essentially foreign. *See id.* at *11–13. The Court dismissed the ATS claim, in turn, because the AC failed to plead facts sufficient to establish that plaintiffs’ detentions were arbitrary (or that the U.S. defendants aided and abetted those detentions). *Id.* at *7–11. Having dismissed all claims over which it had original jurisdiction, the Court then declined to exercise supplemental jurisdiction over the remaining state-law claims. *Id.* at *13. The Court granted the plaintiffs leave to amend. *Id.* at *14.

B. The Second Amended Complaint

On November 11, 2013, Tymoshenko, now joined by Snizek, Rullis and several unknown “John Doe” U.S. corporations and citizens, filed the SAC. *See* [Dkt. No. 87]. It names as defendants Firtash and his alleged associate, Semyon Mogilevich; several Ukrainian John Does; four Ukrainian corporations allegedly controlled by Firtash, which do business using the name “Group DF”; and several U.S. corporations and citizens. With the exception of two U.S. citizens, all of those defendants are carried over from the AC. The SAC initially asserted RICO claims and state law claims for fraud and malicious prosecution. *Id.* ¶¶ 122–137. Plaintiffs have

since withdrawn their malicious prosecution claim. *See* Mem. of Law in Opp. [Dkt. No. 97] at 23 n.24.

The SAC reiterates many of the AC's allegations but ostensibly describes a different, "U.S.-based" racketeering enterprise. SAC ¶ 2; *see also* Mem. of Law in Opp. 3. The factual allegations that follow are accepted as true for the purposes of the Moving Defendants' motions to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

i. RUE's Operations and Income in Ukraine

From 2004 to 2009, RUE earned millions of dollars by serving as a "middleman" in natural gas contracts between Naftogaz, a Ukrainian state-owned gas company, and Gazprom, a Russian gas company. *See* SAC ¶¶ 3, 5, 22. Firtash secured RUE's participation in those contracts through "his close relationship with, and payment of illegal kickbacks to, Ukrainian government officials." *Id.* ¶ 3.

In December 2007, Tymoshenko — a "vocal critic" of RUE — became Ukraine's Prime Minister. *Id.* ¶¶ 5, 106. Over the next two years, she took several steps to exclude RUE from Ukraine's natural gas transactions with Russia. In 2008, Tymoshenko revoked the authority of an RUE/Naftogaz joint venture to operate in Ukraine, and in 2009, she negotiated new natural gas contracts with Russia that eliminated RUE as an intermediary. *Id.* ¶¶ 106–107. Those new contracts also provided for Naftogaz to take control of, and assume the debt for, 11 billion cubic meters of natural gas that Gazprom had delivered to RUE, but for which RUE had not yet paid. *Id.* ¶ 108.

After Naftogaz took control of RUE's natural gas, RUE and Firtash sought legal redress. They initially sued Naftogaz in Ukrainian court; when that action proved unsuccessful, they filed an international arbitration claim with the Arbitration Institute for the Stockholm Chamber of

Commerce. *Id.* ¶¶ 114–115. Under Tymoshenko’s leadership, Naftogaz contested RUE’s arbitration claim. *Id.* ¶ 116. In February 2010, however, Viktor Yanukovich — an ally of Firtash — narrowly defeated Tymoshenko to become the President of Ukraine, which prompted Tymoshenko to resign as Prime Minister. *Id.* ¶¶ 36–37. Under Yanukovich’s leadership, Naftogaz changed course in the arbitration and admitted that RUE’s claim was valid. *Id.* ¶¶ 116–117. In June 2010, the Stockholm tribunal found in favor of RUE and ordered Naftogaz to transfer 11 billion cubic meters of natural gas, plus interest, to Firtash’s company. *Id.* ¶ 118. The gas was valued at \$3.5 billion at the time. *Id.*

ii. The Defendants Use RUE’s Income as “Initial and Ongoing Financing” for the U.S. Enterprise

Firtash and his co-defendants used some of the money that RUE received from its natural gas contracts and related arbitration as “initial and ongoing financing” for a “U.S.-based Racketeering Enterprise.” *Id.* ¶¶ 19, 22. The U.S. Enterprise consisted largely of U.S. corporations and citizens working together to commit “money laundering and other racketeering acts . . . from their New York base under the guise of otherwise legitimate real estate deals and other investment activities in New York and elsewhere in the United States.” *Id.* ¶ 20. The SAC identifies 39 corporate entities that participated in the U.S. Enterprise. *Id.* ¶ 61.

Firtash and others “funneled” money to the U.S. Enterprise through several types of transactions. *Id.* ¶ 20. First, Firtash wired funds for the ostensible purpose of financing real estate investment proposals prepared by defendant U.S. corporations. *Id.* ¶ 80. Those proposed investments were, by design, never consummated; they served merely as a pretense for Firtash to send money to the U.S. Enterprise. *Id.* The SAC identifies one wire transfer of this type. In 2008 and 2009, three defendant companies — CMZ, Dynamic, and Calister Investments (“Calister”), all of which served as “investment vehicles” for Firtash, *id.* ¶ 17 — collectively

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