

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE COMMODITY EXCHANGE, INC.
SILVER FUTURES AND
OPTIONS TRADING LITIGATION

1:11-md-02213-RPP

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR LEAVE TO FILE AMENDED
CONSOLIDATED CLASS ACTION COMPLAINT**

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CONCLUSION

I. Introduction

Pursuant to this Court's Opinion and Order dated December 21, 2012 [Dkt. No. 127] ("Opinion"), Plaintiffs respectfully submit this memorandum in order to demonstrate that leave should be granted for Plaintiffs to file the proposed "Amended Consolidated Class Action Complaint" ("Amended Complaint") accompanying the Notice of Motion.

Plaintiffs divide this showing into two parts. First, generally, the law favors permitting leave to amend. *See* "II" below. Second, Plaintiffs respond to what the Opinion found to be shortcomings or gaps in Plaintiffs' allegations by specifically alleging multiple additional details and facts. *See* "III" below.

II. Leave To Amend Generally Should Be Granted And Was Properly Requested By Plaintiffs

Under this Court's previous decisions and controlling Second Circuit law, Plaintiffs respectfully submit that leave to file the proposed Amended Complaint should be granted. *Compare Spavone v. N.Y.S. Dep't of Correctional Services*, 09 Civ. 0969, 2011 WL 253958 at *4-5 (S.D.N.Y. Jan. 21, 2011) (Patterson, J.) (leave to supplement a complaint ordinarily "should, as the rules require, be freely given" to add additional conspiratorial acts); *Stone v. Travis*, 05 Civ. 6249, 2006 WL 334648 at *2 (S.D.N.Y. Feb. 9, 2006) (Patterson, J.) ("leave to amend 'shall be freely given'" to enhance particularity) *with Forman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) ("[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."); *Wiggins v. Weicker*, 104 F.3d 351, 1 (2d Cir. 1996) ("even in dismissing a complaint that states no claim on which relief can be granted, the court should normally give the plaintiff at least one opportunity to amend the complaint"); *Middle Atl. Utils. Co. v. S M. W. Dev. Corp.*, 392 F.2d 380, 384 (2d Cir. 1968) ("[a]mendments should be granted

liberally”); *Asset Mgmt. Assoc. of N.Y. v. Emerson Telecomm. Prod. LLC*, 395 Fed.Appx. 752, 753 (2d Cir. 2010) (only for such reasons as undue delay, bad faith, futility of amendment or undue prejudice should such a motion [to amend] be denied).

This is especially true given the specifics of the proposed Amended Complaint. See “III” below. Plaintiffs requested leave to replead in Plaintiffs’ Memorandum Of Law In Opposition to Defendants’ Motion To Dismiss The Consolidated Class Action Complaint [Dkt. No. 97] (P. Mem.”), at p. 35. The quotation in the Opinion about Plaintiffs having “alleged all we realistically could”, related to JP Morgan’s trades on June 26, 2007 and August 14-15, 2008.

Your Honor questioned Plaintiffs yesterday about the alleged size or other specifics of the trades by JP Morgan on June 26, 2007 and August 14-15, 2008. Plaintiffs basically responded “we alleged all we realistically could”.

Plaintiffs’ May 17, 2012 Letter to the Honorable Robert P. Patterson, Jr., p. 4. Because information about trades is required to be kept confidential, Plaintiffs were stating in the above letter that their pleading realistically complied with *ATSI v. Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007). Plaintiffs were **not** saying that they could not plead any further facts in any other part of the complaint.

III. Plaintiffs Have Plausibly Alleged Multiple Further Facts Indicating That Defendants Were Not Hedging In Holding Their Large Concentrated Short Position On The COMEX And Did Uneconomically And Intentionally Cause COMEX Prices To Be Artificially Low

Plaintiffs’ Amended Complaint contains amendments in the following areas.

A. Plaintiffs Plausibly Allege That JP Morgan’s Concentrated Large Short Positions Artificially Depressed COMEX Silver Futures Prices Which Led The Other Prices Lower

Plaintiffs’ Amended Complaint adds new allegations relating to JP Morgan’s concentrated short position and its effect on COMEX silver futures prices, as well as the fact that

COMEX prices accomplished 92%-100% of the price discovery and led London silver prices and world's silver prices throughout the Class Period. *See* ¶137(a)-(z) of Amended Complaint.

First, Plaintiffs allege additional facts relating to the degree of concentration and size of JP Morgan's COMEX silver futures position. *See* ¶137(j)-(x) of Amended Complaint. Second, Plaintiffs allege simple averaging as well as statistical analysis and other observations showing that, by intentionally maintaining a high short concentration in COMEX silver futures, JP Morgan depressed COMEX silver prices. *See* ¶137(i)-(r) of Amended Complaint. Third, Plaintiffs specifically allege the amounts by which COMEX silver prices were increased relative to gold prices during the Class Period as compared to before and after the Class Period. *See* ¶137(j)-(y), of Amended Complaint.

Fourth, Plaintiffs allege that JP Morgan well knew, from the "Report on Large Short Trader Activity In The Silver Futures Market" dated May 13, 2008 ("Report") and from other sources of the fact that a high short side concentration depressed COMEX silver prices. *See* ¶137(t)-(u) of Amended Complaint.

Fifth, Plaintiffs allege that, by transacting on the smaller COMEX silver market, JP Morgan had a larger downward effect on prices and that the London market was a market of big transactions between market professionals who desired to have minimal effect on prices. *See* ¶137(a)-(b), (d)-(g), (u), (w) of Amended Complaint.

Sixth, Plaintiffs allege that hedgers want to avoid the transaction cost of selling at a lower price such that hedgers typically and usually would transact in the London market for large transaction rather than in the COMEX market. *See* ¶137(w) of Amended Complaint. Seventh, Plaintiffs allege that JP Morgan intentionally and uneconomically acted against the interests of a

hedger or any market participant to transact at the best prices, by making its large transactions in the small COMEX silver market. See ¶137(e), (v)-(x) of Amended Complaint.

Plaintiffs further allege that JP Morgan recently settled with the Federal Reserve for stating that it was hedged or had low risk on derivative positions, when, in fact, JP Morgan was unhedged or had large risks on such positions. See ¶137(v) of Amended Complaint. This unhedged conduct had positioned JP Morgan's traders to make large sums but the bank to lose large amounts of money depending on how the prices moved for the unhedged derivatives. *Id.* In fact, contrary to JP Morgan's statements that it was hedged in that instance, JP Morgan lost approximately \$7 billion. See ¶137(v) of Amended Complaint.

Similarly and far worse here, JP Morgan's statements that it was hedging its activities as a bullion dealer make no sense. See ¶137(r)-(w) of Amended Complaint. By acting contrary to the way a hedger would act and engaging in the highly unusual and uneconomic conduct of unnecessarily incurring unnecessary transaction costs repeatedly to sell and maintain its large short position on the small COMEX market. Thereby, JP Morgan produced a number of "payoffs" that came from depressing prices and made offsetting profits for someone who was acting as a manipulator rather than a hedger. Compare ¶137(w) of Amended Complaint with *In the Matter of DiPlacido*, CFTC No. 01-23, 2008 WL 4831204, at *28 (Nov. 5, 2008) (actions against economic interest by paying more or selling for less than one could, indicate manipulative intent), *aff'd* 364 Fed.Appx. 657, 661 (2d Cir. 2009).

Plaintiffs otherwise plausibly allege in detail that JP Morgan intentionally and uneconomically focused its extraordinarily large short position on the small COMEX market in order to artificially reduce, and did artificially reduce, COMEX silver futures prices. See ¶137(a)-(z) of Amended Complaint.

These allegations, combined with Plaintiffs' previous allegations, "nudge" Plaintiffs' pleading over the line from being "consistent with" to plausibly alleging manipulation. *Compare Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ("*Twombly*") with Opinion at p. 28-31.

B. Plaintiffs Allege That JP Morgan Knew The Impact Of Large Concentrated Positions On COMEX Silver Futures Prices And Intentionally Concentrated Its Large Short Position In The Small COMEX Futures Market, Rather Than In The Large London Market, Precisely In Order To Cause Such Depressant And Suppressant Effect On COMEX Silver Futures Contract Prices

Plaintiffs allege that JP Morgan knew the impact of large concentrated positions on COMEX silver futures prices. *See* ¶137(a)-(f) of Amended Complaint. Furthermore, JP Morgan intentionally concentrated its large short position in the small COMEX futures market, rather than in the large London market, precisely in order to cause such depressant and suppressant effect on COMEX silver futures contract prices. *See* ¶137(a)-(b), (d)-(g), (u), (w) of Amended Complaint.

These allegations, combined with Plaintiffs' previous allegations, "nudge" Plaintiffs' pleading over the line from being "consistent with" to plausibly alleging manipulation. *Compare Twombly*, 550 U.S. at 570 with Opinion at p. 8-9, 28.

C. Plaintiffs Plausibly Allege That The Price Discovery For The Silver Futures Market Occurred On The COMEX And That The Much Larger London Market Was A Market In Which JP Morgan Could Have Conducted Its Trading With Much Less Impact On Prices

Plaintiffs plausibly allege that the price discovery for the silver futures market occurred on the COMEX. *See* ¶137(b)-(d) of Amended Complaint. Plaintiffs also alleged that the much larger London market was a market in which JP Morgan could have conducted its trading with much less impact on prices. *See* ¶137(a)-(b), (d)-(g), (w) of Amended Complaint.

These allegations, combined with Plaintiffs' previous allegations, "nudge" Plaintiffs' pleading over the line from being "consistent with" to plausibly alleging manipulation. *Compare Twombly*, 550 U.S. at 570 with Opinion at p. 19.

D. Plaintiffs Allege That JP Morgan Has Been Criticized By The Federal Reserve For Saying That It Was Hedging When It Was Not Hedging, And Plaintiffs Plausibly Allege That JP Morgan's Conduct Was Not Hedging And Intentionally Suppressed Prices

Plaintiffs allege that JP Morgan has been criticized by the Federal Reserve for saying that it was hedging when it was not hedging. *See* ¶137(v) of Amended Complaint. Plaintiffs plausibly allege that JP Morgan's conduct was not hedging and it intentionally suppressed prices. *See* ¶137(w)-(y) of Amended Complaint.

These allegations, combined with Plaintiffs' previous allegations, "nudge" Plaintiffs' pleading over the line from being "consistent with" to plausibly alleging manipulation. *Compare Twombly*, 550 U.S. at 570 with Opinion at p. 22-23.

E. Plaintiffs Plausibly Allege That The Price Movement On June 26, 2007 And August 14-15, 2008 Were Contrary To And Inconsistent With Competitive Market Behavior, And Were Very Consistent With And Only With Manipulation

Plaintiffs plausibly allege that the price movement on June 26, 2007 and August 14-15, 2008 were contrary to and inconsistent with the fundamentals, the news flow, usual market activity, and a competitive market based on legitimate supply and demand factors. *See* ¶¶ 4(d), 60, 64, 66, 111, 114, 115 of Amended Complaint. Plaintiffs also allege that the price movement on June 26, 2007 and August 14-15, 2008 were very consistent with and only with manipulation. *See* ¶¶ 4(d), 60, 64, 66, 111, 114, 115 of Amended Complaint.

These allegations, combined with Plaintiffs' previous allegations, "nudge" Plaintiffs' pleading over the line from being "consistent with" to plausibly alleging manipulation. *Compare Twombly*, 550 U.S. at 570 with Opinion at p. 24-30.

F. Plaintiffs Plausibly Allege That COMEX Silver Futures Prices Underperformed Gold Prices Between March 17, 2008 And March 25, 2010 When The CFTC Held Its Hearing On Manipulation Of The Silver Markets

Plaintiffs plausibly allege that COMEX silver futures prices underperformed gold prices between March 17, 2008 and March 25, 2010 when the CFTC held its hearing on manipulation of the silver markets. *See* ¶14(a), 87(a) of Amended Complaint. Plaintiffs further allege that palladium is very different from silver in terms of usage, demand, supply, and other factors. *See* ¶87(i)-(j) of Amended Complaint. Plaintiffs further allege that platinum is not nearly as good a comparator to silver as gold is. *See* ¶87(f)-(j) of Amended Complaint. Further, Plaintiffs allege that platinum and palladium prices were allegedly manipulated to artificially high levels as of the March 17, 2008 start of the Class Period. *See* ¶87(f)-(g) of Amended Complaint. Silver was not artificially high at that point. *See* ¶87(g) of Amended Complaint. For these further reasons, Plaintiffs allege that platinum and palladium are particularly poor benchmarks for silver futures prices for comparisons made with the price levels on the March 17, 2008 start of the Class Period. *See* ¶87(f)-(j) of Amended Complaint.

These allegations, combined with Plaintiffs' previous allegations, "nudge" Plaintiffs' pleading over the line from being "consistent with" to plausibly alleging manipulation. *Compare Twombly*, 550 U.S. at 570 with Opinion at p. 24-25.

G. Plaintiffs Plausibly Allege That COMEX Silver Futures Prices Outperformed Gold Prices After The CFTC Meeting On Manipulation

Plaintiffs plausibly allege that COMEX silver futures prices outperformed gold prices between the time of the CFTC hearing on silver manipulation on March 25, 2010 and three weeks later, on April 15, 2010. *See* ¶87(b) of Amended Complaint (alleging daily changes in COMEX silver futures prices after the CFTC hearing on silver manipulation).

Plaintiffs then plausibly allege that, after the initial impact on prices of the CFTC hearing on silver manipulation, COMEX gold prices then caught up with COMEX silver prices by August 26, 2010. *See* ¶87(c) of Amended Complaint.

Plaintiffs then allege that JP Morgan announced that it was closing its London silver office. *See* ¶87(d) of Amended Complaint. Plaintiffs allege that once again COMEX silver prices outperformed COMEX gold prices, increasing by 25.78% compared to 8.68% through of the announcement by CFTC Commissioner Bart Chilton that there had been misdeeds in the silver market. *See* ¶87(e) of Amended Complaint.

These allegations, combined with Plaintiffs' previous allegations, "nudge" Plaintiffs' pleading over the line from being "consistent with" to plausibly alleging manipulation. *Compare Twombly*, 550 U.S. at 570 *with* Opinion at p. 26-28.

H. Plaintiffs Plausibly Allege That Defendants Also Violated Section 2 Of The Sherman Antitrust Act

Count Four of Plaintiffs' proposed Amended Complaint asserts a claim for monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2. *See* ¶211-217 of Amended Complaint. To state a monopolization claim, Plaintiffs need only allege two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power." *United States v. Grinell Corp.*, 384 U.S. 563, 570-571. Plaintiffs have adequately alleged both.

1. Plaintiffs Plausibly Allege JP Morgan's Monopoly Power

Plaintiffs allege, *inter alia*, direct and, indeed, the ultimate evidence of monopoly power, *i.e.*, the ability to control price in the relevant market.¹ *Am. Tobacco Co. v. United States*, 328 U.S. 781, 789 (1946).

It is black letter law that a plaintiff need not demonstrate market share in order to prove the existence of monopoly power. While market share may in some situations serve as a *surrogate* for evidence of monopoly power, monopoly power can also be proven by *direct evidence of the actual exercise of control over prices* in the relevant market and/or the actual exclusion of competition from the relevant market. *Am. Tobacco Co.*, 328 U.S. at 789 (exclusion of some competitors supported jury’s monopolization finding); *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 98 (2d Cir. 1998) (noting that monopoly power “may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm’s large percentage share of the relevant market”); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 107-108 (2d Cir. 2002) (stating that a relevant market definition simply serves as a surrogate for market power).²

Here, the proposed Amended Complaint unequivocally sets forth detailed factual allegations concerning JP Morgan’s exercise of control over prices in the relevant market throughout the Class Period. The CAC alleges that JP Morgan had the power to and did suppress the price of Comex Silver Futures Contracts by: (1) acquiring a dominant and concentrated short

¹ The Proposed Amended Complaint defines the relevant market as Comex Silver Futures Contracts. (Complaint at ¶212)

² See also *Todd v. Exxon Corp.*, 275 F.3d 191, 197 (2d Cir. 2001) (“If a Plaintiff can show that a defendant’s conduct exerted an actual adverse effect on competition, this is a strong indication of market power. In fact, this arguably is more direct evidence of market power than calculations of elusive market share figures”); *Re/Max International Inc. v. Realty One, Inc.*, 173 F.3d 995, 1018 (6th Cir. 1999) (the “simplest way of showing monopoly power is to marshal evidence showing the exercise of actual control over prices or the actual exclusion of competitors”).

position in the Relevant Market (Complaint at ¶¶ 3, 51-53, 68-87, 96-128); (2) using that dominant market position to drive down the price of Comex Silver Futures Contracts (Complaint at ¶¶ 4-6, 55-67); and (3) profiting from their unlawful monopolization of the Relevant Market during the Class Period (Complaint at ¶¶ 55-57, 95).

Taken as true, Plaintiffs' allegations plausibly suggest that JP Morgan had market power in the relevant market. *See CFTC v. Parnon*, 2012 WL 1450443, at *10 (S.D.N.Y. Apr. 26, 2012) (internal quotations omitted) (holding that CFTC plausibly alleged defendants' market power through their "ability to influence prices" and thereby manipulate the relevant market); *In re Crude Oil Commodity Futures Litig.*, 2012 WL 6645728 (S.D.N.Y. Dec. 21, 2012) (upholding monopolization claim based on defendants' ability to influence market prices).

2. The Proposed Amended Complaint Contains Fulsome Allegations Demonstrating Defendants' Anticompetitive Conduct In The Relevant

The proposed Amended Complaint plausibly alleges the second element of a monopoly claim as well – that JP Morgan's manipulation of COMEX Silver Futures Contracts constituted anticompetitive conduct.

Specifically, the proposed Amended Complaint alleges that, contrary to its rational economic interests, JP Morgan elected to unlawfully abuse its dominant and concentrated short position in the Relevant market. ¶137(a)-(z). Also, JP Morgan (1) sold large amounts of COMEX Silver Futures Contracts in a compressed time period, especially during illiquid (i.e. low trading) periods (supra at ¶¶4-6, 7, 52, 56-57); and (2) executed large spoof orders, i.e., high volume orders in the Market that were not intended to be executed, but would provide a strong and unmistakable signal that the market is headed in a certain direction (supra ¶¶ 56-57, 65).

Courts have routinely upheld similar antitrust claims alleging anticompetitive conduct resulting in the artificial lowering of commodity prices. *See, e.g., Sanner v. Board of Trade of*

the City of Chicago, 62 F.3d 918 (7th Cir. 1995); *Strobl v. N.Y. Mercantile Exch.*, 768 F.2d 22, 28 (2d Cir. 1985); *Transnor (Bermuda) Ltd. v. BP N. Am. Petroleum*, 738 F. Supp. 1472 (S.D.N.Y. 1990); *Blanchard Co., Inc. v. Barrick Gold Corp.*, 2003 WL 22071173 (E.D. La 2003).

These allegations, combined with Plaintiffs' previous allegations, "nudge" Plaintiffs' pleading over the line from being "consistent with" to plausibly alleging manipulation. *Compare Twombly*, 550 U.S. at 570 with Opinion at p. 35-38.

CONCLUSION

It is necessary, in the interests of justice, that Plaintiffs be granted leave to file the proposed Amended Complaint containing the foregoing allegations which correct what the Opinion found to be shortcomings or gaps in Plaintiffs' pleading and otherwise plausibly allege claims for relief against Defendants. For the foregoing reasons, Plaintiffs should be granted leave to file the Amended Complaint.

Dated: New York, New York
January 22, 2013

Respectfully submitted,

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