No. 19-

IN THE

Supreme Court of the United States

SUSAN LEVY,

Petitioner,

v.

BASF METALS LIMITED, BASF CORPORATION, GOLDMAN SACHS INTERNATIONAL, GOLDMAN SACHS GROUP, INC., GOLDMAN SACHS & CO., GOLDMAN SACHS EXECUTION & CLEARING, L.P., ICBC STANDARD BANK PLC, UBS AG, USB SECURITIES LLC, HSBC BANK USA, N.A., LONDON PLATINUM AND PALLADIUM FIXING COMPANY LIMITED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issues-presented are important because they concern individual rights, a principal that our founders used to establish our Democracy that allowed a person to protect her own interests, free from the shackles of group think. The time has come to address investor rights in a meaningful way. Many investors have suffered in silence by experiencing monetary losses without even understanding how. Class actions are one avenue of recovery, but in some cases, an investor's chances of a full recovery as a class member may be described as riding on a wing and a prayer. Whether through pension funds or as in petitioner's own case by attempting to invest on her own; investors would now like to realize their right to proceed in court when necessary and individually. Therefore, petitioner seeks resolution of the following questions:

1. Whether the lower courts erred in failing to apply *American Pipe* tolling to petitioner's opt-out case?

2. Whether the lower courts erred in refusing to apply the Discovery Accrual Rule to petitioner's Commodity Exchange Act ("CEA") claims?

    A. Whether petitioner's monetary losses in her customer account constituted Actual Notice of her federal claims?

    B. Whether petitioner's monetary losses in her customer account standing alone constituted Inquiry Notice or "Storm Warnings" of her federal claims?

3. Whether the lower courts erred in refusing to apply the Discovery Accrual Rule to petitioner's RICO case?

4. Whether the lower courts erred in refusing to apply the doctrine of Equitable Tolling based on Fraudulent Concealment to all federal claims?

5. Whether the lower courts erred in failing to consider petitioner's due process rights as an opt-out from a companion class action *In re Platinum & Palladium Antitrust Litigation,* 1:14-cv-09391, 2017 WL 116962 (S.D.N.Y. 2017) when dismissing her case as untimely.

6. Whether petitioner is still a bona fide member of the Class Action in *In re Platinum & Palladium II*, even though her individual case has been dismissed?

PARTIES TO THE PROCEEDINGS

Petitioner Susan Levy was the plaintiff in the district court and plaintiff-appellant in the Second Circuit. Respondents BASF Metals Limited and BASF Corporation, HSBC Bank USA, N.A., Goldman Sachs International, The Goldman Sachs Group, Inc., Goldman Sachs & Co. LLC f/k/a Goldman Sachs & Co., Goldman Sachs Execution & Clearing, L.P., UBS AG, and UBS Securities LLC, ICBC Standard Bank PLC, London Platinum and Palladium Fixing Company Limited were defendants in the district court and defendants-appellees in the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, the undersigned states that:

Respondent BASF Metals Limited's parent company is BASF Catalysts UK Holdings Ltd. BASF Metals Limited and BASF Catalysts UK Holdings Ltd. are indirect, wholly-owned subsidiaries of BASF SE, a publicly held European Corporation (Societas Europas). No other publicly held corporation owns ten percent or more of BASF Metals Limited.

Respondent BASF Corporation is a wholly owned subsidiary of BASF Americas Corporation. BASF Americas Corporation is a wholly owned subsidiary of BASFIN Corporation. BASF Corporation, BASF Americas Corporation, and BASFIN Corporation are all Delaware corporations. BASFIN Corporation is a majority owned subsidiary of BASF USA Holding LLC, a Delaware limited liability company. BASF USA Holding LLC is a wholly owned subsidiary of BASF Nederland BV, a Dutch limited liability company, which in turn is a wholly owned subsidiary of BASF SE (Societas Europaea – "SE"), a publicly traded European Company. BASF Corporation, BASF Americas Corporation, BASFIN Corporation, BASF USA Holding LLC and BASF Nederland BV are not publicly held.

Respondents The Goldman Sachs Group, Inc. has no parent corporation, and to the best of its knowledge no publicly held corporation owns 10% or more of its common stock. Respondents Goldman Sachs International and Goldman Sachs & Co. LLC are indirect wholly owned

subsidiaries of The Goldman Sachs Group, Inc., a publicly held corporation, and no other publicly held company owns 10% or more of Goldman Sachs International or Goldman Sachs & Co. LLC. Respondents Goldman Sachs Execution & Clearing, L.P. was merged into Respondent Goldman Sachs & Co. LLC on June 12, 2017, and ceases to exist as a legal entity.

Respondent ICBC Standard Bank PLC identifies Industrial and Commercial Bank of China Limited and Standard Bank Group Limited as publicly-held companies that directly or indirectly own 10% or more of the stock of ICBC Standard Bank Plc.

Respondent UBS AG is wholly owned by UBS Group AG, a publicly traded corporation. No publicly held corporation holds 10% or more of UBS Group AG's stock. Respondent UBS Securities LLC's corporate parents are UBS Americas Holding LLC and UBS Americas Inc., the latter of which is wholly owned by UBS Americas Holding LLC. UBS Americas Holding LLC is wholly owned by UBS AG.

Respondent HSBC Bank USA, N.A. identifies HSBC Holdings plc, HSBC Overseas Holdings (UK) Limited, HSBC North America Holdings Inc., and HSBC USA Inc. as corporations that directly or indirectly own 10% or more of any class of HSBC Bank USA, N.A.'s equity interests.

Respondent London Platinum and Palladium Fixing Company Limited has no parent corporation and no publicly held corporation owns 10% or more of its stock.

RULE 14.1(b)(iii) STATEMENT

Proceedings in Federal Trial and Appellate Courts as well as this Court identified below are directly related to the above-captioned case in this Court:

1. *Levy v. BASF Metals, et al.,* 1:15-cv-07317 (GHW) (S.D.N.Y 2015) (marked as related case to *In re Platinum & Palladium Antitrust Litigation* (Class Action II) 2017 WL 1169626; 14-cv-09391-GHW (S.D.N.Y. 2014.))

The Trial Court's opinion dismissing *Levy v. BASF Metals, Et. Al.* is in Appendix F. It is unpublished but available at 2017 WL 2533501. A motion for reconsideration was denied and that order is in Appendix E. It is unpublished but available at *Levy v. BASF Metals, Inc.,* 1:15-cv-07317, Docket# 186 (S.D.N.Y. 2017.)

The judgment dismissing petitioner's case at the trial court level was entered on October 19, 2017.

2. *Levy v. BASF Metals, Et. Al.,* 17-3823 (2d Cir. 2017.) The Second Circuit Court of Appeals entered judgment affirming dismissal of this case on May 2, 2019. The Second Circuit denied petitioner's combined motion for panel rehearing and rehearing en banc on April 22, 2019.

The published opinion of the United States Court of Appeals for the Second Circuit appears at Appendix C to the petition. The opinion in Appendix C has been published at 917 F.3d 106 and is dated February 28, 2019.

The Second Circuit also issued an unpublished Summary Order relating to *Levy v. BASF Metals Ltd,*

et al., in Appendix D and is available at 755 Fed. Appx. 29. The Westlaw Federal Appendix decision erroneously states the date of decision as February 28, 2018 when the correct date was and is February 28, 2019.

The Second Circuit's order denying Rehearing/Rehearing *en banc* dated April 22, 2019 is unpublished but reproduced in Appendix B.

3. In this Court, a motion for an extension of time to file the writ of certiorari was granted on July 15, 2019 by Justice Ginsberg extending the filing date for the writ of certiorari until September 19, 2019.

RELATED CASE STATEMENT

Levy v. BASF Metals, et al., 1:15-cv-07317 (GHW) (SDNY 2015) was marked as related case to *In re Platinum & Palladium Antitrust Litigation* (Class Action II) 2017 WL 1169626; 14-cv-09391-GHW (S.D.N.Y. 2014.). A judgment was entered in *Levy v. BASF*, 1:15-cv-07317 (S.D.N.Y. 2015) on October 19, 2017, but no judgment has been entered in the ongoing related case.

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Petitioner Susan J. Levy, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case entered on May 2, 2019, Pet. App. A, 1a.

OPINIONS BELOW

The orders and decisions of the Court of Appeals for the Second Circuit (App. Pet. 5a, 13a) are reported at 917 F.3d 106 and at 755 Fed. Appx. 29. The order of the Second Circuit denying Rehearing/Rehearing *En Banc* is unpublished, but can be found at *Levy v BASF Metals Inc.*, 17-3823cv (2d Cir. April 22, 2019.), Pet. App. 3a.

The opinion of the district court granting respondents' motion to dismiss is unpublished, (Pet. App. 23a) but available at 2017 WL 2533501. The district court's denial of petitioner's motion for reconsideration (Pet. App. 19a) is unpublished, but available at *Levy v. BASF Metals, Inc.*, 1:15-cv-07317 #186 (S.D.N.Y. 10/06/2017.)

JURISDICTION

The Judgment of the court of appeals was entered on May 2, 2019 after the appellate court denied petitioner's request for a Rehearing/Rehearing *En banc* on April 22, 2019. That Reconsideration Order is unpublished but is in Pet. App. B., 3a.

Justice Ginsberg granted a motion to extend the time to file a petition for a writ of certiorari on July 15, 2019 and extended the time to file the petition for a writ of certiorari to September 19, 2019. This Court has jurisdiction pursuant to 28 U.S.C § 1254(1).

STATUTES INVOLVED

COMMODITIES EXCHANGE ACT:

7 U.S.C. §25(c), Jurisdiction; statute of limitations; venue; process

The United States district courts shall have exclusive jurisdiction of actions brought under this section. Any such action shall be brought not later than two years after the date the cause of action arises. Any action brought under subsection (a) of this section may be brought in any judicial district wherein the defendant is found, resides, or transacts business, or in the judicial district wherein any act or transaction constituting the violation occurs. Process in such action may be served in any judicial district of which the defendant is an inhabitant or wherever the defendant may be found.

Title 15 - COMMERCE AND TRADE

CHAPTER 1 -MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§15b. Limitation of actions

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

NATIONAL FUTURES ASSOCIATION CODE OF ARBITRATION

SECTION 5. TIME PERIOD FOR ARBITRATION.

No Arbitration Claim may be arbitrated under this Code unless an Arbitration Claim or notice of intent to arbitrate (see Sections 6(a) and (C) is received by NFA within two years from the date when the party filing the Arbitration Claim knew or should have known of the act or transaction that is the subject of the controversy. Except as is provided in Sections 6(f) and (h) below, no counterclaim, cross-claim or third-party claim may be arbitrated under this Code unless it is asserted in a timely filed Answer in accordance with Section 6(e) below. NFA shall reject any claim that is not timely filed. If, in the course of any arbitration, the Panel determines that the requirements of this section have not been met as to a particular claim, the Panel shall thereupon terminate the arbitration of the claim without decision or award.

I. INTRODUCTION AND STATEMENT OF THE CASE.

The law regarding statutes of limitations continues to present a maze of confusion for litigants whether acting individually or as part of a class action. The case at bar presents an excellent opportunity for this Court to clarify this important area of the law in what appears to be several issues of first impression. The case at bar also presents an important sequel to the recently decided case of *California Public Employees Retirement System (CalPERS) v. ANZ,* 137 S. Ct. 2042, 2058 (2017) where this Court in a 5-4 decision declined to apply *American Pipe* tolling where the federal statute at issue therein,

contained a statute of repose. Here, because the RICO and Commodity Exchange Act claims as well as the Sherman Act claims do not contain any statutes of repose, blocking application of *American Pipe* tolling *ab initio;* petitioner respectfully requests a writ of *certiorari* to answer the question left open in *CalPERS v. ANZ.* 137 S. Ct. 2042 (2017.)

The issue regarding application of *American Pipe* tolling is of utmost importance because once the companion Class Action, *In re Platinum & Palladium Antitrust Litigation* (Class Action II) 1:14-cv-09391-GHW (S.D.N.Y. 2014), was interposed in 2014, ten months prior to petitioner's filing—that defined a class from 2008 through 2014; all members of the class's claims including the 2008 petitioner's, appeared to have been subject to Equitable Tolling or the Discovery Accrual Rule, or both, since the 2014 class action is proceeding, but not the petitioner's individual opt-out case. *See In re Platinum & Palladium Antitrust Litigation,* 1:14-cv-09391-GHW Docket #179, 2017 WL 1169626 (S.D.N.Y. March 28, 2017.)

As a 2008 member of the defined class, petitioner does not wish to have one set of rights as a class member, in this case with respect to tolling and accrual of the applicable claims; yet as an opt-out, she has been precluded based on another set of standards at the pleading stage. She would also like to know if she still is a class-member and may proceed with the other 2008 class-members?

Therefore, a writ of *certiorari* is requested to answer the question as to whether petitioner's case was appropriately dismissed where a companion class action was commenced on petitioner's behalf and was timely, just

as in *CalPERS v. ANZ,* 137 S. Ct. 2042 (2017.) *CalPERS v. ANZ,* also identified a split in the circuits that still exists today regarding whether an opt-out, like petitioner here, can timely proceed prior to class certification and whether an opt-out is protected under *American Pipe* tolling from dismissal based on timeliness under this posture. Because the Second Circuit did not appear to follow its own precedent in *In Re Worldcom Securities,* 496 F.3d 245 (2d Cir. 2007), which would have allowed petitioner's claims to be tolled; there are two excellent reasons to take up this case.

Notwithstanding *American Pipe* tolling, here the Second Circuit also departed from well-settled precedents that should have afforded petitioner the same tolling rights and accrual rights presumptively enjoyed by the similarly-situated 2008 members of the class to which petitioner was or is a part. The class members appear to have enjoyed these principles, even though they knew or should have known what petitioner knew in 2008 regarding their account balances—that there were declines in the account values. Although this fact was enough to bar petitioner's case from proceeding, it appears not to have disturbed the 2008, 2009, 2010 and 2011 class members who would have also been estopped from proceeding based on the Commodity Exchagne Act's ("CEA" hereinafter) two-year statute of limitations, where the class was filed in 2014. *See* 7 U.S.C. 25(c), Pet. App. 6a, 7a.

The Discovery Accrual Rule has been traditionally applied in these types of cases, where Congress has remained silent on the accrual method in the text of the statute. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997). It appears that petitioner also lost the benefit of this age-old Discovery Accrual Rule relegating her

opt-out case to that of a second-class citizen. *Merck v. Reynolds,* 559 U.S. 633 (2010); *Klehr A.O. Smith Corp.,* 521 U.S. 179 (1997), *United States v. Kubrick,* 444 U.S. 111 (1979), *see also, Gabelli v. SEC,* 133 S. Ct. 1216. (2013), *Urie v. Thompson,* 337 U.S. 163 (1949.) Thus, this case is respectfully being submitted for Supreme Court review to clarify these important principles and correct the errors petitioner believes were committed below so that the opt-out, who has constitutional protections, will have parity at the pleading stage with the other 2008 class members. Any other result would create a dual track—one for class members, and the other for opt-outs in violation of the opt-outs' due process rights. *See Wal-mart v. Dukes,* 564 U.S. 338, 363 (2011), *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 846 (1999)("The constitutionally protected right to opt-out comes from 'our deep-rooted historic tradition that everyone should have his own day in court.'"(quotation marks omitted.))

With respect to the Sherman Act claims, 15 U.S.C. §1, §2, although an Injury Accrual Rule has been applied generally; here, the lower courts' refusal to afford petitioner the privilege of Equitable Tolling based on Fraudulent Concealment was also a departure from precedent where the allegations included a price-fixing scheme which is considered self-concealing. *See In re Nine West Shoes Antitrust Litig.* 80 F. Supp.2d 181, 194 (S.D.N.Y. 2000). Additionally, the trial court made a finding of fact that the London Price-Fixing Scheme at issue in this case was "self-concealing" and ongoing from 2008 through 2014. Pet. App. 43a. Despite the concealment involved, the lower court refused to equitably toll petitioner's Sherman Act claims based on the solitary fact that petitioner like many investors had knowledge of

her balances in her trading account and finding that those losses alone qualified as actual knowledge of her entire claim and injury. Pet. App. 16a, 17a, 44a. Because this conclusion is an impossibility, such an exacting standard could not be met by any reasonable person.

With respect to both Equitable Tolling and the Discovery Accrual Rule, the lower court placed inappropriate reliance on the fact that petitioner experienced monetary losses in her trading account. Pet. App. 10a. The holding below directly contradicted this Court's prior holding with respect to Equitable Tolling based on Fraudulent Concealment in *Credit Suisse Securities (USA) LLC, et al. v. Simmonds,* 132 S. Ct. 1414 (2012). It also contradicted New York Federal Precedent that applies equitable tolling based on fraudulent concealment, notwithstanding knowledge of losses in one's account statement. *See, In re London Silver Fixing, Ltd, Antitrust Litigation,* 213 F. Supp. 3d 530, 572-574 (S.D.N.Y. 2016.). Thus, there are several reasons that this Court should grant *certiorari.*

Thirdly, because the statute of limitations defense typically requires a fully developed record, it has traditionally not been successful at the pleading stage; and it should not have been here. So many facts were dehors the record. *See LC Capital Partners, L.P. v. Frontier Ins. Group. Inc.* 318 F.3d 148, 156 (2d Cir. 2003)(Inquiry Notice is a fact intensive investigation "often inappropriate for resolution on a motion to dismiss under rule 12(b)(6).") As such, the record was incomplete and allegations made in a complaint in 2015 were used erroneously to show what petitioner knew about her case back in 2008. *See* Pet. App. 10a, 11a. Therefore, the lower court erred

by holding without a sufficient factual record that an investor's realization of her monetary losses standing alone was actual notice of an Commodities Exchange Act and RICO injury. Pet. App. 10a.

These holdings did not appreciate well-settled precedent in this Court as well as the Second Circuit and other courts that would have attributed the more likely scenario for the investment losses to natural market volatility, poor investment advice or just bad luck. In fact, other courts as well as the Second Circuit itself have expressively taken the opposite view of the view of the lower courts' here that such monetary losses in a customer account do not provide sufficient notice for accrual purposes. *See Briskin v. Ernst & Ernst,* 589 F.2d 1363, 1368 (9th Cir. 1978.)(Court reversed dismissal holding that it was a jury question as to whether failure to pay dividend and decline by 85% of the account value put plaintiffs on Inquiry Notice of a fraud;) *see also, Kronisch v. United States,* 150 F.3d 112, 121 (2d Cir. 1998) ("[A] claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice." (internal quotation marks omitted)).

Therefore, again, this Court should decide this conflict as to what significance, if any, the losses in an investor's account bear in determining accrual of a claim based on fraud or market manipulation. Because petitioner was not even afforded the traditional Inquiry Notice accrual method, there was no opportunity for her to demonstrate that despite her diligent efforts, she could not unmask the self-concealing London Price-Fixing Scheme until it revealed itself to her while reading the 2014 Class

Complaint. *See Cohen v. SAC Trading Corp.*, 711 F.3d 353 (2d Cir. 2013)(Second Circuit recognized the reading of a complaint was valid notice of plaintiff's claim under the Discovery Accrual Rule.)

Therefore, the opt-out case was extinguished at the pleading stage based on the statute of limitations defense; while the companion class action entitled *In re Platinum & Palladium Antitrust Litig.* 1:14-cv-09391-GHW, Docket#179, 2017 WL 1169626 (S.D.N.Y. 2017) filed only ten months prior to petitioner's case is still proceeding and also includes presumptively petitioner who is a 2008 Platinum NYMEX holder, and Class member.

It appears that the statute of limitations defense was not even raised in the companion class action, and there was no mention of it in the trial court's decision and order regarding the first motion to dismiss the Class Complaint which was granted and denied in part. *See In Re Platinum and Palladium Antitrust Litigation,* 2017 WL 1169626, 1:14-cv-09391 Docket #179 (S.D.N.Y. 03/28/2017).

A. Nature of the Case and Summary of Proceedings

The claims here relate to market manipulation or price fixing of the Platinum and Palladium global markets that effected trading on the NYMEX Exchange. Just like Gold and Silver, Platinum is traded on the Precious Metals desk at various investment banks and brokerage houses, like those respondents. From 2008 to 2014, Platinum and Palladium were traded both in the Physical (Spot) and Futures Markets, and still are today. During the relevant time period, the physical market for Platinum

and Palladium was located in London, England and the Futures Market for Platinum and Palladium was located, in petitioner's home state, the Empire State. Although both markets are subsets of the same relevant market, petitioner was an investor in and owner of NYMEX Futures Platinum Contracts from approximately January through September, 2008. Her losses coincided with trading days in August, 2008 when some of the respondents were allegedly engaging in manipulative price fixing conduct.

Petitioner commenced her case on September 16, 2015. She filed her case after reviewing the case of *In Re Platinum and Palladium Antitrust Litigation,* 1:14-cv-09391 (S.D.N.Y. 2013)("In Re Platinum and Palladium, II" or "Class Action II") which was filed on November 25, 2014. Petitioner filed her case as a related case to *In Re Platinum and Palladium, II* pursuant to the rules of the Southern District of New York. *See,* Rules for the Division of Business Among District Judges, Rule 13 (S.D.N.Y.).

Petitioner decided to institute her own legal proceeding because she did not want to get lost in the shuffle. At the preliminary hearing petitioner explained that she had received a prior partial settlement in the other unrelated class action naming her again as a 2008 class member in *In re Platinum & Palladium Commodities Litigation* 1:10-cv-03617 (S.D.N.Y. 2014) (Class Action I.) Class Action I also settled in addition to her companion case. She had decided to commence her own case as an opt-out plaintiff entitled *Levy v. Welsh,* 1:13-cv-01858. (S.D.N.Y 2013). These opt-out cases were time-consuming, but petitioner made the judgment that her interests were best protected by opting-out *ab initio*. She started to realize

there were so many others who could not protect their own rights as she was trying to do. It did make her think about principals of fairness and how to promote that goal which is important to her for herself and others.

The claims in *Levy v Welsh* 1:13-cv-01858 (S.D.N.Y 2013) are distinct from the facts in the instant case of *Levy v BASF,* 15-cv-07317 (S.D.N.Y 2015) because the manipulative scheme in the first class action related to "banging the close transactions" which effected the settlement prices on the NYMEX Exchange at the close of the Bell in New York and appears to have nothing in common with the instant allegation of a London Price Fixing Scheme. After learning about the second class action, sometime in 2014, petitioner felt confused. During the next ten months, petitioner diligently studied all the cases mentioned above to see if the parties were in privity with each other preclusion or if there were any issue preclusion or preclusion Claim. When she realized that the cases were virtually unrelated, she decided to file suit.

The only overlying issue was how each independent set of actors proximately caused damages to petitioner's account. On March 28, 2017, the trial court denied in part and granted in part the Second Class Action's motion to dismiss upholding the validity of the market manipulation claims under the Commodities Exchange Act, *see, In re Platinum and Palladium Antitrust Lit.* 1:14-cv-09391, Doc.# 179, 2017 WL 1169626 (S.D.N.Y 03/28/2017); however, a few months later on June 9, 2017, the trial court granted the motion to dismiss petitioner's related case based on the statute of limitations defense. Pet. App. 23a. It appeared to petitioner that an asymmetry existed to her detriment.

B. Nature of the Allegations Regarding Manipulation of the Platinum Markets.

The gravamen of the second class action as well as petitioner's opt-out case of *Levy v. BASF*, is that during the relevant time period, four auctioneer respondents convened twice daily in London, by telephone, to establish the benchmark rate in Spot Platinum and Palladium. This benchmark rate was then used to price NYMEX Futures Platinum contracts traded in New York. The non-auctioneer respondents, allegedly benefitted from, participated in, aided and abetted and/or conspired with the four auctioneer respondents with respect to trading activities involving Platinum and Palladium Futures Contracts from 2008 through 2014. ("The relevant period."). The London Platinum and Palladium Fixing Company, Ltd. ("LPPFX" hereinafter) was a British Trade Association exclusively made up of the four auctioneer respondents for the purpose of administering the twice-daily, London Fixing Auctions.

Petitioner also alleges that these respondents were horizontal competitors in the Platinum Marketplace who agreed to set the prices of Platinum in restraint of trade. Thus, petitioner claims a classic case of price fixing per se. She also claims *inter alia* that these respondents monopolized the prices of Platinum as well as controlled the entire global price and supply of Platinum. Because price-fixing is also defined under the Commodities Exchange Act as market manipulation and because there is no preemption, petitioner also interposed a claim under 7 U.S.C. § 9. *Strobl v. New York Mercantile Exchange,* 768 F.2d 22 (2d Cir. 1985.)

Petitioner also alleges Civil RICO because mailings and wirings were used to facilitate this Scheme to allegedly defraud the members of the investing public such as petitioner. These mailings and wirings allowed respondents to take positions that were advantageous to their proprietary trading positions at petitioner's expense; because futures trading is alleged to be a zero-sum game.

As such, petitioner's positions were bound to fail and did fail allegedly due to market manipulation in the summer of 2008 due to a sudden and unforeseen market collapse. Therefore petitioner's analysis of her investments based on the fundamental principles of supply and demand failed and instead the uneconomic principles of price-fixing appeared to have crashed the market where it should have been rising. This case appears to be another iteration of other global benchmark manipulations seen during this time period similar to FOREX, LIBOR, Gold, Silver, the ISDA Fix and many other instruments.

The only unique question about this particular case is why is a member of the investing public and an efficient enforcer of the Sherman Act, such as petitioner, now suddenly out-of-court notwithstanding her meritorious case, and where the companion class action is continuing? Now, the stakes are high, because if justice cannot be served in this Court, then respondents, who may be too big to fail, will not have to compensate victims to the full extent of the law; and they can continue to defeat legitimate claims on motions to dismiss—never even reaching merits discovery. This result would be a travesty, but a real possibility; hence petitioner is seeking a writ of *certiorari* as a final attempt to right this terrible wrong.

She is not appealing just for herself, although she is advocating on her own behalf; but she knows that there are other voiceless citizens, who have suffered terribly and similarly to her who would like the law to be crystal clear that if a party engages in market manipulation and causes price artificiality in the relevant market, such party will be expected to pay actual damages exactly as stated in the Commodities Exchange Act, 7 U.S.C. §25(a)(1).

Petitioner also claims in this case other disruptive and manipulative trading practices harming her account including Spoofing that contributed to the sudden collapse of the Platinum market in August, 2008.

REASONS FOR GRANTING THE PETITION

I. BECAUSE PETITIONER'S OPT-OUT CASE WAS PROPER UNDER *AMERICAN PIPE*, THE OPT-OUT'S CASE SHOULD HAVE PROCEEDED ALONG WITH THE CLASS.

Petitioner's right to proceed with her opt-out case, appears to have been fully protected against a dismissal based on the statute of limitations defense under this Court's holding in *American Pipe v. Utah,* 414 U.S. 538 (1974) as well as the Second Circuit's application of *American Pipe Tolling* in *In re WorldCom Securities Liti.,* 496 F. 3d 245 (2007).

The lower court appears to have departed from its prior holding in *In re Worldcom Securities,* 496 F.3d 245 (2d Cir. 2007) and apparently joined the minority of circuits who appear split on the issue of whether an opt-out who commences an individual action prior to class certification is entitled to tolling under *American Pipe*

in cases like petitioner's. *See In re Worldcom Securities Litigation,* 496 F.3d 245 (2007); *In re Hanford Nuclear Reservation Litig.,* 534 F.3d 986, 1009 (9th Cir. 2008), *cert. denied sub. nom. E.I. Dupont de Nemours and Co. v. Stanton*, 555 U.S. 1084 (2008); *State Farm Mut. Auto. Ins. Co. v. Boellstorff,* 540 F.3d 1223, 1235 (10th Cir, 2008); *see also, Winn-Dixie Stores, Inc., et al. v. Eastern Mushroom Marketing Cooperative, et al.*, 2019 WL 130535 (E.D. PA January 8, 2019.)("[N]either the Supreme Court nor the Third Circuit has answered the tolling question at issue here: whether the class action tolling doctrine applies when a purported class member chooses to file an individual lawsuit before class certification is decided ... ")

Thus, the case at bar would present an excellent opportunity to resolve this circuit split. It is crucial to promoting fairness for members of the investing public.

Defense counsel appears to have made the decision to waive their statute of limitations defense because it was never asserted in their motions to dismiss nor even addressed by the trial court in the related class action. Respondents should not be successful at cherry picking the opt-out case by asserting the statute of limitations defense against a solitary member of the class who prefers to exercise her constitutionally protected opt-out rights by instituting her own case prior to class certification. *See Wal-mart Stores Inc. v. Dukes,* 564 U.S. 338, 363 (2001); *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 846 (1999.)

The opt-out petitioner was therefore entitled to the law of the case doctrine, since she was also a 2008 class member. Although only one solitary petitioner can get hurt now; in the future, this case could be used as binding precedent to extinguish claims for numerous claim holders

such as CalPERS members. Thus, the issue is ripe for resolution.

A. Petitioner Was Entitled To Proceed Based On Her Constitutionally Protected Rights under *American Pipe* and *Worldcom.*

Because of the importance of this issue and because of the lower courts neglected to appreciate precedent, this Court should consider this case. Here, the trial court, notwithstanding the filing of a companion class action, refused to afford **any** tolling rights under *American Pipe.* Pet. App. 42a, n.5, *Levy v. BASF,* 1:15-cv-07317 Docket #170, page 14, fn. 5 (S.D.N.Y. 2017). Instead, the trial court concluded:

> Plaintiff believed that by tweaking her 2012 lawsuit by adding new parties and copying facts from a class action complaint, she could find another route to recover her 2008 losses. This approach cannot succeed. While the Court recognizes that Ms. Levy feels wronged, plaintiffs cannot simply file new complaints every time they hear of a potential avenue of recovery particularly after years have passed. Here, Ms. Levy's federal claims are untimely, and she is not entitled to equitable tolling of the elapsed statute of limitations. Defendants joint motion to dismiss Plaintiffs Second Amended Complaint is GRANTED.

Pet. App. 47a.

The trial court overlooked the fact that once petitioner's 2008 claims were properly made part of the class action

filed in 2014; petitioner had rights under *American Pipe.* Petitioner did not fare much better on appeal, and under the Second Circuit's *de novo* review, the lower court left the issue of *American Pipe* tolling alone and affirmed. Pet. App. 5a, 13a. At this juncture, petitioner would not only like to protect her constitutionally protected right as an opt-out, but at the same time to perhaps change the hearts and minds of all those who have viewed petitioner as a nuisance or worse; instead of someone seeking to protect her due process rights. Under *American Pipe* and its progeny, petitioner should not have to apologize for doing what she did at great financial and emotional cost to herself, which was nothing more than trying to be made whole as best as she could under the law.

Therefore, when she learned of the London Price Fixing case in 2014, when the case presented itself to her, she wanted to act on her own behalf. She used that ten-month period, between the time she read the second class action complaint and filed her own related case, to evaluate the claims. Her allegations were alleged in good faith after a careful examination of the class complaint in addition to her own knowledge. She also reviewed the class expert's opinion which she found on the internet. She was convinced about the merits of the case.

1. Petitioner's case presents an appropriate sequel to *CalPERS v. ANZ.*

Because just recently, this Court clarified the reach and scope of *American Pipe* tolling in the case where a federal statute contained a statute of repose, this case is ripe for review. Here, this case presents a similar dilemma without the statutes of repose. In a close 5-4 decision, this Honorable Court decided that Congress, by putting in a

statute of repose in a particular federal statute, barred the doctrine of *American Pipe* tolling. Although that question has been answered for now, more issues abound. The natural question that remains under *American Pipe*, is whether the federal statutes presented here including, the Sherman Act, RICO, and Commodities Exchange Act can be tolled under *American Pipe* for an opt-out who files prior to class certification notwithstanding any other principles of tolling or accrual.

The issue is important and will effect litigants for years to come. Justice Ginsberg's powerful and eloquent dissent shows the importance of granting *certiorari* here, as she observed: "Today's decision impels courts and class counsel to take on a more active role in protecting class member's opt-out rights." *CalPERS v. ANZ,* 137 S. Ct. 2042, 2058 (2017.)

As such, this case presents a further opportunity to actively manage this evolving area of the law and hopefully for the public good. Based on this valid dicta, this case should be taken up for further review.

B. This Case Presents an Exceptional Vehicle to Resolve the Circuit Conflicts Regarding Application of *American Pipe* and is Therefore Ripe for Consideration.

In determining which cases get chosen for review, an important consideration is whether the circuits are split. Here, there is such a split and therefore the time is ripe to resolve such split.

A review of the circuit courts that have considered whether *America Pipe* tolling applies to opt-outs who have

brought their own cases prior to class certification, and after a timely commenced class action, have viewed the issues diametrically as reflected in the divergent holdings. This petitioner would like all the circuits to afford such tolling.

The Second Circuit, Ninth and Tenth Circuits appear to allow *American Pipe* tolling in cases like petitioner's. *See In re Worldcom Securities Litigation* 496 F. 3d 245 (2007); *In re Hanford Nuclear Reservation Litig.,* 534 F.3d 986, 1009 (9th Cir. 2008), *cert. denied sub. nom., E.I. Dupont de Nemours and Co. v. Stanton*, 555 U.S. 1084 (2008); *State Farm Mut. Auto. Ins. Co. v. Boellstorff,* 540 F.3d 1223, 1235 (10th Cir, 2008); *see also, Winn-Dixie Stores, Inc., et al. v. Eastern Mushroom Marketing Cooperative, et al.*, 2019 WL 130535 (E.D.PA January 8, 2019.)("[N]either the Supreme Court nor the Third Circuit has answered the tolling question at issue here: whether the class action tolling doctrine applies when a purported class member choose s to file an individual lawsuit before class certification is decided.")

The Sixth Circuit and First Circuit appear to see it the other way, and would not allow for *American Pipe* tolling absent class certification where an opt-out decides to proceed prior to class certification, but after a class action has been commenced on behalf of the opt-out plaintiff. *See, Stein v. Regions Morgan Keegan Select High Income Fund Inc.*, 821 F.3d 780, 789 (6th Cir. 2016); *Glater v. Eli Lilly & Co.*, 712 F.2d 735 (1st Cir. 1983) (holding that: *American Pipe* says nothing about "a class member's 'ability to maintain a separate action while class certification is still pending.'" *Id.* at 739.)

Thus, based on this real conflict that will greatly effect many litigants' decision whether or not to opt-out, any advisory opinion by this Court would be extremely helpful for potential opt-outs to decide wisely how they would like to proceed in the future.

II. BECAUSE THE WELL-ACCEPTED DISCOVERY ACCRUAL RULE ("DAR") DID NOT APPLY, *CERTIORARI* IS APPROPRIATE.

Because petitioner was familiar with the Discovery Accrual Rule prior to commencing her case and believed the application of the Discovery Accrual Rule ("DAR") was a given, she was alarmed to learn that she would not be afforded this accrual method. It also appeared that had she remained with the class, her 2008 claims would be deemed timely. Seeking resolution, she studied the lower courts' decisions, but found no solace. It appears that the lower courts dispensed with the age-old requirement that a person learn of the triggering data in the public domain to alert one of the fraud, and then such person must act diligently to unmask the claims. By removing this analysis, and simply applying a straight injury discovery rule, rights have been lost along the way.

The set of decisions, Pet. App. *C, D, F,* 5a, 13a, 23a demonstrate that the lower courts broke with well-settled precedent in the Second Circuit and the Supreme Court which required triggering data of critical facts describing other elements of an offense, such as scienter, and not just monetary losses, to trigger the running of the statute of limitations. Such critical data may include the identity of the perpetrators, facts showing the scheme involved or facts relating to causation. *See CalPERS. v. ANZ,* 137 S.

Ct. 2042, 2055, *U.S. v. Kubrick,* 444 U.S. 111, (1979); *see also, Merck & Co., Inc. v. Reynolds, et al.*, 559 U.S. 633 (2010), *Gabelli v. S.E.* C. 568 U.S. 442 (2013); *Klehr v. A.O. Smith Corp.,* 521 U.S. 179, 191, 117 S. Ct. (1984); *accord, See LC Capital Partners, L.P. v Frontier Ins. Group, Inc.,* 318 F.3d 148 (2d Cir. 2003); *Newman v. Warnaco Group, Inc.* 335 F. 3d 187 (2d Cir. 2003); *Levitt v. Bear Stearns & Co.,* 340 F.3d 94 (2d Cir. 2003); *Lentell v. Merrill Lynch & Co.,* 396 F . 3d 161 (2d Cir. 2005), *cert. denied*, 546 U.S. 935 (2005); *Shah v. Meeker,* 435 F.3d 244 (2d Cir. 2006).

By only requiring knowledge of the actual monetary loss to commence the running of the statute of limitations on claims involving fraud and manipulation, the Second Circuit has in effect replaced the Discovery Accrual Rule with a straight Injury Accrual rule. See Pet. App. 10a, 35a. This sea-change is unprecedented and did not appear to apply to the class, but only to the individual opt-out, petitioner, who dared to break from the pack.

A. The Lower Courts Misapplied The Discovery Accrual Rule.

The logic in applying a straight Injury Discovery rule instead of a Discovery Accrual Rule should fail in this case and others because it is unworkable. Pet. App. 10a, 35a. By restricting the knowledge necessary to proceed with a claim to only financial losses appearing in a customer's account; an investor who lost value due to normal market risk will now be forced to start to investigate a potential claim just based on their losses alone. Even though no other critical facts exist showing that untoward conduct has occurred, a potential claimant will have to hire an expert nevertheless. In fact, this Court confirmed this logic in *Gabelli v. S.E.C.* 568 U.S. 442 (2013):

> Most of us do not live in a state of constant investigation; absent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded. And the law does not require that we do so. Instead, courts have discovered the discovery rule, providing that the statue of limitations in fraud cases should typically begin to run only when the injury is or reasonably could have been discovered."

Gabelli v. S.E.C., 568 U.S. 442, 451, 133. S. Ct. 1216, 1222 (2013).

The Discovery Accrual Rule exists not only in federal cases but also under state law like in the State of New York where causes of action sounding in financial fraud are routinely heard as well as in pendent state law claims in federal court. To now have two divergent standards, one for federal court and another for state court would be troublesome. In fact, the Appellate Division, First Department expressly held in the case of *CSAM Capital Inc. v. Lauder,* 67 A.D.3d 149, 155 (1st Dep't 2009) that "[K]nowledge of the fraud cannot be imputed to the investor as a result of the losses they experienced." The Appellate Division First Department, also held in *CSAM Capital* that "['m]ere suspicion will not suffice as a ground for imputing knowledge of the fraud." (*K & E trading & Shipping v. Radman Trading Corp.,* 174 A.2d 346, 570 N.Y.S.2d 557, 558 (1st Dep't 1991.) *Id.* at 156.

Therefore, as a threshold issue, this Court should consider whether the existence of losses in a customer's account such as petitioner's in 2008 even gave rise

to Inquiry Notice let alone Actual Notice that a self-concealing market manipulation, the London Price Fixing Scheme, was on-going and effecting her account in 2008 where the self-concealing price-fixing scheme allegedly lasted from 2008 all the way through 2014. *See* Pet. App. 43a.

In fact, the Second Circuit's published decision in *Levy v. BASF*, Pet. App. 5a now creates a split with the Ninth Circuit Court of Appeals which does not recognize investor losses as valid triggering data to commence the accrual period of the Statue of limitations. *See Gray v. First Winthrop Corp.* 82 F.3d 877, 881 (9th Cir. 1996)(poor financial performance standing alone does not necessarily suggest securities fraud ... but could be explained by poor management, general market conditions or other events unrelated to fraud and therefore was deemed insufficient to place the plaintiff investors on inquiry notice of fraud); *Briskin v. Ernst & Ernst,* 589 F.2d 1363, 1368 (9th Cir 1978.) This Court should resolve this split by weighing in on the critical issue which will help investors manage their affairs.

Therefore, based on this split, this Courts should grant the writ of *certiorari.*

B. The Discovery Accrual Rule Should Have Applied to the CEA Claim Sounding in Market Manipulation, 7 U.S.C. §9.

The Second Circuit departed from its own precedent in now holding that petitioner was on Actual Notice of her CEA claim just based on the losses in her trading account and without knowing of any of the other four elements of

a market manipulation, CEA claim. Pet. App. 10a. Prior to this case, the Second Circuit did not expect an investor to have actual knowledge of a complicated claim based on losses standing alone and actually took the opposite view that investor losses standing alone did not commence the running of the statute of limitations. *See Merrill Lynch Ltd. Partnerships Litiga.*, 154 F.3d 56, 60 (2d Dep't 1998); *Benfield v. Mocatta Metal Corp.*, 26 F.3d 19 (2d Cir. 1994.) Therefore, based on the Second Circuit's changed position, a writ is called for to clarify this principle.

Here, the lower court refused to apply the DAR, in essence depriving petitioner of a reasonable time period in which to learn of the critical facts or "triggering data" to support her market manipulation claim under the Commodities Exchange Acct, 7 U.S.C. §9(1) and §9(3). Because claims for market manipulation are like fraud claims and include scienter, deceit and trickery, the DAR should have been applied to these CEA claims. The only difference between a market manipulation scheme compared to a fraud scheme is that, in the fraud case, words are used either as material misrepresentations or material omission to skew a market and defraud investors; whereas in a market manipulation case, conduct is also used to move a market uneconomically where the actors have enough market power to literally effect a market to go in their desired-direction. As a result, a fraudulent marketplace exists where the manipulator can simply buy and sell positions in a fashion completely divorced from the fundamentals of supply and demand.

As such, in both fraud and manipulation cases, markets become uneconomic, injuring customers along the way, who have entered the markets trying to make investment

decisions based on fundamental analysis. In fact, market manipulation cases have included fraudulent statements as well to coincide with the market manipulation, and both fraud and manipulation go together hand-in-hand in many cases. *See In re Soybeans Futures Liti.,* 892 F. Supp. 1025, 1031 (N.D. Ill, 1995), *citing, Cargill Inc. v. Hardin,* 452 F.2d 1154, 1163 (8th Cir. 1971)("recognizing that floating false rumors which affect prices is a common manipulative device.)

Because of this strong similarity between fraud and market manipulation cases, the Discovery Accrual Rule has generally been applied to market manipulation cases until this case at bar. *See, In re Commodity Exchange, Inc.,* 213 F. Supp. 3d 631, 675 (S.D.N.Y. 2016)(Discovery Accrual Rule applied to class action members from 2004 to 2013 regarding market manipulation of Gold); *In re LIBOR-based Financial Instruments Antitrust Litigation,* 935 F. Supp. 2d 666, 700 (S.D.N.Y. 2013.)(Discovery Accrual Rule applied to CEA claims for *LIBOR-based* instruments sold over an Exchange.)

However, all of a sudden, the lower court's refusal to apply the DAR is astonishing in light of the long-standing and binding precedent cited above, and therefore a writ of *certiorari* is sought to reverse the lower courts and reinstate petitioner's meritorious case. *See Merrill Lynch Ltd. Partnerships Litiga.,* 154 F.3d 56, 60 (2d Dep't 1998.)

Here too, there was good reason to apply the Discovery Accrual Rule to the CEA case as well as the RICO case based on allegations sounding in wire and mail fraud because RICO like the CEA is also silent with respect to any statutes of repose. Where Congress is silent on

an accurual method, courts have applied the Discovery Accrual Rule to the statute of limitations provisions of those federal statutes. *See, Merck v. Reynolds*, 559 U.S. 633 (2010); *Rotella v. Wood*, 528 U.S. 549, 555 (2000), *Klehr v. A. O. Smith Corp.*, 521 U.S. 179, 191, 117 S. Ct. 1984 (citing *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991), and 1 C Corman, *Limitations of Actions* 6.5.5.1, p. 449 (1991)("Federal Courts generally apply a discovery accrual rule when a statute is silent on the issues…); *See also, Benfield v. Mocatta Metals Corp.*, 26 F.3d 19 (2d Cir. 1994); *In Re LIBOR Financial Instruments Litigation*, 935 F. Supp. 2d 666, 700 (S.D.N.Y. 2013).

The lower courts have previously and generously applied the DAR in so many other cases, and it should have also applied it here. *See e.g., Gabelli v. SEC*, 568 U.S. 442 (2013). As a practical matter, the plethora of precedents here in the Supreme Court would have applied the Discovery Accrual Rule in a logical way so that petitioner could learn the essential facts to plead her case. Just knowing about one's financial losses is just not enough information to accrue the cause of action in light of the self-concealed market manipulation going on at the time back in 2008, when the losses were incurred. Therefore, there was simply not enough available information to frame a complaint until 2014. *See* Pet. App. 43a.

No where in the lower court's decision, did the traditional Inquiry Notice analysis come into play. Nobody considered petitioner's due diligence, and nobody mentioned how petitioner would have been able to unmask a self-concealing fraud. Pet. App. 43a. However, it appears that the class was allowed to proceed based on their good-faith allegations of fraudulent concealment. These

allegations were the only requirement to equitably toll the statute of limitations in a very similar case involving the Silver Fixes. *See In re London Silver Fixing Ltd. Antitrust Litigation,* 213 F. Supp.3d 530, 572-573 (S.D.N.Y. 2013); *In re Platinum & Palladium Antitrust Lit.,* 1:14-cv-09391, Docket #179, 17 WL 4169626 (S.D.N.Y. 2017), Pet. App. 46a.

Thus, the lower courts now have made it virtually impossible for any diligent person to unmask her claim because the lower court eliminated the essential element of the DAR that there be some triggering data in the public domain to apprise a reasonable person of the critical information to file her claim as explained in *Merck v. Reynolds,* 559 U.S. 633, 644 (2010.)

The lower courts' approach may encourage clever fraudsters who are better able to hide their misconduct from the public for as little as two years. This reward for fraudsters will incentivize them to better manage their frauds knowing the statute of limitations will start to run as soon as a customer's losses appear in a customer's account.

In fact, because individual losses are not even part of the claim when establishing a market manipulation claim under the CEA, this element should not have been considered to accrue the cause of action. Pet. App. 11a, 47a. The market manipulation provision in 7 U.S.C. §9 requires four elements to be established to support recovery including that: (1) defendants had the ability to influence the relevant market, (2) defendants intended to move the relevant market, (3) the existence of a manipulated market, and (4) loss causation of a manipulated market by defendants' conduct. Once these four elements are

established, an individual's loss causation or the fifth element, appears to be inferred. *See, In re Platinum & Palladium Commodities Litigation,* 828 F. Supp. 588, 600-601 (S.D.N.Y. 2011.)

Additionally, based on the element of scienter, it is unrealistic to assert, as the lower court did, that a petitioner had actual knowledge of her CEA claim just based on her losses as reflected in her customer accounts. In fact, where the scheme is self-concealing, as in this case, personal losses alone will not even alert the plaintiff that they have any cognizable legal injury. *See U.S. v. Kubrick,* 444 U.S.111, 121-122 (1979)(To frame a complaint, one needs to know about Injury and causation.)

The lower court's reliance on citations to petitioner's operative complaint filed in 2015 to establish that petitioner had "Actual" knowledge to start the clock on her claims, makes no sense because those allegations were made seven years later, after petitioner had had ample time to figure out what had happened in her account. *See* Pet. App. 10a. At the time, in 2008, petitioner believed her personal losses were related to a legitimate market crash, and there was no indication of fraud or manipulation early on.

C. Because The National Futures Association Appears to Have a Discovery Accrual Rule, An Inference Can and Should Be Drawn That Congress Intended To Apply the DAR To CEA Claims.

Here, it was disturbing to find out that there would be no accrual of the claim under the DAR, where the same CEA claim would be subject to the DAR, if brought

in Arbitration before the NFA, a Registered Futures Association pursuant to 7 U.S.C.§ 21. A review of the National Futures Association's Code of Arbitration Section 5 allows claimants to bring arbitrations: "within two years from the date when the party filing the Arbitration Claim knew or should have known of the act or transaction that is the subject of the controversy." *See* NFA Code of Arbitration §5. NFA is the only Registered Futures Association, in the United States, and it should know how Congress intended to frame the accrual rule for CEA claims. Because all NFA rules are subject to oversight by the Commodity Futures Trading Commission ("CFTC"), upon information and belief NFA's discovery accrual rule is an excellent indication that Congress intended to allow the CEA to be subject to the DAR. *See Troyer v. NFA*, 2017 WL 2971962 *4 (ND. IN 2017) ("NFA operates under the oversight of the CFTC, the federal government's regulator for the futures industry.") (citations omitted.)

Now, under the Second Circuit's holding, one would be better served by filing a claim for arbitration rather than filing in court, since the DAR is in the code of arbitration. However, because a litigant should be subject to the same rule whether in arbitration or in court, a writ of *certiorari* is indicated in this case to correct this asymmetry.

III. THE DAR SHOULD ALSO BE APPLIED TO PETITIONER'S RICO CASE BASED ON MAIL AND WIRE FRAUD.

The Second Circuit has been applying the Discovery Accrual Rule to RICO cases since at least 2012, and there was no reason to stop now. *Koch v. Christies's Int'l PLC*, 699 F. 3d 141 (2nd Cir. 2012). Although the RICO statutes

are analogized to the Clayton Act provision, in 15 U.S.C. § 15(b), this Court recognized in binding dicta a strong inclination to apply the DAR to RICO claims based on mail and wire fraud. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188 (1997):

> We do not say that a pure injury accrual rule always applies without modification in the civil RICO setting in the same way that it applies in traditional antitrust cases. . . Furthermore, there is some debate as to whether the running of the limitations period depends of plaintiff's awareness of certain elements of the cause of action.

This case will allow this Court to clarify its thoughts and hopefully apply the DAR to this RICO claim involving mail and wire fraud requiring scienter since there are no prohibitions to doing so in the text of the RICO statutes.

Considering the difficulty in reaching a jury on any Civil RICO claim, deserving citizens will be deprived once again of the protections of the RICO statute which are most welcome under these circumstances.

There have been four different accrual methods competing to apply to RICO, including: (1) Injury Discovery, (2) the Discovery Accrual Rule, (3) Injury and Pattern Discovery, and (4) the Last Predicate Act. This Court has already eliminated the last two rules in *Rotella v. Woods,* 528 U.S. 549 (2000), and *Klehr v. A.O. Smith Corp,* 521 U.S. 179 (1997) from consideration and for good reason. So, now the only two remaining accrual methods to be considered are the ones at issue in this case.

The late Justice Scalia sagaciously realized that the time had come to address head-on the accrual rules for RICO claims where mail and wire fraud are alleged requiring scienter. *See Klehr* at. 196. Applying *Merck v. Reynolds* to the case at bar, would ineluctably mean that here too with a RICO case, a person would be entitled to accrual under the DAR in order to plead scienter. Thus application of the DAR should be utilized here so that an ordinary investor's case can proceed. It seems sensible to apply the DAR as the Second Circuit has already been doing prior to the instant case.

In fact, the confusion below may be related to the misquotations of cases where courts discussed, out of context, the element of knowledge of an injury to commence the running of the statute of limitations such as in *Rotella v. Woods,* 528 U.S. 549 (2000), and *Cancer Fund v. Cerberus Capital Management, L.P.,* 559 F.3d 671 (7th Cir. 2009), Pet. App. 9a, 10a. However, in both *Rotella and Cerberus,* each plaintiff there understood the critical information concerning their claims early on, unlike in this case. In both those miscited cases, as a matter of fact, the plaintiffs also knew of the causes of their injuries within the statute of limitations. Therefore, because each plaintiff had actual knowledge of at least two elements of their claim, unlike in this case, where the element of causation was admittedly missing until 2014, those cases are inapposite.

It should also be noted that the element of causation in a non-mail and non-wire fraud RICO case is normally known to the plaintiff because RICO proximate causation is an exacting standard to meet and closely tethered to the injury itself. Thus, to the extent the lower courts

misapplied these holdings to make it seem as though only an "injury" was known to the plaintiffs when the statute of limitation began to run; this Court should issue a writ to clarify this obvious confusion that could have profound effects in changing the DAR to an Injury Discovery Rule.

IV. EQUITABLE TOLLING BASED ON FRAUDULENT CONCEALMENT ALSO APPLIED TO PETITIONER'S FEDERAL CLAIMS INCLUDING THE SHERMAN ACT.

Another basis for dismissing the opt-out's case but not the 2008 class, was the lower court's refusal to apply the well-settled doctrine of Equitable Tolling Based on Fraudulent Concealment. Pet. App. 16a. The class also made strong allegations regarding Equitable Tolling based on Fraudulent Concealment. This case does present an extraordinary circumstance where the global scheme included ICBC, which stands for the Industrial and Commercial Bank of China, HSBC, the Hong Kong Shanghai Bank of China, Goldman Sachs, which owned a stake in ICBC, upon information and belief during part of the relevant time period and BASF Metals, Inc.

However, instead of applying the three traditional criteria to the Sherman Act claims that require a showing that: (1) the cause of action was self-concealing or concealed during the statute of limitations, (2) the cause of action was unknown to the plaintiff during the statute of limitations period, and (3) the plaintiff acted diligently; the lower court changed the second criterion and held that knowledge of one's monetary losses precluded application of the doctrine. This change is just as unworkable and unfair in this context, as it was with respect to the DAR

and for the same reasons as discussed herein. Knowing of one's monetary losses would not alert a diligent person to the fact that there was a self-concealing fraud or scheme, on-going at the very same time. Here, in this case, application of this exacting standard would preclude any diligent person from equitable tolling based on fraudulent concealment.

In fact, the lower court's holding directly contradicts this Court's holding in *Credit Suisse Securities (USA) LLC, et al. v. Simmonds*, 566 U.S. 221, 227, 132 S. Ct. 1414, 1420 (2012) where this Court held "[W]hen a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases when those facts are, or should have been, discovered by Plaintiff. 2C *Corman Limitation of Actions* §9.7.1 pp. 55-57 (1991)" *Id.* at 1420. *See also In re London Silver Fixing Ltd., Antitrust Litigation*, 213 F. Supp. 3d 530, 572-574 (S.D.N.Y. 2016.) Certainly, knowing of one's losses should not be considered knowledge of the entire claim. Thus, *certiorari* is requested.

V. BECAUSE THE OPT-OUT'S CASE WAS DISMISSED WHILE THE CLASS ACTION CONTINUES, PETITIONER'S DUE PROCESS RIGHTS WERE NOT CONSIDERED.

Clearly, the 2008 members of the class action, like the 2009, 2010, and 2011 members of the class, all had access to their account statements and presumptively read these statements showing a decline in value, just like petitioner; yet these class members are continuing to proceed, while petitioner cannot based on her knowledge of the losses in her account. Because the 2008 class members are still proceeding, it appears petitioner's case is still viable as a class member, but not individually.

This result appears incongruous; and therefore a reversal is respectfully requested.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

SUSAN J. LEVY, ESQ.
Counsel of Record
40 East 10th Street, Suite 2K
New York, New York 10003
(212) 962-1965
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Counsel for Petitioner

September 19, 2019

APPENDIX

APPENDIX A — MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 2, 2019

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of February, two thousand and nineteen.

SUSAN LEVY,

Plaintiff-Appellant,

v.

BASF METALS LIMITED, BASF CORPORATION, GOLDMAN SACHS INTERNATIONAL, GOLDMAN SACHS GROUP, INC., GOLDMAN SACHS & CO., GOLDMAN SACHS EXECUTION & CLEARING, L.P., ICBC STANDARD BANK PLC, UBS AG, UBS SECURITIES LLC, HSBC BANK USA, N.A., LONDON PLATINUM AND PALLADIUM FIXING COMPANY LIMITED,

Defendants-Appellees.

Before: Ralph K. Winter,
Rosemary S. Pooler,
Circuit Judges,
Ronnie Abrams,
*District Judge.**

JUDGMENT

Docket No. 17-3823

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that, for the reasons stated in the Court's opinion and summary order, the judgment of the district court is AFFIRMED.

A True Copy
Catherine O'Hagan Wolfe
United States
Court of Appeal
For the Second
Circuit
/s/ Catherine O'Hagan Wolfe

For the Court:

Catherine O'Hagan Wolfe,
/s/ Catherine O'Hagan Wolfe
Clerk of the Court

* Judge Ronnie Abrams, of the United States District Court for the Southern District of New York, sitting by designation.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO: 17-3823

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of April, two thousand nineteen.

SUSAN LEVY,

Plaintiff-Appellant,

v.

BASF METALS LIMITED, BASF CORPORATION, GOLDMAN SACHS INTERNATIONAL, GOLDMAN SACHS GROUP, INC., GOLDMAN SACHS & CO., GOLDMAN SACHS EXECUTION & CLEARING, L.P., ICBC STANDARD BANK PLC, UBS AG, UBS SECURITIES LLC, HSBC BANK USA, N.A., LONDON PLATINUM AND PALLADIUM FIXING COMPANY LIMITED,

Defendants-Appellees.

ORDER

Appellant, Susan Levy, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe,
/s/ Catherine O'Hagan Wolfe
Clerk

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED FEBRUARY 28, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2018

Docket No. 17-3823

SUSAN LEVY,

Plaintiff-Appellant,

v.

BASF METALS LIMITED, BASF CORPORATION, GOLDMAN SACHS INTERNATIONAL, GOLDMAN SACHS GROUP, INC., GOLDMAN SACHS & CO., GOLDMAN SACHS EXECUTION & CLEARING, L.P., ICBC STANDARD BANK PLC, UBS AG, UBS SECURITIES LLC, HSBC BANK USA, N.A., LONDON PLATINUM AND PALLADIUM FIXING COMPANY LIMITED,

Defendants-Appellees.[1]

October 18, 2018, Argued
February 28, 2019, Decided

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1. The Clerk of the Court is directed to amend the caption as above.

Before: WINTER and POOLER, Circuit Judges, and ABRAMS, District Judge.[2].

Appeal from United States District Court for the Southern District of New York (Gregory H. Woods, J.) dismissing appellant Susan Levy's second amended complaint in which she alleges claims under the Commodities Exchange Act, the Racketeer Influenced and Corrupt Organizations Act, the Sherman Act, and New York law related to alleged manipulation of the platinum futures market. We affirm the bulk of the district court's decision in a summary order published simultaneously with this opinion. We write separately to address Levy's Commodities Exchange Act claims and hold that they accrued when she discovered her injury in 2008, not when she discovered the manipulation scheme she alleges or the identity of the defendants. Therefore, the limitations period on those claims expired in 2010, well before she filed the present lawsuit.

Affirmed.

PER CURIAM:

Appellant Susan Levy, an attorney proceeding *pro se*, brought this lawsuit in an effort to be made whole for her 2008 losses in the platinum futures market. She alleges, in sum, that BASF Metals Limited, BASF Corporation, Goldman Sachs International, Goldman Sachs Group,

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2. Judge Ronnie Abrams, United States District Court for the Southern District of New York, sitting by designation.

Inc., Goldman Sachs & Co., Goldman Sachs Execution & Clearing, LP, HSBC Bank USA, NA, ICBC Standard Bank PLC, UBS AG, UBS Securities LLC, London Platinum and Palladium Fixing Company Ltd., and twenty unnamed John Does conspired to manipulate the New York Mercantile Exchange platinum futures contract market in violation of the Commodities Exchange Act (CEA), 7 U.S.C. § 1 *et seq.*, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, the Sherman Act, 15 U.S.C. §§ 1, 2, and New York law. The district court (Gregory H. Woods, *J.*) dismissed her federal claims as time barred and declined to exercise supplemental jurisdiction over Levy's state law claims. *Levy v. BASF Metals Ltd.*, 1:15-cv-7317-GHW, 2017 WL 2533501, at *9 (S.D.N.Y. June 9, 2017). We affirm the bulk of that decision in a summary order we publish simultaneously with this opinion. We write separately to address Levy's CEA claims and hold that they accrued when she discovered her CEA injury in 2008, not when she discovered the alleged manipulation scheme or the identity of the defendants.

BACKGROUND

Levy began trading in the platinum futures market in 2008 at what she alleges were artificially inflated prices. Based on her review of the platinum market, she took a long position with the expectation that platinum prices would soar even higher than market predictions. However, on August 15, 2008, the platinum market crashed, causing Levy to lose her entire investment.

Levy filed suit in April of 2012 against a different set of defendants that she alleged manipulated the platinum market (and, by extension, the platinum futures market) by engaging in so-called banging the close transactions. She claimed that the defendants in that case manipulated the value of platinum futures contracts by placing large platinum orders at the end of, or immediately after, the trading day, resulting in increased settlement prices of platinum futures contracts. In other words, Levy alleged that the defendants in her first lawsuit engaged in a pump and dump scheme that manipulated the value of platinum futures in violation of the CEA, RICO, the Sherman Act, and New York law. That case was transferred from the Eastern District of New York to the Southern District of New York in 2013 so it could be before the same district court judge presiding over a related class action lawsuit. *See generally Levy v. Welsh*, No. 12-CV-2056 (DLI) (VMS), 2013 WL 1149152 (E.D.N.Y. Mar. 19, 2013). Levy settled the *Welsh* lawsuit in 2014, but the settlement did not provide Levy with a complete recovery.

Levy filed the present action on September 16, 2015, after she received in the fall of 2014 a copy of a class action complaint containing similar allegations to the ones she now asserts. *See generally In re Platinum and Palladium Antitrust Litig.*, 1:14-cv-9391-GHW, 2017 WL 1169626 (S.D.N.Y. Mar. 28, 2017). In this suit, Levy claims, in sum, that Defendants-Appellees conspired to fix the price of platinum and thus manipulate the platinum futures market in a four-step manipulation process that involved exchanging confidential information during private conference calls, in violation of the CEA, RICO, the

Sherman Act, and New York law. She alleges that the 2014 class action complaint first apprised her of this conduct, as well as the identities of some of the parties involved. Levy filed an amended complaint on January 14, 2016, and a second amended complaint on April 4, 2016. On August 31, 2016, Defendants-Appellees moved to dismiss Levy's second amended complaint. The district court granted the motion, finding that Levy's federal claims were time barred, and declined to exercise supplemental jurisdiction over her remaining state law claims. *Levy v. BASF Metals Ltd.*, 2017 WL 2533501, at *9.

DISCUSSION

We review *de novo* "[a] district court's interpretation and application of a statute of limitations." *Muto v. CBS Corp.*, 668 F.3d 53, 56 (2d Cir. 2012). "Federal courts . . . generally apply a discovery accrual rule when a statute is silent on the issue . . . ." *Rotella v. Wood*, 528 U.S. 549, 555, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000); *see also Koch v. Christie's Int'l PLC*, 699 F.3d 141, 148 (2d Cir. 2012). In applying this rule, it is "discovery of the injury, not discovery of the other elements of a claim," that "starts the clock." *Rotella*, 528 U.S. at 555. We have not yet applied this general rule to CEA claims. We do so now and hold that Levy's CEA claims accrued when she discovered her CEA injury. This happened when she suffered her losses in 2008. Thus, the CEA's two-year limitations period expired before she initiated the present suit in September 2015. 7 U.S.C. § 25(c).

Levy contends that the district court mistakenly conflated the date she suffered her losses with the date her CEA claims accrued. The relevant inquiry, however, is not whether Levy had discovered the identity of the defendants or whether she had discovered the manipulation scheme she alleges in her complaint. Rather, the question is when Levy discovered her CEA injury—that is, a loss that was the result of a CEA violation. *See* 7 U.S.C. § 25(a)(1) (providing a cause of action for someone who suffers "actual damages" "caused by" a CEA violation); *Cancer Found., Inc. v. Cerberus Capital Mgmt., LP*, 559 F.3d 671, 674 (7th Cir. 2009) ("A plaintiff does not need to know that his injury is actionable to trigger the statute of limitations. The focus is on the discovery of the harm itself, not the discovery of the elements that make up a claim."); *cf. Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998) ("[A] claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice." (internal quotation marks omitted)).

Here, Levy alleges that, by August of 2008, "prices started to fall for no apparent reason and without any fundamental reason." App'x at 260-61 ¶ 417. And, by the end of 2008 "the market price had dropped by over 50%," which Levy describes as "an extraordinary, unprecedented and unjustified sudden collapse." App'x at 262 ¶ 423. Levy further alleges that there was "no explanation for this sudden drop in price, other than market distortion due to manipulation." App'x 261 ¶ 419. In light of these allegations, we have little difficulty concluding that Levy

discovered her CEA injury in 2008. Once Levy was aware of this injury, the CEA gave her two years to ascertain the facts necessary to bring her suit. 7 U.S.C. § 25(c).

Levy primarily argues that she was not on inquiry notice of her present CEA claims until 2014 when a group of investors filed a class action lawsuit against Appellees. *See generally In re Platinum and Palladium Antitrust Litig.*, 2017 WL 1169626. It is true that we have held that where "the circumstances known to" a plaintiff, "as alleged in the complaint, were such as to suggest to a person of ordinary intelligence" that she has been defrauded, "a duty of inquiry" may arise that commences the CEA's two-year limitations period. *Benfield v. Mocatta Metals*, 8 Corp., 26 F.3d 19, 22 (2d Cir. 1994); *see also id.* at 23 (finding constructive knowledge where the loss of an entire investment within a four-month period "should have caused eyebrows to raise" and imposed a "duty of inquiry that would . . . have disclosed the nature and extent of" the fraud). However, this is not an inquiry notice case. The district court held, and we now hold, that Levy had actual knowledge of her CEA injury in 2008. *Levy v. BASF Metals Ltd.*, 2017 WL 2533501, at *5. That knowledge of her CEA injury "start[ed] the clock," irrespective of when she discovered the additional information necessary for her to bring her suit. *See Rotella*, 528 U.S. at 555.

CONCLUSION

For the foregoing reasons, and the reasons stated in the summary order we publish simultaneously with this opinion, we AFFIRM the district court's dismissal of this action.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED FEBRUARY 28, 2019

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 28th day of February, two thousand nineteen.

No: 17-3823-cv

SUSAN LEVY,

Plaintiff-Appellant,

v.

BASF METALS LIMITED, BASF CORPORATION, GOLDMAN SACHS INTERNATIONAL, GOLDMAN SACHS GROUP, INC., GOLDMAN SACHS & CO., GOLDMAN SACHS EXECUTION & CLEARING, L.P., ICBC STANDARD BANK PLC, UBS AG, UBS SECURITIES LLC, HSBC BANK USA, N.A., LONDON PLATINUM AND PALLADIUM FIXING COMPANY LIMITED,

Defendants-Appellees[1]

PRESENT: RALPH K. WINTER,
ROSEMARY S. POOLER,
Circuit Judges.
RONNIE ABRAMS,[2]
District Judge.

1. The Clerk of the Court is directed to amend the caption as above

2. Judge Ronnie Abrams, United States District Court for the Southern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Appellant Susan Levy, an attorney proceeding *pro se*, appeals from the October 19, 2017, judgment of the United States District Court for the Southern District of New York (Woods, J.), dismissing her second amended complaint as time barred and denying leave to amend. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review. We review the district court's "interpretation and application of a statute of limitations" de novo. *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011).

We review the district court's denial of equitable tolling and leave to amend, as well as its discovery orders, for abuse of discretion. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) (leave to amend); *Torres v. Barnhart*, 417 F.3d 276, 279 (2d Cir. 2005) (equitable tolling); *DG Creditor Corp. v. Dabah*, 151 F.3d 75, 79 (2d Cir. 1998) (discovery orders).

Levy first challenges the dismissal of her claims as time barred. Levy's second amended complaint asserted claims under the Commodities and Exchange Act ("CEA"),[3] Racketeer Influenced and Corrupt Organizations Act

3. We address Levy's CEA claims in a separate opinion, which we issue simultaneously with this summary order.

("RICO"), and the Sherman Act. "RICO claims are subject to a four-year statute of limitations," which begins to run "upon the discovery of the injury." *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 148, 150 (2d Cir. 2012). Likewise, claims under the Sherman Act "shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. A cause of action under the antitrust laws accrues "when a defendant commits an act that injures a plaintiffs business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *see also id.* at 339 ("[I]f a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date."). We agree with the district court that the statute of limitations for Levy's RICO and Sherman Act claims began to run in 2008. Levy had actual notice of her injuries in 2008 when she was forced to pay a margin call and lost her entire investment. Therefore, Levy's complaint, which she did not file until 2015, was not timely.

The district court did not abuse its discretion by denying Levy the benefit of equitable tolling. As the district court explained, equitable tolling applies only in "rare and exceptional circumstance[s]" where (1) a plaintiff is "prevented" from filing her complaint in a timely manner and (2) a plaintiff has "acted with reasonable diligence throughout the period [s]he seeks to toll." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (internal quotation marks omitted); *see also Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996) (observing that

equitable tolling is appropriate when a plaintiff "has been prevented in some extraordinary way from exercising [her] rights" (internal quotation marks omitted)). The district court concluded that Levy's previous complaint, which she filed in 2012 asserting various claims based on the same financial losses at issue here, demonstrated that she was aware that she had been injured and that she was capable of pursuing in her legal remedies. We agree with its analysis.

Nor can we say that the district court abused its discretion by denying Levy leave to amend her complaint. Indeed, Levy, an attorney, had already amended her complaint twice. Moreover, as explained above, Levy's claims were time barred. Under these circumstances, the district court did not abuse its discretion by concluding that any further amendment would be futile. *See Grace v. Rosenstock*, 228 F.3d 40, 53 (2d Cir. 2000) ("Amendment would likely be futile if, for example, the claims the plaintiff sought to add would be barred by the applicable statute of limitations.").

Finally, Levy argues that the district court abused its discretion by staying discovery while the defendants' motions to dismiss were pending. District courts have "broad discretion to direct and manage the pre-trial discovery process." *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 41 (2d Cir. 2004). Federal Rule of Civil Procedure 26(c)(l) allows district courts to issue protective orders "to protect a party or person from . . . undue burden or expense." The district court cited appropriate factors–undue burden and expense–in granting the stay of

discovery. We cannot say that this determination was an abuse of discretion.

We have considered the remainder of Levy's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk
United States Second Circuit

APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT IN THE SOUTHERN DISTRICT OF NEW YORK, DATED OCTOBER 6, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUSAN LEVY,

Plaintiff,

-v-

BASF METALS LIMITED, BASF CORPORATION, GOLDMAN SACHS INTERNATIONAL, GOLDMAN SACHS GROUP, INC., GOLDMAN SACHS & CO. INC., GOLDMAN SACHS EXECUTION & CLEARING, LP, HSBC BANK USA, NA, ICBC STANDARD BANK PLC, UBS AG, UBS SECURITIES LLC, LONDON PLATINUM AND PALLADIUM FIXING COMPANY LTD., and JOHN DOES #1-40,

Defendants.

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

On June 9, 2017, the Court issued an opinion and order granting Defendants' motion to dismiss Plaintiff Susan Levy's Second Amended Complaint ("SAC"). Dkt.

No. 170. On June 23, 2017, Plaintiff filed a motion for reconsideration of that opinion and order. Dkt. No. 171 ("Pl.'s Mot.").[1] Defendants' submitted an opposition on July 7, 2017. Dkt. No. 172. Plaintiff filed a reply in support of her motion for reconsideration on July 14, 2017. Dkt. No. I73 ("Pl.'s Reply").

Motions for reconsideration are governed by Local Rule 6.3, which provides that the moving party shall set forth "the matters or controlling decisions which counsel believes the Court has overlooked." "Motions for reconsideration are . . . committed to the sound discretion of the district court." *Immigrant Def. Project v. U.S. Immigration and Customs Enforcement,* No. I4-cv-6II7 (JPO), 2017 WL 2126839, at *1 (S.D.N.Y. May 16, 2017) (citing cases). "Reconsideration of a previous order by the Court is an extraordinary remedy to be employed sparingly." *Ortega v. Mutt,* No. 14-cv-9703 (JGK), 20I7 WL 1968296, at *1 (S.D.N.Y. May 11, 2017) (quoting *Anwar v. Fairfield Greenwich Ltd.,* 800 F. Supp. 2d 571, 572 (S.D.N.Y. 2011)). As such, reconsideration should be granted only when the moving party "identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Robinson v. Disney Online,* 152 F. Supp. 3d 176, 185 (S.D.N.Y. 2016) (quoting *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust,* 729 F.3d 99, 104 (2d Cir. 2013)) (internal quotation marks omitted).

1. Plaintiff's motion was re-filed on the docket as Dkt. No. 184.

Plaintiff has not identified any grounds for reconsideration of the Court's order. Her arguments concerning the discovery accrual rule and the relevance of inquiry notice are unavailing, as the Court determined that Plaintiff had actual notice of her injury as early as 2008. Plaintiff does not point to any new facts or controlling law that the Court overlooked in reaching this conclusion. In addition, Plaintiff's insistence that she is entitled to equitable tolling does not persuade the Court that it overlooked the relevant law in determining that, as a matter of fairness, Plaintiff is not entitled to tolling of her claims when she had actual notice of her injury seven years prior to filing her lawsuit.

Finally, Plaintiff's contention that she "did not think that she even needed to address" the legal issues that formed the basis of the Court's decision is not a grounds for reconsideration. Pl.'s Reply at 3. While Ms. Levy is proceeding *pro se* in this action, she is an attorney, and is therefore not entitled to the special solicitude afforded to non-attorney *pro se* litigants. *See Gundlach v. IBM Japan, Ltd.,* 983 F. Supp. 2d 389, 393 (S.D.N.Y. 2013), *aff'd sub nom. Gundlach v. Int'l Bus. Machs. Inc.,* 594 F. App'x 8 (2d Cir. 2014). Accordingly, Plaintiff's motion for reconsideration is DENIED.

The Clerk of Court is directed to terminate the motion pending at Dkt. No. 184.

SO ORDERED.

Dated: October 6, 2017
New York, New York

/s/ Gregory H. Woods
GREGORY H. WOODS
United States District Judge

APPENDIX F — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JUNE 9, 2017

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1:15-cv-7317-GHW

SUSAN LEVY,

Plaintiff,

-v-

BASF METALS LIMITED, BASF CORPORATION, GOLDMAN SACHS INTERNATIONAL, GOLDMAN SACHS GROUP, INC., GOLDMAN SACHS & CO. INC., GOLDMAN SACHS EXECUTION & CLEARING, LP, HSBC BANK USA, NA, ICBC STANDARD BANK PLC, UBS AG, UBS SECURITIES LLC, LONDON PLATINUM AND PALLADIUM FIXING COMPANY LTD., AND JOHN DOES #1-40,

Defendants.

June 9, 2017, Decided
June 9, 2017, Filed

Appendix F

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

I. INTRODUCTION

For the last nine years, Plaintiff Susan Levy has been searching for someone to make her whole for a failed investment. In 2008, Ms. Levy, an attorney, lost her entire investment in New York Mercantile Exchange ("NYMEX") futures contracts for the precious metal platinum. Four years later, in 2012, Ms. Levy filed a lawsuit in the U.S. District Court for the Eastern District of New York, alleging that various NYMEX traders and John Doe defendants colluded to crash the market and manipulate the price of these contracts, thereby causing her losses. That case was transferred to this district, and was voluntarily dismissed following a settlement on December 3, 2014. She now claims that, thanks to the information contained in a putative class action complaint filed on November 25, 2014—when her first lawsuit was still pending—she has discovered the true cause of her losses.

The class action complaint alleged that defendants BASF Corporation ("BASF Corp."), BASF Metals Limited ("BASF Metals" and, together with BASF Corp., "BASF"), Goldman Sachs International ("Goldman Sachs"), HSBC Bank USA, N.A. ("HSBC"), ICBC Standard Bank Plc ("ICBC"), UBS AG, UBS Securities LLC ("UBS Securities" and, together with UBS AG, "UBS"), and the London Platinum and Palladium Fixing

Company Ltd. ("LPPFC") manipulated and artificially suppressed the price of physical platinum and palladium. After copying a significant number of the factual allegations from the class action complaint, attempting to connect those facts to her 2008 injury, and adding twenty John Doe defendants (together with the above-named financial institutions and organizations, "Defendants"), Plaintiff filed the complaint in this case in September 2015. Ultimately, Ms. Levy's claims—all of which arise out of the 2008 injury—have been brought too late, and there is no equitable reason that would permit her to bring yet another complaint to recover her nearly decade-old failed investment. Defendants' motion to dismiss the Second Amended Complaint ("SAC") is therefore GRANTED.

II. BACKGROUND[1]

Ms. Levy's suit stems from the alleged manipulation of the futures market for the precious metals platinum and palladium. Because Ms. Levy relies substantially on the facts presented in the complaint brought in the related class action, and incorporates that complaint by reference, the Court refers the reader to its opinion and order granting the motion to dismiss that complaint. *See*

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1. Unless otherwise noted, the facts are taken from the Second Amended Complaint ("SAC"), Dkt. No. 121, and are accepted as true for the purposes of this Rule 12(b)(6) motion. *See, e.g., Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). However, "[t]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

In re Platinum and Palladium Antitrust Litig., 14-cv-9391-GHW, Dkt. No. 102 ("Class Action Complaint"); Dkt. No. 179, 2017 WL 1169626 (S.D.N.Y. Mar. 28, 2017) ("Class Action Opinion"); *see also* SAC, Dkt. No. 121, ¶ 260. The Class Action Opinion contains a more fulsome description of the London Platinum and Palladium Market ("LPPM"), the process by which the Defendants "fixed" the price of these precious metals through a twice-daily auction process, and Defendants' alleged collusion to manipulate the market. Assuming familiarity with the facts presented in that opinion, the Court summarizes below the facts relevant to deciding Defendants' motion to dismiss Ms. Levy's complaint.

Ms. Levy purchased NYMEX platinum futures contracts in 2008.[2] SAC ¶ 155. According to the SAC, beginning in the summer of 2008, the prices of NYMEX platinum "began to collapse" and Ms. Levy's investment lost value. SAC ¶ 474. On August 15, 2008, Ms. Levy received a margin call, requiring her to liquidate her platinum positions and sell her investments at a loss. SAC ¶ 475. On that day, Ms. Levy alleges that there was a "seismic gyration crashing the market," resulting in her "total losses." SAC ¶¶ 24, 478, 575. Ms. Levy claims that this loss was due to collusion between Defendants to fix the price of precious metal futures contracts through the London-based auction process. She alleges that Defendants violated the Commodities Exchange Act, 7 U.S.C. § 1, *et seq.* ("CEA"), the Sherman Act, 15 U.S.C.

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2. Ms. Levy does not provide specific dates for her purchase of platinum contracts, but on page 130 of her 142-page complaint notes that she purchased NYMEX Platinum Contracts "in the winter and spring of 2008." SAC ¶ 617.

§§ 1-2 and New York State antitrust laws (N.Y. Gen. Bus. Law § 340, *et seq.*), and the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961, *et seq.* ("RICO") in working together to manipulate the price of platinum.

These allegations are not so dissimilar from those Ms. Levy raised in her 2012 lawsuit. In that case, Ms. Levy also alleged that various individuals and corporations colluded to manipulate the price of NYMEX platinum contracts. *See Levy v. Joseph Welsh et al.*, 12-cv-2056 (E.D.N.Y.), 13-cv-01858 (S.D.N.Y.).[3] There, she alleged that the defendants in that case—including forty John Doe defendants—caused "sudden gyrations" in the market that led to the August 15, 2008 margin call and her resulting monetary losses. 2012 Am. Compl. ¶ 255. Just as she does here, in that case, Ms. Levy brought claims under

3. The Court takes judicial notice of the docket sheet and operative complaint in *Levy v. Joseph Welsh et al.*, 12-cv-2056 (E.D.N.Y.), 13-cv-01858 (S.D.N.Y.) and *id.* Dkt. No. 63 ("2012 Am. Compl."). The Second Circuit has explained that the harm in considering material extraneous to the complaint on a motion to dismiss is that the plaintiff does not have "notice that the material may be considered." *See Mangifico v. Blumenthal*, 471 F.3d 391, 397 (2d Cir. 2006) (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)) (holding that "docket sheets are public records of which the court could take judicial notice"). Because Ms. Levy herself filed the complaint in the Eastern District of New York in 2012 and litigated the case through its conclusion, and because the existence of this previous action was raised in both Defendants' motion to dismiss and Plaintiff's opposition to that motion, there is no question that she had notice of these materials. The Court does not, however, take judicial notice of the truth of the matters asserted in the 2012 Amended Complaint.

the CEA, RICO, and sections 1 and 2 of the Sherman Act seeking remedies for her 2008 injury. Ms. Levy voluntarily dismissed the complaint in that lawsuit on December 2, 2014. *Levy v. Welsh*, 13-cv-01858, Dkt. No. 120.

Although there are a number of similarities between this case and her previous one, in the complaint in this action, Ms. Levy borrows heavily from the factual allegations contained in the Class Action Complaint. SAC ¶ 260 (incorporating by reference the data presented in the Class Action Complaint). That complaint alleged that over the class period of January 1, 2008 to November 30, 2014, Defendants worked together to suppress the price of platinum and palladium at prices lower than market forces would otherwise have set. Class Action Compl. ¶¶ 1, 4, 97. As support for this allegation, the class action plaintiffs presented data demonstrating large "anomalous" downward spikes in the prices of the platinum and palladium shortly before the time of the twice-daily auction calls during which Defendants "fixed" the price of these precious metals. Class Action Compl. ¶ 92. The Class Action Complaint does not allege, however, that at any point during the class period Defendants' alleged price suppression caused the class members to suddenly lose their entire investment. To the contrary, the Class Action Complaint notes that palladium prices "have been in a general upward trend" since the beginning of the class period and that platinum prices tripled from January 2000 through December 2013. Class Action Compl. ¶¶ 100, 125 & fig. on p. 41.

Because the Class Action Complaint does not suggest the kind of loss that Ms. Levy alleges in the SAC, Ms. Levy makes additional allegations in an apparent attempt to make her 2008 loss cohere with the data asserted in the class action and the theory of damages that data was presented to support. First, Ms. Levy argues that the August 15, 2008 margin call and her resulting loss occurred when Defendants "decided to crash the market by covering their short positions." SAC ¶ 11. Ms. Levy also states that the Defendants "artificially suppressed prices en mass in August of 2008," which caused members of the public to sell their positions, and that those sales caused a collapse of the market. SAC ¶ 183. In another part of the SAC, Ms. Levy contends the August 2008 market crash was the result of Defendants "selling off their large holdings in the Physical Market in London to create fraudulent profits" throughout the winter, spring, and summer of 2008. SAC ¶ 422. Yet in that same paragraph she also alleges that the August margin call was "sudden and unexpected" and later claims that the suppression of market prices by Defendants was similarly "sudden." SAC ¶¶ 422, 575. In addition to these disparate and inconsistent allegations, Ms. Levy alleges that the Defendants caused the crash on the market by "failing to properly coordinate their scheme with other precious metals traders who were also manipulating the market in the same fashion as the platinum and palladium traders including gold, palladium and silver." SAC ¶¶ 11, 485. That is, Ms. Levy contends that her loss was the result of scheming traders in distinct markets failing to coordinate their illicit acts well enough.

III. PROCEDURAL HISTORY

On September 16, 2015, Plaintiff filed the complaint in this action, alleging causes of action under the CEA, RICO, sections 1 and 2 of the Sherman Act, New York State antitrust laws, for unjust enrichment, and for tortious interference with prospective advantage.

Plaintiff amended her complaint once as a matter of right in January 2016, and again in April 2016 in response to Defendants' March 14, 2016 motion to dismiss. On August 31, 2016, Defendants again moved jointly to dismiss the SAC. Dkt. No. 129. In addition to filing a joint memorandum of law, certain groups of defendants also filed their own memoranda of law in support of the motion to dismiss. Dkt. Nos. 132 (BASF), 133 (LPPFC), 134 (UBS), 136 (ICBC). Plaintiff filed her opposition on September 29, 2016, Dkt. No. 153, and Defendants replied on October 13, 2016, Dkt. No. 159.

Because the statute of limitations for all of Plaintiff's claims has expired, and because there is no equitable reason to permit tolling of the statute of limitations in this case, Plaintiff's CEA, RICO, and Sherman Act claims are dismissed. The Court declines to extend supplemental jurisdiction over the remaining state law claims in Plaintiff's complaint. Defendants' motion to dismiss the SAC is therefore GRANTED.

IV. LEGAL STANDARD

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of

the claim showing that the pleader is entitled to relief." Rule 8 "does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 544).

Determining whether a complaint states a plausible claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. The court must accept all facts alleged in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 124 (2d Cir. 2008) (per curiam). However, a complaint that offers "labels and conclusions" or "naked assertion[s]" without "further factual enhancement" will not survive a motion

to dismiss. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555, 557).

Generally, courts are instructed to read *pro se* complaints with "special solicitude" and interpret them "to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-75, 477 (2d Cir. 2006). However, where plaintiff is an attorney—as Plaintiff is here—she is not entitled to the same liberal construction as would other *pro se* plaintiffs. *Gundlach v. IBM Japan, Ltd.*, 983 F. Supp. 2d 389, 393 (S.D.N.Y. 2013), *aff'd sub nom. Gundlach v. Int'l Bus. Machs. Inc.*, 594 F. App'x 8 (2d Cir. 2014); *see also Fenner v. City of N.Y.*, No. 08-CV-2355, 2009 WL 5066810, at *3 (E.D.N.Y. Dec. 21, 2009) ("Although *pro se* litigants are generally entitled to a broad reading of their submissions because of their lack of familiarity with the law, that is not the case with attorneys who have chosen to proceed *pro se*. It is well settled in the Second Circuit that since the reason for affording *pro se* litigants special deference is not present when the litigant is an attorney, no special consideration is required."). As such, the Court will read the SAC as it would any other counseled complaint.

V. DISCUSSION

At the motion to dismiss stage, dismissal of a complaint on the grounds that the statute of limitations has expired is appropriate only if the "complaint clearly shows the claim is out of time." *Biro v. Condé Nast*, 963 F. Supp. 2d 255, 266 (S.D.N.Y. 2013) (quoting *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999)); *see*

also Mosdos Chofetz Chaim, Inc. v. RBS Citizens, N.A., 14 F. Supp. 3d 191, 209 (S.D.N.Y. 2014) ("Because the defendants bear the burden of establishing the expiration of the statute of limitations as an affirmative defense, a pre-answer motion to dismiss on this ground may be granted only if it is clear on the face of the complaint that the statute of limitations has run.") (citation omitted). Here, Plaintiff repeatedly emphasizes that she suffered harm in August 2008 when she was issued a margin call on her platinum investments, and the SAC contains an affirmative argument for equitable tolling of the statute of limitations on the basis of fraudulent concealment. SAC ¶¶ 641-46. The untimeliness of Plaintiff's claims is apparent on the face of her complaint.

The Court will assume, for purposes of the statute of limitations analysis, that Plaintiff has otherwise stated a valid cause of action under each of the federal statutes she raises in the SAC. *See, e.g.*, 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 320a at 283 (3d Ed. 2007) ("[T]he best way to analyze the limitation issue is to assume that the antitrust laws have been violated and then consider when the antitrust cause of action has accrued and whether other factors may . . . delay the running of the statute."). The Court notes, however, that there are serious questions with regard to the plausibility of Plaintiff's allegations. For instance, a significant portion of the evidence Plaintiff cites as support for the "anomalous price moves" around the time of the London fixing calls analyzes data from after 2008—that is, after Plaintiff alleges she participated in the platinum market. *See, e.g.*, SAC ¶¶ 270-82 (discussing price movements in 2009, 2010,

and 2012). That data, while voluminous, does not bolster the contention that Defendants' alleged scheme caused Plaintiff's specific injury in 2008.

Further, Plaintiff fails to logically tie the theory underlying the class action data to her injury. Plaintiff's injury is not the kind of injury the Class Action Complaint says occurred as a result of the Defendants' alleged manipulation. The class action plaintiffs' theory of downward price suppression around the time of the Fixing—which nevertheless resulted in a three-fold increase in the price of platinum from 2000 to 2013—does not explain a sudden market crash and margin call wiping out an individual's investment. Finally, Plaintiff contends that the August 2008 market collapse that led to her injury occurred because NYMEX traders who were trading in precious metals other than platinum "failed to refine their manipulative skills" and poorly coordinated their contemporaneous schemes with one another. *See* SAC ¶ 11 (explaining that the margin call was the result of platinum traders "generally failing to properly coordinate their scheme with other precious metals traders who were also manipulating the market in the same fashion as the platinum and palladium traders including gold, palladium and silver"); *id.* ¶¶ 479-86. Essentially, Plaintiff alleges that Defendants failed to be good schemers with other parties who also happened to be orchestrating their own, independent manipulative schemes in markets separate and distinct from the platinum market at issue in this case. Those other parties are not named as defendants in this action. While the Court is thus aware that there are potential questions as to whether the SAC states a plausible legal claim, it need not reach that issue

here, because all of Plaintiff's claims are barred by the applicable statutes of limitations.

A. Plaintiff's CEA Claims Are Untimely

Plaintiff brings various claims under the Commodities Exchange Act, arguing generally that Defendants manipulated the market, made false and misleading reports about the prices of platinum, and violated the antifraud provisions of that statute. Claims brought under the CEA must be raised "not later than two years after the date the cause of action arises." 7 U.S.C. § 25(c). Although the CEA does not define when a cause of action arises, "courts apply a 'discovery accrual rule' wherein 'discovery of the injury, not discovery of the other elements of a claim, is what starts the clock.'" *In re Commodity Exch., Inc.*, 213 F. Supp. 3d 631, 2016 WL 5794776, at *27-28 (S.D.N.Y. 2016) (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 697 (S.D.N.Y. 2013) (other citations omitted)). A plaintiff has discovered an injury under the CEA when "circumstances would have suggested to a person of ordinary intelligence the probability that he had been defrauded." *Shak v. JPMorgan Chase & Co.*, 156 F. Supp. 3d 462, 473-74 (S.D.N.Y. 2016).

Plaintiff contends that her cause of action accrued in December 2014 when the class action was filed, and that the case she filed in 2012 "in no way apprised her of the conspiratorial actions of the defendants herein." Pl.'s Opp'n at 5. However, Plaintiff discovered her injury, thus beginning the statute of limitations for her CEA claims, as early as June 2008 and no later than August 15, 2008,

when she was forced to pay a margin call and lost her entire investment. That is, Plaintiff had actual notice of her injury almost seven years before filing the SAC. Moreover, Plaintiff brought CEA claims against other defendants in 2012. *See Levy v. Joseph Welsh, et al.*, 12-cv-2056 (E.D.N.Y.), 13-cv-01858 (S.D.N.Y.). Having filed a lawsuit asserting a cause of action under the CEA for the same financial loss asserted here, there is no doubt that Plaintiff had discovered her injury more than two years before initiating this case. Because Plaintiff had actual notice of her injury in 2008, her 2015 CEA claims are untimely and are therefore barred absent equitable tolling.

B. Plaintiff's RICO Claims Are Untimely

Plaintiff also alleges that Defendants were part of an illegal racketeering enterprise in violation of RICO. Plaintiff also brought these claims too late. RICO claims are subject to a four-year statute of limitations. *Rotella v. Wood*, 528 U.S. 549, 553, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000). As with the CEA, the RICO statute is silent as to when a RICO cause of action accrues. Thus, as with CEA claims, the Second Circuit has adopted a "discovery accrual rule" for RICO claims where "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Koch v. Christie's Int'l. PLC*, 699 F. 3d 141, 148 (2d Cir. 2012) (quoting *Rotella*, 528 U.S. at 555).

As stated above, Plaintiff had actual notice of her injury by August 2008. As with her claims under the CEA, Plaintiff's argument that she did not know of the specific wrongdoing of the specific defendants in this

case has no significance in light of RICO's accrual rule, as courts have held that a plaintiff need not know all of the specific elements of the claim in order for the statute of limitations to run, which includes knowledge of the Defendants' identities. *See, e.g., Robert L. Kroenlein Tr. ex rel. Alden v. Kirchhefer*, 764 F.3d 1268, 1278 (10th Cir. 2014) ("[A] RICO victim need not have actual knowledge of exactly who committed the RICO predicate act resulting in the injury for a civil RICO claim to accrue."). Because Plaintiff had actual notice of her injury by August 2008, her claims accrued at that time—seven years before she filed her complaint. Plaintiff's claims are not timely and are therefore barred absent equitable tolling.

D. Plaintiff's Antitrust Claims Are Untimely

Plaintiff alleges that Defendants' alleged manipulation of the platinum and palladium market constitutes a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, and that LPPFC monopolized the market for these precious metals in violation of Section 2 of the Sherman Act. The statute of limitations for a claim of antitrust injury under the Sherman Act is four years from the date of accrual. 15 U.S.C. § 15(b). The Supreme Court has explained that

> [g]enerally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business . . . [T]his has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act

> and that, as to those damages, the statute of limitations runs from the commission of the act.

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971). The Court analyzes claims under section 1 of the Sherman Act differently than it does claims under section 2.

i. Section 1 Claims

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade. 15 U.S.C. § 1. Plaintiff alleges that Defendants conspired to manipulate the prices of NYMEX platinum by purposefully fixing the prices . . . to be artificially lower and/or higher than the normal market prices." SAC ¶ 567. This conduct allegedly caused her injury when, as a direct purchaser of NYMEX Platinum contracts, she was forced to pay higher than normal prices for inflated contracts, and suffered losses in August 2008 when the market crashed. SAC ¶¶ 557, 572, 575.

Under *Zenith*'s accrual rule, "if a plaintiff feels the adverse impact of an antirust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date," assuming the plaintiff sues within the requisite four years from the accrual date. *Zenith Radio Corp.*, 401 U.S. at 339. There are exceptions to this accrual rule if the damages plaintiff alleges are speculative, or if the alleged antitrust violation consists of a series of acts that continue to harm plaintiff over

time. Under the speculative damages exception, if the "amount and nature [of the alleged antitrust damages] are unprovable," courts will not apply the normal accrual rule for the Sherman Act's four-year statute of limitations. *Rite Aid Corp. v. Am. Ex. Travel Related Servs. Co.*, 708 F. Supp. 2d 257, 266 (E.D.N.Y. 2010); *see Higgins v. N.Y. Stock Exch., Inc.*, 942 F.2d 829, 832 (2d Cir. 1991) ("The only exception to the date-of-injury rule is the rare case in which the damages caused by an antitrust injury are so speculative that the court is unwilling to estimate them."). This rule does not require that damages be calculable to the point of "mathematical precision," but a court will apply the exception if it cannot "reasonably estimate[]" the nature or amount of damages alleged. *Rite Aid Corp.*, 708 F. Supp. 2d at 266.

In addition to the speculative damages exception, courts will not apply the date-of-injury accrual rule in the case of a continuing antitrust violation. When an alleged violation "consists of a series of acts that repeatedly invade a plaintiff's interest and continue over time, a cause of action may accrue each time the plaintiff is injured anew." *Id.* at 267. In that circumstance, the statute of limitations would not only run from the initial antitrust act, but would run from each "overt act." An overt act must (1) be "new and independent" from the previous antitrust violation, and (2) "inflict new an accumulating injury on the plaintiff." *Id.* at 268 (citing *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467 (6th Cir. 1996)) (internal quotation marks omitted). Each overt act that makes up a continuing antitrust violation begins the statutory period, although a plaintiff cannot use a separate and "new predicate act as a bootstrap to recover for injuries caused by other earlier

predicate acts that took place outside the limitations period." *Klehr v. A.O. Smith, Corp.*, 521 U.S. 179, 190, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997).

Neither the continuing violation exception nor the speculative damages exception applies here. This is not the "rare case" described in *Higgins* where the Court cannot determine the nature or amount of Plaintiff's damages—Plaintiff knows exactly how much she lost when her investment bottomed out in 2008. *See* SAC ¶¶ 667-68 (describing monetary damages sought). Additionally, the antitrust violation alleged in the SAC is not a continuing violation wherein Plaintiff was injured by multiple distinct events. Plaintiff only alleges that she suffered harm following the August 15, 2008 margin call; no other overt acts subsequent to that injury date would support a later accrual date for Plaintiff's Sherman Act claims. As the exceptions to the date-of-injury rule are inapplicable here, Plaintiff's section 1 claims accrued the date she was injured. At the latest, that date is August 15, 2008. After that date, any injury that could be traced to the antitrust violation ceased. She thus could have brought her claim within four years of that accrual date—that is, no later than August 2012. Because Plaintiff did not bring her section 1 claim within the statute of limitations, that claim is untimely.

ii. Section 2 Claims

Section 2 of the Sherman Act prohibits monopolization of a relevant market. 15 U.S.C. § 2. Plaintiff alleges that LPPFC, through its four members, monopolized "the interstate trading of Physical and NYMEX Platinum

Futures Contracts for delivery in 2008 to 2014." SAC ¶ 586. She claims that LPPFC acquired and maintained monopoly power during the relevant time period, "foreclos[ing] competitors such as plaintiff herein from effectively competing in the market . . . [and] causing plaintiff as a competitor to lose her holdings by being squeezed out of the Market." SAC ¶ 590. As with her section 1 claims, Plaintiff contends that Defendants' section 2 violations caused her monetary losses "starting in the summer or [sic] 2008 and thereafter when defendants were price-fixing by artificially suppressing prices." SAC ¶ 591.

The Second Circuit has held that, with regard to the statute of limitations for section 2 claims, the accrual of the cause of action depends on whether the plaintiff is a purchaser or a competitor. A purchaser in a monopolized market does not suffer harm "until the monopolist actually exercises its illicit power to extract an excessive price." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 295 (2d Cir. 1979). A monopolists' competitor, by contrast, "may be injured at the time the anticompetitive conduct occurs." *Id.*

Here, Plaintiff alleges that she is a competitor of Defendant LPPFC, meaning that her section 2 claims accrued at the time the monopolistic conduct occurred.[4] Even so, Plaintiff suffered no new harm attributable to any given actor in any platinum market after August 15,

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4. As noted above, there are significant issues regarding the plausibility of many of Ms. Levy's assertions—including that she, as the holder of approximately $280,000 in leveraged platinum options, was a competitor of the LPPFC.

2008, when she lost her investment and exited that market. Because all Sherman Act claims accrue "when a defendant commits an act that injures a plaintiff's business," and Plaintiff's injury occurred in 2008, she had four years from the date of her injury to file her section 2 claim against LPPFC. Because she filed this complaint in 2015—seven years after her injury—her section 2 claim is untimely.

C. Plaintiff is Not Entitled to Equitable Tolling[5]

Recognizing that her claims are untimely, Plaintiff argues that she is entitled to equitable tolling because Defendants fraudulently concealed their unlawful conduct. The doctrine of equitable tolling should only be applied in "rare and exceptional circumstances." *Smith v. McGinnis*,

5. In her opposition to Defendants' motion to dismiss, Plaintiff argues that she is "automatically entitled to a tolling of the statute of limitations at this stage of the litigation, since she filed while the Class Action is still pending." Pl's Opp'n at 3. The Supreme Court has held that, in the context of an individual plaintiff who files a suit separately from a pending class action, "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983) (quoting *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)); *see also In re WorldCom Sec. Litig.*, 496 F.3d 245, 254-55 (2d Cir. 2007) (holding that *American Pipe* tolling applies to class members who file individual suits before class certification is resolved). This tolling doctrine is inapplicable in this case, however, because Plaintiff's claims accrued—and expired—long before the class action litigation was commenced. Thus to the extent Plaintiff seeks tolling of her statutes of limitations, she seeks tolling for the seven years between her injury and filing of the SAC in September 2015.

208 F.3d 13, 17 (2d Cir. 2000). The Second Circuit has found tolling to be appropriate where "extraordinary circumstances" prevented the plaintiff from filing a complaint on time and where "the party seeking equitable tolling . . . acted with reasonable diligence throughout the period he seeks to toll." *Id.* (citing *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996)). The doctrine of equitable tolling is applied in the district court's discretion "as a matter of fairness" when a plaintiff has been prevented from exercising her rights. *Id.* A court's decision to apply or decline to apply equitable tolling is reviewed for abuse of discretion. *Zerilli-Edelglass v. N.Y.C. Transit Auth.*, 333 F.3d 74, 81 (2d Cir. 2003).

Plaintiff contends that equitable tolling should apply on the basis of fraudulent concealment. In order for equitable tolling to be available on that basis, a plaintiff must prove that (1) the defendant concealed the existence of the unlawful conduct; (2) the plaintiff remained ignorant of the violation until sometime within the statute of limitations, and (3) this continuing ignorance was not the result of a lack of diligence. *In re London Silver Fixing, Ltd. Antitrust Litig.*, 213 F. Supp. 3d 530, 2016 WL 5794777, at *24-25 (S.D.N.Y. 2016). "A claim of fraudulent concealment must be pleaded with particularity, in accordance with the heightened pleading standards of Rule 9(b)." *Id.* (citing *Hinds Cty., Miss. v. Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 399 (S.DN.Y. 2010)).

Here, Plaintiff meets the first prong of the fraudulent concealment test because the Defendants' alleged manipulation and misrepresentation of the Fix Price of platinum was self-concealing by its very nature. *See, e.g., In re Nine West Shoes Antitrust Litig.*, 80 F. Supp. 2d 181,

193 (S.D.N.Y. 2000) ("[S]ince bid-rigging and price-fixing conspiracies are deemed self-concealing, a plaintiff is not required to show defendants took independent affirmative steps to conceal their conduct.").

Regardless, the Court cannot find the second prong of the test has been met here, as Plaintiff was not continually ignorant of the existence of unlawful conduct during the pendency of the statute of limitations. Plaintiff filed a similar complaint seeking damages from the same 2008 injury in May 2012. Courts in this district have found that where a Plaintiff has already filed actions alleging similar claims against different defendants, "declining to apply equitable tolling to Plaintiff's claims would not prevent plaintiff from having his day in court." *Wang v. Palmisano*, 51 F. Supp. 3d 521, 533 (S.D.N.Y. 2014). In *Wang v. Palmisano*, the court found that a plaintiff who had previously brought an action against defendant's employer alleging the same claims could not demonstrate why enforcing the statute of limitations would be unfair "in light of Plaintiff's decision to bring parallel actions against [other defendants] over the course of a half-decade." *Id.*; *see also Parada v. Banco Industrial De Venezuela, C.A.*, 753 F.3d 62, 71 (2d Cir. 2014) (finding that plaintiff was not entitled to equitable tolling when her actions "showed that she was capable of taking legal action much earlier").

In this case, Plaintiff knew of her loss in August 2008. She also knew of potential causes of action in 2012, when she brought a lawsuit alleging claims under the CEA, RICO, and the Sherman Act. She named John Doe defendants in that action, and could have determined if other relevant parties were complicit in the alleged

price manipulation of NYMEX precious metals contracts over the more than two years that case remained active. Plaintiff voluntarily dismissed her first complaint in December 2012 after a settlement was reached between the parties. Despite her contention that the Class Action Complaint alerted her to Defendants' alleged wrongdoing, she did not learn anything new about her injury or any potential claims supporting remuneration for her injury by virtue of the November 2012 Class Action Complaint. Indeed, the only thing she potentially did not already know prior to commencement of the class action is the theory of price suppression during the time of the Fixing calls. But, as stated above, the facts Plaintiff alleges to bridge the gap between that theory and her actual injury were not included in the Class Action Complaint and raise serious questions as to the plausibility of her allegations. The Court does not accept that the Class Action Complaint and the facts contained in it justify equitable tolling. Simply put, wherever Plaintiff pulled these bridging allegations from, it was not the Class Action Complaint.

Plaintiff was not "prevented in some extraordinary way" from pursuing her claims. *Johnson*, 86 F.3d at 12. The Court therefore cannot find that "as a matter of fairness" she is entitled to bring her claims seven years after her causes of action accrued. *Id.* Considering all of the information before it, the Court concludes that equitable tolling is not warranted here on the basis of fraudulent concealment or otherwise. Therefore, Plaintiff's claims are time-barred.

D. The Court Declines to Extend Supplemental Jurisdiction Over Plaintiff's Remaining State Law Claims

In addition to her claims under the CEA, RICO, and the Sherman Act, Plaintiff also asserts state law claims under New York State antitrust law, for unjust enrichment, and for tortious interference with prospective advantage, and notes that this Court may exercise pendent jurisdiction over those claims pursuant to 28 U.S.C. § 1367(a). Under 28 U.S.C. § 1367(c)(3), the exercise of supplemental jurisdiction over Plaintiff's remaining state law claims is within the Court's discretion if it has "dismissed all claims over which it has original jurisdiction." The Second Circuit counsels against exercising supplemental jurisdiction in such a situation: "[I]f the 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., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 183 (2d Cir. 2004) (quoting *Castellano v. Bd. of Trs.*, 937 F.2d 752, 758 (2d Cir. 1991)).

Having dismissed all of Plaintiff's claims that were based on a federal question under 28 U.S.C. § 1331, and there being no other basis for federal jurisdiction over this case, the Court declines to exercise its supplemental jurisdiction over Plaintiff's remaining state law claims. *See* 28 U.S.C. § 1367(c)(3). Accordingly, those claims are dismissed.

E. Leave to Amend the Complaint is Denied Because it Would be Futile

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend should be "freely given when justice so requires." Because all of Plaintiff's federal claims are time-barred, leave to amend the complaint is denied as futile. *See Wallace v. NYC Dept. of Corr.*, 112 F. App'x 794, 795 (2d Cir. 2004) (affirming a district court's denial of leave to amend where the statute of limitations had run and amendment would be futile).

VI. CONCLUSION

Plaintiff believed that by tweaking her 2012 lawsuit by adding new parties and copying facts from a class action complaint, she could find another route to recover her 2008 losses. This approach cannot succeed. While the Court recognizes that Ms. Levy feels wronged, plaintiffs cannot simply file new complaints every time they hear of a potential avenue of recovery—particularly after years have passed. Here, Ms. Levy's federal claims are untimely, and she is not entitled to equitable tolling of the elapsed statutes of limitation. Defendants' joint motion to dismiss Plaintiff's Second Amended Complaint is GRANTED.

The Clerk of Court is directed to terminate all pending motions and to close the case.

SO ORDERED.

Dated: June 9, 2017
New York, New York

/s/ Gregory H. woods
GREGORY H. WOODS
United States District Judge