

--- F.3d ---, 2014 WL 1613878 (C.A.2 (N.Y.))
(Cite as: 2014 WL 1613878 (C.A.2 (N.Y.)))

Only the Westlaw citation is currently available.

United States Court of Appeals,
Second Circuit.

EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, Kingdom of Belgium, Republic of Finland, French Republic, Hellenic Republic, Federal Republic of Germany, Italian Republic, Grand Duchy of Luxembourg, Kingdom of the Netherlands, Portuguese Republic, Kingdom of Spain, Individually, Kingdom of Denmark, Czech Republic, Republic of Lithuania, Republic of Slovenia, Republic of Malta, Republic of Hungary, Republic of Ireland, Republic of Estonia, Republic of Bulgaria, Republic of Latvia, Republic of Poland, Republic of Austria, Kingdom of Sweden, Republic of Cyprus, Slovak Republic, and Romania, Plaintiff–Appellants,

v.

RJR NABISCO, INC., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., RJR Acquisition Corp., f/k/a Nabisco Group Holdings Corp., RJR Nabisco Holdings Corp., R.J. Reynolds Tobacco Holdings, Inc., Nabisco Group Holdings Corp., R.J. Reynolds Global Products, Inc., Reynolds American Inc., R.J. Reynolds Tobacco Company, a North Carolina Corporation, Defendant–Appellees.

Docket No. 11–2475–cv.

Argued: Feb. 24, 2012.

Decided: April 23, 2014.

Corrected: April 29, 2014.

LEVAL, Circuit Judge:

This is the latest installment in litigation brought by the European Community and twenty-six of its member states ^{FN1} (collectively “Plaintiffs”) against RJR Nabisco, Inc., and related entities (collectively “RJR”). ^{FN2} Plaintiffs appeal from the dismissal of

their Second Amended Complaint (the “Complaint”) by the United States District Court for the Eastern District of New York (Garaufis, *J.*). The principal issues they raise are (1) whether their claims under the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1961 *et seq.*, are impermissibly extraterritorial, and (2) whether the European Community qualifies as an organ of a foreign state for purposes of diversity jurisdiction under 28 U.S.C. §§ 1332, 1603. The Complaint alleges that RJR directed, managed, and controlled a global money-laundering scheme with organized crime groups in violation of the RICO statute, laundered money through New York-based financial institutions and repatriated the profits of the scheme to the United States, and committed various common law torts in violation of New York state law. The district court dismissed the RICO claims because it concluded that RICO has no extraterritorial application. The court dismissed the state law claims because it determined that the European Community did not qualify as an organ of a foreign state under 28 U.S.C. §§ 1332, 1603 so that its participation in the suit destroyed complete diversity, and thus deprived the court of jurisdiction over the state law claims.

We conclude that the district court erred in dismissing the federal and state law claims. We disagree with the district court’s conclusion that RICO cannot apply to a foreign enterprise or to extraterritorial conduct. Recognizing that there is a presumption against extraterritorial application of a U.S. statute unless Congress has clearly indicated that the statute applies extraterritorially, *see Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010), we conclude that, with respect to a number of offenses that constitute predicates for RICO liability and are alleged in this case, Congress has clearly manifested an intent that they apply extraterritorially. As to the other alleged offenses, the

--- F.3d ---, 2014 WL 1613878 (C.A.2 (N.Y.))
(Cite as: 2014 WL 1613878 (C.A.2 (N.Y.)))

Complaint alleges sufficiently important domestic activity to come within RICO's coverage.

We believe that the district court also erred in ruling that the European Community's participation as a plaintiff in this lawsuit destroyed complete diversity. The European Community is an "agency or instrumentality of a foreign state" as that term is 19 defined in 28 U.S.C. § 1603(b). It therefore qualifies as a "foreign state" for purposes of 28 U.S.C. § 1332(a)(4), and its suit against "citizens of a State or of different States" comes within the diversity jurisdiction.

BACKGROUND

According to the Complaint, the scheme alleged to violate RICO involves a multi-step process beginning with the smuggling of illegal narcotics into Europe by Colombian and Russian criminal organizations. The drugs are sold, producing revenue in euros, which the criminal organizations "launder" by using money brokers in Europe to exchange the euros for the domestic currency of the criminal organizations' home countries. The money brokers then sell the euros to cigarette importers at a discounted rate. The cigarette importers use these euros to purchase RJR's cigarettes from wholesalers or "cut-outs." The wholesalers then purchase the cigarettes from RJR and ship the cigarettes to the importers who purchased them. And the money brokers use the funds derived from the cigarette importers to continue the laundering cycle.

The Complaint alleges that RJR directed and controlled this money-laundering scheme, utilizing other companies to handle and sell their products. It alleges that RJR gave special handling instructions "intended to conceal the true purchaser of the cigarettes." Complaint ¶ 58. The Complaint also alleges that RJR's executives and employees would travel from the United States to Europe, the Caribbean, and Central America in order to further these money-laundering arrangements; that they shipped cigarettes

through Panama in order to use Panama's secrecy laws to shield the transactions from government scrutiny; that RJR's employees would take monthly trips from the United States to Colombia through Venezuela, bribe border guards in order to enter Colombia illegally, receive payments for cigarettes, travel back to Venezuela, and wire the funds to RJR's accounts in the United States; that RJR employees traveled extensively from the United States to Europe and South America to supervise the money-laundering scheme and to entertain the criminal customers; that RJR communicated internally and with its coconspirators by means of U.S. interstate and international mail and wires; that RJR's employees filed large volumes of fraudulent documents with the U.S. Customs Service and the Bureau of Alcohol, Tobacco and Firearms to further their scheme; that RJR received the profits of its money-laundering schemes in the United States; and that RJR acquired Brown & Williamson Tobacco "for the purpose of expanding upon their illegal cigarette sales and money-laundering activities," *id.* ¶¶ 100–103.

The Complaint asserts that in the course of executing this scheme RJR committed various predicate racketeering acts in violation of RICO, including mail fraud, wire fraud, money laundering, violations of the Travel Act, 18 U.S.C. § 1952, and providing material support to foreign terrorist organizations. In addition the Complaint asserts that RJR committed New York common law torts of fraud, public nuisance, unjust enrichment, negligence, negligent misrepresentation, conversion, and money had and received.

Defendants moved to dismiss both the RICO and state law claims. In its first decision, the district court dismissed the RICO claims on the ground that RICO has no application to activity outside the territory of the United States and cannot apply to a foreign enterprise. *European Cmty. v. RJR Nabisco, Inc. (European Cmty. I)*, No. 02–CV–5771, 2011 WL 843957, at *4–5, *7 (E.D.N.Y. Mar. 8, 2011). The court con-

--- F.3d ---, 2014 WL 1613878 (C.A.2 (N.Y.))
(Cite as: 2014 WL 1613878 (C.A.2 (N.Y.)))

cluded, citing *Morrison*, that the “focus” of the RICO statute is the enterprise, *see* 18 U.S.C. § § 1961(4), 1962(a)-(c), and that the enterprise alleged in the Complaint, which consisted largely of a loose association of Colombian and Russian drug-dealing organizations and European money brokers whose activity was directed outside the United States, could not be considered domestic. Because the enterprise was foreign, the district court concluded, under *Morrison*'s presumption that United States statutes do not apply extraterritorially absent a clear indication of congressional intent, that the Complaint failed to state an actionable violation of RICO. The court thus dismissed the RICO claims under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).

As for the state law claims alleged to come within the federal courts' diversity jurisdiction, the district court observed that the necessary *complete* diversity might be destroyed if the European Community remained a plaintiff. [European Cmty. I, 2011 WL 843957, at *8](#). The court allowed Plaintiffs' counsel time to determine whether the European Community intended to remain a party to the suit. *Id.*

Once advised that the European Community would remain a party, the court ruled that the state law claims did not come within the diversity jurisdiction of the federal courts. It held that the European Community was not a “foreign state,” as used in 28 U.S.C. § 1332, with the consequence that the European Community's continued participation in the suit together with various foreign nation plaintiffs destroyed complete diversity and deprived the court of jurisdiction. *European Cmty. v. RJR Nabisco, Inc. (European Cmty. II)*, 814 F.Supp.2d 189, 208 (E.D.N.Y.2011). The court declined to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(c) because it had dismissed all the federal law claims. *Id.*

DISCUSSION

Plaintiffs contend on appeal that the district court

erred in concluding that the Complaint failed to allege federal law claims, and that the district court erred in finding absence of diversity jurisdiction for the state law claims. We agree with both contentions.

I. RICO Claims

We turn first to the dismissal of the RICO claims. We review a district court's dismissal under [Rule 12\(b\)\(6\) de novo](#). [Connecticut v. Duncan, 612 F.3d 107, 112 \(2d Cir.2010\)](#).

A. The Extraterritoriality of RICO

The district court concluded that the Complaint failed to state actionable RICO claims because the alleged enterprise was located and directed outside the United States. The court's analysis was based on the Supreme Court's ruling in *Morrison* that the presumption against extraterritorial application of U.S. statutes bars such application absent a clear manifestation of congressional intent. [European Cmty. I, 2011 WL 843957, at *4](#). The district court concluded that RICO is silent as to whether Congress intended it to apply to conduct outside the United States, and that “this silence prohibits any extraterritorial application of RICO.” *Id.* The district court believed this conclusion was compelled by our holding in [Norex Petroleum Ltd. v. Access Industries, Inc., 631 F.3d 29, 32 \(2d Cir.2010\)](#). We disagree in several respects with the district court's analysis, including its understanding of the *Norex* precedent.

The RICO statute incorporates by reference numerous specifically identified federal criminal statutes, as well as a number of generically described state criminal offenses (known in RICO jurisprudence as “predicates”). 18 U.S.C. § 1961(1). It adds new criminal and civil consequences to the predicate offenses in certain circumstances—generally speaking, when those offenses are committed in a pattern (consisting of two or more instances) in the context of “any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.” 18 U.S.C. § 1962; *see also id.* § 1964.

--- F.3d ---, 2014 WL 1613878 (C.A.2 (N.Y.))
(Cite as: 2014 WL 1613878 (C.A.2 (N.Y.)))

Litigants, including Plaintiffs in this case, have argued that this just-quoted provision of the statute, which makes RICO applicable to enterprises whose activities affect foreign commerce, sufficiently indicates congressional intent that RICO should apply extraterritorially. In *Norex* we rejected that argument, noting the Supreme Court's admonishment in *Morrison* that the mere fact of a statute's generic reference to "interstate or foreign commerce," identifying the source of Congress's authority to regulate, would not qualify as a manifestation of congressional intent that the statute apply extraterritorially. *Norex*, 631 F.3d at 33 (internal quotation mark omitted). The argument we rejected in *Norex* was to the effect that all claims under RICO may apply to foreign conduct because all RICO claims require proof of an enterprise whose activities affect interstate or foreign commerce. *Id.* We viewed this argument as plainly foreclosed by *Morrison*.

We rejected also a similarly ambitious argument to the effect that Congress's adoption of some RICO predicate statutes with extraterritorial reach indicated a congressional intent that RICO have extraterritorial reach for all its predicates. *See id.* In so holding, we refused to equate the extraterritoriality of certain RICO predicates with the extraterritoriality of RICO as a whole. *See id.* ("*Morrison* similarly forecloses *Norex*'s argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach.>").

The district court here construed our rejection in *Norex* of arguments that RICO applies extraterritorially *in all of its applications* as a ruling that RICO can never have extraterritorial reach in *any* of its applications. *See European Cmty. I*, 2011 WL 843957, at *4. This was a misreading of *Norex*. We now confront an argument about the extraterritorial reach of RICO that was not considered in *Norex*, or in other rulings called to our attention. Congress manifested an unmistakable intent that certain of the federal 19

statutes adopted as predicates for RICO liability apply to extraterritorial conduct. This appeal requires us to consider whether and how RICO may apply extraterritorially in the context of claims predicated on such statutes.

We conclude that RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate. Thus, when a RICO claim depends on violations of a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially, RICO will apply to extraterritorial conduct, too, but only to the extent that the predicate would. Conversely, when a RICO claim depends on violations of a predicate statute that does not overcome *Morrison*'s presumption against extraterritoriality, RICO will not apply extraterritorially either. In all cases, what constitutes sufficient domestic conduct to trigger liability is the same as between RICO and the predicate that forms the basis for RICO liability.

Our conclusion is compelled primarily by the text of RICO. Section 1961(1), which defines "racketeering activity" for purposes of RICO, incorporates by reference various federal criminal statutes, which serve as predicates for RICO liability. Some of these statutes unambiguously and necessarily involve extraterritorial conduct. They can apply only to conduct outside the United States. As examples, § 2332 of Title 18 criminalizes killing, and attempting to kill, "a national of the United States, *while such national is outside the United States.*" 18 U.S.C. § 2332(a) (emphasis added). Section 2423(c) criminalizes "[e]ngaging in illicit sexual conduct *in foreign places.*" *Id.* § 2423(c) (emphasis added). As the conduct which violates these two statutes can occur only outside the United States, Congress unmistakably intended that they apply extraterritorially. By explicitly incorporating these statutes by reference as RICO predicate offenses, Congress also unmistakably intended RICO to apply extraterritorially when § 2332 or § 2423(c) form the basis for RICO liability. In-

--- F.3d ---, 2014 WL 1613878 (C.A.2 (N.Y.))
(Cite as: 2014 WL 1613878 (C.A.2 (N.Y.)))

deed, it is hard to imagine why Congress would incorporate these statutes as RICO predicates if RICO could *never* have extraterritorial application.

Other statutes that serve as RICO predicates clearly state that they apply to both domestic and extraterritorial conduct. For example, § 1203(b), which criminalizes hostage taking, explicitly applies to conduct that “occurred outside the United States” if the offender or the hostage is a U.S. national, the offender is found in the United States, or the conduct sought to coerce the government of the United States; sections 351(i) and 1751(k) expressly provide “extraterritorial jurisdiction” for their criminalization of assassination, kidnapping, or assault of various U.S. government officials; a provision of § 1512 criminalizes extraterritorial tampering with witnesses, victims, or informants; and § 2332b(e) expressly asserts “extraterritorial Federal jurisdiction” as to its criminalization of various “conduct transcending national boundaries” ^{FN3} including attempts, threats, or conspiracies to kill persons within the United States or damage property within the United States. Here too, Congress has not only incorporated into RICO statutes that overcome the presumption against extraterritoriality, it has also provided detailed instructions for when certain extraterritorial conduct should be actionable.

By incorporating these statutes into RICO as predicate racketeering acts, Congress has clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for RICO liability. Thus, a RICO complaint predicating the defendants' liability on their having engaged in a pattern of attempting, while “outside the United States,” to kill the plaintiff, “a national of the United States,” as prohibited by 18 U.S.C. § 2332(b), would state an actionable violation of RICO notwithstanding the extraterritorial conduct because RICO incorporates Congress's express statement that § 2332(b) applies to whomever “*outside the United States* at-

tempts to kill ... a national of the United States.” *Id.* (emphasis added). When, and to the extent that, a RICO charge is based on an incorporated predicate that manifests Congress's clear intention to apply extraterritorially, the presumption against extraterritorial application of U.S. statutes is overcome. The district court was mistaken in interpreting our *Norex* decision as holding that RICO can *never* apply extraterritorially.

Applying its perception of our holding in *Norex*, the district court approached the question whether a RICO claim can apply to extraterritorial conduct by determining that the “focus” of RICO is the criminal enterprise and that any application of RICO is therefore impermissibly extraterritorial when the alleged enterprise is foreign. Because the district court viewed the enterprise alleged in the Complaint as consisting primarily of a loose association of foreign criminal organizations whose policies and activities were directed from outside the United States, it concluded that the enterprise was foreign. It accordingly held that the presumption against extraterritorial application of U.S. statutes barred application of RICO to the facts alleged in the Complaint. In our view, the court erred in that analysis for two principal reasons.

First, the district court's approach necessarily disregards the textual distinctions in the statutes incorporated by reference as RICO predicates. For example, the money laundering statute explicitly applies to extraterritorial conduct “if (1) the conduct is by a United States citizen ... and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding \$10,000.” 18 U.S.C. § 1956(f). The district court's reading of RICO would preclude extraterritorial applications of RICO where they are explicitly permitted under the money laundering statute. By contrast, some RICO predicates do not mention any extraterritorial application, *see, e.g.*, 18 U.S.C. § 1511 (criminalizing the obstruction of state or local law enforcement), while others clearly apply to extraterritorial conduct, but

--- F.3d ---, 2014 WL 1613878 (C.A.2 (N.Y.))
(Cite as: 2014 WL 1613878 (C.A.2 (N.Y.)))

under different circumstances than the money laundering statute, *see, e.g., id.* § 1203(b) (criminalizing a subset of extraterritorial hostage-taking). The district court would presumably have RICO apply extraterritorially in the same manner when claims are brought under these different predicates, effectively erasing carefully crafted congressional distinctions.

Nothing in RICO requires or even suggests such an erasure of statutory distinctions. Rather, RICO prohibits, roughly speaking, investing in, acquiring control of, working for, or associating with an “enterprise” if the defendant’s conduct involves (in a variety of potential fashions) a “pattern of racketeering activity.” 18 U.S.C. §§ 1962(c), 1964(c). RICO does not qualify the geographic scope of the enterprise.^{FN4} Nor does RICO contain any other language that would suggest its extraterritorial application differs from that specified in its various predicates. Without any congressional instruction to the contrary, we see no reason to adopt a construction of RICO that would permit a defendant associated with a foreign enterprise to escape liability for conduct that indisputably violates a RICO predicate, but that could impose liability on a defendant associated with a domestic enterprise for extraterritorial conduct that does not fall within the geographic scope of the relevant predicate.

Second, the district court’s requirement that the defendant be, loosely speaking, associated with a domestic enterprise in order to sustain RICO liability seems to us illogical. Under that standard, if an enterprise formed in another nation sent emissaries to the United States to engage in domestic murders, kidnappings, and violations of the various RICO predicate statutes, its participants would be immune from RICO liability merely because the crimes committed in the United States were done in conjunction with a foreign enterprise. Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States.

Cf. United States v. Parness, 503 F.2d 430, 438–39 (2d Cir.1974) (noting that a conclusion that RICO requires both a domestic enterprise and a domestic pattern of racketeering activity would “permit those whose actions ravage the American economy to escape prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise”).

The district court’s standard has the additional, undesirable effect of complicating the question of what conduct exposes a party to liability in the United States. Under the substantive criminal law, conduct may be sufficiently extraterritorial to provide a party with peace of mind that it is not subject to U.S. law. Under the district court’s reasoning, however, if the party acts in concert with a “domestic enterprise,” it may nevertheless face stiff penalties under RICO. An important value of the presumption against extraterritoriality is predictability. An interpretation of RICO that depends on the location of the enterprise would undermine, rather than promote, that value.

We think it far more reasonable to make the extraterritorial application of RICO coextensive with the extraterritorial application of the relevant predicate statutes. This interpretation at once recognizes that “RICO is silent as to any extraterritorial application” and thus has no extraterritorial application independent of its predicate statutes. *See Norex*, 631 F.3d at 33 (quoting *N.S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir.1996)). At the same time, it gives full effect to the unmistakable instructions Congress provided in the various statutes incorporated by reference into RICO. This approach has the benefit of simplifying the question of what conduct is actionable in the United States and permitting courts to consistently analyze that question regardless of whether they are presented with a RICO claim or a claim under the relevant predicate. It also avoids incongruous results, such as insulating purely domestic conduct from liability simply because the defendant has acted in concert with a foreign enterprise.^{FN5}

--- F.3d ---, 2014 WL 1613878 (C.A.2 (N.Y.))
 (Cite as: 2014 WL 1613878 (C.A.2 (N.Y.)))

B. The Conduct Alleged in the Complaint

The Complaint in our case alleges a pattern of racketeering activity based on predicates that include (1) money laundering, 18 U.S.C. §§ 1956–57, (2) providing material support to foreign terrorist organizations, 18 U.S.C. § 2339B, (3) mail fraud, 18 U.S.C. § 1341, (4) wire fraud, 18 U.S.C. § 1343, and (5) violations of the Travel Act, 18 U.S.C. § 1952. Applying *Morrison's* presumption against extraterritoriality to these predicate statutes, we conclude first that the money laundering and material support of terrorism statutes both apply extraterritorially under specified circumstances, including those circumstances alleged in the Complaint. Second, we conclude that the wire fraud and money fraud statutes, as well as the Travel Act, do not overcome *Morrison's* presumption against extraterritoriality. Nevertheless, because Plaintiffs have alleged that all elements of the wire fraud, money fraud, and Travel Act violations were completed in the United States or while crossing U.S. borders, we conclude that the Complaint states domestic RICO claims based on violations of those predicates.

1. Allegations of Money Laundering and Material Support of Terrorism

The money laundering predicates apply extraterritorially “if (1) the conduct is by a United States citizen ... and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding \$10,000.” 18 U.S.C. § 1956(f). Section 1956(f) expressly states that “[t]here is extraterritorial jurisdiction over the conduct prohibited by this section.” Section 1957 similarly criminalizes knowingly engaging “in a monetary transaction in criminally derived property of a value greater than \$10,000 ... derived from specified unlawful activity,” *id.* § 1957(a), if the offense “takes place outside the United States ...,” but the defendant is a United States person,” ^{FN6} *id.* § 1957(d) (emphasis added). The predicate act criminalizing material support for terrorism similarly states that it applies extraterritorially.

It covers “knowingly provid[ing] material support or resources to a foreign terrorist organization,” *id.* § 2339B(a)(1), and adds that “[t]here is extraterritorial Federal jurisdiction over an offense under this section,” *id.* § 2339B(d)(2).

The claims of the Complaint asserting RICO liability for a pattern of violations of these predicates meet the statutory requirements for extraterritorial application of RICO. The district court erred in dismissing, as impermissibly extraterritorial, the RICO claims based on these predicates. ^{FN7}

2. Allegations of Mail Fraud, Wire Fraud, and Travel Act Violations

Whether Congress manifested an intent that the wire fraud statute, 18 U.S.C. § 1343, ^{FN8} or the Travel Act, 18 U.S.C. § 1952, ^{FN9} applies extraterritorially presents a more complicated question. The argument in favor of extraterritoriality depends on their references to foreign commerce. The wire fraud statute applies to the transmission of communications by “wire, radio, or television ... in interstate or foreign commerce” in the execution of a scheme to defraud. *Id.* § 1343. The Travel Act applies to “travel[] in interstate or foreign commerce or use[] of the mail or any facility in interstate or foreign commerce” with intent to further unlawful activity. *Id.* § 1952(a). In *Morrison*, the Supreme Court observed that a “general reference to foreign commerce ... does not defeat the presumption against extraterritoriality.” *Morrison*, 130 S.Ct. at 2882. This admonition appears to bar reading these statutes literally to cover wholly foreign travel or communication. We conclude that the references to foreign commerce in these statutes, deriving from the Commerce Clause's specification of Congress's authority to regulate, do not indicate a congressional intent that the statutes apply extraterritorially. ^{FN10}

The mail fraud statute presents an easier case. ^{FN11} There, unlike in the Travel Act and wire fraud statute, Congress included no reference to

--- F.3d ---, 2014 WL 1613878 (C.A.2 (N.Y.))
(Cite as: 2014 WL 1613878 (C.A.2 (N.Y.)))

transnational application whatsoever. *See generally* 18 U.S.C. § 1341. Accordingly, we see no basis for finding a manifestation of congressional intent that the mail fraud statute apply extraterritorially.

Applying these principles to the Complaint, we conclude that it alleges sufficient domestic conduct for the claims involving mail fraud, wire fraud, and Travel Act violations to sustain the application of RICO, notwithstanding that these predicates do not apply extraterritorially.^{FN12}

The Complaint alleges that RJR essentially orchestrated a global money laundering scheme from the United States by sending employees and communications abroad. It claims that RJR “communicated ... with [its] coconspirators on virtually a daily basis by means of U.S. interstate and international wires as a means of obtaining orders for cigarettes, arranging for the sale and shipment of cigarettes, and arranging for and receiving payment for the cigarettes in question.” Complaint ¶ 94. The Complaint also states that RJR and its coconspirators “utilized the interstate and international mail and wires, and other means of communication, to prepare and transmit documents that intentionally misstated the purchases of the cigarettes in question so as to mislead the authorities within the United States, the European Community, and the Member States.” *Id.* ¶ 95. The Complaint alleges that “the U.S. mails and wires are used by [RJR] to bill and pay for the cigarettes, to confirm billing and payment for the cigarettes, to account for the payment of the cigarettes to [RJR] and [its] subsidiaries, and to maintain an accounting of the proceeds received by [RJR] from the sale of the cigarettes, with said proceeds ultimately being returned to [RJR] in the United States.” *Id.* ¶ 96. The Complaint furthermore alleges:

[T]he employees, executives, and managers of [RJR] often traveled extensively, both to supervise the schemes and also to entertain [RJR's] criminal customers. RJR executives traveled from the

United States to Europe and South America to meet with, entertain, and maintain relations with RJR's criminal customers. RJR executives and managers who engaged in such travel and entertainment often received large travel and entertainment budgets from [RJR].

Id. ¶ 84.

Beyond these allegations that the Defendants managed their global money laundering schemes from the United States through foreign travel and communications, the Complaint also claims that the schemes themselves were directed at the United States and had substantial domestic effects. The Complaint alleges that RJR repatriated the profits of its unlawful activity into the United States through money laundering and other acts of concealment. The money laundering involved in one portion of the scheme—that comprising Russian organized crime and the Bank of New York—was largely centered in and operated from Queens, New York, where tens of millions of dollars were allegedly laundered. Defendants allegedly filed large volumes of false documents with the United States Customs Service and the Bureau of Alcohol, Tobacco and Firearms in order to deceive these agencies and permit the unlawful activity to continue. Finally, the Complaint alleges that the money laundering scheme it describes is intertwined with organized crime and narcotics trafficking in New York City, that much of the money laundering through cigarette sales occurs in New York City, and that millions of dollars' worth of real estate have been purchased within New York in conjunction with the scheme.

We need not now decide precisely how to draw the line between domestic and extraterritorial applications of the wire fraud statute, mail fraud statute, and Travel Act, because wherever that line should be drawn, the conduct alleged here clearly states a domestic cause of action. The complaint alleges that defendants hatched schemes to defraud in the United

--- F.3d ---, 2014 WL 1613878 (C.A.2 (N.Y.))
(Cite as: 2014 WL 1613878 (C.A.2 (N.Y.)))

States, and that they used the U.S. mails and wires in furtherance of those schemes and with the intent to do so. Defendants are also alleged to have traveled from and to the United States in furtherance of their schemes. In other words, plaintiffs have alleged conduct in the United States that satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims. If domestic conduct satisfies every essential element to prove a violation of a United States statute that does not apply extraterritorially, that statute is violated even if some further conduct contributing to the violation occurred outside the United States.^{FN13}

We note that, as we are reviewing a dismissal based solely on the contents of the Complaint, our conclusion is based entirely on the Complaint, which we find sufficient to state an actionable claim. Plaintiffs' ability to prevail will depend, in part, on their ability to present evidence showing that the alleged statutory violation was domestic. Should the pattern of conduct of certain Defendants or certain schemes prove to be extraterritorial, the district court may need to narrow the scope of this action accordingly, through either motions for (partial) summary judgment or through carefully tailored jury instructions.

* * *

CONCLUSION

The judgment of the district court dismissing the action is VACATED, and the case REMANDED for further proceedings.

FN1. The member state plaintiffs are: the Kingdom of Belgium, the Republic of Finland, the French Republic, the Hellenic Republic, the Federal Republic of Germany, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the Kingdom of Denmark, the Czech Republic, the Republic of Lithuania, the Republic of Slovenia, the Republic of Malta, the Republic of Hungary, the Republic of Ireland, the Republic of Estonia, the

Republic of Bulgaria, the Republic of Latvia, the Republic of Poland, the Republic of Austria, the Kingdom of Sweden, the Republic of Cyprus, the Slovak Republic, and Romania.

FN2. The procedural history of this litigation was summarized by the district court. See *European Cmty. v. RJR Nabisco, Inc.*, No. 02–CV–5771, 2011 WL 843957, at *1–2 (E.D.N.Y. Mar. 8, 2011).

FN3. “[C]onduct transcending national boundaries” is defined as “conduct occurring outside of the United States in addition to the conduct occurring in the United States.” 18 U.S.C. § 2332b(g)(1).

FN4. RICO does, however, limit its application to conduct associated with enterprises “engaged in, or the activities of which affect interstate or foreign commerce.” 18 U.S.C. § 1962.

FN5. Our rejection of the district court's conclusion—that RICO has an exclusive focus on the location of the enterprise, which alone determines whether a particular application is impermissibly extraterritorial—accords with the Ninth Circuit's ruling in *United States v. Chao Fan Xu*, 706 F.3d 965, 977 (9th Cir.2013), although on different reasoning.

FN6. In defining the offense of money laundering, § 1956 also states that money laundering includes transporting “a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States.” 18 U.S.C. § 1956(a)(2). This

--- F.3d ---, 2014 WL 1613878 (C.A.2 (N.Y.))
(Cite as: 2014 WL 1613878 (C.A.2 (N.Y.)))

however is irrelevant to our inquiry. The quoted passage necessarily involves crossing the United States border. Regulation of conduct in crossing the United States borders is not regulation of extraterritorial conduct. The presumption against extraterritorial application of United States statutes does not apply to statutes that regulate entering and exiting the United States.

FN7. It might be argued that Congress's clear statement in the predicate statute that *it* applies extraterritorially does not constitute a congressional statement that a RICO charge predicated on that statute applies extraterritorially. This overlooks the fact that the predicate statutes are incorporated by reference into the RICO statute and are a part of it.

FN8. The wire fraud statute, [18 U.S.C. § 1343](#), provides that:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned....

FN9. The Travel Act, [18 U.S.C. § 1952](#), provides, in pertinent part, as follows:

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce,

with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) ... or

(B) an act described in paragraph (2) ... shall be fined ..., imprisoned ..., or both.

(b) As used in this section (i) “unlawful activity” means ... any act ... indictable under ... [section 1956](#) or [1957](#) [the money-laundering statute].

FN10. In *Pasquantino v. United States*, 544 U.S. 349, 371–72, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005), the Supreme Court suggested, in dictum, that, because “the wire fraud statute punishes frauds executed in interstate or foreign commerce” it “is surely not a statute in which Congress had only domestic concerns in mind.” *Id.* (internal citations and quotation marks omitted). Because that statement is dictum, and because *Morrison* explicitly rejects the reasoning on which it relies, we do not read *Pasquantino* to require us to construe the “foreign commerce” language of the wire fraud statute as rebutting the presumption against extraterri-

--- F.3d ---, 2014 WL 1613878 (C.A.2 (N.Y.))
(Cite as: 2014 WL 1613878 (C.A.2 (N.Y.)))

toriality.

FN11. The mail fraud statute, 18 U.S.C. § 1341, provides that:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier ... shall be fined under this title or imprisoned

FN12. As noted above, the allegations based on the money-laundering predicate and the predicate covering material support for terrorist activities state an actionable claim notwithstanding their non-domestic elements, because Congress manifested its intention that those predicates apply extraterritorially as RICO violations.

FN13. We need not decide whether domestic conduct satisfying fewer than all of the statute's essential elements could constitute a violation of such a statute.

FN14. Since this lawsuit was filed, the European Community has been incorporated into the European Union. Despite this change, the European Community remains the relevant entity, as the court's subject matter jurisdiction and a party's instrumentality status for purposes of § 1603 are both

determined at the time when the complaint is filed. See *Newman–Green, Inc. v. Alfonso–Larrain*, 490 U.S. 826, 830, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989) (subject matter jurisdiction); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003) (instrumentality status).

FN15. The European Community has independent legal status. Consolidated Version of the Treaty Establishing the European Community, art. 281, Oct. 11, 1997, O.J. (C340) 293 (1997) [hereinafter EC Treaty] (“The Community shall have legal personality.”). The European Community was not created under the laws of a non-member state. See EC Treaty, art. 313; see also *In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 938 (7th Cir.1996) (“The FSIA requires that the [entity] not be created under the laws of a third country, that is, a nation not a member of the multinational joint venture.”).

FN16. RJR also cites, in support of its position, the enactment of separate statutes, 22 U.S.C. §§ 288–288 I, which provide certain immunities to certain international organizations, but which do not grant co-extensive immunities to all international organizations as the FSIA provides to foreign states. RJR argues that this separate statutory framework for analyzing the immunities of international organizations suggests that Congress did not contemplate that such organizations would fall within the definition of “foreign state” under the FSIA. It suffices to say that Congress's belief that certain international organizations were not organs of foreign states under the FSIA cannot be read to imply that Congress believed none could be organs of foreign states. Nothing in the statutes cited by RJR suggests that international organiza-

--- F.3d ---, 2014 WL 1613878 (C.A.2 (N.Y.))
(Cite as: 2014 WL 1613878 (C.A.2 (N.Y.)))

tions that do qualify as organs of a foreign state cannot, by virtue of their status as international organizations, be treated as foreign states under the FSIA.

FN17. Plaintiffs also contend that the district court erred by dismissing their federal common law nuisance claim without discussion. Although the Complaint does not specify whether Plaintiffs' public nuisance claim was brought under federal or state law, it appears that Plaintiffs stipulated that all of their common law claims were to be decided under New York law. Therefore, we have considered the dismissal of Plaintiffs' public nuisance claim along with Plaintiffs' other state law claims.