APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

16-2994-cv

[Filed September 6, 2017]

Simmtech Co., Ltd., Plaintiff-Appellant,

v.

Citibank, N.A., Citigroup Inc., Citibank Overseas Investment Corporation, Citicorp Holdings Inc., Citigroup Global Markets Inc., Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York (Forrest, *J.*).
ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Counsel of Record

Appearing for Appellant: Peter Melamed Kim & Bae, P.C. (Alan L. Poliner, on the brief), Fort Lee, NJ.

Appearing for Appellee: Daniel M. Perry, Milbank Tweed Hadley & McCloy LLP (Jed M. Schwartz, Taryn J. Gallup, Daniel B. Kaplan, on the brief), New York, NY.

Present JON O. NEWMAN, ROSEMARY S. POOLER, PETER W. HALL, Circuit Judges.

SUMMARY ORDER

Simmtech Co., Ltd., appeals from the August 3, 2016 opinion and order of the United States District Court for the Southern District of New York (Forrest, *J.*) dismissing its complaint against Citibank, N.A., Citigroup Inc., Citibank Overseas Investment Corporation, Citicorp Holdings, Inc., Citigroup Global Markets Inc. (together, "Citibank"). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

We affirm the district court's dismissal of Counts 1-3 of the Second Amended Complaint ("SAC") for failure to state a claim, Count 4 as time barred, and Counts 11-14 as barred by res judicata, primarily for the reasons set forth in the district court's thorough and well-reasoned opinion.[1] The district court correctly concluded that the Second Amended Complaint's claims of currency manipulation were previously raised in *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 599 (S.D.N.Y. 2015). It is a "well-established rule that a plaintiff cannot avoid the effects of res judicata by 'splitting' his claim into various suits, based on different legal theories (with different evidence 'necessary' to each suit)." *Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 110 (2d Cir. 2000). As master of its complaint, Simmtech did not have to split its claims to pursue a class action—it was free to bring both the currency manipulation claims and its other causes of action in a suit on its own behalf in the first instance.

With respect to Counts 1-3 of the SAC, the district court properly concluded that SAC failed to state a claim. While Simmtech attempts to portray itself as an unsophisticated consumer, the facts as pleaded in the SAC betray the reality that it had significant experience using financial instruments to hedge against fluctuations in the exchange rate between the U.S. dollar and Korean won, which was a large factor in its business.

To the extent that Simmtech relied on Citibank Korea's ("CKI") representation that the KIKOs were "zero-cost," the district court correctly concluded that such reliance was "patently

[1] Simmtech does not appeal from the district court's dismissal of Counts 5-10.

unreasonable" given Simmtech's experience utilizing financial instruments. To the extent that Simmtech relied on CKI's representation that the KIKOs were a "hedge," the district court correctly determined that this statement was not a misrepresentation, and that the KIKOs were in fact a hedge under certain exchange rates. To the extent that Simmtech understood CKI's representation to mean that the KIKOs were a hedge at all exchange rates, that would have been an absurd interpretation, and Simmtech's reliance upon it would not have been reasonable. To the extent that Simmtech relied on CKI's projections of the exchange rate, the district court correctly concluded that such reliance was not reasonable, because Simmtech understood the inherent volatility and unpredictability of exchange rates. Finally, the express terms of the KIKO agreements contained a non-reliance clause.

In sum, we are satisfied that the district court correctly determined that the KIKOs were inherently risky instruments and that Simmtech had not plausibly pled that it was not properly apprised of the risks.

With respect to Count 4, which sounds in negligence, the district court correctly applied New York's three-year statute of limitations. After carefully reviewing the record, we agree with the district court's determination that Simmtech failed to raise any sufficient basis for the application of equitable estoppel to toll the statute of limitations. Further, we see no "rare and exceptional circumstances," that would justify the application of equitable tolling here. *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 801 (2d Cir. 2014) (quoting *Phillips v. Generations Family Health Ctr.*, 723 F.3d 144, 150 (2d Cir. 2013)).

As we find that the district court properly dismissed on the grounds discussed above, we do not reach the remainder of Simmtech's arguments. Accordingly, the judgment of the district court hereby is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 13-cv-6768 (KBF)

[Filed August 3, 2016]

Simmtech Co., Ltd., Plaintiff,

v.

Citibank, N.A., Citigroup, Inc., Citibank Overseas Investment Corporation, Citicorp Holdings, and Citigroup Global Markets, Inc.., Defendants.

Filed 08/03/2016

Counsel of Record

Bong June Kim, Christine M. Bae, Kim & Bae, P.C., Carlton R. Asher, Jr., Law Offices of Carlton R. Asher, Jr., New York, NY, for Plaintiff.

Daniel Byron Kaplan, Daniel Mumford Perry, Jed Mastren Schwartz, Scott A. Edelman, Taryn Jean Gallup, Milbank, Tweed, Hadley & McCloy LLP, New York, NY, for Defendants.

OPINION & ORDER

KATHERINE B. FORREST, District Judge

Plaintiff Simmtech, a Korean company, brings this action against defendants (collectively, "Citigroup"), corporate entities comprising a large international banking institution, alleging, *inter alia*, that defendants used its Korean subsidiary ("CKI") to sell plaintiff a financial product that led to significant losses for plaintiff while enriching defendants.

Simmtech is an exporter who receives payment in U.S. Dollars and must convert those payments into Korean Won. In this action, Simmtech alleges that in the period leading up to 2006, it became concerned about the risk of the U.S. Dollar depreciating against the Korean Won. It alleges that defendants, acting through CKI, induced plaintiff to enter into risky options contracts that did not in fact provide an appropriate hedge against the risk of U.S. Dollar depreciation and instead exposed plaintiff to more risk. Plaintiff alleges that it sustained over $73 million dollars in losses between 2008 and 2011. In 2013, it brought three suits: one in Korea in the Seoul Central Court against CKI, one antitrust action in the Southern District of New York against Citigroup Inc., Citibank N.A. and Citibank Korea, Inc., and the instant action.

Before this Court is defendants' motion to dismiss on the grounds of res judicata and collateral estoppel, statute of limitations, and failure to state a claim. For the reasons set for the below, that motion is GRANTED.

I. BACKGROUND

A. *Factual Background*[1]

1. Decision to Enter Agreement

Simmtech Co., Ltd. ("Simmtech" or "plaintiff") is a Korean exporting company. (SAC ¶ 75, 360.) Simmtech receives payment for goods it sells in U.S. dollars (USD) and must then convert them to Korean won (KRW). (SAC ¶¶ 191-194; 361.) Embedded in its transactions are costs and the risk of loss due to fluctuations in the USD-KRW exchange rate. (*Id.*)

Simmtech had previously used currency forwards as a risk hedging strategy. (SAC ¶¶ 194, 374.) Under the forward contracts, Simmtech agreed to sell at a specific time in the future at a set rate (the "strike price") a set quantity of USD in exchange for a set quantity of KRW. (*Id.*) If the KRW appreciated against the USD, Simmtech would be protected against losses from exchanging less-valuable USD. (*Id.*) If the KRW depreciated against

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[1] In connection with this motion to dismiss, the Court accepts as true all material allegations of the complaint and construes all facts pled in favor of plaintiff. *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008).

the USD, Simmtech would lose out on the exchange premium above previously-agreed upon strike price. (*Id.*)

In 2004, the KRW began to steadily appreciate in value against the USD. (SAC ¶ 195.) A variety of new financial products became available to allow exporters to set a higher strike price than the forward contracts would allow. (*Id.*)

In January 2006, Simmtech representatives met with a manager in CKI's foreign exchange sales department; at the meeting, CKI discussed a financial product referred to as a "catapult," designed to limit the impact of KRW/USD volatility. Over the following the two months, CKI and Simmtech continued their discussions. (SAC ¶ 3.) CKI provided forecasts via reports and emails to Simmtech that the KRW would appreciate significantly against the USD in 2006. (SAC ¶¶ 393-401, 406-410, 665.) These forecasts continued throughout 2006 and 2007. (SAC ¶¶ 736-752.) Simmtech alleges that at least as of 2007, defendants did not actually believe that the KRW would appreciate against the USD for the next three years, but rather believed the opposite. (SAC ¶¶ 736-742.)

Simmtech alleges that it trusted CKI's forecasts because it was associated with a large bank, Citigroup. (SAC ¶¶ 9, 131, 135-137, 142-43.) It knew that CKI was a part of a group of related Citigroup affiliates, and many of the investor relations documents bore the Citigroup logo. (SAC

¶¶ 135-137, 142-43.) Simmtech therefore believed that it was communicating with "Citigroup." (SAC ¶ 307.) Moreover, Simmtech alleges that although its employees had limited command of English, a large percentage of the documents CKI sent to Simmtech were in English. (SAC ¶¶ 23, 216, 273, 274, 277-283, 291.)

2. Transaction Structure

In February 2006, Simmtech decided entered into a series of transactions with Citibank Korea Inc. ("CKI"), to purchase a product described to Simmtech as a currency "hedge." (SAC ¶¶3, 8, 51, 56, 80, 386.) The product at issue is referred to as a KIKO ("knock-in, knock-out"): it allowed Simmtech to purchase a set quantity of KRW on a fixed date for a fixed quantity of USD, provided that the KRW was more expensive than a certain strike price. (SAC ¶¶ 467, 483.) However, if the KRW became even more expensive, at a certain "knock-out price," Simmtech would lose its ability to exercise its option and to continue earning gains (and CKI, who was on the other end of the transaction, would cap further losses). (SAC ¶¶ 233, 485-86.) Simmtech's core allegation is that had it known that CKI stood to gain from the KIKO transactions, it would not have relied the aforementioned currency risk forecasts. (SAC ¶ 675.)

CKI and Simmtech entered into their first transaction on March 24, 2006, as evidenced by the FX Confirmation, a document that listed what options were being traded between the parties.

(SAC ¶ 703.) In total, the two entities entered into 15 FX Confirmations between March 2006 and April 2008. (SAC ¶¶ 704-05.)[2]

As a part of the KIKO agreement, Simmtech not only purchased a group of options from CKI, but it also sold another group of options to CKI. (SAC ¶ 218.) Therefore, CKI was also taking a position in the currency market by purchasing options from Simmtech. (SAC ¶¶ 496-98.) CKI had an option to exercise a call option in the event the KRW depreciated substantially against the USD, reaching a certain "knock-in" price. (SAC ¶¶ 496-98.) CKI's option did not have a "knock-out" price, which meant that its gains were not capped. (SAC ¶¶ 521-23.) The transaction was also structured such that the option held by CKI allowed CKI to purchase "twice as many US dollars as the number of US dollars that Simmtech's option allowed Simmtech to sell." (SAC ¶¶ 243 519.) Simmtech alleges that this "2:1 discrepancy" constituted significant risk that Simmtech would "encounter ... catastrophic loss." (SAC ¶¶ 243-45, 521, 524.)

The KIKO contracts that Simmtech purchased had three-year terms. (SAC ¶ 536.) According to Simmtech, it did not understand that the longer term meant greater exposure to currency market risk and was unsuitable for its three-month lag time between order and payment. (SAC ¶¶ 33-36,

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[2] The Confirmations all bore the "Citigroup" name and logo. (SAC ¶¶ 708-12.) Simmtech alleges that the FX Confirmations were drafted in New York. (SAC ¶ 713.)

229-31, 234, 538-39.) A three-year contract versus a shorter-term contract meant that Simmtech had higher probability of experiencing both: 1) a "knock out" event—i.e., the KRW appreciating very significantly against the USD—which would cause Simmtech to lose the benefits of its options, and 2) a "knock in" event—i.e., the KRW depreciating very significantly against the USD—which would cause CKI to gain the ability to exercise its option to buy USD from Simmtech. (SAC ¶¶ 229-31, 538-39.) A representative of CKI told a representative of Simmtech that a long term contract would allow Simmtech to have a higher strike price for its options and convinced Simmtech to choose the three-year contract. (SAC ¶¶ 546-48.)

Moreover, Simmtech alleges that defendants wanted CKI to sell KIKOs to Simmtech in order to generate profits for the parent company, Citibank N.A. (SAC ¶ 530-533.) Simmtech alleges that defendants and CKI knew that export companies like Simmtech would not understand the risks that the KIKO posed. (*Id.*) Simmtech alleges that it was an unsophisticated buyer of financial products and did not know KIKOs were in fact "highly complex, exotic, risky foreign exchange investment vehicles that exposed [it] to virtually unlimited liability." (*Id.* ¶ 10.)

Simmtech alleges that it did not know until February 2013 that defendants directly benefitted from the transactions at issue. (SAC ¶¶ 71, 455-56.) According to Simmtech, CKI also engaged in "reverse transactions" with Citibank N.A. whereby

CKI transferred any profits to Citibank N.A. (SAC ¶¶ 297, 509.) The Second Amended Complaint does not specify what precise "mirroring" transactions CKI and Citibank N.A. engaged in, but stated that Citibank N.A. "realized substantial profit" from these transactions. (SAC ¶¶ 65, 509.) This allegedly resulted in CKI not profiting from the transactions, but Citibank N.A. gaining "dollar for dollar" what Simmtech lost. (SAC ¶¶ 18-19, 53, 65.) Simmtech also alleges that defendants "designed" the KIKO products in New York. (SAC ¶ 269.)

Simmtech further alleges that the KIKOs were marketed as "zero cost" instruments. (SAC ¶¶ 20, 207-08, 253.) CKI told Simmtech that this zero-cost feature was because Simmtech's "nominal premium" for its options would be offset by CKI's "nominal premium" for its own options, but that, in reality, the premium that Simmtech paid were higher than those that CKI paid. (SAC ¶¶ 254-56.) Simmtech alleges that it was induced to enter into the KIKO agreement based on the understanding that they were on net zero-cost. (SAC ¶¶ 662-65.)

Finally, Simmtech alleges that it entered into the KIKO transactions on the understanding that it could terminate or restructure the agreements. (SAC ¶ 668.) Indeed, the February 2006 agreement provided that it would govern all future transactions. (SAC ¶¶ 467-70, 476.) It also provided that Simmtech could terminate or amend the individual transactions with CKI's consent. (SAC ¶ 471.) This was preceded by email communications between CKI and Simmtech in which CKI's representative stated that termination or restructuring could occur once one year out of the three-year contract elapsed—in particular, if the KRW appreciated, the strike price could be lowered, and if the KRW depreciated, the contract could be extended for another three years. (SAC ¶ 461.) Simmtech alleges that this constituted a side agreement. (SAC ¶ 575.)

Each FX Confirmation, however, contained a provision contradicting the termination / modification clause in the February 2006 Agreement. (SAC ¶¶ 577, 605.) The FX Confirmations stated the transaction was exclusively governed by the terms contained within itself and an ISDA (International Swaps and Derivatives Association, Inc.) agreement. (SAC ¶¶ 580-587.) Simmtech alleges that it did not know that the FX Confirmations had this effect because they were in English. (SAC ¶¶ 588.)

3. Alleged Currency Price Fixing

Simmtech also alleges that—independently of selling KIKOs—defendants also manipulated currency exchange rates during the relevant time period. (SAC ¶¶ 900-01.) According to Simmtech, defendants manipulated the WM/ Reuters benchmark rate, which is used by foreign exchange traders all around the world to price currency swaps such as the KIKO. (SAC ¶¶ 896, 905-06.) The manipulation affected the price of the KRW and was, of course, not disclosed to Simmtech. (SAC 901-02.) Simmtech alleges that if it had known that defendants were manipulating exchange rates, it would not have entered into the KIKO transaction. (SAC ¶¶ 904, 909.) However, the Second Amended Complaint does not state how the alleged manipulation affected the KRW valuation. In other words, it does not state whether the manipulation led to a higher or lower valuation of the KRW against the USD.

4. Plaintiff's Alleged Losses

By December 2008, Simmtech began to experience substantial losses on the KIKOs. (SAC ¶¶ 454, 819.)[3] Over the next 3 years, the KRW depreciated significantly against the dollar, and Simmtech's losses continued. (SAC ¶ 818.)

In December 2008, Simmtech entered into discussions with CKI to restructure the KIKO agreements. (SAC ¶ 820.) During these discussions (which allegedly occurred sixteen times between December 2008 and early 2009), CKI told Simmtech that it had to obtain authorization from the New York defendants. (SAC ¶¶ 821-22.) In early 2009, CKI informed Simmtech that restructuring was not possible. (SAC ¶¶ 823-24, 827.) Instead, CKI—allegedly working under defendants' instruction—told Simmtech that it could provide a loan for Simmtech to cover its losses. (SAC ¶¶ 828-29.) On March 25, 2009,

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[3] Simmtech alleges that at this point, it had reason to believe that CKI had not been acting as an advisor but rather had interests contrary to that of Simmtech. (SAC ¶ 454.)

Simmtech received a loan from CKI in the amount of KRW 42 billion, with an interest of approximately KRW 7 billion. (SAC ¶¶ 830-32.)

By March 2011, Simmtech had sustained over $73 million dollars in losses on the KIKOs. (SAC ¶¶ 834-35.) It had paid off the entirety of the losses as well as its loan. (SAC ¶¶ 835.)

5. Other Litigation

Simmtech has already sued CKI for misconduct in Korea regarding similar events. It filed suit against CKI on December 28, 2012 (the "Korean action"). (SAC ¶ 348.) On October 2, 2014, the Seoul Central District Court issued a written order entering judgment in favor of CKI on all of Simmtech's claims. After considering the parties' submissions, making factual findings, and reviewing the relevant law, the Korean trial court determined that the relief sought against CKI was "unfounded." (Kaplan Decl. Ex. 3, at 36.)[4] The court's decision was then affirmed on July 20, 2015 by the Seoul High Court. (Kaplan Decl., Ex. 6, at 7.)

Simmtech also initiated litigation against defendants and other banks in a separate action in the Southern District of New York on November 7,

[4] The Court takes judicial notice of the Korean judgment and its translation into English. *Negrin v. Kalina*, No. 09 CIV 6234, 2010 WL 2816809, at (S.D.N.Y. July 15, 2010). The SAC also expressly references the Korean Action; it is therefore incorporated by reference into the SAC. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002).

2013 (the "SDNY FX Action"). *See* Compl., *Simmtech Co., Ltd. V. Barclays Bank PLC et al.*, No. 13 Civ. 7953 (LGS) (S.D.N.Y. Nov. 7, 2013). The suit was brought as a class action. Simmtech alleged that defendants' manipulation of the WM/Reuters currency benchmark rates violated Section 1 of the Sherman Act and provisions of the New York General Business Law—in particular, the Donnelly Act, an antitrust statute, and the deceptive practices law. Simmtech alleges that defendants' actions deprived Simmtech and the class of the benefits of free, open, and unrestricted competition in the currency trading market and that it suffered injury to business or property as a result. *Id.* at ¶¶ 70-90.

On January 28, 2015, Simmtech's claims were dismissed. The court ruled that Simmtech's Sherman Act claims must be dismissed because the allegations implicated "exclusively foreign activity that does not sufficiently affect American commerce," and therefore is barred under the Foreign Trade Antitrust Improvements Act ("FTAIA"). *In re Foreign Exch. Benchmark Rates Antitrust* Litig., 74 F. Supp. 3d 581, 599 (S.D.N.Y. 2015), *appeal withdrawn* (Apr. 27, 2015). It also dismissed the claims pursuant to the Donnelly Act on the same grounds. Finally, the Court dismissed the claims brought under the New York deceptive practices law because the alleged deception of the customer did not occur in New York, a requirement under the statute. *Id.*, 74 F. Supp. 3d. at 601.

B. Procedural Background

This action was originally filed in state court on July 22, 2013. It was removed to this Court on September 25, 2013. (ECF No. 1.) Plaintiff filed an amended complaint on December 10, 2013 (ECF No. 23) and a Second Amended Complaint ("SAC") on November 21, 2014 (ECF No. 73).

The defendants in this action are CKI's corporate affiliates in the United States. In essence, the claims in the SAC are based on the theory that, in selling KIKOs to Simmtech, CKI acted as defendants' agent. In the SAC, Simmtech brings ten claims related to the KIKO transactions themselves, consisting of fraud in the inducement, fraud, negligence, breach of fiduciary duty, tortious interference, unjust enrichment, and rescission/disgorgement. Simmtech also brings four fraud-related claims related to the alleged FX manipulation.

Defendants filed the first Motion to Dismiss the SAC in December 2014 on the basis of forum non conveniens, res judicata and collateral estoppel, statute of limitations, and claim-related legal deficiencies. (ECF Nos. 74, 75.) This Court granted the Motion on solely forum non conveniens grounds on February 10, 2015. (ECF No. 79.) The Second Circuit reversed on February 23, 2016, (ECF No. 82-83), and defendants filed a renewed motion to dismiss on May 13, 2016. (ECF Nos. 95, 96.)

II. LEGAL STANDARDS

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must provide 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 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (quoting Twombly, 550 U.S. at 570). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In applying this standard, the Court accepts as true all well-pled factual allegations, but does not credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Id.* The Court will give "no effect to legal conclusions couched as factual allegations." *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) (citing Twombly, 550 U.S. at 555). A plaintiff may plead facts alleged upon information and belief "where the facts are peculiarly within the possession and control of the defendant." *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010). But, if the Court can infer no more than the mere possibility of misconduct from the factual averments—in other words, if the well-pled allegations of the complaint have not "nudged [plaintiff's] claims across the line from conceivable to plausible"—dismissal is appropriate. Twombly, 550 U.S. at 570; *Starr*, 592 F.3d at 321 (quoting *Iqbal*, 556 U.S. at 679).

A court may properly consider documents and contracts attached to or incorporated by reference in a complaint on a Rule 12(b)(6) motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). In resolving a challenge to standing under Rule 12(b)(1), courts may look outside the pleadings to "resolve factual disputes concerning the existence of jurisdiction." *United States v. Vazquez*, 145 F.3d 74, 80 (2d Cir. 1998); *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986).

III. DISCUSSION[5]

A. Claims 11-14 and Res Judicata (The SDNY FX Action)

Defendants move to dismiss the four fraud claims in Claims 11 through 14[6] in the SAC on the basis

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[5] The Court notes that no new arguments were brought in the second Motion to Dismiss that relate to this Court's Opinion here. In any event a motion to dismiss under Rule 12(c) would have also been proper. Plaintiff has also had the opportunity to be heard on all arguments.

[6] In addition to alleging fraud in relation to currency manipulation, Claims 11 through 14 also allege fraud in

that they are barred by the doctrine of res judicata in light of the dismissal of the SDNY FX Action. This Court agrees.

"Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Res judicata, or "claim preclusion," and the doctrine of collateral estoppel, or "issue preclusion," "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Id.* To assert the defense of res judicata, a defendant must prove "that (1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000).

Plaintiff makes three arguments against res judicata.[7] First, it asserts that the dismissal of the

relation to the reverse transaction between Citibank N.A. and CKI. The latter is not addressed in the SDNY FX Action and therefore not precluded on that basis. The Court discusses those portions of Claims 11 through 14 elsewhere in this Opinion.

[7] Plaintiff also notes that the SDNY FX Action was filed later than the instant action. This is of no consequence. The preclusive effect of res judicata stems from an earlier judgment, not from an earlier-filed suit. *See Gonzalez v. City of New York*, 396 F. Supp. 2d 411, 415 n.3 (S.D.N.Y. 2005)

SDNY FX Action was not on the merits. Second, it argues that the facts in the two cases are dissimilar. Third, it contends that because the SDNY FX Action was pled as a class action, it could have raise common law fraud claims that are raised in this case because the elements of fraud were not common among all class members. None of these arguments are persuasive.

First, the claims in the SDNY FX Action were adjudicated on their merits. Plaintiff's argument that dismissal based on the FTAIA is jurisdictional rather than a judgment on the merits is belied by Second Circuit caselaw. In *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014), the court held that "we have little difficulty concluding that the requirements of the FTAIA go to the merits of an antitrust claim rather than to subject matter jurisdiction. Nothing in the statute 'speak[s] in jurisdictional terms or refer [s] in any way to the jurisdiction of the district courts.' " (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006). The fact that the Court in the SDNY FX Action did not actually evaluate the merits of whether defendants engaged in the alleged practices is of no import. "It is a misconception of res judicata to assume that the doctrine does not come into operation if a court has not passed on the

("[F]or the purposes of res judicata, the effective date of a final judgment is the date of its rendition, without regard to the date of commencement of the action in which it is rendered or the action in which it is to be given effect." (quoting Restatement (Second) of Judgments § 14 & cmt.a (1982)).

'merits' in the sense of the ultimate substantive issues of a litigation." *Angel v. Bullington*, 330 U.S. 183, 190 (1947); *see also Federated Dep't Stores, Inc. v. Moite*, 452 U.S. 394, 399 n.3 (1981) ("[A] dismissal for failure to state a claim ... is a judgment on the merits." (internal quotation marks and citations omitted)).

Next, although the fraud claims here were not litigated in the SDNY FX Action, the claims in both actions involved the "same transaction or connected series of transactions at issue," and "the same evidence is needed to support" them. *Pike v. Freeman*, 266 F.3d 78, 91 (2d Cir. 2001). Plaintiff argues that the facts of the claims in this case and the facts of the SDNY FX Action were different because the SDNY FX Action focused on the facts relating to coordination between defendants and other banks to manipulate the market, whereas the facts of this case relate to the material omission—namely, that defendant was engaged in market manipulation—which, if made known to plaintiff, would have prevented it from entering into the KIKO transaction. The Court disagrees. As long as the later claim arose "out of the same factual grouping as an earlier litigated claim," it is barred even if it "is based on different legal theories or seeks dissimilar or additional relief." *LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester*, 40 F.3d 587, 591 (2d Cir. 1994) (alternations omitted); *see also* Teltronics, 762 F.2d at 193 ("New legal theories do not amount to new causes of action so as to defeat the application of the principle of res judicata.)

In this case, the claims relating to defendants' alleged exchange rate manipulation are based on the same "factual groupings" as the allegations in the SDNY FX Action. The common nucleus of fact is the alleged currency manipulation. From it, Simmtech has asserted varying legal theories: that it impeded Simmtech's participation in a competitive free market in violation of the Sherman Act, that it constituted deceptive business practices under the New York general business law, and that it constituted common-law fraud. The alleged manipulation is essential to all of these claims, and all the claims arise from the same "nucleus" of conduct that plaintiff complains of. *Cameron v. Church*, F. Supp. 2d 611, 620 (S.D.N.Y. 2003) (internal citation omitted). "[T]he facts essential to the barred second suit need not be the same as the facts that were necessary to the first suit. It is instead enough that the facts essential to the second were [already] present in the first." *Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 110–11 (2d Cir. 2000) (internal citations omitted).

Although plaintiff asserts additional facts in the instant case relating to its reliance on the material omission (that defendants were manipulating currency rates), the decision not to plead the additional facts in support of fraud claims in the SDNY FX Action does not absolve plaintiff from res judicata. A plaintiff cannot avoid res judicata by "splitting his claim into various suits, based on different legal theories (with different evidence 'necessary' to each suit." *Cameron v. Church*, F.

Supp. 2d 611, 620 (S.D.N.Y. 2003) (citing *Waldman v. Village of Kiryas Joel*, 207 F.3d 105, 110 (2d Cir. 2000)).

Finally, Simmtech cannot use the class action form as a tool to circumvent the doctrine of res judicata. Simmtech argues that res judicata does not apply because it could not have asserted the common law fraud claims—which involve proving reliance—in the SDNY FX Action, which was brought as a class action. Simmtech cites to the class action exception to claim splitting. However, that exception protects absent class members who had no choice in determining what claims the class action encompasses (and especially for an opt-out class) from being barred from asserting their individualized grievances which were not included in the class action. *See Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 256 F.R.D. 586, 597 (N.D. Ill. 2009) ("As Moore's [Federal Practice] explains, the special nature of class actions—representation in absentia and often without notice—requires this exception."). As the Seventh Circuit has explained, the exception to claim splitting applies where, "before a class *member* may be barred from pursuing an individual claim for damages, he must have been *notified* that he was required to adjudicate his damage claims as part of a prior class action suit." *Crowder v. Lash*, 687 F.2d 996, 1008 (7th Cir. 1982) (emphasis added). Moreover, the exception appears to apply only to class actions seeking only declaratory or injunctive relief. *See In re Vitamin C. Antitrust Litig.*, 279 F.R.D. 90, 114-15 (E.D.N.Y. 2012) (collecting cases). The SDNY FX

Action sought not only declaratory relief but also money damages.

It makes little sense to apply the exception here because the concerns of representation in abstentia and lack of notice do not exist for Simmtech. *See Collins v. E.I. DuPont de Nemours & Co.*, 34 F.3d 172, 175 (3d Cir. 1994) (holding that earlier class action has preclusive effect on all plaintiffs in new action who were named plaintiffs in earlier suit except one, who was only a putative class member). Simmtech was the lead plaintiff of a putative class; it was the one who decided to bring the SDNY FX Action as a class action. It chose what claims to pursue in that action. It does not face the dilemma that class members would face in choosing on the one hand whether to opt-out of a class suit and the declaratory or injunctive relief that it may provide and on the other hand whether to stay in the class but be barred from a later suit seeking damages. *See Vitamin C Litig.*, 279 FRD at 115, n.6. Moreover, the class action exception to claim splitting does not provide a loophole for lead plaintiffs to use the class action mechanism as a means of evading the rule against claim splitting, as plaintiff is attempting here.

The bottom line is that plaintiff cannot slice and dice its theories into separate lawsuits. The doctrine of res judicata applies "not only as to what was pleaded, but also as to what could have been pleaded." *In re Teltronics Servs. Inc.*, 762 F.2d 195, 193 (2d Cir. 1985). The claims in this action could have been pleaded in the SDNY FX Action.

Plaintiff chose not to do so, and cannot have a second bite at the apple.

B. Claims 1-10 (The Korean Action)

The October 2, 2014 judgment of the Seoul Central District Court—later affirmed by the Seoul High court—also bars Simmtech from relief on its remaining claims in this action. Before turning to the specific doctrines of res judicata and collateral estoppel as they apply in this action, this Court addresses several threshold issues.

First, the judgment of the Seoul High court should be recognized as a matter of comity. *See Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) ("Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy"). Plaintiff does not challenge this proposition.

Second, this Court applies federal res judicata and collateral estoppel rules to the remaining claims. Plaintiff appears to argue that the preclusive rules of Korea apply. (*See* Pl.'s Mem. of L. at 8, n.10). However, the Court notes that the prevailing practice appears to be "follow[ing] domestic rules of preclusion, whether they apply those of the applicable federal or state court." *Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 32 (D.D.C. 2007); *Alfadda v. Fenn*, 966 F. Supp. 1317, 1329 (S.D.N.Y. 1997), *aff'd,* 159 F.3d 41 (2d

Cir. 1998) ("[T]he Court concludes that a federal court should normally apply either federal or state law, depending on the nature of the claim, to determine the preclusive effect of a foreign country judgment"); Restatement (Third) of Foreign Relations Law § 481 (1987) (stating that although "a judgment of a foreign country ordinarily has no greater effect in the United States than in the country where the judgment was rendered ... no rule prevents a court in the United States from giving greater preclusive effect to a judgment of a foreign state than would be given in the courts of that state."). The Court agrees with the court in Alfadda that "[r]egardless of the mechanisms utilized by a foreign court to achieve its objectives [regarding preclusion], a United States court should not be confined to using the foreign court's mechanisms or else forgo achieving its own objectives." Alfadda, 966 F. Supp. at 1329.

Because defendant Citigroup Overseas Investment Corporation's is a federally-chartered Edge Act Corporation and the transaction at issue is of an international nature, there is federal jurisdiction over this case and this Court applies federal res judicata and collateral estoppel rules. *See* 12 U.S.C. § 623 ("[A]ll suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of ... international or foreign financial operations ... shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits."); *Am. Int'l*

Grp., Inc. v. Bank of Am. Corp., 712 F.3d 775, 784 (2d Cir. 2013) ("[Section] 632 provides that in order for its grant of federal jurisdiction and removability to apply, the suit must have a federally chartered corporation as a party, and the suit must arise out of an offshore banking or financial transaction of that federally chartered corporation.")

1. Res Judicata

Plaintiff's claims 1 through 10 all involve the same nucleus of fact adjudicated in the Korean Action and is therefore barred by the doctrine of res judicata. As discussed above, the three elements of a res judicata defense are that 1) the previous action involved adjudication on the merits, 2) the previous action involved the same parties or those in privity with them, and 3) the claims asserted in the later action were or could have been raised in the prior action. *See Monahan*, 214 F.3d at 285; *Saud v. Bank of New York*, 929 F.2d 916, 919 (2d Cir. 1991).

Plaintiff does not contest element one or the notion that Claims 1 through 10 in this action rested on the same essential facts arising from the same transaction or series of transactions as the Korean action. *See Teltronics*, 762 F.2d at 193. Instead, plaintiff's main argument against res judicata is that it was unaware that it should sue defendants, and instead sued CKI. There are two reasons why this argument is unavailing.

First, the face of plaintiff's SAC contains a litany of allegations regarding its knowledge as of 2006 to 2008 that Citigroup—the American corporation—was the entity with which Simmtech was doing business. For example, a significant portion of the allegations are with regards to the fact that marketing materials and other documents provided to Simmtech in advance of their decision to enter into the KIKO transactions bore the Citigroup—not CKI—name and logo and were written entirely in English. (*See* SAC ¶¶ 23, 216, 273, 274, 277-283, 291.) Indeed, the SAC states that "at all relevant times, many if not all of CKIs advertising and marketing materials prominently bore the label 'Citigroup' ... In advertisements and other marketing materials, CKI advertised itself as 'Citigroup,' 'Citibank,' or merely 'Citi,' and freely used Citi logos such as the Citigroup umbrella." (SAC ¶ 131.) Simmtech also alleges that the branding of documents and other factors compelled Simmtech to believe that the individuals it met with in initial discussions about the KIKO January and February 2006 worked for Citigroup and that there was no distinction between CKI and Citigroup. (SAC ¶¶ 383-401.) Therefore, as of the very commencement of the relationship between Simmtech and CKI, Simmtech had reason to know of the involvement of Citigroup's American affiliates. In fact, Simmtech alleges that its reliance on CKI's advice as of January or February 2006 was based on its status as a part of Citigroup. (*See* SAC ¶¶ 9, 131, 135-137, 142-43, 383-401.) Because Simmtech believed that it was doing business with Citigroup since the beginning of the transaction at issue, (*see*. SAC ¶ 307), it is difficult to fathom how plaintiff did not know it should sue Citigroup when it initiated the Korean Action in December 2012.[8]

Second, the question of whether a plaintiff was aware of the identity of defendants in the later action is not a relevant one for the purposes of res judicata. With respect to the identity of parties, all that res judicata requires is that the parties are in privity with each other. *Monahan*, 214 F.3d at 285. To the extent that plaintiff suggests CKI was not in privity with defendants, that position is untenable. Plaintiff repeatedly asserts in the SAC the close relationship between CKI and defendants, and its claims in this case depend on the core, repeated assertion that CKI was an agent of defendants. (SAC ¶¶ 511, 579, 775-76, 781.) Plaintiff also stated in the SAC that as of 2010, CKI was wholly owned by Citigroup Korea, Inc., which in turn had "more than" 99.9% of its ownership held by defendant Citigroup Overseas Investment Corp. (SAC ¶ 82.) Moreover, plaintiff acknowledges that "at all relevant times, Defendants owned and controlled CKI as an agent." (SAC ¶ 83.) Thus, according to the very facts alleged by plaintiff, defendants were in privity with CKI. *See. Farber v. Goldman Sachs Grp., Inc.*, 10 Civ. 873 (BSJ), 2011 WL 666396 (S.D.N.Y. Feb. 16, 2011) (holding that a parent

[8] Even if the fact of Citigroup's involvement was somehow truly newly discovered, this does not preclude the application of res judicata because there is no allegation that Citigroup's role was somehow "fraudulently concealed" or "could not have been discovered with due diligence." *Saud v. Bank of New York*, 929 F.2d 916, 920 (2d Cir. 1991).

company of a wholly-owned subsidiary was in privity with its subsidiary for the purposes of res judicata); *see. also Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 346 (2d Cir. 1995) ("For purposes of claim preclusion, the requisite privity must be found in the substantial identity of the incentives of the earlier party with those of the party against whom res judicata is asserted.").

Similarly, there is no requirement under res judicata that the court rendering the earlier judgment must have had jurisdiction over the party asserting res judicata in the later action.[9] Plaintiff's argument on this basis is incorrect and without basis.[10] Claims 1 through 10 are therefore barred by the doctrine of res judicata, as they have already been resolved against plaintiffs in the Korean Action.

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[9] Indeed, one can imagine that a prior judgment issued by a federal court with diversity jurisdiction over plaintiff and defendant 1 would have preclusive effect over a later suit in state court in State A involving the same plaintiff and defendant 2 (who is in privity with defendant 1), both of whom are citizens State A. In that scenario, the federal court issuing the prior judgment would not have jurisdiction over defendant 2 because of lack of diversity; nevertheless, there is no exception to res judicata under this scenario.

[10] Plaintiff's citation to *A.P. Moller-Maersk A/s v. Ocean Express Miami* is wholly inapposite and, in fact, misleading. The Ocean Express court's discussion of jurisdiction pertained to the United States' decision to recognize a foreign decision, which was characterized as "permissive, unlike the mandatory doctrines of res judicata, collateral estoppel and full faith and credit." 550 F. Supp. 2d 454, 470 (S.D.N.Y. 2008) (emphasis added).

2. Collateral Estoppel

In addition to res judicata, or "claim preclusion," the doctrine of collateral estoppel, or issue preclusion, also prohibits plaintiff from asserting Claims 1 to 7, Claims 9 to 10, and the non-FX manipulation claims in Claim 11-14. "Four elements must be met for collateral estoppel to apply: (1) the issues of both proceedings must be identical, (2) the relevant issues were actually litigated and decided in the prior proceeding, (3) there must have been 'full and fair opportunity' for the litigation of the issues in the prior proceeding, and (4) the issues were necessary to support a valid and final judgment on the merits." Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995). Plaintiff has failed to meaningfully oppose defendants' collateral estoppel arguments. The Court has reviewed the Korean judgment and the claims asserted in this action, and find that each of Claims 1 through 10, except Claim 8, contain issues that were decided against plaintiff in the Korean Action. In particular, the Korean judgment rejected the notion that CKI made any material omissions upon which plaintiff relied, and found that CKI had "provided sufficient explanation to a degree that could be understood by [Simmtech] including the structure and details of the FX option Contracts in this case, concrete information on profits that can be reaped and the risk that may be triggered by exchange rate fluctuation or concrete details on loss that can be sustained from the respective FX Option Contracts in this case." (Kaplan Decl. Ex. 3, at 32-

33.) It also found that "it cannot be seen that [Simmtech's] having entered into the above respective FX option contracts caused excessive risk to be generated." (*Id.* at 22.) The Court also found that the decision to enter into the longer, three-year contract term was based "a management decision on the part of [Simmtech]." (*Id.* at 30.) Finally, the court found that "with exchange rates being the most difficult economic indicators to forecast, to perceive that [CKI] was behooved to suggest concrete exchange rate fluctuation forecasts would be overkill." Rather, Simmtech "appears to have had knowledge that prospects of the market taking a turn largely contrary to expert forecasts was high." (*Id.* at 34-35.) The Korean court's findings on these issues preclude the successful assertion of each claim under claims 1 – 7, 9, and 10.

As for Claim 8, this Court has not identified any issues relating to tortious interference in the Korean judgment. In fact, there appears to be no discussion of the alleged interference with the February 2006 contract terms regarding termination and restructuring. This claim is therefore not precluded by collateral estoppel.

3. Statute of Limitations

Claims 1 through 10 are also barred by the statute of limitations. A foreign plaintiff's claims must be timely under both New York law and the law of the jurisdiction where the action accrued. N.Y. C.P.L.R.

§ 202.[11] As to plaintiff's tort claims, because the injury alleged in this complaint is purely economic, the causes of action accrued "where plaintiff resides and sustains the economic impact of the loss"; in this case, the causes of action accrued in Korea. *Global Fin. Corp. v. Triar Corp.*, 93 N.Y.2d 525, 529 (1999).

a) Korean Statutes of Limitations

Claims 1 through 10 are barred by the Korean statute of limitations and therefore must be dismissed. Under Korean law, the statute of limitations for tort damages are the earlier of three years from when plaintiff became aware of his or her damages and the identity of the tortfeasor, and ten years from the occurrence of the tortious act. (Lee Decl., ECF No. 48, ¶ 10.) *See. also Woori Bank v. Citigroup Glob. Markets, Inc.,* 609 Fed.Appx. 696, 697 (2d Cir. 2015) ("The right to claim for damages resulting from an unlawful act shall lapse by prescription if not exercised within three years commencing from the date on which the injured party or his agent by law becomes aware of such damage and of the identity of the person who caused it.")

Plaintiff has acknowledged that it knew of mounting economic damages as early as December

[11] For Edge Act cases, the court follows the substantive laws of the state in which it sits—in this case, *New York. Loreley Financing (Jersey) No. 3 Ltd. V. Wells Fargo Securities LLC.*, 797 F.3d 160, 169-70 (2d Cir. 2015).

2008. (SAC ¶ 454.) In addition, plaintiff alleges that it believed the advice regarding the currency market and the suitability of the KIKO transaction came from Citigroup; in fact, plaintiff alleges that it believed it was doing business with Citigroup. (*See* SAC ¶¶ 23, 216, 273, 274, 277-283, 291, 307.) Moreover, as to the tortious interference with contract claim, the SAC alleges that in early 2009, CKI told Simmtech that Citigroup would not give permission for restructuring based on the 2006 agreement. (SAC ¶¶ 821-22, 823-24, 827.) There is no question, therefore, that based on the face of the SAC, plaintiff knew of the identity of the tortfeasor as early as 2006 but not later than early 2009. Plaintiff's argument that it did not know "the twisted intermingling of affiliates" does not save its argument, since it acknowledged in its SAC that it received investor relations documents bearing contact information for Citigroup defendants. (SAC ¶ 137.)[12] This is not a situation where plaintiff would have been relying on "only presumptions and guesses," but rather on the basis of its personal knowledge and documents bearing defendants' logo and name that were in plaintiff's possession. *Woori Bank*, 609 Fed.Appx. at 700. Plaintiffs thus had

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[12] The Court notes that the allegations regarding Citibank N.A. entering into "reverse transactions" with CKI do not affect the fact that plaintiff knew of its damages and of defendants' identities in 2006-2009. By virtue of being on the other side of the KIKO transaction as CKI, plaintiff must have known that CKI and its affiliates had the opposite gain / loss profile as plaintiff. That plaintiff did not know CKI transferred its position to a Citigroup affiliate does not affect the time that the actions in this case accrued.

three years from either 2006 or 2009 to bring suit on the tort claims. Because plaintiff did not bring this action until 2013, which at least four to seven years after the actions accrued, the claims are untimely and must be dismissed.

As to plaintiff's contract claim for unjust enrichment and recission, Korean law requires that for such claims, the allegedly defrauded party must first seek recission of the contract within three years of plaintiff's becoming aware of the grounds for recission. (Lee Decl. ¶ 14.) Plaintiff does not dispute that it became aware of fraudulent conduct not later than December 2008. Therefore, the last to file date for this claim was December 2011. Plaintiff did not seek recission until 2013. Therefore, the unjust enrichment and recission claims are untimely.

b) New York Statutes of Limitations

Because plaintiff's claims 1-10 are time-barred under Korean law, they are also time-barred under New York law pursuant to CLPR § 202. Moreover, New York's statutes of limitations on also bar plaintiff's tortious interference claim and negligence claim.[13]

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[13] As to the breach of fiduciary duty claims, plaintiff alleges that they are borne of fraud and are thus subject to a six-year statute of limitations. The Court need not address that issue here, as the claims are dismissed for other reasons stated in this opinion.

A tortious interference claim has a three-year limitations period in New York and accrues no later than the date on which plaintiff allegedly sustains an injury, not the date of discovery. N.Y. C.P.L.R. § 214(4); *S.A.R.L. Galerie Enrico Navarra v. Marlborough Gallery, Inc.*, No. 10 Civ. 7547 KMW, 2013 WL 1234937, at (S.D.N.Y. Mar. 26, 2013). Plaintiff's only argument against the time bar is that it continued to suffer losses as a result of the alleged tortious interference from December 2008 until March 2011. But the fact that the effects of the alleged wrongdoing continued until 2011 does not give plaintiff license to sit on its rights. The action accrued "when the claim becomes enforceable," which in this case occurred in 2008. *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 (1993). Moreover, tortious interference is not a "continuing tort" and does not allow plaintiff to extend the statute of limitations on that basis. *Bloomfield Bldg. Wreckers, Inc. v. City of Troy*, 41 N.Y.2d 1102 (1977).

Negligence claims under New York law are also subject to a three-year statute of limitations. N.Y.C.P.L.R § 214(4)-(5). Plaintiff has pled this claim as a negligence claim, separate from its fraud claims. Therefore, it is subject to the three-year limitations period and not the six-year period for fraud. If plaintiff is alleging fraud in this claim, it is duplicative of plaintiffs other fraud claims and should be dismissed on that basis. *See AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 11 N.Y.3d 146, 154-55 (2008).

Plaintiff has not sufficiently demonstrated that the statute of limitations for these claims are tolled for equitable estoppel. "Equitable estoppel is appropriate where the plaintiff is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant." *Putter v. N. Shore Univ. Hosp.*, 7 N.Y.3d 548, 552-53 (2006). Here, there is no allegation that defendants "somehow kept [plaintiff] from timely bringing suit." *Id.* In fact, plaintiff has alleged that it knew that defendants were the ones who refused to allow restructuring under the February 2006 contract. (SAC ¶ 824.) It also alleged that it knew that it was doing business with Citigroup from the beginning and that it began to sustain losses on the KIKOs in 2008. There is therefore no basis for application of equitable estoppel here: not only did defendants did not keep plaintiff from timely bringing suit, but plaintiffs also had no reason to not bring these actions within the three-year limitations period. Therefore, plaintiff's claims for negligence and tortious interference, which were brought five years later in 2013, are untimely.

C. Merits of Individual Claims

The Court now turns to plaintiff's individual claims and finds that the vast majority of them fail to state a claim and must be dismissed.

1. Fraud Claims

The bulk of plaintiffs causes of action sound in fraud. "The elements of fraud are a misrepresentation or a material omission of fact which was known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or omission, and injury." *VisionChina Media Inc. v. Shareholder Representative Servs., LLC*, 967 N.Y.S.2d 338, 343 (App. Div. 2013).[14] The Court addresses the "original" fraud claims (claims 1 through 3) and the "new" fraud claims relating to the FX rate manipulation (claims 11-14) separately. These claims are facially deficient based on the allegations in the SAC.

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[14] Plaintiff also pleads conspiracy to commit fraud and aiding and abetting fraud. "To plead a valid cause of action for conspiracy under New York law, a plaintiff must allege the primary tort" and additional elements regarding the conspiracy. *De Sole v. Knoedler Gallery*, LLC, 974 F. Supp. 2d 274, 315 (S.D.N.Y. 2013). The primary elements of the fraud claim must also be alleged for an aiding and abetting claim. *Weshnak v. Bank of Am., N.A.*, 451 Fed.Appx. 61, 61–62 (2d Cir. 2012) ("Under New York law, the elements of aiding and abetting a breach of fiduciary duty, aiding and abetting a conversion, and aiding and abetting a fraud are substantially similar. The claims require the existence of a primary violation, actual knowledge of the violation on the part of the aider and abettor, and substantial assistance.")

a) "Original" Fraud Claims (Claims 1-3)

The original fraud claims fail because plaintiff has failed to plead misrepresentation and justifiable reliance. First, the SAC fails to specify any particular statements as fraudulent misrepresentations. Second, in its briefing,[15] the three statements identified fail to meet the elements of fraud: 1) that the KIKOs were "zero cost," 2) that they were "hedges," and 3) that the USD would depreciate relative to the KRW.

First, the statement that the KIKOs were "hedges" is not a cognizable misrepresentation. There is no question that at certain KRW/USD exchange rate levels, the KIKOs could provide a hedge. Plaintiff does not allege that defendants represented that KIKOs would be a hedge at all exchange rates; indeed, such an allegation would directly contradict the very premise of the KIKO. Furthermore, at no time did plaintiff allege that it did not understand the concept of a knock-out price or a knock-in price. Rather, it claimed that it did not understand that the relative consequences of the transaction for itself versus for CKI. That KIKOs may have been too aggressive a product or otherwise unsuitable for plaintiff s particular position does not mean that the "hedge" descriptor is a misrepresentation.

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[15] It is long settled that a party may not—by way of a brief—amend a pleading. *See, e.g.*, *Pollio v. MF Global, Ltd.*, 608 F. Supp. 2d 564, 568 (S.D.N.Y. 2009); *Fadem v. Ford Motor Co.*, 352 F.Supp.2d 501, 516 (S.D.N.Y. 2005).

Moreover, any statements by CKI or defendants that the USD would depreciate relative to the KRW cannot be the basis for a fraud claim. "Mere predictions ... may not form the basis for an action for fraud when both parties have equal access to the facts, or when it is obvious that the declarant is using a subjective standard. In these situations, reliance on the opinions is deemed unreasonable." *Kimmell v. Schaefer*, 637 N.Y.S.2d 147, 149 (App. Div.), aff'd, 89 N.Y.2d 257 (1996) (internal citations and alterations omitted). As an exporter, plaintiff knew that exchange rates are volatile. (SAC ¶¶ 193-94.) That is the precise reason why plaintiff sought these currency hedging instruments in the first place. Indeed, it is plainly not plausible that plaintiff actually believed that defendants accurately predicted the future direction of the exchange rate; if this were so, plaintiff would not have entered into the KIKO—it would have taken a straight bet in the exchange rate. Moreover, plaintiff knew that despite whatever forecasts defendants made regarding the exchange rate, CKI was taking the *opposite side* of plaintiff's position in every option in the KIKO transaction. Therefore, plaintiff cannot possibly assert that it justifiably relied on the representation as to what direction the exchange rate would go.

Plaintiff also cannot plead justifiable reliance on the "zero cost" representation. Essentially, plaintiff is alleging that it justifiably relied on defendants' promise that the KIKOs were free. This is patently unreasonable, as plaintiff, which had previously purchased currency forwards at cost—could not have justifiably believed that defendants' offering would miraculously be free. Furthermore, because the FX confirmations listed the premiums for each option, plaintiff could have easily deduced that the transaction was not actually cost-free. There is no justifiable reliance "where a plaintiff does not bother to consult a source of information that might have revealed the alleged fraud." *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1049 (2015).

Finally, the fact that the FX Confirmations contained an express "Non-Reliance" clause cannot not be ignored merely because the Confirmation was in English. The clause states that each party "has made its own independent decision to enter into the Transaction and as to whether the Transaction is appropriate or proper for it based on its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into the Transaction." (Kaplan Decl. Ex. 1, at 12.) Plaintiff has only asserted that its employees' command of English was limited, but makes no allegation that the Simmtech employees who signed the Confirmations did not understand this specific clause. In all events, a total "inability to understand the English language, without more, is insufficient to avoid this general rule" that the signer of an agreement is "deemed to be conclusively bound by its terms." *Maines Paper & Food Serv. Inc. v. Adel*, 681 N.Y.S.2d 390, 391 (App. Div. 1998); *see also*

Holcomb v. TWR Express, Inc., 782 N.Y.S.2d 840, 841 (App. Div. 2004). Moreover, plaintiff's suggestion that Simmtech employees' limitations in the English language should excuse them from being bound by the FX Confirmation is belied by the SAC's allegations that they relied on English language market forecasts. (SAC ¶¶ 392-402.) For these reasons, Simmtech has failed to state a claim as to fraud in Claims 1 to 3.

b) "New" Fraud Claims (Claims 11-14)

Plaintiff's fraud claims based on the alleged exchange rate manipulation and the "reverse" transactions between CKI and Citibank N.A. also fail.

First, there is no basis for reliance or loss causation resulting from any alleged exchange rate manipulation because, according to the CFTC's findings that plaintiff cites in the SAC, the manipulation occurred from 2009 to 2012, after plaintiff purchased the KIKO products. (See CFTC Order, Kaplan Decl. Ex. 8, at 2.)[16] Although plaintiff alleges that defendants had been manipulating rates since 2004 "based on the CFTC's conclusions," it does not provide any explanation for the discrepancy between the "2004" assertion and the CFTC Order itself. Therefore, plaintiff has failed to plead any possibility that it

[16] The SDNY FX Complaint, strangely enough, does not make any allegations as to when the alleged manipulation took place. (*See* Kaplan Decl. Ex. 6.)

would not have entered into the KIKO transactions had it known of defendants' alleged conduct in exchange rate manipulation.

Second, plaintiff has failed to allege that the fact that Citibank N.A. was the entity with which CKI made its reverse transactions was a material omission. There is no question that by entering into the KIKO transaction with CKI, Simmtech knew that CKI was taking the opposite bet that Simmtech was taking. Simmtech also alleges if CKI had entered into reverse transactions with a non-Citi entity, that would not have been material to its decision to enter the KIKO transaction. (SAC ¶ 1054.) Nowhere in the SAC has Simmtech explained why the fact of CKI's transferring of its profits to a parent company versus another entity would make any difference to Simmtech. (SAC ¶ 297.) The claim is simply implausible and does not meet the *Twombly / Iqbal* standard for surviving a motion to dismiss.

2. Breach of Fiduciary Duty Claims (Claims 5-7)

Plaintiff's claims for breach of fiduciary duty fail because it has failed to establish that defendants were fiduciaries.[17] "A fiduciary relationship arises

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[17] As discussed above, to sufficiently plead an aiding and abetting or conspiracy claim, plaintiff must sufficiently allege the primary elements of a tort such as breach of fiduciary duty in addition to additional elements of conspiracy and aiding and abetting. *De Sole*, 974 F. Supp. 2d at 315; *Weshnak*, 451 Fed.Appx. at 61–62.

between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Roni LLC v. Arfa*, 18 N.Y.3d 846, 848 (2011). Plaintiff's entire basis for the allegation that defendants are fiduciaries is that defendants acted through an agency relationship with CKI, which was a fiduciary. But the facts alleged in the complaint make it objectively implausible that CKI had a fiduciary relationship with Simmtech. To start, as discussed above, it is undisputed that CKI took the opposite side of every trade that Simmtech made in the KIKOs. This makes it mathematically impossible for CKI and Simmtech could have had common interests and that CKI was "act[ing] for ... the benefit" of Simmtech. *Roni*, 18 N.Y.3d at 848; *see also Boccardi Capital Sys., Inc. v. D.E. Shaw Laminar Portfolios, L.L.C.*, 355 Fed.Appx. 516, 519 (2d Cir. 2009). Similarly, the fact that the alleged term in the 2006 Agreement provided that Simmtech could try to obtain consent from CKI to amend the terms of the options if market conditions changed suggests the opposite of a fiduciary relationship. (*See* SAC ¶ 471).

Moreover, plaintiff's theory of fiduciary duty appears to be based solely on the fact that CKI provided financial advice. (SAC if 1017.) But mere dispensing of economic forecasts and opinions relating to the markets is insufficient to show that CKI "agreed to act for or give advice for the benefit of CKI." Boccardi, 355 Fed.Appx. at 519.

Finally, as discussed above, the FX Confirmations contained express disavowals of fiduciary duty. The statement is short and direct: "Status of parties. The other party is not acting as a fiduciary for or an advisor to it in respect of the Transaction." (Kaplan Decl. Ex. 1, at 13.) Plaintiff's suggestion as to Simmtech employees' less-than-perfect command of English alone does not excuse it from being bound by these terms. *See Maines Paper & Food Serv. Inc. v. Adel*, 681 N.Y.S.2d 390, 391 (App. Div. 1998); *see also Holcomb v. TWR Express, Inc.*, 782 N.Y.S.2d 840, 841 (App. Div. 2004).

3. Unjust Enrichment (Claim 9)

To assert an action for unjust enrichment, plaintiff must show "(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.,* 373 F.3d 296, 306 (2d Cir. 2004). Plaintiff has not done so here.

Plaintiff's basis for asserting unjust enrichment is that Citibank N.A. was enriched by entering into reverse payment transactions with CKI. However, there is no plausible allegation that the fact of the reverse payment transaction was what enriched Citibank N.A. at plaintiff s expense. As discussed above, any moves in the KRW / USD market at plaintiff s expense would have benefitted CKI. That CKI transferred any gains to Citibank N.A. is not in itself a basis for "unjustly enriching" Citibank

N.A. Plaintiff has in essence failed to allege why the profit-sweeping setup between CKI and Citibank N.A. is of any consequence. Indeed, plaintiff has acknowledged that if CKI had entered into reverse transactions with a non-Citi entity, that would not have been material to its decision to enter the KIKO transaction. (SAC ¶ 1054.)

4. Rescission (Claim 10)

Plaintiff alleges that the KIKOs are unenforceable because: 1) the contracts are "unconscionable," 2) plaintiffs should be protected by the doctrine of unilateral mistake, and 3) that defendants breached the implied covenant of good faith and fair dealing. These claims are pled as threadbare recitations—plaintiff does no more than make the above proclamations—and are wholly unsupported by factual basis. *See Port Dock*, 507 F.3d at 121. For example, plaintiff fails to allege what aspect of the KIKO transaction—or indeed which particular contract or contracts—is unconscionable. Plaintiff does not provide any plausible theory or such a cause of action (for example, the SAC does not state whether the claim is on the basis of procedural or substantive unconscionability or both). Similarly, plaintiff has not provided any basis for unilateral mistake; the SAC does not even explain what the alleged mistake is. Finally, the naked assertion that defendants breached the covenant of good faith and fair dealing is similarly unsupported by any factual basis. Therefore, this claim cannot meet the *Twombly / Iqbal* pleading standard and must be dismissed.

IV. CONCLUSION

Having found multiple bases for dismissal, the Court need not reach the remaining bases advanced by defendants. For the reasons set forth above, this action is dismissed. The Clerk of Court is directed to terminate the motion at ECF No. 95 and to terminate this action.

SO ORDERED

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Case Nos. 13 Civ. 7789(LGS), 13 Civ. 7953(LGS), 14 Civ. 1364(LGS)

[Filed Jan. 28, 2015]

In re FOREIGN EXCHANGE BENCHMARK RATES ANTITRUST LITIGATION.
Simmtech Co., Ltd., Plaintiff,

v.

Barclays Bank PLC, et al., Defendants.

Oddvar Larsen, Plaintiff,

v.

Barclays Bank PLC, et al., Defendants.

Filed Jan. 28, 2015

Counsel of Record

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Newport News Employees' Retirement Fund, pro se.

David Harold Braff, Jeffrey T. Scott, Kathleen Suzanne McArthur, Matthew Francis Sullivan, Qian Allison Gao, Yvonne Susan Quinn, Sullivan and Cromwell, LLP, Andrew Arthur Ruffino, Covington & Burling LLP, David George

Januszewski, Elai E. Katz, Herbert Scott Washer, Jason Michael Hall, Cahill Gordon & Reindel LLP, Joseph Serino, Jr., Eric Foster Leon, Kirkland & Ellis LLP, Peter Edward Greene, Boris Bershteyn, Peter S. Julian, Skadden, Arps, Slate, Meagher & Flom LLP, Arthur J. Burke, Greg Donald Andres, Joel Murray Cohen, Lewis Charles Shioleno, Davis Polk & Wardwell, Peter Sullivan, Rachel Alden Lavery, Gibson, Dunn & Crutcher, LLP, Elizabeth Vicens, Thomas J. Moloney, Victor L. Hou, Cleary Gottlieb, Jonathan M. Moses, Keia Denise Cole, Wachtell, Lipton, Rosen & Katz, Adam Selim Hakki, Richard Franklin Schwed, Jeffrey Jason Resetarits, Shearman & Sterling LLP, New York, NY, Alan M. Wiseman, Andrew D. Lazerow, Covington & Burling, L.L.P., George Patrick Montgomery, Robert S. Khuzami, Kirkland & Ellis LLP, Joshua H. Soven, Melanie L. Katsur, Gibson, Dunn & Crutcher LLP, George S Cary, Leah Brannon, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC, Patrick Joseph Fitzgerald, Skadden, Arps, Slate, Meagher & Flom, LLP, Chicago, IL, Joel Steven Sanders, Gibson, Dunn & Crutcher, LLP, San Francisco, CA, for Defendants.

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

The three cases before the Court allege a long-running conspiracy among the world's largest banks to manipulate the benchmark rates in one of the world's largest markets, the foreign exchange

("FX") market. The primary action is on behalf of U.S.-based Plaintiffs, who, in a Consolidated Amended Class Action Complaint (the "U.S. Complaint"), allege that the twelve defendant banks[1] violated Sections 1 and 3 of the Sherman Act (the "Consolidated Action").

The two remaining actions involve Plaintiffs who are not in the United States (the "Foreign Plaintiffs" and the "Foreign Actions"). Plaintiff Simmtech Co., Ltd., filed a Complaint (the "Simmtech Complaint") on behalf of those who traded foreign currency in South Korea with seven of the Defendants. Plaintiff Oddvar Larsen's Amended Complaint (the "Larsen Complaint")

[1] Defendants are Bank of America Corporation and Bank of America, N.A. (collectively, "Bank of America"); Barclays Bank PLC and Barclays Capital Inc. (collectively, "Barclays"); BNP Paribas Group and BNP Paribas North America Inc. (collectively, "BNP Paribas"); Citigroup, Inc. and Citibank, N.A. (collectively, "Citigroup"); Credit Suisse Group AG and Credit Suisse Securities (USA) LLC (collectively, "Credit Suisse"); Deutsche Bank AG ("Deutsche Bank"); Goldman Sachs Group, Inc. and Goldman, Sachs & Co. (collectively, "Goldman Sachs"); HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc. and HSBC Bank USA, N.A. (collectively, "HSBC"); JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (collectively, "JPMorgan"); Morgan Stanley; Royal Bank of Scotland Group PLC and RBS Securities, Inc. (collectively, "RBS"); and UBS AG and UBS Securities LLC (collectively, "UBS"). On January 5, 2015, Plaintiffs and JPMorgan filed a letter stating that they have reached a settlement in principle. Because the settlement is yet to be approved, JPMorgan remains a party to this motion and this action.

alleges similar claims on behalf of those who traded foreign currency with the Defendants in Norway (collectively, the "Foreign Complaints"). Defendants move to dismiss all three actions. For the reasons stated below, the motions are denied as to the Consolidated Action and granted as to the Foreign Actions.

I. BACKGROUND

The following recitation is based on the allegations in the complaints in the three actions, documents incorporated by reference or integral to those complaints and judicially noticed facts. The allegations are assumed to be true solely for purposes of the present motions to test the sufficiency of the three complaints.

A. The Consolidated Action

Unless otherwise indicated, all quotations in this Section are taken from the U.S. Complaint.

1. The Parties

The U.S. Complaint alleges that the FX market is the largest and most actively traded financial market in the world, with global trades averaging $5.3 trillion per day. Defendants are the dominant dealers and horizontal competitors in the global FX market, with 84.25% of all trades in the market in 2013. Plaintiffs are twelve entities, including a municipal board, investment funds, pension plans and hedge funds[2] that engaged in FX spot and outright forward transactions[3] with one or more Defendants between January 1, 2003, and March 31, 2014.

The U.S. Complaint also asserts claims on behalf of a putative class of:

> [a]ll persons who, between January 1, 2003 and the present ..., entered into an FX instrument directly with a Defendant at or around the time of the fixing of the WM/Reuters Closing Spot Rates [i.e., the Fix, *see infra*], or who entered into an FX Instrument directly with a Defendant settled in whole or in part on the basis of WM/Reuters Closing Spot Rates, where such persons were either domiciled in the United

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[2] Plaintiffs are Aureus Currency Fund, L.P.; City of Philadelphia, Board of Pensions and Retirement; Employees' Retirement System of the Government of the Virgin Islands ("Virgin Islands Retirement System"); Employees' Retirement System of Puerto Rico Electric Power Authority ("Puerto Rico Retirement System"); Fresno County Employees' Retirement Association; Haverhill Retirement System; Oklahoma Firefighters Pension and Retirement System; State–Boston Retirement System; Syena Global Emerging Markets Fund, LP; Tiberius OC Fund, Ltd.; Value Recovery Fund L.L.C.; and United Food and Commercial Workers Union and Participating Food Industry Employers Tri–State Pension Fund.

[3] According to the U.S. Complaint, spot transactions are conducted pursuant to agreements to exchange currency at "an agreed-on exchange rate on a value date within two bank business days." Outright forwards are similar transactions that take place more than two business days out.

> States or its territories or, if domiciled outside the United States or its territories, transacted in the United States or its territories.

2. The FX Market and Trading at "The Fix"

Currencies are traded in pairs where the seller sells one currency and buys another, and the price of one currency is expressed in relation to another currency as a ratio. To initiate an FX transaction, typically, a customer contacts a dealer bank for a quote for the relevant currency and quantity. The dealer provides a "bid," which is the price at which the dealer is willing to buy the currency. The dealer also quotes an "ask," the price at which the dealer is willing to sell the currency. The difference between the bid and ask is called the "bid-ask spread," which is the basis of the dealer's compensation. While "dealers are incentivized to quote wider bid-ask spreads," competition among them "narrows bid-ask spreads." Currencies are commonly traded at published exchange rates called "fixing rates." The WM/Reuters published rates "are the most important fixing rates in the FX markets" and "the primary benchmark for currency trading globally." The U.S. Complaint alleges that Plaintiffs traded in the FX market with Defendants at, or at rates determined in large part by, "the most widely used WM/Reuters" fixing rates, the WM/Reuters Closing Spot Rates (the "Fix").

For the most widely traded currencies, the Fix is determined by the median price of actual FX transactions in the 30 seconds before and after 4 p.m. London time (the "Fixing Window"). The WM Company extracts actual market prices from electronic communications networks that Defendants use to execute orders for FX instruments, such as Reuters, Currenex and EBS. The process is automated and anonymous. Trading at the Fix is popular for many reasons, including reduced tracking error and the perception of "universality and independence from any specific dealer."

Plaintiffs bought FX instruments from Defendants priced at or by the Fix. The U.S. Complaint identifies the Defendants with whom each Plaintiff traded FX instruments, and alleges that each Plaintiff traded FX instruments with at least one Defendant and each Defendant traded with at least one Plaintiff.

3. Manipulation of the Fix

The core allegation in the U.S. Complaint is that "Defendants executed concerted trading strategies designed to manipulate, and which actually did manipulate" the Fix, allowing Defendants "to reap supra-competitive profits at the expense of Plaintiffs and the Class." The U.S. Complaint alleges that "Defendants' top-level traders used electronic communications to meet and conspire for over a decade" using a variety of electronic fora, including chat rooms, instant messages and email.

The chat rooms, with evocative names such as "The Cartel," "The Bandits' Club," "The Mafia" and "One Team, One Dream," were the primary sites of conspiracy. The Cartel, for example, counted traders from at least four Defendants among its members, including Citigroup, Barclays, UBS and JPMorgan, whose chief currency dealer in London ran the chat room. The Cartel's members "exchanged information on customer orders and agreed to trading strategies to manipulate" the Fix. After manipulating the Fix, members allegedly "would send written slaps on the back for a job well done."

In The Cartel and in other chat rooms, FX traders from the various Defendant banks shared inappropriate "market-sensitive information with rivals" including "information about pricing," their customers' orders and their net trading positions in advance of 4 p.m. London time. The traders discussed the "types and volume of trades they planned to place." Using this nonpublic information, and "by agreeing in chat rooms and instant messages" to employ collusive trading strategies, Defendants moved the Fix in the direction they desired and thereby fixed the prices of the FX instruments.

The U.S. Complaint alleges that the risk of unilaterally manipulating the Fix was too high, and that "[n]o one defendant could accomplish systematic and continuing manipulation of" the Fix without coordination with its rivals.

FX traders typically used one of three strategies to "fix the Fix":

- "Front running" or "trading ahead"—Defendants traded their own proprietary positions before executing their customers' large market-moving trades so that Defendants could take positions to their benefit and "to the detriment of the customer."

• "Banging the close"—Because the calculation of the Fix does not weight the trades by amount traded and takes into account only the number of trades in any currency pair, traders conspired to impact the Fix by engaging in more trades. To this end, traders broke up larger orders into smaller amounts and concentrated the trades in the minutes before and after the Fixing Window to affect the Fix.

• "Painting the screen"—Defendants' traders placed fake orders with other Defendants to create the illusion of trading activity in a given direction to move rates prior to the Fixing Window. These trades were not actually executed.

The U.S. Complaint alleges that the chat room exchanges were not isolated instances of inter-firm communications by rogue employees, but common practice in a "market controlled by a small and close-knit group of traders" whose "social and professional ties in the FX trading community create[d] incentives and opportunities for collusion."

4. Global Investigations, Penalties and Terminations

On June 12, 2013, Bloomberg reported that FX traders at "some of the world's largest banks" had been "rigging" the Fix by "pushing through trades before and during the 60–second window when the benchmarks are set." During the fall of 2013 and the first quarter of 2014, the media reported global investigations into the manipulation of the Fix, including in the United States, United Kingdom, European Union, Switzerland, Germany, Hong Kong, Singapore, Australia and New Zealand. The U.S. Complaint identifies the investigating bodies, the Defendants involved in the investigation and explains the nature of the investigations.

Some of these investigations have resulted in settlements and penalties.[4] On November 12, 2014,

[4] Federal Rule of Evidence 201 authorizes a court to "judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned ... at any stage in the proceeding," including on a motion to dismiss. *See, e.g., Kramer v. Time Warner Inc.,* 937 F.2d 767, 773 (2d Cir.1991) ("Of course," a district court "may ... consider matters of which judicial notice may be taken under Fed.R.Evid. 201" on a motion to dismiss.). Accordingly, the Court takes judicial notice of the settlements and penalties involving Defendants based on various government agencies' press releases and the underlying orders "whose accuracy cannot reasonably be questioned" and which resulted from the investigations described in the U.S. Complaint. *See, e.g., McLoughlin v. People's United Bank, Inc.,* 586 F.Supp.2d 70, 73 (D.Conn.2008) ("The Court may take judicial notice of the press releases of government agencies" (citing *In re Zyprexa Products Liability Litigation,*

the Commodity Trading Futures Commission levied civil penalties of $310 million each on Citibank and JPMorgan, $290 million each on RBS and UBS, and $275 million on HSBC; the Officer of the Comptroller of Currency assessed civil penalties of $250 million against Bank of America, and $350 million each against Citibank and JPMorgan; the UK–Financial Conduct Authority fined Citibank $358 million, HSBC $343 million,

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549 F.Supp.2d 496, 501 (E.D.N.Y.2008))); *Mitchell v. Home,* 377 F.Supp.2d 361, 367 n. 1 (S.D.N.Y.2005) ("The press release [from the New York Attorney General] may be considered on this motion to dismiss because ... this Court may take judicial notice of it as a matter of public record"). *But see United States v. Int'l Longshoremen's Ass'n,* 518 F.Supp.2d 422, 456 (E.D.N.Y.2007) ("The scant Second Circuit authority on this point suggests that press releases are not subject to judicial notice."). The Commodity Trading Futures Commission's press release and the underlying orders announcing the civil penalties are available at http://www.cftc.gov/PressRoom/PressReleases/pr7056–14 (the orders are available under the heading "Related Links"). The Officer of the Comptroller of Currency's press release and the underlying orders announcing assessing civil penalties are available at http://www.occ. gov/news–issuances/news–releases/2014/nr–occ–2014–157.html (the orders are available under the heading "Related Links"). The UK Financial Conduct Authority's press release and the underlying Final Notices announcing fines are available at http://www.fca.org.uk/news/fca-fines-five-banks-for-fx-failings (the Final Notices are available under the heading "Notes for Editors"). FINMA's press release and the underlying report are available at http://www.finma.ch/e/aktuell/pages/mm–ubs–devisenhandel–20141112.aspx (the final report is available as a related link). All websites cited in this footnote were last visited on January 27, 2015.

JPMorgan $352 million, RBS $344 million and UBS $371 million; and Switzerland's FINMA fined UBS (approximately) $139 million. Other investigations remain ongoing.

Since the investigations began, all 12 Defendants have terminated, suspended or overseen the departure of over 30 long-time and key employees associated with their FX operations. The U.S. Complaint identifies each such employee, his position and former employer. Further, nine Defendants—Barclays, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, JPMorgan, Morgan Stanley, RBS and UBS—have banned their traders from multibank chat rooms.

B. The Foreign Actions

The Foreign Complaints allege essentially the same facts as the U.S. Complaint.

The Simmtech Complaint brings suit against seven of the twelve Defendants in the Consolidated Action—Barclays, Citibank, [5] Credit Suisse, Deutsche Bank, JPMorgan, RBS and UBS—and alleges a shorter class period than the U.S. Complaint and the Larsen Complaint. The Simmtech Complaint is brought on behalf of Simmtech Co., Ltd. and a putative class of

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[5] The Simmtech Complaint also includes the Korean Citibank subsidiary as a defendant.

> [a]ll natural and legal persons who traded foreign currency directly with a Defendant in the Republic of Korea between August 1, 2005 and the present which transaction was settled on the basis of WM/Reuters Rates.

The Larsen Complaint brings suit against all of the Defendants in the U.S. Complaint for the same class period as the U.S. Complaint, on behalf of Oddvar Larsen and a putative class of:

> [a]ll persons or entities located in Norway who engaged in foreign currency transactions directly with a Defendant during the period January 1, 2003 through the present ..., which actions were settled on the basis of WM/Reuters rates. Excluded from the Class are all United States persons and transactions occurring in the United States or its territories.

The Foreign Complaints allege violations of Section 1 of the Sherman Act, New York's Donnelly Act and New York's Consumer Protection Act.[6]

II. LEGAL STANDARD

On a motion to dismiss, the Court accepts as true all well-pleaded factual allegations and draws all

[6] The Larsen Complaint also alleges unjust enrichment, but counsel for Larsen explicitly withdrew that claim at oral argument. Accordingly, Larsen's unjust enrichment claim is dismissed as withdrawn.

reasonable inferences in favor of the non-moving party. *See Keiler v. Harlequin Enters. Ltd.,* 751 F.3d 64, 68 (2d Cir. 2014). In determining the adequacy of a complaint, courts "may consider any written instrument attached to the complaint as an exhibit or incorporated in the complaint by reference, as well as documents upon which the complaint relies and which are integral to the complaint." *Subaru Distribs. Corp. v. Subaru of Am., Inc.,* 425 F.3d 119, 122 (2d Cir.2005). Courts may also take judicial notice of matters of public record when considering motions to dismiss. *See Kramer v. Time Warner Inc.,* 937 F.2d 767, 773 (2d Cir.1991).

To withstand dismissal, a pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937. Rule 8 of the Federal Rules of Civil Procedure "requires factual allegations that are sufficient to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Anderson News, L.L.C. v. Am. Media, Inc.,* 680 F.3d 162, 182 (2d Cir.2012) (quoting *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955).

III. DISCUSSION

Section 1 of the Sherman Act ("Section 1") bans "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Because two of the Plaintiffs in the Consolidated Action are domiciled in United States territories,[7] Plaintiffs also include a claim under Section 3 of the Act, which extends the protections of Section 1 to "any Territory of the United States or ... the District of Columbia" and is substantively the same as Section 1. *Id.* § 3. Accordingly, the discussion below, like the parties' arguments in their submissions, is confined to Section 1. All Plaintiffs assert their claims under Section 4 of the Clayton Act, which establishes a private right of action to enforce Section 1 to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," and provides for treble money damages and "the cost of the suit." *Id.* § 15.

A. The Consolidated Action

Defendants argue that the U.S. Complaint should be dismissed on four principal grounds: (1) it does not adequately allege an agreement in restraint of trade as required by *Twombly;* (2) it does not

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[7] Plaintiff Virgin Islands Retirement System is domiciled in the Virgin Islands and Plaintiff Puerto Rico Retirement System is domiciled in Puerto Rico.

adequately allege harm to competition; (3) it does not adequately allege an injury in fact; and (4) it fails to establish antitrust injury. [8] These arguments are rejected.

1. Sufficiency of Conspiracy Allegations

The U.S. Complaint sufficiently alleges the existence of a conspiracy in violation of Section 1 of the Sherman Act, and that all Defendants were part of that conspiracy.

The central inquiry in a Section 1 case is whether the alleged conduct "stem[s] 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, 74 S.Ct. 257, 98 L.Ed. 273 (1954)). To sustain a Section 1 conspiracy claim, a complaint must allege facts that show "joint or concerted action" that "reveal[s] 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.' " *Anderson News,* 680 F.3d at 183 (quoting *Monsanto Co. v. Spray–Rite Service Corp.,* 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)). Rule 8 does not "require heightened fact pleading of specifics, but only

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[8] Defendants initially advanced a fifth argument: Plaintiffs' claims that arose from conduct that occurred more than four years prior to the first-filed complaint were time-barred. At oral argument and at the Court's request, Defendants withdrew this argument without prejudice to renewal at a later stage.

enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955. Absent a specific allegation of fraud, antitrust claims such as the one in the present case must satisfy Rule 8 and not the heightened pleading standard of Rule 9(b). *See, e.g., Twombly,* 550 U.S. at 569 n. 14, 127 S.Ct. 1955; *Anderson News,* 680 F.3d at 182 (applying Rule 8 to a Section 1 claim); *Starr,* 592 F.3d at 321 (same); *In re Elevator Antitrust Litig.,* 502 F.3d 47, 49–50 (2d Cir.2007) (same).

In particular, a complaint must "allege enough facts to support the inference that a conspiracy actually existed" by either direct or circumstantial evidence, because "in many antitrust cases" a " 'smoking gun' can be hard to come by, especially at the pleading stage." *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.,* 709 F.3d 129, 136 (2d Cir.2013). Because "conspiracies are rarely evidenced by explicit agreements," they "nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators." *Anderson News,* 680 F.3d at 183 (internal quotation marks omitted).

"Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact [s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly,* 550 U.S. at 556, 127 S.Ct. 1955. Further, "to present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action," as required at later stages such as summary judgment. *Anderson News,* 680 F.3d at 184. Thus, "a well-pleaded complaint may proceed even if ... actual proof of those facts is improbable, and ... a recovery is very remote and unlikely" as long as the complaint presents *a* plausible interpretation of wrongdoing. *Twombly,* 550 U.S. at 556, 127 S.Ct. 1955 (internal quotation marks omitted); *accord Anderson News,* 680 F.3d at 185.

Here, the U.S. Complaint meets the plausibility requirement. The U.S. Complaint offers direct evidence akin to the "recorded phone call in which two competitors agreed to fix prices at a certain level"—the Second Circuit's paradigmatic example of direct proof of a Section 1 violation. *Mayor & City Council of Baltimore,* 709 F.3d at 136. The U.S. Complaint alleges that FX traders from the Defendant banks used various electronic communications platforms, particularly chat rooms and instant messaging, to share "market-sensitive information with rivals" including price-information, customer information and their net trading positions before the setting of the Fix. Based on this nonpublic information and "by agreeing in chat rooms and instant messages" to use collusive trading strategies across banks, Defendants manipulated the Fix to the price that they desired. The U.S. Complaint contains specific allegations of chat room participants congratulating each other about the manipulation of the Fix. Even the names the FX traders gave their chatrooms—such as "The Cartel," "The Bandits' Club" and "The Mafia"—support the inference that the chat rooms were used for anticompetitive purposes.

Because the U.S. Complaint specifically alleges that (i) the Fix is a "pricing mechanism" and the "primary benchmark for currency trading globally"; (ii) the Fix is the price at which Plaintiffs bought FX instruments from Defendants; and (iii) Defendants manipulated this price, the U.S. Complaint plausibly alleges a price-fixing conspiracy among horizontal competitors, a per se violation of the antitrust laws. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,* 551 U.S. 877, 886, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007) ("Restraints that are per se unlawful include horizontal agreements among competitors to fix prices[.]").

Defendants' argument that the existence of pending government investigations cannot support the inference of an unlawful conspiracy is unavailing. Certainly, the mere fact of pending investigations without more only raises, but does not respond to, the question of whether concerted wrongdoing occurred because the outcome and scope of such investigations are "pure speculation." *Hinds Cnty., Miss. v. Wachovia Bank N.A.,* 620 F.Supp.2d 499, 514 (S.D.N.Y.2009) (internal citation omitted). Here, however, both the scope and outcome of at least some investigations is known. The Court has taken 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. The penalties provide non-speculative support for the inference of a conspiracy.[9] In addition, while the fact of a single investigation may not be probative, the detailed allegations of investigations into the manipulation of FX benchmark rates by regulators in seemingly every significant financial market in the world lends some credence to the conspiracy allegation. *Cf. Starr,* 592 F.3d at 325 (considering DOJ's "two new investigations into whether defendants engaged in collusion and price fixing" in evaluating the plausibility of a complaint alleging a Section 1 violation). Most important, the reported investigations and their outcomes merely buttress the critical allegations in the U.S. Complaint that detail how the benchmark was manipulated through actions that were inherently collusive and

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[9] To the extent Defendants rely on cases from this District that dismissed antitrust actions in the LIBOR context despite the pendency and resolution of various government investigations, their reliance is misplaced because those cases were dismissed on antitrust injury grounds rather than plausibility grounds. *See In re LIBOR–Based Financial Instruments Antitrust Litig.,* 935 F.Supp.2d 666, 739 (S.D.N.Y.2013) (finding dismissal warranted "although we are fully cognizant of the settlements that several of the defendants here have entered into with government regulators" because plaintiffs failed to meet the requirements of antitrust injury); *Laydon v. Mizuho Bank, Ltd.,* No. 12 Civ. 3419, 2014 WL 1280464, at *10–12 (S.D.N.Y. Mar. 28, 2014) (finding dismissal warranted on antitrust injury grounds, but also stating, without any discussion of investigations or settlements and in dicta, that complaint did not sufficiently allege restraint of trade).

conspiratorial—the sharing of proprietary pricing information and agreeing on trading strategies to manipulate the Fix.

Further, the U.S. Complaint cites various alleged facts from the investigations that, apart from the fact of the investigations, support the inference of a conspiracy, including:

- A JPMorgan trader wrote messages to his counterparts at other firms that included details of his trading positions, according to a transcript provided by RBS to the UK Financial Conduct Authority.

- Traders from Citigroup and RBS among others were present at a meeting in which they told the Bank of England that they shared information about customer orders before currency benchmarks were set.

- A Deutsche Bank trader boasted in an electronic chat about his ability to influence the currency markets, according to a transcript obtained by the DOJ and FBI.

Defendants contend that the U.S. Complaint lumps all Defendants together and pleads insufficient facts to connect each Defendant to the conspiracy. Consequently, they argue, the U.S. Complaint makes generalized and conclusory allegations about Defendants like the dismissed complaints in *Twombly* and *In re Elevator Antitrust Litigation.*

Defendants' reading of the U.S. Complaint is unpersuasive—the U.S. Complaint offers neither "a list of theoretical possibilities, which one could postulate without knowing any facts whatever," *In re Elevator Antitrust Litig.,* 502 F.3d at 50–51, nor "conclusory allegation[s] of agreement at some unidentified point" based on mere parallel conduct, *Twombly,* 550 U.S. at 557, 127 S.Ct. 1955. Rather, in addition to describing the alleged conspiracy in great detail, the U.S. Complaint makes specific allegations regarding each Defendant. With regard to several, the U.S. Complaint alleges that they enjoyed a significant share of the global FX market; that their traders were members of The Cartel chat room; after public announcements of the investigations and allegations of a horizontal price-fixing conspiracy, they banned their traders from participating in multi-bank chat rooms; they fired or otherwise oversaw the departure of one or more of their key FX traders during the six-month period when global investigations were widely reported; and they were not only subject to, but have been penalized as a result of, regulatory investigations. The U.S. Complaint also specifies other damning details and anecdotes such as those in the bullet points above. Even as to Defendants about whom the allegations are least substantial, the U.S. Complaint includes allegations of market share, being subject to investigations and the termination or departure of key figures in their global FX business in the wake of the investigations. Reading the U.S. Complaint in its entirety and drawing all inferences in Plaintiffs' favor, it can be inferred that even those Defendants whose traders the U.S. Complaint does not name as part of any chat room were nevertheless implicated, based on Defendants' own actions such as banning multibank chat rooms and firing or suspending FX traders.

Defendants' argument that the U.S. Complaint should be dismissed because it fails to allege which Defendants conspired when and about which exact currency pairs is also unavailing. *Twombly* suggests in dicta that a complaint that specifies "no specific time, place, or person involved in the alleged conspiracies" may violate the notice requirement of Rule 8. 550 U.S. at 565 n. 10, 127 S.Ct. 1955; *see Starr,* 592 F.3d at 325 (characterizing the discussion of date and time specifications in *Twombly* as dicta). The U.S. Complaint, however, is not akin to the conclusory hypothetical complaint *Twombly* posits, and more than satisfies the notice requirements of Rule 8. The U.S. Complaint plausibly alleges that FX traders at Defendant banks (the persons) entered into conspiratorial agreements via electronic fora (the place) in advance of 4 p.m. London time (a specific time) repeatedly during the class period. It puts Defendants on notice of the nature of the agreements at issue, as well as how those agreements came into being. Even in the absence of specific allegations identifying the exact date and time of each illicit act, the U.S. Complaint gives "defendant[s] fair notice of what the claim is and the grounds upon which it rests." *Anderson News,* 680 F.3d at 182 (quoting *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955) (alterations omitted).

Finally, Defendants' argument that the conspiracy does not make economic sense is unavailing at the pleading stage. Plaintiffs have proffered a plausible rationale that must await closer scrutiny at a later stage: sharing customer orders and net positions before the setting of the Fix allowed Defendants to take large proprietary positions and make trades that would have been too risky to undertake absent collusion. The exchange of information allowed Defendants to know the likely direction of price movements at the Fix and then push the Fix to their benefit. Absent collusion and information about other Defendants' trading positions, the risk of manipulating the Fix was too high. With collusion and free access to trade and price information, Defendants could line up their orders to maximize their profits from consumers like Plaintiffs who were relying on the Fix as the price. The logic is at least facially simple and intuitive—price-fixing to maximize profits at the expense of consumers.

Fairly read, the U.S. Complaint adequately alleges that Defendants engaged in a long-running conspiracy to manipulate the Fix to Defendants' advantage. Because the U.S. Complaint contains sufficient factual material to "raise a reasonable expectation that discovery will reveal evidence of illegal agreement," *Twombly,* 550 U.S. at 556, 127 S.Ct. 1955, the motion to dismiss the U.S. Complaint for failing to allege sufficiently a conspiracy in restraint of trade is denied.

2. Harm to Competition

Defendants argue that the U.S. Complaint must be dismissed because it does not plead sufficient harm to competition. However, a complaint that sufficiently pleads a per se violation need not separately plead harm to competition. *See, e.g., Leegin Creative Leather Prods., Inc.,* 551 U.S. at 886, 127 S.Ct. 2705 (per se violations are "necessarily illegal" and "eliminate [ ] the need to study the reasonableness of an individual restraint in light of the real market forces at work"). The U.S. Complaint plausibly alleges a horizontal price-fixing conspiracy, which is "thought so inherently anticompetitive that [it] is illegal per se without inquiry into the harm it has actually caused." *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984).

The U.S. Complaint specifically alleges that the Fix is the price at which Plaintiffs actually purchased FX instruments from Defendants. Defendants' argument that the Fix rates are no more than "indices" that "constitute information" rests on a misreading of the U.S. Complaint, as does their attempt to recharacterize the alleged wrong as the practices of "front running," "banging the close" and "painting the screen," rather than the per se violation of fixing the price *through* those practices.

Defendants also suggest that they are not horizontal competitors for purposes of the Fix. Defendants argue that because the Fix "will be the same regardless of the dealer with which the customer transacts," they are not competing in the market for the Fix. Such arguments also misconstrue the U.S. Complaint. The U.S. Complaint specifically alleges that "Defendants are horizontal competitors in the FX market" who compete for customers by supplying different bid and ask quotations. The U.S. Complaint also alleges that many customers, such as Plaintiffs, choose to transact at the Fix, which is a price. The Fix is set on the basis of transactions in which Defendants are supposed to be offering competitive bid and ask quotes. The U.S. Complaint alleges that because of Defendants' collusion (1) Plaintiffs who transacted during the Fixing Window received and therefore paid non-competitive quotes and (2) Plaintiffs who had agreed to transact at the Fix were similarly overcharged. In short, the U.S. Complaint alleges that horizontal competitors fixed prices.

Accordingly, the motion to dismiss the U.S. Complaint for its alleged failure to demonstrate harm to competition is denied.

3. Injury in Fact

Defendants argue that the U.S. Complaint fails to "allege facts that, if proven, would establish ... *actual harm* in *real trades* in *specific currencies* on *particular days*." (emphases in original). Defendants contend that the U.S. Complaint does not adequately allege an injury in fact, a requisite for standing, because, absent such specifics, any allegation of harm is conclusory. Defendants' argument is rejected.

Plaintiffs "must have suffered an injury-in-fact, that is, the invasion of a 'legally protected interest' in a manner that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Bhatia v. Piedrahita,* 756 F.3d 211, 218 (2d Cir.2014) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The standing requirements ensure that judicial resources are "devoted to those disputes in which the parties have a concrete stake." *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 191, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). Plaintiffs 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.

Defendants conceded at oral argument, as they must, that any particular transaction that a particular Plaintiff entered into with a particular Defendant on a day that the Fix was manipulated to that Plaintiff's detriment would sufficiently demonstrate injury in fact as to that Plaintiff. Defendants' argument based on injury in fact, like their argument based on plausibility, ultimately amounts to a demand for specifics that are not required, and that Plaintiffs could not be reasonably expected to know, at the pleading stage.

Discovery may show that, for particular

transactions, some Plaintiffs benefited instead of being harmed by the manipulation of the Fix, but "the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing." *Ross v. Bank of America N.A.,* 524 F.3d 217, 222 (2d Cir.2008). The U.S. Complaint's plausible allegations about an overarching conspiracy among horizontal competitors to fix prices that resulted in Plaintiffs paying overcharges satisfy the injury-in-fact requirement at the pleading stage.

4. Antitrust Injury

Relying chiefly on *In re LIBOR–Based Financial Instruments Antitrust Litigation,* 935 F.Supp.2d 666, 739 (S.D.N.Y.2013) ("*LIBOR I* "), Defendants argue that Plaintiffs have not alleged harm to competition, and therefore have not pleaded an antitrust injury to establish standing under the Clayton Act.[10] That argument fails.

"The requirement that plaintiffs demonstrate

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[10] To sustain a private antitrust action, a plaintiff must demonstrate antitrust standing. To do so, it must plausibly allege (1) that it suffered antitrust injury and (2) that it "is an 'efficient enforcer' of the antitrust laws." *Gatt Commc'ns, Inc. v. PMC Associates, L.L.C.,* 711 F.3d 68, 76 (2d Cir.2013). Plaintiffs' status as "efficient enforcers" has not been challenged, and, in any case, such a challenge would be unsuccessful. Accordingly, this Opinion evaluates only whether the U.S. Complaint plausibly alleges that Plaintiffs suffered antitrust injury.

antitrust injury when bringing a private antitrust action 'ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place.' " *Gatt Commc'ns, Inc. v. PMC Assocs., LLC,* 711 F.3d 68, 76 (2d Cir.2013) (quoting *Atl. Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 342, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) ("*ARCO* ")). Courts in the Second Circuit employ a "three-step process for determining whether a plaintiff has sufficiently alleged antitrust injury." *Id.* "First, the party asserting that it has been injured by an illegal anticompetitive practice must identify the practice complained of and the reasons such a practice is or might be anticompetitive." *Id.* (internal quotation marks and alteration omitted). Second, courts "identify the actual injury the plaintiff alleges," i.e., "the ways in which the plaintiff claims it is in a worse position as a consequence of the defendant's conduct." *Id.* (internal quotation marks omitted). Third, courts compare the "anticompetitive effect of the specific practice at issue" to "the actual injury the plaintiff alleges." *Id.* (internal quotation marks omitted). "It is not enough for the actual injury to be causally linked" to the asserted violation, but instead, "in order to establish antitrust injury, the plaintiff must demonstrate that its injury is of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* (internal quotation marks and alteration omitted).

The U.S. Complaint adequately pleads antitrust injury. It alleges that Defendants, who are horizontal competitors, engaged in price-fixing, which caused Plaintiffs to pay supra-competitive prices. "In this case, the plaintiffs are purchasers of the defendants' product who allege being forced to pay supra-competitive prices as a result of the defendants' anticompetitive conduct. Such an injury plainly is 'of the type the antitrust laws were intended to prevent.' " *In re DDAVP Direct Purchaser Antitrust Litig.,* 585 F.3d 677, 688 (2d Cir.2009) (quoting *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,* 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)); *see also Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 530, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) ("Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets."). Consequently, Defendants' efforts to show the absence of antitrust injury necessarily fail.

Defendants' reliance on *LIBOR I* in urging a contrary conclusion is unavailing. As an initial matter, *LIBOR I's* conclusion that the plaintiffs in that case had not demonstrated antitrust injury was explicitly based on that court's understanding that the LIBOR-setting process was a "cooperative endeavor wherein otherwise-competing banks agreed to submit estimates of their borrowing costs ... to facilitate the ... calculation of an interest rate index." 935 F.Supp.2d at 688. The Fix, by contrast, is set by actual transactions in a market where Defendants are supposed to be perpetually competing by offering independently determined bid-ask spreads.

Defendants argue that because "plaintiffs would have suffered the same injury from any alleged manipulation of the London fix" even if "individual defendants had unilaterally engaged in such manipulation," there can be no antitrust injury. However, that argument would doom almost every price-fixing claim at the pleading stage. Simply because conduct can be legal when undertaken individually, does not prevent it from becoming illegal if undertaken collusively—that is the essence of a conspiracy.

Defendants' argument—that there can be no antitrust injury where they could have accomplished unilaterally the same result that they allegedly achieved through collusion—does not even implicate the concept of antitrust injury. The argument has nothing to do with whether Plaintiffs allege that they suffered an injury of the kind the antitrust laws were intended to prevent—which they do. Rather, Defendants' argument, if accepted, would impose an additional pleading requirement: that private antitrust plaintiffs must plead that the alleged antitrust violation could not have occurred through Defendants' unilateral action. Such a pleading requirement has no support in the law. While a plaintiff must present evidence to "rule out the possibility of independent action" at summary judgment or trial in order to prove an illegal conspiracy, no such requirement applies at the pleading stage. *Anderson News,* 680 F.3d at 184;

Starr, 592 F.3d at 325 ("Defendants ... argue that a plaintiff seeking damages under Section 1 of the Sherman [A]ct must allege facts that tend to exclude independent self-interested conduct as an explanation for defendants' parallel behavior. This is incorrect.") (internal quotations and alteration omitted); *see also Twombly,* 550 U.S. at 556, 127 S.Ct. 1955 (stating a Section 1 conspiracy claim requires alleging "plausible grounds to infer an agreement [and] does not impose a probability requirement at the pleading stage"). As is well established, "[a] court ruling on ... a motion [to dismiss] may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version," such as unilateral self-interested conduct, equally or even "more plausible." *Anderson News,* 680 F.3d at 185. The U.S. Complaint adequately pleads facts that plausibly suggest an unlawful agreement among Defendants that caused Plaintiffs the type of injury the antitrust laws were designed to address. The U.S. Complaint need plead no more to withstand dismissal.

To the extent *LIBOR I* suggests that no antitrust injury will be found at the pleading stage where "the harm alleged ... could have resulted from normal competitive conduct," 935 F.Supp.2d at 690, this Court respectfully disagrees with its conclusion because it blurs the lines between two separate analytic categories—the sufficiency of a complaint under *Twombly* and antitrust injury. *LIBOR I's* conclusion that such an analysis should be conducted at the pleading stage is unpersuasive for the additional reason that it relies on two inapposite Supreme Court cases—*Brunswick* and *ARCO*. *See LIBOR I,* 935 F.Supp.2d at 689–92 (discussing *Brunswick,* 429 U.S. 477, 97 S.Ct. 690 and *ARCO,* 495 U.S. 328, 110 S.Ct. 1884).

First, neither *Brunswick* nor *ARCO* addressed the sufficiency of a complaint on a motion to dismiss. *See ARCO,* 495 U.S. at 333, 110 S.Ct. 1884 (reviewing the Ninth Circuit's reversal of the District Court's summary judgment decision); *Brunswick,* 429 U.S. at 481, 97 S.Ct. 690 (reviewing the Third Circuit's reversal based on the District Court's jury instructions). Because summary judgment and trial standards are inappropriate on a motion to dismiss, *see Anderson News,* 680 F.3d at 184, the two cases provide little, if any, guidance in evaluating the U.S. Complaint for purposes of the present motion.

Second and most important, both *Brunswick* and *ARCO* involved claims and facts where the plaintiffs could show no anticompetitive injury, and not because the plaintiffs could have suffered the same harm under normal circumstances of free competition. *Brunswick* and *ARCO* were brought by competitors against their rivals, not by consumers alleging the per se wrong of horizontal price-fixing against colluding competitors as in the present case. *ARCO* held that the injury suffered by a plaintiff when its rival lowers prices to non-predatory levels pursuant to a vertical agreement "cannot be viewed as an 'anticompetitive' consequence of the claimed violation. A firm complaining about the harm it suffers from nonpredatory price competition is really claiming that it is unable to raise prices. This is not *antitrust* injury ....” 495 U.S. at 337–38, 110 S.Ct. 1884 (emphasis in original; internal quotation marks and citations omitted). In *Brunswick,* a group of bowling centers brought suit against a company that was acquiring other financially distressed bowling centers and allowing them to survive instead of going bankrupt. Recognizing that the plaintiffs’ theory of antitrust injury amounted to claiming that increased competition had reduced their profits, the Supreme Court held that it was “inimical to the purposes of [the antitrust] laws to award damages” for such an injury. *Brunswick,* 429 U.S. at 488, 97 S.Ct. 690 (internal quotation marks and citations omitted). In finding no antitrust injury, both cases reaffirmed the Supreme Court’s seminal observation in *Brown Shoe Co. v. United States* that the antitrust laws are “concern[ed] with the protection of *competition,* not *competitors*.” 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) (emphases in original); *see ARCO,* 495 U.S. at 338, 110 S.Ct. 1884; *Brunswick,* 429 U.S. at 488, 97 S.Ct. 690. The instant case is readily distinguishable because a consumer’s injury of having to pay supra-competitive prices as a result of a horizontal price-fixing conspiracy is the quintessential antitrust injury.

In sum, Defendants’ motion to dismiss the U.S. Complaint for its alleged failure to plead antitrust injury is denied.

B. The Foreign Actions

The Foreign Complaints are dismissed. The Sherman Act claims are barred by the Foreign Trade Antitrust Improvements Act ("FTAIA"), and the New York state law claims have an insufficient nexus to New York.

1. FTAIA Claims

The FTAIA provides:

[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the [Sherman Act].

If [the Sherman Act] appl[ies] to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a. The Supreme Court has explained:

> This technical language initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.,* it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.,* the "effect" must "giv[e] rise to a [Sherman Act] claim."

F. Hoffmann–La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 162, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004) (alterations and emphases in original) (quoting 15 U.S.C. § 6a) ("*Empagran* "). Because the Foreign Complaints' Section 1 claims implicate exclusively foreign activity that does not sufficiently affect American commerce, they are dismissed.

The Foreign Complaints seek to apply American antitrust laws to Defendants' foreign conduct for harm suffered outside the United States by Foreign Plaintiffs and their putative classes. The Larsen Complaint expressly excludes "all United States persons and transactions occurring in the United States or its territories." The Simmtech Complaint similarly confines its claims only to those arising out of FX transactions "in the Republic of Korea." Under principles of comity, such claims necessarily fall outside the Sherman Act's purview. *See Empagran,* 542 U.S. at 165, 169, 124 S.Ct. 2359

("Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, ... Congress, we must assume, would not have tried to impose" American antitrust laws on other nations "in an act of legal imperialism, through legislative fiat.").

Foreign Plaintiffs unsuccessfully try to shoehorn their Section 1 claims into FTAIA's exceptions. They argue that Defendants' conduct falls under the "import commerce" exception. To satisfy the "import commerce" exception, the Foreign Complaints must allege facts that plausibly show that "the conduct by the defendants ... was directed at an import market." *Kruman v. Christie's Int'l PLC,* 284 F.3d 384, 395 (2d Cir.2002), *abrogated on other grounds by Empagran,* 542 U.S. 155, 124 S.Ct. 2359. The Foreign Complaints fail to plead, nor could they plead consistent with their theory of liability, that Defendants' manipulation of the Fix, which allegedly impacted currencies worldwide, was directed at the U.S. import market.

In support of their "import commerce" argument, Plaintiffs identify the following allegations in the Foreign Complaints: (1) that the relevant class members "entered into FOREX transactions in Norway directly with one or more American Defendants" in the Larsen Complaint; (2) that "many of these FOREX transactions involved Defendants' importation of currency they received into United States accounts" in the Larsen Complaint; and (3) that a "spot FX trade is a transaction between two counterparties to exchange sums of currencies on a settlement date in two bank business days via the exchange of bank deposits in the respective countries" in the Simmtech Complaint.

None of these allegations satisfy the Foreign Complaints' burden of pleading that Defendants' conduct was *directed* at an import market. The Simmtech Complaint fails to make an allegation about any kind of import market, however generously defined. The Larsen Complaint similarly fails to plead that Defendants' conduct was specifically directed at an import market in the United States. Indeed, both complaints allege that their respective Plaintiffs suffered harm outside the United States while participating in what the Larsen Complaint calls a large "global decentralized" market and the Simmtech Complaint calls a "worldwide competitive market."

In *Kruman,* the Second Circuit held that where defendants had engaged in a conspiracy "directed at controlling the prices they charged for their services in foreign auctions," the "import commerce" exception did not apply. *Id.* at 395. That "some of the goods purchased in those auctions," like some currency that was bought and sold in this case, "may ultimately have been imported by individuals in the United States" did not relieve the plaintiffs' burden of showing that the defendants specifically targeted an import market in the United States. *Id.* at 395–96. Because Defendants' conduct was directed at manipulating prices charged for extraterritorial FX transactions, FTAIA's "import commerce" exception does not apply. *Cf. Animal Sci. Prods., Inc. v. China Minmetals Corp.,* 654 F.3d 462, 470 (3d Cir.2011), *as amended* (Oct. 7, 2011) (explaining that the "import trade" exception applied in a case where plaintiffs alleged "that defendants engaged in a course of activity designed to ensure that only United States importers, and not United States retailers, could bring oriental rugs manufactured abroad into the stream of American commerce," but not in a case where defendants' "actions did not directly increase or reduce imports into the United States.").

The Foreign Plaintiffs also fail to satisfy FTAIA's "domestic effects" exception, which requires that they plausibly plead: (1) that Defendants' anticompetitive conduct had a "domestic effect," i.e., a "direct, substantial and reasonably foreseeable effect" on U.S. domestic commerce, 15 U.S.C. § 6a(1); and (2) that such a domestic effect "gives rise to" Plaintiffs' injuries, *id.,* § 6a(2). To satisfy the second limitation, the Foreign Complaints must plausibly allege that the domestic effects of Defendants' anticompetitive conduct proximately caused their injury. *Lotes Co. v. Hon Hai Precision Indus. Co.,* 753 F.3d 395, 414 (2d Cir.2014).

The Foreign Plaintiffs state that the domestic effects in the United States of Defendants' conspiracy proximately caused them injury because "*without the domestic effects,* there would be *no* foreign injury to Plaintiffs." (emphases in original).

However, this argument runs counter to the Foreign Complaints' central allegations of a global conspiracy that simultaneously and independently injured all FX instrument purchasers trading at, or during the setting of, the Fix, whether in the United States, Norway, South Korea, or elsewhere. They also argue, somewhat unclearly, that "but for Defendants' conspiracy on the United States commerce, they were injured in Norway and South Korea because they had to pay the same identical supra-competitive prices that American consumers paid." Again, even generously read, this argument fails to show how any domestic effects proximately *caused* Foreign Plaintiffs injury. Instead, by conceding that all FX purchasers across the world paid the same supra-competitive prices, this argument provides further support for the Foreign Complaints' allegations of a global conspiracy that independently caused Foreign Plaintiffs harm in their home countries. Accordingly, any domestic effect in the United States of Defendants' anticompetitive conduct "is not even a factual, 'but for' cause" of Foreign Plaintiffs' injury, let alone a proximate cause. *Lotes Co.,* 753 F.3d at 415. "[R]egardless of what effect defendants' conduct ha[d] on U.S. domestic or import commerce, any such effect did not give rise to the plaintiff[s'] claim[s]." *Id.* at 398 (alterations and quotation marks omitted). Consequently, the "domestic effects" exception does not apply.

2. New York State Law Claims

The Donnelly Act "cannot reach foreign conduct deliberately placed by Congress beyond the

Sherman Act's jurisdiction." *Global Reins. Corp. U.S. Branch v. Equitas Ltd.,* 18 N.Y.3d 722, 735, 946 N.Y.S.2d 71, 969 N.E.2d 187 (2012). The Foreign Complaints' Section 1 claims are beyond the Sherman Act's reach. Accordingly, Foreign Plaintiffs' Donnelly Act claims are dismissed.

Each Foreign Complaint also includes a cause of action under New York's Consumer Protection Act, which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. Law § 349(a). But "to qualify as a prohibited act under the statute, the deception of a consumer must occur in New York." *Goshen v. Mut. Life Ins. Co. of New York,* 98 N.Y.2d 314, 325, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002). Here, there is no dispute that any deception of customers that the Foreign Complaints allege did not occur in New York. Accordingly, the Foreign Complaints' Consumer Protection Act claims are dismissed.

3. Leave to Amend

To the extent Foreign Plaintiffs seek leave to amend their Complaints, leave is denied as futile. The principles of comity articulated in *Empagran* do not allow a cause of action under the Sherman Act for the exclusively foreign conduct that the Foreign Complaints allege. The lack of sufficient nexus to New York similarly dooms Foreign Plaintiffs' state law claims. Because any "proposed amendments would fail to cure prior deficiencies or to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure," leave to amend is denied as futile. *Panther Partners Inc. v. Ikanos Commc'ns, Inc.,* 681 F.3d 114, 119 (2d Cir.2012).

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is DENIED as to the Consolidated Action and GRANTED as to the Foreign Actions. The Foreign Actions are DISMISSED WITH PREJUDICE.

The Clerk of Court is directed to close the motions at Dkt. Nos. 208 and 209 in 13 Civ. 7789; Dkt. No. 81 in 13 Civ. 7953; and Dkt. No. 49 in 14 Civ. 1364. The Clerk is further directed to close the following cases: 13 Civ. 7953 and 14 Civ. 1364.

SO ORDERED.