APPENDIX

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM 2020
NOS. 20-1458, 20-1575, 20-1611

[Filed February 27, 2023]

IN RE PLATINUM AND PALLADIUM ANTITRUST LITIGATION	)
KPFF INVESTMENT, INC., WHITE OAK FUND LP, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, LARRY HOLLIN, *Plaintiffs-Appellants-Cross-Appellees*,	)
MODERN SETTINGS LLC, A NEW YORK LIMITED LIABILITY COMPANY, MODERN SETTINGS LLC, A FLORIDA LIMITED LIABILITY COMPANY, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, CRAIG R. COOKSLEY, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED, NORMAN BAILEY, THOMAS GALLIGHER, KEN PETERS, *Plaintiffs,*	)
v.	)

BASF METALS LIMITED, ICBC STANDARD BANK PLLC,
Defendants-Appellees-Cross-Appellants,

GOLDMAN SACHS INTERNATIONAL, HSBC BANK USA, N.A., THE LONDON PLATINUM AND PALLADIUM FIXING COMPANY LTD., BASF CORPORATION,
Defendants-Appellees,

UBS AG, UBS SECURITIES LLC,
Defendants.[*]

On Appeal from the United States District Court for the Southern District of New York

ARGUED: JUNE 4, 2021
DECIDED: FEBRUARY 27, 2023

Before: POOLER and MENASHI, *Circuit Judges*, and VYSKOCIL, *District Judge*.[†]

The plaintiffs-appellants and cross-appellees are participants in the physical and derivatives markets for platinum and palladium and seek monetary and injunctive relief for violations of the antitrust laws and the Commodities Exchange Act ("CEA"). According to

[*] The Clerk of Court is directed to amend the caption as set forth above.

[†] Judge Mary Kay Vyskocil of the U.S. District Court for the Southern District of New York, sitting by designation.

the plaintiffs-appellants, the defendants—mostly foreign companies engaged in trading these metals—manipulated the benchmark prices for platinum and palladium by collusively trading on the futures market to depress the price of these metals and by abusing the process for setting the benchmark prices. The defendants allegedly benefited from this conduct via trading in the physical markets and holding short positions in the futures market. The district court held that it had personal jurisdiction over two of the foreign defendants, but it dismissed the plaintiffs' antitrust claims for lack of antitrust standing and the plaintiffs' CEA claims for being impermissibly extraterritorial. The plaintiffs appeal the dismissal of these claims. The defendants cross-appeal the district court's holdings on personal jurisdiction.

We reverse in part, vacate in part, and affirm in part. We reverse the district court's holding that Larry Hollin and White Oak Fund LP (the "Exchange Plaintiffs") lacked antitrust standing to sue for the manipulation of the New York Mercantile Exchange futures market in platinum and palladium. As traders in that market, the Exchange Plaintiffs are the most efficient enforcers of the antitrust laws for that injury. But we affirm the district court's conclusion that KPFF Investment, Inc. did not have antitrust standing. Additionally, we vacate the district court's dismissal of the plaintiffs' CEA claims. The plaintiffs have alleged sufficient domestic activity so that the CEA claims are not impermissibly extraterritorial. We affirm the district court's holdings as to personal jurisdiction over the foreign defendants under a conspiracy theory of personal jurisdiction.

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PAUL MEZZINA, King & Spalding LLP, Washington, DC (Damien J. Marshall, Leigh M. Nathanson, King & Spalding LLP, New York, NY, *and* Joshua N. Mitchell, King & Spalding LLP, Washington, DC, *on the brief*), *for HSBC Bank USA, N.A.*

Stephen Ehrenbergh, Mark A. Popovsky, Sullivan & Cromwell LLP, New York, NY, *for Goldman Sachs International*.

MATTHEW A. KATZ (Lisa C. Cohen, *on the brief*), Schindler Cohen & Hochman LLP, New York, NY, *for the London Platinum and Palladium Fixing Company Ltd.*

ANDREW C. LAWRENCE (Michael F. Williams, Peter A. Farrell, *on the brief*), Kirkland & Ellis LLP, Washington, DC, *for BASF Metals Limited and BASF Corporation*.

ROBERT G. HOUCK (John D. Friel, Minji Reem, *on the brief*), Clifford Chance US LLP, New York NY, *for ICBC Standard Bank Plc*.

MENASHI, *Circuit Judge*:

The plaintiffs-appellants and cross-appellees in this case participate in the markets for physical platinum and palladium and for derivatives in those commodities. The plaintiffs-appellants brought lawsuits alleging that the defendants—companies engaged in precious metals trading—conspired to manipulate the global benchmarks for those metals. Most, but not all, of the defendants are foreign.

The plaintiffs sued for violations of the antitrust laws and the Commodities Exchange Act ("CEA") and for unjust enrichment. According to the plaintiffs, the defendants artificially depressed the benchmark prices for platinum and palladium both by collusively trading in those metals' derivatives—and thereby affecting the price of platinum and palladium generally—and by manipulating the process of setting the benchmark price. The defendants allegedly benefited from these actions by participating in the physical market for platinum and palladium and by holding short positions in the futures market. The plaintiffs, as sellers of platinum and palladium and participants in the derivatives market, allege corresponding injuries.

The changing legal landscape since the initial filing resulted in multiple complaints from the plaintiffs and multiple dispositions from the district court. Ultimately, the district court concluded that it had personal jurisdiction over two of the foreign defendants under a conspiracy theory of personal jurisdiction, but it dismissed the antitrust and CEA claims. It determined that the plaintiffs were not efficient enforcers of the antitrust laws—and therefore lacked

antitrust standing—and that the plaintiffs' CEA claims were impermissibly extraterritorial. The plaintiffs timely appealed, and the foreign defendants over whom the district court held that it had personal jurisdiction cross-appealed that issue.

We reverse in part, vacate in part, and affirm in part. KPFF Investment, Inc. lacked antitrust standing to sue for the impact that the defendants had on the physical platinum and palladium market. However, those plaintiffs who participated in the futures market—Larry Hollin and White Oak Fund LP—are the most efficient enforcers of the alleged antitrust injury in that market and have antitrust standing to pursue claims based on that injury. We also hold that the plaintiffs have alleged sufficient domestic activity to survive a motion to dismiss on the CEA claims. And we affirm the district court's exercise of personal jurisdiction over the foreign defendants.

BACKGROUND

In considering this appeal, we "accept[] as true all factual claims in the complaint and draw[] all reasonable inferences in the plaintiff's favor." *Henry v. County of Nassau*, 6 F.4th 324, 328 (2d Cir. 2021) (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 740-41 (2d Cir. 2013)).

I

Platinum and palladium, members of the same element family, are versatile metals. The metals are used in "catalytic converters, laboratory equipment, electrodes, and dentistry equipment." App'x 372 (footnote omitted). Besides these industrial

applications, platinum and palladium are used in jewelry and are traded by investors. In 2013 alone, the gross demand for platinum and palladium was over 8 million and 9.6 million ounces, respectively.

Aside from the traditional physical market, the metals are also traded in futures and options markets, especially on the New York Mercantile Exchange ("NYMEX"), "the leading centralized exchange for platinum and palladium futures and options worldwide." *Id.* at 381. On the NYMEX, "futures are standardized contracts that call for the delivery of physical platinum or palladium ... on a specified date." *Id.* In contrast to transactions involving physical metal, which "are done between private parties," the NYMEX "is the counterparty to all transactions on the exchange" through "its clearinghouse, CME Clearing." *Id.* at 381. By "simultaneously buying and selling the contract," a clearinghouse "guarantees both sides of the trade and ensures that neither buyer nor seller is exposed to any counterparty credit risk." *In re Amaranth Nat. Gas Commodities Litig.*, 730 F.3d 170, 174 (2d Cir. 2013). Since 2011, the aggregate annual value of platinum and palladium futures has surpassed $100 billion and $40 billion, respectively.

The defendants include BASF Metals Ltd. ("BASF Metals"), Goldman Sachs International ("Goldman Sachs"), HSBC Bank USA, N.A. ("HSBC"), and ICBC Standard Bank PLC ("ICBC") (collectively, the "Fixing Members"). BASF Metals is a company organized under the laws of the United Kingdom with its principal place of business in London, England, that engages in "precious metals commodity dealing." App'x 363.

Goldman Sachs, HSBC, and ICBC are financial services companies and, according to the plaintiffs, each company "holds substantial market share in Physical and NYMEX Platinum and Palladium." *Id.* at 366-68. The three financial services companies each conduct proprietary trading and also execute client trades. HSBC's principal place of business is in McLean, Virginia; Goldman Sachs's and ICBC's principal places of business are in London, England.

Between 2008 and 2014, there was a formal process for establishing the market spot price for platinum and palladium called the "Fixing." *Id.* at 373. The Fixing was conducted twice daily—in an "AM Fixing" and a "PM Fixing"—with a private conference call that would set global benchmark prices for platinum and palladium. To conduct the Fixing, BASF Metals, Goldman Sachs, HSBC, and ICBC established the London Platinum and Palladium Fixing Company Ltd. ("LPPFC"). The LPPFC has its principal place of business in London, England, and "is 100% owned and controlled" by the four entities that founded it. *Id.* at 371. Its "only function is to take on and continue the promotion, administration and conduct of [the Fixing]." *Id.* (internal quotation marks omitted).

The Fixing was designed to be conducted as a Walrasian auction.[1] One of the four founding entities

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[1] In a Walrasian auction, each trader "submit[s] his demand, or even his demand schedule," to the auctioneer, who "aggregates traders' demands and supplies to find a market-clearing price." Maureen O'Hara, *Market Microstructure Theory* 4 (1995). In this way, the final price is the result of "an unseen trading game in which buyers and sellers costlessly exchange assets." *Id.*

would serve as the chair of the auction, and the chair would announce an opening price "ostensibly at or near the current spot price." App'x 374. Each of the other three founding entities would then declare itself to be a net buyer or a net seller or to have no interest. The chair would adjust the price until there was no (or nearly no) net interest in buying or selling, and the resulting price would serve as the benchmark price—or the "Fix price."

Once the chair announced the benchmark price, the orders of the auction participants could not be retracted. But the effects of the benchmark extended beyond those orders. Market participants uninvolved in the Fixing frequently incorporated the benchmark prices in contracts. When buyers and sellers entered "spot" contracts—pursuant to which the contracting parties agreed to consummate the purchase and sale of physical platinum or palladium—the "spot price" was "often tied or keyed to the relevant metal's Fixing on the day of the sale." *Id.* at 380. Because the prices of NYMEX platinum and palladium closely tracked the spot prices of those metals, the result was that "[t]he spot, Fix, and NYMEX settlement prices exhibit[ed] an almost perfect correlation." *Id.* at 387.

II

The Fixing would have been "a competitive process" if it were conducted properly. *Id.* at 352. The plaintiffs allege that it was not so conducted.

The plaintiffs-appellants in this case are Larry Hollin, White Oak Fund LP ("White Oak"), and KPFF Investment, Inc. ("KPFF"). Hollin and White Oak sold

NYMEX platinum or palladium futures contracts (collectively, the "Exchange Plaintiffs"). KPFF sold physical platinum and palladium. All of the plaintiffs-appellants reside in the United States.

According to the plaintiffs, the defendants had the opportunity and the motive to use the Fixing to manipulate the benchmark prices of platinum and palladium toward lower prices. The plaintiffs alleged collusion among the defendants in several ways. Each Fixing call "involved the direct exchange of intended or future price information among horizontal competitors." *Id.* at 448. The defendants also moved the market downward by coordinating large sell orders, which would lower the opening price for the Fixing. During the Fixing itself, the defendants affected the benchmark price by "submit[ting] aggregate 'auction' 'bids' that understated demand." *Id.* at 452. All the while, the defendants coordinated their behavior using "chat rooms, instant messages, phone calls, proprietary trading venues and platforms, and e-mails." *Id.* at 449. The motive for such collusion, the plaintiffs contend, was that the defendants "are traders of Physical and NYMEX Platinum and Palladium and ... had large short futures positions on NYMEX." *Id.* at 474.

Five complaints based on this alleged conduct—each seeking to bring claims individually and on behalf of a class—were filed between November 2014 and March 2015. On March 20, 2015, the district court consolidated the five cases. Four months and two amendments later, the plaintiffs filed a second consolidated class action complaint. This second amended complaint named BASF Metals, Goldman

Sachs, HSBC, ICBC, the LPPFC, BASF Corporation, UBS AG, and UBS Securities LLC as defendants. BASF Corporation, a "carrier, assayer, and refiner of platinum and palladium," is a sister company of BASF Metals and is registered in Delaware. *Id.* at 85-86. UBS AG and UBS Securities—a wholly owned subsidiary of UBS AG—are financial services companies involved in trading physical and NYMEX platinum and palladium.

The second amended complaint brought seven causes of action alleging (1) an agreement restraining trade in violation of the Sherman Act, 15 U.S.C. § 1, (2) five violations of the CEA, 7 U.S.C. § 1 *et seq.*, and (3) unjust enrichment. The plaintiffs alleged that the "manipulation of the Fixing by the Defendants impacted" the plaintiffs' transactions and caused the plaintiffs "to incur greater losses and/or realize lower prices than they would have realized in a free and open competitive market." *Id.* at 193. The plaintiffs also sought to certify a class of persons and entities similarly situated who engaged in certain transactions in platinum or palladium during the period from January 1, 2008, through November 30, 2014.

The defendants moved to dismiss the complaint, and the district court granted the motion in part and denied it in part. *In re Platinum & Palladium Antitrust Litig.* (*Platinum I*), No. 14-CV-9391, 2017 WL 1169626, at *2 (S.D.N.Y. Mar. 28, 2017). First, after noting that the complaint "is silent with respect to whether ... Plaintiffs had any direct sales to or purchases from Defendants," the district court dismissed the plaintiffs' claim under the Sherman Act for lack of antitrust standing. *Id.* at *20-25. Second, the district court

denied the defendants' motion to dismiss the CEA claims, granting the motion only with respect to the plaintiffs' claims "based on false reports and transactions that precede the effective date of" Commodity Futures Trading Commission ("CFTC") Rule 180.1. *Id.* at *36. Third, because the plaintiffs did not allege any direct transactions with the defendants, the district court held that "they have not adequately pleaded that Defendants were enriched at their expense" and dismissed the unjust enrichment claim. *Id.* at *38. Additionally, the district court dismissed all claims against BASF Corporation, UBS AG, and UBS Securities for failure to state how those entities were involved in the alleged misconduct. *See id.* at *51 ("UBS is not alleged to have been a member of the Fixing during the Class Period, or to have participated in the Fixing, either directly or indirectly."); *id.* at *52 ("[T]he [complaint] says nothing about BASF Corp.'s involvement—direct or indirect—in the alleged price manipulation, BASF Corp.'s role in executing the scheme, or BASF Corp.'s motive in artificially suppressing the Fix Price.").

BASF Metals, ICBC, and the LPPFC (collectively, the "Foreign Defendants") also filed a motion to dismiss the complaint for lack of personal jurisdiction, which the district court granted. *Id.* at *2. The district court held that the plaintiffs "have not made a *prima facie* showing that the Foreign Defendants have sufficient contacts with the United States as a whole." *Id.* at *44. Additionally, the district court rejected the plaintiffs' argument that it could hear the suit under a theory of conspiracy jurisdiction. *Id.* at *49. The district court

concluded its order by granting the plaintiffs leave to amend the complaint a third time. *Id.* at *53.

On May 15, 2017, the plaintiffs filed a third amended complaint that differed from the previous complaint in several respects. The complaint no longer named the LPPFC, BASF Corporation, UBS AG, and UBS Securities as defendants. It also no longer brought claims for unjust enrichment or CEA claims based on Rule 180.1 for conduct that preceded the rule's enactment.

Most important, the plaintiffs added allegations relating to antitrust standing and personal jurisdiction. As to antitrust standing, the complaint provided allegations to demonstrate "[t]he close relationship between the Fix[ing] and NYMEX futures prices," "[t]he Defendants' substantial market share in physical platinum and palladium as well as NYMEX platinum and palladium futures and options," and "Plaintiffs' ability to assess damages through discovery." App'x 350-51. As to personal jurisdiction, the complaint provided allegations "pertaining to [BASF Metals's and ICBC's] continuous presence in the U.S. and their suit-related conduct in the U.S." *Id.* at 350.

While the third amended complaint was pending, this court decided *Charles Schwab Corp. v. Bank of America Corp.* (*Schwab I*), 883 F.3d 68 (2d Cir. 2018), and *Prime International Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019). Those cases addressed, respectively, whether a conspiracy theory of jurisdiction establishes personal jurisdiction over a co-conspirator and whether the CEA has extraterritorial application. *See Schwab I*, 883 F.3d at

86-87; *Prime Int'l*, 937 F.3d at 102-04. In response to *Prime International*, the defendants sought reconsideration of the district court's denial of the motion to dismiss with respect to the CEA claims. *In re Platinum & Palladium Litig.* (*Platinum II*), 449 F. Supp. 3d 290, 302 (S.D.N.Y. 2020).

Taking the new allegations and the recent case law into account, the district court dismissed in part the third amended complaint. *Id.* at 298. The district court again concluded that the plaintiffs lacked antitrust standing, but this time the district court separately analyzed the antitrust standing of KPFF, which transacted solely in physical platinum and palladium, and the antitrust standing of the other plaintiffs, which transacted on the NYMEX. *Id.* at 303. The district court held that KPFF lacked antitrust standing because "the [complaint] does not allege that [KPFF] transacted directly with any defendant." *Id.* at 304. With respect to the plaintiffs that transacted on the NYMEX, the district court was persuaded that the "line between those who transacted directly with defendants and those who did not" had little meaning in the exchange context. *Id.* at 311. Instead, the district court adopted a "market domination" test that other district courts in this circuit have applied. *Id.* at 312. Under that test, plaintiffs must "allege that defendants dominated the relevant exchange market" to establish antitrust standing. *Id.* ("Recognizing that counterparties to exchange plaintiffs are not reasonably ascertainable, judges in this district have adopted a test that depends primarily on the extent of defendants' control of the market for the product traded on the exchange.") (internal quotation marks

omitted). Because it determined that the NYMEX plaintiffs "have not adequately pleaded that Defendants dominated the NYMEX market for platinum and palladium derivatives," the district court held that those plaintiffs lacked antitrust standing as well. *Id.* at 317.

The district court reached a different conclusion with respect to personal jurisdiction. The district court understood *Schwab I* to allow the exercise of personal jurisdiction in this case if "United-States-based co-conspirators acted in furtherance of the conspiracy." *Id.* at 323-24 (internal quotation marks omitted). Because the third amended complaint "alleges United-States based traders for affiliates of BASF Metals and [ICBC] provided non-public client order information directly to Fixing participants" in furtherance of the conspiracy, the district court held that it had personal jurisdiction over BASF Metals and ICBC. *Id.* at 325-26. The district court denied the defendants' motion to dismiss under Rule 12(b)(2).

Success on the jurisdictional issue did not mean overall success for the plaintiffs, however, because the district court granted the defendants' motion to reconsider its holding on the CEA claims. *Id.* at 332. Based on *Prime International*, the district court concluded that the plaintiffs' CEA claims "are predominantly foreign" and therefore "impermissibly extraterritorial." *Id.* at 331. The district court dismissed the CEA claims without prejudice and granted the plaintiffs leave to amend the Sherman Act and CEA claims. *Id.* at 332-33.

In sum, the district court denied BASF Metals's and ICBC's motion to dismiss for lack of personal jurisdiction, but it granted the defendants' motion to dismiss for failure to state a claim as well as the defendants' motion for reconsideration. Rather than file another amended complaint, the plaintiffs requested that the district court enter final judgment, which the district court did on April 15, 2020. Of the plaintiffs, only Hollin, White Oak, and KPFF appealed. BASF Metals and ICBC cross-appealed the district court's denial of their motion to dismiss for lack of personal jurisdiction.

DISCUSSION

"We review de novo the grant of a motion to dismiss, accept as true all factual claims in the complaint, and draw all reasonable inferences in the plaintiffs' favor." *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157 (2d Cir. 2016).

According to the plaintiffs, the district court erred (1) in holding that the plaintiffs lack antitrust standing, (2) in holding that the CEA claims were impermissibly extraterritorial, (3) in dismissing the LPPFC for lack of personal jurisdiction, and (4) in dismissing the second amended complaint as to BASF Corporation for failure to state a claim. BASF Metals and ICBC—the only cross-appellants in this case—argue that the district court erred in holding that it had personal jurisdiction to hear claims against them. We address these arguments in turn.

I

We begin with the plaintiffs' Sherman Act claims. Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States ... is declared to be illegal." 15 U.S.C. § 1. The Clayton Act provides a private cause of action for injuries "by reason of anything forbidden in the antitrust laws," *id.* § 15(a), as well as a private cause of action to seek "injunctive relief ... against threatened loss or damage by a violation of the antitrust laws," *id.* § 26. The plaintiffs claim that the defendants violated the Sherman Act when they "conspir[ed] to manipulate platinum and palladium market prices and the benchmark price" and seek treble damages and injunctive relief because the conspiracy affected "the price of Physical and NYMEX Platinum and Palladium." App'x 491-92.

The district court dismissed these claims for lack of antitrust standing. The antitrust standing requirement "originates in the Supreme Court's recognition that ... 'Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.'" *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 436-37 (2d Cir. 2005) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* (*AGC*), 459 U.S. 519, 534 (1983)). "To establish antitrust standing, a plaintiff must show (1) antitrust injury, which is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful, and (2) that he is a proper plaintiff in light of

four efficient enforcer factors." *Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC* (*Schwab II*), 22 F.4th 103, 115 (2d Cir. 2021) (internal quotation marks omitted). Whether a plaintiff is an efficient enforcer depends on:

> (1) the directness or indirectness of the asserted injury; (2) the existence of more direct victims or the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the extent to which the claim is highly speculative; and (4) the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.

In re Am. Express Anti-Steering Rules Antitrust Litig., 19 F.4th 127, 138 (2d Cir. 2021) (internal quotation marks omitted). "[T]he weight to be given the various factors will necessarily vary with the circumstances of particular cases." *Daniel*, 428 F.3d at 443.

The district court separately analyzed the antitrust standing of KPFF, which traded in the physical market for platinum and palladium, and the antitrust standing of the Exchange Plaintiffs, who traded only on the exchange market for those metals. It determined that none of the plaintiffs were efficient enforcers and that no plaintiff had antitrust standing. We agree with the district court as to KPFF but disagree as to the other plaintiffs. We hold that the Exchange Plaintiffs have antitrust standing.

A

We first consider whether KPFF has antitrust standing. KPFF alleges that it "sold physical platinum and palladium ... at artificial prices proximately caused by Defendants' unlawful manipulation." App'x 362. The district court determined that the complaint "does not allege that [KPFF] transacted directly with any defendant," *Platinum II*, 449 F. Supp. 3d at 304, and KPFF on appeal concedes that it "did not transact with a Defendant," Appellants' Br. 45. Based on the efficient-enforcer factors, we agree with the district court that KPFF lacks antitrust standing in this case.

1

The first efficient-enforcer factor—"whether the violation was a direct or remote cause of the injury"—turns on "familiar principles of proximate causation." *Am. Express*, 19 F.4th at 139. "In the context of antitrust standing, proximate cause generally follows the first-step rule." *Id.* That rule "requires some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 140 (internal quotation marks omitted); *see also Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 78 (2d Cir. 2013) ("Directness in the antitrust context means close in the chain of causation.") (quoting *IBM Corp. v. Platform Sols., Inc.*, 658 F. Supp. 2d 603, 611 (S.D.N.Y. 2009)).

"Our court has repeatedly followed the first-step rule in the antitrust context." *Am. Express*, 19 F.4th at 140. In *American Express*, we held that merchants who complained of anticompetitive conduct by American

Express Company ("Amex") but did not accept American Express cards lacked antitrust standing to sue. *Id.* at 134-35. We reasoned that, "[a]t the first step, Amex raised the price for Amex-accepting merchants," and only at a later step did Amex's competitors follow suit and raise the price for the plaintiff merchants. *Id.* at 140-41. Accordingly, the plaintiff merchants' injuries "were not proximately caused by Amex; the alleged antitrust violation was instead a 'remote' cause of the injuries." *Id.* at 141.

In *Schwab II*, we considered the London Interbank Offered Rate ("LIBOR"), a "benchmark interest rate" that "serves as an index for a variety of financial instruments, including bonds, interest rate swaps, commercial paper, and exchange-traded derivatives." *Schwab II*, 22 F.4th at 109-10. Bondholders who "held LIBOR-based bonds issued by third parties" alleged that the defendant banks had manipulated the LIBOR in violation of the antitrust laws. *Id.* at 111. We held that those bondholders were not efficient enforcers because "the decision of a third party to incorporate LIBOR as a term in a financial instrument could be made without any connection to the actions" of the defendant banks. *Id.* at 116. Additionally, that decision "in no way enriched the [defendant banks], who had no financial stake in the [third-party] transactions whatsoever." *Id.* Accordingly, "[t]he first-step rule and traditional proximate cause considerations require drawing a line between those whose injuries resulted from their direct transactions with the [defendant banks] and those whose injuries stemmed from their deals with third parties." *Id.*

We hold that KPFF has not alleged a direct injury in this case. As in *Schwab II*, the decision to incorporate or reference the benchmark price in the transactions into which KPFF entered—and by which KPFF was allegedly harmed—was an independent decision. The only transactions that were required to adopt the benchmark prices were those into which the defendants entered as part of the Fixing, and KPFF has concededly not transacted with the defendants.

We said in *Schwab II* that the "disconnect" between the plaintiffs' injury and the defendants' alleged benefit "further demonstrates the attenuated nature of the causal chain." *Id.* In other words, the allegedly harmful transactions in that case "in no way enriched" the defendants. *Id.* In this case, KPFF alleges that the conspiracy enabled the defendants, as "large participants in the market for physical platinum and palladium," to "buy platinum and palladium cheaper than they would have been able to" otherwise, App'x 466, just as the defendant banks in *Schwab II* "may have increased their profits by selling LIBOR-indexed instruments," 22 F.4th at 116. But the defendants "derived no benefit from [KPFF's] transactions with third parties," which "were entirely separate from the purpose of the alleged conspiracy and took place merely because of [the benchmark's] unlimited public availability as a reference point for innumerable transactions." *Id.* at 117.

KPFF argues that this case differs from *Schwab II* because, in this case, KPFF alleges a "lockstep" relationship between the benchmark prices and the spot prices—and provided "the kind of statistical

allegations" to prove that relationship—that was absent from the *Schwab II* plaintiffs' case. Appellants' Supp. Br. 14. In *Sanner v. Board of Trade*, the Seventh Circuit characterized the futures market and the cash market for the same commodity as exhibiting a "lockstep" relationship. 62 F.3d 918, 929 (7th Cir. 1995).[2] To prove that such a relationship is present here, KPFF provides charts to show that "[t]he spot, Fix, and NYMEX settlement prices exhibit an almost perfect correlation." App'x 387-88.

We disagree that *Schwab II* can be framed as a mere failure of proof. In *Schwab II*, the plaintiffs held "LIBOR-based bonds," which "incorporate[d] LIBOR as a term." 22 F.4th at 116. If the court were merely seeking evidence of a close relationship between LIBOR and the plaintiffs' bonds, the incorporation of the benchmark into the bonds would have sufficed. Instead, we found it significant that the plaintiffs independently decided to incorporate the LIBOR in contracts with third parties; those decisions "snap the chain of

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[2] *Sanner* involved the Chicago Board of Trade's July 11, 1989, resolution that "required all holders of gross long positions in soybean futures contracts to liquidate their positions by at least 20 percent daily until July 20, 1989." 62 F.3d at 920-21. The plaintiffs were soybean farmers who alleged that the resolution "was prompted by a conspiracy to cause a precipitous drop in soybean cash crop prices" and brought antitrust claims against the Board. *Id.* at 921. Despite the farmers being in the cash market for soybeans, as opposed to the futures market, the court held that "[s]ince one market tends to move in lockstep with the other, participants in the cash market can be injured by anticompetitive acts committed in the futures market." *Id.* at 929. The court held that the farmers had alleged a direct injury for purposes of antitrust standing.

causation linking [p]laintiffs' injury to the [b]anks' misconduct." *Id.*

Accordingly, KPFF's causal link between the benchmark prices and its own transactions—even if more fully documented than the one in *Schwab II*—does not transform its indirect injury into a direct one. As in *Schwab II*, transactions in the commodity (here, platinum and palladium) were "often tied or keyed to" the benchmark prices, but KPFF's injury was separated from the defendants' conduct by the decision to incorporate the benchmark. App'x 380.

We hold that KPFF's injury is indirect for purposes of antitrust standing.

2

The remaining efficient-enforcer factors do not establish antitrust standing for KPFF. As noted above, "the weight to be given the various factors will necessarily vary with the circumstances of particular cases." *Daniel*, 428 F.3d at 443. "Though *Associated General Contractors* outlined a comprehensive approach to the question of antitrust standing, it gives little guidance as to how to weigh the various factors, and whether the absence of a particular factor would be fatal to standing in every instance." *Sullivan v. Tagliabue*, 25 F.3d 43, 46 (1st Cir. 1994). We look to our precedents to decide how the efficient-enforcer factors must be balanced. In this case, the first and second factors are decisive.

We held in *Schwab II* that the second factor—"the existence of more direct victims of the alleged conspiracy"—"clearly weighs against antitrust standing

since there is no shortage of other parties in this very case who purchased LIBOR-indexed financial instruments directly" from the defendants. 22 F.4th at 118. In this case, the fact that there are platinum and palladium sellers who have directly transacted with the defendants "diminishes the justification for allowing a more remote party to perform the office of a private attorney general." *Am. Express*, 19 F.4th at 141 (alteration omitted) (quoting *AGC*, 459 U.S. at 542). The second factor "weighs against antitrust standing" for that reason. *Schwab II*, 22 F.4th at 118.

The fourth efficient-enforcer factor—"the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other"— favors the plaintiffs, as it did in *Schwab II*. 22 F.4th at 119. The fourth factor guards against "pass-on theories that would require a court to divide damages from the same violation among multiple plaintiffs." *Am. Express*, 19 F.4th at 143; *see also Schwab II*, 22 F.4th at 119 (describing pass-on theories as "the usual focus" of the fourth factor). We held in *Schwab II* that the fourth factor favored the plaintiffs because "the third parties who sold the bonds—and *benefited* from the suppressed rate—would clearly not be in a position to enforce the antitrust laws." 22 F.4th at 119. The same logic applies in this case. Whoever purchased palladium or platinum from KPFF benefited from the lowered price, and there is no concern that those purchasers would sue the defendants or cause any complex problems of apportionment. Thus, we "view this fourth factor as favoring" KPFF. *Id.*

This case differs from *Schwab II* with respect to the third efficient-enforcer factor—"whether the alleged damages are highly speculative." *Id.* (internal quotation marks omitted). The third factor evaluates whether the plaintiff can produce "a just and reasonable estimate of damages." *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 779 (2d Cir. 2016) (internal quotation marks omitted) (quoting *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1378 (2d Cir. 1988)). "[H]ighly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement." *Id.* In *Schwab II*, we held that this factor cut against antitrust standing because calculating damages "would require the court to speculate about how the third-party sellers would have factored a non-suppressed LIBOR into the transaction." 22 F.4th at 119. To estimate the damages, the plaintiffs "would essentially have to create an alternative universe" beyond modeling "basic lost sales and lost profits." *Id.* (internal quotation marks and alterations omitted). At the same time, we gave this factor "only limited weight" because the damages calculation would be "more straightforward" for the plaintiffs who purchased bonds prior to the LIBOR being suppressed and because "[t]he Supreme Court has warned that antitrust standing should not provide a 'get-out-of-court-free card' to be played 'any time that a damages calculation might be complicated.'" *Id.* (quoting *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1524 (2019)).

The third factor favors KPFF in this case. Unlike in *Schwab II*, the benchmark prices for platinum and palladium are derived from the same kind of

transactions that incorporated the benchmark prices. Damages were speculative in *Schwab II* because the LIBOR aimed to describe the rate at which certain banks could borrow money but it was incorporated into the terms of unrelated bonds. That disjunction meant that the plaintiffs would have needed to account for such possibilities as whether "the price of the bond itself may have been correspondingly lowered to account for a suppressed LIBOR." *Id.* In this case, the benchmark price describes the price at which the defendants buy metal, and KPFF alleges that the benchmark price was used in its transactions to sell the same type of metal. KPFF has provided data to show that the prices at which it sold the metal and the benchmark prices were all but identical. Thus, even though the "damages calculation might be complicated," *Apple*, 139 S. Ct. at 1524, the damages are not so speculative as to weigh against antitrust standing in this case.

Even so, we ultimately conclude that KPFF cannot pursue its antitrust claims. "The four efficient-enforcer factors need not be given equal weight," and the fact that KPFF's injury "may have been foreseeable, predictable, and even calculable" is not by itself sufficient to confer antitrust standing. *Am. Express*, 19 F.4th at 142. In *American Express*, we determined that only the first two efficient-enforcer factors weighed against standing. *Id.* at 143. We nevertheless held that because "[t]he key principle underlying [the efficient enforcer test] is proximate cause" and the plaintiffs "fail[ed] to show the required direct connection between the harm and the alleged antitrust violation," the plaintiffs lacked antitrust standing. *Id.* In the same

way, the absence of a direct connection between the harm and the violation and the existence of more direct victims are decisive here. We affirm the district court's dismissal of KPFF's antitrust claims.

B

We next consider whether the Exchange Plaintiffs have alleged antitrust standing. The Exchange Plaintiffs did not participate in the physical platinum and palladium market; instead, the Exchange Plaintiffs allegedly sold "NYMEX platinum and palladium futures contracts at artificial prices proximately caused by Defendants' unlawful manipulation." App'x 361. The district court held that these plaintiffs also lacked antitrust standing.

We disagree. The antitrust standing question depends on "the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff." *Am. Express*, 19 F.4th at 143 (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1058 (9th Cir. 1999)). "We employ the efficient-enforcer test to evaluate the relevant relationship." *Id.* After considering the four factors, we hold that the Exchange Plaintiffs are efficient enforcers of the antitrust laws.

1

Unlike KPFF, the Exchange Plaintiffs suffered a direct injury. The complaint alleges that the defendants were "large participants in NYMEX futures and options" and "profited from their manipulation" of the futures market. App'x 466. The Exchange Plaintiffs argue that the defendants "exploited their foreknowledge of downward swings in the [benchmark

price] to make advantageous trades in ... [the] NYMEX markets." Appellants' Br. 10. Apart from the Fixing itself, the Exchange Plaintiffs allege that the defendants engaged in collusive trading to move the NYMEX market downward. According to the Exchange Plaintiffs, the defendants "profited from their manipulation ... at the expense of" the Exchange Plaintiffs. App'x 466. In other words, the defendants manipulated the futures market to profit from futures contracts transactions, while the Exchange Plaintiffs simultaneously lost money through futures contracts transactions in the same market. The Exchange Plaintiffs were harmed at the first step.

The defendants argue that the plaintiffs' injury cannot be direct because, as the complaint notes, "NYMEX—through its clearinghouse, CME Clearing—is the counterparty to *all* transactions on the exchange." *Id.* at 381. Thus, although the Exchange Plaintiffs and the defendants all traded in the same market, each traded directly only with CME Clearing. According to the defendants, "[t]he reasoning in *Schwab II* applies with full force to the Exchange Plaintiffs" because the Exchange Plaintiffs "did not transact with any defendant." Appellees' Supp. Br. 7 n.2.

We disagree. "Futures trading is a zero-sum game" because "every contract has a long and a short" and "every gain can be matched with a corresponding loss." *Leist v. Simplot*, 638 F.2d 283, 286-87 (2d Cir. 1980). Although CME Clearing is, formally, the counterparty to every transaction, it serves only as a conduit: "CME Clearing matches buyers and sellers." App'x 382; *see*

also Amaranth Nat. Gas, 730 F.3d at 174 ("All trades on NYMEX must go *through* the exchange's clearinghouse.") (emphasis added). We would have no difficulty identifying a direct injury if the defendants had selected another NYMEX participant with which to execute a futures contract, even if a clearinghouse facilitated the transaction. To argue, as the defendants do, that interposing a clearinghouse immunizes misconduct on an exchange market from antitrust liability is to exalt form over substance.[3]

The district court viewed the effect of the clearinghouse differently than the defendants. Because of the clearinghouse, the district court concluded that "the Exchange Plaintiffs' counterparties are not reasonably ascertainable" and instead used market dominance as a proxy for directness of injury. *Platinum II*, 449 F. Supp. 3d at 311. According to the district court, "in a market in which defendants dominate, it is far more likely that a plaintiff who bought on an exchange will have transacted directly

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[3] We note that this case differs from *Laydon v. Coöperatieve Rabobank U.A.*, in which we held that a plaintiff who traded Euroyen TIBOR futures on an exchange lacked antitrust standing. 55 F.4th 86, 98-99 (2d Cir. 2022). In that case, a plaintiff alleged that defendant banks made fraudulent submissions to the British Bankers' Association, a body that set the Yen-LIBOR benchmark rate, which in turn affected a second benchmark rate that was set by the Japanese Bankers Association, causing losses to traders in futures that referenced the second benchmark rate. We said that the plaintiff failed to allege proximate causation because of the "series of causal steps that separate [the d]efendants' conduct and [the plaintiff's] purported injury." *Id.* at 98. In this case, the defendants transacted on the same exchange as the Exchange Plaintiffs and we do not have the same attenuated causal chain.

with a defendant." *Id.* at 312. Additionally, "concern[s] about damages disproportionate to wrongdoing" would "appl[y] much less forcefully" when the defendants dominate the market; "where defendants had over 90% market share, they would also be responsible for over 90% of the damages." *Id.* In adopting this test, the district court followed other district courts in this circuit. *See, e.g.*, *In re London Silver Fixing, Ltd., Antitrust Litig.*, 332 F. Supp. 3d 885, 909 (S.D.N.Y. 2018); *Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 561-62 (S.D.N.Y. 2017).

Although the defendants' market share may inform the amount of damages the Exchange Plaintiffs can seek, we disagree that it can render the Exchange Plaintiffs' injury indirect. "The first-step rule requires some direct relation between the injury asserted and the injurious conduct alleged." *Am. Express*, 19 F.4th at 139-40. Market dominance does not determine whether such a relation exists. The defendants allegedly sought to profit from concurrently manipulating the Fixing and entering the futures market. That profit came at the expense of the other futures market participants. The members of that group are—as the defendants contend—interchangeable, and that group includes the Exchange Plaintiffs. That the defendants' profits cannot be traced to a subgroup of those market participants is not a reason to conclude that none of those participants suffered a direct injury. To hold otherwise would be to hold that anticompetitive behavior on an exchange can directly injure no one.

We conclude that the Exchange Plaintiffs have adequately alleged a direct injury.

2

We hold that the remaining efficient-enforcer factors favor antitrust standing for the Exchange Plaintiffs as well.

First, there are no more direct victims than the Exchange Plaintiffs. Because all participants in the NYMEX transact through the clearinghouse, there is no injured party closer to the defendants' alleged anticompetitive activity than the Exchange Plaintiffs. If the Exchange Plaintiffs do not have antitrust standing, the defendants' alleged conspiracy to manipulate the exchange market would go "undetected or unremedied." *Am. Express*, 19 F.4th at 141 (quoting *AGC*, 459 U.S. at 542).

The defendants contend that the existence of sellers who sold physical platinum and palladium to the defendants means that those sellers are more direct victims. According to the defendants, "[t]he question is whether there are 'more direct victims *of the alleged conspiracy*,' not among a particular subset of those allegedly affected." Appellees' Supp. Reply Br. 4 (quoting *Schwab II*, 22 F.4th at 118). Because the conspiracy sought to affect the physical platinum and palladium market in addition to the futures market, the defendants argue, the second factor must take the victims in that market into account as well.

The defendants' argument rests on false premises. The assertion that the direct victims in the physical market are better situated to sue is based on the defendants' argument that the Exchange Plaintiffs are indirect victims. But because we hold that the

Exchange Plaintiffs are direct victims, even if we were to include the victims in the physical market in our analysis, there is no reason to think that those victims are *more* direct than the Exchange Plaintiffs. Nor does it make sense for victims in one market to disqualify victims in a different market from bringing suit.[4]

In *In re Aluminum Warehousing Antitrust Litigation*, we held that purchasers in the physical aluminum market who had alleged a conspiracy by traders in the aluminum futures market had not suffered an antitrust injury. 833 F.3d at 161-62. We reached that conclusion by treating the physical market as separate from the futures market; because typically "only those that are participants in the defendants' market can be said to have suffered antitrust injury," we dismissed the plaintiffs' claims without reaching the efficient-enforcer analysis. *Id.* at 158. In this case, the physical market victims cannot allege the same type of injury that the Exchange Plaintiffs suffered. It is hard to see how the "self-interest" of those victims can render the Exchange Plaintiffs' suit—alleging injuries in a different and larger market—superfluous. *Am. Express*, 19 F.4th at 141.

Second, we do not think that calculating damages would be so "highly speculative" that the Exchange Plaintiffs should be denied antitrust standing. *AGC*,

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[4] In *Laydon*, we concluded that the plaintiff was not a direct victim of the alleged conspiracy and for that reason looked for participants in other markets who might be more direct victims. *Laydon*, 55 F.4th at 99.

459 U.S. at 542. "A damages calculation for a market manipulation scheme, though it may require expert testimony, is hardly beyond the ken of the federal courts." *Sanner*, 62 F.3d at 930. "[S]ome degree of uncertainty stems from the nature of antitrust law," *Gelboim*, 823 F.3d at 779, but we generally require "that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," *id.* (quoting *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 689 (2d Cir. 2009)).

Third, there is no risk of "duplicate recoveries" or "complex apportionment of damages." *AGC*, 459 U.S. at 544. There was no intermediary between the Exchange Plaintiffs and the defendants who could sue for the defendants' anticompetitive conduct in the exchange markets. Accordingly, recognizing antitrust standing in this case would not "require a court to divide damages from the same violation among multiple plaintiffs." *Am. Express*, 19 F.4th at 143.

We hold that the Exchange Plaintiffs have antitrust standing to proceed on their claims under the Clayton Act.[5]

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[5] KPFF and the Exchange Plaintiffs also seek injunctive relief under § 16 of the Clayton Act. Because standing to sue for injunctive relief "raises no threat of multiple lawsuits or duplicative recoveries," the third and fourth efficient enforcer factors "are not relevant" to standing to pursue such relief. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 n.6 (1986). Based on the remaining factors, our disposition of KPFF's and the Exchange Plaintiffs' respective claims for injunctive relief is the same as each party's claim for damages. The Exchange Plaintiffs have antitrust standing, and KPFF does not. However, we note that it is unclear what injunctive relief would be available to the

II

We now consider the district court's dismissal of the plaintiffs' CEA claims. The third amended complaint alleges that the defendants manipulated the prices of platinum and palladium in violation of the CEA, including CFTC Rule 180.2. In connection with that claim, the plaintiffs also allege that the defendants are liable under principal-agent and aiding-and-abetting theories for violations of the CEA. The district court dismissed the plaintiffs' CEA claims as impermissibly extraterritorial. *Platinum II*, 449 F. Supp. 3d at 327-28. We disagree, and we vacate the district court's dismissal of those claims.

"The CEA is a remedial statute that serves the crucial purpose of protecting the innocent individual investor—who may know little about the intricacies and complexities of the commodities market—from being misled or deceived." *Loginovskaya v. Batratchenko*, 764 F.3d 266, 270 (2d Cir. 2014) (internal quotation marks omitted). Sections 6 and 9 of the CEA proscribe fraud in commodities markets. 7 U.S.C. § 9(1) ("It shall be unlawful for any person ... to use or employ ... in connection with any swap, or a contract of sale of any commodity in interstate commerce ... any manipulative or deceptive device or contrivance."); *id.* § 13(a)(2) ("It shall be a felony ... for ... [a]ny person to manipulate or attempt to manipulate

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plaintiffs, given that the alleged misconduct occurred in the past. The district court may consider on remand whether to dismiss the Exchange Plaintiffs' request for injunctive relief for failure to state a claim.

the price of any commodity in interstate commerce.").[6] Private parties have a cause of action to sue for violations of the CEA under section 22 of the Act, which provides that "[a]ny person ... who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages." 7 U.S.C. § 25(a)(1).

In *Prime International*, this court held that sections 6, 9, and 22 do not apply extraterritorially. 937 F.3d at 102-03. Accordingly, stating a proper claim under section 22 has two requirements. First, because "the focus of congressional concern in Section 22 is clearly transactional, ... the suit must be based on transactions occurring in the territory of the United States." *Id.* at 104 (internal quotation marks omitted). In other words, "[t]he 'domestic transaction test' essentially 'decides the territorial reach of Section 22.'" *Id.* (alteration omitted) (quoting *Loginovskaya*, 764 F.3d at 272). Second, because section 22 "creates no freestanding, substantive legal obligations," the plaintiff must allege "domestic—not extraterritorial—*conduct* by Defendants that is violative of a substantive provision of the CEA, such as [7 U.S.C. § 9(1)] or [§ 13(a)(2)]." *Id.* at 105.[7]

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[6] *See also* 17 C.F.R. § 180.2 ("It shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.").

[7] This two-part test comes from *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, in which this court held that "a domestic transaction is necessary but not necessarily sufficient to

Under that analysis, the plaintiffs in this case have alleged a domestic application of section 22. We have explained, in the context of the Securities Exchange Act, that "there are two ways to allege a 'domestic transaction'": a plaintiff may allege either "that title ... was transferred within the United States" or "that the purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security." *Loginovskaya*, 764 F.3d at 273-74 (quoting *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 68 (2d Cir. 2012)). The same test applies to CEA claims. *Id.* at 274. Here, the plaintiffs have alleged domestic transactions in both ways. First, the Exchange Plaintiffs allege that they

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make [Securities Exchange Act § 10(b)] applicable." 763 F.3d 198, 216 (2d Cir. 2014); *see Prime Int'l*, 937 F.3d at 105 (holding that "*Parkcentral*'s rule carries over to the CEA"). Some courts have criticized the conduct requirement as "inconsistent with *Morrison*." *SEC v. Morrone*, 997 F.3d 52, 60 (1st Cir. 2021); *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 950 (9th Cir. 2018). In *Morrison v. National Australia Bank Ltd.*, the Supreme Court held that § 10(b) does not apply extraterritorially because the statute covers "only transactions in securities listed on domestic exchanges, and domestic transactions in other securities." 561 U.S. 247, 265-67 (2010). The Supreme Court described its "transactional test" as a "clear test" that asks "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 269-70. *Parkcentral* held that, despite the presence of a domestic transaction, § 10(b) did not apply because "the claims in this case are so predominantly foreign as to be impermissibly extraterritorial." 763 F.3d at 216. The court recognized that it was not straightforwardly applying *Morrison* and cautioned that the conduct requirement could not be "perfunctorily applied to other cases based on the perceived similarity of a few facts." *Id.* at 217.

sold NYMEX platinum and palladium futures contracts. Such sales on a domestic futures exchange are domestic transactions. *See Morrison*, 561 U.S. at 269-70 (noting that the "transactional test" asks whether the purchase or sale "is made in the United States, or involves a security listed on a domestic exchange"); *see also Loginovskaya*, 764 F.3d at 273-74 (applying this test in the context of the CEA). Second, KPFF, with a principal place of business in California, alleges selling physical platinum and palladium, thereby incurring liability to deliver those commodities. The plaintiffs have adequately alleged that domestic transactions took place.

The plaintiffs also allege domestic conduct by the defendants that violated the CEA. To succeed at this step, the conduct must not "be so predominantly foreign as to render the claims impermissibly extraterritorial." *Prime Int'l*, 937 F.3d at 107 (internal quotation marks omitted). On this basis, in *Prime International* we dismissed the CEA claims brought by plaintiffs who traded in Brent crude futures on the NYMEX and who alleged manipulation of the benchmark for Brent crude. We dismissed those claims because the benchmark—which "reflect[ed], in part, the value of Brent crude physically traded in Northern Europe"—was "foreign." *Id.* at 106. Moreover, "[t]he alleged misconduct ... was also entirely foreign"; there was no allegation that "any manipulative oil trading occurred in the United States." *Id.* Instead, the plaintiffs alleged only that the defendants—"a diverse group of entities involved in various aspects of the production of Brent crude"—"execut[ed] fraudulent bids, offers, and transactions in the underlying physical

Brent crude market." *Id.* at 98, 100. Because "[n]early every link in Plaintiffs' chain of wrongdoing is entirely foreign," we held that the facts in *Prime International* were predominantly foreign. *Id.* at 107.

This case is different. In *Prime International* we considered both the benchmark and the misconduct by which the benchmark was manipulated to be "entirely foreign." *Id.* at 106. In this case, however, the benchmark prices are based on the trading activity of BASF, Goldman Sachs, HSBC, and ICBC, each of which conducts precious metals trading in the United States. Furthermore, the alleged misconduct of manipulating the benchmark prices involved both foreign and domestic activity. According to the complaint, the defendants "colluded to manipulate the price at which the chair opened the Fixing on a given day by placing 'spoof orders,' engaging in 'wash sales,' as well as collusively sharing and acting on non-public information regarding client orders (including stop-loss orders) shortly before and during the AM and PM Fixing." App'x 485. "[B]y moving Physical and NYMEX Platinum and Palladium prices in advance of and even during the Fixing," the plaintiffs allege, the defendants "alter[ed] the starting price" for the Fixing and "g[ave] cover to an auction-rate that would otherwise have stood out." *Id.* at 355. The alleged "constant communication" between the defendants' domestically based "precious metals traders" and "the participant[s] in the Fixing" shows that much of the alleged manipulation was domestic. *Id.* at 365, 368, 376.

The district court erred in discounting the defendants' domestic activity in furtherance of

manipulating the Fixing. The district court discounted the plaintiffs' claim that the defendants traded in the physical and NYMEX markets to influence the Fixing because it "reject[ed] it as implausible." *Platinum II*, 449 F. Supp. 3d at 332. According to the district court, "[t]he suggestion that Defendants ... traded to further depress the price of platinum and palladium when they had—according to Plaintiffs' allegations—a tailor-made opportunity to manipulate that price via the Fixing does not make sense and is inconsistent with the allegations in the [third amended complaint]." *Id.* But the plaintiffs did not allege that the defendants traded to depress the market in a scheme independent of the Fixing; the plaintiffs' theory is that "[t]hese schemes were undertaken *for the purpose of manipulating the benchmark price*." App'x 485 (emphasis added). The defendants' collusive trading allegedly affected the operation of the Fixing by "altering the starting price" and "inducing clients to change their directions to the Defendants." *Id.* at 355. The collusive trading also served the purpose of "giving cover" to the defendants' manipulation of the Fixing. *Id.*

Because the district court dismissed the plaintiffs' claims as impermissibly extraterritorial, it did not consider the defendants' additional arguments that the plaintiffs failed to plead the required elements of a CEA claim. We hold only that the plaintiffs have alleged sufficient domestic activity to invoke the CEA's private remedy. Accordingly, we vacate the district court's dismissal of the plaintiffs' CEA claims.

III

We turn to the issue of personal jurisdiction. In *Platinum I*, the district court held that it lacked personal jurisdiction over the Foreign Defendants: BASF Metals, ICBC, and the LPPFC. *Platinum I*, 2017 WL 1169626, at *44. In *Platinum II*, it held that BASF Metals and ICBC were subject to conspiracy jurisdiction in light of *Schwab I*. 449 F. Supp. 3d at 323. Because the plaintiffs did not replead their claims against the LPPFC in the third amended complaint, the district court did not revisit its earlier dismissal of the LPPFC in *Platinum II*. *Id.* at 300 n.4.

BASF Metals and ICBC argue that the district court erred in *Platinum II* when it concluded that it had personal jurisdiction over BASF Metals and ICBC. The plaintiffs argue that the LPPFC is the alter ego of the Fixing Members and that the district court therefore has personal jurisdiction over the LPPFC. We affirm the district court's judgment as to personal jurisdiction over the Foreign Defendants.

A

We start with the district court's most recent holding on personal jurisdiction—that it had personal jurisdiction over BASF Metals and ICBC. *Platinum II*, 449 F. Supp. 3d at 327. BASF Metals and ICBC argue that the district court's application of conspiracy jurisdiction was inconsistent with the Due Process Clause of the Fifth Amendment. In the context of personal jurisdiction, "due process demands that each defendant over whom a court exercises jurisdiction have some 'minimum contacts with the forum such that

the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Schwab II*, 22 F.4th at 121 (alteration omitted) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). This inquiry usually proceeds in two steps—an analysis of whether each defendant has "minimum contacts" with the forum state, and an analysis of whether exercising jurisdiction would "comport with fair play and substantial justice." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 170 (2d Cir. 2013). We address each step, and we affirm.

1

We begin with minimum contacts. There are two types of personal jurisdiction: specific jurisdiction and general jurisdiction. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1779-80 (2017). Specific jurisdiction exists when a court "exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contact with the forum," and general jurisdiction "is based on the defendant's general business contacts with the forum state and permits a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts." *SPV OSUS, Ltd. v. UBS AG*, 882 F.3d 333, 343 (2d Cir. 2018) (quoting *Met. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996)). When specific jurisdiction is asserted, "minimum contacts necessary to support such jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." *Licci*, 732 F.3d at 170 (alteration omitted) (quoting *Bank Brussels*

Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 127 (2d Cir. 2002)).

In this case, the district court employed a conspiracy theory of specific jurisdiction. So-called conspiracy jurisdiction "is based on the time-honored notion that the acts of a conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy." *Textor v. Bd. of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1392 (7th Cir. 1983) (internal quotation marks and alteration omitted). Under that theory, "one conspirator's minimum contacts allow for personal jurisdiction over a co-conspirator," even when the co-conspirator lacks such contacts itself. *Schwab I*, 883 F.3d at 86.[8] In *Schwab I*, this court laid out three requirements for imputing the minimum contacts of one co-conspirator to another: "the plaintiff must allege that (1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the

[8] "The essence of [the conspiracy theory of personal jurisdiction] is its reliance on the conspiracy as an independent source of jurisdiction over a nonresident defendant, irrespective of his own contacts with the forum. ... Once the court finds a conspiracy, it simply asserts its power over all defendants shown to be coconspirators." Stuart M. Riback, Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 Colum. L. Rev. 506, 507 (1984) (footnote omitted); *see also* Alex Carver, Note, *Rethinking Conspiracy Jurisdiction in Light of Stream of Commerce and Effects-Based Jurisdictional Principles*, 71 Vand. L. Rev. 1333, 1337 (2018) ("Conspiracy jurisdiction is an application of specific jurisdiction: courts attribute the purposefully established, conspiracy-related forum contacts of one conspirator to a second conspirator who lacks such contacts.").

conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state." 883 F.3d at 87.

In *Schwab II*, this court held that a complaint alleged personal jurisdiction under a conspiracy theory over the defendants' objection that the third *Schwab I* factor was not met. 22 F.4th at 122. In that case, the plaintiffs alleged that the defendant banks had executives and managers in the United States who would direct subordinates to manipulate the LIBOR. *Id.* at 123. The directions took the forms of "a standing directive to submit low LIBOR contributions" and "emails between a senior [bank] executive in New York ... asking the [bank's LIBOR submitter] to err on the low side when setting LIBOR." *Id.* (internal quotation marks and alteration omitted). We held that "these communications would establish overt acts taken by co-conspirator Banks in the United States in furtherance of the suppression conspiracy, vesting the district court with personal jurisdiction over each Defendant"—including those defendants who did not engage in such overt acts. *Id.*

Our decision in *Schwab II* requires the conclusion that there are minimum contacts to establish conspiracy jurisdiction in this case. The plaintiffs have adequately alleged that a conspiracy existed to manipulate the platinum and palladium benchmark prices. "At the pleading stage, a complaint claiming conspiracy, to be plausible, must plead enough factual matter (taken as true) to suggest that an agreement was made." *Gelboim*, 823 F.3d at 781 (internal quotation marks omitted). We have said that

allegations that "evince a common motive to conspire" combined with "a high number of interfirm communications" are adequate to plead a conspiracy. *Id.* at 781-82. Here, the plaintiffs allege that the defendants were "net short" in their platinum and palladium positions and that the defendants "could and *did* cash in on the foreknowledge that the Fix price, and thus the prices of platinum and palladium generally, was going to go down on a given day, at a given time." App'x 460, 357.

The plaintiffs allege not only a common motive but also numerous interfirm communications. According to the complaint, via the Fixing the defendants "met twice daily on ... private phone call[s]" that "involved the direct exchange of intended or future price information among horizontal competitors." *Id.* at 448. Interfirm communications included "the sharing of client orders and imminent orders" as well as "chat rooms, instant messages, phone calls, proprietary trading venues and platforms, and e-mails to coordinate among themselves ... to ensure ... that attempts to move the market in one way or the other were not undone (unwittingly or not) by the contrary efforts of other members or other large banks." *Id.* at 448-49.

Because the plaintiffs allege that BASF Metals and ICBC participated in a conspiracy, we have personal jurisdiction over those parties at this stage if "a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state." *Schwab I*, 883 F.3d at 87. That is not a difficult requirement to meet: "[a]n overt act is any act

performed by any conspirator for the purpose of accomplishing the objectives of the conspiracy." *United States v. Lange*, 834 F.3d 58, 70 (2d Cir. 2016) (quoting *United States v. Tzolov*, 642 F.3d 314, 320 (2d Cir. 2011)). The complaint alleges that precious metals traders—based in the United States and employed by co-conspirators of BASF and ICBC—"would update order information during the Fixing and provide this updated order information to" BASF's and ICBC's "participant[s] in the Fixing as the Fixing was conducted." App'x 365, 368. According to the complaint, such communications were necessary to "coordinate" members of the conspiracy so that the conspiracy's "attempts to move the market in one way or the other were not undone" by individual orders. *Id.* at 449. The alleged sharing of "client orders and imminent orders" also enabled manipulation of the benchmark prices because it provided the defendants "access to nonpublic, real-time information about changes in the price of platinum and palladium" and "future price information among horizontal competitors." *Id.* at 448. Because these communications occurred in the United States, the complaint in this case satisfies *Schwab I*'s third prong and our requirements for minimum contacts under conspiracy jurisdiction.

BASF Metals and ICBC argue that they "could not have reasonably anticipated being haled into court in the United States as a result of participating with other London-based parties in London-based activity that concerned London- and Zurich-based materials." Cross-Appellants' Supp. Br. 20 (internal quotation marks and alteration omitted). Perhaps not. The allegations in the complaint might not establish that

BASF Metals or ICBC themselves had minimum contacts with the forum state. But we have already held in *Schwab I* that "a *co-conspirator's* minimum contacts ... in furtherance of the conspiracy" fulfills the requirement that the "defendant must have purposefully availed itself of the privilege of doing business in the forum." 883 F.3d at 85-87 (emphasis added) (internal quotation marks omitted). Such purposeful availment is the sort of "conduct and connection with the forum State" that should lead a defendant to "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

BASF Metals and ICBC take issue with the theory of conspiracy jurisdiction itself, criticizing it as "hing[ing] entirely on the proposition that a court may legitimately impute the in-forum contacts of a *third party* to a defendant who resides outside of the forum." BASF Metals's Br. 41. Conspiracy jurisdiction, these parties assert, is "extraordinarily broad" because "it ... permit[s] the exercise of personal jurisdiction over a defendant based on the actions of a co-conspirator who is entirely unknown to that defendant." *Id.* at 46 (internal quotation marks and alteration omitted). For these reasons, BASF Metals and ICBC argue that "'conspiracy jurisdiction' violates the Due Process Clause and Supreme Court precedent interpreting it." *Id.* at 40.

There may be grounds for those objections. Conspiracy jurisdiction seems to have expanded beyond its more limited roots. "[E]arly cases upheld jurisdiction over nonresident conspirators based on the

in-state acts of their coconspirators, but the courts generally did so on the theory that the in-state coconspirators acted as agents of the nonresident defendants." Carver, *supra* note 8, at 1340. In fact, *Schwab II* referenced agency principles in explaining conspiracy jurisdiction. 22 F.4th at 122 ("Much like an agent who operates on behalf of, and for the benefit of, its principal, a co-conspirator who undertakes action in furtherance of the conspiracy essentially operates on behalf of, and for the benefit of, each member of the conspiracy."). But the argument that our exercise of conspiracy jurisdiction should be limited by agency principles is no longer available. We have observed that "some control is necessary to establish agency for jurisdictional purposes," *CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 366 (2d Cir. 1986) (construing New York's long-arm statute), but we have squarely rejected that limitation on conspiracy jurisdiction, *Schwab II*, 22 F.4th at 125 (concluding that "our caselaw does not require a relationship of control, direction, or supervision" to establish conspiracy jurisdiction).

In doing so, we followed the suggestion that, because "for most purposes the acts of one conspirator within the scope of the conspiracy are attributed to the others," there is no reason "personal jurisdiction should be an exception." *Stauffacher v. Bennett*, 969 F.2d 455, 459 (7th Cir. 1992) (Posner, J.). BASF Metals and ICBC argue that the minimum contacts inquiry must be more "defendant-focused" than the rules of conspiracy liability. BASF Metals's Br. 41 (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)). Other critics of conspiracy jurisdiction have similarly argued

that the "purposes of the law of civil conspiracy and the law of in personam jurisdiction" are "opposed." Riback, *supra* note 8, at 530. On the one hand, "[a] conspiracy claim serves merely to expand liability for the underlying wrong to persons who are not directly involved in the wrongful actions," 15A C.J.S. *Conspiracy* § 18 (2022), and is "a mechanism to aid the plaintiff," Riback, *supra* note 8, at 530. The due process limitations on in personam jurisdiction, on the other hand, are meant to "give[] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. In other words, "[w]hile a solicitude for the plaintiff's interests is central to the determination of conspiratorial liability, it is not so in the determination of jurisdiction, in which the defendant is the primary concern." Riback, *supra* note 8, at 530. Under this line of argument, the rules of conspiratorial liability should not govern a court's personal jurisdiction over a conspirator.[9]

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[9] *See* Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234, 241 (1983) (criticizing courts for "fail[ing] to differentiate between the standards governing liability and those governing jurisdiction"); Riback, *supra* note 8, at 510 ("It is elementary that the fact of liability does not confer jurisdiction, yet by endowing a conspiracy with an independent jurisdictional significance, the conspiracy theory does just that.") (footnote omitted).

While we acknowledge the debate over this question,[10] our court has already taken a position—and we are bound to follow our previous decision. *Glob. Reinsurance Corp. of Am. v. Century Indem. Co.*, 22 F.4th 83, 100-01 (2d Cir. 2021) ("[A] decision of a panel of this Court is binding unless and until it is overruled by the Court *en banc* or by the Supreme Court.") (quoting *United States v. Hightower*, 950 F.3d 33, 36 (2d Cir. 2020)). Because this court held that minimum contacts were present in *Schwab II*, it follows that such contacts are present for BASF Metals and ICBC in this case.

2

"If a defendant has sufficient minimum contacts," we "must also determine whether the exercise of personal jurisdiction is reasonable under the Due Process Clause." *MacDermid, Inc. v. Deiter*, 702 F.3d 725, 730 (2d Cir. 2012). BASF Metals and ICBC argue that, even if minimum contacts are present in this case, "any exercise of specific jurisdiction ... would be

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[10] *See, e.g.*, *Smith v. Jefferson Cnty. Bd. of Educ.*, 378 F. App'x 582, 586 (7th Cir. 2010) (describing conspiracy jurisdiction as "a theory that is ... marginal at best"); *Chirila v. Conforte*, 47 F. App'x 838, 842 (9th Cir. 2002) ("There is a great deal of doubt surrounding the legitimacy of this conspiracy theory of personal jurisdiction."); *Schwartz v. Frankenhoff,* 733 A.2d 74, 80 (Vt. 1999) (observing that the U.S. Supreme Court's "decisions strongly suggest" that "conspiracy participation is not enough" to "meet due process requirements for personal jurisdiction"); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) (declining "to recognize the assertion of personal jurisdiction over a nonresident defendant based solely upon the effects or consequences of an alleged conspiracy with a resident in the forum state").

unreasonable." BASF Metals's Br. 55. We disagree. The reasonableness inquiry depends on five factors:

> (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.

Met. Life, 84 F.3d at 568. "Where a plaintiff makes the threshold showing of the minimum contacts required for the first test, a defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Bank Brussels Lambert*, 305 F.3d at 129 (internal quotation marks omitted). "The import of the 'reasonableness' inquiry varies inversely with the strength of the 'minimum contacts' showing—a strong (or weak) showing by the plaintiff on 'minimum contacts' reduces (or increases) the weight given to 'reasonableness.'" *Id.*

BASF Metals and ICBC have not met the burden of showing unreasonableness. According to BASF Metals and ICBC, the burden of being haled into court in the United States is "severe." BASF Metals's Br. 57 (quoting *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 114 (1987)). But we have previously held with respect to a Puerto Rican defendant sued in New York that this factor provides "only weak support" because "the conveniences of modern communication

and transportation ease what would have been a serious burden only a few decades ago." *Bank Brussels Lambert*, 305 F.3d at 129-30. Neither do BASF Metals and ICBC make the necessary showing on the second or third factors given New York's interest in adjudicating a claim concerning manipulation on the NYMEX and the fact that the plaintiffs reside in the United States.

BASF Metals and ICBC argue that the remaining factors—which those parties characterize as "considerations of international rapport," BASF Metals's Br. 58 (alteration omitted) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 142 (2014))—weigh against exercising personal jurisdiction in this case. The Supreme Court has explained that, in the context of an "assertion of jurisdiction over an alien defendant," the fourth and fifth reasonableness factors "call[] for a court to consider the procedural and substantive policies of other *nations* whose interests are affected" by the exercise of personal jurisdiction. *Asahi*, 480 U.S. at 115. According to BASF Metals and ICBC, "[i]t is insulting to the sovereignty of foreign nations to subject their residents to personal jurisdiction in the United States" based on a conspiracy jurisdiction theory. BASF Metals's Br. 59.

BASF Metals and ICBC overestimate the weight of "international rapport" in this context. That language comes from the Supreme Court's decision in *Daimler*, which rejected the Ninth Circuit's attempt to "subject[] Daimler to the general jurisdiction of courts in California." 571 U.S. at 142. Given the scope of general jurisdiction, it is unsurprising that "international

rapport" would be harmed by "some domestic courts' expansive views of general jurisdiction." *Id.* at 142. The international rapport concerns of *Daimler* do not apply equally in a case, such as this one, that involves specific jurisdiction.

This case is not "the 'exceptional situation' where exercise of jurisdiction is unreasonable even though minimum contacts are present." *Bank Brussels Lambert*, 305 F.3d at 130. We affirm the district court's assertion of personal jurisdiction over BASF Metals and ICBC.

B

We next turn to the district court's dismissal of the LPPFC as a defendant. The plaintiffs expressly decline to challenge the district court's holding in *Platinum I* that there is no conspiracy jurisdiction over the LPPFC and instead argue that the district court should have exercised personal jurisdiction under an alter ego theory of personal jurisdiction. We disagree and affirm.

This court has observed that it is "well established that the exercise of personal jurisdiction over an alter ego corporation does not offend due process." *S. New Eng. Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 138 (2d Cir. 2010). "The alter-ego theory provides for personal jurisdiction if the parent company exerts so much control over the subsidiary that the two do not exist as separate entities but are one and the same for purposes of jurisdiction." *Indah v. SEC*, 661 F.3d 914, 921 (6th Cir. 2011) (internal quotation marks omitted). The usual application of an alter ego theory serves to extend personal jurisdiction over the parent company.

In this case, the plaintiffs seek to do the reverse—to extend personal jurisdiction over the Fixing Members to their subsidiary, the LPPFC.

"Because we treat the parent and subsidiary as 'not really separate entities' if they satisfy the alter ego analysis, there is no greater justification for bringing the parent into the subsidiary's forum than for doing the reverse." *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1072 (9th Cir. 2015) (internal citation omitted) (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001)). Accordingly, "[t]he crux of the alter-ego theory of personal jurisdiction" is that "courts are to look for two entities acting as one," *Anwar v. Dow Chem. Co.*, 876 F.3d 841, 848 (6th Cir. 2017), an inquiry that we have compared to piercing the corporate veil, *S. New Eng. Tel. Co.*, 624 F.3d at 147. The parties disagree on whether English or federal common law governs the question of piercing the LPPFC's corporate veil.[11] We

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[11] In diversity cases, we look to the choice-of-law rules of the forum state to determine the veil-piercing law to apply. *See Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997). Because the LPPFC is "organized and existing under the laws of the United Kingdom," App'x 370-71, and New York's rule is that "the law of the state of incorporation determines when the corporate form will be disregarded," *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995) (quoting *Fletcher v. Atex, Inc.*, 861 F. Supp. 242, 244 (S.D.N.Y. 1994)), under that rule English law would apply. This case, however, arises under federal law. Other courts have held that federal common law governs alter-ego theories "when a federal interest is implicated by the decision of whether to pierce the corporate veil." *Anwar*, 876 F.3d at 848-49 (applying federal common law to an alter ego personal jurisdiction claim); *see also United States ex rel. Small Bus. Admin. v. Pena*, 731 F.2d 8, 12 (D.C. Cir. 1984) (noting that "courts ha[ve] both a

need not resolve that dispute because under neither approach can the plaintiffs succeed.

The plaintiffs have not pleaded facts sufficient to pierce the corporate veil under English law. "English law ... will pierce the corporate veil and recognize one entity as the alter ego of another only where special circumstances exist indicating that the relationship of one corporation to another is a mere facade concealing the true facts." *Great Lakes Overseas, Inc. v. Wah Kwong Shipping Grp.*, 990 F.2d 990, 997 (7th Cir. 1993) (internal quotation marks omitted). In *Great Lakes*, the Seventh Circuit observed that English courts will not "pierc[e] the corporate veil to hold a parent company responsible for the debts of its wholly owned subsidiary even where the subsidiary was created to conduct the business at issue and was funded entirely by loans advanced by the parent." *Id.* (describing *Atlas Maritime Co. SA v. Avalon Maritime Ltd.* [1991] 4 All E.R. 769 (AC)). In this case, the plaintiffs argue that the district court should have pierced the corporate veil because the Fixing Members "selected LPPFC's board members" and "conducted LPPFC's day-to-day operations" and because the LPPFC "was financially dependent on" the Fixing Members and "had no function other than to implement the Fixing." Appellants' Br. 55-56. But the same could be said of any single-shareholder corporation, and "[t]he involvement of a sole or majority shareholder in a corporation is not sufficient

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jurisdictional and substantive basis for resorting to a federal common law of veil-piercing" when "some federal interest [i]s implicated by the decision whether to pierce the corporate veil").

alone to establish a basis to disregard the corporate entity and pierce the corporate veil." 18 C.J.S. *Corporations* § 21 (2022).[12] The plaintiffs have not identified any "special circumstances" to justify piercing the veil here. *Great Lakes*, 990 F.2d at 997.

Neither can the plaintiffs succeed on an alter ego theory under federal common law. The plaintiffs in this case argue that, under federal common law, they "need only show that Defendants dominated LPPFC." Appellants' Br. 55. The plaintiffs cite *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981), for the proposition that "veil-piercing for purposes of pleading personal jurisdiction is relaxed." Appellants' Reply Br. 58. In *Marine Midland Bank*, this court considered the "fiduciary shield doctrine," which provides that "if an individual has contact with a particular state only by virtue of his acts as a fiduciary of the corporation, he may be shielded from the exercise, by that state, of jurisdiction over him personally on the basis of that conduct." 664 F.2d at 902. We created an exception to that rule, holding that "[i]f the corporation is merely a shell, it is equitable, even if the shell may not have been used to perpetrate a fraud, to subject its owner personally to the court's jurisdiction to defend the acts he has done on behalf of his shell." *Id.* at 903.

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[12] *See also* 1 James D. Cox & Thomas L. Hazen, *Treatise on the Law of Corporations* § 7:10 (3d ed. 2021) (noting that, when courts in "veil-piercing cases" consider "whether the controlling stockholder has so dominated the affairs of the corporation that the corporation has no existence of its own," there is usually "the additional requirement that fraud, illegality or gross unfairness will result if the corporate existence is not disregarded").

Even if we accept that as the federal common law test for alter ego personal jurisdiction, the plaintiffs have not adequately alleged that the LPPFC is such a "shell." We have "disregarded corporate formalities when a corporation's owner exercises 'total and exclusive domination of the corporation.'" *S. New Eng. Tel. Co.*, 624 F.3d at 139 (quoting *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1221 (2d Cir. 1987)). For example, in *Midland Bank*, the plaintiffs "made a prima facie showing that Miller & Associates was a shell corporation" when it "presented deposition testimony and affidavits concerning the ownership, capitalization, and use by Miller of Miller & Associates" as well as evidence that "Miller & Associates was no more than a telephone number and stationery." 664 F.2d at 904. In contrast, the allegations that the plaintiffs highlight on appeal—that the LPPFC "was financially dependent on Defendants" and "had no function other than to implement the Fixing" and that the defendants placed its employees on the LPPFC's board, Appellants' Br. 55-56—do not provide a reason to treat the LPPFC differently from any corporation operated by its owner. *See Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003) (holding that "100% control through stock ownership" and "shar[ing] the same offices ... and some of the same staff" did not make one company the alter ego of the other).[13]

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[13] In the third amended complaint, the plaintiffs allege that the LPPFC "never maintained any office space" and that "its correspondence address [is] at a corporate law firm." App'x 371. At oral argument, however, the plaintiffs conceded that because the LPPFC is not named as a defendant in the third amended

As noted above, the plaintiffs did not merely fail to argue that we have conspiracy jurisdiction over the LPPFC but expressly declined to make that argument. Cross-Appellees' Supp. Reply Br. 10 n.7 ("Plaintiffs do not challenge the district court's conspiracy jurisdiction ruling as to LPPFC."). "[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief." *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005). Because the plaintiffs have not adequately alleged that the LPPFC is the Fixing Members' alter ego for jurisdictional purposes, we affirm the district court's dismissal of claims against the LPPFC.

IV

We consider last the plaintiffs' challenge to the district court's dismissal of claims against BASF Corporation in *Platinum I*. The district court dismissed the claims against BASF Corporation under Rule 12(b)(6), holding that the plaintiffs' "allegations against BASF Corp. do not meet even the most liberal pleading standard." *Platinum I*, 2017 WL 1169626, at *52. According to the plaintiffs, however, "BASF Corp. had every incentive and opportunity to work closely with BASF Metals and the Fixing's participants

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complaint, we "evaluate the sufficiency of the claims as to" the LPPFC "based on the allegations in the second amended complaint." Oral Argument Audio Recording at 20:30. Because the allegations concerning the LPPFC's office space are absent from the second amended complaint, we do not consider those allegations.

generally to further the conspiracy" and the second amended complaint's allegations "plausibly demonstrate [BASF Corporation's] participation in the price fixing conspiracy." Appellants' Br. 59. We disagree and affirm the district court's judgment on this point.

Section 1 of the Sherman Act "punishes the conspiracies at which it is aimed on the common law footing,—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability." *Nash v. United States*, 229 U.S. 373, 378 (1913). In other words, "the agreement itself [is] the offense" and no overt acts are necessary to violate section 1. *United States v. Sassi*, 966 F.2d 283, 284 (7th Cir. 1992). Thus, "[a] plaintiff's job at the pleading stage ... is to allege enough facts to support the inference that a conspiracy actually existed," and that may be accomplished through either direct or circumstantial evidence. *Mayor & Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). Direct evidence is rare; it "would consist, for example, of a recorded phone call in which two competitors agreed to fix prices at a certain level." *Id.* There is no assertion of such evidence in this case.

"[A] complaint may, alternatively, present circumstantial facts supporting the *inference* that a conspiracy existed." *Id.* "[E]ven in the absence of direct 'smoking gun' evidence, a horizontal price-fixing agreement may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors." *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d

Cir. 2001). Such plus factors include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Mayor & Council of Balt.*, 706 F.3d at 136 (quoting *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005), *rev'd on other grounds*, 550 U.S. 544 (2007)).

The plaintiffs have failed to allege a conspiracy that includes BASF Corporation. The plaintiffs' argument relies on those parts of the second amended complaint which assert that BASF Corporation had a "common interest" in suppressing platinum and palladium prices. Appellants' Br. 59. That may demonstrate a "plus factor," but it does not address the primary defect of the claims against BASF Corporation: the second amended complaint "says nothing about BASF Corp.'s involvement—direct or indirect—in the alleged price manipulation, BASF Corp.'s role in executing the scheme, or BASF Corp.'s motive in artificially suppressing the Fix Price." *Platinum I*, 2017 WL 1169626, at *52. Plus factors such as common motive are "circumstances which, when combined with parallel behavior, might permit a jury to infer the existence of an agreement." *Mayor & Council of Balt.*, 706 F.3d at 136 n.7. The plaintiffs in this case, however, have not alleged any behavior on the part of BASF Corporation at all.

We affirm the district court's dismissal of the claims against BASF Corporation.

CONCLUSION

We **REVERSE** the district court's dismissal of the Exchange Plaintiffs' antitrust claims and **VACATE** the district court's dismissal of the plaintiffs' CEA claims. We **AFFIRM** the remainder of the district court's judgment, and **REMAND** to the district court for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Lead Case 1:14-cv-9391-GHW

[Filed March 29, 2020]

IN RE PLATINUM AND PALLADIUM ANTITRUST LITIGATION	)

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

Platinum and palladium are precious metals. Plaintiffs in this case allege that Defendants conspired to manipulate the price of these metals by "fixing the Fix." *In re Platinum and Palladium Antitrust Litig.* ("*Platinum I*"), 1:14-CV-9391-GHW, 2017 WL 1169626, at *5 (S.D.N.Y. Mar. 28, 2017). The Fix was supposed to be a process by which Defendants determined the worldwide benchmark price of platinum and palladium according to the laws of supply and demand. But Plaintiffs allege that Defendants colluded to push the benchmark price below the price that would have prevailed in a competitive market, which allegedly caused Plaintiffs to receive lower prices for their platinum and palladium investments than they otherwise would have.

The Court reaffirms the conclusion it reached in *Platinum I* that Plaintiffs are not efficient enforcers of the antitrust laws because Plaintiffs have not adequately alleged that they traded directly with any Defendant or that Defendants dominated the market for platinum and palladium derivatives. However, the Court has personal jurisdiction over the foreign defendants because Plaintiffs have amended their complaint to plausibly allege conduct by their co-conspirators in the United States in furtherance of the conspiracy to manipulate the Fix price. Finally, because Plaintiffs' Commodities Exchange Act ("CEA") claims are predominately foreign, those claims are impermissibly extraterritorial. Accordingly, Defendants' motion to dismiss Plaintiffs' Sherman Act claim is GRANTED, the foreign defendants' motion to dismiss for lack of personal jurisdiction is DENIED, and Defendants' motion for reconsideration is GRANTED.

I. BACKGROUND[1]

A. Facts[2]

Platinum and palladium are "closely related precious metals." TAC ¶ 104. "While platinum and

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[1] The Court has issued a prior opinion in this case that provides further background. *See Platinum I*, 2017 WL 1169626, at *2-9.

[2] These facts are drawn from the Third Consolidated Amended Class Action Complaint ("TAC"), Dkt No. 183, and are accepted as true for the purposes of the 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 (2009).

palladium—like gold and silver—have industrial uses, all four have traditionally been traded internationally . . . [and] held primarily for their exchange value rather than industrial use." *Id.* ¶ 54 (citation omitted). The allegations in this case center on the "London Platinum and Palladium Price Fixing (the 'Fixing' or 'Fix')." *Id.* ¶ 3. The Fix was a "private conference call twice each London business day" that "set global benchmark prices for platinum and palladium." *Id.* The Fix set this benchmark by establishing the price for physical platinum and palladium; the physical platinum and palladium was housed in London or Zurich. *Id.* ¶ 59.

The London Platinum and Palladium Fixing Company Ltd. ("LPPFC") operated as the "vehicle" for the Fix from 2004 to 2014. *Id.* ¶ 3. Throughout the period between January 1, 2008 and November 30, 2014 (the "Proposed Class Period"), there were four "members" of LPPFC that participated in the Fix. *Id.* Those members are the defendants in this case: BASF Metals Limited ("BASF Metals"), Goldman Sachs International ("Goldman Sachs"), HSBC Bank USA, N.A. ("HSBC"), and ICBC Standard Bank Plc ("ICBC Standard"). *Id.*

In theory, the Fix price was determined through a bona fide Walrasian auction among Defendants. *Id.* ¶ 58. One Fixing member, known as the Chair, would announce an opening price. *Id.* ¶ 59. Then, each Defendant would announce whether they were interested in buying or selling platinum and palladium at that price. *Id.* The Chair would then adjust the Fix price until the market reached an equilibrium at which supply equaled demand for platinum and palladium at

the Fix price. *Id.* ¶ 62; *see Platinum I*, 2017 WL 1169626, at *3.

Platinum and palladium trade in at least two markets. First, "[t]he market for physical platinum and palladium operates on an over-the-counter ('OTC,' *i.e.*, between private parties) basis." TAC ¶ 74; *see Platinum I*, 2017 WL 1169626, at *4-5. Second, platinum and palladium futures and options contracts trade either OTC or on an "exchange." TAC ¶ 79; *see Platinum I*, 2017 WL 1169626, at *4-5 (defining the terms "futures contract" and "options contract"). The New York Mercantile Exchange ("NYMEX") is the "leading centralized exchange for platinum and palladium futures and options worldwide." TAC ¶ 79. Plaintiffs also allege that "NYMEX Platinum and Palladium prices move virtually in tandem with Fix prices." *Id.* ¶ 82; *see id.* ¶ 94 (alleging a correlation coefficient of 1.00 for physical platinum prices to futures prices and 0.99 for physical palladium prices to futures prices).

Plaintiffs Norman Bailey, Thomas Galligher, and Larry Hollin are individuals who "sold NYMEX platinum and palladium futures contracts at artificial[ly low] prices." *Id.* ¶ 28-30. Plaintiff White Oak Fund is a "private placement fund" also alleged to have transacted in NYMEX platinum futures contracts. *Id.* ¶ 32. Collectively, this opinion refers to these plaintiffs as the "Exchange Plaintiffs." The TAC alleges that Plaintiff KPFF Investment, Inc. "sold physical platinum and palladium" at artificially low prices. *Id.* ¶ 31. This opinion refers to KPFF as the "OTC Plaintiff."

The crux of Plaintiffs' allegations giving rise to this action is that Defendants took advantage of the Fixing Calls to set the Fix Price at lower levels than competitive market forces would otherwise have dictated. *Id.* ¶ 102; *see Platinum I*, 2017 WL 1169626, at *5. Plaintiffs allege that Defendants manipulated the Fix Price in two ways. First, Plaintiffs allege that Defendants "conspired to manipulate the Opening Price announced by the Chair at the beginning of the Fixing Calls." TAC ¶ 247; *see Platinum I*, 2017 WL 1169626, at *5. Second, Plaintiffs allege that "Defendants misrepresented actual market supply and demand in order to move the AM and PM Fix Price to the level at which it was ultimately fixed." TAC ¶ 247; *see Platinum I*, 2017 WL 1169626, at *5.

Plaintiffs allege that Defendants employed different strategies to profit from this manipulation. First, Plaintiffs generally allege that Defendants exploited their foreknowledge of downward swings in the platinum and palladium Fix Price to make advantageous transactions in a variety of Platinum and Palladium Investments. TAC ¶¶ 15-16; *see Platinum I*, 2017 WL 1169626, at *8. Relatedly, Defendants also benefited from reducing their risk in digital options and other contracts with market-based triggers, such as "stop loss" orders and "margin calls." TAC ¶ 208; *see Platinum I*, 2017 WL 1169626, at *8. Second, the TAC alleges that Defendants were particularly motivated to suppress the Fix Price in order to profit from large net "short" positions that they allegedly held in the platinum and palladium futures market, including NYMEX, throughout the Proposed Class Period. TAC ¶ 174; *see Platinum I*, 2017 WL 1169626, at *8. In

addition to these methods of profiting directly from manipulating the Fix, Plaintiffs allege that the Fixing calls enabled Defendants to employ other price manipulation tactics, including "front running," "spoofing," "wash sales," "painting the screen," and "jamming." TAC ¶¶ 10, 179 & n.4; *see Platinum I*, 2017 WL 1169626, at *6 (defining these terms).

Plaintiffs present economic data in support of their claims that there were "artificial downward spikes around the time of the Fixing" for which "there is no innocent explanation." TAC at 49, 91 (capitalization altered). Plaintiffs also highlight government investigations into Defendants, which they claim "corroborate" their allegations. *Id*. at 128 (capitalization altered).

B. Procedural History

Plaintiffs commenced this action on November 25, 2014. Dkt No. 1. The parties filed a joint motion to consolidate five substantively similar complaints and to appoint Labaton Sucharow LLP and Berger & Montague, P.C. as interim co-lead counsel for the proposed class, which the Court granted. Dkt No. 32. Plaintiffs subsequently filed a consolidated amended complaint, and Defendants moved to dismiss. Dkt Nos. 45, 76, 79. Plaintiffs then filed a second consolidated amended class action complaint ("SAC"), and Defendants again moved to dismiss for failure to state a claim and for lack of personal jurisdiction over certain foreign defendants. Dkt Nos. 102, 115, 117, 119-20.

The Court granted those motions in part and denied them in part. *Platinum I*, 2017 WL 1169626, at *53. The Court held that Plaintiffs had plausibly alleged a conspiracy among Defendants to violate the Sherman Act based on Plaintiffs' allegations of Defendants' "parallel conduct" and other circumstantial evidence including that "the Fixing coincided with Defendants' alleged price manipulation[,]" that Defendants allegedly acted against their own economic self-interest, and that Defendants had a "common motive" to "profit from their foreknowledge of the Fix Price[.]" *Id.* at *10-16. The Court also concluded that Plaintiffs had Article III standing. *Id.* at *16-17. The Court then considered whether Plaintiffs had antitrust standing. *See id.* at *18-25. The Court held that Plaintiffs had adequately alleged an antitrust injury. *Id.* at *19-20.

However, the Court concluded that Plaintiffs were not "efficient enforcers" of the antitrust laws. *Id.* at *20-25. Examining all four efficient enforcer factors, the Court determined that "it is appropriate to draw a line between persons who transacted directly with Defendants and those who did not." *Id.* at *22. Because Plaintiffs did not allege that they transacted directly with Defendants, the Court held that Plaintiffs were not efficient enforcers of the antitrust laws.

The Court also concluded that Plaintiffs had plausibly alleged Commodities Exchange Act ("CEA") violations. *Id.* at *25-37.[3] The Court held that

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[3] The Court also dismissed Plaintiffs' unjust enrichment claim. *Id.* at *38. Plaintiffs have chosen not to replead this claim. *See* TAC ¶ 1.

Plaintiffs' CEA claims were not impermissibly extraterritorial. *Id.* at *26-28. Those claims are the subject of Defendants' motion for reconsideration. In addition, the Court held that it did not have personal jurisdiction over Foreign Defendants BASF Metals, ICBC Standard, and LPPFC and denied Plaintiffs' request for jurisdictional discovery.[4] *Id.* at *39-49. Finally, the Court granted Plaintiffs leave to amend. *Id.* at *53.

C. New Allegations in the TAC

In response to the Court's decision in *Platinum I*, Plaintiffs have added new allegations to the TAC. With respect to Plaintiffs' claim that they are "efficient enforcers" of the antitrust laws, Plaintiffs' new allegations can be grouped into four buckets. *See* TAC at 2-3. First, Plaintiffs present new allegations related to exchange trading on NYMEX. Plaintiffs allege that NYMEX is "owned and operated by CME [Chicago Mercantile Exchange] Group." *Id.* ¶ 4 n.3. The TAC alleges that "NYMEX—through its clearinghouse, CME Clearing—is the counterparty to all transactions on the exchange (*i.e.*, the buyer or seller to a NYMEX contract does not have any identified counterparty other than NYMEX)." *Id.* ¶ 80 (emphasis omitted); *see also id.* ¶ 81. Second, Plaintiffs allege that there is a close relationship between the Fix and NYMEX futures prices. *See id.* ¶¶ 5, 14, 79-103, 134, 143. Third,

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[4] Plaintiffs have chosen not to replead their claim against LPPFC. See TAC ¶ 1. The Court also granted motions to dismiss filed by UBS and BASF Corporation ("BASF Corp.") for failure to state a claim. *Platinum I*, 2017 WL 1169626, at *50-52. Plaintiffs have chosen not to replead these claims. *See* TAC ¶ 1.

Plaintiffs allege that Defendants have substantial market share in both the OTC and NYMEX platinum and palladium markets. *See id.* ¶¶ 6, 38, 40, 42, 44, 64, 71, 73, 77, 191, 194, 199. Fourth, Plaintiffs allege that NYMEX is the leading centralized exchange for trading platinum and palladium derivatives. *See id.* ¶¶ 4, 79, 89.

Plaintiffs have also substantially narrowed the scope of the Class and the scope of the transactions covered by the Class definition. Plaintiffs "bring this action on behalf of themselves and as a class action under Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, seeking relief on behalf of" a class including "[a]ll persons or entities who during the period from January 1, 2008 through November 30, 2014 . . . : (i) sold physical platinum or palladium (99.95% or greater purity, or otherwise good delivery); (ii) sold platinum or palladium futures contracts traded on NYMEX; (iii) sold platinum or palladium call options traded on NYMEX; or (iv) bought platinum or palladium put options traded on NYMEX." TAC ¶ 265; *cf.* SAC ¶ 271 (including in the proposed class those who "sold shares in platinum or palladium [exchange traded funds,]" those who "sold over-the-counter platinum or palladium spot or forward contracts or platinum or palladium call options[,]" and those who "bought over-the-counter platinum or palladium put options.").

Additionally, Plaintiffs have added new allegations to the TAC with respect to BASF Metals and ICBC Standard's alleged continuous presence in the United States and their allegedly suit-related conduct in this

country. *See* TAC ¶¶ 14, 34-38, 43-46, 64, 68, 72, 190-191, 194, 202. Plaintiffs allege that both BASF Metals and ICBC Standard engaged in conduct directed at the NYMEX and that information from the Fixing was disseminated to and traded on by traders in New York and New Jersey, including on the NYMEX. *See id.* Specifically, Plaintiffs allege that United States-based "precious metals traders" employed by a BASF Metals' affiliate "would update order information during the Fixing and provide this updated order information to BASF [Metals'] participant in the Fixing as the Fixing was conducted." *Id.* ¶ 38. Similarly, the TAC alleges that "New York-based precious metals traders [employed by a United States affiliate of ICBC Standard] would update order information during the Fixing and provide this updated order information to [ICBC Standard]'s participant in the Fixing as the Fixing was conducted." *Id.* ¶ 44. Furthermore, the TAC alleges that the participants in the Fixing on behalf of Defendants BASF Metals and ICBC Standard were in "constant communication" with traders employed by United States-based affiliates. *Id.* ¶ 38 (BASF Metals); *id.* ¶ 44 (ICBC Standard).

The TAC asserts five claims for relief. First, the TAC alleges that Defendants made an agreement to restrain trade in violation of section 1 of the Sherman Act, 15 U.S.C. §§ 1 *et seq*. TAC ¶¶ 273-79. Second, the TAC alleges a claim for manipulation in violation of the CEA, 7 U.S.C. §§ 1 *et seq.*, including Commodity Futures Trading Commission ("CFTC") Rule 180.2. TAC ¶¶ 280-84. Third, the TAC asserts that Defendants employed a manipulative device in violation of the CEA including CTFC Rule 180.1. *Id.*

¶¶ 285-89. Fourth, the TAC asserts a claim for principal agent liability in violation of the CEA. *Id.* ¶¶ 290-92. Finally, the TAC asserts a claim for aiding and abetting liability in violation of the CEA. *Id.* ¶¶ 293-95.

Defendants have again moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) as to all Defendants and for lack of personal jurisdiction as to the foreign defendants BASF Metals and ICBC Standard under Federal Rule of Civil Procedure 12(b)(2). Dkt Nos. 207-11.[5] Plaintiffs filed an opposition to both motions, Dkt Nos. 214-16, and Defendants filed their replies. Dkt Nos. 218-21. After those motions were fully briefed, Defendants also filed a motion for reconsideration of the Court's prior holding that Plaintiffs' CEA claims were not impermissibly extraterritorial. Dkt Nos. 235-36. Plaintiffs filed an additional opposition to that motion, Dkt No. 237, and Defendants filed an additional reply. Dkt No. 238.

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[5] Defendants also ask the Court to take a "fresh look at the lack of particularity" in Plaintiffs' allegations. Joint Memorandum of Law in Support of Defendants' Motion To Dismiss Plaintiffs' Third Amended Complaint ("Mem."), Dkt No. 208, at 20. Having considered this argument, the Court declines to disturb its prior rulings holding that Plaintiffs have sufficiently alleged a conspiracy among Defendants.

II. DISCUSSION

A. Rule 12(b)(6) Motion[6]

1. Legal Standard

Under Federal Rule of Civil Procedure 8, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A defendant may nonetheless move to dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). 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 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (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.*

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[6] "Although a court should 'traditionally treat personal jurisdiction as a threshold question to be addressed prior to consideration of the merits of a claim, that practice is prudential and does not reflect a restriction on the power of the courts to address legal issues.'" *Sullivan v. Barclays PLC*, 13-CV-2811 (PKC), 2017 WL 685570, at *11 (S.D.N.Y. Feb. 21, 2017) (quoting *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 498 n.6 (2d Cir. 2013)). "[I]n cases such as this one with multiple defendants—over some of whom the court indisputably has personal jurisdiction—in which all defendants collectively challenge the legal sufficiency of the plaintiffs['] cause of action, [a court] may address first the facial challenge to the underlying cause of action[.]" *Id.* (quoting *Chevron Corp. v. Naranjo*, 667 F.3d 232, 247 n.17 (2d Cir. 2012)). Accordingly, the Court considers Defendants' Rule 12(b)(6) motion first.

(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).

2. Application

Plaintiffs have not adequately alleged that they are efficient enforcers of the antitrust laws. As discussed in *Platinum I*, "[w]hile 'it is a well-established principle that the United States is authorized to sue anyone violating the federal antitrust laws, a private plaintiff must demonstrate standing.'" 2017 WL 1169626, at *18 (quoting *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 436 (2d Cir. 2005)) (alterations and some quotation marks omitted). "Antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement, the court must dismiss it as a matter of

law." *Id.* (quoting *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75-76 (2d Cir. 2013)) (brackets omitted).

"To satisfy the antitrust standing requirement, 'a private antitrust plaintiff must plausibly allege that (i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations,' *i.e.*, that plaintiff is 'an "efficient enforcer" of the antitrust laws." *Id.* (quoting *In re Aluminum Warehousing Antitrust Litig.* ("*Aluminum II*"), 833 F.3d 151, 157-58 (2d Cir. 2016)). The Court concluded in *Platinum I* that Plaintiffs have adequately alleged an antitrust injury, *id.* at *19-20, and it does not disturb that conclusion here.

Thus, the question before the Court is whether Plaintiffs are "efficient enforcers of the antitrust laws." *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 777-78 (2d Cir. 2016) (citation omitted). The efficient enforcer inquiry focuses on four factors: "(1) the 'directness or indirectness of the asserted injury' . . . ; (2) the 'existence of more direct victims of the alleged conspiracy'; (3) the extent to which [plaintiffs'] damages claim is 'highly speculative;' and (4) the importance of avoiding 'either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.'" *Id.* at 778 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* ("*AGC*"), 459 U.S. 519, 540-44 (1983)).

"The efficient enforcer inquiry is a general balancing test in which the importance assigned to each factor 'will necessarily vary with the circumstances of particular cases.'" *Iowa Pub.*

Employees' Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 340 F. Supp. 3d 285, 332 (S.D.N.Y. 2018) (quoting *Gatt*, 711 F.3d at 78). The factors are meant to determine "whether the putative plaintiff is a proper party to 'perform the office of a private attorney general' and thereby 'vindicate the public interest in antitrust enforcement[.]" *Gatt*, 711 F.3d at 80 (quoting *AGC*, 459 U.S. at 542). Because the efficient enforcer inquiry presents somewhat different considerations for the OTC Plaintiff and the Exchange Plaintiff, the Court conducts the inquiry for each in turn.

a. OTC Plaintiff

The OTC Plaintiff is not an efficient enforcer of the antitrust laws because Plaintiffs have not alleged that it transacted directly with any Defendant. The TAC alleges that the OTC Plaintiff "sold physical platinum and palladium[.]" TAC ¶ 31. Plaintiffs also allege that "[d]uring the [Proposed] Class Period," each Defendant "entered directly into platinum and palladium transactions with members of the Class." *Id.* ¶ 38 (BASF Metals); *id.* ¶ 40 (Goldman Sachs); *id.* ¶ 42 (HSBC); *id.* ¶ 44 (ICBC Standard). In addition, the TAC alleges a number of "dates on which one or more of Plaintiffs['] sales coincided with Defendants['] manipulation of the PM Platinum fixing" and makes similar allegations for the PM Palladium Fixing. *Id.*, apps. C & D (capitalization altered).[7] However,

[7] Plaintiffs made similar allegations in the SAC, *see, e.g.*, SAC ¶ 34; apps. C & D, which the Court found to be insufficient to plausibly alleged that OTC plaintiffs were efficient enforcers. *Platinum I*, 2017 WL 1169626, at *21-25.

Plaintiffs do not allege that the OTC Plaintiff transacted directly with any Defendant.

Accordingly, the analysis of the four efficient enforcer factors as applied to the OTC Plaintiff focuses on whether it qualifies as an efficient enforcer, even though it did not transact directly with Defendants. Plaintiffs allege that the Fix "set global benchmark prices for platinum and palladium," *id.* ¶ 3, and that Defendants conspired to rig the Fix. *See, e.g.*, *id.* ¶ 102. Thus, Plaintiffs allege that Defendants manipulated the global benchmark price of platinum and palladium. As discussed below, the application of the efficient enforcer factors where plaintiffs allege manipulation of a benchmark is not straightforward. Ultimately, with respect to the OTC Plaintiff, the Court adheres to its decision in *Platinum I* to "dr[a]w a line between plaintiffs who transacted directly with defendants and those who did not." 2017 WL 1169626, at *22 (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR VI*"), 11 MDL 2262 (NRB), 2016 WL 7378980, at *16 (S.D.N.Y. Dec. 20, 2016)) (brackets omitted). Because the TAC does not allege that the OTC Plaintiff transacted directly with any defendant, it is not an efficient enforcer.

i. Directness of Injury

The first efficient enforcer factor is "the 'directness or indirectness of the asserted injury.'" *Gelboim*, 823 F.3d at 778 (quoting *AGC*, 459 U.S. at 540). This factor "requires evaluation of the 'chain of causation' linking [plaintiff's] asserted injury and the [defendants'] alleged price-fixing." *Id.* (quoting *AGC*, 459 U.S. at 540); *see also In re Commodity Exch., Inc.* ("*Gold*"), 213

F. Supp. 3d 631, 653 (S.D.N.Y. 2016) (holding that this factor "requir[es] proximate causation" between the antitrust injury alleged by plaintiff and defendants' allegedly anticompetitive conduct) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 135 (2014); *DNAML PTY, Ltd. v. Apple Inc.*, 25 F.Supp.3d 422, 430 (S.D.N.Y. 2014); *In re London Silver Fixing, Ltd., Antitrust Litig.* ("*Silver I*"), 213 F. Supp. 3d 530, 552 (S.D.N.Y. 2016)) (capitalization altered).

The first factor is problematic for Plaintiffs' argument that the OTC Plaintiff is an efficient enforcer in this case. Plaintiffs allege that the Fixing set the "globally accepted benchmark prices" for platinum and palladium. TAC ¶ 4. In similar circumstances, some courts have held that plaintiffs alleging injury via manipulation of a benchmark price satisfy the proximate causation requirement because their allegation is that they are directly injured by defendants' manipulation of the benchmark, regardless of whether they have transacted directly with defendants. *See Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 165 (S.D.N.Y. 2018) (describing the first efficient enforcer factor as requiring plaintiffs to "demonstrate[] a sufficiently direct injury" and concluding that the plaintiffs had met that standard because they "allege[d] that they engaged in transactions for" derivatives linked to a financial benchmark "and that their returns were lower because of defendants' anticompetitive conduct"); *Gold*, 213 F. Supp. 3d at 653-54 (concluding that the plaintiffs "ha[d] demonstrated a sufficiently direct injury" in

similar factual circumstances).[8] On this view, Plaintiffs have sufficiently alleged that Defendants proximately caused the OTC Plaintiff to receive lower prices than it otherwise would have when it sold its platinum and palladium.

On the other hand, where a plaintiff does not purchase directly from defendant, there are "significant intervening causative factors," which may "attenuate the causal connection between the violation and the injury." *LIBOR VI*, 2016 WL 7378980 at *15. When "[a] plaintiff and a third party" choose to "incorporate [a benchmark] into a financial transaction without any action by defendants whatsoever," the "independent decision to do so" may attenuate "the chain of causation between defendants' actions and a plaintiff's injury." *Id.* at *16.[9] Thus, although the causation analysis does

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[8] *See also* Sharon E. Foster, *Antitrust Efficient Enforcer and the Financial Products Benchmark Manipulation Litigation* ("*Benchmark Manipulation Litigation*"), 13 Ohio St. Bus. L.J. 99, 137 (2019) (opining "that there is no intervening cause or persons between plaintiffs' damages and defendants' conduct" in benchmark manipulation cases); *cf. Gelboim*, 823 F.3d at 779 ("At first glance, here there appears to be no difference in the injury alleged by those who dealt in LIBOR-denominated instruments, whether their transactions were conducted directly or indirectly with [the defendants].").

[9] *See also Sullivan*, 2017 WL 685570, at *17 ("A defendant may have had no knowledge of the existence of a particular transaction, and the plaintiff may have had no dealings with the defendant, but, provided the derivative product incorporated [the benchmark] as a price term, it would fall within the scope of plaintiffs' claims."); *Sonterra Capital Master Fund Ltd. v. Credit Suisse Group AG* ("*CHF LIBOR*"), 277 F. Supp. 3d 521, 560-61 (S.D.N.Y. 2017)). *But see* Foster, *Benchmark Manipulation Litigation* at 138-

not itself preclude Plaintiffs' argument that the OTC Plaintiff is an efficient enforcer, the problems of proving causation in this case is a significant factor in the efficient enforcer analysis.

ii. Existence of More Direct Victims

The second efficient enforcer factor is "the 'existence of more direct victims of the alleged conspiracy[.]" *Gelboim*, 823 F.3d at 779 (quoting *AGC*, 459 U.S. at 542). Generally, "[w]hether there is a more direct victim of Defendants' alleged antitrust violation turns 'chiefly on whether the plaintiff is a consumer or a competitor.'" *Platinum I*, 2017 WL 1169626, at *23 (quoting *Gelboim*, 823 F.3d at 779). However, a plaintiff's status "is not the end of the inquiry; the efficient enforcer criteria must be established irrespective of whether the plaintiff is a consumer or a competitor." *Id.* (quoting *Gelboim*, 823 F.3d at 779). "'Inferiority' to other potential plaintiffs can be relevant, but it is not dispositive." *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 689 (2d Cir. 2009). "Implicit in the inquiry is recognition that not

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39 (challenging this analysis because "it assumes, incorrectly, that plaintiffs had a choice, and the bargaining power to affect that choice, regarding what benchmark to select as part of the price equation. . . . The economic reality was that LIBOR benchmarks controlled approximately 75% of the global market for interest rate financial products during the relevant time period. Further, as a practical matter, some benchmark had to be used to estimate price. . . . Leading benchmarks, such as LIBOR, were used as a matter of course[,] not as a matter of choice.") (footnote and citations omitted).

every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced." *Gelboim*, 823 F.3d at 779.

The existence of more direct victims of Defendants' alleged conspiracy does not weigh clearly in favor of or against the conclusion that Plaintiffs have sufficiently pleaded that the OTC Plaintiff is an efficient enforcer. On the one hand, those who transacted directly with Defendants may be conceived of as more direct victims of Defendants' alleged conspiracy than those who did not.

On the other hand, *Gelboim* held that this factor may have "diminished weight" in benchmark manipulation cases. 823 F.3d at 779. "In *Gelboim*, the Second Circuit recognized that 'one peculiar feature of that case was that remote victims (who acquired LIBOR-based instruments from any of thousands of non-defendant banks) would be injured to the same extent and in the same way as direct customers of the Banks.'" *Platinum I*, 2017 WL 1169626, at *23 (quoting *Gelboim*, 823 F.3d at 779) (other citations and brackets omitted). What *Gelboim* labeled a "peculiar feature" is present in any benchmark manipulation case, and *Platinum I* concluded that it is "also present here. Those who transacted in [p]latinum and [p]alladium [i]nvestments with other market participants would be injured to the same extent and in the same way as Defendants' direct customers." *Id.* (quoting *Gelboim*, 823 F.3d at 779) (other citations omitted); *see also* Foster, *Benchmark Manipulation Litigation* at 140-41 (arguing that so long as the price a purchaser paid was

tied to the relevant benchmark, it does not matter whether a plaintiff transacted directly with a defendant). It was for this reason that *Gelboim* held that whether there were more direct victims of the alleged conspiracy should receive "diminished weight" in cases like this one. 823 F.3d at 779. Consequently, both because *Gelboim* indicated that this factor carries diminished weight in benchmark manipulation cases and because it does not clearly cut for or against the OTC Plaintiff's efficient enforcer status, the second factor does not carry much weight in the Court's analysis.

iii. Speculative Damages

The third efficient enforcer factor is "whether the damages would necessarily be 'highly speculative[.]'" *Gelboim*, 823 F.3d at 780 (quoting *AGC*, 459 U.S. at 542). "'Some degree of uncertainty stems from the nature of antitrust law' and 'the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' At the same time, 'highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement.'" *CHF LIBOR*, 277 F. Supp. 3d at 563 (first quoting *Gelboim*, 823 F.3d at 780; then quoting *DDAVP*, 585 F.3d at 689; and then quoting *Gelboim*, 823 F.3d at 779). "Damages claims may . . . be too speculative where: (1) 'the damages claim is conclusory'; (2) 'the injury is so far down the chain of causation from defendants' actions that it would be impossible to untangle the impact of the fixed price from the impact of intervening market decisions'; or (3) 'due to external market factors, there is no relationship between the fixed price and the price that

the plaintiffs ultimately paid.'" *Id.* (quoting *LIBOR VI*, 2016 WL 7378980, at *17-18).

This factor also does not cut clearly in favor of or against Plaintiffs' argument that the OTC Plaintiff is an efficient enforcer. On the one hand, the OTC Plaintiff's damages claim is not conclusory; if, as Plaintiffs allege, Defendants suppressed the price of platinum and palladium, the OTC Plaintiff's theory of damages flows directly from that suppression. Moreover, Plaintiffs have alleged that the OTC Plaintiff suffered a direct injury as a result of Defendants' manipulation of the benchmark price for platinum and palladium, so the OTC Plaintiff's injury is arguably not causally attenuated from Defendants' alleged manipulation. And, although the price of platinum and palladium is undoubtedly influenced by market forces independent of Defendants' alleged manipulation, the same is true to some extent in any Sherman Act case. *Cf. Gelboim*, 823 F.3d at 780 ("Some degree of uncertainty stems from the nature of antitrust law.").

On the other hand, as in *Gelboim*, damages calculations in this case "present[] some unusual challenges." *Id.* at 781. In *Platinum I*, the Court expressed concern about Plaintiffs' ability to "untangle the impact" of Defendants' alleged conspiracy "from the impact of intervening market decisions." *LIBOR VI*, 2016 WL 7378980, at *17; *see Platinum I*, 2017 WL 1169626, at *23-25 (discussing the difficulties calculating damages would present in this case). Those concerns have not entirely abated. Accordingly, this factor also does not carry much weight in the Court's

analysis of whether the OTC Plaintiff is an efficient enforcer of the antitrust laws.[10]

iv. Duplicative Recovery & Complex Damages Apportionment

The fourth efficient enforcer factor is "either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Gelboim*, 823 F.3d at 778 (quoting *AGC*, 459 U.S. at 544). This factor "reflects a 'strong interest in keeping the scope of complex antitrust trials within judicially manageable limits.'" *LIBOR VI*, 2016 WL 7378980 (quoting *AGC*, 459 U.S. at 543) (ellipsis omitted). It is arguably the most important factor in the efficient enforcer analysis. *See* Foster, *Benchmark Rate Manipulation* at 140 ("Efficient enforcer factors focus on duplicative recovery and complex apportionment.") (citations omitted).

Like the first efficient enforcer factor, this factor does not preclude Plaintiffs' argument that the OTC Plaintiff is an efficient enforcer, but it does present significant challenges. On the one hand, if every seller of platinum and palladium collects damages from Defendants, it would not present a risk of duplicative

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[10] The Court observes that the third efficient enforcer factor may be in tension with traditional principles of notice pleading. In most areas of law, concerns about damage calculations are deferred until after the pleading stage. *See* Foster, *Benchmark Manipulation Litigation* at 142 (opining that the concern about speculative damages "is not an efficient enforcer issue; rather, it is a problem of proof").

recoveries. That is because every seller can only recover from Defendants once. *See ISDAFix*, 175 F. Supp. 3d at 61 ("[T]he damages at issue are tied to particular transactions and contracts, obviating the danger of duplicative recovery."). And, at first blush, the apportionment of damages may not seem complex. If Plaintiffs prove that Defendants manipulated the price of platinum and palladium by $X, then each seller should be able to recover $X. On this view, there is nothing more complex about damages apportionment in this case than in any price-fixing case.

Damages apportionment may not be so simple in this case, however. As noted above with respect to factor one, decisions by non-defendant buyers to incorporate the Fix into transactions over which Defendants have no control may create difficult questions of causation that bear on the damages analysis. In other words, where non-defendant parties decided to incorporate the Fix price into transactions without Defendants' knowledge, those decisions may make apportioning damages particularly complex. The complexity of damages apportionment is a significant factor in the Court's analysis of whether plaintiffs who are not alleged to have transacted directly with Defendants are efficient enforcers in this case.[11]

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[11] The allegation that there are government investigations into Defendants' manipulation of the Fix price does not carry significant weight in the Court's analysis. *Gelboim* noted that there were government investigations related to the transactions at issue in that case "ongoing in at least several countries." 823 F.3d at 780. The Second Circuit observed that "[s]ome of those government initiatives may seek damages on behalf of victims, and for apportionment among them" but did not elaborate on how this

v. Conclusion

The Court concludes that plaintiffs who sold physical platinum and palladium and did not transact directly with Defendants are not efficient enforcers of the antitrust laws. As discussed above, the first and fourth factors raise serious concerns about the OTC Plaintiff's efficient enforcer status. Thus, after balancing the efficient enforcer factors with a focus on determining whether the OTC Plaintiff "is a proper party to 'perform the office of a private attorney general' and thereby 'vindicate the public interest in antitrust enforcement'" *Gatt*, 711 F.3d at 80 (quoting *AGC*, 459 U.S. at 542), the Court has concluded that plaintiffs who did not transact directly with defendants are not efficient enforcers.

This conclusion is reinforced by the possibility of disproportionate damages in benchmark manipulation

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should factor into its analysis beyond stating that it was "wholly unclear on this record how issues of duplicate recovery and damage apportionment can be assessed." *Id.* Plaintiffs have made similar allegations of government investigations into Defendants' conduct in this case. TAC ¶¶ 229-40. The importance of related government investigations in similar cases is unsettled in this district. *Compare Sullivan*, 2017 WL 685570, at *20 ("[A]ctions of government regulators lessen the need for plaintiffs to function as private attorneys general and vindicators of the public interest.") *with In re For. Exch. Benchmark Rates Antitrust Litig.* ("*FOREX*"), 13 CIV. 7789 (LGS), 2016 WL 5108131, at *8 (S.D.N.Y. Sept. 20, 2016) ("Because public enforcement does not provide redress to victims of the conspiracy, the OTC Class is an efficient and necessary enforcer."). In this case, the allegations that there are government investigations into the alleged manipulation of the Fix is not a significant factor in the Court's analysis.

cases. As noted above, benchmark manipulation cases present unique challenges for application of the efficient enforcer factors. *Gelboim* noted that one difficult issue arises with respect to so-called "umbrella" standing. "Umbrella standing concerns are most often evident when a cartel controls only part of a market, but a consumer who dealt with a non-cartel member alleges that he sustained injury by virtue of the cartel's raising of prices in the market as a whole." *Gelboim*, 823 F.3d at 778; *see also Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 484 n.4 (7th Cir. 2002) ("If . . . cartel members A and B sell to customers X and Y, and then non-cartel member firm C makes sales at or near the enhanced cartel price to customer Z, the question arises whether A and B are liable to Z for the overcharges it paid."). Here, plaintiffs who did not transact directly with defendants are "umbrella" purchasers.

Benchmark manipulation cases present particularly difficult questions regarding umbrella standing because alleged manipulators can affect prices without dominating the market. In a standard (*i.e.*, non-benchmark) manipulation case, alleged manipulators must have at least a substantial market share—if not outright market dominance—to maintain a non-competitive price. That is because a cartel must have a large enough fraction of the market to exert control over the market price. In other words, if a would-be cartel is only a tiny fraction of the market, it cannot exert market power and thus is no cartel at all. This premise has led to a "scholarly consensus" that is "skeptical" about whether it is possible for private actors to manipulate large commodity markets. *See*

Andrew Verstein, *Benchmark Manipulation*, 56 B.C. L. Rev. 215, 216 (2015).[12]

Benchmark manipulation cases are different. All that a would-be cartel must do is manipulate a benchmark. Where, as here, the benchmark is calculated based on a tiny fraction of market activity, a manipulator need only manipulate that tiny fraction of market activity.[13] And "[o]nce the benchmark is hardwired into legal relationships, manipulating the proxy pays off just as much as manipulating the underlying reality." *Id.* at 217; *see also id.* ("If the manipulator has agreed to sell oil at the benchmark price, tampering with the benchmark has the same effect as moving the worldwide supply of oil.") (citation omitted). As noted above, because the benchmark is then widely disseminated, any party that transacted based on the benchmark can reasonably complain that their damages were caused by defendants'

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[12] *See also id.* at 216-17 ("To drive up the global price of an asset—such as silver—you have to buy a truly enormous amount. But you haven't gotten rich unless you can sell at the inflated price, and whatever forces raised the price while you bought will reverse when you try to sell. In theory, the plummeting price should precisely evaporate your profits. And in the meantime, you had to pay to transport and store a quarter of the world's silver.").

[13] *See also id.* at 218 ("By their nature, benchmarks describe a market based on some small slice of it. Careful manipulators can bias that slice. It is daunting to corner the world currency market, but it is less daunting to comer the two percent of the market whose price is considered by the leading benchmark. By shrinking the domain over which the manipulator must exercise influence, benchmarks directly circumvent the principal challenges to manipulation identified by scholars.") (footnote omitted).

manipulation. But allowing parties who did not transact directly with defendants to recover also leads to the causal attenuation and complex damages apportionment noted in the Court's discussion of the first and fourth efficient enforcer factors.

Thus, benchmark manipulation cases generate the *Gelboim* court's concern that "if the [defendants] control only a small percentage of the ultimate identified market," the defendants may be liable for "damages disproportionate to wrongdoing[.]" 823 F.3d at 779 (citation omitted); *see also id.* ("Requiring the Banks to pay treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative swap would, if appellants' allegations were proved at trial, not only bankrupt 16 of the world's most important financial institutions, but also vastly extend the potential scope of antitrust liability in myriad markets where derivative instruments have proliferated."). As noted above, absent a benchmark, it would be difficult—if not impossible—for defendants who "control[led] only a small percentage of the ultimate identified market" to exert meaningful control over the market price. *Id.* Thus, although the concern about disproportionate damages may arise where a plaintiff alleges market manipulation by means other than the manipulation of a benchmark, it generally will not do so as forcefully as in a benchmark manipulation case—at least where, as here, the benchmark is calculated based on a small slice of market activity or information submitted by a small number of market participants. Either the would-be cartel is too small (and fails in its attempt to manipulate the market) or the cartel has substantial

market share (and market-wide damages are more proportional to the harm caused by defendants). Hence, *Gelboim*'s concern about disproportionate damages is particularly relevant in benchmark manipulation cases.

There is another distinct, though conceptually overlapping, issue that results from the problems identified in the Court's discussion of the first and fourth efficient enforcer factors. This concern is that, taking the facts as alleged in the TAC as true, every non-defendant buyer received a benefit from the lower prices that prevailed in the market as a result of Defendants' illegal conduct. That is, assuming that Defendants successfully downwardly manipulated the prices of platinum and palladium, non-defendant buyers received a windfall as a result of Defendants' manipulation. But there is no mechanism for non-defendant buyers to compensate Plaintiffs for this windfall.

This is another way of characterizing *Gelboim*'s concern about disproportionate damages. Plaintiffs' damages may be disproportionate to defendants' wrongdoing because Plaintiffs' damages are not proportional to defendants' ill-gotten gains. Some (even most) of plaintiffs' damages—the difference between the lower price that allegedly prevailed because of Defendants' manipulation and the price that allegedly would have prevailed absent Defendants' manipulation—flowed to non-defendants. Although this concern applies to "umbrella" plaintiffs generally and not only in benchmark manipulation cases, it is particularly vexing where defendants control only a small

percentage of the identified market, as is more likely to be the case in benchmark manipulation cases.[14]

These concerns, which flow from the problems inherent in the application of the first and fourth efficient enforcer factors in benchmark manipulation cases, reinforce the Court's conclusion that it should adhere to its decision in *Platinum I* to "dr[a]w a line between platinum and palladium purchasers who transacted directly with Defendants and those who did not." 2017 WL 1169626, at *22 (quoting *LIBOR VI*, 2016 WL 7378980, at *16). In addition to addressing the problems associated with the first and fourth efficient enforcer factors identified above, this approach has the further advantage of rendering Plaintiffs' recovery essentially proportional to Defendants' allegedly ill-gotten gains. For similar reasons, "a critical mass of judges within this district" addressing similar concerns in benchmark manipulation cases "have concluded that plaintiffs who are not direct

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[14] The question is not, as one commentator has argued, whether defendants are subject to "ruinous liability" or whether particular defendants are systemically important financial institutions. Foster, *Benchmark Manipulation Litigation* at 139-40. The Court agrees that there would be a "serious rule of law problem" if the efficient enforcer inquiry turned on whether a particular defendant was "too big to fail." *Id.* at 140; *cf.* Sharon E. Foster, *Too Big to Prosecute: Collateral Consequences, Systemic Institutions and the Rule of Law*, 34 Rev. Banking & Fin. L. 655, 674-85 (2015). Rather, the problem is whether defendants—no matter their size—are subject to liability that is *disproportionate* to their allegedly ill-gotten gains. This problem arises because of the structure of benchmark manipulation litigation and, more specifically, the problems of causal attenuation and complex damages apportionment noted above.

purchasers are not efficient enforcers in a benchmark manipulation case." *In re London Silver Fixing, Ltd., Antitrust Litig.* ("*Silver II*"), 332 F. Supp. 3d 885, 905 (S.D.N.Y. 2018) (citing *LIBOR VI*, 2016 WL 7378980, at *16; *Sullivan*, 2017 WL 685570, at *15; *Platinum I*, 2017 WL 1169626, at *22; *CHF LIBOR*, 277 F. Supp. 3d at 558). Hence, the Court reaffirms its conclusion in *Platinum I* that the OTC Plaintiff is not an efficient enforcer because Plaintiffs have not alleged that the OTC Plaintiff transacted directly with Defendants.

b. Exchange Plaintiffs

The Exchange Plaintiffs are not efficient enforcers of the antitrust laws because Plaintiffs have not adequately alleged that Defendants dominated the market for platinum and palladium derivatives. As an initial matter, the same concerns noted above with respect to causation and complex damages apportionment also apply to the Exchange Plaintiffs. Exchange Plaintiffs' choice to incorporate the Fix price into their platinum and palladium derivative transactions arguably attenuates the causal connection between Defendants' actions and their injury. And damage apportionment may be complex given Plaintiffs' choice to incorporate the Fix price independently of any action by Defendants. Hence, the same problems that flow from the application of the efficient enforcer factors to the OTC Plaintiff's claim also arise in the exchange context.

The solution to those problems that the Court has adopted with respect to the OTC Plaintiff is not readily transferrable to the exchange market, however. As explained above, parties transact directly in the OTC

market. Therefore, an OTC plaintiff's counterparty is reasonably ascertainable. But "[t]he framework of dividing plaintiffs between those who transacted with defendants and those who did not in OTC transactions 'is not readily transferable to the futures market,' because a clearinghouse such as the CME, rather than any identifiable third party, serves essentially as the counterparty." *CHF LIBOR*, 277 F. Supp 3d at 561 (quoting *LIBOR VI*, 2016 WL 7378980, at *16); *see also LIBOR VI*, 2016 WL 7378980, at *16 ("[W]here a plaintiff's counterparty is *reasonably ascertainable* and is not a defendant . . . a plaintiff is not an efficient enforcer.") (emphasis added). For plaintiffs who sold on an exchange, "there is simply no way to tailor the standing analysis to those who dealt directly with defendants." *CHF LIBOR*, 277 F. Supp. 3d at 561. In this case, the Plaintiffs have amended their complaint to allege that CME Clearing "is the counterparty to *all* transactions on the exchange (*i.e.*, the buyer or seller to a NYMEX contract does not have any identified counterparty other than NYMEX)." TAC ¶ 80. In light of the Plaintiffs' amendments, the Court is persuaded that it cannot draw a line between those who transacted directly with defendants and those who did not in the exchange context.

Because the Exchange Plaintiffs' counterparties are not reasonably ascertainable, the Court is caught on the horns of a dilemma. Defendants argue that a necessary corollary of the Exchange Plaintiffs' argument that all NYMEX sellers should be able to collect damages is that "all sellers of NYMEX futures are equally positioned to enforce the antitrust laws" and that accepting their arguments would "effectively

eliminate[] the efficient enforcer requirement altogether" in this case. Mem. at 17. On the other hand, Plaintiffs argue that "to allow only those who directly contracted with Defendants to state a claim would leave wide swaths of their victims—including the *entirety* of the futures and options traders—without a remedy." Plaintiffs' Letter to Court, Dkt No. 195, at 2 n.3. Both Plaintiffs and Defendants are correct. Because the Court cannot enforce the line between those who transacted directly with Defendants and those who did not on an exchange, either *no* seller or *every* seller will be an efficient enforcer. As Judge Stein observed with respect to exchange plaintiffs, "there is simply no way to tailor the standing analysis to those who dealt directly with defendants." *CHF LIBOR*, 277 F. Supp. 3d at 561. Therefore, it is difficult to "render[] plaintiffs' recovery essentially proportional to defendants' ill-gotten gains" and "the choice is between under-enforcement and over-enforcement[.]" *Id.*

One way to resolve this dilemma is for plaintiffs to allege that defendants dominated the relevant exchange market. Recognizing that counterparties to exchange plaintiffs are not reasonably ascertainable, judges in this district have adopted a test that "depends primarily on the extent of defendants' control of the market for the product traded on the exchange." *CHF LIBOR*, 277 F. Supp. 3d at 561 (citations omitted).

FOREX was the first case to adopt this standard. 2016 WL 5108131, at *10. In that case, Judge Schofield noted the *Gelboim* court's observation that "'at first glance there appears to be no difference in the injury

alleged by those who dealt in LIBOR-denominated instruments, whether their transactions were conducted directly or indirectly with the Banks'" but also observed that *Gelboim* "expressed concern . . . with the possibility of damages disproportionate to wrongdoing 'if the Banks control only a small percentage of the ultimate identified market.'" *Id.* (quoting *Gelboim*, 823 F.3d at 779) (ellipsis omitted). She then concluded that this concern was inapplicable because the plaintiffs alleged that the defendants in that case "dominated the FX market with a combined market share of over 90% as significant participants in both OTC and exchange transactions." *Id.* In other words, *Gelboim*'s concern about damages disproportionate to wrongdoing applied much less forcefully on the facts of *FOREX* because where defendants had over 90% market share, they would also be responsible for over 90% of the damages. Three other judges in this district have followed Judge Schofield's lead, reasoning that "control of an exchange-based market 'may be viewed as a . . . way of ensuring that damages would not be greatly disproportionate to wrongdoing." *CHF LIBOR*, 277 F.Supp.3d at 561 (quoting *LIBOR VI*, 2016 WL 7378980, at *16); *see also Silver II*, 332 F. Supp. 3d at 909.

The Court likewise adopts this test as one method by which plaintiffs can allege that an exchange plaintiff is an efficient enforcer.[15] The market domination test

[15] The Court does not hold that an allegation of market domination is the only method by which an exchange plaintiff can adequately plead antitrust standing in this context. For example, Defendants correctly note that the Exchange Plaintiffs have not "allege[d] that

helps to resolve the causation and complex apportionment issues described above. Indeed, the market domination test may be thought to serve as a proxy for whether a plaintiff transacted directly with a defendant; in a market in which defendants dominate, it is far more likely that a plaintiff who bought on an exchange will have transacted directly with a defendant.

The question presented by the Exchange Plaintiffs on this motion is thus whether the Plaintiffs have adequately alleged that Defendants have dominated the platinum and palladium exchange market. The Court's inquiry consists of three steps. First, the Court must define the relevant market. Second, the Court must examine what share of that market Defendants are alleged to have controlled. Finally, the Court must determine whether Defendants controlled a sufficiently large percentage of the relevant market that they "dominated" it.

i. Market Definition

The first step of the Court's inquiry is to define the relevant market. The "guiding precedent leaves room for debate as to how the 'market' should be defined" in cases like this one. *Gold*, 213 F. Supp. 3d at 653. Plaintiffs argue that they have alleged "a single market for platinum and palladium physical, futures and options transactions[.]" Opposition to Joint Motion to

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they traded *through* a clearing member affiliated with any Defendant." Mem. at 12. The Court does not take a position on whether allegations of this type plausibly plead that a plaintiff is an efficient enforcer.

Dismiss for Failure to State a Claim ("Opp."), Dkt No. 216, at 15 n.4; *see, e.g.*, TAC ¶ 254 ("Plaintiffs were sellers in the market for Physical and NYMEX Platinum and Palladium[.]"). However, "[w]hile the Court is bound by the factual allegations in the Complaint[]," the "definition of the relevant market is a legal conclusion, not a factual one." *In re N. Sea Brent Crude Oil Futures Litig.* ("*Oil*"), 256 F. Supp. 3d 298, 312 (S.D.N.Y. 2017), *aff'd sub nom.*, *Prime Int'l Trading, Ltd. v. BP P.L.C.*, 784 F. App'x 4 (2d Cir. 2019). Therefore, "[t]he Court must examine the facts alleged in the [TAC] to determine what market or markets allegedly were restrained based on Plaintiffs' theory of the case." *Id.*

The TAC alleges harm in two different markets: The physical platinum and palladium market and the NYMEX platinum and palladium market. The markets for physical commodities and derivatives based on the price of those commodities are distinct.[16] *See Prime Int'l*

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[16] The TAC is inconsistent with respect to whether platinum and palladium derivatives traded on NYMEX are directly pegged to, or merely strongly correlated with, the price of physical platinum and palladium. *Compare* TAC ¶ 207 ("The Defendants were also large participants in NYMEX futures and options. These contracts, like those for physical sales of platinum and palladium, *directly incorporate or reference* the Fix price in order to determine the cash flows between the parties.") *with id.* ¶ 91 ("The Fixing also directly impacts the price of NYMEX Platinum and Palladium. This is because exchange prices *closely track* the price of spot platinum or palladium.") (emphases added). Therefore, the Court interprets the TAC as alleging that some NYMEX derivatives directly reference the Fix price while others do not. With respect to derivatives that directly incorporate the Fix price, the antitrust injury inquiry is straightforward because "[c]ourts in this Circuit

Trading, 784 F. App'x at 7 (holding that the "physical market for Brent crude oil" and the market for "derivatives that were linked to, or otherwise tracked" a benchmark oil price were two separate markets); *Oil*, 256 F. Supp. 3d at 313.[17] This conclusion is consistent with other decisions in this district that have concluded that OTC and exchange plaintiffs are "victims in . . .

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consider manipulation of a price benchmark to constitute restraint of the market which that benchmark guides." *Oil*, 256 F. Supp. 3d at 313 (citing *Gelboim*, 823 F.3d at 776-77; *FOREX*, 2016 WL 5108131, at *6; *Alaska Elec. Pension Fund v. Bank of Am. Corp.* ("*ISDAFix*"), 175 F. Supp. 3d 44, 59 (S.D.N.Y. 2016)). With respect to derivatives that do not directly incorporate—but closely track—the Fix price, Plaintiffs have adequately alleged that Defendants' manipulation of the NYMEX market is "inextricably intertwined" with their manipulation of the price for physical platinum and palladium. *Aluminum II*, 833 F.3d at 161. Plaintiffs have adequately alleged that Defendants profited by trading in the NYMEX market and that the manipulation of the physical prices of platinum and palladium—*i.e.*, the prevailing price in the OTC market—was "the very means" by which Defendants profited in the NYMEX market. *Id.* at 162. Hence, the Exchange Plaintiffs have pleaded antitrust injury regardless of whether the derivatives they traded were directly linked to the Fix price. *Gold* reached a similar conclusion. 213 F. Supp. at 653 (holding that allegations that exchange plaintiffs suffered antitrust injury were "inextricably intertwined" with the Defendants' alleged manipulation of the Fix Price for antitrust standing purposes).

[17] The *Prime International Trading* and *Oil* courts conducted their analyses of the markets in which the plaintiffs had alleged injury in the context of the antitrust injury prong of the antitrust standing analysis, rather than (as here) in the context of the efficient enforcer factors. But because the analysis of which market or markets in which the plaintiffs have alleged injury must be consistent across both prongs of the antitrust standing inquiry, both are persuasive for the Court's analysis.

different markets." *Nypl v. JPMorgan Chase & Co.*, 15 CIV. 9300 (LGS), 2017 WL 3309759, at *6 (S.D.N.Y. Aug. 3, 2017) (citations omitted); *see also FOREX*, 2016 WL 5108131, at *11 (holding that OTC plaintiffs and exchange plaintiffs suffered injury in two different markets); *cf. CHF LIBOR*, 277 F. Supp. 3d at 562 (observing that both OTC and exchange plaintiffs could be efficient enforcers if the OTC plaintiffs pleaded that they transacted directly with the defendants and the exchange plaintiffs pleaded that the defendants dominated the market, implying that the OTC and exchange markets are distinct).[18]

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[18] This analysis shows why Defendants' argument that the OTC Plaintiffs are "more direct victim[s] of any alleged conspiracy to manipulate the" Fixing than are the Exchange Plaintiffs is unconvincing. Mem. at 15. Plaintiffs have sufficiently pleaded antitrust injury in two different markets, so the OTC Plaintiffs are not more direct victims than the Exchange Plaintiffs; they are victims in a different market. Other judges in this district have also rejected the argument that participants in an OTC market are more direct victims of an alleged conspiracy than participants in an exchange market. *See Nypl*, 2017 WL 3309759, at *6 ("Contrary to Defendants' argument, FX spot market participants who transacted directly at spot trading prices are not more direct victims, but rather victims in a different market.") (citations omitted); *FOREX*, 2016 WL 5108131, at *11; *cf. CHF LIBOR*, 277 F. Supp. 3d at 561-62 (noting that "[o]ne could . . . conceive of the Direct Transaction Plaintiffs as a 'more direct' victim than" an exchange plaintiff but also observing that exchange plaintiffs' claim could proceed if they plausibly alleged market domination by defendants). Consequently, this argument is unconvincing.

The Court observes a tension in both parties' arguments with respect to this issue. Plaintiffs assert that they have alleged "a single market for platinum and palladium physical, futures and options transactions[.]" Opp. at 15. This seems surprising because it supports Defendants' argument that the OTC plaintiff is a

Moreover, Plaintiffs allege different theories of competitive harm in the OTC and exchange markets. For example, the TAC alleges that BASF Metals was "motivated by its desire to keep prices of platinum and palladium low because both metals are used as raw materials in products manufactured by BASF (and its related corporate entities) . . . in addition to its motive

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victim in the same market as the Exchange Plaintiffs. For their part, Defendants argue that Plaintiffs are "asking the Court to hold Defendants trebly liable for transactions in '*two* extraordinarily large' markets (futures and physical)[.]" Mem. at 6 (quoting *Platinum I*, 2017 WL 1169626, at *21) (emphasis added). This also seems surprising because it supports Plaintiffs' arguments that OTC plaintiffs are not efficient enforcers with respect to the NYMEX market. Hence, Plaintiffs and Defendants both appear to be arguing on the wrong side of the one-vs.-two markets question.

This odd configuration likely arises because both Plaintiffs and Defendants had incentives to argue the opposite side of this question on the antitrust injury prong of the antitrust standing analysis. It is easier for Plaintiffs to show antitrust injury if they need only show such injury in one market; thus, Plaintiffs argued that physical and NYMEX platinum and palladium were traded in one market and Defendants argued that each set of Plaintiffs must demonstrate a distinct antitrust injury. Plaintiffs now argue that "[w]hether physical and futures transactions represent one market or two markets is of no moment at this stage because the Court already ruled that Plaintiffs suffered antitrust injury." Opp. at 15 (citing *Platinum I*, 2017 WL 1169626, at *19-20). It is true that courts have generally addressed this issue on the antitrust injury prong of the antitrust standing analysis. *See, e.g.*, *Prime Int'l Trading*, 784 F. App'x at 7. But as the above demonstrates, it is also relevant to the application of the efficient enforcer factors, including whether there are more direct victims of the alleged conspiracy under the second efficient enforcer factor. Furthermore, a definition of the relevant market is a prerequisite to the inquiry into whether defendants dominated a market.

as a proprietary trader in platinum and palladium[.]" TAC ¶ 202. This is distinct from the TAC's allegations that all Defendants profited from manipulating the Fix downward by virtue of their short positions in NYMEX platinum and palladium. *See, e.g.*, *id.* ¶ 207.

These are distinct theories of anticompetitive harm, which reinforces the conclusion that Plaintiffs have alleged antitrust injury in two separate markets *See Oil*, 256 F. Supp. 3d at 312-13 (concluding that where "Plaintiffs posit that Defendants engaged in . . . anticompetitive behavior for two, potentially conflicting, reasons[,]" one of which was to drive the price of Brent crude oil "downward where related entities are both producers and refiners, so as to increase the margin, making the refining business more profitable" and the second of which was to make increased profits on "futures and derivatives products traded on NYMEX" linked to a Brent oil benchmark, the plaintiffs had alleged harm in two markets). Thus, Plaintiffs have alleged harms in both the OTC and NYMEX markets. Accordingly, the relevant market for purposes of the Court's inquiry into whether the Exchange Plaintiffs have plausibly alleged efficient enforcer status is the NYMEX market.

ii. Defendants' Market Share

The second step of the Court's inquiry is to ascertain what share of the market Defendants allegedly controlled. Plaintiffs allege that Defendants each "h[eld] substantial market share in Physical and NYMEX Platinum and Palladium." TAC ¶ 38 (BASF Metals); *id.* ¶ 40 (Goldman Sachs); *id.* ¶ 42 (HSBC); *id.* ¶ 44 (ICBC Standard); *see also id.* ¶ 191

("BASF[Metals] engages in a large amount of Physical and NYMEX Platinum and Palladium trading."); *id.* ¶ 192 ("Defendant Goldman Sachs has a precious metals trading desk and engages in millions of dollars of platinum and palladium physical and derivatives trades each year."); *id.* ¶ 193 ("HSBC engages in millions of dollars of platinum and palladium physical and derivatives trades each year."); *id.* ¶ 207 ("The Defendants were also large participants in NYMEX futures and options."). Standing alone, these allegations might have been sufficient to allege that Defendants dominated the exchange market, requiring further factual development to resolve that question. *Cf. LIBOR VI*, 2016 WL 7378980, at *17 (denying motion to dismiss because further factual development was necessary to determine if defendants dominated the market); *CHF LIBOR*, 277 F. Supp. 3d at 562. However, as explained below, the Court does not decide whether the above allegations would have been sufficient to plausibly allege that Defendants dominated the market.

The TAC contains additional allegations that are relevant to the market-domination inquiry. The TAC alleges that all banks held between 20 and 50 percent of the "overall open interest" in platinum and palladium over the class period. TAC at 113, Charts 81 & 82. The TAC does not allege that the three Defendant Banks[19] were the only banks trading in the platinum and palladium futures market. In fact, the

[19] This opinion refers to Goldman Sachs, HSBC, and ICBC Standard collectively as the "Defendant Banks" because BASF Metals "is not a bank." TAC ¶ 197 n.60.

TAC also alleges that UBS, which is no longer a defendant and was not a member of the Fixing, "engages in millions of dollars of platinum and palladium trades each year." *Id.* ¶ 195. Therefore, the Defendant Banks' market share must represent some fraction of this overall open interest. The TAC also notes that "BASF is not included in" the 20 to 50 percent figure "because it is not a bank." *Id.* ¶ 197 n.60. However, the TAC alleges that BASF Metals had very small holdings in the platinum and palladium derivatives market. *Id.* at 112, Chart 79. Therefore, it is implausible that adding BASF Metals' market share to the other Defendants would have a meaningful impact on the inquiry into whether Defendants dominated the exchange market.

The TAC further alleges that "data obtained from the CFTC . . . shows that NYMEX short positions were heavily concentrated among the top 4 and top 8 traders. Despite the presence of other traders in the market, the top 4 and top 8 traders accounted for approximately 30 to 45% and 45 to 65%, respectively, of platinum and palladium short positions during the Class Period." *Id.* ¶ 199; *see also id.* ¶ 114-15, charts 83 & 85.[20] Plaintiffs' theory is that Defendants "were holders of massive short positions in NYMEX platinum and palladium futures and options" during the Proposed Class Period. *Id.* ¶ 14. Consequently, on Plaintiffs' theory, the four Defendants would have been

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[20] The TAC alleges that there were approximately 40 to 100 traders with short positions on the exchange market that reported data to the CFTC during the Proposed Class Period. *See id.* at 114-15, Charts 82 & 84.

among the largest NYMEX short traders. As the Court must draw all inferences in favor of the plaintiffs on a motion to dismiss, the Court assumes that the four Defendants were the largest NYMEX short traders in the market. But even granting that assumption, Defendants' combined market share would have been "approximately 30[%]" of the platinum NYMEX market and "approximately 45[%]" of the palladium NYMEX market. *Id.* ¶ 199.[21]

iii. Market Domination

The final step in the Court's inquiry is whether Defendants controlled a sufficiently large share of the market to "dominate" it. As noted above, *Gelboim* expressed concern that "if the [defendants] control only a small percentage of the ultimate identified market," they may be held liable for "damages disproportionate to wrongdoing." 823 F.3d at 779. Here, Plaintiffs have alleged that Defendants control more than a small percentage of the relevant market. On the other hand, *FOREX* concluded that an allegation that defendants had "a combined market share of over 90%" was sufficient to allege market domination. 2016 WL 5108131, at *9. Plaintiffs have not alleged that Defendants controlled 90% of the NYMEX platinum or palladium markets.

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[21] Defendants point to the TAC's allegation that "'the autocatalyst and jewelry segments of the platinum market' are 'the two largest sources of demand'" as further undercutting any suggestion that Defendants dominated the platinum and palladium market. Mem. at 13-14 (quoting TAC ¶ 78). However, as noted above, the Court has concluded that the OTC market and the exchange market are distinct, and this allegation pertains to the OTC market.

LIBOR VI presented a closer question. There, the plaintiffs alleged that the sixteen defendant banks or their affiliates were "large traders" and that "large traders comprised 70 to 90 percent of [the exchange] market." *LIBOR VI*, 2016 WL 7378980, at *17. However, the *LIBOR VI* court noted that the sixteen defendants were "dwarfed by the total population of over 2,900 large traders in that market during the same time period." *Id.* Pronouncing itself "skeptical that the Exchange-Based plaintiffs can ultimately show that the defendants controlled the market," the court nonetheless allowed the plaintiffs to proceed because "it remains possible that the panel banks, which included some of the world's largest financial institutions, together controlled a large percentage of the market, measured by number of trades or by dollar amount." *Id.* There was "simply not a sufficient record on the issue of market control" for Judge Buchwald to conclude as a matter of law that the plaintiffs had failed to state a claim. *Id.*

Likewise, the *CHF LIBOR* court concluded that "[i]f plaintiffs had adequately alleged an antitrust conspiracy involving all or nearly all of defendants" in that case, "the extent of defendants' control of the exchange markets for Swiss franc currency futures would require factual development and would not be a basis for dismissal." 277 F. Supp. 3d at 562. But because the plaintiffs had failed to plausibly allege a conspiracy, Judge Stein dismissed the claims brought by exchange plaintiffs. *Id.*; *see also Silver II*, 332 F. Supp. 3d at 908-09 (concluding that plaintiffs lacked antitrust standing because they had not plausibly

alleged domination of the relevant exchange market by certain defendants).

The Court concludes that on the facts alleged in the TAC, Plaintiffs have not adequately pleaded that Defendants dominated the NYMEX market for platinum and palladium derivatives. Plaintiffs have alleged that Defendants' market share was at most 45% of the relevant market, and Plaintiffs' allegations suggest that Defendants' market share was likely far less than that. The Court need not and does not adopt a bright line rule for the market share that a defendant or group of defendants must control to meet the "market domination" standard. Rather, the Court holds only that Plaintiffs have not adequately pleaded market domination in the TAC.

c. Conclusion

As in *Platinum I*, the Court concludes that Plaintiffs are not efficient enforcers of the antitrust laws and, therefore, are not the "proper party 'to perform the office of a private attorney general' and . . . 'vindicate the public interest in antitrust enforcement.'" *Gelboim*, 823 F.3d at 780 (quoting *Gatt*, 711 F.3d at 80). Accordingly, Plaintiffs' Sherman Act claim is dismissed without prejudice.

B. Rule 12(b)(2) Motion

1. Legal Standard

A defendant may move to dismiss a plaintiff's claims against it for "lack of personal jurisdiction." Fed. R. Civ. P. 12(b)(2). On a motion to dismiss pursuant to Rule 12(b)(2), the "plaintiff bears the burden of

demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit." *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010) (citing *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206 (2d Cir. 2003) (per curiam)); *see also Bank Brussels Lamberts v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999) ("When responding to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant." (citations omitted)). To defeat a jurisdiction-testing motion, the plaintiff's burden of proof "varies depending on the procedural posture of the litigation." *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 84 (2d Cir. 2013) (quoting *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990)). At the pleading stage—and prior to discovery—a plaintiff need only make a prima facie showing that jurisdiction exists. *Id.* at 84-85; *see also Eades v. Kennedy, PC Law Offices*, 799 F.3d 161, 167-68 (2d Cir. 2015) ("In order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists.") (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 167 (2d Cir. 2013)).

If the court considers only pleadings and affidavits, the plaintiff's prima facie showing "must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 659, 673 (2d Cir. 2013) (quoting *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163

(2d Cir. 2010) (quotation marks omitted)). Courts may rely on materials outside the pleading in considering a motion to dismiss for lack of personal jurisdiction. *See DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001). "The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits." *MacDermid, Inc. v. Deiter*, 702 F.3d 725, 727 (2d Cir. 2012) (quoting *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 580 (2d Cir. 1993)). If the parties present conflicting affidavits, however, "all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party." *Seetransport Wiking*, 702 F.3d at 727 (citations omitted).

2. Application

Plaintiffs have adequately pleaded that BASF Metals and ICBC Standard are subject to personal jurisdiction in the United States under a conspiracy theory. In its prior opinion, the Court explained at length the requirements for a federal court to exercise personal jurisdiction. *See Platinum I*, 2017 WL 1169626, at *39-44. The Court does not rehash that analysis here and provides only a summary of the law necessary for the disposition of the motions currently before the Court.

As in *Platinum I*, Plaintiffs have "disclaimed that the Foreign Defendants are subject to general personal jurisdiction." *Id.* at *43; *see* Plaintiffs' Letter to the Court, Dkt No. 196, at 1 ("Plaintiffs do not assert that

Defendants are subject to general jurisdiction[.]"). Therefore, the Court will confine its analysis to specific jurisdiction. Among other requirements, "the exercise of personal jurisdiction must comport with constitutional due process." *Platinum I*, 2017 WL 1169626, at *39 (citing *Licci ex rel Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59-60 (2d Cir. 2012)). The

> due process analysis proceeds in two steps. First, courts evaluate the quality and nature of the defendant's contacts with the forum state under a totality of the circumstances test. Where the claim arises out of, or relates to, the defendant's contacts with the forum—*i.e.*, specific jurisdiction is asserted—minimum contacts necessary to support such jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there. Second, once minimum contacts are established, a court considers those contacts in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.

Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68, 82 (2d Cir. 2018) (quotations omitted).

There are two "independent, if conceptually overlapping, methods of demonstrating minimum contacts." *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 243 (2d Cir. 2007). "The first is through purposeful availment,' in which 'the defendant purposefully availed itself of the privilege of doing business in the

forum and could foresee being haled into court there.'" *CHF LIBOR*, 277 F. Supp. 3d at 589 (quoting *Licci ex rel Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 170 (2d Cir. 2013)). "The second is through 'purposeful direction,' in which 'the defendant took intentional, and allegedly tortious, actions expressly aimed at the forum.'" *Id.* (quoting *In re Terrorist Attacks*, 714 F.3d at 674). "The 'purposeful direction' test is also referred to as the 'effects test,' which is a 'theory of personal jurisdiction typically invoked where . . . the conduct that forms the basis for the controversy occurs entirely out-of-forum, and the only relevant jurisdictional contacts with the forum are therefore in-forum effects harmful to the plaintiff.'" *Id.* (quoting *Licci*, 732 F.3d at 173). "In such circumstances, the exercise of personal jurisdiction may be constitutionally permissible if the defendant expressly aimed its conduct at the forum." *Id.* (quoting *Licci*, 732 F.3d at 173).

Plaintiffs have alleged Sherman Act and CEA claims against all Defendants in this case, including the Foreign Defendants. *See* TAC ¶¶ 273-95; *see also Platinum I*, 2017 WL 1169626, at *43. Both of these statutes provide for nationwide service of process. *See CHF LIBOR*, 277 F. Supp. 3d at 589 (citing 15 U.S.C. § 22 (Sherman Act); 7 U.S.C. § 25(c) (CEA)). District courts in this circuit, and courts of appeals other than the Second Circuit, have concluded that "when a civil case arises under federal law and a federal statute authorizes nationwide service of process, the relevant contacts for determining personal jurisdiction are contacts with the United States as a whole." *Platinum I*, 2017 WL 1169626, at *40 (quoting *Gucci*

Am., Inc. v. Weixing Li, 768 F.3d 122, 142 n.21 (2d Cir. 2014) (collecting cases)); *see, e.g.*, *CHF LIBOR*, 277 F. Supp. 3d at 589-90 (concluding the relevant forum is the United States as a whole).[22] Therefore, the Court analyzes whether Plaintiffs have made a prima facie showing of minimum contacts with the United States with respect to BASF Metals and ICBC Standard.[23]

a. BASF Metals

i. Purposeful Availment

Plaintiffs have not made a prima facie showing that BASF Metals purposefully availed itself of the privilege of doing business in the United States. The TAC alleges that BASF Metals "is a company organized and existing under the laws of the United Kingdom with its principal place of business in London, England." TAC ¶ 34. The TAC alleges that

> [i]n 2006, BASF [Metals]'s ultimate parent company, BASF Societas Europaea ('BASF SE') . . . acquired Engelhard Corporation of New Jersey. . . . As part of the acquisition of Engelhard Corporation, BASF SE also acquired Engelhard Metals Limited, which was a Fixing member[.] . . . Through its acquisition of

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[22] "[T]he Second Circuit 'has not yet decided' whether to adopt this approach[.]" *Platinum I*, 2017 WL 1169626, at *40 (quoting *Gucci*, 768 F.3d at 142 n.21).

[23] Because the Court concludes that Plaintiffs have made such a showing, it does not reach the question of whether personal jurisdiction is proper under New York law or Federal Rule of Civil Procedure 4(k)(2). *See Platinum I*, 2017 WL 1169626, at *40-41.

> Engelhard Metals Limited, BASF became a Fixing member[.] . . . In 2012, BASF SE changed the name of Engelhard Metals Limited to BASF Metals Limited.

Id. Plaintiffs also allege that BASF Corporation ("BASF Corp.") is a subsidiary of BASF SE and "is based in New Jersey (and a Delaware-registered company)." *Id.* ¶ 36. Thus, the TAC alleges that BASF SE is the parent corporation of both BASF Metals and BASF Corp. *See id.* ¶¶ 34-36. BASF Metals "does not have offices, operations, or employees in New York, New Jersey, or anywhere else in the United States." Declaration of Dr. Vasileios Vergopouls in Support of BASF Metals Limited's Motion to Dismiss Pursuant to Fed R. Civ. P. 12(b)(2) and 12(b)(6) ("Vergopouls Decl."), Dkt No. 209-1, ¶ 2.

Plaintiffs' fundamental difficulty can be summarized as follows. They have alleged that employees of BASF *Metals* manipulated the Fix as part of a conspiracy. And they have alleged that United States-based traders employed by BASF *Corp.* executed platinum and palladium trades, allegedly to profit from the conspiracy. However, for the Court to exercise personal jurisdiction over Defendant BASF Metals, Plaintiffs' allegations must somehow connect BASF Metals to the United States, such that BASF Metals can be said to have "purposefully availed itself of the privilege of doing business in the [United States] and could foresee being haled into court there." *Licci*, 732 F.3d at 173

Plaintiffs attempt to bridge this gap by arguing that employees of BASF Metals were agents of BASF Corp.

or, perhaps, of BASF SE. *See, e.g.*, Plaintiffs' Consolidated Opposition to Motions To Dismiss Pursuant To Fed. R. Civ. P. 12(b)(2) ("Rule 12(b)(2) Opp."), Dkt No. 215, at 10 ("Regardless of whether or not these individuals were employees of BASF Metals . . . a time-honored principle of agency law is *qui facit per alium facit per se*—he who acts through another acts himself."). In support of this argument, Plaintiffs argue that yet a fourth BASF entity, BASF Precious Metals Services, holds BASF out as "global and vertically integrated" and as providing "24/7 access to world metals exchanges & key bullion centres via trading offices in among other places Iselin, New Jersey." Rule 12(b)(2) Opp. at 12 (quoting TAC ¶ 36). In addition, the TAC alleges "BASF Corporation has shared employees and directors with BASF Metals Limited." TAC ¶ 37.

The Second Circuit recently observed that it "ha[s] not clearly delineated the showing necessary before an agent's contacts will be imputed to its principal for purposes of personal jurisdiction under the Due Process Clause[.]" *Schwab*, 883 F.3d at 84. However, the Circuit's "caselaw concerning the New York long-arm statute is . . . instructive" because "[a]lthough the long-arm statute and the Due Process Clause are not technically coextensive, the New York requirements (benefit, knowledge, some control) are consonant with the due process principle that a defendant must have purposefully availed itself of the privilege of doing business in the forum." *Id.*

Thus, the Court takes guidance from *Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181 (2d Cir. 1998),

which applied the New York long-arm statute. The *Jazini* court held that "[t]o establish that a subsidiary is an agent of the parent, the plaintiff must show that the subsidiary 'does all the business which the parent corporation could do were it here by its own officials.'" *Id.* at 184 (quoting *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 537 (N.Y. 1967)). Prior to *Jazini*, "the key Second Circuit case regarding the propriety of a court's exercise of personal jurisdiction over a foreign parent company based on the conduct of its subsidiary was" *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117 (2d Cir. 1984). *In re Aluminum Warehousing Antitrust Litigation* ("*Aluminum I*"), 90 F. Supp. 3d 219, 228 (S.D.N.Y. 2015). "*Beech Aircraft* established a four-factor test for evaluating whether [a court's exercise of] personal jurisdiction [over a defendant is proper] in such a scenario: (1) common ownership, (2) financial dependency, (3) the degree to which the parent interferes with the selection and assignment of executive personnel and fails to observe corporate formalities, and (4) the parent's degree of control over the marketing and operational policies of the subsidiary." *Id.* (citing *Jazini*, 148 F.3d at 184).

Plaintiffs have failed to make a prima facie showing as to any of these factors. In addition, the Supreme Court has observed that "[i]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quotation omitted). Plaintiffs' attempt to circumvent this well-entrenched principle via an appeal to agency law is unconvincing.

See Schwab, 883 F.3d at 84 (finding that the requirements for personal jurisdiction were not met where a complaint impermissibly "collapses . . . two distinct Defendants—a parent and a wholly owned subsidiary—. . . into one"); *Aluminum I*, 90 F. Supp. 3d at 238 ("It is commonplace for executives to hold several roles at several affiliated companies. But so long as separate corporate formalities are maintained, the mere fact that some employees of a parent are also officers of a subsidiary does not imply that the subsidiary is an agent of the parent."); *id.* at 232 (website touting "global reach of a family of companies" insufficient where corporate formalities observed).

Plaintiffs also argue in support of their agency theory that "BASF Metals . . . advertised for precious metals trading positions in New Jersey." Rule 12(b)(2) Opp. at 9 (citing Ex. 1 to Declaration of Jay L. Himes in Support of Plaintiffs' Consolidated Opposition to Motions to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) ("Himes Decl."), Dkt No. 214). This allegation is also insufficient to establish purposeful availment. Even assuming that BASF Metals' employment of a United-States-based trader would be sufficient to make a prima facie showing of purposeful availment with the United States (which the Court does not decide), the reference to BASF Metals in the job posting was "inadvertent" and the posting "was not filled." Declaration of Rachel Crowley, Dkt No. 221; *see also id.* ("If an individual had been hired to fill the position described in the Job Posting, the individual would have been an employee of BASF Corporation, not BASF Metals Ltd."). Similarly, Plaintiffs' attempt to point to LinkedIn profiles for "individuals who traded precious

metals for BASF's U.S.-based affiliates during the class period" is unavailing. Rule 12(b)(2) Opp. at 9 (citing Exs. 2-3 to Himes Decl.). These traders did not work for BASF Metals because BASF Metals "does not have . . . employees in . . . the United States." Vergopouls Decl. ¶ 2. Hence, neither the job advertisement nor the LinkedIn profiles provide support for Plaintiffs' agency theory.

Accordingly, Plaintiffs have failed to make a prima facie showing that employees of Defendant BASF Metals were agents of BASF Corp. or BASF SE, and they have therefore failed to show that Defendant BASF Metals "purposefully availed itself of the privilege of doing business in the [United States] and could foresee being haled into court there." *Licci*, 732 F.3d at 173.

ii. Effects Test

Plaintiffs arguments that BASF Metals should be subject to personal jurisdiction under the effects test is similarly flawed. Under the effects test, "the exercise of personal jurisdiction may be constitutionally permissible if the defendant expressly aimed its conduct at the forum." *Id.* at 173 (citing *Calder v. Jones*, 465 U.S. 783, 789 (1983)). "The fact that harm in the forum is foreseeable is insufficient for the purpose of establishing specific personal jurisdiction over a defendant." *Platinum I*, 2017 WL 1169626, at *42 (quoting *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 339 (2d Cir. 2016)) (alterations and quotation marks omitted).

Plaintiffs are unable to show any conduct by BASF Metals that was expressly aimed at the United States. Again, Plaintiffs have pleaded that BASF Metals conspired to manipulate the Fix and that BASF Corp. engaged in trading to profit from that illegal conduct in the United States. But Plaintiffs have not alleged that BASF Metals took any action that was expressly aimed at the United States. Plaintiffs argue that BASF Metals' "conduct was aimed directly *at* the U.S." because the conspiracy allegedly targeted NYMEX. Rule 12(b)(2) Opp. at 15. But that characterization is inaccurate: BASF Metals' conduct allegedly targeted the Fix, which occurred in London. Although it may have been foreseeable that this conduct would cause harm in the United States, "[m]ere foreseeability" is insufficient under the effects test. *Schwab*, 883 F.3d at 87. Hence, Plaintiffs have failed to make a prima facie showing of personal jurisdiction as to BASF Metals under the effects test.

b. ICBC Standard

The TAC fails to make a prima facie showing of personal jurisdiction as to ICBC Standard under the purposeful availment or effects test for much the same reasons as it failed to do so with respect to BASF Metals. The TAC alleges that ICBC Standard "is a banking and financial services company organized and existing under the laws of the United Kingdom." TAC ¶ 43. Plaintiffs allege that a different corporate entity, Standard Bank Group Limited, is "licensed by the New York Department of Financial Services with" headquarters located in New York City. *Id.* The TAC further alleges that a third entity, "ICBC"—which is

the "corporate majority owner" of ICBC Standard, Declaration of Karen Florencio in Support of ICBC Standard Bank Plc's Motion to Dismiss the Third Consolidated Amended Class Action Complaint ("Florencio Decl."), Dkt No. 211, ¶ 11—"is also licensed by the New York Department of Financial Services" with headquarters located in New York City. TAC ¶ 43. However, much like BASF Metals, ICBC Standard has no employees in the United States. Florencio Decl. ¶ 9. The Court construes the TAC to allege that there were New-York-based platinum and palladium traders in both the physical and derivatives markets for affiliates or subsidiaries of ICBC Standard, although the TAC is not clear on this point.

Plaintiffs raise the same agency argument with respect to employees of ICBC Standard's affiliates and subsidiaries as they do with BASF Metals, and the result is the same. Plaintiffs have not alleged sufficient reason for the Court to disregard distinctions between distinct corporate entities. The Court need not repeat its analysis here. One allegation Plaintiffs raise that is specific to ICBC Standard is that Ludmila Fabianova, a "Senior Vice President" of "Precious Metals Sales" at ICBC Standard was listed as a "'USA'-based delegate" for a conference in Rome. Rule 12(b)(2) Opp. at 10 (citing Exs. 4 & 5 to Himes Decl.). But this listing is insufficient to support the inference that Ms. Fabianova did anything to contribute to the alleged conspiracy to manipulate the Fix price while in the United States. Accordingly, Plaintiffs have failed to make a prima facie showing of personal jurisdiction with respect to ICBC under the minimum contacts or effects test.

c. Conspiracy Jurisdiction

Plaintiffs have plausibly alleged that BASF Metals and ICBC Standard are subject to conspiracy jurisdiction. The Second Circuit has recently clarified that to "alleg[e] a conspiracy theory of jurisdiction: the plaintiff must allege that (1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state." *Schwab*, 883 F.3d at 87 (citing *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013)).[24]

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[24] Because Plaintiffs argued that conspiracy jurisdiction was proper under the New York long-arm statute, the Court offers an observation about the relationship between the requirements for conspiracy jurisdiction under that statute and the standard announced in *Schwab*. In its prior opinion, the Court held that "[t]he elements of conspiracy jurisdiction [under the New York long-arm statute] are that '(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control or at the request of or on behalf of the out-of-state defendant.'" *Platinum I*, 2017 WL 1169626, at *48 (quoting *Tarsavage v. Citic Trust Co.*, 3 F. Supp. 3d 137, 147 (S.D.N.Y. 2014)). Although a defendant need not demonstrate a "formal agency relationship . . . between co-conspirators," the third prong of this test is designed to capture "the traditional indicia of an agency relationship." *Contant v. Bank of Am. Corp.*, 385 F. Supp. 3d 284, 292 n.2, 293 (S.D.N.Y. 2019). However, the Court recognizes that the requirements of conspiracy jurisdiction under New York law are unsettled. *See id.* at 292 n.2 (noting that "an out-of-state defendant can be subject to personal jurisdiction in New York even without the traditional indicia of an agency relationship when that defendant 'has knowledge of the

The Court concluded in its earlier opinion that Plaintiffs had plausibly alleged a conspiracy among Defendants. *See Platinum I*, 2017 WL 1169626, at *10-16. There is also no question that BASF Metals and ICBC Standard participated in the conspiracy as alleged. Thus, the contested issue is whether any United-States-based co-conspirators acted "in furtherance of the conspiracy[.]" *Schwab*, 883 F.3d at 87.

Schwab guides the Court's analysis of conspiracy jurisdiction. The *Schwab* court considered whether the court had personal jurisdiction over three categories of defendants. Most relevant here, *Schwab* considered

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New York acts of his co-conspirators.'" (quoting CPLR § 302 Practice Commentary C302:4 (2013) and citing *Lawati v. Montague Morgan Slade Ltd.*, 961 N.Y.S.2d 5, 8 (1st Dep't 2013)). Still, the requirements for conspiracy jurisdiction announced in *Schwab* appear to be less demanding than those established under the New York long-arm statute. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR VIII*"), 11 MDL 2262 (NRB), 2019 WL 1331830 (S.D.N.Y. Mar. 25, 2019), at *11 (observing that "any discussion of conspiracy jurisdiction must be approached with caution" because "the state[] in which . . . the FDIC bring[s its] state law claim[] [*i.e.*, New York] . . . impose[s] more stringent requirements than the ones adopted by *Schwab*"). Conspiracy jurisdiction may thus be the rare issue where "the jurisdictional analysis under the New York long-arm statute" does not "closely resemble the analysis under the Due Process Clause of the Fourteenth Amendment." *Licci*, 673 F.3d at 61 n.11 (citation omitted). As noted above, because the Court concludes that Plaintiffs have adequately alleged the prerequisites for conspiracy jurisdiction with respect to the United States as a whole, it need not decide the relationship between the due process requirements for conspiracy jurisdiction and the requirements for conspiracy jurisdiction under the New York long-arm statute.

claims of "non-seller defendants." *Id.* at 86 (capitalization altered). The only forum-related contact in which these defendants had engaged was the sale of securities in California. *Id.* at 86-87.[25] The *Schwab* court concluded that it could not exercise personal jurisdiction because the plaintiff's "pleading does not permit an inference that certain Defendants' sales in California were in furtherance of the conspiracy." *Id.* at 87. Although the plaintiff argued that "Defendants conspired not only to manipulate LIBOR, but also to earn profits from that manipulation," the Second Circuit held that "financial self-interest is not the same as furthering a conspiracy through California-directed sales, and nowhere in Schwab's complaint are there allegations that Defendants undertook such sales as part of the alleged conspiracy." *Id.* (quotation omitted). Thus, the teaching of *Schwab* is that the mere sale of financial instruments by a co-conspirator in a forum is insufficient to confer conspiracy jurisdiction in that forum, at least on the facts presented in that case.[26]

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[25] California was "the relevant forum for jurisdictional purposes" in *Schwab*. 883 F.3d at 82 n.4.

[26] There is disagreement among district courts in this circuit over the precise holding of *Schwab*. The root of the disagreement centers on the motive of the conspiracy alleged in *Schwab*. In *Gelboim*—which involved the same conspiracy—the Second Circuit held that the allegations in that case "evince[d] a common motive to conspire" consisting of "increased profits and the projection of financial soundness[.]" 823 F.3d at 781-82 (quotation omitted). On remand, Judge Buchwald concluded that "[i]t is far from clear that Gelboim should be read to mean that plaintiffs have sufficiently alleged 'increased profits' as a goal independent of a conspiracy to 'project[] . . . financial soundness." *LIBOR VI*, 2016 WL 7378980, at *2 (citation omitted). Therefore, the *LIBOR VI* court concluded

that United States-based trading was not within the scope of the "reputation-motivated," as opposed to a "profit-motivated," conspiracy. *Id.* at *8-9. This conclusion rested on the court's reasoning that a profit-motivated conspiracy was implausible because the *LIBOR VI* plaintiffs had alleged that the panel banks had colluded to suppress the LIBOR rate, but banks act as both borrowers and lenders. *See id*. at *2-6. *Gelboim* itself noted that "common sense dictates that the Banks operated not just as borrowers but also as lenders in transactions that referenced LIBOR . . . It seems strange that this or that bank (or any bank) would conspire to gain, as a borrower, profits that would be offset by a parity of losses it would suffer as a lender" before concluding that it could not come to a firm conclusion on the question because "the record is undeveloped." 823 F.3d at 783. Judge Buchwald found the record sufficiently developed to dismiss the claims of a profit-motivated conspiracy as implausible. *LIBOR VI*, 2016 WL 7378980, at *3. Thus, Judge Buchwald concluded in *LIBOR VIII* that the allegation that Defendants had sold LIBOR-influenced securities in a forum was not an act "in furtherance of the conspiracy" because the sale of securities in the forum did not advance a reputation-motivated conspiracy. *See* 2019 WL 1331830, at *4 ("[T]he conspiracy to manipulate LIBOR had nothing to do with' defendants' transactions with plaintiffs, because the sale of LIBOR-based instruments motivated by defendants' 'financial self-interest' could not have furthered their conspiracy to manipulate LIBOR." (quotation omitted)). The upshot of this reasoning is that *if* plaintiffs plausibly allege a profit-motivated conspiracy, then the mere sale of securities in a forum *can* constitute an act in furtherance of the conspiracy sufficient to confer jurisdiction. *See FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, No. 16 Civ. 5263, 2018 WL 4830087, at *8 (S.D.N.Y. Oct. 4, 2018) (concluding that "where the complaint plausibly alleges a profit-motive, as here, the U.S.-based trading is properly alleged to have been a part of the conspiracy and to be related to the overseas . . . jurisdiction").

At least one court disagrees with this interpretation of *Schwab*, however. In *Dennis*, the plaintiffs argued that certain "defendants marketed and sold BBSW-Based Derivatives in the United States."

Here, however, Plaintiffs have alleged more than that co-conspirators sold platinum and palladium or platinum and palladium derivatives on an exchange. Plaintiffs allege that BASF Corp.'s "precious metals traders would update order information during the

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343 F. Supp. 3d at 203 (cleaned up). The plaintiffs contended that "[t]hese transactions are sufficiently related to [their] claims . . . because they are the machinery through which Defendants committed a domestic per se antitrust violation by reaching into the forum to contract for price-fixed BBSW-Based Derivatives with U.S. investors." *Id.* (cleaned up). The plaintiffs argued that "the 'reputation-based' conspiracy alleged in *Charles Schwab* should be distinguished from the 'profit-motivated' conspiracy alleged here." *Id.* at 205. However, Judge Kaplan noted that in *Schwab* "the alleged conspiracy was undertaken both because 'by understating their true borrowing costs, Defendants were able to project an image of financial stability to investors who were sensitive to risks associated with major banks following the financial crisis that began in 2007' *and* because 'suppressing LIBOR . . . had the immediate effect of lowering Defendants' interest payment obligations on financial instruments tied to LIBOR." *Id.* (quoting *Schwab*, 883 F.3d at 78) (emphasis in *Dennis*) (alterations omitted). "Accordingly," the *Dennis* Court held, "the conspiracy to manipulate LIBOR alleged in *Charles Schwab* was indeed motivated in part by financial incentives." *Id.* And thus, Judge Kaplan held that *Schwab* "controls here and precludes a finding of personal jurisdiction—whether through the Foreign Defendants' direct transactions in BBSW-Based Derivatives with plaintiffs or through a conspiracy theory of jurisdiction—over plaintiffs' federal claims on the basis of the Foreign Defendants' transactions in BBSW-Based Derivatives in the United States." *Id.* at 205-06. Ultimately, as described at greater length below, the Court need not reach the issue of the precise holding of *Schwab* because the Court concludes that even if it defines Plaintiffs' alleged conspiracy narrowly—*i.e.*, as a conspiracy to manipulate the Fix price—Plaintiffs have sufficiently alleged in-forum conduct in furtherance of the conspiracy.

Fixing and provide this updated order information to BASF [Metals'] participant in the Fixing as the Fixing was conducted." TAC ¶ 38. Similarly, the TAC alleges that "New York-based precious metals traders [employed by a United States affiliate of ICBC Standard] would update order information during the Fixing and provide this updated order information to [ICBC Standard]'s participant in the Fixing as the Fixing was conducted." *Id.* ¶ 44.[27] Furthermore, the TAC alleges that the participants in the Fixing on behalf of Defendants BASF Metals and ICBC Standard were in "constant communication" with traders employed by United-States-based affiliates. *Id.* ¶ 38 (BASF Metals); *id.* ¶ 44 (ICBC Standard).

Hence, Plaintiffs plausibly plead actions by co-conspirators in the United States in furtherance of the conspiracy to manipulate the Fix price. The TAC alleges United-States based traders for affiliates of BASF Metals and ICBC Standard provided non-public client order information directly to Fixing participants. *Id.* ¶ 38. While the TAC does not precisely allege what BASF Metals' and ICBC Standard's participants in the Fixing did with this information, it is plausible to infer that they used the information provided by United-States-based traders to decide on the price at which

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[27] The TAC names BASF Corporation as a co-conspirator but not as a defendant. It does not name ICBC's U.S. based affiliate as a co-conspirator. However, because the complaint alleges that Defendant ICBC has "New York-based precious metals traders," TAC ¶ 44, but ICBC has "[n]o employees . . . permanently located in the United States," Florencio Decl. ¶ 9, the Court construes the TAC to allege that employees of a United-States-based affiliate of ICBC Standard employed precious metals traders.

they ultimately wanted the Fixing to settle. Thus, the TAC plausibly alleges that United-States-based co-conspirators acted in furtherance of the conspiracy to manipulate the Fix, and the Court has personal jurisdiction over both BASF Metals and ICBC Standard.

The Court observes that the *Schwab* standard for conspiracy jurisdiction is extraordinarily broad. Indeed, under the *Schwab* standard, a court can exercise personal jurisdiction over a defendant based on the actions of a co-conspirator who is entirely unknown to that defendant.[28] *Cf. Contant*, 385 F. Supp. 3d at 292

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[28] Consider the following hypothetical. Imagine that, hoping to earn profits by trading abroad, Bank A conspired to manipulate the Fix price in London with Bank B. Imagine also that, entirely unbeknownst to Bank A, Bank B received information about platinum trading from a United States branch of Bank C. Under the *Schwab* standard, a United States court may have personal jurisdiction over Bank A based on the transmission of information from Bank C to Bank B—even though Bank A is not alleged to have had any control over, or even to have known about, Bank C's communication. This hypothetical must be reconciled with the Supreme Court's admonition that the "exercise of jurisdiction comports with due process only if the defendant's conduct and connection with the forum is 'such that the defendant should reasonably anticipate being haled into court there.'" *Contant*, 385 F. Supp. 3d at 292 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Judge Schofield has reasoned that the *Schwab* standard can be reconciled with the Supreme Court's case law on specific jurisdiction by noting that "in any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." *Id.* at 293 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984)) (brackets omitted). In other words, two co-conspirators—even co-conspirators who were unaware of

n.2 (observing that under the New York long-arm statute, "an out-of-state defendant can be subject to conspiracy jurisdiction in New York" only if there are "traditional indicia of an agency relationship" or if the defendant "has knowledge of the New York acts of his co-conspirators") (quotation omitted). In addition, this standard may be in tension with the Supreme Court's holding in *Walden v. Fiore* that "the relationship [between the defendant and the litigation] must arise out of the contacts that the 'defendant *himself*' creates with the forum State." 571 U.S. 277, 284 (2014) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)); *see also id.* (noting that the Supreme Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between . . . third parties . . . and the forum State") (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984)). *But see Contant*, 385 F. Supp. 3d at 293 (rejecting foreign defendants' argument that "an agency relationship between co-conspirators is necessary because personal jurisdiction cannot be based on the unilateral activity of a third party" because "a co-conspirator is no mere third party" and "conspiracy jurisdiction is best conceived of as an example of the well-established principle that 'a defendant's contacts with the forum State may be intertwined with his transactions or interactions with other parties'") (quoting *Walden*, 571 U.S. at 286 (ellipsis omitted)).

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the existence of the other—may be viewed as a single entity for purposes of conspiracy jurisdiction.

It was in part because of the concerns outlined above that the Court observed in *Platinum I* that "[c]ourts have been increasingly reluctant to extend this theory of [conspiracy] jurisdiction beyond the context of New York's long-arm statute." 2017 WL 1169626, at *49 (quoting *Laydon v. Mizuho Bank, Ltd.*, 12 CIV. 3419 GBD, 2015 WL 1515358, at *3 (S.D.N.Y. Mar. 31, 2015) and citing *Aluminum I*, 90 F. Supp. 3d at 227 ("The rules and doctrines applicable to personal jurisdiction are sufficient without the extension of the law to a separate and certainly nebulous 'conspiracy jurisdiction' doctrine."); *Tymoshenko v. Firtash*, 11-CV-2794 (KMW), 2013 WL 1234943, at *3-4 (S.D.N.Y. Mar. 27, 2013) (recognizing that conspiracy jurisdiction "has been widely criticized by courts and scholars" and declining to consider co-conspirators' contacts for the purpose of establishing personal jurisdiction over a foreign defendant). However, any doubts about the continued viability of conspiracy jurisdiction in the Second Circuit were resolved by *Schwab*. Therefore, the TAC has plausibly alleged that BASF Metals and ICBC Standard purposefully availed themselves of doing business in the United States as required by the minimum contacts prong of the due process analysis.

Because the Court has concluded that Plaintiffs have adequately alleged that the Foreign Defendants have satisfied the first step of the personal jurisdiction analysis, it must "determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Schwab*, 883 F.3d at 82 (citation and quotation marks omitted). "The Supreme Court has set forth five factors in considering the reasonableness of the forum[:] 'A court must consider

[1] the burden on the defendant, [2] the interests of the forum State, and [3] the plaintiff's interest in obtaining relief. It must also weigh in its determination [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and [5] the shared interest of the several States in furthering fundamental substantive social policies.'" *FrontPoint*, 2018 WL 4830087, at *7 (quoting *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cty.*, 480 U.S. 102, 113 (1987)). "[T]he 'primary concern' is 'the burden on the defendant.'" *U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143, 151 n.5 (2d Cir. 2019) (quoting *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017)). "Where a defendant has purposefully directed its activities at the forum state, it may still defeat jurisdiction on due process grounds. To do so, however, it 'must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Licci*, 732 F.3d at 173 (quoting *Burger King*, 471 U.S. at 477).

Plaintiffs' allegations satisfy the reasonableness requirement in this case. The Foreign Defendants "are some of the world's largest financial institutions" and their affiliates "are alleged to have substantial presence in the U.S." *FrontPoint*, 2018 WL 4830087, at *9. "There is little burden in requiring them to answer the allegations that they entered into collusive transactions in the U.S." *Id.* Accordingly, the Court's exercise of personal jurisdiction over the Foreign Defendants would not be unreasonable. Thus, Plaintiffs have made a prima facie showing that the Court has personal jurisdiction over the Foreign Defendants, and

the Foreign Defendants' motion to dismiss for lack of personal jurisdiction is denied.

C. Motion for Reconsideration

Plaintiffs' CEA claims are predominately foreign and are thus impermissibly extraterritorial. In *Platinum I*, the Court held that Plaintiffs' CEA claims were not extraterritorial. *See* 2017 WL 1169626, at *26-28. Defendants move for reconsideration of that holding based on the Second Circuit's decision in *Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019). For the reasons that follow, the Court agrees that *Prime International Trading* compels the conclusion that Plaintiffs' CEA claims are impermissibly extraterritorial.

1. Legal Standard

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 Enf't*, No. 14-cv-6117 (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), 2017 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 Tr.*, 729 F.3d 99, 104 (2d Cir. 2013)) (quotation marks omitted). Here, Defendants argue that the Second Circuit's decision in *Prime International Trading* is an intervening change of controlling law.

2. Application

Prime International Trading requires the Court reconsider its holding in *Platinum I* that Plaintiffs' CEA claims, as alleged, are not impermissibly extraterritorial. In *Platinum I*, the Court applied the two-step framework established by the Supreme Court in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), to the question of whether Plaintiffs' CEA claims are extraterritorial. Under this framework, "[f]irst, unless Congress's intention to give a statute extraterritorial effect is 'clearly expressed,' courts 'must presume it is primarily concerned with domestic conditions.' In other words, 'when a statute gives no clear indication of an extraterritorial application, it has none.' Second, if a statute applies only domestically, a court must determine which domestic conduct it regulates." *Platinum I*, 2017 WL 1169626, at *26 (quoting *Morrison*, 561 U.S. at 265-67) (brackets omitted).

In *Morrison*, the Supreme Court applied that two-step framework and "held that § 10(b) [of the Exchange Act] only applies to 'transactions in securities listed on domestic exchanges and domestic transactions in other

securities. With regard to securities *not* registered on domestic exchanges, the exclusive focus is on *domestic* purchases and sales.'" *Id.* (quoting *Morrison*, 561 U.S. at 268) (other citation and alterations omitted). "Although *Morrison* did not further define a domestic transaction, the Second Circuit addressed that issue in *Absolute Activist* [*Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012)]. There, the Second Circuit held that 'transactions involving securities that are not traded on a domestic exchange are domestic if irrevocable liability is incurred or title passes within the United States.'" *Platinum I*, 2017 WL 1169626, at *26 (quoting *Absolute Activist*, 677 F.3d at 67).

The Second Circuit extended the *Absolute Activist* framework to the CEA in *Loginovskaya v. Batratchenko*, 764 F.3d 266 (2d Cir. 2014), such that "plaintiffs asserting CEA claims must 'demonstrate that the transfer of title or the point of irrevocable liability for such an interest occurred in the United States.'" *Platinum I*, 2017 WL 1169626, at *26 (quoting *Loginovskaya*, 764 F.3d at 274). Hence, in *Platinum I*, the Court concluded that the issue before it was whether "the transactions at issue here are 'domestic' within the meaning of *Morrison* and *Absolute Activist*." *Id.*

The Court also held that the Second Circuit's decision in *Parkcentral Global Hub, Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198 (2d Cir. 2014) (per curiam), was not relevant to Plaintiffs' CEA claims. In *Parkcentral*, the Circuit held that "while a domestic transaction or listing is *necessary* to state a claim under § 10(b), a finding that these transactions

were domestic would not *suffice* to compel the conclusion that the plaintiffs' invocation of § 10(b) was appropriately domestic." *Id.* at 216. Rather, the *Parkcentral* court held that even if the plaintiffs in that case had alleged a domestic transaction within the meaning of *Absolute Activist*, their claims were "so predominantly foreign as to be impermissibly extraterritorial." *Id.*

In considering whether *Parkcentral*'s requirement that a plaintiff's claims not be "predominately foreign" applied to CEA claims in *Platinum I*, the Court held that

> Defendants' reliance on *Parkcentral Global Hub, Ltd. v. Porsche Automobile Holdings SE* is unavailing. In *Parkcentral*, the Second Circuit applied the *Morrison* and *Absolute Activist* tests to claims under § 10(b) against foreign defendants for securities transactions relating to securities-based swap agreements pegged to the foreign defendants' stock value. The court held that allowing the claims to proceed "would constitute an impermissibly extraterritorial application of the statute." In so holding, the court expressly stated that its "ultimate conclusion that this suit seeks impermissibly to extend § 10(b) extraterritorially *depends in some part on the particular character of the unusual security at issue*." The court "expressed no view whether it would have reached the same result if the suit were based on different transactions." Courts in this district have declined to extend the *Parkcentral* analysis on that basis. For those

> reasons, the Court similarly declines to extend the *Parkcentral* holding to the transactions at issue in this action.

Platinum I, 2017 WL 1169626, at *27 n.13 (quoting *Parkcentral*, 763 F.3d at 201-02 and citing *In re Poseidon Concepts Sec. Litig.*, No. 13-CV-1213 (DLC), 2016 WL 3017395, at *12-13 (S.D.N.Y. May 24, 2016); *Atlantica Holdings, Inc. v. BTA Bank JSC*, No. 13-CV-5790 JMF, 2015 WL 144165, at *8 (S.D.N.Y. Jan. 12, 2015)). Because it concluded that *Parkcentral*'s holding did not apply and that the transactions at issue were domestic, the Court held that "Plaintiffs' CEA claims d[id] not implicate an impermissible extraterritorial application of the statute." *Id.* at *28 (citation omitted).

The Court's holding in *Platinum I* that *Parkcentral* does not apply to Plaintiffs' CEA claims in this case is untenable after *Prime International Trading*. In *Prime International Trading*, the Second Circuit evaluated whether the plaintiffs' CEA claims were extraterritorial by applying *Morrison*'s two-step framework to section 22 of the CEA and two other CEA provisions. *See Prime Int'l Trading*, 937 F.3d at 104 ("Importantly, we must discern the 'focus' of each provision individually, for even if Plaintiffs satisfactorily pleaded a domestic application for one of the conduct-regulating provisions—i.e., Sections 6(c)(1) and 9(a)(2)—they must also do the same for the CEA's private right of action provision, Section 22." (citation omitted)). At the first step of the *Morrison* framework, the Second Circuit held that "since Section 22 of the CEA 'is silent as to extraterritorial reach,' suits funneled through this private right of action 'must be

based on transactions occurring in the territory of the United States.'" *Prime Int'l Trading*, 937 F.3d at 102-03 (quoting *Loginovskaya*, 764 F.3d at 272). At *Morrison*'s second step, the Circuit held that "in order for Plaintiffs to state a proper domestic application of Section 22, the suit 'must be based on transactions occurring in the territory of the United States.'" *Id.* at 104 (quoting *Loginovskaya*, 764 F.3d at 272). The *Prime International Trading* court noted that "[t]o assess whether Plaintiffs pleaded permissibly domestic transactions under Section 22[,] . . . typically we would apply a test first announced in *Absolute Activist*," as the Court did with the transactions at issue in this case in *Platinum I*. *Id.* at 104-05.

Rather than apply the *Absolute Activist* test, however, the Circuit applied *Parkcentral*'s holding to the CEA—effectively overruling the Court's decision not to do so in *Platinum I*. The Circuit held that it "need not decide definitively whether Plaintiffs' transactions satisfy *Absolute Activist*, for (as discussed below) their claims are impermissibly extraterritorial even if the transactions are domestic." *Id.* at 105 (citing *Parkcentral*, 763 F.3d at 216). It then noted that the *Parkcentral* court "assumed without deciding that the equity swaps at issue there were 'domestic transactions' under Section 10(b), but nonetheless dismissed the claims because the facts in that case rendered the suit 'predominately foreign.'" *Id.* (quoting *Parkcentral*, 763 F.3d at 216). The *Prime International Trading* court observed that "[t]he predicate to our conclusion in *Parkcentral* was the maxim that 'a domestic transaction or listing is *necessary*' but 'not alone sufficient' to state a claim under Section 10(b)."

Id. (quoting *Parkcentral*, 763 F.3d at 215-16). The Second Circuit then held that this "rule carrie[d] over to the CEA." *Id.* In other words, "while a domestic transaction as defined by *Absolute Activist* is 'necessary' to invoke the private remedy afforded by Section 22, it is not 'sufficient.'" *Id.* at 106.

The *Prime International Trading* court explained that "[i]n order to close the gap between 'necessary' and 'sufficient,' Plaintiffs' claims must not be 'so predominately foreign as to be impermissibly extraterritorial.'" *Id.* at 106 (quoting *Parkcentral*, 763 F.3d at 216); *see also id.* at 105 ("To state a proper claim under Section 22, Plaintiffs must allege not only a domestic transaction, but also domestic—not extraterritorial—*conduct* by Defendants that is violative of a substantive provision of the CEA, such as Section 6(c)(1) or Section 9(a)(2).") (citation omitted).

On the facts presented in *Prime International Trading*, the Second Circuit concluded that the plaintiffs' CEA claims were "predominately foreign," and thus impermissibly extraterritorial, because the plaintiffs relied on an "attenuated 'ripple effects' theory whereby (1) the alleged manipulative trading activity taking place in the North Sea (2) affected Brent crude prices—a foreign commodity—which (3) affected a foreign benchmark, the Dated Brent Assessment, which (4) was then disseminated by a foreign price-reporting agency, which (5) was then allegedly used (in part) to price futures contracts traded on exchanges around the world." *Id.* at 106-07. The Circuit noted that "[n]early every link in Plaintiffs' chain of wrongdoing is entirely foreign." *Id.* at 107. Furthermore, the plaintiffs

in *Prime International Trading* "ma[de] no claim that any manipulative oil trading occurred in the United States." *Id.* at 106.

Prime International Trading teaches that to assess whether Plaintiffs have pleaded an appropriately domestic application of the CEA, the Court must assess whether Plaintiffs' CEA claims are predominately foreign. Plaintiffs assert multiple substantive CEA violations. *See* TAC ¶¶ 281, 286, 291, 294. However, "Plaintiffs' suit must satisfy the threshold requirement of CEA § 22" ("Section 22"), which "gives Plaintiffs a private right of action" under the CEA,[29] before the Court can "reach[] the merits of their" substantive CEA claims. *Prime Int'l Trading*, 937 F.3d at 101 n.4, 104 (quotation and brackets omitted). Consequently, the Court "start[s] by assessing whether Plaintiffs have pleaded a proper domestic application of Section 22." *Id.* at 104.[30]

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[29] *See* 7 U.S.C. § 25.

[30] Although Plaintiffs' claim for principal-agent liability under the CEA does not expressly cite Section 22, both "principal-agent liability and aiding and abetting claims under the CEA . . . are viable only where an underlying primary violation of the CEA can survive a motion to dismiss." *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC*, 366 F. Supp. 3d 516, 554 (S.D.N.Y. 2018) (citations omitted). Accordingly, the viability principal-agent liability claim also depends on whether Plaintiffs have pleaded an appropriately domestic application of Section 22.

Plaintiffs' Section 22 claims are predominately foreign.[31] Plaintiffs allege that Defendants manipulated the Fix, which occurred in London and set the price of physical platinum located in London or Zurich. TAC ¶¶ 51-53, 59. Moreover, as the Court noted in *Platinum I*, "[t]he alleged unlawful conduct in this case is the manipulation of the Fix Price that took place during the Fixing Calls" in London, "not manipulations of particular transactions on NYMEX." *Platinum I*, 2017 WL 1169626, at *45. Because *Prime International Trading* directs that the Court should direct its focus to where the allegedly unlawful manipulation occurred, *see Prime Int'l Trading*, 937 F.3d at 106, this weighs heavily in favor of the conclusion that Plaintiffs' claims are predominately foreign. Furthermore, although Plaintiffs allege that they have suffered losses in the United States as a result of Defendants' manipulation, it has been clear since *Morrison* that an allegation that a foreign course of conduct has caused malign effects in the United States is not enough to salvage an otherwise extraterritorial claim. *See Morrison*, 561 U.S. at 259 (rejecting an "effects" test for extraterritoriality); *see also Prime Int'l Trading*, 937 F.3d at 106-07. Consequently, Plaintiffs' CEA claims are so predominately foreign as to be impermissibly extraterritorial.

This conclusion is bolstered by the attenuated causal linkage between Defendants' alleged conduct

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[31] Because the Court concludes that Plaintiffs' Section 22 claims are predominately foreign, it does not decide whether Plaintiffs have pleaded an appropriately domestic application of other CEA provisions.

and Plaintiffs' alleged injury. The crux of Plaintiffs' theory is that Defendants caused them to suffer losses by manipulating the Fix because the Fix price is a global benchmark. *See* TAC ¶ 5 ("Because of the Fixing's importance as a benchmark, as the Fix prices move, so too do the prices for physical platinum and palladium and NYMEX platinum and palladium futures and options[.]"); *id.* ¶ 91 ("Defendants seized upon the Fixing as a means to manipulate . . . NYMEX Platinum and Palladium prices because Fix prices are used as benchmarks."). The plaintiffs in *Prime International Trading* made virtually the same argument. *See Prime Int'l Trading*, 937 F.3d at 100 (noting that the plaintiffs in that case argued that there was a "'direct link' between Brent Futures settlement prices and the Dated Brent Assessment. Specifically, they contend that the 'ICE Brent Futures Contracts prices rarely deviate from the Dated Brent Assessment by more than 1% at expiration,' and that 'changes in the Dated Brent Assessment directly impact Brent Futures prices'") (brackets omitted). Yet the *Prime International Trading* court rejected those plaintiffs' claims as an "attenuated 'ripple effects' theory[.]" *Id.* at 106. There is no meaningful distinction between the theory of harm rejected in *Prime International Trading* and Plaintiffs' theory of harm in this case. Thus, this is an independent reason that the Circuit's decision in *Prime International Trading* case compels the conclusion that Plaintiffs' CEA claims are impermissibly extraterritorial.

Plaintiffs' arguments to the contrary are unavailing. Plaintiffs first argue that the TAC alleges that "Defendants' precious metals traders in" the United

States "were in 'constant communication' with Defendants' precious metals desk employees in London," who were directly involved in the twice-a-day Fixings. Opposition to Motion for Reconsideration ("MR Opp."), Dkt No. 237, at 4 (citing TAC ¶¶ 10, 13, 26 38, 49). This is, to be sure, an allegation of domestic activity, but "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Morrison*, 561 U.S. at 266. The allegation that United-States-based traders communicated with the Fixing participants to further the scheme to manipulate the Fix price only serves to highlight that the locus of the manipulative scheme was the Fixing itself, which was located in London. Moreover, the Fixing directly set prices in the spot markets for physical platinum and palladium, which are located in London and Zurich. *See, e.g.*, TAC ¶ 59. At bottom, the inquiry called for in *Parkcentral* and applied to the CEA in *Prime International Trading* is whether a plaintiff's claims are "predominately"—not exclusively—"foreign," and Plaintiffs' allegations regarding communications from United-States-based traders do not predominate over their allegations of foreign misconduct. *Prime Int'l Trading*, 937 F.3d at 106. Therefore, these allegations are insufficient to render Plaintiffs' claims not predominately foreign.

Plaintiffs also seek to recharacterize the allegations in the TAC to argue that United States-based trading in the physical platinum and palladium market and on the NYMEX was part of Defendants' manipulative scheme itself, not simply a means by which Defendants profited from the manipulation. *See* MR Opp. at 9 n.5.

This argument is implausible. Plaintiffs' theory is that Defendants manipulated the price of platinum and palladium to profit from their short positions. *See, e.g.*, TAC ¶ 14 ("The Defendants profited because they were holders of massive short positions in NYMEX platinum and palladium futures and options."). The suggestion that Defendants (and, perhaps, their non-defendant co-conspirators) traded to further depress the price of platinum and palladium when they had—according to Plaintiffs' allegations—a tailor-made opportunity to manipulate that price via the Fixing does not make sense and is inconsistent with the allegations in the TAC. Hence, to the extent that the TAC can be read to support Plaintiffs' novel theory, the Court rejects it as implausible. Accordingly, Defendants' motion for reconsideration is granted as to Plaintiffs' CEA claims; those claims are dismissed without prejudice.

D. Leave to Amend

Because the Court has dismissed Plaintiffs' Sherman Act and CEA claims, there are no remaining claims in this case. However, although Plaintiffs have twice amended their complaint in response to Defendants' motions to dismiss, in this circuit, "[i]t is the usual practice upon granting a motion to dismiss to allow leave to replead." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (citation omitted); *see also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). Leave may be denied "for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014)

(citation omitted). Thus, the Court will grant Plaintiffs leave to amend once again. However, Plaintiffs should not expect any additional opportunities to amend their complaint. *See In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 397 (S.D.N.Y. 2003) ("[W]here pleading deficiencies have been identified a number of times and not cured, there comes a point where enough is enough."(citations omitted)). Any amended complaint must be filed no later than **May 1, 2020**.

Discovery in this action is stayed pursuant to the Court's April 21, 2015, order. Dkt. No. 48. Discovery in this action will remain stayed until the deadline for Defendants to answer or otherwise respond to an amended complaint. If Plaintiffs amend the TAC, and Defendants move to dismiss Plaintiffs' amended complaint, the parties may file a new motion for a stay of discovery no later than **June 1, 2020**. If Plaintiffs do not amend the TAC, or if Defendants do not file a motion to stay by the deadlines specified above, the Court will schedule a Rule 16 conference promptly thereafter.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is GRANTED, the Foreign Defendants' motion to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2) is DENIED, and Defendants' motion for reconsideration is GRANTED. Plaintiffs are granted leave to replead their Sherman Act and CEA claims.

The Clerk of Court is directed to terminate the motions pending at Dkt Nos. 207 and 235.

SO ORDERED.

Dated: March 29, 2020
New York, New York

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

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Lead Case 1:14-cv-9391-GHW

[Filed March 28, 2017]

IN RE PLATINUM AND PALLADIUM ANTITRUST LITIGATION

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

TABLE OF CONTENTS

I. INTRODUCTION

In this case, platinum and palladium join several of their fellow elements in the periodic table as the objects of an alleged massive price manipulation scheme.[1] Plaintiffs, a group of entities and individuals who sold physical platinum and palladium or platinum and palladium futures, allege 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") (collectively, "Defendants") manipulated and artificially suppressed the price of physical platinum and palladium. To recover financial losses incurred as a result of Defendants' alleged price manipulation, Plaintiffs brought this putative class action claiming violations of the Sherman Act, 15 U.S.C. § 1, and the Commodities

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[1] *See, e.g.* (listed in the order of the corresponding elements appearance in the table, *see* Periodic Table of Elements: International Union of Pure and Applied Chemistry, *available at* https://iupac.org/what-we-do/periodic-table-of-elements/ (last accessed on March 28, 2017)), *In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419 (S.D.N.Y. 2015); *In re Copper Antitrust Litig.*, No. 99-C-621-C, 2000 WL 34230131 (W.D. Wis. Jul. 12, 2000); *In re Zinc Antitrust Litig.*, No. 14-CV-3728 (KBF), 2016 WL 3167192 (S.D.N.Y. June 6, 2016); *In re London Silver Fixing, Ltd., Antitrust Litig.*, No. 14-MD-2573 (VEC), 2016 WL 5794777 (S.D.N.Y. Oct. 3, 2016); *In re Commodity Exch., Inc., Gold Futures and Options Trading Litig.*, No. 14-MD-2548 (VEC), 2016 WL 5794776 (S.D.N.Y. Oct. 3, 2016).

Exchange Act ("CEA"), 7 U.S.C. § 1, *et seq*., and for unjust enrichment.

Because the Court finds that Plaintiffs are not efficient enforcers of the antitrust laws, Defendants' motion to dismiss Plaintiffs' Sherman Act claim is GRANTED. Defendants' motion to dismiss Plaintiffs' CEA claims is GRANTED IN PART and DENIED IN PART. The Court finds that the alleged conduct does not require an impermissible extraterritorial application of the CEA and that Plaintiffs have stated a CEA claim and have standing to sue under the Act. However, because CFTC Rule 180.1 did not come into effect until August 15, 2011, Defendants' motion to dismiss is granted as to Plaintiffs' CEA manipulative device claims that are based on transactions effected prior to that date. Because Plaintiffs have not alleged that they had any direct dealings with Defendants and that Defendants' were unjustly enriched at their expense, Defendants' motion to dismiss Plaintiffs' unjust enrichment claim is GRANTED.

In addition, because Plaintiffs have failed to make a *prima facie* showing that Defendants ICBC, BASF Metals, and the LPPFC have sufficient suit-related contacts in the United States, those Defendants' motions to dismiss for lack of personal jurisdiction are GRANTED. Finally, because Plaintiffs have not alleged that UBS and BASF Corp. had any involvement in the alleged price manipulation conspiracy, those defendants' motions to dismiss for failure to state a claim are GRANTED.

II. BACKGROUND

A. Facts[2]

1. The London Platinum and Palladium Market

Platinum and palladium are precious metals. SAC ¶ 99. They are used decoratively in jewelry, but also have significant commercial and industrial uses. SAC ¶ 82. We all breathe a little easier thanks to the two metals. As essential components of catalytic converters, platinum and its "sister metal" palladium are responsible for reducing toxic air pollutants from vehicle exhaust emissions. SAC ¶ 73 & n.31. In addition to the automobile industry, both metals are used in a variety of industrial and commercial applications, including in electrical, laboratory, and dentistry equipment. SAC ¶ 73 & n.31.

Platinum and palladium have traditionally been traded internationally as precious metals, and have been held primarily for their exchange value rather than their industrial use. SAC ¶ 73 (internal quotation marks and citations omitted). Physical platinum and palladium trade in "opaque," "over-the-counter" ("OTC") markets that operate "24-hours a day." SAC

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[2] Unless otherwise noted, the facts are taken from the second consolidated amended class action complaint ("SAC"), Dkt. No. 102, 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 (2009).

¶¶ 78-81. Major players in the global physical platinum and palladium markets include Defendants as well as platinum and palladium producers (*e.g.*, miners and refiners), consumers (*e.g.*, jewelers and industrials), and investors (*e.g.*, pension funds, hedge funds, and individuals). SAC ¶¶ 81-82. Since the 1970s, London has been the center for physical platinum and palladium trading. SAC ¶ 74.

London's physical platinum and palladium trading similarly takes place in an OTC market and involves a number of activities by various market participants, including Defendants. SAC ¶ 75. The London Platinum and Palladium Market ("LPPM") is at the center of the London market for those metals. Established in 1987, the LPPM is a trade association that coordinates the activities conducted on behalf of LPPM members and other participants in the platinum and palladium market. SAC ¶ 65. Among other things, the LPPM sets standards for the "London Good Delivery," a set of rules prescribing the physical characteristics and attributes of platinum and palladium bars used in settlement in LPPM transactions. SAC ¶ 65. As of July 2015, the LPPM had fifty-two members, including thirteen market-making full members, six ordinary full members, and thirty-three associate members. SAC ¶ 67. The market-making members form the core of the LPPM; they quote buying and selling prices for spot delivery and provide liquidity to the market. SAC ¶ 71.

During the relevant time period, Defendants BASF Metals, Goldman Sachs, HSBC, ICBC, and UBS were five of the thirteen LPPM market-making members. SAC ¶¶ 31, 33, 35, 37, 44, 67. Four out of the five

LPPM market-making members—BASF Metals, Goldman Sachs, HSBC and ICBC (the "Fixing Members")—were also members of the London Platinum and Palladium Fixing Company Ltd. ("LPPFC"), a private company wholly owned and controlled by its four members. SAC ¶ 45. As the body responsible for setting global benchmark prices for platinum and palladium, the LPPFC is "an integral part of the market for London platinum and palladium as well as global markets—including U.S. markets—for platinum and palladium" and investments in securities based on physical platinum and palladium prices. SAC ¶ 77; *see also* SAC ¶¶ 1, 22.

2. Platinum and Palladium Fixing Process

Throughout the period between January 1, 2008 and November 30, 2014 (the "Class Period"), the Fixing Members participated in morning and afternoon conference calls to set the daily market prices of platinum and palladium (the "AM Fixing" and "PM Fixing," and, collectively, the "Fixing" or "Fixing Calls"). SAC ¶¶ 1, 62, 271. The Fixing was conducted through a "Walrasian" auction among the Fixing Members. SAC ¶ 51. The LPPFC's Chair (selected annually from and by LPPFC members) announced a starting price (known as the "Opening Price"). SAC ¶¶ 50, 52. The Opening Price typically reflected the "spot price"[3] for platinum and palladium, which, in turn, reflected the values of those metals at the time of

[3] The "spot price" refers to the current market price of the underlying physical commodity.

the quote. SAC ¶¶ 2, 52 & n.1. The remaining Fixing Members would then declare themselves as "a net buyer or a net seller, or as having no interest at the starting price." SAC ¶ 52. Each Fixing Member's interest was based on its customers' orders, as well as proprietary orders from its trading desks. SAC ¶ 51. By combining those orders, the Fixing Members generated an aggregate buy or sell position for the auction. *See* SAC ¶ 51.

In conducting the auction, the Chair's goal was to reach an equilibrium between platinum and palladium supply and demand orders. SAC ¶¶ 52-53. If the Opening Price did not generate any buying or selling, the Chair announced the Opening Price as the price as fixed (the "Fix" or the "Fix Price"). SAC ¶ 52. If the Opening Price generated only selling or buying interest, however, the Chair solicited figures from the Fixing Members and then adjusted the Opening Price upward or downward until buying and selling reached an equilibrium or were within 4,000 troy ounces. SAC ¶¶ 53, 55. If the Chair was unable to match supply and demand exactly, and had instead declared the price as fixed when the difference between buying and selling was 4,000 troy ounces or less, the Chair pro-rated the difference between supply and demand between the participating firms. SAC ¶ 59. When the Chair reached an equilibrium between buy and sell orders, the Chair declared the Fix Prices and stated the time at which they had been fixed and the final prices in U.S. dollars. SAC ¶ 57. Once the Chair declared the Fix Price, the Fixing Members were not able to alter or withdraw buy and sell orders based on that price. SAC ¶ 57.

Operating through the LPPFC, the Fixing Members conducted the Fixing throughout most of the Class Period. SAC ¶ 63. On October 16, 2014, in response to the LPPFC's earlier solicitation for an independent party to assume responsibility for administering the Fixing, the LPPFC announced that, starting December 1, 2014, the London Metal Exchange ("LME") would administer the Fixing. SAC ¶ 63. The LME replaced the LPPFC's Fixing process with the LMEbullion, which relies on "a fully automated price-discovery process, holding two daily auctions." SAC ¶ 63. The LMEbullion auctions allow authorized "traders [to] participate through a secure web interface, where they can view the auction price and each submit their interest until a final price is set." SAC ¶ 63.

3. The Impact of the Fixing on Other Platinum and Palladium Investments

As noted above, the Fixing was used to set global benchmark prices for platinum and palladium, which were used in numerous transactions for platinum and palladium worldwide. SAC ¶ 2. Plaintiffs explain that "[t]he prices of palladium move the value of, and determine the cash flow for, many different kinds of transactions." SAC ¶ 12. The effect of the Fixing was widespread. For example, as alleged in the SAC, many physical supply contracts—such as contracts for the sale of raw platinum or palladium—expressly incorporate prices from the Fixing. SAC ¶ 91.

The relevance and impact of the Fixing extends beyond the markets for physical platinum and palladium. Many market participants trade in platinum and palladium derivatives, including futures,

forwards, and options. SAC ¶ 91. Such derivatives are financial instruments whose value is derived from the underlying price of physical platinum and palladium on the spot market. SAC ¶ 84. The Fixing affects trades in such financial instruments because, as Plaintiffs explain, exchange prices closely track the price of spot platinum or palladium. SAC ¶ 91. Consequently, changes in the price of one will be almost immediately reflected in the other. As alleged in the SAC, "[t]he spot, Fix, and [New York Mercantile Exchange ("NYMEX")] settlement prices exhibit an almost perfect correlation." SAC ¶ 91; *see also* SAC ¶¶ 3-4. The relationship, Plaintiffs assert, is undeniable, and is thoroughly documented by studies conducted by independent academics and Plaintiffs. SAC ¶ 3. Many derivatives' cash flows are calculated by reference to the Fix benchmark prices on a given day. SAC ¶ 3. The SAC does not allege the total market size for platinum and palladium derivatives. But Plaintiffs assert that, since 2011, the markets for platinum and palladium futures alone have surpassed annual values of $100 billion and $40 billion, respectively. SAC ¶ 83. The alleged impact of the Fixing on the platinum and palladium market could therefore be immense.

A brief description of the financial instruments described above may be helpful to illustrate the relationship between the Fix Price for physical platinum and palladium and the value of the derivatives. A future "is a bilateral agreement for the purchase or sale of an agreed amount of" the underlying commodity at a specified time in the future. SAC ¶ 84. A futures contract buyer takes a "long" position on platinum or palladium, thereby agreeing to

pay for a specified amount of the commodity at the expiry of the contract. SAC ¶ 85. A futures contract seller takes a "short" position, thereby agreeing to deliver and receive payment for the commodity at the specified amount and time. SAC ¶ 85. Most market participants do not settle their futures contracts at the expiry date; rather, instead of taking physical delivery of the commodity, traders generally offset their futures position prior to maturation. SAC ¶ 85.

Traders who hold a "long" position, and who are obligated to purchase the commodity at the agreed-upon price in the future, can profit when the price of the commodity increases by selling an offsetting futures contract at the higher price. *See* SAC ¶ 86. By contrast, traders who hold a "short" position, and who are obligated to sell the underlying commodity at an agreed-upon price in the future, can profit when the price of the commodity decreases by selling an offsetting futures contract at the lower price. *See* SAC ¶ 86. Forwards are virtually identical to futures, but, unlike futures that are traded on an exchange, forwards are traded over the counter. SAC ¶ 84.

Like futures, platinum and palladium options contracts—"puts" or "calls"—can be traded over-the-counter or on an exchange. SAC ¶ 87. A put involves two parties: the put seller and the put buyer. SAC ¶ 87. By entering into a put, the put buyer obtains the right, but not the obligation, to force the put seller to buy the underlying futures contract, or the underlying metal itself, within an agreed-upon time frame at a specified, predetermined price—the "strike" price. SAC ¶ 87. In exchange for committing to buy, the put seller receives

a fee—the premium. SAC ¶ 87. Conversely, a call gives the holder of the underlying platinum and palladium option the right, but not the obligation, to buy the underlying platinum or palladium futures contract, or the underlying metal itself, at a specified, predetermined price—the strike price—during a specified time period. SAC ¶ 87. The call seller is obligated to sell those futures contracts or the underlying metal to the call option buyer if the buyer exercises the right to do so before the expiry date. SAC ¶ 87. To retain the right to do so, the call buyer pays a premium to the call seller. SAC ¶ 87. As described in the SAC, "[a]n investor that buys a put option generally expects the price of platinum or palladium to fall . . . and an investor that buys a call option generally expects the price of the relevant metal to rise." SAC ¶ 87. If the price of the option contract falls below the strike price, the put buyer is likely to exercise the put option, and the put seller will likely have to purchase shares from the put buyer when the option is exercised. A call option buyer is more likely to exercise the right to "call in" the underlying futures contract if the price goes above the strike price. SAC ¶ 88. At that point, the buyer can execute the purchase at the lower price and make a profit by selling the futures contract at the higher market price. SAC ¶ 88.

Finally, platinum and palladium exchange-trade funds ("ETFs") invest only in those commodities and issue shares of stock that are directly linked to platinum and palladium spot prices. SAC ¶¶ 89-90. Plaintiffs assert that the price of shares issued by such ETFs "correlates very closely to the spot price of platinum and palladium itself." SAC ¶ 90. The

correlation between the spot price and the derivative is not unique to ETFs. As alleged and illustrated in the SAC, the correlation coefficient of platinum and palladium spot prices and corresponding derivatives range between 0.96 to 1.00 (where a coefficient of 1 represents a perfect correlation). SAC ¶ 95 & figs. on pp. 33-38. Plaintiffs maintain that the relationship "make[s] sense" because "the various instruments . . . have a common underlying economic good, be it platinum or palladium" and "[a]ny price changes in one instrument are very quickly transmitted and imputed in the others." SAC ¶ 96.[4]

4. Defendants' Alleged Platinum and Palladium Price Manipulation

The crux of Plaintiffs' allegations giving rise to this action is that Defendants took advantage of the Fixing Calls to set the Fix Price at lower levels than competitive market forces would otherwise have dictated. SAC ¶ 97. Put simply, Plaintiffs claim that the Fixing Members fixed the Fix. Plaintiffs allege that the Fixing Calls provided Defendants with "a ready-made process for *daily* coordination of their activities," and that Defendants took advantage of that opportunity to move the Fix Price downward at their discretion and for their own benefit. SAC ¶ 9; *see also*

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[4] As in the SAC, this opinion will refer to platinum and palladium bullion and platinum and palladium bullion coins, platinum and palladium futures traded on NYMEX and other U.S. exchanges, shares of platinum and palladium ETFs, OTC platinum and palladium, and platinum and palladium spot or forward transactions and options, or any of the foregoing, as "Platinum and Palladium Investments." SAC ¶ 22 n.13.

SAC ¶ 4. Because they move in lockstep with the price for physical platinum and palladium, Defendants' coordinated suppression of the Fix Price had the effect of artificially lowering the prices of platinum and palladium futures and options traded on NYMEX, platinum and palladium ETFs, and other Platinum and Palladium Investments. SAC ¶ 97. Consequently, in addition to creating numerous opportunities for Defendants to profit, Plaintiffs assert that during the Class Period, they, and other similarly situated members of the proposed class, were forced to sell their Platinum and Palladium Investments at artificially low prices as a result of Defendants' alleged price manipulation. SAC ¶ 97.

a. How Defendants Manipulated the Fix Price

Plaintiffs allege that Defendants manipulated the Fix Price in at least two ways. First, Defendants conspired to manipulate the Opening Price that the Chair announced at the beginning of the Fixing Calls. SAC ¶ 253. Second, Defendants misrepresented actual market supply and demand in order to move the AM and PM Fix Price to the level at which it was ultimately fixed. SAC ¶ 253. In advance of the AM and PM Fixing Calls, for example, Defendants allegedly compiled confidential client order information and then shared the information with the other Fixing Members in order to coordinate the execution of transactions immediately prior to and during the Fixing. SAC ¶ 8. To achieve "maximum effect," Defendants allegedly grouped and timed particularly large sell orders around the Fixing on the days when they intended to drive

down the price of platinum or palladium. SAC ¶ 8. Plaintiffs allege that this practice was intended to, and in fact did, alter the Opening Price, inducing clients to change their interest in buying or selling at that price, and removing suspicion from an auction price that otherwise would have stood out. SAC ¶¶ 8, 172-173.

The Fixing Calls, Plaintiffs allege, provided the perfect cloak of secrecy and veneer of legitimacy to Defendants' conduct, and enabled them to employ other price manipulation tactics. For example, Defendants are alleged to have engaged in "front running," which Plaintiffs describe as "trading in their own positions in advance of customer orders to take advantage of the market's resulting move when the client's orders are placed." SAC ¶ 8 n.2. Defendants also allegedly placed large orders that were never executed (a practice known as "spoofing"), placed large orders that were quickly executed but then reversed (a practice known as "wash sales"), placed orders that were subsequently cancelled to "give the illusion of activity" (a practice known as "painting the screen"), and used such techniques to "trigger a stop-loss order or to avoid a bank's having to pay on an option or similar contract" (generally referred to as "jamming"). SAC ¶¶ 8, 175 & n.2.[5]

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[5] Although the Court must accept all facts alleged in the SAC as true, *see infra* Part III.A, the Court observes that, in connection with their allegations that Defendants engaged in such practices, Plaintiffs point to statements in HSBC's and UBS's settlements with the U.S. Commodity Futures Trading Commission ("CFTC") and the U.K. Financial Conduct Authority ("FCA") to impute HSBC's and UBS's conduct leading up to the settlements to the Defendants in this action. While the Court accepts as true the

As alleged in the SAC, Defendants' price manipulation continued into and during the Fixing itself. For example, Plaintiffs assert that to ensure that the auction produced their desired Fix Price, the Fixing Members placed auction bids and quotes irrespective of the actual aggregate demand reflected in their order books. SAC ¶ 177. By submitting aggregate auction bids that understated their clients' demand, the Fixing Members were able to suppress the Fix Price to benefit themselves, even if doing so was detrimental to their clients' interests. SAC ¶ 177.

While the Fixing Calls themselves furnished a convenient forum for sharing information, it was not the only one Defendants are alleged to have utilized. Plaintiffs claim that Defendants used chat rooms, instant messages, phone calls, proprietary trading venues and platforms, and emails to coordinate among themselves to ensure members that attempts to move the market in one way or the other were not undermined by contrary efforts of other members or other large banks. SAC ¶ 171. By arming each other with pertinent information and deciding "to move in a particular direction, the colluding banks would equip each other with the tools to do so." SAC ¶ 172.

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allegations that these statements were made, as noted above, it does not accept as true the implicit suggestion that all Defendants engaged in such conduct. *Iqbal*, 556 U.S. at 678.

b. Defendants' Alleged Price Manipulation Caused Price Distortions of Platinum and Palladium Investments Around the Fixing

In support of their price manipulation allegations, Plaintiffs point to economic data analyses, which they claim demonstrate large "anomalous" downward spikes in both spot prices and NYMEX prices around the time of the Fixing. SAC ¶ 92; *see also* SAC ¶¶ 101-144. Plaintiffs maintain that downward spikes are inconsistent with results driven entirely by market forces, which would have resulted in a random pattern exhibiting equal upward and downward shifts of the Fix Price. SAC ¶ 104. According to Plaintiffs, the data are indicative of Defendants' collusion and price manipulation in a number of ways. For example, Plaintiffs' allege that in every year during the Class Period, the platinum Fix Price moved downward around the AM and PM Fixing on approximately 60% to 70% of trading days. SAC ¶ 106-107 & figs. on pp. 44-45. Similarly, Plaintiffs allege that in every year during the Class Period, the palladium Fix Price moved downward around the AM Fixing on approximately 40% to 60% of trading days, although the corresponding PM Fixing does not exhibit the same trends. SAC ¶ 106 & figs. on pp. 45-46.

Plaintiffs also examined intraday-minute tick figures, which demonstrate a minute-by-minute upward or downward movement in price. SAC ¶ 116. According to Plaintiffs, the data show significant downward price spikes just before the AM and PM

Fixing and until the Fixing Calls ended. SAC ¶ 117 & fig. on p. 53; *see also* SAC ¶ 118 & figs. on p. 54. Plaintiffs also evaluated average price changes (referred to as "average returns") throughout the Class Period, examining the data in five- and fifteen-minute intervals throughout the trading day. SAC ¶¶ 126-130. As Plaintiffs explain, the data show consistent statistically significant downward price movements only around the AM and PM Fixing, with the largest negative returns taking place immediately before and after the Fixing Calls began. SAC ¶ 130 & figs. on pp. 68-69; *see also* SAC ¶¶ 119-121 & figs. on pp. 56-57 (explaining that the greatest price drops for both platinum and palladium occurred around the PM Fixing window with far greater frequency than would be expected by normal statistical probability).

In addition to the frequency of the downward price spikes around the time of the Fixing, Plaintiffs assert that the downward price spikes were significantly more intense during those time windows than price spikes observed at any other time of the trading day. SAC ¶ 117 & figs. on p. 53; *see also* SAC ¶¶ 135-137 & figs. on pp. 76-77 (pointing to data demonstrating that the Fix Prices were not only more likely to drop at the time of the Fixing as compared to any other time during the trading day, but also that the magnitude of the decrease is significantly larger than when prices increased during the Fixing).

In support of their allegations that Defendants were responsible for the anomalous downward price spikes, Plaintiffs compared Defendants' platinum and palladium price quotes immediately before the Fixing

with simultaneous quotes from other market participants. According to Plaintiffs, the resulting data show that, on the days when the market price declined shortly before the PM Fixing, other market participants were quoting significantly higher prices for the commodities as compared to the Fixing Members. SAC ¶¶ 178-79 & fig. on p. 96. Plaintiffs contend that the comparison demonstrates that on trading days when the prices of platinum and palladium decreased in the window leading up to and including the PM Fixing, the decrease was caused at least in part by the Fixing Members' offering lower quotes for the commodities than other market participants. SAC ¶ 180.

Plaintiffs maintain that limited and incomplete data of the Fixing Members' specific quotes on specific trading days confirms that Defendants were "driving movements in prices before and around the Fixing window." SAC ¶ 181. For example, Plaintiffs allege that they have identified several days during the Class Period when Defendants' quotes appear to have caused, or at a minimum, correlated with, downward spikes in the PM Fixing. SAC ¶¶ 182-185 & figs. on pp. 97-99. Plaintiffs maintain that their analysis shows "numerous days throughout the Class Period on which Defendants conspired to and did manipulate the Fixing, and thereby set the price of platinum and palladium at artificially low levels." SAC ¶ 141 & apps. A, B.

Plaintiffs allege that the downward spikes in the Fix Price caused a corresponding decline in platinum and palladium spot prices and futures markets. SAC

¶¶ 138-139. Pointing to three days during the Class Period, Plaintiffs contend that the downward movements coincide with the time period immediately preceding and including the Fixing. SAC ¶ 140 & figs. on pp. 79-80. According to Plaintiffs, the data show a consistent average downward bias in the price of platinum and palladium futures during the window immediately before and during the AM and PM Fixing. SAC ¶¶ 131-134 & figs. on pp. 70-75.

Plaintiffs claim that the frequency, magnitude, and timing of the downward price spikes represented in the data, coupled with the fact that (1) Defendants' own quotes correlate with those trends, and (2) platinum and palladium prices during the Class Period moved downward during the Fixing even against the upward trends, support an inference that Defendants manipulated those downward price movements using an intentional and coordinated scheme. SAC ¶¶ 101-104, 167-213.

c. Defendants Profited from Manipulating the Fix Price

According to Plaintiffs, Defendants were motivated to suppress the platinum and palladium Fix Price for two reasons. First, Plaintiffs generally allege that Defendants exploited their foreknowledge of downward swings in the platinum and palladium Fix Price to make advantageous transactions in a variety of Platinum and Palladium Investments. SAC ¶¶ 13-14, 61, 217. For example, as large participants in the market for physical platinum and palladium, the downward spikes in the Fix Price allowed Defendants to buy cheaper platinum and palladium than they

would have been able to, creating opportunities for themselves to profit if and when platinum and palladium prices increased as the effects of suppression abated. SAC ¶ 200. During the Class Period, Plaintiffs assert, Defendants were also large participants in the market for platinum and palladium Fix Price-denominated derivatives. SAC ¶ 201. Derivative contracts, like contracts for sale of physical platinum and palladium, directly incorporate the Fix Price in order to determine cash flows between the parties. SAC ¶ 201. Plaintiffs allege that Defendants profited from the price manipulation in this market because suppressing the Fix Price during the Fixing enabled Defendants to influence the volume of cash flows between respective parties and members of the Class in their favor. SAC ¶ 201.

Plaintiffs further allege Defendants' manipulation of the Fixing gave them an unfair advantage over counterparties that were not also members of the LPPFC by reducing their risk in "digital options" and other contracts with market-based triggers, such as "stop loss" orders and "margin" calls. SAC ¶ 202. As described in the SAC, "[t]hese contracts in various forms require the Defendants to act, or not act, based on whether the price of platinum and palladium crosses a specific threshold. By accepting these orders, the banks agreed to transact with the client at a specified price if the platinum and palladium benchmark reached that price." SAC ¶ 202. Through price manipulation of the Fix, Defendants frequently were able to trigger (or avoid triggering) such orders, avoiding much of the risk in such obligations. SAC ¶ 202.

Plaintiffs also maintain that Defendants were particularly motivated to suppress the Fix Price in order to profit from large net "short" positions that they allegedly held in the platinum and palladium futures market, including NYMEX, throughout the Class Period. SAC ¶¶ 12, 170. According to the SAC, since at least 2008 and until at least 2014—*i.e.*, for most of the Class Period—Defendants and their co-conspirators manipulated the AM and PM Fixing in order to profit from their short positions on the platinum and palladium futures market. SAC ¶¶ 185-203. As discussed above, holders of short positions (who are obligated to sell platinum and palladium at an agreed-upon price in the future), profit when the underlying commodity price goes *down* because they are able to buy an offsetting contract for a lower price. SAC ¶¶ 85-86. Plaintiffs allege that Defendants had an interest in suppressing the platinum and palladium Fix Price for that reason. SAC ¶ 185-203.[6] Plaintiffs assert that a comparison between Defendants' net positions and the direction of the platinum and palladium Fixes shows that, to a statistically significant degree, the direction of the Fix prices is much more strongly correlated with the Defendants' net position than it is with the overall direction of the market on a given day. SAC ¶ 196.

Plaintiffs assert that, even if Defendants were using their short positions in NYMEX futures for hedging purposes—*i.e.*, to offset the risk of large long positions

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[6] Although Plaintiffs are unable at this stage to quantify each individual Defendant's short position in the futures and OTC markets, they rely on publicly available data in support of this claim. *See* SAC ¶ 192-193.

elsewhere—Defendants were still primarily motivated to cause downward spikes in the price of platinum and palladium. SAC ¶ 204-205. That is because Defendants could profit from driving the commodities' prices down by cashing in on margin payments since futures are marked to market on a daily basis, thus requiring daily cash margin payments as a result of changes in the value prior to the settlement date for the future. SAC ¶ 205. As Plaintiffs explain, that structure "generates daily cash flows for the holder of the futures contract if the market moves in favor of the holder's position." SAC ¶ 205.

d. Related Regulatory Investigations

To buttress their claim that Defendants engaged in the alleged collusion—and were, in fact, able to profit from their the manipulation of the platinum and palladium Fixing process—Plaintiffs note that many of the "world's leading banks have *admitted* to manipulating the key LIBOR financial benchmark, including by way of collusion between their respective traders." SAC ¶¶ 16, 203 (emphasis in original). Plaintiffs also point out that, in the currency-exchange markets, many leading banks, including several of the Defendants, "*admitted* that their traders would *collude* to move the market in advance of setting key benchmarks." SAC ¶ 203 (emphasis in original). In addition, as set forth in the SAC, several investigations by various authorities around the world are currently underway. SAC ¶ 223. For example, Plaintiffs assert that the U.S. Department of Justice ("DOJ") and the CFTC have launched investigations into Defendants' manipulation of the price-setting mechanisms in

precious metals, including in the platinum and palladium markets. SAC ¶ 223. FINMA, the Swiss financial regulator, has recently reported that it has identified attempts to manipulate fixes in the precious metals market, including by at least one of the defendants in this action. SAC ¶¶ 17, 168, 224-226.

According to the SAC, HSBC had recently entered into a settlement with the CFTC resulting from its manipulation of Forex benchmarks after the CFTC found that it and other banks used private chat rooms to communicate and plan their price manipulation. SAC ¶ 243. As alleged in the SAC, HSBC has also recently resolved charges by the U.K.'s FCA after the FCA found that HSBC attempted to manipulate foreign exchange rates through collusion with traders at other firms for HSBC's benefit and to the detriment of clients and other market participants. SAC ¶ 244. Plaintiffs also allege that Barclays has recently settled with the FCA following an investigation into price manipulation in the precious metals context. SAC ¶ 168. Plaintiffs assert that the precious metals, which include platinum and palladium, and the Forex markets, their benchmarks, and the Defendants' respective trading desks "were closely related," particularly at UBS. SAC ¶ 174.

In addition to DOJ's and CFTC's investigations of Defendants' price-setting mechanisms in precious metals markets generally, and the platinum and palladium markets specifically, the CFTC, FCA, and the German financial regulators have all launched probes into benchmark price manipulation in the context of other precious metals. SAC ¶¶ 223-226.

Other regulators and legislative bodies, including the United States Senate, have noted concerns regarding potential "conflicts of interest" between banks and their clients with respect to platinum and palladium, as well as other precious metals. SAC ¶¶ 19, 222, 228-231, 246.

B. Procedural History

Plaintiffs commenced this action on November 25, 2014. Dkt. No. 1. Subsequently, plaintiffs in related actions (*see* 15-cv-0436-GHW, 15-cv-1036-GHW, 15-cv-1712-GHW, and 15-cv-1817-GHW) filed substantively similar complaints. On March 19, 2015, the parties filed a joint motion to consolidate all five actions and to appoint Labaton Sucharow LLP and Berger & Montague, P.C. as interim co-lead counsel for the proposed class, which the Court granted on March 20, 2015. Dkt. Nos. 22, 32. Also on March 19, 2015, the parties also filed a joint motion to stay discovery in the consolidated actions, which the Court granted on April 21, 2015. Dkt. Nos. 30, 48. On April 21, 2015, Plaintiffs filed a consolidated amended complaint, which Defendants moved to dismiss on June 22, 2015. Dkt. Nos. 45, 76, 79. On July 21, 2015, Plaintiffs filed their second consolidated class action complaint. Dkt. No. 102. Thereafter, Defendants moved to dismiss the SAC, challenging Plaintiffs' ability to bring Sherman Act, CEA, and unjust enrichment claims. Dkt. No. 115. BASF, ICBC, and LPPFC filed supplemental memoranda of law, arguing that the claims against them should be dismissed for lack of personal jurisdiction. Dkt. Nos. 117, 119-120. UBS filed a separate motion to dismiss for failure to state a claim, arguing that neither of the UBS entities named as

defendants in the SAC had any role in the Fixing. Dkt. No. 113. Plaintiffs filed their oppositions to Defendants' motions on November 16, 2015. Dkt. Nos. 127-129. Defendants filed their respective replies on December 11, 2015. Dkt. Nos. 130-134. Since the motions were fully briefed, and in response to recent decisions issued by the Second Circuit and courts in this district, the parties filed a number of supplemental letters, advising the Court regarding those decisions' relevance to and impact on the pending motions in this action. *See, e.g.*, Dkt. Nos. 136-141, 146, 155-158, 161, 164-166.

III. DISCUSSION[7]

A. Legal Standard[8]

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 (2009).

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[7] Although UBS filed a separate motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), because UBS joined the remaining Defendants' motion, *see* Dkt. No. 113 at 1 n.1, references to "Defendants" in Parts III.B-III.D of this opinion include UBS. UBS's stand-alone motion is addressed separately below. *See* Part III.F.

[8] Unless otherwise noted, the legal standard set forth below governs the Court's analysis of Defendants' motion to dismiss.

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 (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).

B. Sherman Act Claim

1. Sherman Act Violation

Plaintiffs claim that Defendants' alleged manipulation of the Fixing constitutes a conspiracy in

restraint of trade in violation of Section 1 of the Sherman Act. Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1; *see also Twombly,* 550 U.S. at 553-63. "Notwithstanding its broad language, this provision prohibits 'only *unreasonable* restraints of trade.'" *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 61 (2d Cir. 2012) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.,* 485 U.S. 717, 723 (1988) (emphasis added)). To run afoul of § 1, the unreasonable restraint must result from an agreement between two or more entities. *See Twombly*, 550 U.S. at 553-54. A restraint of trade resulting from unilateral or independent action does not violate Section 1. *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012) ("In order to establish a conspiracy in violation of § 1, whether horizontal, vertical, or both, proof of joint or concerted action is required; proof of unilateral action does not suffice.") (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). "The crucial question in a Section 1 case is therefore whether the challenged conduct 'stems from independent decision or from an agreement, tacit or express.'" *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)) (alteration omitted).

To overcome a motion to dismiss, a plaintiff must allege "'enough factual matter (taken as true) to suggest that an agreement was made.'" *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 781 (2d Cir. 2016), *cert. denied*, No. 16-545, 137 S. Ct. 814 (2017). A

plaintiff can meet this pleading requirement in one of two ways. "First, a plaintiff may, of course, assert direct evidence that the defendants entered into an agreement in violation of the antitrust laws." *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) (citing *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323-24 (3d Cir. 2010)); *see also In re Commodity Exch., Inc.* ("*In re Gold*"), No. 14-MD-2548 (VEC), --F. Supp. 3d--, 2016 WL 5794776, at *15 (S.D.N.Y. Oct. 3, 2016); *In re London Silver Fixing, Ltd., Antitrust Litig.* ("*In re Silver*"), No. 14-MD-2573 (VEC), --F. Supp. 3d--, 2016 WL 5794777, at *14 (S.D.N.Y. Oct. 3, 2016). In many antitrust cases, however, "this type of 'smoking gun' can be hard to come by, especially at the pleading stage. Thus a complaint may, alternatively, present circumstantial facts supporting the inference that a conspiracy existed." *Mayor & City Council of Baltimore*, 709 F.3d at 136; *see also Gelboim*, 823 F.3d at 781 ("'[C]onspiracies are rarely evidenced by explicit agreements' and 'nearly always must be proven through 'inferences that may fairly be drawn from the behavior of the alleged conspirators.'") (quoting *Anderson News*, 680 F.3d at 183). Allegations of parallel conduct alone are insufficient to support an inference that a conspiracy existed. *Mayor & City Council of Baltimore*, 709 F.3d at 136; *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 366 (S.D.N.Y. 2016) ("At the pleading stage, plaintiffs must allege sufficient facts to support (not 'prove' or even 'demonstrate') a plausible inference that defendants reached an agreement; a complaint merely alleging parallel conduct alone is not sustainable.") (citing *Twombly*, 550 U.S. at 556).

In the absence of direct evidence, therefore, courts can infer the existence of an agreement in restraint of trade "'on the basis of conscious parallelism when such independent conduct is accompanied by circumstantial evidence and plus factors.'" *Mayor & City Council of Baltimore*, 709 F.3d at 136 (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001)); *see also Twombly*, 550 U.S. at 557 (stating that allegations of parallel conduct "must be placed in a context that raises a suggestion of a preceding agreement"); *Gelboim,* 823 F.3d at 781; *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987) ("Since mere parallel behavior can be consistent with independent conduct, courts have held that a plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy."). Such "plus factors" include "(1) 'a common motive to conspire'; (2) 'evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators'; and (3) 'evidence of a high level of interfirm communications.'" *Gelboim,* 823 F.3d at 781 (quoting *Mayor & City Council of Baltimore*, 709 F.3d at 136). The list of plus factors is "neither exhaustive nor exclusive, but rather illustrative of the type of circumstances which, when combined with parallel behavior, might permit a jury to infer the existence of an agreement." *Id.* (quoting *Mayor & City Council of Baltimore*, 709 F.3d at 136 n.6).

a. Parallel Conduct

Plaintiffs allege that Defendants' parallel conduct can be deduced from a comparison of Defendants' platinum and palladium quotes shortly before the Fixing with simultaneous quotes by other participants acting in the same market. SAC ¶¶ 178-194. According to Plaintiffs, the data show that on days when the price of platinum and palladium decreased in the window leading up to and during the PM Fixing, for example, the price drop was due at least in part to the Fixing Members' offering lower quotes for those metals than other participants in the platinum and palladium markets. SAC ¶¶ 179-180 & fig. on p. 96. Plaintiffs further allege that the Fixing Members' quotes were consistently lower than quotes of other market participants. SAC ¶ 181. Relying on several data plots from select days within the Class Period, Plaintiffs claim that their analysis of pricing behavior indicates that spot prices moved not only during the Fixing, but also before the Fixing process commenced. SAC ¶ 184 & figs. on pp. 97-99. The direction of the price movement, Plaintiffs contend, was often contrary to trends occurring during the rest of the day. SAC ¶ 184. Plaintiffs have also identified numerous days on which Defendants' alleged price manipulation generated downward movement of the PM Fixing for both platinum and palladium, resulting in artificial suppression of the Fix Price of both metals. *See* SAC apps. A & B. Plaintiffs interpret these data as showing that Defendants quoted lower platinum and palladium prices in unison. *See* Pls.' Opp'n to Defs.' Joint Mot. to Dismiss the Second Am. Class Action Compl., ("Pls.' Opp'n"), Dkt. No. 129, at 6.

Defendants maintain the SAC does not plausibly allege that they acted in parallel because, among other things, it includes allegations of aggregated spot-market activity and does not show any instances in which two Defendants simultaneously quoted similar artificially low prices. Defs. BASF Corp. BASF Metals Ltd., Goldman Sachs, HSBC, ICBC, and the LPPFC's Joint Mem. of Law in Supp. of Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) ("Defs.' Joint Br."), Dkt. No. 116, at 13-14. Therefore, Defendants argue, the allegations in the SAC are entirely consistent with lawful independent action or with rational business behavior. Defs. BASF Corp. BASF Metals Ltd., Goldman Sachs, HSBC, ICBC, and the LPPFC's Joint Reply Mem. of Law in Supp. of Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) ("Defs.' Joint Reply"), Dkt. No. 132, at 3-4. Defendants are correct that Plaintiffs' parallel conduct allegations, without more, do not support an inference of the existence of a conspiracy. *See, e.g.*, *Twombly*, 550 U.S. at 553 ("While a showing of parallel 'business behavior is admissible circumstantial evidence from which the fact finder may infer agreement,' it falls short of 'conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense.'") (quoting *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954)); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 227 (1993); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007) ("[S]imilar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy."). As described below, here there is more. The Court is, therefore, satisfied that the SAC plausibly pleads conduct consistent with conscious

parallelism. *See, e.g.*, *In re Silver*, 2016 WL 5794777, at *14-15 (concluding that allegations that defendants "opportunistically caus[ed] 'reversions' in spot pricing in advance of" the silver benchmarking calls supported an inferences that they acted in parallel); *In re Gold*, 2016 WL 5794776, at *16 (concluding that the complaint sufficiently pleaded parallel conduct where plaintiffs alleged that defendants offered spot quotes around the gold fixing calls that were clustered at prices that were lower than those of other market participants and where plaintiffs identified select days on which two more defendants appeared to have offered spot quotes that correlated with a downward trend in gold prices shortly before and after the publication of the gold benchmark price).

b. Plus Factors

Plaintiffs point the Court to the following types of circumstantial evidence and plus factors alleged in the SAC: (1) Defendants engaged in direct exchange of pricing information during the Fixing Calls; (2) the information exchange occurred among a small group of dominant market players; (3) the communications between Defendants were private; (4) Defendants had a direct financial interest in the outcome of the Fixing and, thus, were strongly incentivized to influence the Fixing in their desired direction; (5) the semidiurnal Fixing Calls furnished ample opportunity for Defendants to police conspiracy participants who "broke rank;" (6) because of the Fixing Calls' private setting, there was a relatively low likelihood that the conspiracy would be exposed, thus encouraging collusion; and (7) numerous regulators in the U.S. and

around the world were investigating and continue to investigate anticompetitive conduct and price manipulation in the precious metals markets. Pls.' Opp'n at 7-12. Defendants maintain that these plus factors are insufficient to salvage Plaintiffs' Section 1 claim. Defs.' Joint Reply at 4-6.

While the Court agrees with some of Defendants' critiques, on balance, the Court is satisfied that Plaintiffs have alleged sufficient circumstantial evidence and plus factors from which a conspiracy in restraint of trade may plausibly be inferred. First, Plaintiffs allege that the Fixing Calls furnished an ideal, recurrent setting for the Fixing Members to discreetly exchange pricing information. Notwithstanding the negative connotation of the term "price fixing" in the legal context, the Fixing Calls and the Fix Price were part of the platinum and palladium markets for several decades. Absent manipulation, the process had been acknowledged and accepted by market participants as a legitimate and beneficial price-setting apparatus. While it might be true that the Fixing Calls furnished a convenient forum and ample opportunities to conspire—and that the structure is not irrelevant—an "opportunity to collude does not translate into collusion." *Ross v. Am. Exp. Co.*, 35 F. Supp. 3d 407, 452 (S.D.N.Y. 2014), *aff'd sub nom. Ross v. Citigroup, Inc.*, 630 F. App'x 79 (2d Cir. 2015), *as corrected* (Nov. 24, 2015); *see also Venture Tech., Inc. v. Nat'l Fuel Gas Co.,* 685 F.2d 41, 47 (2d Cir. 1982) ("[O]ne who alleges that he is a victim of an antitrust conspiracy and seeks to impose the heavy sanctions of the Sherman Act upon the accused, must show more than the existence of a climate in which such a

conspiracy may have been formed."). Even at the pleading stage therefore, the Court finds that, in and of itself, the structure of the Fixing does not constitute a plus factor. *See, e.g.*, *In re Gold*, 2016 WL 5794776, at *16-17 (concluding that the "[t]he structure of the Fixing is not irrelevant because it provide a forum and opportunity for the Fixing Banks to conspire," but concluding that the structure alone did not constitute a plus factor).

That said, although the structure of the Fixing is not damning by itself, that the Fixing coincided with Defendants' alleged price manipulation constitutes sufficient circumstantial evidence of a conspiracy in restraint of trade. Particularly important are Plaintiffs' allegations that the most significant platinum and palladium price drops were observed at the time of Fixing, during which Defendants allegedly shared confidential customer information and misrepresented their own and their customers' orders. *See, e.g.*, SAC ¶¶ 117-118, 171 & figs. on pp. 53-54; *see also* SAC app. E, ¶¶ (a)-(k). Coupled with Plaintiffs' allegations that the Fixing Members controlled the Fixing process, and used various channels of communications to share information, the correlating price drops support an inference that a conspiracy existed. *See, e.g.*, *In re Gold*, 2016 WL 5794776, at *17.[9]

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[9] Defendants argue that Plaintiffs' conspiracy allegations rely almost exclusively on the opinions of unidentified experts, and that the Court may not consider those opinions at the motion to dismiss stage. Defs.' Joint Br. at 19-24. There is a difference between expert opinions, which the Court does not rely on, and allegations based on those opinions, which the Court may rely on—and has relied on—in analyzing whether Plaintiffs have stated a claim. *See,*

Second, the Court is not persuaded that Plaintiffs' proffered circumstantial evidence regarding investigations of price manipulation in precious commodities markets should be considered as circumstantial evidence suggesting a conspiracy in the platinum and palladium market in particular. Again, while not entirely irrelevant, those allegations do not substantiate Plaintiffs' allegations here. Many of the investigations and settlements referenced in the SAC are in the context of different markets or different market players (*i.e.*, not Defendants). *See* SAC ¶¶ 223-262. Accordingly, the Court finds that Plaintiffs' allegations concerning past, ongoing, or future investigations do not constitute a plus factor. *In re*

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e.g., *In re Silver*, 2016 WL 5794777, at *17 ("The Court is not, however[,] relying on Plaintiffs' *opinions* (expert or otherwise) but rather on Plaintiffs' factual assertions regarding pricing and other economic data, which courts generally accept at the pleading stage.") (emphasis in original) (citations omitted). The Second Circuit and district courts in this circuit routinely rely on expert and statistical analyses contained in pleadings. *See, e.g.*, *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC.*, 750 F.3d 227, 234 n.8 (2d Cir. 2014) (relying on, among other things, plaintiff's expert economic analysis showing loss causation); *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR I*") 935 F. Supp. 2d 666, 716-17 (S.D.N.Y. 2013) (accepting plaintiffs' proffered expert data analyses comparing LIBOR rates to other data), *vacated and remanded sub nom. on other grounds by*, *Gelboim*, 823 F.3d 759; *Dover v. British Airways, PLC (UK)*, No. 12-cv-5567, 2014 WL 317845, at *2 (E.D.N.Y. Jan. 24, 2014) (noting that plaintiff's statistical analysis of prices "is a factual allegation that the Court must credit"); *Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 858 F. Supp.2d 306, 332 (S.D.N.Y. 2012), *aff'd*, 712 F.3d 136 (2d Cir. 2013) (addressing plaintiffs' internal review of a sampled subset of loan files and valuation models at the motion to dismiss stage).

Elevator Antitrust Litig., 502 F.3d at 52 (concluding that allegations of antitrust wrongdoing abroad, "absent any evidence of linkage between such foreign conduct and conduct here—is merely to suggest (in defendants' words) that 'if it happened there, it could have happened here'"); *In re Gold*, 2016 WL 5794776, at *17 (concluding that ongoing government investigations into possible manipulation of precious metals benchmarks and findings of misconduct with respect to FX and LIBOR benchmarks do not constitute circumstantial evidence of a conspiracy in the defendants' market) (citations omitted).

The Court observes, however, that in some circumstances, government and regulatory agencies' investigations, "when combined with parallel behavior, might permit a jury to infer the existence of an agreement." *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44, 55 (S.D.N.Y. 2016) (internal quotation marks and citations omitted). In *Alaska Electrical Pension Fund*, for example, plaintiffs "allege[d] not only that government investigations [were] pending, but also that those investigations *ha[d] actually turned up evidence of criminal behavior relating to the [defendants'] manipulation of*" a benchmark interest rate incorporated into a broad range of financial derivatives. *Id.* (emphasis added) (internal quotation marks and citations omitted). The plaintiffs further alleged that defendants "abruptly and simultaneously ceased engaging in parallel conduct when they were served with subpoenas in connection with" the investigations, "strengthening substantially the inference that a conspiracy existed." *Id.*; *see also Starr v. Sony BMG*, 592 F.3d at 324 (acknowledging

investigations by the New York State Attorney General and DOJ into the *defendants'* price fixing scheme in conjunction with other circumstantial evidence, as plausible grounds from which to infer an agreement in restraint of trade). Such "strengthening" factors are absent here.

Third, while not expressly alleged, the SAC implies that the Fixing Members often acted against their own individual economic interests by, for example, quoting below-market prices leading up to the Fixing. As noted above, the Second Circuit has recognized that actions against apparent individual and economic self-interest of the alleged conspirator are among the plus factors that courts must consider. *Mayor & City of Baltimore*, 709 F.3d at 136. The Fix Price dips alleged and illustrated in the SAC can only be explained, Plaintiffs maintain, if the Fixing Members held uniform trading positions and quoted in unison throughout the Class Period. *See* SAC ¶¶ 178-203. Thus, Plaintiffs allege, the data suggest that, at least on some days during this period, one or more of the Fixing Members quoted prices that were contrary to their economic interest by, for example, agreeing to suppress the Fix Price irrespective of the fact that a given bank would have profited more from an increase in the price rather than a decrease. On that basis, the Court finds that the SAC's allegations that Defendants acted against their own economic self-interest constitute circumstantial evidence of a conspiracy to manipulate the Fix Price. *See, e.g.*, *In re Gold*, 2016 WL 5794776, at *20 (citations omitted); *In re Silver*, 2016 WL 5794777, at *17 (citations omitted); *Alaska Elec. Pension Fund*, 175 F. Supp. 3d at 55 (recognizing allegations that banks

conspired to manipulate ISDA benchmark rates by, among other things, trading against their own economic self-interest, sufficiently pleaded a plus factor in support of a Section 1 conspiracy claim); *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR III*"), 27 F. Supp. 3d 447, 469 (S.D.N.Y. 2014) ("[I]t is implausible that all defendants would maintain parallel trading positions in the Eurodollar futures market across the Class Period and that those positions, in turn, motivated their daily LIBOR submissions.").

Fourth, Plaintiffs assert that Defendants acted with "common motive" to manipulate the platinum and palladium Fix Price. Pls.' Opp'n at 8-11. "Motive to conspire may be inferred where the parallel 'action taken [by defendants] had the effect of creating a likelihood of increased profits.'" *Anderson News, L.L.C. v. Am. Media, Inc.*, 123 F. Supp. 3d 478, 500 (S.D.N.Y. 2015) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 287 (1968)) (alteration in *Anderson*); *cf. Ross*, 35 F. Supp. 3d at 442 (reasoning that "[c]ourts may not infer a conspiracy where the defendants have no 'rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations'") (quoting *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 233 (2d Cir. 1999)).

Plaintiffs maintain that Defendants had a "common motive" to suppress the platinum and palladium Fix Price for at least two related reasons: (1) Defendants held net short platinum and palladium positions on NYMEX, which allowed them to profit when the price of the underlying metals dropped (*e.g.*, SAC ¶ 193); and

(2) foreknowledge of the downward platinum and palladium price swings enabled Defendants to profit from a variety of Platinum and Palladium Investments (*e.g.*, SAC ¶¶ 12-14, 199-203).

In *In re Gold*, the plaintiffs pleaded the existence of a common motive with virtually identical allegations. Addressing the "net short" allegations, Judge Caproni found this theory "implausible," noting several internal inconsistencies within the complaint. *In re Gold*, 2016 WL 5794776, at *18-19. For example, Judge Caproni reasoned that, even if she "were to accept Plaintiffs' claim that the Defendants (as opposed to other bullion banks) consistently held large net short positions in gold futures throughout the Class Period, Plaintiffs fail to present a plausible theory as to how Defendants profited from their short positions during a bull market in which the price of gold nearly quadrupled." *Id.* at *18 (citations omitted). This is because, as explained above, the holder of a short position profits if the price of the underlying commodity falls, in which case the holder can eliminate its delivery obligation before expiry by purchasing a lower-priced offsetting futures contract and pocketing the difference in price. SAC ¶¶ 85-86. "[I]n a rising market," Judge Caproni noted,

> short futures are a losing proposition. Because the market price of gold rose steadily throughout the Class Period, Defendants would have had to hold massive long positions in physical gold, derivatives, and over-the-counter investments in order to counter losses on any short positions, including short futures. Thus to the extent there were discrete periods when the price of gold fell,

> enabling Defendants to reap profits from their short futures, those profits would have been neutralized by Defendants other long holdings, thus negating Plaintiffs' alleged profit motive.

In re Gold, 2016 WL 5794776, at *18. On that basis, Judge Caproni concluded that even accepting the plaintiffs' allegations as true, the defendants in that case would still have lost money on their alleged massive net short positions. *Id.* at *19.

That conclusion applies with equal force to Plaintiffs' claims in this action, given that palladium prices "have been in a general upward trend" since the beginning of the Class Period and platinum prices *tripled* from January 2000 through December 2013. SAC ¶¶ 100, 125 & fig. on p. 41. In light of the substantial similarity between the allegations in *In re Gold* and the Plaintiffs' allegations here, the Court finds Judge Caproni's analysis of this plus factor persuasive and adopts her conclusions here. 2016 WL 5794776, at *18-19.

That said, while Plaintiffs' net short theory fails the plausibility test, their allegations that the Fixing Members were incentivized to profit from their foreknowledge of the Fix Price constitutes a "common motive" for antitrust purposes. *Id.* at *19. As large financial institutions with significant presence in various platinum and palladium markets, the SAC plausibly pleads that Defendants had an interest in the outcome of the Fixing. For example, as alleged in the SAC, the Fixing Members were positioned to cause platinum and palladium prices to increase or decrease: they had the ability to buy platinum and palladium at

suppressed prices and sell at higher prices, an advantage not available to other market participants. SAC ¶ 206. The Fixing Members could also utilize their control of the Fixing to profit from platinum and palladium derivatives that directly incorporated the Fix Price. *See, e.g.*, SAC ¶ 201.

In sum, the Court finds that Plaintiffs have plausibly alleged conscious parallelism and sufficient circumstantial evidence and plus factors to support an inference that Defendants participated in a conspiracy in restraint of trade. In *Gelboim*, the Second Circuit found that "the complaints contain[ed] numerous allegations [of circumstantial evidence and plus factors] that clear the bar of plausibility" and noted that "[c]lose cases abound on this issue, but [that case was] not one of them." *Gelboim*, 823 F.3d at 781-82. As the analysis above shows, this case *is* one of them, but it still clears the bar.

2. Standing

Antitrust plaintiffs must establish both constitutional standing and antitrust standing. *Gelboim*, 823 F.3d at 770. "Antitrust standing is distinct from constitutional standing, in which a mere showing of harm will establish the necessary injury." *Port Dock & Stone Corp. v. Oldcastle, Northeast, Inc.*, 507 F.3d 117, 121 (2d Cir. 2007). As is true of constitutional standing, antitrust standing is a threshold question resolved at the pleading stage. *Gelboim*, *823 F.3d* at 770 (citing *Gatt Commc'ns v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75 (2d Cir. 2013)).

a. Constitutional Standing[10]

Constitutional standing refers to the limitation on federal courts to hear a case or controversy within the meaning of Article III of the U.S. Constitution. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 55 (2d Cir. 2016). "Constitutional standing 'is the threshold

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[10] Although Defendants do not appear to contest Plaintiffs' constitutional standing to bring a Sherman Act claim, their arguments concerning Plaintiffs' failure adequately to plead an antitrust injury is relevant to both constitutional standing and the antitrust standing inquires. *See, e.g.*, Defs.' Joint Br. at 25 (arguing that Plaintiffs' allegations fall short of adequately pleading an antitrust injury because "Plaintiffs only assert that 'manipulation of the Fixing impacted . . . transactions and caused Plaintiffs and the Class to incur greater losses and/or realize lower prices than they would have realized in a free and open competitive market'") (quoting SAC ¶ 247); *see also id.* at 36. Accordingly, before proceeding to the parties' arguments concerning Plaintiffs' Sherman Act claim, the Court must first satisfy itself that Plaintiffs have constitutional standing to pursue this claim; the Court can raise the issue *sua sponte*. *E.g.*, *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 198 (2d Cir. 2005) ("Because the standing issue goes to this Court's subject matter jurisdiction, it can be raised *sua sponte*.") (citing *United States v. Quinones*, 313 F.3d 49, 57-58 (2d Cir. 2002)); *see also Thomas v. City of New York*, 143 F.3d 31, 34 (2d Cir. 1998) (noting that because of the "Article III limitations on judicial power . . . the court can raise [an Article III issue] *sua sponte*"); *Schwartz v. HSBC Bank USA, N.A.*, No. 14 CIV. 9525 (KPF), 2017 WL 95118, at *4 (S.D.N.Y. Jan. 9, 2017) (reasoning that that the court has an "'independent obligation to consider the presence or absence of subject matter jurisdiction *sua sponte* . . . [including] whether a plaintiff has standing under Article III to pursue its claim'") (quoting *Jennifer Matthew Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.*, 607 F.3d 951, 955 (2d Cir. 2010)).

question in every federal case, determining the power of the court to entertain the suit.'" *Leibovitz v. New York City Transit Auth.*, 252 F.3d 179, 184 (2d Cir. 2001) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "'If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim,'" and the claim must be dismissed. *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012) (quoting *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 198 (2d Cir. 2005)).

"To satisfy the 'irreducible constitutional minimum' of Article III standing, a plaintiff must demonstrate (1) 'injury in fact,' (2) a 'causal connection' between that injury and the complained-of conduct, and (3) a likelihood 'that the injury will be redressed by a favorable decision.'" *Strubel v. Comenity Bank*, 842 F.3d 181, 187-88 (2d Cir. 2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). The injury-in-fact prong of the constitutional standing inquiry requires that the plaintiff's alleged injury be "'an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical.'" *Montesa v. Schwartz*, 836 F.3d 176, 195 (2d Cir. 2016) (quoting *Lujan*, 504 U.S. at 560) (alterations in *Montesa* omitted). In determining whether a plaintiff has standing, courts must "'accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor.'" *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 191 (2d Cir. 2014) (quoting *Bigio v. CocaCola Co.,* 675 F.3d 163, 169 (2d Cir. 2012)

(alterations omitted)); *see also Warth*, 422 U.S. at 501 ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.").

Defendants argue that allegations that they suffered "greater losses" or realized lower profits than they would have in a competitive market lack sufficient detail to show that Plaintiffs suffered any nonspeculative injuries as a result of the Fixing. Defs. Joint Br. at 25-26. Defendants also argue that, because Plaintiffs do not allege that they engaged in a transaction *at a time* that coincides with the AM or PM Fixing, when the prices were allegedly artificial, Plaintiffs have failed to allege that they suffered an injury-in-fact. Defs.' Joint Br. at 36 (emphasis in original) (citing *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR II*"), 962 F. Supp. 2d 606, 622 (S.D.N.Y. 2013)). But Plaintiffs allege that they sold Platinum and Palladium Investments on days when Defendants allegedly manipulated the Fix Price. SAC apps. C & D. In fact, Plaintiffs have amassed a list of dates on which, they allege, one or more of Plaintiffs' sales coincided with Defendants' manipulation of the PM platinum and palladium Fix Price. SAC apps. A-D.

Moreover, Plaintiffs allege that the effect of the Fix price's downward spike lingered beyond the Fixing window, and through the time of day when the margin payment cash flows for the Defendants' large short futures positions would be calculated. SAC ¶ 209. In other words, even though Plaintiffs have not alleged

that they sold futures within the Fixing window, they have alleged that they sold futures within the period during which Defendants' price manipulation had an effect on the Fix Price and the platinum and palladium derivatives markets. SAC ¶ 209. Because Plaintiffs have alleged that they suffered losses or reduced profits from sales at artificially lower prices as a result of Fixing, Plaintiffs have sufficiently pleaded that they suffered an injury as a result of Defendants' alleged price manipulation. Accordingly, Plaintiffs have established that they have constitutional standing to sue. *See Gelboim*, 823 F.3d at 770 (noting that the injury component of the constitutional standing inquiry was "uncontested, and easily satisfied by [plaintiffs'] pleading that they were harmed by receiving lower returns on LIBOR-denominated instruments as a result of defendants' manipulation of LIBOR"); *see also In re Gold*, 2016 WL 5794776, at *9 (finding that nearly identical allegations satisfied the constitutional standing inquiry); *In re Silver*, 2016 WL 5794777, at *7 (same); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 595 (S.D.N.Y. 2015), *appeal withdrawn*, (Apr. 27, 2015) (concluding that plaintiffs have satisfied the injury-in-fact prong because they "have demonstrated that they have a concrete stake in the present action. Each named Plaintiff claims that it was injured by having to pay supra-competitive prices as a result of Defendants' manipulation of the Fix").

b. Antitrust Standing

"Section 4 of the Clayton Act establishes a private right of action for violation of the federal antitrust laws." *Gatt*, 711 F.3d at 75. Pursuant to Section 4,

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a). While "[i]t is a well-established principle that . . . the United States is authorized to sue anyone violating the federal antitrust laws, a private plaintiff must demonstrate 'standing.'" *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 436 (2d Cir. 2005) (citing *Cargill, Inc. v. Monfort of Colo.,* 479 U.S. 104, 110 & nn.5-6 (1986). "This standing requirement originates in the Supreme Court's recognition that, although Section 4 of the Clayton Act appears to confer a broad private right of action for antitrust damages, 'Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.'" *Id.* at 436-37 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* ("*AGC*"), 459 U.S. 519, 534 (1983)); *see also Gatt*, 711 F.3d at 75.

"The right to pursue private actions for treble damages under § 4 has thus developed limiting contours over the thirty years since [*AGC*] was handed down. Those contours are embodied in the concept of 'antitrust standing.'" *Gatt*, 711 F.3d at 75 (citing *Daniel*, 428 F.3d at 436-38). "'[A]ntitrust standing is a

threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [the court] must dismiss it as a matter of law.'" *Id.* at 75-76 (quoting *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (en banc)).[11] This limiting contour "'prevents private plaintiffs from recover[ing] damages under § 4 . . . merely by showing injury causally linked to an illegal presence in the market.'" *Id.* at 76 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (alterations in original)). To satisfy the antitrust standing requirement, "a private antitrust plaintiff must plausibly allege that (i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations," *i.e.*, that plaintiff is "an 'efficient enforcer' of the antitrust laws." *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157-58 (2d Cir. 2016) (citing *Gatt*, 711 F.3d at 76, *Daniel*, 428 F.3d at 438).

i. Antitrust Injury

As noted above, the Supreme Court reasoned in *AGC* that "'Congress did not intend the antitrust laws

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[11] Although the Second Circuit has not directly addressed this issue, it has cited with approval the D.C. Circuit's "holding that statutory standing under the antitrust laws is not a prerequisite to federal subject matter jurisdiction." *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir. 2003) (citing *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 107-08 (D.C. Cir. 2002) ("Unlike constitutional standing, this court's jurisdiction does not turn on antitrust standing.")); *see also Paulsen v. Remington Lodging & Hospitality, LLC*, 773 F.3d 462, 468 (2d Cir. 2014) (reasoning that "statutory standing is not jurisdictional unless Congress says so").

to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.'" 459 U.S. at 534 (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972)). Rather, "[a]n antitrust injury 'should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.'" *Gelboim*, 823 F.3d at 772 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). "Competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury." *In re Aluminum Warehousing*, 833 F.3d at 158 (internal quotation marks and citations omitted).

The Second Circuit's decision in *Gelboim* provides the framework for this Court to analyze whether Plaintiffs have alleged an antitrust injury. In *Gelboim*, plaintiffs claimed that the defendant banks colluded to depress LIBOR rates through participation in the benchmarking process for LIBOR. 823 F.3d at 771. The plaintiffs maintained that they alleged an antitrust injury because they traded in LIBOR-dependent financial instruments and, consequently, incurred losses or reduced profits. *Id.* at 772-75. The Second Circuit held that the plaintiffs sufficiently alleged an antitrust injury because they "claim[ed] violation (and injury in the form of higher prices) flowing from the corruption of the rate-setting process, which (allegedly) turned a process in which the Banks jointly participated into conspiracy." *Id.* at 775. Because the plaintiffs alleged that the defendant banks "warp[ed] market factors affecting the prices for LIBOR-based financial instruments," the Second Circuit held that "[n]o further showing of actual adverse effect in the

market place is necessary. This attribute separates evaluation of *per se* violations—which are presumed illegal—from rule of reason violations, which demand appraisal of the marketplace consequences that flow from a particular violation." *Id.* at 776. By alleging a horizontal price-fixing scheme, "'perhaps the paradigm of an unreasonable restraint of trade'" and which, if proven, would be a *per se* violation of the antitrust laws, plaintiffs were not required to allege additional harm to competition writ large. *Id.* at 771, 775 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984)). Adding that pleading requirement, the Second Circuit reasoned, "'comes dangerously close to transforming a *per se* violation into a case to be judged under the rule of reason.'" *Id.* at 776 (quoting *Pace Elecs., Inc. v. Canon Comput. Sys., Inc.*, 213 F.3d 118, 123-24 (3d Cir. 2000)).

Because "antitrust law is concerned with influences that corrupt market conditions, not bargaining power," that plaintiffs "remained free to negotiate the interest rates attached to particular financial instruments," was immaterial to the Second Circuit's conclusion in *Gelboim*. *Id.* at 773. In addition, although the defendant banks did not control the market, to the extent that they "raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces," and therefore engaging in an unlawful activity. *Id.* (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940)). By "alleging that they paid artificially higher prices" as a result of defendants' conduct, the Second Circuit held that the plaintiffs in *Gelboim* had sustained their burden of pleading an antitrust injury. *Id.* at 777.

While, as a general rule, "only those that are participants in the defendants' market can be said to have suffered antitrust injury . . . [c]ourts have also recognized the antitrust claims of market participants other than consumers or competitors, *e.g.*, potential new market entrants, suppliers, and dealers." *In re Aluminum Warehousing*, 833 F.3d at 158 (internal quotation marks, citations, and alterations omitted). "The universe of potential [antitrust] plaintiffs is not strictly limited to participants in the defendants' market." *Id.* (citing *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 465 (1982)). *Gelboim* observed that the injury prong of the antitrust standing requirement is satisfied when a plaintiff was injured through "'a purposefully anticompetitive scheme'" and the "'injury . . . was inextricably intertwined with the injury the conspirators sought to inflict.'" *Gelboim*, 823 F.3d at 774 (quoting *Brunswick* 429 U.S. at 483-84). Because plaintiffs claimed that they were in a "'worse position' as a consequence" of defendants' scheme to manipulate LIBOR rates, the Second Circuit held that plaintiffs' alleged injury was "one the antitrust laws were designed to prevent." *Id.* at 775 (quoting *Gatt*, 711 F.3d at 76).

Here, Plaintiffs allege that, as a result of Defendants' manipulation of the Fix Price, they were forced to sell platinum and palladium and Platinum and Palladium Investments at artificially low prices. SAC ¶¶ 260-262. Although, at the pleading stage, Plaintiffs are limited to publicly available information, they have preliminarily identified numerous dates on which one or more of Plaintiffs' sales coincided with Defendants' alleged manipulation of the platinum and

palladium PM Fixing. SAC apps. C &D. Because Plaintiffs allege that their "loss[es] stem[ ] from a competition-*reducing* aspect of [D]efendants' behavior," they have sufficiently alleged an injury that the antitrust laws were designed to prevent and that flows from Defendants' allegedly unlawful conduct. *In re Gold*, 2016 WL 5794776, at *10 (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 329 (1990)); *see also In re Silver*, 2016 WL 5794777, at *8 (same); *In re Foreign Exch. Benchmark Rates*, 74 F. Supp. 3d at 596 (concluding that plaintiffs have sufficiently alleged antitrust injury where plaintiffs claimed to have paid supra-competitive prices as a result of defendants alleged horizontal price-fixing conspiracy); *Alaska Elec. Pension Fund*, 175 F. Supp. 3d at 59 ("Notably, this Court and the [*In re Foreign Exch. Benchmark*] Court are not alone in concluding that collusion in the setting of a benchmark rate (or its functional equivalent) that is then used as a component of price results in antitrust injury" and "courts have long held that such collusion gives rise to a claim under the Sherman Act by purchasers of the affected products."); *7 West 57th Street Realty Co. v. Citigroup, Inc.*, No. 13-CV-981 (PGG), 2015 WL 1514539, at *15-20 (S.D.N.Y. Mar. 31, 2015); *Laydon v. Mizuho Bank, Ltd.*, No. 12-CV-3419 (GBD), 2014 WL 1280464, at *7-8 (S.D.N.Y. Mar. 28, 2014).

ii. Efficient Enforcers

The second question the Court must address in determining whether Plaintiffs have antitrust standing is whether Plaintiffs are "efficient enforcers of the antitrust laws." *Gelboim*, 823 F.3d at 777-78 (citing

Daniel, 428 F.3d at 443). The Second Circuit has identified four factors that bear on the efficient enforcers analysis: "(1) the 'directness or indirectness of the asserted injury'; (2) the 'existence of more direct victims of the alleged conspiracy'; (3) the extent to which [plaintiffs'] damages claim is 'highly speculative;' and (4) the importance of avoiding 'either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.'" *Id.* at 778 (quoting *AGC*, 459 U.S. at 540-45).

> These factors are meant to guide a court in exploring the fundamental issue of "whether the putative plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement." After all, "[i]t is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." Indeed, "[t]here is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause,' and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages." In both situations, the court must draw a line beyond which a defendant will not be held responsible for harm experienced by a plaintiff. And in both situations, no black-letter rule exists; *a court must "exercise [its] judgment in deciding whether the law affords a remedy in specific circumstances*."

In re LIBOR-Based Fin. Instruments Antitrust Litig. ("*LIBOR VI*"), No. 11 MDL 2262 (NRB), 2016 WL 7378980, at *15 (S.D.N.Y. Dec. 20, 2016) (citations omitted) (emphasis added) (alterations in original). The Court will address each factor in turn.

(a) Directness of Injury

The "'directness or indirectness of the asserted injury'" factor "requires evaluation of the 'chain of causation' linking [plaintiff's] asserted injury and the [defendants'] alleged price-fixing." *Gelboim*, 823 F.3d at 778 (*quoting AGC*, 459 U.S. at 540). "The antitrust laws do not require a plaintiff to have purchased directly from a defendant in order to have antitrust standing." *In re Foreign Exch. Benchmark Rates Antitrust Litig.* ("*FOREX*"), No. 13 CIV. 7789 (LGS), 2016 WL 5108131, at *9 (S.D.N.Y. Sept. 20, 2016) (citations omitted); *see also LIBOR VI*, 2016 WL 7378980, at *16. As the Supreme Court has recognized, the protection of the antitrust laws are not "confine[d] . . . to consumers, or to purchasers, or to competitors, or to sellers. . . . [They] are comprehensive in . . . coverage [and] protect[ ] all who are made victims of the forbidden practices by whomever they may be perpetrated." *McCready*, 457 U.S. at 472 (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)). A determination of standing in an individual antitrust case is a fact-specific exercise involving a fact-intensive inquiry. *AGC*, 459 U.S. at 536-37.

Plaintiffs bring their antitrust claim on behalf of a putative class of "[a]ll persons or entities who," during the Class Period,

> (i) sold physical platinum or palladium; (ii) sold platinum or palladium futures contracts traded on NYMEX; (iii) sold shares in platinum or palladium ETFs; (iv) sold platinum or palladium call options traded on NYMEX; (v) bought platinum or palladium put options traded on NYMEX; (vi) sold over-the-counter platinum or palladium spot or forward contracts or platinum or palladium call options; or (vii) bought over-the-counter platinum or palladium put options.

SAC ¶ 271. Thus, all contracts for physical platinum and palladium and all platinum and palladium futures, ETFs, options, forwards, and any other OTC or exchange-based platinum and palladium transactions could fall within the scope of this case. In addition, because the proposed class is not limited to person who transacted directly with Defendants, this broad sweep exposes Defendants to potentially astronomical damages for transactions in which they played no direct role.

The scope and scale of Platinum and Palladium Investments that are the subject of this action "is relevant to the relationship between the defendants' actions and the 'concern of damages disproportionate to wrongdoing,' affecting 'myriad markets where derivative instruments have proliferated.'" *Sullivan v. Barclays PLC*, No. 13-CV-2811 (PKC), 2017 WL 685570, at *16 (S.D.N.Y. Feb. 21, 2017) (quoting *Gelboim*, 823 F.3d at 779) (emphasis added). Accepting the SAC's allegations as true, the universe of Platinum and Palladium Investments allegedly affected by Defendants' conduct is extraordinarily large. As noted

earlier, by Plaintiffs' own estimation, subsets of the relevant market—those limited to platinum and palladium futures—have surpassed annual values of $100 billion and $40 billion, respectively. SAC ¶ 83. The Court expects that the quantities of affected physical platinum and palladium trades and ETFs are also significant in magnitude.

The named Plaintiffs are a group of entities and individuals who sold physical platinum and palladium or platinum and palladium futures during the Class Period. SAC at pp. 13-14, ¶¶ (a)-(f). The SAC is silent with respect to whether those Plaintiffs had any direct sales to or purchases from Defendants. Plaintiffs only allege that, as a result of Defendants' price manipulation, they were forced to sell the physical platinum and palladium and platinum and palladium futures at artificial prices, and that those artificial prices were caused by Defendants' unlawful manipulation. SAC at pp. 13-14, ¶¶ (a)-(f). Two appendices to the SAC identify dates on which one or more of Plaintiffs' sales coincided with Defendants' alleged manipulation of the PM Platinum and Palladium Fixing. SAC apps. C & D.

Defendants argue that, because Plaintiffs are, at most, indirect sellers, their injury is too attenuated from the alleged unlawful conduct to satisfy the directness prong. Defs.' Joint Br. at 28-29. Plaintiffs who do not have direct dealings with the defendants, but purchased products allegedly affected by defendants' price fixing, are referred to as "umbrella purchasers." *LIBOR VI*, 2016 WL 7378980, at *15; *Sullivan v. Barclays*, 2017 WL 685570, at *17.

"Umbrella standing concerns are most often evident when a cartel controls only part of a market, but a consumer who dealt with a non-cartel member alleges that he sustained injury by virtue of the cartel's raising of prices in the market as a whole." *Gelboim*, 823 F.3d at 778 (citations omitted). "In the typical umbrella liability case, plaintiffs' injuries arise from transactions with non-conspiring retailers who are able, but not required, to charge supra-competitive prices as the result of defendants' conspiracy to create a pricing 'umbrella.'" *In re Gold*, 2016 WL 5794776, at *13 (citations omitted).

Some courts have found that umbrella purchasers do not have antitrust standing because "'significant intervening causative factors,' most notably, the 'independent pricing decisions of non-conspiring retailers,' attenuate the causal connection between the violation and the injury." *LIBOR VI*, 2016 WL 7378980, at *15 (quoting *In re Gold*, 2016 WL 5794776, at *13); *see also Gross v. New Balance Athletic Shoe, Inc.*, 955 F. Supp. 242, 245-47 (S.D.N.Y. 1997) (finding that plaintiffs injury was too remote to satisfy the directness prong of the efficient enforcers inquiry, and rejecting umbrella purchasers' standing because "the causal connection between the alleged injury and the conspiracy is attenuated by significant intervening causative factors," including "independent pricing decisions of non-conspiring retailers"). Under such circumstances, because the defendants did not secure an illegal benefit at the plaintiffs' expense, "permitting recovery . . . 'could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally earned profits.'" *LIBOR VI*, 2016 WL 7378980,

at *15 (quoting *Mid-West Paper Prods. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 583, 586 (3d Cir. 1979)). Although *Gelboim* observed that the question of antitrust standing of umbrella purchasers has produced a split among the circuit courts, the Second Circuit did not adopt a clear position on the issue. 823 F.3d at 778-79. Accordingly, as Judge Caproni observed in *In re Gold*, here too, "[d]ue to the uncertainty surrounding the viability of the theory [of] umbrella liability, and the unique facts of this case, analyzing Plaintiffs' claims under an umbrella theory of liability leads to no dispositive conclusions." *In re Gold*, 2016 WL 5794776, at *12; *see also In re Silver*, 2016 WL 5794777, at *11.

In remanding *Gelboim* to the district court to consider the efficient enforcers analysis, the Second Circuit observed that "there are features of this case that are like no other" and, "[a]t first glance . . . there appears to be no difference in the injury alleged by those who dealt in LIBOR-denominated instruments, whether their transactions were conducted directly or indirectly with the Banks." *Gelboim*, 823 F.3d at 778-79. The court cautioned, however, that "[r]equiring the Banks to pay treble damages to every plaintiff who ended up on the wrong side of a[ ] [relevant transaction] would, if [plaintiffs'] allegations were proved at trial, not only bankrupt 16 of the world's most important financial institutions, but also vastly extend the potential scope of antitrust liability in myriad markets where derivative instruments have proliferated." *Id.* at 779.

Mindful of the Second Circuit's concern regarding a vast extension of the potential scope of antitrust liability, and recognizing that antitrust standing determinations are fact-specific, on remand the district court "dr[ew] a line between plaintiffs who transacted directly with defendants and those who did not." *LIBOR VI*, 2016 WL 7378980, at *16. The court was able to draw that line in part by acknowledging that "plaintiffs who did not purchase directly from defendants continue to face the same hurdle: they made their own decisions to incorporate LIBOR into their transactions, over which defendants had no control, in which defendants had no input, and from which defendants did not profit." *Id.* "To hold defendants trebly responsible for these decisions would result in 'damages disproportionate to wrongdoing . . . .'" *Id.* (quoting *Gelboim*, 823 F.3d at 779). Since the Second Circuit's decision in *Gelboim* and the district court's application its instruction, at least one other court in this district has adopted the same approach when faced with damages that could accrue in the trillions if non-direct plaintiffs were allowed to proceed. *Sullivan v. Barclays*, 2017 WL 685570, at *17-18 (concluding that plaintiffs who did not have direct dealings with defendants were not efficient enforcers of the antitrust laws).

Analyzing substantially similar allegations as those alleged here, brought by similarly situated plaintiffs as those named in the SAC, Judge Caproni determined that at least a subset of the plaintiffs in the proposed class had cleared the causation hurdle. *In re Gold*, 2016 WL 5794776, at *13; *In re Silver*, 2016 WL 5794777, at *12. Judge Caproni expressed skepticism, however,

regarding whether "*all* market participants who sold gold [or sliver] or gold [or silver] instruments on alleged manipulation days will ultimately be able to move forward with their claims," but concluded that the question could be deferred to the class certification stage. *In re Gold*, 2016 WL 5794776, at *13; *see also In re Silver*, 2016 WL 5794777, at *12. The Court shares Judge Caproni's skepticism. But unlike Judge Caproni, the Court does not believe that this issue should be deferred to class certification with respect Plaintiffs' Sherman Act claim. As discussed above, satisfaction of the efficient enforcer requirement is a condition to antitrust standing, which is appropriately considered on the pleadings.[12] Examining the remaining efficient enforcers factors lends additional support to the Court's ultimate conclusion that, as in *LIBOR VI*, it is

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[12] Since *Gelboim*, at least one other court has found non-direct plaintiffs to be efficient enforcers. *See Merced Irrigation Dist. v. Barclays Bank PLC*, No. 15 CIV. 4878 (VM), 2016 WL 6820738, at *4 (S.D.N.Y. Nov. 10, 2016). In *Merced*, the plaintiff did not deal directly with Barclays, but instead "ended up on the wrong side of an independent" contract, the terms of which referenced the indexes allegedly manipulated by Barclays. *Id.* (citations omitted). The court recognized that it was "unclear how many entities are parties to contracts that reference the indexes at issue" and that, "if Barclays were to be held responsible for all of them, it would greatly expand Barclay's potential liability." *Id.* Nevertheless, the court concluded that "this factor is unlikely to have as much weight as it did in *Gelboim*, where innumerable financial instruments all over the world relied upon LIBOR to determine rates of return, because the scope of Merced's action is *limited to contracts which settled against the indexes at four Western United States based trading hubs*." *Id.* (internal quotation marks and citations omitted) (emphasis added). The limited scope of the plaintiffs' transactions in *Merced* is not present here.

appropriate to draw a line between persons who transacted directly with Defendants and those who did not.

(b) Existence of More Direct Victims

Whether there is a more direct victim of Defendants' alleged antitrust violation turns "chiefly on whether the plaintiff is a consumer or a competitor." *Gelboim*, 823 F.3d at 779. The plaintiff's status, however, "is not the end of the inquiry; the efficient enforcer criteria must be established irrespective of whether the plaintiff is a consumer or a competitor." *Id.* (citing *Sunbeam Television Corp. v. Nielsen Media Research, Inc.,* 711 F.3d 1264, 1273 (11th Cir. 2013)). "'Inferiority' to other potential plaintiffs can be relevant, but it is not dispositive." *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 689 (2d Cir. 2009). "Implicit in the inquiry is recognition that not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced." *Gelboim*, 823 F.3d at 779.

In *Gelboim*, the Second Circuit recognized that "one peculiar feature of [that] case [was] that remote victims (who acquired LIBOR-based instruments from any of thousands of non-defendant banks) would be injured to the same extent and in the same way as direct customers of the Banks." *Id.* Accordingly, the Second Circuit concluded that this factor "may have diminished weight." *Id.*; *see generally Daniel*, 428 F.3d at 443 (2d Cir. 2005) ("[T]he weight to be given the various [efficient enforcer] factors will necessarily vary

with the circumstances of particular cases."). *Gelboim*'s "peculiar feature" is also present here. Those who transacted in Platinum and Palladium Investments with other market participants would be injured to the same extent and in the same way as Defendants' direct customers. Therefore, this factor carries diminished weight in this case. *See Sullivan v. Barclays*, 2017 WL 685570, at *17 (concluding that plaintiffs "who engaged in a . . . transaction as counterparty to a defendant employing the price-fixers were in the immediate impact zone of the defendant's unlawful conduct" and are sufficiently direct victims; "plaintiffs who had no such dealings with a defendant would not"); *see also LIBOR VI*, 2016 WL 7378980, at *17.

(c) Speculative Damages

"[H]ighly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement." *Gelboim*, 823 F.3d at 779. Whether damages calculations will be too speculative and, therefore, unreliable, depends on "the nature and complexity of the alleged antitrust violation." *Id.* "The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981); *see also Gelboim*, 823 F.3d at 780 ("Impediments to reaching a reliable damages estimate often flow from the nature and complexity of the alleged antitrust violation.") (citing *DDAVP,* 585 F.3d at 689). "At the same time, some degree of uncertainty stems from the nature of antitrust law." *Gelboim*, 823 F.3d at 779.

To prove their claim, Plaintiffs will carry the burden of coming forward with "'a just and reasonable estimate' of damages." *Id.* (quoting *Football League v. Nat'l Football League*, 842 F.2d 1335, 1378 (2d Cir. 1988)). As with most antitrust cases, to establish damages, Plaintiffs will have to offer a reliable "but-for" world. IIA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles & Their Application § 395d (3d ed. 2007) (explaining that, in seeking antitrust damages, the plaintiff must "prov[e] the price that is actually paid . . . [and] the price that it would have paid 'but for' the conspiracy"); *see also Sullivan v. Barclays*, 2017 WL 685570, at *18 (stating that, "[t]o prove damages in this case, plaintiffs will have to offer a reliable 'but for' [interest rate benchmark] calculation"); *In re Elec. Books Antitrust Litig.*, No. 11-MD-2293 DLC, 2014 WL 1282293, at *16 (S.D.N.Y. Mar. 28, 2014) ("In this [antitrust] case . . . the damages will be calculated by subtracting the but-for prices of e-books from the prices paid by class members."). At a minimum, that "but-for" world will require Plaintiffs to establish (1) what an alternative Fix Price would have been absent collusion, and (2) the behavior of Platinum and Palladium Investments absent a Fix Price affected by collusion. As alleged in the SAC, the effect of the Fixing reverberated worldwide, affecting numerous market participants and various OTC markets and exchanges where physical platinum and palladium and Platinum and Palladium Investments are traded. Thus, the Court would have to assess the ripple effects of the Fixing and determine whether and how numerous market participants, many of whom had no

relationship with Defendants, reacted to the allegedly artificial Fix Price.

Plaintiffs argue that computing damages in this case would be relatively straightforward because "[h]ere, there is only one benchmark, the Fixing, which affects all derivatives." Pls.' Opp'n at 31. That argument is far too simplistic. First, although the Fix Price is the only "benchmark," it is not the only variable in Plaintiffs' "but-for" world. Plaintiffs do not dispute that the platinum and palladium prices are subject to other market forces, irrespective of any alleged collusion or manipulation. As alleged in the SAC, the platinum and palladium Fix Prices were "the globally accepted benchmark prices . . . used in a plethora of transactions for platinum and palladium worldwide." SAC ¶ 2. Once the Fixing Calls concluded and the Fix Price was set, that price did not remain static. Market forces unrelated to the alleged manipulation—present and at play both before and after the Fixing—resulted in price fluctuations across each day. *See, e.g.*, SAC, figs. on pp. 35, 53, 54, 59-65. Although Plaintiffs allege that the effect of the Fixing "lingered far longer than economists would expect to see if a price movement was caused" by market forces not subject to manipulation, SAC ¶ 163, Plaintiffs do not dispute that the price varied throughout each day and across all days within the Class Period. Moreover, even on days allegedly affected by the Fixing, prices varied considerably; Plaintiffs' statistical analyses show significant rebounds in the price shortly after the Fixing, suggesting that damages may be affected not only by the trade date, but also by the specific trade time.

Plaintiffs further allege that the spot, Fix Price, and NYMEX settlement prices "exhibit an almost perfect correlation," *e.g.*, SAC ¶ 91, and that there is a "correlation between the prices reached at the Fixing and in the markets for Platinum and Palladium Investments," SAC ¶ 92. Even when statistically significant, however, correlation does not necessarily imply causation. Thus, while Plaintiffs maintain that the price behavior throughout the Class Period exhibited a pattern consistent with artificial price suppression, given the sheer number of market participants and exchanges that rely on the Fixing, it is not clear to the Court how Plaintiffs will be able to control for any single variable when calculating damages in the "but-for" world. The presence of intervening factors further supports the finding that the chain of causation between Defendants' alleged price manipulation scheme and any injury Plaintiffs may prove too attenuated. *See Laydon* 2014 WL 1280464, at *10 ("Analysis of Plaintiff's injury would require the reconstruction of hypothetical 'but-for' Euroyen TIBOR and Yen-LIBOR benchmark rates during the period Plaintiff held his positions. The Court cannot hypothesize the impact of these 'but-for' benchmark rates on the perceptions of the market participants whose activities would have influenced the prices of Euroyen TIBOR futures contracts."); *see also Reading Indus., Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 13-14 (2d Cir. 1980) (finding damages too speculative where numerous intervening factors could have affected the market such that the "court's task of tracing [those variables] would be difficult, if not impossible"); *Sullivan v. Barclays*, 2017 WL 685570, at *19.

Second, Plaintiffs' damages theory is that, as a result of Defendants' artificial price suppression, they were forced to sell derivatives at lower prices than those that would have resulted from market forces not subject to manipulation, and that those prices were artificially low as a result of Defendants' manipulation of the Fix Price. Plaintiffs maintain that as result of being forced to sell derivatives at lower prices, they suffered losses and reduced profits. That theory only accounts for one side of the equation. Simply put, profit is the difference between a purchase price and a sale price. Plaintiffs allege that their sale prices were depressed, but they do not account for the impact of the Fix on their purchase price. If the effect of the Fix was constant, there may be no impact on their profit, since both purchase and sale prices were similarly suppressed. To prove damages, therefore, Plaintiffs will have to establish not only the price at which they sold their derivatives during the Class Period, but also the price at which they first acquired the derivatives. Furthermore, they will have to show that their purchase price was somehow less affected by the Fixing than their sale price.

As pleaded, Plaintiffs will have to determine not only the sale price for those derivatives, but also the purchase price from a vast—and yet undetermined—number of market participants who are not defendants in this case. This type of speculative undertaking might be mitigated if Plaintiffs had had direct dealings with Defendants, but none of the named Plaintiffs had such a relationship. *See, e.g.*, *Sullivan v. Barclays*, 2017 WL 685570, at *19 (finding that determining damages for plaintiffs who had direct dealings with the defendants

"would still require the calculation of the hypothetical unaffected Euribor rate at multiple points in time. But [those plaintiffs] ought to be able to identify specific transactions in which a remaining named defendant was a counterparty and that defendant, based upon its own records, ought to be able to intelligently respond.").

The Court does not purport to question Plaintiffs' or their experts' ability to construct some model to estimate damages despite these many complications. But, as noted above, any damages estimate would necessarily require Plaintiffs to put forth evidence to support a just and reasonable estimate of their damages. *Gelboim*, 823 F.3d at 779 (citing *Nat'l Football League*, 842 F.2d at 1378). Given Plaintiffs' definition of the proposed class, "it is difficult to see how [Plaintiffs] would arrive at such an estimate, even with the aid of expert testimony." *Gelboim*, 823 F.3d at 779. "[T]o find antitrust damages in this case would engage the court in hopeless speculation concerning the relative effect of an alleged conspiracy in [a] market . . . where countless other market variables could have intervened to affect those pricing decisions." *Reading*, 631 F.2d at 13-14. These concerns reinforce the appropriateness of drawing a line between persons who transacted directly with Defendants and those who did not. The task of computing damages for persons who, for example, had direct dealings with Defendants would not be a simple undertaking. But at the very least, those who had direct dealings with Defendants would be able to identify specific transactions to which Defendants were counterparties. Under those circumstances, damages computation would require

plausible computations rather than financial models so attenuated as to approach hopeless speculation.

(d) Duplicative Recovery & Complex Damages Apportionment

The Court need not discuss the risks of duplicative recovery and complex damages apportionment at length. *Gelboim* observed that "[t]he transactions that are the subject of investigation and suit are countless and the ramified consequences are beyond conception." 823 F.3d at 780. That characterization is equally applicable to the facts of this case. Here, Defendants represent a subset of the fifty-two LPPM members and a subset of the LPPM market-making members. SAC ¶¶ 31, 33, 35, 37, 44-45, 67. But the SAC asserts claims on behalf of all market participants, including persons who have not transacted with Defendants. Plaintiffs ask that these few Defendants be held liable for the conduct of all other market participants: The extent of their potential liability is enormous, and the allocation of responsibility for the claimed damages will be extremely challenging. "In certain of these transactions, it may not even be apparent which party profited and which party was injured by the [alleged price] manipulation; given the nature of these transactions, there would surely be instances in which both sides would claim to have suffered injury." *Sullivan v. Barclays*, 2017 WL 685570, at *19. That concern may well dissipate—at least to some extent—if the plaintiff group is limited to those who transacted directly with Defendants. Those plaintiffs would be better able to ascertain profits and losses in

transactions to which Defendants were counterparties. *See id.* The risks of duplicative recovery and complex apportionment of damages will not be eliminated by limiting the claims in that way, but they will be considerably mitigated.

* * *

Although Plaintiffs have sufficiently alleged antitrust injury for the purpose of establishing antitrust standing, the Court concludes that Plaintiffs are not efficient enforcers of the antitrust laws and, therefore, are not the "proper party 'to perform the office of a private attorney general' and . . . 'vindicate the public interest in antitrust enforcement.'" *Gelboim*, 823 F.3d at 780 (quoting *Gatt*, 711 F.3d at 80). Accordingly, Defendants' motion with respect to this count is granted and Plaintiffs' Sherman Act claim is dismissed. As the Second Circuit observed, and as noted above, "not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced." *Id.* at 779.

C. Commodities Exchange Act ("CEA") Claims

Plaintiffs' CEA claims include: (1) market manipulation in violation of 7 U.S.C. §§ 1 *et seq.* and CFTC Rule 180.2; (2) employment of a manipulative or deceptive device and delivery of false reports in violation of 7 U.S.C. §§ 1 *et seq.* and CFTC Rule 180.1; (3) principal-agent liability in violation of 7 U.S.C. §§ 1 *et seq.*; and (4) aiding and abetting manipulation in violation of 7 U.S.C. §§ 1 *et seq.* Defendants move to

dismiss all claims, arguing that (1) the CEA does not extend to the alleged foreign transactions and conduct; (2) Plaintiffs lack standing to assert CEA claims because they have not alleged actual damages; and (3) the SAC does not adequately plead a claim under the CEA. Defs.' Joint Br. at 30.

1. Extraterritoriality

Defendants argue that the CEA does not reach the alleged price manipulation here because the Fixing Calls took place abroad and the CEA does not apply to extraterritorial conduct concerning a foreign commodity. Defs.' Joint Br. at 31-34. The parties agree that *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), governs the question of whether Plaintiffs' CEA claims require an impermissible extraterritorial application of the CEA. Defs.' Joint Br. at 31; Pls.' Opp'n at 32. Although *Morrison* analyzed the extraterritorial reach of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, the Second Circuit has since endorsed the application of the *Morrison* framework to claims brought under the CEA. *See, e.g.*, *Loginovskaya v. Batratchenko*, 936 F. Supp. 2d 357 (S.D.N.Y. 2013), *aff'd*, 764 F.3d 266 (2d Cir. 2014) (reviewing and affirming the district court's application of the *Morrison* framework to CEA claims); *see also Chan Ah Wah v. HSBC N. Am. Holdings Inc.*, No. 15 CIV. 8974 (LGS), 2016 WL 4367976, at *3 (S.D.N.Y. Aug. 11, 2016); *Starshinova v. Batratchenko*, 931 F. Supp. 2d 478, 486 (S.D.N.Y. 2013).

Morrison reaffirmed the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within

the territorial jurisdiction of the United States.'" 561 U.S. at 255 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). The Supreme Court observed that "[t]his principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate," and "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Id.* (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932), *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).

Morrison established the following framework for deciding questions regarding the extraterritorial application of federal statutes. First, unless Congress's intention to give a statute extraterritorial effect is "clearly expressed," courts "must presume it is primarily concerned with domestic conditions." *Id.* (citations omitted). In other words, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* Second, if a statute applies only domestically, a court must determine which domestic conduct it regulates. *Id.* at 266-67. This is because "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.* at 266 (emphasis in original).

Addressing those questions, the Supreme Court held that § 10(b) only applies to "transactions in securities listed on domestic exchanges[ ] and domestic

transactions in other securities." *Morrison*, 561 U.S. at 267. "'With regard to securities *not* registered on domestic exchanges, the exclusive focus [is] on *domestic* purchases and sales . . . .'" *Morrison*, 561 U.S. at 268 (emphasis in original); *see also Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 66 (2d Cir. 2012). Although *Morrison* did not further define a domestic transaction, the Second Circuit addressed that issue in *Absolute Activist*. There, the Second Circuit held that "transactions involving securities that are not traded on a domestic exchange are domestic if irrevocable liability is incurred or title passes within the United States." *Absolute Activist*, 677 F.3d at 67.

The Second Circuit has evaluated the first *Morrison* prong in the context of a CEA claim. In *Loginovskaya*, the Second Circuit held that, because "[t]he CEA as a whole . . . is silent as to extraterritorial reach," courts must "'presume it is primarily concerned with domestic conditions.'" 764 F.3d at 271-72 (quoting *Morrison*, 561 U.S. at 255). Interpreting § 22 of the CEA, which creates a private right of action under the Act, the court reasoned that "the focus of § 22 . . . [is] domestic conduct, domestic transactions, or some other phenomenon localized to the United States." *Id.* at 272. The focus of Congress's concern, therefore, was "clearly transactional." *Id.* at 272. The court concluded that "the CEA creates a private right of action for persons anywhere in the world who transact business in the United States, and does not open our courts to people who choose to do business elsewhere." *Id.* at 273. Addressing the second prong of *Morrison*, the Second Circuit stated that "there is no reason why *Absolute Activist's* formulation should not apply" to CEA claims,

and, therefore, that plaintiffs asserting CEA claims must "demonstrate that the transfer of title or the point of irrevocable liability for such an interest occurred in the United States." *Id.* at 274. Thus, the Court must determine whether the transactions at issue here are "domestic" within the meaning of *Morrison* and *Absolute Activist.*

Plaintiffs assert that the "vast majority" of the derivatives contracts at issue in this action were traded on NYMEX. Pls.' Opp'n at 37. Because NYMEX is a domestic exchange, they maintain, trades on NYMEX—including platinum and palladium derivatives contracts—do not require an impermissible extraterritorial reach of their CEA claims. *Id.* at 34. With respect to OTC transactions, Plaintiffs maintain their allegations are limited to those OTC derivatives contracts where "incurrence of liability and/or the passing of an interest equivalent to 'title' happened within the U.S." *Id.* Defendants do not appear to dispute that NYMEX is a domestic exchange; in fact, Defendants described it as a "U.S.-based derivatives exchange[ ]." Defs.' Joint Br. at 33. Defendants also do not appear to take issue with the assertion that Plaintiffs' OTC transactions are limited to those that incurred liability in the U.S. or those where title passed within the U.S.

The crux of Defendants' argument is that Plaintiffs' CEA claims do not apply to "bids, asks, and trades made by *foreign* employees of mostly *foreign* corporations in a *foreign* auction for a *foreign* physical commodity." Defs.' Joint Br. at 31. That argument lacks merit. The Second Circuit's conclusion in *Absolute*

Activist could not have been clearer: for the purpose of determining whether a transaction is "domestic" within the meaning of *Morrison*, "a party's residency or citizenship is irrelevant." 677 F.3d at 70. "While it may be more likely for domestic transactions to involve parties residing in the United States, '[a] purchaser's citizenship or residency does not affect where a transaction occurs; a foreign resident can make a purchase within the United States, and a United States resident can make a purchase outside the United States.'" *Id.* (quoting *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166, 178 (S.D.N.Y. 2010)).[13] "Rather than looking to

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[13] Defendants' reliance on *Parkcentral Global Hub, Ltd. V. Porsche Automobile Holdings SE* is unavailing. In *Parkcentral*, the Second Circuit applied the *Morrison* and *Absolute Activist* tests to claims under § 10(b) against foreign defendants for securities transactions relating to securities-based swap agreements pegged to the foreign defendants' stock value. 763 F.3d 198, 201 (2d Cir. 2014) (per curiam) (emphasis added). The court held that allowing the claims to proceed "would constitute an impermissibly extraterritorial application of the statute." *Id.* In so holding, the court expressly stated that its "ultimate conclusion that this suit seeks impermissibly to extend § 10(b) extraterritorially *depends in some part on the particular character of the unusual security at issue*." *Id.* at 201-02. The court "express[ed] no view whether [it] would have reached the same result if the suit were based on different transactions." *Id.* Courts in this district have declined to extend the *Parkcentral* analysis on that basis. *See, e.g.*, *In re Poseidon Concepts Sec. Litig.*, No. 13-CV-1213 (DLC), 2016 WL 3017395, at *12-13 (S.D.N.Y. May 24, 2016) (concluding that purchases of OTC stock in the U.S. is a "domestic transaction in other securities" within the meaning of *Morrison* and holding that *Parkcentral* was inapposite); *Atlantica Holdings, Inc. v. BTA Bank JSC*, No. 13-CV-5790 JMF, 2015 WL 144165, at *8 (S.D.N.Y. Jan. 12, 2015) ("Given the differences in the nature of the securities involved in

the identity of the parties, the type of security at issue, or whether each individual defendant *engaged in conduct within the United States*," the Second Circuit held "that a securities transaction is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States." *Absolute Activist*, 677 F.3d at 69.

With respect to the "vast majority" of transactions at issue in this action, the Court concludes that, as derivatives contracts traded on NYMEX, they are "transactions in securities listed on [a] domestic exchange[ ]." *Morrison*, 561 U.S. at 267. With respect to any OTC platinum and palladium derivatives, which Plaintiffs acknowledged in their opposition as limited to those where liability was incurred or title transferred in the United States, the Court concludes that those are domestic as defined in *Absolute Activist*.[14] Accordingly, Plaintiffs' CEA claims do not

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Parkcentral from the Subordinated Notes at issue here, that case does not alter the Court's conclusion that Plaintiffs have adequately pled that the Exchange Act applies."). For those reasons, the Court similarly declines to extend the *Parkcentral* holding to the transactions at issue in this action.

[14] The Court notes that, although Plaintiffs cite several paragraphs in the SAC as support for their assertion that the OTC transactions at issue are limited to transactions where liability was incurred or title was transferred in the United States, the allegations in the SAC are not so limited. In light of the Court's conclusion, and the Second Circuit's holding in *Absolute Activist*, however, any OTC transactions that fall outside those limitations will necessarily require an impermissible extraterritorial application of the CEA. To the extent that the SAC seeks to assert

implicate an impermissible extraterritorial application of the statute. *See, e.g.*, *LIBOR I*, 935 F. Supp. 2d at 696 (concluding that a claim is within the "CEA's domestic application if it involves (1) commodities in interstate commerce or (2) futures contracts traded on domestic exchanges" and concluding that "plaintiffs' claims involve manipulation of the price of domestically traded futures contracts" and therefore do not implicate an impermissibly extraterritorial application of the CEA).

2. Standing Under the CEA

Section 22 of the CEA creates a private right of action for any person "who purchased or sold a [futures contract] or swap if the violation constitutes . . . (ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap." 7 U.S.C. § 25(a)(1)(D). To have standing to sue under the Act, the plaintiff must show that he or she suffered "actual damages" as a result of the manipulation. 7 U.S.C. § 25(a)(1); *see also In re Silver*, 2016 WL 5794777, at *18 (citations omitted). To establish "actual damages" a plaintiff must show an "'actual injury caused by the violation.'" *In re Silver*, 2016 WL 5794777, at *18 (quoting *LIBOR II*, 962 F. Supp. 2d at 620); *see also In re Amaranth Nat. Gas Commodities Litig.*, 269 F.R.D. 366, 379 (S.D.N.Y. 2010) (finding that plaintiffs had standing to sue under the CEA because they established that they "suffered

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claims regarding OTC contracts where irrevocable liability to carry out the transaction occurred or where title was transferred outside the United States, such claims must be, and are, dismissed.

net losses . . . caused by the [defendants'] alleged [price] manipulation"). When "CEA claims are based on discrete, episodic instances of manipulation, plaintiffs must allege that they 'engaged in a transaction at a time during which prices were artificial as a result of defendants' alleged . . . manipulative conduct, and that the artificiality was adverse to their position.'" *In re Silver*, 2016 WL 5794777, at *18 (quoting *LIBOR II*, 962 F. Supp. 2d at 622).

Defendants argue that Plaintiffs do not have standing under the CEA because Plaintiffs have not alleged that they sold Platinum and Palladium Investments during time periods when prices were allegedly suppressed. Defs.' Joint Br. at 35. If Plaintiffs purchased derivatives at artificially low prices, Defendants argue, they could have potentially benefited from the alleged price manipulation by selling them at slightly higher prices. *Id.*

As several courts in this district have held, however, where plaintiffs allege that they transacted "at artificial prices, injury may be presumed." *In re Amaranth*, 269 F.R.D. at 380; *see also In re Silver*, 2016 WL 5794777, at *18; *In re Gold*, 2016 WL 5794776, at *21. Unlike federal securities cases, "courts have observed that loss causation is not a statutory element of proof under the CEA." *In re Crude Oil Commodity Futures Litig.*, 913 F. Supp. 2d 41, 60 (S.D.N.Y. 2012) (collecting cases). In securities fraud actions, which require a showing of loss causation,

> a securities fraud plaintiff purchasing or selling stock before a corrective disclosure occurs cannot plausibly allege injury from the fraud. Thus, a

> loss causation requirement can dispose of such a securities fraud claim at the pleading stage. However, in the context of a CEA manipulation claim, there is no similar bright line indicating when losses begin or cease to accrue. And the period during which the manipulative activity occurs is not necessarily a proxy for the period when losses attributable to artificial prices occur. . . . The issue of "actual damages" thus becomes a complex factual inquiry.

Id. (citing *Initial Public Offering Securities Litig.*, 297 F. Supp. 2d 668, 674-75 (S.D.N.Y. 2003)); *see also Sullivan v. Barclays*, 2017 WL 685570, at *31.

Defendants point to *LIBOR II* in support of their argument that Plaintiffs lack standing under the CEA because they fail to allege that they "'engaged in a transaction *at a time* during which prices were artificial.'" Defs.' Joint Br. at 36 (quoting *LIBOR II*, 962 F. Supp. 2d at 622 (emphasis in Defs.' Joint Br.). But the reference to "time" in *LIBOR II* was to *days*, not hours or minutes. In addition, the district court expressly distinguished the "persistent suppression theory," where it did not require plaintiffs to allege specific days on which they traded, from the "trader-based manipulation theory," where it did impose that requirement. *Id.* For the group of plaintiffs alleging persistent suppression, the court reasoned that because "LIBOR, and consequently Eurodollar futures prices, was allegedly artificial throughout the Class Period," plaintiffs need not match specific trades with days on which they alleged LIBOR manipulation. *Id.* For the trader-based allegations, however, the court reasoned

that the claims "would entail only that LIBOR was artificial for certain discrete days during the Class Period, and thus the allegation that plaintiffs traded during the Class Period is insufficient to show that plaintiffs suffered actual damages." *Id.*

The *LIBOR II* "persistent suppression theory" reasoning applies here. Plaintiffs allege that they sold platinum and palladium derivatives on dates when Defendants allegedly artificially suppressed the Fix Price for those commodities. *See, e.g.*, SAC apps. A-D. Plaintiffs also allege that the platinum and palladium Fix Prices were artificially low throughout the Class Period as a result of Defendants' ongoing manipulation scheme. *See, e.g.*, SAC ¶ 215. As set forth in four appendices attached to the SAC, to the extent that Plaintiffs were able to cross-reference sale dates with artificial suppressions dates, the lists they generated are "preliminary." *Id.* At the pleading stage, those allegations and preliminary lists are sufficient. Accordingly, Plaintiffs have adequately alleged that they suffered actual damages as a result of Defendants' price manipulation. *See, e.g.*, *Sullivan v. Barclays*, 2017 WL 685570, at *31 (concluding that plaintiffs have sufficiently alleged actual damages to establish standing under the CEA and stating that "plaintiffs' allegations do not purport to be the exclusive universe of defendants' alleged manipulation. It ultimately remains plaintiffs' burden to prove through reliable evidence that they suffered actual loss based on defendants' manipulation of the [interest rate benchmark], but at the pleading stage, they have adequately alleged that they were damaged by the [benchmark's] manipulation.").

3. CEA Violations

a. Legal Standard

The parties disagree regarding the pleading standard applicable to Plaintiffs' CEA claims. Defendants argue that, although Plaintiffs allege price manipulation, their allegations sound in fraud and are therefore subject to the heightened pleading standard dictated by Federal Rule of Civil Procedure 9(b). Defs.' Joint Br. at 36. Plaintiffs argue that Defendants mischaracterize their claims; they maintain that the SAC only alleges that Defendants took advantage of their control of the market in order to collude and suppress prices. Pls.' Opp'n at 39. Plaintiffs maintain that, based on those allegations, Rule 8(a) is the applicable pleading standard to their CEA allegations. *Id.* at 37-38.

Pursuant to Federal Rule 9(b), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.* In this district, "[m]ost courts . . . apply [a] case-by-case approach to determine whether Rule 9(b) applies to claims of manipulation under the CEA." *CFTC v. Parnon Energy Inc.*, 875 F. Supp. 2d 233, 244 (S.D.N.Y. 2012); *see also Myun-Uk Choi v. Tower Research Capital LLC*, 165 F. Supp. 3d 42, 47 (S.D.N.Y. 2016); *U.S. Commodity Futures Trading Comm'n v. Amaranth Advisors, L.L.C.*, 554 F. Supp. 2d 523, 531 (S.D.N.Y. 2008); *In re Crude Oil Commodity Litig.*, No. 06 CIV. 6677 (NRB), 2007 WL 1946553, at *5 (S.D.N.Y. June 28, 2007). Other courts have held

that Rule 9(b) applies generally in CEA manipulation cases because "market manipulation is inherently deceptive." *In re Amaranth Nat. Gas Commodities Litig.* ("*Amaranth I*"), 587 F. Supp. 2d 513, 535 (S.D.N.Y. 2008), *aff'd*, 730 F.3d 170 ("*Amaranth III*") (2d Cir. 2013).

Notwithstanding Plaintiffs' attempt to cast their claims as Defendants' abuse of market power, the allegations in the SAC plainly sound in fraud. For example, Plaintiffs allege that Defendants submitted "false, misleading, or inaccurate reports of the Fixing, *i.e.*, false reports concerning market information or conditions that affected or tended to affect both prices of platinum and palladium and prices of platinum and palladium futures and options." SAC ¶ 298; *see also id.* ("Defendants and co-conspirators did so either knowingly, intentionally, or with reckless disregard of the fact that such reports were false, misleading, or inaccurate."). Plaintiffs elsewhere allege that Defendants operated a secret cartel and utilized chat rooms, instant messages, phone calls, and proprietary trading venues and platforms with the intent to mislead market participants and profit at others' expense. *See, e.g.*, SAC ¶¶ 171, 248. Thus, Rule 9(b) is the appropriate pleading standard with which to evaluate Plaintiffs CEA allegations. *See, e.g.*, *FOREX*, 2016 WL 5108131, at *19 (concluding that Rule 9(b) applies to plaintiffs' CEA claims where they alleged collusive acts committed in secret and where traders acted with the intent to mislead defendants' customers); *see also LIBOR I*, 935 F. Supp. 2d at 713-14 (applying Rule 9(b) to plaintiffs' market manipulation claims where the allegations "sound[ed] in fraud and

thus must be pled with particularity" and where "the claim [was] that defendants, by submitting artificial LIBOR quotes, misled the market with regard to future levels of LIBOR, and by extension future prices of Eurodollar contracts, and thus caused Eurodollar contracts to trade at artificial prices").

Despite the generally rigid requirement that fraud be pleaded with particularity, the Second Circuit has recognized that "[a] claim of manipulation . . . can involve facts solely within the defendant's knowledge; therefore, at the early stages of litigation, the plaintiff need not plead manipulation to the same degree of specificity as a plain misrepresentation claim." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d Cir. 2007) (citing *Internet Law Library, Inc. v. Southridge Capital Mgmt., LLC*, 223 F. Supp. 2d 474, 486 (S.D.N.Y. 2002)). As a result, the heightened pleading standard under 9(b) "is generally relaxed in the context of manipulation-based claims, where the complaint must simply specify 'what manipulative acts were performed, which defendants performed them, when the manipulative acts were performed, and what effect the scheme had on the market for the securities at issue.'" *In re Silver*, 2016 WL 5794777, at *19 (citing *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d Cir. 2007), quoting *In re Nat. Gas Commodity Litig.*, 358 F. Supp. 2d 336, 343 (S.D.N.Y. 2005)); *see also Sullivan v. Barclays*, 2017 WL 685570, at *30. Here, in addition to price manipulation, Plaintiffs also allege that Defendants engaged in manipulative trading practices. The pleading standard applicable to those claims remains an open issue in this Circuit. *See In re Gold*, 2016 WL 5794776, at *22 (citations

omitted). The Court need not address this issue, however, because it concludes that the SAC meets the more stringent 9(b) standard.

b. Price Manipulation Claim

Plaintiffs bring a CEA price manipulation claim under Sections 6(c)(3) and 9(a)(2) and CFTC Rule 180.2, which make it unlawful for "any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or of any swap . . ." and for any person to "directly or indirectly . . . manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity." 7 U.S.C. §§ 9(3), 13(a)(2); *see also* 17 C.F.R. § 180.2 ("It shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to [CFTC rules and regulations]."). "The CEA is a 'remedial statute that serves the crucial purpose of protecting the innocent individual investor—who may know little about the intricacies and complexities of the commodities market—from being misled or deceived.'" *Loginovskaya*, 764 F.3d at 270 (quoting *Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co.,* 310 F.3d 1321, 1329 (11th Cir. 2002)).

To state a claim for market manipulation under the CEA, Plaintiffs must allege that: (1) the defendant "possessed an ability to influence market prices;" (2) "an artificial price existed;" (3) the defendant

"caused the artificial price; and" (4) the defendant "specifically intended to cause the artificial price." *Amaranth III*, 730 F.3d at 173 (quoting *Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 246-47 (5th Cir. 2010) (internal quotation marks omitted)); *see also In re Crude Oil Commodity Litig.*, No. 06 CIV. 6677 (NRB), 2007 WL 1946553, at *3 (S.D.N.Y. June 28, 2007); *In re Nat. Gas Commodity Litig.* ("*In re Natural Gas I*"), 337 F. Supp. 2d 498, 507 (S.D.N.Y. 2004)). "There is thus no manipulation without intent to cause artificial prices." *In re Amaranth III*, 730 F.3d at 183.

The SAC adequately pleads a manipulation claim under Rule 9(b). First, Plaintiffs plausibly allege Defendants' ability to influence market prices. "[T]he ability to influence prices can manifest itself in various ways, including the exercise of market power." *Parnon Energy*, 875 F. Supp. 2d at 245; *see also In re Amaranth*, 269 F.R.D. at 383 (concluding that the ability to influence prices can be evaluated by determining whether defendant held a dominant market position and whether such a market position would allow it to manipulate prices).

Defendants' sole basis for disputing the contention that they had the ability to influence market prices is that, although the SAC alleges a price manipulation claim by collective action, Plaintiffs have not adequately pleaded the existence of a conspiracy necessary to show that Defendant had the ability to influence prices. Defs.' Joint Br. at 40. Because the Court already found that the SAC adequately pleads a conspiracy, *see supra*, Part III.B(1), it need not repeat

that analysis here. It is worth reiterating, however, that, according to the SAC, Defendants are five of thirteen market making-members that form "the heart of the LPPM." SAC ¶¶ 67, 71. Moreover, the four Fixing Members form and exclusively control the LPPFC, the vehicle for the alleged price manipulation. SAC ¶¶ 1, 47. Through their control of the Fixing process and their role as LPPM market makers, the Court finds that the first element of Plaintiffs' CEA manipulation claim is met.

With respect to the second element, an artificial price is "a price that 'does not reflect basic forces of supply and demand.'" *In re Term Commodities Cotton Futures Litig.*, No. 12 CIV. 5126 ALC KNF, 2013 WL 9815198, at *17 (S.D.N.Y. Dec. 20, 2013) (quoting *Parnon Energy Inc.*, 875 F. Supp. 2d at 246), *on reconsideration in part on other grounds*, No. 12 CIV. 5126, 2014 WL 5014235 (S.D.N.Y. Sept. 30, 2014). "When determining if artificial prices exist, a court may consider the underlying commodity's normal market forces, historical prices, supply and demand factors, price spreads, and also the cash market for the commodity at issue." *In re Commodity Exch., Inc., Silver Futures and Options Trading Litig.,* No. 11 Md. 2213(RPP), 2012 WL 6700236, at *12 (S.D.N.Y. Dec. 21, 2012) (citing *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 90 n.6 (S.D.N.Y. 1998)). The allegations in the SAC sufficiently plead the existence of artificial platinum and palladium prices throughout the Class Period. For example, Plaintiffs alleged a pattern of downward spikes at and around the Fixing. SAC ¶¶ 115-118 & figs. on pp. 53-54. Plaintiffs also allege that the AM and PM Fixing's downward spikes stand

out as against movement at any other time of day. SAC ¶¶ 115-134 & figs. on pp. 53-54, 56-57, 59-65, 68-75.

Relying on *In re Commodity Exch., Inc., Silver Futures*, Defendants argue that the SAC does not adequately plead this element because Plaintiffs have not alleged that the platinum and palladium prices during the Class Period "did not . . . comport with contemporaneous prices in comparable markets." Defs.' Joint Br. at 38. Because the SAC alleges a near-perfect to perfect correlation between the spot prices and the futures platinum and palladium prices, Defendants' maintain, Plaintiffs have in fact demonstrated that price movement in the comparable the futures market was entirely consistent with the commodities' price movement. *Id.* Defendants' argument fails for at least three reasons.

First, Defendants misread *In re Commodity Exch., Inc., Silver Futures*. The court's reference to other markets comparable to silver was with respect to markets for other commodities, not the markets for silver derivatives. 2012 WL 6700236, at *13. Second, the Court is not aware of any cases suggesting that a "comparable market" allegation is required in order to successfully plead a CEA manipulation claim. In fact, *In re Commodity Exch., Inc., Silver Futures* described artificial prices as "those prices that do not reflect the forces of supply and demand in the market *or* do not otherwise comport with contemporaneous prices in comparable markets." *Id.* at *12 (emphasis added). Third, Defendants' argument that the correlation between the spot and futures and spot and ETF prices during the Class Period shows that the Fix Prices were

not artificial misses the mark. Plaintiffs allege that the Fixing set the global benchmark for platinum and palladium and that exchange prices closely track the platinum and palladium spot price. That is the essence of Plaintiffs' claims. Defendants have not explained why platinum and palladium spot, Fix, and derivatives would exhibit a different correlation in the absence of the alleged price manipulation than they would if the Fix Price was artificially suppressed.

Plaintiffs also adequately plead that Defendants' conduct was the "proximate cause of the price artificiality." *In re Commodity Exch., Inc., Silver Futures*, 2012 WL 6700236, at *16. Plaintiffs have identified multiple days on which atypical downward pricing spikes occurred distinctly around the Fixing Calls and have provided ample examples showing predictable price movements in the platinum and palladium derivatives market. *See, e.g.*, SAC ¶¶ 131-134 & figs. on pp. 70-75. While Plaintiffs acknowledge that Defendants were not operating in a vacuum, and that other market participants and forces were present, "[t]he choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion." *Anderson News*, 680 F.3d at 185. At the pleading stage, "[i]t is enough, for purposes of a finding of manipulation in violation of . . . the [CEA] that [the defendants'] action *contributed* to the price [movement]." *Parnon Energy*, 875 F. Supp. 2d at 248 (emphasis added) (internal quotation marks and citations omitted) (alterations in original). Thus, the Court finds that the SAC sufficiently pleads that Defendants' alleged price

manipulation was at least one cause of the artificial pricing during the Class Period.

Finally, to adequately plead the specific intent element, Plaintiffs must allege that Defendants "'acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand.'" *U.S. Commodity Futures Trading Comm'n v. Wilson*, 27 F. Supp. 3d 517, 532 (S.D.N.Y. 2014) (quoting *Parnon*, 875 F. Supp. 2d at 249). "A generalized intent to obtain trading profits 'which could be imputed to any corporation with a large market presence in any commodity market, is insufficient to show intent.'" *Id.* at 532-33 (quoting *In re Crude Oil Commodity*, 2007 WL 1946553, at *8). "The specific intent to cause a market distortion, scienter, can be pled by 'alleging facts (1) showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness.'" *Amaranth I*, 587 F. Supp. 2d at 530 (quoting *ATSI*, 493 F.3d at 99).

The SAC adequately pleads scienter. First, as discussed above, Plaintiffs allege that the Fixing Members were motivated to manipulate the Fix Price for platinum and palladium because doing so provided them with arbitrage opportunities in both the physical and derivatives platinum and palladium markets. *See, e.g.*, SAC ¶¶ 185-186. Plaintiffs further allege that foreknowledge of the Fixing allowed Defendants to capitalize on their price manipulation by strategically buying and selling physical platinum and palladium and platinum and palladium futures at opportune

times during or around the Fixing window. *See, e.g.*, SAC ¶¶ 200-201. Such allegations are sufficient to establish motive because they "'entail concrete benefits that could be realized by'" Defendants' price manipulation. *Amaranth I*, 587 F. Supp. 2d at 530 (quoting *Kalnit v. Eichler*, 264 F.3d 131, 139 (2d Cir. 2001)); *see also LIBOR I*, 935 F. Supp. 2d at 715 (concluding that plaintiffs plausibly pleaded scienter by alleging that "defendants specifically intended to manipulate the price of Eurodollar futures contracts" and identified "concrete benefits that defendants stood to gain from manipulating Eurodollar futures contract prices"). In addition, because the Fixing Members were in complete control of the Fixing Process, they were able to implement the alleged price manipulation in an ideal setting—and with the veneer of legitimacy—during the Fixing Calls and via communications between the LPPFC members. Thus, Defendants were perfectly situated to implement and execute the alleged price manipulation scheme. *See Laydon*, 2014 WL 1280464, at *5 (reasoning that defendants' positions in the market furnished an opportunity to engage in price manipulation); *see also In re Silver*, 2016 WL 5794777, at *21; *In re Gold*, 2016 WL 5794776, at *24.[15]

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[15] Defendants argue that Plaintiffs' "net 'short' position" theory is insufficient to establish motive. Defs.' Joint Br. at 43-45. As discussed above, *see supra* Part III.B(1)(b), the Court agrees. Regardless, even if Plaintiffs are able to establish that Defendants held large net short positions during the Class Period and profited from holding those positions, such generalized motive allegations "could be imputed to any corporation with a large market presence in any commodity market," and are insufficient to show intent." *In re Crude Oil Commodity*, 2007 WL 1946553, at *8.

Plaintiffs have also alleged sufficient facts to show that Defendants engaged in conscious misbehavior or, at least, acted with recklessness in artificially suppressing the Fix Price. The four Fixing Members were the *only* members of the LPPFC. As such, the Fixing Member were in complete control over the Fixing process and fully aware of their ability to influence it. Based on the facts alleged, it is improbable that Defendants somehow managed to artificially lower the platinum and palladium Fix Price over the course of seven years by sheer happenstance or chance. Rather, Plaintiffs allegations support the inference that the Fixing Members acted with conscious misbehavior or recklessness. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR III*"), 27 F. Supp. 3d 447, 470 (S.D.N.Y. 2014) (concluding that plaintiffs have adequately pleaded scienter based on a conscious misbehavior or recklessness theory where they alleged that defendants had submitted artificial LIBOR quotes and, given their positions and involvement in the markets, the danger of doing so was either known or so obvious that they must have been aware).[16]

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[16] Defendants argue that Plaintiffs have not alleged "any particular communications supposedly evidencing Defendants' manipulative intent," and instead rely on references to "regulatory investigations into *other* entities that are not defendants here, into *other* financial benchmarks, and to articles describing alleged investigations into precious metals markets," all of which Defendants describe as an insufficient "hearsay" substitute for factual allegations. Defs.' Joint Br. at 45-46. In a footnote, Defendants invite the Court, if it is so "inclined[,] to strike the offending allegations" and ask the Court to treat their motion as a motion to strike pursuant Federal Rule of Civil Procedure 12(f). *Id.* at 46 n.32. The Court is not so inclined. First, those allegations do not form the basis of the Court's

Accordingly, because Plaintiffs have adequately alleged the elements of a price manipulation claim under the CEA, Defendants' motion to dismiss this claim is denied.

c. Manipulative Device Claims

Plaintiffs bring two manipulative device claims under CEA Sections 6(c)(1), 9(a)(2), and CFTC Rule 180.1. Sections 6(c)(1) renders it unlawful for any person

> directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity . . . or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention [of CFTC rules and regulations].

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conclusions in this case. Second, "'motions to strike under Rule 12(f) are rarely successful.'" *Hidalgo v. Johnson & Johnson Consumer Companies, Inc.*, 148 F. Supp. 3d 285, 292 (S.D.N.Y. 2015). Unless there "is a strong reason for doing so . . . courts should not tamper with the pleadings." *Restis v. Am. Coalition Against Nuclear Iran, Inc.*, 530 F. Supp. 3d 705, 731 (S.D.N.Y. 2014). "'To prevail on a [Rule 12(f)] motion to strike, a party must demonstrate that (1) no evidence in support of the allegations would be admissible; (2) that the allegations have no bearing on the issues in the case; and (3) that to permit the allegations to stand would result in prejudice to the movant." *Landesbank Baden-Württemberg v. RBS Holdings USA Inc.*, 14 F. Supp. 3d 488, 497 (S.D.N.Y. 2014) (quoting *In re Fannie Mae 2008 Sec. Litig.*, 891 F. Supp. 2d 458, 471 (S.D.N.Y. 2012) (alteration in original). Defendants have not met this standard, let alone attempted to meet it in their footnote.

7 U.S.C. § 9(1). Section and 9(a)(2) renders it unlawful

> to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or of any swap . . . or knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity . . . .

7 U.S.C. § 13(a)(2). CFTC Rule 180.1 prohibits

> any person . . . in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery . . . to intentionally or recklessly: (1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud; (2) Make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading; (3) Engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person; or, (4) Deliver or cause to be delivered . . . a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce,

> knowing, or acting in reckless disregard of the fact that such report is false, misleading or inaccurate.

17 C.F.R. § 180.1(a).

Although the CEA does not define the terms "manipulate device" or "contrivance," the CFTC has provide the following guidance with respect to those terms:

> The language of CEA section 6(c)(1), particularly the operative phrase 'manipulative or deceptive device or contrivance,' is virtually identical to the terms used in section 10(b) of the Securities Exchange Act of 1934. . . . Indeed, when the Commission promulgated Rule 180.1, the Commission observed that given the similarities between CEA section 6(c)(1) and Exchange Act section 10(b), the Commission deems it appropriate and in the public interest to model final Rule 180.1 on SEC Rule 10b-5. Accordingly, case law developed under Section 10(b) of the Exchange Act and SEC Rule 10b-5 is instructive in construing CEA Section 6(c)(1) and Commission Regulation 180.1(a).

In re Total Gas & Power N. Am., Inc., CFTC Dkt. No. 16-03, 2015 WL 8296610, at *8 (Dec. 7, 2015) (internal quotation marks and citations omitted). Nevertheless, the CFTC explained, because of "the differences between the securities markets and the derivatives markets, the Commission will be *guided, but not controlled*, by the substantial body of judicial precedent applying the comparable language of SEC

Rule 10b-5." *Id.* (quoting 76 Fed. Reg. at 41,399) (emphasis added).

Defendants first argue that, because Rule 180.1 did not take effect until August 15, 2011, Plaintiffs' manipulative device claims that predate August 15, 2011 must be dismissed. Defs.' Joint Br. at 47; Defs.' Joint Reply at 23. Plaintiffs maintain that the statute's prohibition on "false reporting" existed before Rule 180.1 came into effect and, therefore, their "false reporting" claims are actionable even with respect to transactions effected prior to August 15, 2011. Pls.' Opp'n at 46-47. The Court need not decided this issue, however, because it concludes that, to the extent that the SAC alleges that Defendants delivered any false reports, those are not "reports" within the meaning of the CEA.

Although case law on this issue is scarce, as one court in this district observed, "'[t]he term 'report' is not defined in the CEA or any CFTC regulations.'" *FOREX*, 2016 WL 5108131, at *23 (quoting *United States v. Brooks*, 681 F.3d 678, 691 (5th Cir. 2012)). Interpreting the meaning of the term within the CEA, the Fifth Circuit noted that "report," is a "detailed statement of fact." *Brooks*, 681 F.3d at 691. In contrast to "expression of opinion, or casual conversation," the Fifth Circuit reasoned, "the lengthy documents outlining detailed information about natural gas trades, sent to established industry publications with the intent to inform those publications about the state of natural gas markets," were within the CEA's meaning of that term. *Id.*; *see also FOREX*, 2016 WL 5108131, at *23. Adopting the Fifth Circuit's reasoning,

the *FOREX* court rejected plaintiffs' argument that, by "furtively coordinating the prices they showed to customers," Defendants submitted "reports" within the meaning of the statute, despite the fact that the prices may ultimately have affected the prices of foreign exchange instruments, because "[t]hey are not lengthy written accounts describing historical fact that courts have found to be within the plain meaning of the term 'report.'" *Id.*; *see also U.S. Commodity Futures Trading Comm'n v. Atha*, 420 F. Supp. 2d 1373, 1376 (N.D. Ga. 2006) (concluding that oral conversations or information submitted by defendants to indexes fell within the meaning of "reports" under the CEA).

The Court finds the Fifth Circuit's analysis and the *FOREX* court's application of that analysis persuasive. The Court finds that the same conclusion is warranted here. The SAC contains a single reference to "false reports" allegedly submitted by Defendants. That reference appears under the manipulative device claim, where Plaintiffs allege that "Defendants and co-conspirators caused to be delivered for transmission false, misleading, or inaccurate reports of the Fixing, *i.e.*, false reports concerning market information or conditions that affected or tended to affect both prices of platinum and palladium and prices of platinum and palladium futures and options in interstate commerce." SAC ¶ 298. Beyond a recitation of the statutory language, the SAC's 136 pages, 310 paragraphs, and five appendices contain no other reference to or illustration of any false reports associated with Defendants' conduct. Plaintiffs cannot shoehorn Defendants' alleged false or misleading price quotes and orders during the Fixing into claims under the

CEA provisions prohibiting the delivery of false or misleading "reports." Therefore, while the allegations plausibly plead a price manipulation claim, they do not support a manipulative device claim based on false reports. *See FOREX*, 2016 WL 5108131, at *23.

Since Plaintiffs do not dispute that Rule 180.1 came into effect on August 15, 2011, any claims based on transactions that predate August 15, 2011 must be dismissed. *See, e.g.*, *In re Silver*, 2016 WL 5794777, at *22 (dismissing pre-August 15, 2011 manipulative device claims alleging violations of Rule 180.1); *In re Gold*, 2016 WL 5794776, at *25 (same); *see also Amaranth III*, 730 F.3d at 173 n.1 (noting that Rule 180.1 "does not impact the present appeal . . . given the regulation's effective date of August 15, 2011" (citations omitted)); *In re Barclays PLC, Barclays Bank PLC, and Barclays Capital Inc.*, CFTC Dkt. No. 15-25, 2015 WL 2445060, at *14 (CFTC May 20, 2015) (differentiating between conduct occurring pre- and post-August 15, 2011 for purposes of Rule 180.1).

Regarding the remaining claims based on transactions that post-date August 15, 2011, Defendants argue that Plaintiffs have not sufficiently alleged scienter, loss causation, or actual reliance, and that Plaintiffs failed to identify any public misstatement that could support a fraud-on-the market presumption of reliance. Defs.' Joint Br. at 46. The Court already found that Plaintiffs have adequately alleged scienter, including through circumstantial misbehavior or recklessness, and need not address that argument again. *See supra*, Part III.C(3)(b).

With respect to reliance and loss causation, the case law addressing whether those elements must be pleaded in CEA manipulative device claims is scarce. *See In re Gold*, 2016 WL 5794776, at *26. In *In re Gold*, Judge Caproni noted that "'at least in the context of manipulation-based claims, as to which the effects of the alleged manipulation presumably dissipate over time, loss causation is not required.'" *Id.* (quoting *In re Crude Oil Commodity Futures Litig.*, 913 F. Supp. 2d 41, 60-61 (S.D.N.Y. 2012)); *see also In re Platinum and Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 600-01 (S.D.N.Y. 2011) (concluding that loss causation principles were not applicable to a CEA claim involving a manipulative "bang the close" trading strategy). Here, as in *In re Gold*, Plaintiffs allege both that Defendants misrepresented bids and quotes during the Fixing and that Defendants engaged in price manipulation of the Fix Price leading up to and during the Fixing. Accordingly, given the absence of Second Circuit authority directly addressing this issue, and in light of Judge Caproni's persuasive analysis in *In re Gold* and *In re Silver*, the Court concludes that Plaintiffs have plausibly pleaded a CEA manipulative device claim "by alleging with particularity 'the nature, purpose, and effect of the fraudulent conduct and the roles of the defendants.'" *In re Gold*, 2016 WL 5794776, at *26 (quoting *ATSI*, 493 F.3d at 101); *see also In re Silver*, 2016 WL 5794777, at *22 (same); *In re Platinum and Palladium Commodities Litig.*, 828 F. Supp. 2d at 600-001 (distinguishing CEA claims based on allegations that information was hidden from the market, which require a showing of loss causation at the pleading stage, from claims based on market manipulation, which do not) (citing *In re Initial Public*

Offering Sec. Litig., 297 F. Supp. 2d 668, 674-75 (S.D.N.Y. 2003)); *cf. Laydon*, 2014 WL 1280464, at *5-6 (denying defendants' motion to dismiss plaintiff's CEA claims based on alleged Euroyen TIBOR and Yen-LIBOR manipulation without separately addressing reliance and loss causation).

Accordingly, Defendants' motion to dismiss Plaintiffs' CEA manipulative device claims is granted with respect to Plaintiffs' claims based on false reports and transactions that precede the effective date of Rule 180.1, but denied with respect to any remaining manipulative device claims in connection with transactions that post-date August 15, 2011.

d. Secondary Liability

i. Aiding and Abetting

Pursuant to Section 22 of the CEA, "[a]ny person . . . who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from [relevant transactions] . . . and caused by such violation" of the statute. 7 U.S.C. § 25(a)(1). The Second Circuit has interpreted "aiding and abetting" in this context as "'requir[ing] the defendant to 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" *Amaranth III*, 730 F.3d at 182 (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)). Consistent with the Second Circuit's holding, courts in this district have required plaintiffs alleging aiding and abetting under the CEA to plead

sufficient facts showing that "the Defendant (1) had knowledge of the principal's intent to violate the CEA; (2) intended to further that violation; and (3) committed some act in furtherance of the principal's objective." *Laydon*, 2014 WL 1280464, at *4 (citing *In re Platinum and Palladium*, 828 F. Supp. 2d at 600-01); *see also FOREX*, 2016 WL 5108131, at *25.

The SAC adequately pleads those elements. As discussed above, the SAC is replete with allegations that the Fixing Members colluded to manipulate the platinum and palladium Fix Price during the Fixing Calls. Therefore, and as discussed more fully above, Plaintiffs plead sufficient facts showing that Defendants knowingly assisted each other and participated in the Fixing with the intent to artificially suppress the prices of platinum and palladium. *See, e.g.*, *FOREX*, 2016 WL 5108131, at *25 (denying a motion to dismiss CEA aiding and abetting claims when plaintiffs alleged defendants knowingly associated in a venture to manipulate prices with the intent that that the venture would succeed); *see also In re Silver*, 2016 WL 5794777, at *23; *In re Gold*, 2016 WL 5794776, at *27; *Laydon*, 2014 WL 1280464, at *6 (denying defendants' motion to dismiss a CEA aiding and abetting claim based on "numerous allegations giving rise to an inference that Defendants knew of the other Defendants' unlawful and manipulative conduct and assisted each other in the furtherance of the violation"). Accordingly, Defendants' motion to dismiss Plaintiffs' aiding and abetting claim under the CEA is denied.

ii. Principal-Agent Liability

The SAC also asserts a claim for principal-agent liability under Section 2 of the CEA, pursuant to which, "[t]he act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person." 7 U.S.C. § 2(a)(1)(B). This section is "'a variant of the common law principle of *respondeat superior*,' which holds an employer 'strictly liable—that is to say, regardless of the presence or absence of fault on the employer's part—for torts committed by [its] employees in the furtherance of [its] business.'" *U.S. Commodity Futures Trading Comm'n v. Byrnes*, 58 F. Supp. 3d 319, 326 (S.D.N.Y. 2014) (quoting *In re Natural Gas I*, 337 F. Supp. 2d at 515 (S.D.N.Y. 2004)).

To state a claim for principal-agent liability under the CEA, a plaintiff must plead "that the agent was acting in the capacity of an agent when he or she committed the unlawful acts and that the agent's actions were within the scope of his or her employment." *In re Gold*, 2016 WL 5794776, at *27 (citing *Guttman v. CFTC*, 197 F.3d 33, 39 (2d Cir. 1999)); *see also FOREX*, 2016 WL 5108131, at *24 ("'Such liability may be imposed where (1) the agent participated in the alleged unlawful activity and (2) his actions were within the scope of his employment or office.'") (quoting *In re Platinum and Palladium*, 828 F. Supp. 2d at 599. "[I]t is enough if [the agent] was

'acting for' [the principal] in executing the illegal trades." *Guttman v. Commodity Futures Trading Comm'n*, 197 F.3d 33, 39 (2d Cir. 1999).

Plaintiffs adequately plead principal-agent liability under the CEA. The SAC expressly states that whenever it refers to an "any act, deed, or transaction of any entity, the allegation means that the corporation engaged in the act, deed, or transaction by or *through its officers, directors, agents, employees, or representatives while they were engaged in the management, direction, control, or transaction of the entity's business or affairs*." SAC ¶ 28 (emphasis added). Elsewhere Plaintiffs allege that, around the time of the AM and PM Fixing, Defendants quoted platinum and palladium prices that were significantly lower than those other market participants. *See, e.g.*, SAC ¶ 212(c). Plaintiffs also allege that Defendants shared customer and confidential proprietary information necessary to execute the alleged price manipulation scheme through chat rooms, instant messages, phone calls, emails, and other proprietary trading platforms. SAC ¶ 171. Those allegations necessarily implicate the involvement of Defendants' officers, directors, agents, employees, or representatives. As several courts in this district have concluded based on similar allegations, in the absence of any indication that these yet-to-be identified employees acted outside the scope of their employment, CEA principal-agent liability claims will be allowed to proceed. *See, e.g.*, *FOREX*, 2016 WL 5108131, at *25 ("Nothing in the [complaint] suggests that any trader was operating outside the scope of his employment when engaging in the alleged conduct. To the contrary,

the [complaint] alleges conduct by traders 'acting for' the benefit of their respective employers. Nothing more is required to plead a claim for principal-agent liability."); *In re Platinum & Palladium*, 828 F. Supp. 2d at 599-600 (concluding that allegations that the "head of the execution desk . . . entered into entered the manipulative orders" for defendants sufficiently pleaded a CEA principal-agent claim); *see also In re Silver*, 2016 WL 5794777, at *23 ("There is no indication, at this stage, that these employees acted on a lark or in any way outside the scope of their employment."); *In re Gold*, 2016 WL 5794776, at *27 (same). To the extent the evidence shows that certain rogue employees were responsible for the entire alleged scheme, Defendants will have the opportunity to introduce that evidence at the summary judgement stage or at trial.

D. Unjust Enrichment

"The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (N.Y. 2009) (citation omitted). To state a claim for unjust enrichment under New York law, a plaintiff must allege "'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (N.Y. 2012) (quoting *Mandarin Trading Ltd. v. Wildenstein,* 16 N.Y.3d 173, 182 (N.Y. 2011)). The "essence" of an

unjust enrichment claim "is that one party has received money or a benefit at the expense of another." *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000) (citing *City of Syracuse v. R.A.C. Holding, Inc.,* 685 N.Y.S.2d 381, 381 (4th Dep't 1999)). "A complaint does not state a cause of action in unjust enrichment if it fails to allege that defendant received something of value which belongs to the plaintiff." *Chevron Corp. v. Donziger,* 871 F. Supp. 2d 229, 260 (S.D.N.Y. 2012). The benefit must be both "specific" and "direct." *Kaye,* 202 F.3d at 616.

There is no requirement that the aggrieved party be in privity with the party enriched at his or her expense. *See Sperry v. Crompton Corp.,* 8 N.Y.3d 204, 215 (N.Y. 2007). "An unjust enrichment claim, however, 'requires some type of direct dealing or actual, substantive relationship with a Defendant.'" *Laydon*, 2014 WL 1280464, at *13 (quoting *Reading Int'l, Inc. v. Oaktree Capital Mgmt.,* 317 F. Supp.2d 301, 334 (S.D.N.Y. 2003)). Nevertheless, if the relationship between the parties is too attenuated, the unjust enrichment claim must be dismissed. *Sperry*, 8 N.Y.3d at 215.

Defendants argue that the unjust enrichment claim must be dismissed because Plaintiffs have not alleged that they had any direct dealings with Defendants. Defs.' Joint Br. at 48-50. Defendants are correct. That Plaintiffs "relied on the Fix as a *bona fide* benchmark in conducting their transactions," as they argue in response, Pls.' Opp'n at 49-50, says nothing about whether the relationship between the parties was not too attenuated. It says nothing about the relationship at all. Moreover, because Plaintiffs do not allege that they transacted directly with Defendants, they have

not adequately pleaded that Defendants were enriched at their expense. *See, e.g.*, *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR II*"), 27 F. Supp. 3d 447, 479 (S.D.N.Y. 2014) ("[I]t makes little sense to conclude that a particular defendant bank somehow improperly obtained profits intended for a certain plaintiff when those two parties never transacted or otherwise maintained a business relationship at all."). Accordingly, Plaintiffs have failed adequately to plead an unjust enrichment claim, and Defendants' motion to dismiss that claim is granted. *See, e.g.*, *Laydon*, 2014 WL 1280464, at *13 (dismissing an unjust enrichment claim where plaintiff's conclusory assertions that defendants financially benefited from the unlawful manipulation and that the unlawful acts caused plaintiff injury were insufficient to meet the pleading requirement for that claim); *Amaranth I*, 587 F. Supp. 2d at 547 (dismissing an unjust enrichment claim based on alleged market manipulation that impacted prices of natural gas futures contracts because plaintiffs did not "allege[ ] any direct relationship, trading or otherwise, between themselves and any [defendant]"); *see also In re Silver*, 2016 WL 5794777, at *26 (dismissing plaintiffs' unjust enrichment claim because "[t]he connection between the named Plaintiffs and Defendants is 'too attenuated'"); *In re Gold*, 2016 WL 5794776, at *29 (same).

E. Personal Jurisdiction Over Foreign Defendants

BASF Metals, ICBC, and LPPFC (the "Foreign Defendants") filed supplemental memoranda of law arguing that they should be dismissed from this action

pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction. *See* BASF Metals Ltd. And BASF Corp.'s Mem. of Law in Supp. of Mot. to Dismiss Pursuant to Fed. R. of Civ. P. 12(b)(2) and 12(b)(6) ("BASF JDX Br."), Dkt. No. 117; LPPFC Supp. Mem. of Law in Supp. of Mot. to Dismiss Pursuant to Rule 12(b)(2) ("LPPFC JDX Br."), Dkt. No. 119; ICBC Standard Bank Plc's Mem. of Law in Supp. of Mot. to Dismiss Pursuant to Fed. R. 12(b)(2) and 12(b)(6) ("ICBC JDX Br."), Dkt. No. 120.

1. Rule 12(b)(2) Legal Standard

It is well established that, on a motion to dismiss pursuant to Rule 12(b)(2), the "plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit." *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010) (citing *In re Magnetic Audiotape Antitrust Litig.,* 334 F.3d 204, 206 (2d Cir. 2003) (per curiam)); *see also Bank Brussels Lamberts v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999) ("When responding to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant.") (citations omitted). To defeat a jurisdiction-testing motion, the plaintiff's burden of proof "'varies depending on the procedural posture of the litigation.'" *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 84 (2d Cir. 2013) (quoting *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990)). At the pleading stage—and prior to discovery—a plaintiff need only make a *prima facie* showing that jurisdiction exists. *Id.* at 84-85; *see also*

Eades v. Kennedy, PC Law Offices, 799 F.3d 161, 167-68 (2d Cir. 2015) ("'In order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists.'") (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 167 (2d Cir. 2013)).

If the court considers only pleadings and affidavits, the plaintiff's *prima facie* showing "must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 659, 673 (2d Cir. 2013) (quoting *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir. 2010) (internal quotation marks omitted)). Courts may rely on materials outside the pleading in considering a motion to dismiss for lack of personal jurisdiction. *See DiStefano v. Carozzi N. Am., Inc.,* 286 F.3d 81, 84 (2d Cir. 2001). "'The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits.'" *MacDermid, Inc. v. Deiter*, 702 F.3d 725, 727 (2d Cir. 2012) (quoting *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala,* 989 F.2d 572, 580 (2d Cir. 1993)). If the parties present conflicting affidavits, however, "all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party." *Seetransport Wiking*, 702 F.3d at 727 (citations omitted).

a. Standard for Exercising Personal Jurisdiction

Federal courts must satisfy three requirements in order to exercise personal jurisdiction over an entity: (1) the entity must have been properly served, (2) the court must have a statutory basis for exercising personal jurisdiction, and (3) the exercise of personal jurisdiction must comport with constitutional due process. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL,* 673 F.3d 50, 59-60 (2d Cir. 2012). In a federal question case, the manner in which district courts assess whether the exercise of personal jurisdiction comports with constitutional due process varies depending on the asserted statutory basis.

"The constitutional analysis under the Due Process Clause consists of two separate components: the 'minimum contacts' inquiry and the 'reasonableness' inquiry. The 'minimum contacts' inquiry requires [the court] to consider whether the defendant has sufficient contacts with the forum state to justify the court's exercise of personal jurisdiction." *Id.* at 60. Although the Second Circuit has not "has not yet decided" whether to adopt this approach, other circuits have held that "when a civil case arises under federal law and a federal statute authorizes nationwide service of process, the relevant contacts for determining personal jurisdiction are contacts with the United States as a whole." *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 142 n.21 (2d Cir. 2014) (collecting cases). Courts in this district have followed this approach, including in cases arising under the federal statutes at issue in this case. *See, e.g.*, *S.E.C. v. Straub*, 921 F. Supp. 2d 244, 253

(S.D.N.Y. 2013) ("When the jurisdictional issue flows from a federal statutory grant that authorizes suit under federal-question jurisdiction and nationwide service of process, however, the Fifth Amendment applies, and the Second Circuit has consistently held that the minimum-contacts test in such circumstances looks to contacts with the entire United States rather than with the forum state.") (internal quotation marks and citations omitted); *Estate of Ungar v. Palestinian Auth.*, 400 F. Supp. 2d 541, 548 (S.D.N.Y. 2005), *aff'd*, 332 F. App'x 643 (2d Cir. 2009) ("If a federal statute provides for nationwide service of process, the jurisdictional reach of an enforcing court is at its fullest—its analysis is limited only by the requirements of due process, and it may consider a party's contacts with the United States as a whole, rather than with the forum state."); *see also Sullivan v. Barclays PLC*, 2017 WL 685570, at *42 (examining nationwide contacts in an action alleging CEA and Sherman Act violations); *LIBOR IV*, 2015 WL 4634541, at *18 (examining nationwide contacts in an action alleging CEA violations); *Amaranth I*, 587 F. Supp. 2d at 526; *Grosser v. Commodity Exch., Inc.*, 639 F. Supp. 1293, 1312 (S.D.N.Y. 1986) ("Section 12 [of the Clayton Act] is construed as conferring nationwide personal jurisdiction over corporate antitrust defendants."), *aff'd*, 859 F.2d 148 (2d Cir. 1988). "The rationale underlying this national contacts approach is that when the national sovereign is applying national law, the relevant contacts are the contacts between the defendant and the sovereign's nation." *In re Libor-Based Fin. Instruments Antitrust Litig.* ("*LIBOR IV*"), No. 11 MDL 2262 NRB, 2015 WL 4634541, at *18 (S.D.N.Y. Aug. 4, 2015), *amended on other grounds*,

No. 11 MDL 2262 (NRB), 2015 WL 13122396 (S.D.N.Y. Oct. 19, 2015) (internal quotation marks, citations, and alternations omitted).

If the federal statute at issue does not provide for nationwide service, or if the claim does not arise under federal law, the personal jurisdiction analysis begins by applying the forum state's long-arm statute. *See PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997) ("In a federal question case where a defendant resides outside the forum state, a federal court applies the forum state's personal jurisdiction rules 'if the federal statute does not specifically provide for national service of process.'") (quoting *Mareno v. Rowe,* 910 F.2d 1043, 1046 (2d Cir. 1990)). If the long-arm statute is satisfied, the due process inquiry examines whether the foreign defendant has sufficient minimum contacts with the forum state. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997).

A third means of establishing personal jurisdiction over a foreign defendant is found in Federal Rule of Civil Procedure 4(k)(2). Rule 4(k)(2) states:

> For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Fed. R. Civ. P. 4(k)(2). The Second Circuit has interpreted this rule as "'extend[ing] the reach of

federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made and who can be constitutionally subjected to the jurisdiction of the courts of the United States.'" *Chew v. Dietrich*, 143 F.3d 24, 27 (2d Cir. 1998) (quoting Fed. R. Civ. P. 4, 1993 advisory committee's note to 1993 amendment).

Rule 4(k)(2) allows courts to exercise personal jurisdiction over a defendant on condition: "(1) that plaintiff's cause of action arise[s] under the federal law; (2) that the defendant is not subject to the jurisdiction of the courts of general jurisdiction of any one State; and (3) that the defendant's total contacts with the *United States* as a whole are sufficient to confer the court with personal jurisdiction without offending due process." *Hartford Fire Ins. v. Co.*, No. 03 CIV. 2196 (SAS), 2003 WL 22990090, at *3 (S.D.N.Y. Dec. 18, 2003) (quoting *Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd.*, 956 F. Supp. 427, 434 (S.D.N.Y. 1996)). As the Second Circuit observed:

> Rule 4(k)(2) was specifically designed to "correct[ ] a gap" in the enforcement of federal law in international cases. The gap arose from the general rule that a federal district court's personal jurisdiction extends only as far as that of a state court in the state where the federal court sits. . . . The pre-1993 Rules, the Advisory Committee noted, left a significant lacuna "when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of

> forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction."

Porina v. Marward Shipping Co., 521 F.3d 122, 126-27 (2d Cir. 2008) (citing Fed R. Civ. P. 4 advisory committee's note, 1993 Amendments) (alterations in original). As amended, Rule 4(k)(2) closes that gap.

Whether personal jurisdiction is based on a statute containing nationwide service, a state-long arm statute, or Rule 4(k)(2), the court must also determine that the exercise of personal jurisdiction comports with the Due Process Clause.[17] "[D]ue process requires a plaintiff to allege (1) that a defendant has 'certain minimum contacts' with the relevant forum, and (2) that the exercise of jurisdiction is reasonable in the circumstances." *In re Terrorist Attacks*, 714 F.3d at 673 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). As discussed above, the "relevant forum" for

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[17] Depending on the basis for personal jurisdiction, due process under either the Fifth or Fourteenth Amendment applies. "[T]he due process analysis is basically the same under both the Fifth and Fourteenth Amendments. The principal difference is that under the Fifth Amendment the court can consider the defendant's contacts throughout the United States, while under the Fourteenth Amendment only the contacts with the forum state may be considered." *Chew v. Dietrich*, 143 F.3d 24, 28 n. 4 (2d Cir. 1998); *see also Straub*, 921 F. Supp. 2d at 253 ("[B]ecause the language of the Fifth Amendment's due process clause is identical to that of the Fourteenth Amendment's due process clause, the same general principles guide the minimum contacts analysis.").

the purpose of the contacts analysis may be the forum state (here, New York) or the United States as a whole.

"To determine whether a defendant has the necessary 'minimum contacts,' a distinction is made between 'specific' and 'general' personal jurisdiction." *Id.* (citing *Metro. Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 567-68 (2d Cir. 1996)). "A court may assert general jurisdiction over a foreign defendant to hear any and all claims against that defendant only when the defendant's affiliations with the State in which the suit is brought 'are so constant and pervasive so as to render it essentially at home in the forum State.'" *Waldman v. Palestinian Liberation Org.*, 835 F.3d 317, 331 (2d Cir. 2016) (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014)). "'Specific jurisdiction, on the other hand, depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and therefore subject to the State's regulation.'" *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)); *see also Licci,* 732 F.3d at 170 ("'Where the claim arises out of, or relates to, the defendant's contacts with the forum—*i.e.*, specific jurisdiction [is asserted]—minimum contacts [necessary to support such jurisdiction] exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there.'") (quoting *Brussels Lambert,* 305 F.3d at 127).

Specific personal jurisdiction is predicated on "an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that

takes place in the forum." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (internal quotation marks and alteration omitted). "In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Id.* A plaintiff must plead personal jurisdiction with respect to each claim asserted. *Sunward Elecs., Inc. v. McDonald,* 362 F.3d 17, 24 (2d Cir. 2004) (citing *SAS Group, Inc. v. Worldwide Inventions, Inc.,* 245 F. Supp.2d 543, 548 (S.D.N.Y. 2003)). "[T]he relationship must arise out of contacts that the 'defendant *himself*' creates with the forum . . . ." *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (emphasis in *Walden*). "The activities of plaintiffs or third parties alone will not confer jurisdiction, and the court's analysis is directed to the defendant's contacts with the forum itself and 'not the defendant's contacts with persons who reside there.'" *Sullivan v. Barclays*, 2017 WL 685570, at *43 (quoting *Walden*, 134 S. Ct. at 1122).

Specific jurisdiction over a foreign defendant may also exist even if the relevant conduct took place entirely outside the forum. Under the so-called "effects test," personal jurisdiction is "typically invoked where . . . the conduct that forms the basis for the controversy occurs entirely out-of-forum, and the only relevant jurisdictional contacts with the forum are therefore in-forum effects harmful to the plaintiff." *Licci*, 732 F.3d at 173; *see also Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 243 (2d Cir. 2007) (describing "independent, if conceptually overlapping, methods of demonstrating

minimum contacts," including where on the basis of "in-state effects of out-of-state activity"). For such claims, "the exercise of personal jurisdiction may be constitutionally permissible if the defendant *expressly aimed its conduct at the forum*." *Licci*, 732 F.3d at 173 (citing *Calder v. Jones*, 465 U.S. 783, 789 (1983) (emphasis added). Harmful effects alone will not establish jurisdiction: "'[T]he fact that harm in the forum is foreseeable . . . is insufficient for the purpose of establishing specific personal jurisdiction over a defendant.'" *Waldman*, 835 F.3d at 339 (quoting *In re Terrorist Attacks*, 714 F.3d at 674). "[T]he defendant must expressly aim his conduct at the United States." *Id.* at 337 (citing *Licci*, 732 F.3d at 173) (alterations omitted)); *see also LIBOR IV*, 2015 WL 4634541, at *27 (concluding that effects in forum did not support personal jurisdiction over a foreign defendant when "there [wa]s no suggestion, and it [did] not stand to reason, that foreign defendants aimed their manipulative conduct at the United States or any particular forum state").

In addition, the underlying "suit-related conduct must create a substantial connection with the forum State." *Walden*, 134 S. Ct. at 1121. "[I]t is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Id.* at 1122. Therefore, the analysis necessarily includes consideration of the claims' elements and where the conduct occurred. *See generally Waldman*, 835 F.3d at 335-39. The forum must be the "focal point" or "nucleus" of plaintiff's alleged harm. *Id.* at 340. Continuous presence in the forum does not confer specific jurisdiction unless that

presence involves "suit-related conduct." *Id.* at 335; *see also 7 W. 57th Realty Co.*, 2015 WL 1514539, at *10 ("Plaintiff must demonstrate that the Foreign Banks' *suit*-related conduct creates minimum contacts with New York, however, not simply that the Foreign Banks have a presence here or conduct business activities here in general.") (citations omitted).

If the contacts are not sufficient, the due process inquiry ends. *See Metro. Life Ins.*, 84 F.3d at 568-69. If the court has either general or specific jurisdiction, it must turn to the second step of the due process inquiry, and determine "whether the assertion of personal jurisdiction comports with 'traditional notions of fair play and substantial justice'—that is, whether it is reasonable to exercise personal jurisdiction under the circumstances of the particular case." *Licci*, 673 F.3d at 60 (citing *Chloe*, 616 F.3d at 164). The "reasonableness" analysis requires district courts to evaluate the following five factors: "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies." *Chloe,* 616 F.3d at 164-65 (citing *Asahi Metal Indus., Co., Ltd. v. Superior Court of Cal.,* 480 U.S. 102, 109 (1987)).

2. Statutory Bases for Personal Jurisdiction

Plaintiffs have asserted three statutory bases for the Court's exercise of specific personal jurisdiction

over the Foreign Defendants. First, Plaintiffs point to nationwide service provisions embedded in the CEA and the Clayton Act. Pls.' Consol. Opp'n to Defs.' Mot. ("Pls.' JDX Opp'n"), Dkt. No. 128, at 19-20. Under the CEA, "[p]rocess . . . may be served in any judicial district of which the defendant is an inhabitant or wherever the defendant may be found." 7 U.S.C. § 25(c). Under the Clayton Act,

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22.[18]

Second, Plaintiffs assert personal jurisdiction over the Foreign Defendants is proper pursuant to New York's long-arm statute. Pls.' JDX Opp'n at 20. Under Section 302 of the C.P.L.R., "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent:

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[18] "Because the service of process provision applies only to 'such cases' described in the preceding clause, the Second Circuit has concluded that nationwide service of process is permissible "only in cases in which its venue provision is satisfied."' *Sullivan v. Barclays*, 2017 WL 685570, at *42 (quoting *Daniel*, 428 F.3d at 423). Neither party has addressed the relationship between the venue provision and the service of process provision, nor have the Foreign Defendants contested that venue is proper in this district.

> (1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or (2) commits a tortious act within the state . . ; (3) commits a tortious act without the state causing injury to person or property within the state . . . .[19]

N.Y. C.P.L.R. 302(a). Finally, Plaintiffs have asserted Rule 4(k)(2) as another statutory basis for exercising personal jurisdiction over the Foreign Defendants. Pls.' JDX Opp'n at 4-5.

Here, Plaintiffs have implicitly disclaimed that the Foreign Defendants are subject to general personal jurisdiction. *See* Pls.' JDX Opp'n at 2 (stating that ICBC and BASF are "subject to *specific* personal jurisdiction in this District"). As alleged in the SAC:

> This Court has personal jurisdiction over each Defendant, because each Defendant: transacted business throughout the U.S., including in this District; had substantial contacts with the U.S., including in this District; and/or committed overt acts in furtherance of their illegal scheme and conspiracy in the U.S. In addition, the conspiracy was directed at, and had the intended effect of, causing injury to persons residing in, located in, or doing business throughout the U.S., including in this District, and Plaintiffs' claims arise out of Defendants' conduct.

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[19] Plaintiffs have not asserted any other subsections of C.P.L.R. § 302 as statutory bases for personal jurisdiction over the Foreign Defendants.

SAC ¶ 26. The SAC does not distinguish between the Foreign Defendants' and the remaining domestic Defendants' contacts with New York or the United States.

Because Plaintiffs have alleged Sherman Act and CEA claims against all Defendants in this case, including the Foreign Defendants, the Court will first analyze whether those Defendants have sufficient minimum contacts in the United States to satisfy the first prong of the due process requirement. Because the Court concludes that Plaintiffs have not made a *prima facie* showing that the Foreign Defendants have sufficient contacts with the United States as a whole, it follows that the Foreign Defendants do not have sufficient contacts in this forum. Thus, the Court need not separately analyze specific personal jurisdiction under the New York long-arm statute and whether the Foreign Defendants have sufficient minimum contacts with New York.

a. BASF Metals

As alleged in the SAC, BASF Metals is "organized . . . under the laws of the United Kingdom with its principal place of business in London, England." SAC ¶ 31. Plaintiffs allege that BASF Metals is "organizationally part of and subordinate to BASF Corp," and that, during the Class Period, BASF Metals was a Fixing Member and a market-making LPPM member. *E.g.*, SAC ¶¶ 31, 45, 62, 271. Plaintiffs further argue that "[v]arious BASF subsidiaries also held memberships in the NYMEX and CME and engaged in trading on NYMEX." Pls.' JDX Opp'n at 7. The SAC alleges generally that the Fixing Members used chat

rooms, instant messages, phone calls, proprietary trading venues and platforms, and emails to coordinate the alleged price manipulation. SAC ¶ 171.

Plaintiffs do not allege sufficient minimum contacts between BASF Metals and the United States to confer specific personal jurisdiction over this defendant. BASF Corp.'s presence in the U.S. is irrelevant because continuous presence in the forum does not confer specific jurisdiction unless its presence involves "suit related conduct." *Waldman*, 835 F.3d at 335; *7 W. 57th Realty Co.*, 2015 WL 1514539, at *10. Plaintiffs have not alleged any such conduct with respect to BASF Corp. The SAC's vague references to the Fixing Members' use of chat rooms and emails is also unavailing. Indeed, even allegations that such communications "passed through and/or were stored within the United States are [generally] insufficient" for the purpose of establishing specific jurisdiction over a foreign defendant. *Laydon*, 2015 WL 1515358, at *3; *see also Sullivan v. Barclays*, 2017 WL 685570, at *44; *LIBOR VI*, 2016 WL 7378980, at *10.

Finally, the SAC does not allege that BASF Metals' conduct was aimed at the United States. That Defendants' alleged manipulation of the Fix Price had harmful effects on U.S.-based exchanges is insufficient. *Waldman*, 835 F.3d at 339. Even if the harm was foreseeable, it "is insufficient for the purpose of establishing specific personal jurisdiction." *Id.* Rather, the allegations must make a *prima facie* showing that the defendant expressly aimed its conduct at the U.S. Plaintiffs' allegations pertaining to BASF Metals do not. Accordingly, the Court concludes that the SAC

does not allege sufficient minimum contacts between BASF Metals and the U.S. for the Court to exercise specific personal jurisdiction over this defendant with respect to Plaintiffs' CEA and Sherman Act claims. Because SAC's allegations fall far short of showing that BASF Metals had the requisite suit-related minimum contacts with the U.S. as a whole, it necessarily follows that BASF Metals does not have the requisite minimum contacts with New York.

b. ICBC

As alleged in the SAC, ICBC is "organized . . . under the laws of the United Kingdom," and "maintains its principal place of business in London, England." SAC ¶ 37. Plaintiffs allege that during the Class Period, ICBC was a Fixing Member and a market-making LPPM member. SAC ¶ 37. Plaintiffs further allege that ICBC is a "a member of NYMEX (COMEX)" and "executes client trades in the physical platinum and palladium markets, on NYMEX, in platinum and palladium derivatives, and in shares of platinum and palladium ETFs." SAC ¶¶ 38-39. Throughout the Class Period, ICBC "entered directly into platinum and palladium spot, forward, option and platinum and palladium ETF share transactions with members of the Class." SAC ¶ 38. As alleged in the SAC, on at least one occasion, "the COMEX Business Conduct Committee initiated disciplinary proceedings against [ICBC] because it had violated exchange rules." SAC ¶ 39. Plaintiffs further allege that ICBC's "website holds itself out as having a substantial presence worldwide including in New York," and ICBC has "four U.S.

subsidiaries . . . [e]ach . . . registered in Delaware with corporate offices located in this District." SAC ¶ 40.

Despite the arguably more detailed allegations against ICBC as compared to BASF Metals, the same deficiencies described above apply to Plaintiffs' jurisdictional allegations against ICBC. That ICBC has subsidiaries in the U.S. and that its website advertises its presence in the United States "is only relevant insofar as it has a nexus to the misconduct underlying plaintiffs' claims." *Sullivan v. Barclays*, 2017 WL 685570, at *44 (citing *Waldman*, 835 F.3d at 340 (jurisdictional requirement)). Here it does not: Plaintiffs have not alleged that ICBC's U.S. subsidiaries played any role in the Fixing or alleged manipulation.

In addition, ICBC's membership in COMEX and trades on NYMEX fall short of establishing that it expressly aimed its conduct at the U.S. The alleged unlawful conduct in this case is the manipulation of the Fix Price that took place during the Fixing Calls, not manipulations of particular transactions on NYMEX. That the effect of the alleged manipulation of the Fix Price had a foreseeable impact on platinum and palladium derivatives traded on NYMEX is insufficient for the purpose of establishing personal jurisdiction over a foreign defendant. *Waldman*, 835 F.3d at 339. And courts in this district have held that general allegations of price manipulation abroad alone do not establish that a foreign defendant expressly aimed its conduct at the U.S. *See Laydon v. Mizuho Bank, Ltd.*, No. 12 CIV. 3419 GBD, 2015 WL 1515358, at *6 (S.D.N.Y. Mar. 31, 2015); *see also LIBOR IV*, 2015 WL

6243526, at *10 ("It is bedrock law that merely foreseeable effects of defendants' [manipulation of the LIBOR rate] do not support personal jurisdiction."); *7 West 57th St. Realty*, 2015 WL 1514539, at *11 ("Because the Amended Complaint does not plead facts demonstrating that the LIBOR manipulation was done with the express aim of causing an effect in New York, the 'effects test' is not satisfied."). Accordingly, and for the reasons discussed above with respect to BASF Metals, the Court concludes that the SAC does not allege sufficient minimum contacts between ICBC and the U.S. for the Court to exercise personal jurisdiction over this defendant.

c. LPPFC

As alleged in the SAC, the LPPFC "is a private company organized and existing under the laws of the United Kingdom with its principal place of business in London, England." SAC ¶ 45. The LPPFC is "100% owned and controlled by" the Fixing Members and, "is indistinguishable from the Fixing [Members] for jurisdictional purposes." SAC ¶ 46. "The LPPFC's only function is to take and continue the promotion, administration and conduct of the [LPPM] Fixing" and, "[a]s such," Plaintiffs allege that "at all times LPPFC was an instrumentality in Defendants' conspiracy alleged in" the SAC. SAC ¶ 47. Plaintiffs further allege that the LPPFC served as a vehicle for the alleged conspiracy, and "was targeted and had substantial depressive effects on the platinum and palladium Fixing price and Platinum and Palladium Investments traded in the U.S., including platinum and palladium derivatives traded on the NYMEX in this District."

SAC ¶ 47. In addition, Plaintiffs allege that "[a]t all times, LPPFC and its members and directors knew that the Fixing—and the Fix prices reached thereby—had a substantial effect on Platinum and Palladium Investments traded in the U.S., including platinum and palladium derivatives traded on the NYMEX in this District." SAC ¶ 47.

Plaintiffs' jurisdictional allegations concerning the LPPFC suffer from the same defects as their jurisdictional allegations concerning BASF Metals and ICBC. The Court need not restate that analysis here, but notes that the LPPFC's presence on NYMEX, or any other domestic OTC market or exchanges, fails to establish that it expressly aimed its conduct at the U.S. Absent allegations that the LPPFC—or the other Foreign Defendants—manipulated Platinum and Palladium Investments traded on NYMEX, such allegations do not rise to the level of minimum contacts necessary for personal jurisdiction. *Compare In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR V*"), No. 11 MDL 2262 NRB, 2015 WL 6696407, at *19 (S.D.N.Y. Nov. 3, 2015) (declining to exercise personal jurisdiction over foreign defendants based on allegations that they manipulated LIBOR in London, which plaintiffs argued had a foreseeable effect on futures contract prices in the United States) *with Amaranth I*, 587 F. Supp. 2d at 536 (concluding that plaintiffs made a *prima facie* showing that personal jurisdiction existed over a foreign defendant based on allegations that defendant who manipulated NYMEX futures prices with the knowledge that "trades would affect the price of natural gas futures within the

United States," thus "constitut[ing] purposeful availment of the United States") (citations omitted).[20]

i. Alter Ego Theory of Personal Jurisdiction

Plaintiffs argue that the Court may nevertheless exercise personal jurisdiction over the LPPFC because the LPPFC was the Fixing Members' alter ego. Pls.' JDX Opp'n at 11-12. The Second Circuit has recognized that, under certain conditions, "it is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation . . . when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court." *Transfield ER Cape Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221, 224 (2d Cir. 2009) (internal quotation marks and citations omitted); *cf. Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 142-43 (2d Cir. 1991) (stating that, in general, "alter egos are treated as one entity" for jurisdictional purposes). While the parties agree that courts may exercise personal jurisdiction over foreign defendants pursuant to this theory, they disagree whether English law, federal common law, or a less stringent variant of federal common law governs the analysis. Because the Court concludes that the SAC's allegations fail to establish that the LPPFC was the Fixing Member's alter ego even under the most

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[20] Plaintiffs' assertion that the LPPFC "is indistinguishable from the Fixing [Members] for jurisdictional purposes" SAC ¶ 46, is a legal conclusion that the Court need not—and does not—accept as true. *Iqbal*, 556 U.S. at 678.

forgiving standard, the Court need not resolve the dispute regarding which law applies.[21]

The LPPFC argues that, under New York choice of law rules, "[w]hen courts are asked to pierce the corporate veil against a defendant's alter ego, they look to the state where the defendant is incorporated." LPPFC JDX Br. at 9 & n.6 (citations omitted). Because the LPPFC is incorporated under the laws of the United Kingdom, the LPPFC asserts that English law governs the alter ego analysis. *Id.* at 10. As the LPPFC explains, under English law, "a plaintiff must allege that the defendant has sought deliberately to evade or frustrate an obligation or liability by interposing an alter ego." *Id.* Pointing to a tome of English law

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[21] At least two courts in this district observed that the question whether the same standard that governs the alter ego analysis for liability purposes controls for jurisdictional purpose has not yet been addressed by the Second Circuit and that courts have taken a variety of approaches when confronted with this question. *See, e.g.*, *Int'l Equity Investments, Inc. v. Opportunity Equity Partners, Ltd.*, 475 F. Supp. 2d 456, 459 (S.D.N.Y. 2007) (declining to decide whether "the choice of law for alter ego analysis for personal jurisdiction purposes is different than for liability"); *In re Lyondell Chem. Co.*, 543 B.R. 127, 139 n.38 (Bankr. S.D.N.Y. 2016) ("Some federal courts have engaged in a choice of law analysis to decide which law to apply to an alter ego theory of *jurisdiction*, usually finding that the law of the corporation's state of incorporation governs. Other courts have disagreed, distinguishing the analysis for 'alter ego' *liability* and for 'alter ego' *jurisdiction*, and finding that because 'alter ego' jurisdiction is either a construction of the statute providing jurisdiction or is part of due process (or both), for a *jurisdictional* veil piercing analysis, courts should apply either the law governing the interpretation of the jurisdictional statute or federal due process jurisprudence, or both.") (collecting cases) (citations omitted).

appended to its brief, the LPPFC argues that courts in the United Kingdom have "articulated this concept by reference to a temporal element, namely whether the defendant had 'placed the [alleged alter ego] between himself and his victim *after* incurring liability." *Id.* (citations omitted) (emphasis in LPPFC JDX Br.). And because, as Plaintiffs allege, the LPPFC was formed in 2004—at least four years prior to the beginning of the Class Period—the LPPFC argues that Plaintiffs cannot meet "this critical element." *Id.*; *see also* SAC ¶ 1.

Plaintiffs disagree. Because this action "arises under federal question jurisdiction and implicates antitrust law and commodities manipulation, which are governed by federal statutes and backed by strong federal interest," Plaintiffs maintain that federal common law governs the alter-ego analysis. Pls.' JDX Opp'n at 12. Plaintiffs argue that the "federal common law standard for alter ego requires the party seeking to attach alter-ego based jurisdiction to demonstrate only that 'it would be unfair under the circumstances not to disregard the corporate form." *Id.* at 15 (citations omitted). According to Plaintiffs, this standard is further relaxed when the alter ego theory is "used . . . to establish jurisdiction," and requires only that they allege that the "controlled entity was a shell for the allegedly controlling entity." *Id.* at 15 (citations omitted). Plaintiffs maintain that the allegations in the SAC satisfy this standard. *Id.* at 15-18.

"Federal common law allows piercing of the corporate veil where (1) a corporation uses its alter ego to perpetrate a fraud or (2) where it so dominates and disregards its alter ego's corporate form that the alter

ego was actually carrying on the controlling corporation's business instead of its own." *Status Int'l S.A. v. M & D Mar. Ltd.*, 994 F. Supp. 182, 186 (S.D.N.Y. 1998) (citing *Dow Chem. Pac. Ltd. v. Rascator Mar. S.A.*, 782 F.2d 329, 342 (2d Cir. 1986); *Kirno Hill Corp. v. Holt,* 618 F.2d 982, 984-85 (2d Cir. 1980)); *see also Lakah v. UBS AG*, 996 F. Supp. 2d 250, 260 (S.D.N.Y. 2014) (citing *MAG Portfolio Consult, GMBH v. Merlin Biomed Grp. LLC*, 268 F.3d 58, 63 (2d Cir. 2001)). However, several courts in this district have held that "this standard is relaxed where the *alter ego* theory is used not to impose liability, but merely to establish jurisdiction." *Int'l Equity Investments*, 475 F. Supp. 2d at 459 (citing *Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899, 904 (2d Cir. 1981)); *see also D. Klein & Son, Inc. v. Good Decision, Inc.*, 147 F. App'x 195, 196 (2d Cir. 2005) (summary order) (reasoning that "the exercise of personal jurisdiction over an alleged alter ego requires application of a 'less onerous standard' than that necessary for equity to pierce the corporate veil for liability purposes under New York law") (citations omitted); *Storm LLC v. Telenor Mobile Commc'ns AS*, No. 06 CIV. 13157 GEL, 2006 WL 3735657, at *13 (S.D.N.Y. Dec. 15, 2006) (citing *Marine Midland*, 664 F.2d at 904) ("Establishing the exercise of personal jurisdiction over an alleged alter ego requires application of a less stringent standard than that necessary to pierce the corporate veil for purposes of liability."); *Miramax Film Corp. v. Abraham*, No. 01 CV 5202 (GBD), 2003 WL 22832384, at *7 (S.D.N.Y. Nov. 25, 2003) ("The standard for piercing the corporate veil for liability purposes is not, however, the same standard to be used when piercing for jurisdictional purposes. The standard for piercing the

corporate veil for purposes of obtain jurisdiction is a less stringent one.") (citations omitted); *In re Gold*, 2016 WL 5794776, at *32 (citing *Int'l Equity Invest.*, 475 F. Supp. 2d at 459).[22, 23] "In such an instance, the question is only whether the allegedly controlled entity 'was a shell' for the allegedly controlling party; it is not necessary to show also 'that the shell was used to commit a fraud.'" *Int'l Equity Invs.*, 475 F. Supp. 2d at

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[22] The cases cited in this paragraph address the alter ego analysis under New York law, but "Second Circuit's common law standard is taken directly from New York law." *Lakah v. UBS AG*, 996 F. Supp. 2d 250, 260 (S.D.N.Y. 2014). Accordingly, the standard is same. *See Wajilam Exports (Singapore) Pte. Ltd. v. ATL Shipping Ltd.*, 475 F. Supp. 2d 275, 285 (S.D.N.Y. 2006) (reasoning that federal common law and New York law of veil-piercing are not "meaningfully distinct").

[23] The Court recognizes that most district courts in this circuit—and the Second Circuit itself—point to *Marine Midland* as support for the proposition the alter ego standard applicable to personal jurisdiction questions is different from the standard applicable to liability questions. The Court disagrees with that reading of the case. In *Marine Midland*, the Second Circuit analyzed the fiduciary shield doctrine, under which "it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his own benefit but for the benefit of his employer." 664 F.2d at 902. The court held that, when determining whether it is fair to pierce the fiduciary shield, a "less onerous standard" applies, and "it is sufficient to inquire whether the corporation is a real or shell entity." *Id.* at 903-904. The Court does not read *Marine Midland* as establishing a less onerous standard applicable in all cases involving an alter ego analysis in the personal jurisdiction context. However, because Plaintiffs' allegations do not show that the LPPFC was merely a shell of the Fixing Members, the Court need not determine the scope of *Marine Midland* here.

459 (quoting *Marine Midland*, 664 F.2d at 904); *see also GEM Advisors, Inc. v. Corporacion Sidenor, S.A.*, 667 F. Supp. 2d 308, 319 (S.D.N.Y. 2009) (same) (citations omitted); *Miramax*, 2003 WL 22832384, at *7 ("If a corporation is merely a shell, the corporate veil may be pierced to impute jurisdiction even without a showing that the shell was used to perpetrate a fraud.") (citations omitted).

Courts applying this "less onerous standard" have considered various factors in determining whether a corporation is a "shell," such that the corporate form should be disregarded, including, *inter alia*, "'the failure to observe corporate formality; inadequate capitalization; intermingling of personal and corporate funds; the sharing of common office space, address and telephone numbers of the alleged dominating entity and the subject corporation; an overlap of ownership, directors, officers or personnel; the use of the corporation as a means to perpetrate the wrongful act against the plaintiff.'" *In re Gold*, 2016 WL 5794776, at *33 (quoting *Miramax*, 2003 WL 22832384, at *8 (citing *Wm. Passalacqua Builders, Inc.,* 933 F.2d at 138)). "These factors are not exhaustive, nor is proof of any one factor or a combination of factors necessarily determinative. Rather, a finding that a corporation is an alter ego of another entity is warranted when doing so will achieve an equitable result." *Miramax*, 2003 WL 22832384, at *8 (quoting *William Wrigley Jr. Co. v. Waters*, 890 F.2d 594, 601 (2d Cir. 1989)).

Plaintiffs' allegations regarding the LPPFC do not warrant disregarding its corporate form. As noted above, Plaintiffs allege that the LPPFC is "100% owned

and controlled by" the Fixing Members and, "is indistinguishable from the Fixing [Members] for jurisdictional purposes." SAC ¶ 46. Plaintiffs also allege that "the LPPFC's only function is 'to take and continue the promotion, administration and conduct of the" Fixing and, "[a]s such, at all times LPPFC was an instrumentality in Defendants' conspiracy alleged in" the SAC. SAC ¶ 47. Plaintiffs further allege that the LPPFC served as a vehicle for the alleged conspiracy, and "was targeted and had substantial depressing effects on the platinum and palladium Fixing price and Platinum and Palladium Investments traded in the U.S., including platinum and palladium derivatives traded on the NYMEX in this District." SAC ¶ 47. The SAC does not address whether the LPPFC observed corporate formalities, whether the LPPFC's funds were intermingled with those of the Fixing Members, and whether the Fixing Members shared any office space or addresses with the LPPFC. Although no single factor is determinative, Plaintiffs' scant allegations regarding the LPPFC's membership and role in the alleged price manipulation do not show that the LPPFC was the Fixing Members' shell, such that the Court may disregard its corporate form. Plaintiffs have, therefore, failed to make a *prima facie* showing that the Court may exercise personal jurisdiction over the LPPFC under the alter ego theory.

3. Conspiracy Jurisdiction

Plaintiffs also assert conspiracy-based jurisdiction pursuant to New York's long arm statute. Pls.' JDX Opp'n at 20-21. "The elements of conspiracy jurisdiction are that '(a) the defendant had an

awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control or at the request of or on behalf of the out-of-state defendant.'" *Tarsavage v. Citic Trust Co.*, 3 F. Supp. 3d 137, 147 (S.D.N.Y. 2014) (quoting *Maersk, Inc. v. Neewra, Inc.,* 554 F. Supp. 2d 424, 442-43 (S.D.N.Y. 2008)); *see also In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 805 (S.D.N.Y. 2005), *on reconsideration in part on other grounds*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005), and *aff'd*, 538 F.3d 71 (2d Cir. 2008), and *aff'd*, 714 F.3d 118 (2d Cir. 2013) ("To establish personal jurisdiction on a conspiracy theory, Plaintiffs must make a prima facie showing of conspiracy, allege specific facts warranting the inference that the defendant was a member of the conspiracy, and show that the defendant's co-conspirator committed a tort in New York."). "While '[t]he acts of a co-conspirator may . . . be attributed to a defendant for the purpose of obtaining personal jurisdiction over that defendant, the bland assertion of conspiracy . . . is insufficient to establish jurisdiction for the purposes of § 302(a)(2).'" *Accurate Grading Quality Assur., Inc. v. Thorpe*, No. 12 CIV. 1343 ALC, 2013 WL 1234836, at *3 (S.D.N.Y. Mar. 26, 2013) (quoting *Drucker Cornell v. Assicurazioni Generali S.p.A. Consolidated,* No. 97 CIV. 2262 (MBM), 98 CIV. 9186 (MBM), 2000 WL 284222, 5 (S.D.N.Y. Mar. 16, 2000)); *see also Universal Trading & Inv. Co. v. Tymoshenko*, No. 11 CIV. 7877 PAC, 2012 WL 6186471, at *2 n.3 (S.D.N.Y. Dec. 12, 2012) (same).

"Courts have been increasingly reluctant to extend this theory of jurisdiction beyond the context of New York's long-arm statute." *Laydon*, 2015 WL 1515358, at *3 (citations omitted); *see also In re Aluminum Warehousing Antitrust Litig*., 13-md-2481 (KBF), 2015 WL 892255, at *5 (S.D.N.Y. Mar. 3, 2015) (rejecting the plaintiffs' argument "that Rule 4(k)(2) permits courts to exercise personal jurisdiction over a defendant on the basis of a conspiracy," and holding that "[t]he rules and doctrines applicable to personal jurisdiction are sufficient without the extension of the law to a separate and certainly nebulous 'conspiracy jurisdiction' doctrine"); *Tymoshenko v. Firtash,* 11-CV-2794 (KMW), 2013 WL 1234943, at *2-4 (S.D.N.Y. Mar. 27, 2013) (recognizing that conspiracy jurisdiction "has been widely criticized by courts and scholars" and declining to consider co-conspirators' contacts for the purpose of establishing personal jurisdiction over a foreign defendant).

Even if the Court were to find that exercising personal jurisdiction over the Foreign Defendants based on this theory was proper, Plaintiffs have not alleged sufficient facts to support the elements of conspiracy jurisdiction. Plaintiffs argue that the allegations in the SAC sufficiently plead the elements of a conspiracy jurisdiction because it includes allegations that (1) the Fixing process was "the central tool used to implement the conspiracy;" (2) Defendants' "involvement and knowledge that the conspiracy had effects in New York;" and (3) the Foreign Defendants' "co-conspirators . . . committed torts in New York by implementing the conspiracy via trades made at artificially deflated prices for NYMEX derivatives and

futures." Pls.' JDX Opp'n at 21-22. Plaintiffs mischaracterize their own allegations. The allegations Plaintiffs' point to address (1) the domestic Defendants' businesses and involvement in various platinum and palladium markets and transactions (SAC ¶¶ 33-36); (2) the relationship between the Fix Price and the price of platinum and palladium derivatives (SAC ¶ 12); (3) the Defendants' alleged motive in manipulating the Fix Price (SAC ¶¶ 15, 170, 193-195); and (4) general allegations about governmental investigations that do not identify any specific defendant, market, or conduct. Nowhere in the SAC do Plaintiffs allege that any Defendant—foreign or domestic—engaged in any activity related to the Fixing process or the Fixing Calls while present in New York. Accordingly, because Plaintiffs failed to allege that any conduct relevant to the alleged price manipulation took place in New York, they have failed to allege sufficient facts to establish personal jurisdiction on that basis.

* * *

For the foregoing reasons, and because Plaintiffs have failed to make a *prima facie* showing that the Court has personal jurisdiction over the Foreign Defendants, the Foreign Defendants' motions to dismiss for lack of personal jurisdiction are granted and Plaintiffs' claims against those defendants are dismissed.[24, 25]

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[24] Plaintiffs point to "[a] variety of other facts," which they assert indicate that Defendants' scheme targeted the U.S.," and which they argue demonstrate that the Court may exercise personal jurisdiction over the Foreign Defendants. Those factors include, *inter alia*, that "[p]rices were 'fixed' at 2:00 p.m. London time each

4. Jurisdictional Discovery

In the alternative, Plaintiffs argue that they are entitled to jurisdictional discovery if the Court grants the Foreign Defendants' motions to dismiss. Pls.' JDX Opp'n at 25-26. "It is well settled under Second Circuit law that, even where plaintiff has not made a *prima facie* showing of personal jurisdiction, a court may still order discovery, in its discretion, when it concludes that the plaintiff may be able to establish jurisdiction

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day to coordinate with the start of the U.S. trading day" and that the Fix Prices were "stated in U.S. dollars." Pls.' JDX Opp'n at 1. As Defendants point out, however, "[t]he U.S. dollar is the standard unit of currency in international commodities markets, including for the London and leading European markets that trade in platinum and palladium." Def. LPPFC Reply to Pls.' Consol. Opp'n and in Supp. of Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) ("LPPFC JDX Reply"), Dkt. No. 131, at 3. In addition, Plaintiffs have not alleged that the Fixing was conducted in a different currency prior to the beginning of the Class Period, or that the Fixing Members changed the currency in order to facilitate the alleged price manipulation. As to the timing of the Fixing Calls, Plaintiffs do not allege that the Fixing Members changed the Fixing Calls' schedule to orchestrate their alleged scheme; in fact, as the LPPFC notes, Plaintiffs' assertion "is contradicted by [their] more specific allegation that '[f]or various reasons, such as changing daylight savings times, the Fix occurred at different times during the New York trading day, and sometime did not occur at all.'" LPPFC JDX Reply at 3 (quoting SAC ¶ 10 n.3).

[25] In addition to its motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), ICBC also moves to dismiss the SAC against it for failure to state a claim. *See* ICBC JDX Br. at 11-12. Because the Court concludes that it does not have personal jurisdiction over ICBC, ICBC's Rule 12(b)(6) motion is denied as moot.

if given the opportunity to develop a full factual record." *Ikeda v. J. Sisters 57, Inc.*, No. 14-CV-3570 ER, 2015 WL 4096255, at *8 (S.D.N.Y. July 6, 2015) (citing *Leon v. Shmukler,* 992 F. Supp. 2d 179, 194 (E.D.N.Y. 2014)); *see also In re Magnetic Audiotape Antitrust Litig.,* 334 F.3d at 208. Where a plaintiff does not make a *prima facie* showing that personal jurisdiction exists, a district court is "well within its discretion in declining to permit [jurisdictional] discovery." *Best Van Lines*, 490 F.3d at 255 (citations omitted); *see also Jazini v. Nissan Motor Co.,* 148 F.3d 181, 186 (2d Cir. 1998) (finding that the district court did not err in denying jurisdictional discovery where the plaintiffs did not establish a *prima facie* case that the district court had jurisdiction over the defendant). And "'[d]istrict courts in this [C]ircuit routinely reject requests for jurisdictional discovery where a plaintiff's allegations are insufficient to make out a prima facie case of jurisdiction.'" *Laydon*, 2015 WL 1515358, at *7 (quoting *Stutts v. De Dietrich Grp.,* 465 F. Supp. 2d 156, 169 (E.D.N.Y. 2006) (collecting cases)) (second alteration in *Laydon*).

The Court has not identified any persuasive reason to allow jurisdictional discovery at this stage, and Plaintiffs have pointed to none. The allegations in the SAC are insufficient to support Plaintiffs' application. Among other cases, Plaintiffs cite *In re Magnetic Audiotape* in support of their application for jurisdictional discovery. Pls.' JDX Opp'n at 26 n.25. That case is distinguishable. There, the complaint included an allegation which specifically cited the minutes of a meeting—which was not mentioned in the opinion denying jurisdictional discovery—that an

executive of the dismissed parent company had been present at an in-person meeting at which a price-fixing conspiracy was allegedly discussed. *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d at 208. The defendant asserted that this was simply a courtesy meeting and that no price-fixing discussion in fact took place. *Id.* The Second Circuit vacated the district court's dismissal of that defendant, holding that the plaintiffs should at the very least have been allowed to further develop this point through discovery. *Id.*

Those facts are a far cry from the facts alleged in the SAC. The only allegations that link any of the Foreign Defendants to New York are that they transacted in Platinum and Palladium Investments traded on NYNEX and other U.S.-based exchanges and markets. Such allegations are too generalized, too devoid of meaningful context, and too remote from the unlawful conduct alleged in the SAC—*i.e.*, the Fixing—to allow Plaintiffs to embark on a jurisdictional mining expedition. *See, e.g.*, *In re Aluminum Warehousing Antitrust Litig.*, 90 F. Supp. 3d 219, 240 (S.D.N.Y. 2015) (declining application for jurisdiction discovery); *Laydon*, 2015 WL 1515358, at *7 (same). Accordingly, Plaintiffs' application for jurisdictional discovery is denied.

F. UBS's Motion to Dismiss for Failure to State a Claim

UBS moves to dismiss all claims against it pursuant to Rule 12(b)(6). UBS argues that it did not participate in the Fixing, was not a member of the Fixing, and played no role in the alleged price manipulation underlying Plaintiffs' Sherman Act, CEA, and unjust

enrichment claims. Mem. of Law in Supp. of Individual Mot. of UBS AG and UBS Securities LLC to Dismiss Pls.' Second Consol. Amend. Class Action Compl. ("UBS Br."), Dkt. No. 114, at 1.

The SAC does not allege that UBS participated in the Fixing and contains sparse allegations regarding UBS's presence in the platinum and palladium market. Plaintiffs allege that UBS AG is a Swiss corporation with its principal place of business in Zurich, Switzerland. SAC ¶ 41. Plaintiffs allege that UBS Securities LLC is a Delaware company, a wholly owned subsidiary of UBS AG, with its principal place of business in Stamford, Connecticut. SAC ¶ 42. As alleged in the SAC, "since its inception UBS has operated a large precious metals business;" UBS "holds itself out as 'a leading provider of physical and derivative precious metal products to a broad range of customers around the globe." SAC ¶ 43 (internal quotation marks and citations omitted). Plaintiffs also allege that "UBS executes client trades in physical platinum and palladium markets, on NYMEX, in platinum and palladium derivatives, and in shares of platinum and palladium ETFs." SAC ¶ 44. In addition, Plaintiffs allege that "UBS operates electronic platforms for trading platinum and palladium products" and "conducts proprietary trading in the platinum and palladium markets." SAC ¶ 44. Throughout the Class Period, Plaintiffs allege, "UBS was a market-making member of the LPPM, cleared platinum and palladium transactions, and entered directly into platinum and palladium spot, forward, option, and platinum and palladium ETF share transactions with members of the Class." SAC ¶ 44.

The SAC's allegations concerning UBS fail to state a claim for violation of § 1 of the Sherman Act. As discussed above, *supra* Part III.B(1), to overcome a motion to dismiss for failure to state a claim under § 1, a plaintiff must plead facts from which the court can infer the existence of an agreement in restraint of trade. In the absence of direct evidence of an agreement, Plaintiffs must plead sufficient facts showing parallel conduct as well as circumstantial evidence and plus factors from which the Court can infer the existence of a conspiracy. *Mayor & City Council of Baltimore*, 709 F.3d at 136 *see also Twombly*, 550 U.S. at 557; *Gelboim,* 823 F.3d at 781. The allegations against UBS fall far short of meeting this standard. UBS is not alleged to have been a member of the Fixing during the Class Period, or to have participated in the Fixing, either directly or indirectly. That it is an LPPM market maker does not constitute circumstantial evidence of UBS's misconduct. If it did, the remaining forty-seven LPPM members, which Plaintiffs did not name as defendants in the SAC could have been brought into this action.

In addition, Plaintiffs' assertion that UBS, along with the Fixing Members, allegedly offered below-market platinum and palladium spot quotes during the Class Period, suggests nothing more than parallel conduct. SAC ¶ 182. "While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establish[ing] agreement or itself constitut[ing] a Sherman Act offense.'" *Twombly*, 550 U.S. at 553 (internal quotation marks and citations omitted); *see also In re Elevator*

Antitrust Litig., 502 F.3d at 51 ("Similar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy.").

In opposition to UBS's motion, Plaintiffs argue that they have alleged sufficient plus factors and circumstantial evidence from which the Court can infer an agreement in restraint of trade. *See* Pls.' Opp'n to UBS's Mot. to Dismiss ("Pls.' UBS Opp'n"), Dkt. No. 127, at 1-5. Plaintiffs allege that FINMA found "serious misconduct" by UBS in precious metal trading," that "UBS has recently agreed to cooperate with the U.S. DOJ and CFTC's precious metals investigation in exchange for immunity from criminal charges, that the CFTC found that UBS "actively colluded to manipulate the price of Forex benchmarks," and that the CFTC imposed hefty fines on UBS and other market-participating banks for "actively collud[ing] to manipulate the price of Forex benchmarks." SAC ¶ 168. As already noted above, however, *see supra* Part III.B(1)(b), allegations that regulators have been investigating price manipulation in the precious commodities markets do not constitute circumstantial evidence of a conspiracy in the platinum and palladium market in particular. *See In re Gold*, 2016 WL 5794776, at *17 (concluding that ongoing government investigations into possible manipulation of precious metals benchmarks and findings of misconduct with respect to FX and LIBOR benchmarks do not constitute circumstantial evidence of a conspiracy in the defendants' market) (citations omitted); *In re Elevator Antitrust Litig.*, 502 F.3d at 52 (concluding that allegations of antitrust wrongdoing abroad, "absent any evidence of linkage between such

foreign conduct and conduct here—is merely to suggest (in defendants' words) that 'if it happened there, it could have happened here'"). In the absence of additional circumstantial evidence or plus factors, Plaintiffs' allegations do not plausibly support an inference that UBS was part of the alleged conspiracy. *See In re Gold*, 2016 WL 5794776, at *30 (dismissing Sherman Act claim against UBS where plaintiffs failed to allege that UBS participated in the gold benchmark price setting and the allegations in the complaint did not plausibly support an inference that a conspiracy existed); *see also In re Silver*, 2016 WL 5794777, at *26 (same).[26]

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[26] Plaintiffs cite *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 180 (2d Cir. 2015) and *In re Foreign Exch. Benchmark Rates*, 74 F. Supp. at 588-89, in support of their argument that the Court may rely on allegations concerning regulatory investigations as showing that UBS participated in the alleged manipulation of the platinum and palladium Fix Prices. *See* Pls.' UBS Opp'n at 7-8. Those cases are inapposite. For example, in *In re Foreign Exch. Benchmark Rates*, the court took "judicial notice of penalties and fines levied by regulators in three countries against six Defendants as a result of some of the investigations detailed in the U.S. Complaint and *for the very conduct alleged in the Complaint*." 74 F. Supp. 3d at 592 (emphasis added). On that basis, the court found that "[t]he penalties provide[d] non-speculative support for the inference of a conspiracy." *Id.* Plaintiffs' references to foreign and domestic investigations and settlements do not involve "the very same conduct conducted alleged in the" SAC. Plaintiffs' reliance on *Anderson News* is similarly unavailing. Pls.' UBS Opp'n at 9 (citing *Anderson News*, 680 F.3d at 184 ("The choice between . . . plausible inferences . . . is one for the factfinder.")). While Plaintiffs are correct that it is the factfinder's role to choose between plausible inferences, it nevertheless remains the Court's role to distinguish between plausible and conclusory allegations.

Plaintiffs' CEA claims against UBS fail for substantially the same reasons. Both CEA price manipulation and manipulative device claims require that Plaintiffs plausibly plead that (1) UBS "possessed an ability to influence market prices;" (2) "an artificial price existed;" (3) UBS "caused the artificial price; and" (4) UBS "specifically intended to cause the artificial price." *Amaranth III*, 730 F.3d at 173 (internal quotation marks and citations omitted). Here, Plaintiffs did not allege that UBS played a role in the conspiracy to manipulate and suppress the platinum and palladium Fix Prices. Therefore, Plaintiffs fail adequately to plead that UBS caused the artificial price, that it had the ability to suppress the platinum and palladium Fix Prices, or that UBS intended to cause the alleged price manipulation during the Class Period. Plaintiffs' conclusory allegations also fail to show that, beyond its status as an LPPM market maker, UBS played any role in the Fixing or associated itself with the Fixing Members. Therefore, Plaintiffs have also failed adequately to plead CEA aiding and abetting and principal-agent liability claims. *See, e.g.*, *id.* (stating that proof of unlawful intent is required for aiding and abetting liability under the CEA). Plaintiffs' unjust enrichment claim against UBS is likewise dismissed for the same reasons articulated above with respect to the Fixing Members. *See supra* Part III.D; *see also In re Gold*, 2016 WL 5794776, at *30 (dismissing CEA claim against UBS where Plaintiffs failed to allege that UBS caused the alleged price manipulation or participated in the gold benchmark price setting, and the allegations in the complaint did not plausibly support an inference that UBS was a member of the alleged conspiracy); *In re Silver*, 2016

WL 5794777, at *26 (same). Accordingly, UBS's motion to dismiss the SAC is granted, and Plaintiffs' claims against UBS are dismissed.

G. BASF Corp.'s Motion to Dismiss for Failure to State a Claim

In addition to moving to dismiss BASF Metals for lack of personal jurisdiction, BASF moves to dismiss all claims against BASF Corp. pursuant to Rule 12(b)(6). *See* BASF JDX Br. at 11-12.

Plaintiffs allege that BASF Corp. "is a Delaware-registered company," which is the "parent of BASF Catalysts LLC," and that BASF Catalysts LLC "holds itself out as the global leader in catalysts." SAC ¶ 30. Plaintiffs also allege that "BASF Precious Metals Services," an entity not named as a defendant in the SAC, "is a full service provider of precious metals and products and services that leverages BASF's unparalleled market insight and decades of precious metals sourcing, trading, and hedging expertise to create a tangible competitive advantage for BASF and BASF's industrial customers." SAC ¶ 30 (internal quotation marks, alterations, and citations omitted). In addition, according to Plaintiffs, "BASF Corp. serves as approved carrier, assayer, and refiner of platinum and palladium for CME Group in the U.S." and "provides CME Group approved platinum and palladium brands." SAC ¶ 30. "This branded physical platinum and palladium," Plaintiffs explain, "is deliverable against NYMEX platinum and palladium futures contracts." SAC ¶ 30. Plaintiffs further allege that BASF Metals, a defendant and one of the Fixing

Members, "is organizationally part of and subordinate to BASF Corp." SAC ¶ 31.

Much like Plaintiffs' allegations against UBS, the SAC's exiguous allegations against BASF Corp. do not meet even the most liberal pleading standard, let alone the heightened pleading standard applicable to their CEA claims. In response to BASF's motion to dismiss, Plaintiffs maintain that they "provided a meaningful connection between BASF Metals, the Fixing [M]ember, and BASF Corp.," and claim that "[i]t is immaterial that Plaintiffs do not allege that BASF Corp. (i) participated in the daily Fixing calls; (ii) served as a member of the LPPFC; or (iii) maintained a net short position during the Class Period." Pls.' JDX Opp'n at 26-27. According to Plaintiffs, their allegations that "BASF Corp. engaged in acts in furtherance of the conspiracy and shared common interest with BASF Metals and the other Defendants in achieving the conspiracy's aims" are "sufficient to defeat a Rule 12(b)(6) motion." They are not. Other than educating the Court about the BASF corporate structure, the SAC says nothing about BASF Corp.'s involvement—direct or indirect—in the alleged price manipulation, BASF Corp.'s role in executing the scheme, or BASF Corp.'s motive in artificially suppressing the Fix Price. Plaintiffs' vacuous claims to the contrary cannot salvage their failure adequately to plead any claim against BASF Corp. Accordingly, BASF's motion to dismiss the SAC against BASF Corp. is granted, and Plaintiffs' claims against BASF Corp. are dismissed.

H. Leave to Amend

Although Plaintiffs have already once amended their complaint in response to Defendants' motion to dismiss, in this circuit, "[i]t is the usual practice upon granting a motion to dismiss to allow leave to replead." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991); *see also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). Leave may be denied 'for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.'" *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)). The Court will, therefore, grant Plaintiffs leave to amend once again. However, Plaintiffs should not expect any additional opportunities to amend their complaint. *See In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 397 (S.D.N.Y. 2003) ("[W]here pleading deficiencies have been identified a number of times and not cured, there comes a point where enough is enough.") (citations omitted).

Any amended complaint must be filed no later than **May 2, 2017**. If Plaintiffs file an amended complaint, Defendants must answer or otherwise respond to the amended complaint no later than **June 5, 2017**. If Plaintiffs choose not to amend the SAC, the remaining Defendants must file an answer with respect to claims not dismissed in this opinion and order no later than **June 5, 2017**.

As noted above, *see supra* II.B, discovery in this action is stayed pursuant to the Court's April 21, 2015,

order. Dkt. No. 48. Discovery in this action will remain stayed until the deadline for Defendants to answer or otherwise respond. If Plaintiffs amend the SAC, and Defendants move to dismiss Plaintiffs' amended complaint, the parties may file a new motion for a stay of discovery no later than **June 5, 2017**.

If Plaintiffs do not amend the SAC, or if Defendants do not file a motion to stay by the deadlines specified above, the Court will schedule a Rule 16 conference promptly thereafter.

IV. CONCLUSION

For the foregoing reasons:

Defendants' motion to dismiss Plaintiffs' Sherman Act claim is GRANTED.

Defendants' motion to dismiss Plaintiffs' Commodities Exchange Act claims is GRANTED IN PART AND DENIED IN PART.

Defendants' motion to dismiss Plaintiffs' unjust enrichment claim is GRANTED.

Defendants' motion to strike portions of the SAC is DENIED.

ICBC's, BASF Metals', and the LPPFC's motions to dismiss for lack of personal jurisdiction are GRANTED.

ICBC's motion to dismiss for failure to state a claim is DENIED as moot.

Plaintiffs' application for jurisdictional discovery is DENIED.

BASF Corp.'s and UBS's motions to dismiss for failure to state a claim are GRANTED.

The Clerk of Court is directed to terminate the motions pending at Dkt. Nos. 113 and 115.

SO ORDERED.

Dated: March 28, 2017
New York, New York

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

APPENDIX D

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 12th day of April, two thousand twenty-three.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket Nos: 20-1458 (L)
20-1575 (XAP)
20-1611 (XAP)

[Filed April 12, 2023]

In Re Platinum and Palladium Antitrust Litigation	)

ORDER

Appellee, HSBC Bank USA, N.A., 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, Clerk
/s/ Catherine O'Hagan Wolfe [SEAL]