UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: TERM COMMODITIES COTTON FUTURES LITIGATION,

THIS DOCUMENT RELATES TO ALL MEMBER CASES OF THIS ACTION:

12 Civ. 5126
12 Civ. 5269
12 Civ. 5334
12 Civ. 5380
12 Civ. 5470
12 Civ. 5563
12 Civ. 5732

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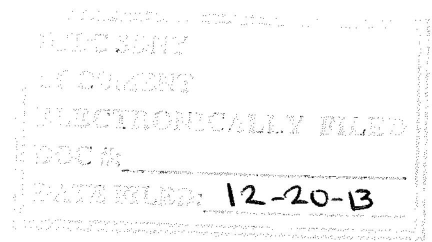
MASTER DOCKET

12 Civ. 5126 (ALC)(KNF)

MEMORANDUM & ORDER



ANDREW L. CARTER, JR., District Judge:

I. Introduction

In these consolidated proposed class actions, Plaintiffs are speculators who lost money when prices in the cotton futures market increased unexpectedly in 2011. Plaintiffs claim Louis Dreyfus Commodities B.V., Louis Dreyfus Commodities Cotton LLC (a/k/a Allenberg Cotton Company), LDC Holding Inc., Term Commodities, Inc., Louis Dreyfus Commodities LLC, and Joseph Nicosia (collectively "Defendants") unlawfully manipulated the price of cotton futures by unreasonably and uneconomically demanding delivery of certificated cotton in fulfillment of futures contracts in conjunction with other manipulative behavior. As a result of Defendants' market conduct, Plaintiffs argue they suffered losses in liquidating their positions in May and July 2011 Cotton No. 2 futures contracts. Defendants moved to dismiss the operative Complaint on jurisdictional grounds as well as for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons fully discussed herein, Defendants' Motion to Dismiss is GRANTED in-part and DENIED in-part.

II. Background

Defendant Louis Dreyfus Commodities B.V. "trades and markets commodities, including cotton, on an international basis." (Second Con. Am. Compl. ¶ 12.) The remaining corporate Defendants are all subsidiaries, affiliates, or clearing members for Louis Dreyfus Commodities B.V. Defendant Allenberg Cotton Company "is one of the largest cotton merchandising organizations in the world" and in 2011, owned 39% of the Exchange-approved warehouse storage capacity for cotton. (Id. ¶¶ 13(a)-(b).) Defendant Nicosia was the Chief Executive Officer ("CEO") of Allenberg, the Senior Platform Head Cotton Trader of the Louis Dreyfus Commodities Executive Group, a member of Louis Dreyfus Commodities' Executive Committee, and a manager of LDC Holding, Inc. (Id. ¶ 16.) On October 26, 2012, Nicosia was removed as CEO of Allenberg. (Id. ¶ 16(b).) Plaintiffs are traders and speculators, who were allegedly forced to pay artificially high prices to liquidate their positions in Cotton No. 2 futures contracts as a result of Defendants' manipulation of the cotton futures market from March 30 to May 6, 2011 and from June 7 to July 7, 2011. (Id. ¶¶ 1(d), 11(a)-(b).)

A. *Commodities Futures Trading*

In order to fully appreciate the allegations in this case, one must have a rudimentary understanding of commodities futures trading and the cotton futures market. A futures contract is an agreement between a buyer and seller in the market to buy or sell a commodity, such as cotton, or make a cash settlement at a fixed date in the future. (Id. ¶ 18.) "Every aspect of a futures contract . . . is standardized, except the price and delivery month. This standardization of futures contracts is specifically designed to facilitate the ease of trading of fungible contracts in one central market place." (Id. ¶ 27.) The buyer of a futures contract is said to hold the "long"

position, and the seller of a futures contract is said to hold the "short" position. (Id. ¶ 20.) If the long retains the contract until the delivery date, it is obligated to take delivery and pay for the commodity or make a cash settlement in accordance with the terms of the contract. (Id.) Conversely, if the short retains the contract until the delivery date, it is obligated to deliver the commodity or make a cash settlement in accordance with the terms of the contract. (Id.)

Judge Marrero provides an elegantly simple example to illustrate the role of the futures market in commodities trading:

> Futures contracts serve as a form of insurance for producers and processors of commodities against potential price alterations. As a simple example, an orange grower may acquire a short position in oranges to protect himself against a decline in orange prices in the event of a bumper crop, while a juice producer may acquire a long position to guard against a price increase in oranges should foul weather destroy the season's orange crop. Futures contracts also enable speculators to profit from anticipated changes in the price of a commodity.

In re Natural Gas Commodity Litig. (Natural Gas I), 337 F. Supp. 2d 498, 502 (S.D.N.Y. 2004).

Once a trader establishes a position in the market, the trader may choose to hold the contract until delivery or liquidate the position before delivery is required. (Second Con. Am. Compl. ¶ 19.) A position is liquidated when the trader enters into a contract in the opposite position for the same quantity of the commodity. (Id.) "For example, a purchaser of one cotton futures contract may cancel or offset her future obligation to take delivery of cotton, by selling one cotton futures contract. This sale of one contract offsets or liquidates the earlier purchase of one contract." (Id.) Offsetting contracts alleviates the need to make or accept delivery of physical cotton as specified in the contract, depending on whether the trader holds the long or short position. (Id. ¶ 20.) "The difference between the initial purchase price and the sale price represents the realized profit or loss for the trader." (Id. ¶ 19.)

"Spread positions" are commonly used in commodities trading and occur when a trader holds the long position in a contract for one delivery month and the short position for another delivery month. (Id. ¶ 23.) A "spread" describes the price difference of the commodity between different months when the contract is held. (Id. ¶ 24.) "Thus, if the May 2011 Contract were priced at $2.50 per pound and the July 2011 Contract were priced at $3.00 per pound, then the 'spread' would be 50¢[.]" (Id.) "Spread" can also refer to the difference between the cash market price and the futures market price. (Id.) "If the July 2011 Contract price was $2.50 per pound and the cash market price was $2.46 per pound, the spread would be 4 cents." (Id.)

B. *The Cotton Exchange and Certificated Cotton*

In the futures market, parties do not directly contract with each other but rather, conduct their trading through a commodities exchange – in this case, the Inter-Continental Exchange Futures U.S. ("ICE" or "Exchange"). (Id. ¶ 25.) The Exchange designates five dates throughout the year at which time futures contracts expire – March, May, July, October, and December. (Id. ¶ 26.) For the May 2011 Contract, "First Notice Day" ("FND") was April 25, 2011, the first delivery date was May 2, 2011, the contract ceased trading on May 6, 2011, and "Last Notice Day" ("LND") was May 13, 2011. (Id. ¶¶ 31(f), 41.) Similarly, for the July 2011 Contract, FND was June 24, 2011, the first delivery date was July 1, 2011, the contract ceased trading on July 7, 2011, and LND was July 14, 2011. (Id.). According to Plaintiffs, "the commodity exchanges . . . have repeatedly stated that futures markets are not intended to be substitutes for the physical market . . . [and] are carefully designed to facilitate ease of trading . . . without deliveries. As a result, . . . deliveries are extremely rare." (Id. ¶¶ 21, 29(a).)

Most aspects of ICE futures contracts are standardized, such as the quality and amount of cotton, with the exception of the price and delivery month. (Id. ¶ 27.) ICE rules dictate the standards for the grade, staple, and value of all cotton delivered pursuant to a contract within its market. (Id. ¶ 29.) In 2011, Exchange rules designated forty Exchange-approved warehouses to which a short could deliver cotton in five locations from the mid-Atlantic to the Gulf of Mexico: Galveston, Texas; Greenville, South Carolina; Houston, Texas; Memphis, Tennessee; and New Orleans, Louisiana. (Id. ¶ 29(f).) Cotton stored in an Exchange-approved warehouse must be extracted within nine weeks from the date of receiving a valid load-out order, which was also the maximum load-out time for non-Exchange-approved warehouses in 2011, according to Plaintiffs. (Id. ¶¶ 31, (a).) Cotton stored at a non-Exchange-approved warehouse, once extracted, is transported to an Exchange-approved warehouse, which could take days or weeks depending on the distance between locations. (Id. ¶ 31(d).) After the cotton is delivered to an Exchange-approved warehouse, it is certificated by the USDA. (Id. ¶ 31(e).) Certification took more than two weeks in May of 2011, which was "much longer than usual."[1] (Id.) Once the cotton is moved to an Exchange-approved warehouse and certificated, "[l]ongs have no control over the quality or color or location of cotton they receive nor the exact time of receipt." (Id. ¶ 29(h).)

[1] Plaintiffs note a change to the ICE rules subsequent to the allegations in this case:

> ICE announced, on March 4, 2013, new rule changes to the [rules governing the cotton] futures contract. According to ICE, [the new rule] is designed to reduce the amount of time it takes to move cotton into a 'tenderable position' by reducing bottlenecks and frictions in the process of moving cotton into delivery warehouses and certificating it. 'Tenderable position' means that a market participant could tender a warehouse receipt in respect of that cotton under ICE rules and, for example, thereby satisfy a short position. . . . Compared to the conditions actually existing during April-May and June 2011, this rule change alone shortened the time to make delivery by approximately as much as two weeks.

(Id. ¶¶ 31(g)-(h).) The CEA manipulation claim is analyzed under the old rules in effect during 2011 when the alleged misconduct took place.

Cotton can be traded and acquired in cash markets as well as the futures market. One such cash market, The SEAM, of which Defendant Nicosia was a founding member and director, is the cotton industry's public internet trading marketplace. (Id. ¶¶ 16, 61(f).) The SEAM provides sellers with exposure to a large number of potential buyers and provides buyers with real time access to the most complete inventory in the market year round. (Id. ¶¶ 61(f), (h).) The SEAM also guarantees the credit and transactions of traders and takes extensive measures to ensure the quality of cotton delivered meets the terms agreed to by the buyer and seller. (Id. ¶ 61(g).) Cotton supplies from cash markets and the SEAM are not subject to Exchange standards for grade and staple, meaning it may be of a different quality, either higher or lower, than cotton purchased through a futures contract. (See id. ¶ 54.) Further, cotton from cash markets may be available faster if ICE warehouse stocks are depleted, and there is a back-log of non-Exchange cotton that must be certificated. (See id. ¶ 56.)

C. *Alleged Market Manipulation by Defendants*

The Second Consolidated Amended Complaint ("SCAC") alleges Defendants intentionally and uneconomically took the largest ratio of deliveries of physical cotton to the amount of certificated supplies in the history of ICE cotton futures trading. (Id. ¶¶ 4(a)-(c), 5(a)-(c).) Defendants allegedly did so in order to cause contract prices to climb and effectuate a squeeze in the cotton futures market by intentionally exacerbating existing market congestion.[4]

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[4] A squeeze is:

> [A] condition in maturing futures where sellers (hedgers or speculators), having waited too long to close their trades, find there are no new sellers from whom they can buy, deliverable stocks are low, and it is too late to procure the actual commodity elsewhere to settle by delivery. Under such circumstances and though the market is not cornered in the ordinary sense, traders who are long hold out for an arbitrary price.

(Id. ¶¶ 6(a), (f).) The alleged price manipulation occurred between March 30 and May 7, 2011 for the May 2011 Contract and between June 7 and July 8, 2011 for the July 2011 Contract. (Id. ¶ 1(d).) Ultimately, "Defendants' interconnected series of uneconomic steps each consisted of highly unusual steps . . . contrary to the customs and practices of cotton market participants . . . ." (Id. ¶ 44(b).)

"Defendants began to acquire significant long positions in the May 2011 Contract by late March 2011, and added to them thereafter . . . ." (Id. ¶¶ 47, 52(a).) Around April of 2011, there was an allegedly sharp decrease in demand for physical cotton due to cancellations in export contracts, resulting in cheaper-priced cotton being freely available in the cash market from April to July of 2011. (Id. ¶¶ 53-54, 74-75.) Despite these circumstances, Defendants did not liquidate their long May 2011 Contract positions; instead, they refused cotton from the cash market and demanded delivery, which purportedly artificially inflated prices for the May and July 2011 Contracts. (Id. ¶¶ 5(k), 61(a), 63.)

Plaintiffs allege Defendants' uneconomic conduct caused an unusually high open interest approaching settlement for the May 2011 Contract.[5] (Id. ¶¶ 52(c), (e)-(f).) "[T]he open interest on the May 2011 Contract increased on eight of the twelve trading days between the 25th day before FND and the 12th day before FND compared to zero such increases in the average open interest in May contracts [between 2003 and 2010]." (Id. ¶ 52(g).) "Defendants caused the actual open interest [in the May 2011 Contract] to be almost 35% higher than it should have been thirteen trading days from FND *i.e.*, on April 5, 2011; almost 68% higher eleven trading days

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In re Ind. Farm Bureau Coop. Ass'n, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,796, 1982 WL 30249, at *7 (CFTC Dec. 17, 1982) (quoting Senator Pope, Debate on the Commodity Exchange Act, 80 Cong. Rec. 8089 (1928)).

[5] Open interest "reflects the amount of contracts that have been open but not yet liquidated or closed." (Second Con. Am. Compl. ¶ 52(a).)

from FND *i.e.*, April 7, 2011; and between twice as much and four times greater than it should have been for the remaining trading days until FND." (Id. ¶ 52(k).) "These large differences reflect Defendants' uneconomic squeeze of the shorts when [sic] was too late to bring new cotton to the ICE warehouse." (Id. ¶ 52(l).) Plaintiffs claim Defendants orchestrated the slow reduction in the open interest at precisely the time when the deliverable supply was too low to satisfy Defendants' positions through delivery. (Id. ¶¶ 21(a)-(b); Pl.'s Second Opp. at 11-12.)

While Defendants allegedly accumulated large long positions in the May 2011 Contract, some Plaintiffs held the opposite, short positions. (Second Con. Am. Compl. ¶ 11(a).) Upon the expiration of the May 2011 Contract, "Defendants stopped 3,898 . . . deliveries in satisfaction of Defendants' long positions . . . . This was 99.23% of all deliveries on such contract." (Id. ¶¶ 4(b), 42(b).) Plaintiffs claim this conduct demonstrated uneconomic behavior, as it was "the highest number of stops of deliveries (which means that Defendants received cotton) relative to the amount of certificated cotton stocks in ICE warehouses in the history of cotton futures trading on ICE." (Id. ¶ 4(a).) "The deliveries taken by Defendants alone on the May 2011 Contract were 2.02 times the certificated cotton stocks at the start of the notice period." (Id. ¶¶ 4(c), 42(f).) Since Plaintiffs were not prepared to deliver physical cotton, they were forced to offset at allegedly inflated prices caused by Defendants. (Id. ¶ 52(t).)

By adding to their already dominant long positions, Defendants created and/or exacerbated market congestion, purportedly knowing there was not enough certificated cotton available to satisfy delivery on their contracts. (Id. ¶ 52(p).) At the time, it took up to nine weeks to load-out physical cotton from a non-Exchange-approved warehouse, move it to an Exchange-approved warehouse, and have it certificated so that it could be delivered in satisfaction of the futures contract, according to Plaintiffs. (Id. ¶¶ 31(a)-(f).) Therefore, any cotton which had not

begun the certification process by mid-March of 2011 would not have been certificated in time for delivery on the May 2011 Contract. (Id. ¶ 31(f).) Purchasing additional long positions in April of 2011 allegedly precluded Plaintiffs from having additional physical stocks brought into ICE warehouses and certificated in time for delivery.[6] (Id. ¶¶ 47, 52(l), 52(p).)

As set forth in the SCAC, the amount of certificated stocks from mid-February to June of 2011 was lower than it had been for the same months from 2000 to 2010. (Id. ¶ 36(b).) "[T]he total amount of deliverable supplies on the May 2011 Contract [between March 30 and May 6, 2011] was significantly less than 500,000 bales." (Id. ¶ 36(d).) Available deliverable supplies are based on several variables, including USDA certification delays. (Id.)

> Reasons for such low deliverable supplies included the amount of time required to move cotton from non-ICE warehouses into ICE warehouses and thereafter to certificate [sic] same to make such cotton "tenderable", the large export cancelations from mid-March 2011 forward that produced increasing [sic] large amounts of available cotton in the cash markets that could not be timely moved into the ICE warehouse for delivery, Defendants' uneconomic refusal to re-tender, Defendants' decertification of ICE warehouse supplies, and Defendants' rejections of EFPs for the cotton being offered to Defendants in the actively trading cash markets.

(Id. ¶ 36(e) (internal citations omitted).) Lastly, "[a]lthough the cotton being offered to Defendants . . . could not be moved into the ICE warehouses in time for futures market delivery, such cotton was freely available to satisfy any legitimate needs for cotton that Defendants or any market participant had." (Id. ¶ 36(f).)

During the period from March of 2011 forward, United States Department of Agriculture reports show there were large numbers of cancellations of cotton to be exported to foreign

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[6] Plaintiffs further allege there were no existing stocks of non-certificated cotton already in transit to or already stored at ICE warehouses, so Plaintiffs would have needed to extract cotton from non-Exchange-approved warehouses and have it certificated to make delivery. (Id. ¶ 36(c).)

buyers. (Id. ¶¶ 74-75.) In the last two weeks of March, "there were 49,170 running bales of net cancellations; April 2011 had 185,235 running bales of net cancellations; May 2011 had 110,727 running bales of net cancellations; June 2011 had 342,054 running bales of net cancellations; July 2011 had 153,864 running bales of net cancellations." (Id. ¶ 76.) Plaintiffs claim the cancellations "unexpectedly freed up cotton in the cash market" and showed "demand for cotton was plummeting." (Id. ¶¶ 74-76.) Therefore, the "decrease in actual and near-term demand for cotton and large increase in the actual and near-term supply of cotton meant that prices of cotton for immediate and near-term delivery should fall relative to prices for delivery further into the future." (Id. ¶ 81.) Instead, notwithstanding the large number of cancellations, "[t]he May 2011 Contract price during the last trading days prior to the First Notice Day of such contract, was greater than the price of the July 2011 Contract on the corresponding dates." (Id. ¶ 93.)

Further, "cotton was being repeatedly offered in the cash market at lower prices than those in the futures market[,]" yet "Defendants . . . uneconomically refused to purchase the lower priced, high quality cotton available . . . [in the] cash markets." (Id. ¶¶ 53, 56.) "If Defendants were acting economically, they would have purchased the lower priced cotton in the cash market and sold their higher priced futures contracts on the ICE." (Id. ¶ 63.) Defendants also refused exchange for physical ("EFP") transactions, whereby the physical cotton would be exchanged for May 2011 long positions for substantially less than the contract prices with supplies more readily available. (Id. ¶¶ 55, 56.) These alternative offers would have allegedly satisfied Defendants' needs to purchase cotton with higher quality bales at a lower cost. (Id. ¶¶ 56, 78(d).)

Defendants uneconomic insistence on delivery of certificated stocks allegedly "caused May 2011 Contract prices to further diverge from cash market prices rather than converging with cash market prices[,]" resulting in losses to traders who had to liquidate their short positions at

prices greater than what physical cotton could be sold for in the cash market. (Id. ¶¶ 56, 61(e).) Plaintiffs claim futures contract prices tend to converge with cash market prices as futures contracts move closer to the month before trading ends. (Id. ¶ 4(f).) "As time progresses and each futures contract moves towards its final trading month, there is less of a 'predictive' or 'anticipatory' component of the futures price. Accordingly, . . . contract prices and cash market prices should tend to converge during the month before the end of trading in a given contract." (Id.) Thus, "[t]he unprecedented spread between the prices of the May 2011 Contract and [the] cash market cotton price in April and May, 2011 is a classic badge of manipulation." (Id. ¶¶ 66(a), 67(a).) The same "unprecedented spread" occurred with respect to the July 2011 Contract price and cash market price in June and July of 2011. (Id. ¶¶ 66(b), 67(b).) In contributing to this spread, "Defendants uneconomically refused to sell their long positions at [the] best selling prices, and instead overpaid to purchase cotton at [the] worst buying prices . . . ." (Id. ¶ 79.)

The alleged squeeze by Defendants caused "backwardation" – when prices for immediate or near term delivery are higher than prices for future deliveries. (Id. ¶¶ 4(d) n.2, 93-105.) Plaintiffs assert, "A substantial 'backwardation' is a classic indicator of a manipulation undertaken by a large long trader who takes a large amount of deliveries relative to the deliverable supply of the commodity in delivery warehouses."[7] (Id. ¶ 4(d).) Defendants' unprecedented ratio of deliveries caused the May to July 2011 spread to move to record levels of backwardation during comparable periods from 2000 to 2011. (Id. ¶¶ 4(e), 86-87, 93-96.) Since

[7] Plaintiffs offer the following explanation for the significance of backwardation:

> In a competitive market, increasing backwardation should be associated with stock drawdowns. . . . [A]s the present cotton becomes much more valuable or higher priced than cotton in two to three months, the rational economic actors hurry to sell their cotton at the relatively high prices now available. Such sales are preferable to continuing to pay storage, insurance and other charges to hold the cotton in warehouses for months until the lower prices are projected to materialize.

(Id. ¶ 89.)

the available stock of cotton was allegedly increasing during the delivery period for the May 2011 Contract, Plaintiffs argue the concurrent rising backwardation, which was highly anomalous and contrary to market expectations, indicated prices were being manipulated. (Id. ¶¶ 5(e)-(g), 52(o), 90, 91.)

Overall, Plaintiffs summarize Defendants' role in allegedly exacerbating market congestion with the intent to manipulate cotton futures prices as follows:

> By adding to their May 2011 Contract long position and refusing to liquidate except at record levels of backwardation, Defendants knowingly created and/or greatly exacerbated the congestion in which the amount of the open interest in the May 2011 Contract greatly exceeded the amount of cotton that could be timely delivered on the May 2011 Contract. This congestion was intensified by the long times it took during April-May 2011 to move cotton from non-ICE warehouses into ICE warehouses and certificate such cotton during April-May 2011.

(Id. ¶ 52(p).) The congestion was purportedly intensified when Defendants failed to retender any of the certificated cotton they received from the May 2011 Contract. (Id. ¶ 42(c).) Instead, Defendants decertified the cotton and removed it from the ICE warehouses. (Id. ¶ 42(d).) This action had the effect of reducing the deliverable supplies of certificated cotton; meanwhile, Defendants were continuing to demand delivery of such cotton in fulfillment of their contracts. (Id. ¶¶ 5(k), 36(e), (h).)

In conjunction with supposedly depleting the supplies of certificated cotton for the May 2011 Contract, "Defendants began to acquire significant long positions in the July 2011 Contract by late May 2011, and added to them thereafter . . . ." (Id. ¶ 47.) They "topped their own record set in the May 2011 Contract by uneconomically insisting upon an even greater amount of stops of deliveries relative to certificated stocks on the July 2011 Contract." (Id. ¶ 5(a).) Defendants stopped 1,613 deliveries in satisfaction of their long July 2011 Contract positions. (Id. ¶¶ 5(b),

43(b).) "This was 99.01% of the stops of deliveries on the July 2011 Contract" and "2.04 times more than the certificated stocks at the start of the notice period." (Id. ¶¶ 5(b)-(c).) Plaintiffs claim Defendants' exhaustion of certificated cotton in May of 2011 combined with the above mentioned uneconomic conduct repeated during the July 2011 Contract period permitted Defendants to exacerbate market congestion further and continually apply upward pressure on the price of cotton futures. (Id. ¶¶ 5(j), 6(e), 42(e).)

III. Procedural History

Plaintiff Mark Allen filed a class action Complaint on June 29, 2012 against Defendants captioned Allen v. Term Commodities, No. 12 Civ. 5126. Plaintiffs Walford (No. 12 Civ. 5269), Pinkham (No. 12 Civ. 5334), Meierfeld (No. 12 Civ. 5380), Satullo (No. 12 Civ. 5470), Crosta (No. 12 Civ. 5563), and Ledwith (No. 12 Civ. 5732) filed additional actions, making substantially identical factual allegations, claims, and legal arguments to those in the Allen Complaint against the same Defendants on behalf of substantially similar putative classes. By Orders dated August 13, 2012 and April 2, 2013, the above-referenced cases were consolidated into In re Term Commodities Cotton Futures Litigation, Master Docket No. 12 Civ. 5126.

Defendants filed their Motion to Dismiss the (First) Consolidated Amended Complaint on November 28, 2012. Plaintiffs filed their opposition, along with a "corrected copy" thereof, on January 17, 2013, and Defendants filed their reply on February 6, 2013. The Court received oral arguments from the parties on the fully-briefed Motion to Dismiss on May 20, 2013. At the close of oral arguments, Plaintiffs' counsel indicated Plaintiffs had additional facts to support their claims and would like to file a Second Amended Complaint. After receiving an offer of proof regarding the additional factual allegations, the Court granted Plaintiffs leave to amend the

operative Complaint. On June 10, 2013, Plaintiffs filed the SCAC.

The Court held a conference on June 27, 2013 to inquire as to whether the parties wanted to proceed on their previously submitted briefs. For clarity of the record, Defendants withdrew their Motion to Dismiss the (First) Consolidated Amended Complaint on July 8, 2013 and simultaneously filed a Motion to Dismiss the Second Consolidated Amended Complaint, along with their Memorandum of Law. Plaintiffs filed their opposition to the renewed Motion to Dismiss on August 5, 2013, and Defendants submitted their reply on September 9, 2013.

IV. Discussion

The first cause of action in the SCAC alleges Defendants engaged in manipulation of the cotton futures market in violation of the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 9, 13(a), 13b, 25(a) (2013). The second cause of action alleges Defendants willfully aided, abetted, counseled, induced, or procured the commission of violations of the CEA by other Defendants. The third cause of action alleges antitrust violations under the Sherman Act, 15 U.S.C. §§ 1, 2 (2013). The fourth and final cause of action alleges unjust enrichment by Defendants as a result of their unlawful acts.

Pursuant to their manipulative scheme, Plaintiffs claim Defendants engaged in highly unusual conduct by uneconomically overpaying to purchase cotton and demanding delivery on their futures contracts, which, in turn, laid the framework for a squeeze. (Second Con. Am. Compl. ¶¶ 6(f), 34.) Specifically, Defendants' acquired dominant long positions in the May 2011 Contract, (Id. ¶¶ 6(h), 45), turned down EFP offers of higher quality, lower priced cotton in the cash markets, (Id. ¶¶ 55-56), while adding to their long positions, (Id. ¶¶ 47, 52(e)), and refused to liquidate the same even though lower priced cotton could have been used to fulfill

Defendants' merchandising needs. (Id. ¶¶ 61(a)-(d), 78(d).) Then, Defendants took record ratios of deliveries on the May 2011 Contract, (Id. ¶¶ 4(c), (e)), failed to retender certificated stocks, (Id. ¶ 42(c)), and decertified the cotton delivered on the May 2011 Contract, deflating the certificated supplies available for delivery on the July 2011 Contract. (Id. ¶¶ 42(d)-(f).) Finally, after exploiting the depleted certificated supplies for the May 2011 Contract, Defendants repeated the same uneconomic conduct for the July 2011 Contract. (Id. ¶ 5(j).)

To the contrary, Defendants argue Plaintiffs' losses were due to their own poor speculation in a volatile cotton futures market and not because of Defendants' market behavior. The manipulative acts alleged by Plaintiffs, particularly that Defendants demanded delivery on a large number of futures contracts and refused lower priced cotton from the cash markets, do not establish market manipulation. Plaintiffs have not alleged any shortage of physical cotton that prevented them from making delivery. Moreover, Plaintiffs have not sufficiently pled Defendants' manipulative intent, that there were artificial prices in the cotton futures market, or that Defendants' conduct caused artificial prices in the futures market. Defendant Louis Dreyfus Commodities B.V. also challenges personal jurisdiction over it.

A. *Standard of Review*

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows for dismissal if a party fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When deciding a motion to dismiss, the court must accept as true all well-pled facts alleged in the complaint and must draw all reasonable inferences in plaintiff's favor. McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007). Claims should be dismissed when a plaintiff has not pled enough facts that "plausibly give rise to an entitlement for relief." Ashcroft v. Iqbal, 556

U.S. 662, 679 (2009). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678. If the non-moving party has "not nudged [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

B. *CEA Manipulation Claim*[8]

The CEA makes it illegal "to manipulate or attempt to manipulate the price of any commodity . . . ." 7 U.S.C. § 13(a)(2). Drawing from the decisions of the Commodity Futures Trading Commission ("CFTC"), courts have developed a four-factor test to determine whether prices have been manipulated: "'(1) The [defendant] had the ability to influence market prices; (2) The [defendant] specifically intended to do so; (3) The 'artificial' prices existed; and (4) The [defendant] caused the artificial prices.'" In re Platinum & Palladium Commodities Litig., 828 F. Supp. 2d 588, 598 (S.D.N.Y. 2011) (quoting In re DiPlacido, Comm. Fut. L. Rep. (CCH) ¶ 30,970, 2008 WL 4831204, at *25 (CFTC Nov. 5, 2008)). Defendants argue Plaintiffs have not alleged facts to support any of the four elements for a CEA manipulation claim.

At the outset, the parties disagree as to whether Plaintiffs' CEA manipulation claim is subject to the heightened pleading requirements of Rule 9(b) or the more permissive standard of Rule 8(a).[9] Two different approaches have been taken in this District. Some courts have held, "'[A] claim for market manipulation is a claim for fraud, [so] it must be pled with particularity under Rule 9(b).'" In re Amaranth Natural Gas Commodities Litig. (Amaranth I), 587 F. Supp.

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[8] There is no challenge to jurisdiction over any Defendants except Louis Dreyfus Commodities B.V. Therefore, the CEA manipulation claim is initially discussed with respect to those Defendants over which the Court indisputably has personal jurisdiction.

[9] Fed. R. Civ. P. 9(b) requires "a party must state with particularity the circumstances constituting fraud[,]" whereas Fed. R. Civ. P. 8(a) only mandates "a short and plain statement of the claim . . . ."

2d 513, 535 (S.D.N.Y. 2008) (quoting ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 102 (2d Cir. 2007)).[10] To the contrary, other courts have said a "case specific" analysis is required to determine whether the claims "sound in fraud." CFTC v. Parnon Energy Inc., 875 F. Supp. 2d 233, 244 (S.D.N.Y. 2012); CFTC v. Amaranth Advisors, LLC, 554 F. Supp. 2d 523, 530–31 (S.D.N.Y. 2008).

This very issue was recently argued before the Second Circuit; though, the Court did not authoritatively rule on which of these two approaches the district courts should follow. In re Amaranth Natural Gas Commodities Litig. (Amaranth III), 730 F.3d 170, 180-81 (2d Cir. 2013). Nonetheless, the Circuit provided some indication of how it might decide the issue in a footnote: "We do note for future cases that the current CFTC regulations on manipulation, which were promulgated after the district court's decision, distinguish between fraud-based and other forms of manipulation. See 17 C.F.R. §§ 180.1, 180.2." Id. at 181 n.11. Although courts are always hesitant to read the proverbial tea leaves, this footnote seemingly supports the case specific approach. See Amaranth Advisors, 554 F. Supp. 2d at 534 (noting "the CEA has a separate anti-fraud section apart from the anti-manipulation provision[,]" and since "the statute distinguishes fraud and manipulation by addressing them in different provisions, it would be redundant to construe manipulation to require a fraud element"). As such, this Court analyzes the allegations in the SCAC to determine whether they sound in fraud.

Courts utilizing the case specific approach have applied Rule 9(b) where the allegations involve disseminating false or misleading information in the market. See, e.g., In re Crude Oil Commodity Litig., No. 06 Civ. 6677 (NRB), 2007 WL 1946553, at *4–5 (S.D.N.Y. June 28,

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[10] ATSI Communications dealt with securities manipulation rather than commodities manipulation. 493 F.3d at 94. Judge Scheindlin noted, however, "[T]here is no principled reason to distinguish between commodities manipulation and securities manipulation in selecting the applicable pleading standard." Amaranth I, 587 F. Supp. 2d at 535.

2007) (Buchwald, J.) (applying Rule 9(b) to claims that defendants made false and misleading statements in support of their manipulation scheme); In re Natural Gas Commodity Litig. (Natural Gas II), 358 F. Supp. 2d 336, 343 (S.D.N.Y. 2005) (employing Rule 9(b) where defendants disseminated misleading information and engaged in false reporting). Where a plaintiff has alleged a manipulative trading strategy, courts have found Rule 8(a) is more appropriate. See, e.g., Amaranth Advisors, 554 F. Supp. 2d at 534 (applying Rule 8(a) where the allegations of manipulation were based on a particular trading strategy); Parnon Energy, 875 F. Supp. 2d at 244 (analyzing a manipulation claim under Rule 8(a) where the alleged scheme was accomplished through use of market power).

Here, there are no allegations that Defendants provided false or misleading information to anyone or disseminated such information into the market. Instead, Plaintiffs' manipulation claim is based solely on Defendants' market behavior. For example, Plaintiffs allege Defendants took dominant long positions in the May 2011 Contract and added to them, knowing cotton could not be certificated in time to satisfy delivery on the contracts. (Second Con. Am. Compl. ¶¶ 52(a), (l), (p).) Then, they stood for delivery, refusing to purchase cheaper, more freely available cotton in the cash markets. (Id. ¶¶ 53-60.) As a result of Defendants' alleged uneconomic conduct, prices increased artificially, resulting in losses to Plaintiffs. (Id. ¶¶ 52(u), 63.) While this is only a brief account of Plaintiffs' allegations, it shows the CEA manipulation claim in this case does not sound in fraud. Thus, the pleading standards of Rule 8(a) govern here.

i. *Ability to Influence Market Prices*

Defendants argue Plaintiffs have not pled adequate facts showing they had the ability to influence market prices. In particular, Plaintiffs' squeeze theory is deficient because it does not

allege a scarcity that prevented Plaintiffs from delivering the commodity in satisfaction of their contracts. Under Defendants' formulation, a long with dominant positions in the futures market cannot influence prices unless there is either a shortage of physical cotton or market congestion. (May 20, 2013 Tr. at 20.) In other words, if Defendants stop the contracts and the prices to offset are too high, shorts can go into the cash markets to buy cotton for delivery. Therefore, a squeeze can only be effectuated if there is a limitation on the availability of the physical commodity – for instance, if Defendants demand delivery and there is no cotton available for shorts to deliver due to Defendants' control over the cash market. Defendants point out Plaintiffs have alleged, however, there was an abundance of physical cotton available in the cash markets because of the large number of export cancellations. (Id. ¶¶ 53, 74-80.)

In response, Plaintiffs claim they are not required to allege a shortage of physical cotton for Defendants to effectuate a squeeze. They argue the uneconomic conduct alleged – insisting upon record ratios of deliveries, depleting certificated supplies of cotton, and refusing to retender – shows Defendants' improper scheme to inject artificial demand and uneconomically withdraw certificated supplies from the market. These allegedly manipulative actions exacerbated a congested market already subject to long delays for certification. By continuing to acquire dominant long positions in excess of the certificated cotton supply and stopping the contracts, Defendants effectuated a squeeze, knowing it would be impossible for Plaintiffs to certificate more cotton in time for delivery.

Essentially, the parties dispute whether Defendants' lack of control over the market for physical cotton defeats the first element of Plaintiffs' manipulation claim. While the Court is aware of cases holding market control "is *not* a requirement of manipulation in all its forms[,]" DiPlacido v. CFTC, 364 Fed. App'x 657, 660 (2d Cir. 2009) (emphasis in original); In re

Hohenberg Bros. Co., [1975–1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,271, 1977 WL 13562, at *7 (CFTC Feb. 18, 1977), those cases involved trade-based manipulation, which is not relevant to the instant action.[11] Rather, Plaintiffs allege a squeeze by Defendants, a feature of which is often market control over the *deliverable* supply. See DiPlacido v. CFTC, 364 Fed. App'x at 660; In re Cox, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,786, 1987 WL 106879, at *4-8 (CFTC July 15, 1987); Ind. Farm Bureau, 1982 WL 30249, at *10.

Both Cox and Indiana Farm Bureau provide explanations as to why market control over the deliverable supply is necessary to influence prices when a squeeze is alleged. Relying on Indiana Farm Bureau, the CFTC stated in Cox,

> When analyzing the ability of the accused to influence market prices, we must recognize that there are two ways to satisfy futures obligations: offset in the futures market or delivery of the underlying commodity. The accused lacks the ability to influence prices if other market participants can bypass his demands and extinguish their obligations elsewhere. Here, as in Indiana Farm Bureau, we are confronted with an arguably congested market and the claim that respondents either were responsible for the congestion or unlawfully exacerbated it. But as we recognized in Indiana Farm Burea [sic] 'squeezes in general and manipulative squeezes in particular are possible only when the delivery option disappears and its tempering effect is lost. Thus, the adequacy of 'deliverable supply,' as distinguished from supply generally, and the role of market participants in the supply scenario is of great significance in any analysis . . . . The acquisition of market dominance is the hallmark of a long manipulative squeeze. For without the ability to force shorts to deal with him either in the cash or futures market, the (long) manipulator is not able successfully to dictate prices because a short may buy grain from other sources and deliver against his commitments.'"

1987 WL 106879, at *4 (internal citations omitted). Notwithstanding this description of a squeeze, the CFTC has focused on additional considerations:

[11] The trade-based manipulation, also colloquially known as "banging the close," is based on trading floor practices. (May 20, 2013 Tr. at 21-22.) In DiPlacido, for instance, the alleged manipulator tried to distort the market by "execut[ing] large orders during the Closes," which successfully influenced settlement prices. 2008 WL 4831204, at *10. The CFTC distinguished this type of manipulation from a squeeze, "which generally involve[s] manipulation of futures prices through control of the cash market rather than the trade-based type manipulation at issue in [DiPlacido]." Id. at *25.

> [U]nder [the Administrative Law Judge's] reading of Indiana Farms, the holder of a long futures position could not be deemed to exacerbate a market congestion unless he controlled a substantial share of the deliverable supply in addition to his long futures position. Neither the language of Indiana Farms nor the policies underlying the law of manipulation, however, support such a narrow construction of the concept of exacerbation. While holders of dominant long positions should normally be free to reap the benefits of their foresight during a contract's final trading days, a congested market is not an appropriate venue for unrestrained self-interest. Once such a dominant long has knowledge of a congested situation, the least we can demand is that he not take positive steps (such as increasing his position) which are likely to increase the threat to the orderly settlement of the underlying contract.

In re Abrams, Comm. Fut. L. Rep. (CCH) ¶ 25,684, 1993 WL 140823, at *5 (CFTC May 4, 1993). Thus, after Indiana Farm Bureau, Cox, and Abrams, the CFTC found manipulation through a squeeze could be accomplished by a long who holds dominant positions in the futures market *and* exerts control over the market for the deliverable supply of the commodity *or* intentionally exacerbates market congestion by taking positive steps to disrupt orderly settlement with knowledge of congested market conditions. Ind. Farm Bureau, 1982 WL 30249, at *10 n.12; Abrams, 1993 WL 140823, at *3 n.6.

With respect to this case, Plaintiffs contend Defendants' "extensive uneconomic conduct" is sufficient to prove manipulation. Nevertheless, Plaintiffs' argument must be reconciled with Cox and Indiana Farm Bureau. Defendants are correct that there are no allegations of a shortage of cotton, never mind cheaper, higher quality cotton, in the cash markets. Cox makes clear where an alleged manipulator does not foreclose the delivery option, the manipulator cannot effectively implement a squeeze because the artificial market congestion the manipulator is attempting to create cannot exist when a short can turn to another source for deliverable supplies. 1987 WL 106879, at *8.

But the thrust of Plaintiffs' position is that even though there were abundant supplies of physical cotton in the cash markets, due to pre-existing market congestion, there was a shortage of *deliverable* supplies, as only certificated cotton could satisfy the futures contracts. In order to make delivery on Defendants' contracts, Plaintiffs claim they would have been required to purchase the necessary cotton in the cash market and have it certificated over two months in advance of LND due to delays in the shipping and certification processes. (Second Con. Am. Compl. ¶ 31(f).) Certification would require loading-out the cotton from a non-Exchange-approved warehouse and having it shipped to an ICE warehouse, which could take up to sixty-three days from the time of the load out order to the time the cotton is extracted. (Id. ¶ 31(a).) Once the cotton is extracted, the shipping process "typically required days or weeks." (Id. ¶ 31(d).) After the cotton reached the ICE warehouse, Plaintiffs would have to request certification from the USDA, which took "more than two weeks" during April and May of 2011. (Id. ¶ 31(e).) Plaintiffs posit they would have been required to begin moving non-certificated cotton at least nine weeks before LND in order to have it certificated and delivered on time in accordance with the contract. (Id. ¶ 31(f).)

In Cox and Indiana Farm Bureau, the CFTC rejected the notion that a short is not required to plan ahead for delivery. "[I]t is irresponsible market behavior for shorts to enter the delivery month . . . without making adequate delivery preparations." Cox, 1987 WL 106879, at *6 (citing Ind. Farm Bureau, 1982 WL 30249, at *11). In fact, Cox specifically found "a valid analysis of deliverable supply" should not be made "in the context of the last trading day[,]" meaning shorts must make advance preparations for delivery prior to the last trading day or incur the expense of offsetting at the last minute if they have failed to do so. Id.

As Defendants accurately point out, the Fifth Circuit, too, has held shorts have a legal obligation to plan ahead for delivery. Volkart Bros., Inc. v. Freeman, 311 F.2d 52, 60 (5th Cir. 1962). The Volkart Court rejected the argument that shorts did not have time to purchase acceptable cotton and certificate it for delivery. Id. at 59. Since all shorts had the same opportunity to purchase cotton with prudent planning, the failure to do so meant the short might be forced to pay higher prices to offset as a result of poor preparation. Id. at 59-60. Indeed, the Fifth Circuit explicitly found a short would not be excused from its obligations under the contract because it failed to plan ahead. Id. at 60. "[P]roceed[ing] upon the assumption that the shorts should not be required to deliver at maturity would [equate commodities trading to] . . . a gambling institution rather than a legitimate futures exchange." Id.

Ultimately, the fact that Defendants held large long positions on the May and July 2011 Contracts, in excess of over two times the amount of available certificated cotton, does not establish market manipulation in this case. Nor does the fact that Defendants stood for delivery without turning to the cash markets establish manipulation. See id. at 59 ("A large long interest may exist which has not been built up for manipulative or even speculative purposes, but as a hedge, and maybe a hedge on which the buyer expects to take delivery to meet cash . . . commitments.") (citation omitted). None of these acts, on their own, prohibit shorts from delivering physical cotton in satisfaction of the futures contracts. Moreover, Cox and Indiana Farm Bureau state if Plaintiffs choose not to make preparations for delivery in advance, they voluntarily incur the risk that the cost to offset their short positions might be high.[12] If this were all Plaintiffs alleged, there would be little need to explore the manipulation claim any further.

[12] That Defendants may have benefitted from Plaintiffs' poor preparation by exacting high prices from them to offset their short positions does not de facto evidence manipulation. See Ind. Farm Bureau, 1982 WL 30249, at *12 ("A short who, for whatever reason, enters the delivery month unprepared or unable to deliver runs the risk that he will

Except, the facts of this case do not end there. Cognizant of the inability to provide tenderable cotton by LND, Defendants supposedly worsened existing congestion in the futures market by adding to their dominant long positions in April. Accepting the allegations in the SCAC as true, Plaintiffs would have been required to order load-outs of non-certificated cotton by March 11 for the May 2011 Contract and by May 12 for the July 2011 Contract to be certificated in time for delivery. Yet, Defendants increased their long positions well after mid-March, allegedly recognizing they already held greater long positions than the amount of available certificated cotton and Plaintiffs would no longer have the option to certificate additional supplies in a timely manner. Rather, Plaintiffs would have to offset their short positions at artificially high prices or default under the contract. These allegations, if true, when coupled with the other alleged conduct could demonstrate a squeeze through exacerbation of a congested market and, in turn, the ability to influence market prices.[13]

Abrams supports this conclusion. Plaintiffs claim Defendants were or should have been aware that there was not enough certificated cotton to satisfy their long positions through publically-available, daily reports from the USDA of bales pending certification and the ICE's Certified Stocks Report. (Second Con. Am. Compl. ¶ 31(i).) Further, it can be reasonably inferred that Defendants, as frequent and experienced traders, were aware that it took more time than available to certificate cotton for delivery; in fact, Plaintiffs allege as much.[14] (Id. ¶ 31(j).) Purportedly having knowledge that there was a shortage of available certificated cotton and more

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have to offset at the long's price. Where a long has not intentionally created or exploited a congested situation, the long has a contractual right to stand for delivery or exact whatever price for its long position which a short is willing to pay in order to avoid having to make delivery.").

[13] Defendants point out this theory of manipulation is not plausible for the July 2011 Contract because if true, by July of 2011, Plaintiffs, too, would have been aware of the market congestion and able to adequately plan ahead for delivery, even if that meant making preparations over nine weeks in advance. The Court need not determine the viability of this argument at the present time; however, it may be dispositive in the future.

[14] At oral arguments, Defendants' counsel conceded Defendants "had some sense of how long it takes to certificate cotton." (May 20, 2013 Tr. at 65.)

cotton could not be timely certificated, Defendants affirmatively exacerbated market congestion by acquiring additional long positions in spite of these market realities and then demanding delivery notwithstanding the availability of lower-priced cash market cotton and offers for EFPs. See Abrams, 1993 WL 140823, at *5 (stating the knowing exacerbation of a congested market can lead to a manipulation claim).

The unusually lengthy process to certificate cotton was undoubtedly through no fault of Defendants, but there is no requirement that Defendants create the conditions causing market congestion. They merely had to take advantage of a congested situation in such a way that they could intentionally exact artificial prices from other market participants.

> [In a squeeze,] there may not be an actual monopoly of the cash commodity itself, but for one reason or another deliverable supplies of the commodity in the delivery month are low, while the open interest on the futures market is considerably in excess of the deliverable supplies. Hence, as a practical matter, most of the shorts cannot satisfy their contracts by delivery of the commodity, and therefore must bid against each other and force the price of the future up in order to offset their contracts. Many squeezes do not involve intentional manipulation of futures prices, but are caused by various natural market forces, such as unusual weather conditions which have caused abnormally low crop production or inadvertent destruction of a substantial volume of the commodity itself. However, given a shortage of deliverable supplies for whatever reason, the futures price can be manipulated by an intentional squeeze where a long acquires contracts substantially in excess of the deliverable supply and so dominates the futures market – i.e. has substantial control of the major portion of the contracts – that he can force the shorts to pay his dictated and artificially high prices in order to settle their contracts.

Cargill, Inc. v. Hardin, 452 F.2d 1154, 1162 (8th Cir. 1971). By contending Defendants intentionally exploited market congestion, resulting in Plaintiffs' inability to turn to the cash market for deliverable supplies, Plaintiffs have provided sufficient facts to allege the ability to influence market prices on a Rule 12(b)(6) motion.

Defendants advance several arguments challenging this portrayal of Plaintiffs' manipulation claim. First, Defendants contend Plaintiffs' allegations that it took nine weeks to certificate cotton are implausible for non-Exchange-approved warehouses and at best, describe the maximum load-out times for Exchange-approved warehouses. Defendants also argue Plaintiffs' allegations do not explain why they could not have gone to private warehouses or agricultural cooperatives. While Defendants' contentions may or may not be supported by the evidence, such arguments are more appropriate for summary judgment. The Court is required to accept Plaintiffs' well-pled allegations as true, regardless of whether Defendants present an equally plausible scenario. The Court's role on a Rule 12(b)(6) motion is to determine whether Plaintiffs can state a claim – not whether Plaintiffs can provide the most convincing of two competing explanations. See Sims v. Artuz, 230 F.3d 14, 20 (2d Cir. 2000) ("At the Rule 12(b)(6) stage, '[t]he issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims.'") (citation omitted).

In addition, Defendants highlight Plaintiffs' inconsistent position that on the one hand, it was impossible to certificate cotton in time for the May 2011 Contract, and on the other hand, there was certificated cotton available on the SEAM for various dates throughout April of 2011, which Defendants should have purchased. (Second Con. Am. Compl. ¶¶ 52(l), 57, 59.) This information could imply certificated cotton was, in reality, available to Plaintiffs, but further fact-finding would be required to determine whether such facts are fatal to Plaintiffs' claim. Besides, the availability of cotton from the SEAM is described in the context of what could be acquired by Defendants, not Plaintiffs. To assume from these allegations that Plaintiffs could have acquired sufficient certificated cotton for delivery would amount to rejecting Plaintiffs' recitation of the facts and drawing adverse inferences against them. C.f. Chance v. Armstrong,

143 F.3d 698, 701 (2d Cir. 1998) ("'Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test [for a motion to dismiss].'" (quoting Branham v. Meachum, 77 F.3d 626, 628 (2d Cir. 1996))); Twombly, 550 U.S. at 556 ("[O]f course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable . . . .").

Lastly, Defendants argue they did not create the conditions resulting in the alleged market congestion, and they provide several explanations for why they could not have known the market was congested or intentionally exacerbated it. Under Cargill and Abrams, Defendants need not have caused the market congestion but could still manipulate prices if they knew of the congested conditions and intentionally exploited them. Cargill, 452 F.2d at 1162; Abrams, 1993 WL 140823, at *5. As to the latter contention, Plaintiffs allege Defendants would have seen reports on a daily basis regarding the number of bales pending certification and the number of bales certificated, imputing knowledge of market congestion on Defendants. The Court declines Defendants' repeated invitations to weigh evidence not yet presented and to choose between competing arguments at this preliminary stage. See Wetzel v. Town of Orangetown, No. 06 Civ. 15190 (SCR)(GAY), 2009 WL 690114, at *4 (S.D.N.Y. Mar. 16, 2009) ("In evaluating a motion to dismiss a complaint[,] . . . this Court is 'not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient.'" (quoting Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985))). Thus, Plaintiffs have adequately pled the first element of a manipulation claim.

ii. *Manipulative Intent*

Plaintiffs argue manipulative intent can be inferred from Defendants' dominant long

positions in the futures market coupled with Defendants' alleged uneconomic conduct. Such conduct, according to Plaintiffs, includes standing for delivery on their contracts, refusing to purchase cotton in the cash market, refusing to engage in EFPs, adding to their long positions when cotton from the cash markets could no longer be timely certificated, and decertifying the cotton they received rather than re-tendering it to other Exchange participants.

The intent element of a CEA manipulation claim was discussed at length by the CFTC in Indiana Farm Bureau:

> [I]n order to prove the intent element of a manipulation or attempted manipulation of a futures contract price[,] . . . it must be proven that the accused acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand influencing futures prices in the particular market at the time of the alleged manipulative activity. Since proof of intent will most often be circumstantial in nature, manipulative intent must normally be shown inferentially from the conduct of the accused. But once it is demonstrated that the alleged manipulator sought, by act or omission, to move the market away from the equilibrium or efficient price—the price which reflects the market forces of supply and demand—the mental element of manipulation may be inferred.

1982 WL 30249, at *7. "Holding out for high prices is normally rational and lawful market behavior. Such activity only becomes unlawful when it is accompanied by manipulative intent as generally manifested by conduct other than simply seeking the best price in a pit in which there may be supply shortages." Id. at 8 (internal citations omitted). Hence, "where there is evidence that the deliverable supply was intentionally and significantly reduced[,] . . . the seeking of 'unreasonably high prices,' which otherwise would be lawful conduct, becomes susceptible to an inference that the true purpose of the activities of the accused is to create prices not responsive to the forces of supply and demand." Id. at 9.

As discussed earlier, Plaintiffs do not allege Defendants raided the cash markets for control over physical cotton; to the contrary, Plaintiffs repeatedly point out there was an abundance of cotton in the cash market that Defendants consistently turned down. Nonetheless, Plaintiffs do allege Defendants intentionally exhausted the *deliverable* supply with knowledge that additional certificated cotton could not be procured. Recognizing they held significantly more long positions than available certificated cotton, Defendants added to those positions and stopped almost 100% of all deliveries for that settlement period. It can be reasonably inferred from these allegations that Defendants knowingly and actively disrupted an already congested market where the deliverable supply was insufficient to cover the open interest with the intention of seeking artificially high prices from shorts to offset their positions.

iii. *Existence of Artificial Prices*

To successfully plead a manipulation claim, Plaintiffs must also allege an artificial price of the relevant commodity – that is "a price that 'does not reflect basic forces of supply and demand.'" Parnon Energy Inc., 875 F. Supp. 2d at 246. "When determining if artificial prices exist, a court may consider the underlying commodity's normal market forces, historical prices, supply and demand factors, price spreads, and also the cash market for the commodity at issue." In re Commodity Exch., Inc., Silver Futures and Options Trading Litig., No. 11 Md. 2213 (RPP), 2012 WL 6700236, at *12 (S.D.N.Y. Dec. 21, 2012). However, "a statistically unusual high (or low) price will not on that basis alone be deemed artificial. . . . '[I]t is incumbent on the parties to explain or justify the relevance of such evidence." DiPlacido, 2008 WL 4831204, at *30 (quoting Cox, 1987 WL 106879, at *9).

The SCAC details rare market phenomena allegedly resulting from Defendants'

uneconomic conduct. "In May 2011, the May-July spread was approximately 20 cents higher than would be expected given (a) the relation between the May-July spread and USDA projections of carryout during the 1990-2010 period, and (b) the USDA projected carryout as of May 2011." (Second Con. Am. Compl. ¶ 87.) Similarly, "[i]n early-July 2011, the July-December 2011 spread was approximately 34 cents higher than would be expected given (a) the relation between the July-December spread and USDA projections of carryout during the 1990-2010 period, and (b) the USDA projected carryout as of early-July, 2011." (Id. ¶ 88.) "[T]he May 2011 Contract and the July 2011 Contract prices each diverged significantly [from] cash market prices" by as much as "ten times the average spread price [between 2000 and 2010 inclusive]." (Id. ¶¶ 65, 66(b).) Further, "[d]uring the delivery period on the May 2011 Contract, deliverable cotton stocks were rising while the backwardation was increasing." (Id. ¶ 90.) "[T]he backwardation in 2011 was seven times greater than that in 2010." (Id. ¶ 105.)

Once Defendants were in a position to effectuate the squeeze, the market allegedly responded by departing from historical trends in record fashion. The market switched from declining backwardation to increasing backwardation, the spread prices to the next delivery month and beyond reached all-time highs, and the prices in the futures and cash markets continued to diverge.[15] These allegations lead to a reasonable inference that the prices of cotton futures for the May and July 2011 Contracts were not the result of typical market forces. See, e.g., Parnon Energy Inc., 875 F. Supp. 2d at 247 (finding allegations of artificial price sufficient where the market moved from backwardation to contango as a result of defendants' conduct); Cargill, 452 F.2d at 1168 (agreeing the spread between the May and July wheat futures in 1963

[15] Defendants point out that Cox and Indiana Farm Bureau cast some doubt on the value of measuring artificiality by a divergence in price between the futures and cash markets. Cox, 1987 WL 106879, at *9; Ind. Farm Bureau, 1982 WL 30249, at *4 n.2. There is no particular test that is dispositive of whether artificial prices existed; therefore, the Court looks to all of the allegations in the SCAC to construe the market environment as a whole.

and the spread between the futures price and the cash price of wheat, amongst other things, were evidence of an "abnormal" price); In re Soybean Futures Litig., 892 F. Supp. 1025, 1058 (N.D. Ill. 1995) (holding "evidence of record inversions in the cash and futures markets, abnormal spreads in futures prices, and a 'de-linking' of cash and futures prices" created issues of material fact as to whether there were artificial prices in the soybean market).

Defendants counter with seemingly credible explanations as to why these trends occurred in the market at specific times. But, as previously stated, the Court is not permitted to use a motion to dismiss as an opportunity to select the most credible version of events. See Anderson News, LLC v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012) ("The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion. . . . A court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible."). Once more, the Court relies on the reasonable inferences drawn from Plaintiffs' facts without passing upon whether the inferences for which Defendants advocate provide a more accurate picture of market events in lieu of other plausible explanations.

iv. *Effect of Defendants' Conduct on Artificial Prices*

Defendants claim Plaintiffs have not shown they caused the allegedly artificial prices in the cotton futures market because "[t]he only significant act the Complaint alleges . . . was that Term Commodities Inc. took delivery of 99% of the contracts that were delivered in May and July 2011." (Def.'s Mem. at 17.) Since Plaintiffs allege artificial prices appeared as early as the beginning of April and FND was not until the end of April, Defendants argue there is no temporal link between the deliveries and the artificial prices. (Second Con. Am. Compl. ¶ 52(o);

May 20, 2013 Tr. at 30.) But, standing for delivery is not all Plaintiffs have put forth – they contend Defendants failed to liquidate during the "roll" period,[16] which increasingly applied upward pressure on prices in the futures market as Defendants continued to hold their long positions. (May 20, 2013 Tr. at 33.) It was the combination of this conduct by Defendants in conjunction with demanding delivery and existing market congestion that allegedly caused artificial prices.[17]

"The causation element requires that a defendant be the proximate cause of the price artificiality." Silver Futures and Options Trading, 2012 WL 6700236, at *16; Cox, 1987 WL 106879, at *12; DiPlacido v. CFTC, 364 Fed. App'x at 661–62. Essentially, Plaintiffs claim but for Defendants' manipulative market behavior, the backwardation in cotton futures prices would have supposedly continued to decline and the cash market prices would have converged with futures prices approaching settlement. According to Plaintiffs, Defendants' manipulative conduct included actions taken before FND to put upward pressure on prices. By early April, Defendants added to their dominant long positions and held these positions as other traders were rolling into the July 2011 Contract. Defendants allegedly caused prices, and the corresponding rate of backwardation, to climb in the beginning of April. Plaintiffs argue demanding delivery solidified the high prices Defendants could exact from them, but the squeeze was laid by Defendants' conduct in the weeks preceding FND. Similar to the other elements, these

[16] "To 'roll,' means that a trader makes the opposite trade of the position held in the expiring month (e.g., a person long one March 2011 Contract would sell one March 2011 Contract), and simultaneously executes a transaction for the same position in the next futures contract (e.g., a long would purchase one May 2011 Contract to create a long position there)." (Second Con. Am. Compl. ¶ 51.) "The community of traders either starts to roll out of the contract or liquidate about 30 days before first notice day so the first notice date was April 29th, they would begin to liquidate by March 29th or even earlier." (May 20, 2013 Tr. at 32; Second Con. Am. Compl. ¶ 50.)

[17] Much of the same conduct used to show the ability to influence the market is instructive in determining whether Defendants caused artificial prices. Courts have recognized the four elements of a CEA manipulation claim may converge depending on the facts of the case. See Soybean Futures, 892 F. Supp. at 1045 (noting the four elements of a manipulation case are "occasionally modified to fit the specific facts of a particular case, and there is some question to what extent these elements should be treated as separate and independent or whether they are factually and legally interdependent.").

allegations lead to a reasonable inference that Defendants caused the alleged artificial prices in the cotton futures market during the May and July 2011 Contract periods.

Plaintiffs' facts as set forth in the SCAC, when taken as true and drawing all reasonable inferences in their favor, state a CEA manipulation claim, including all four elements thereof. Defendants' Motion to Dismiss with respect to this cause of action is denied.

C. *CEA Aiding and Abetting Claim*

In their second claim, Plaintiffs allege Defendants willfully aided, abetted, counseled, induced, or procured the commission of violations of the CEA by other Defendants and unknown affiliates and associates. See 7 U.S.C. § 25(a)(1) (establishing liability for any individual "who willfully aids, abets, counsels, induces, or procures the commission of a violation [of the CEA]"). This Court benefits from the Second Circuit's recent articulation of the standard for aiding and abetting market manipulation under the CEA. "[A]iding and abetting requires the defendant to 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" Amaranth III, 730 F.3d at 182 (quoting United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.)). The Circuit went on to elucidate what a plaintiff must plead to survive a Rule 12(b)(6) motion:

> Inherent in Peoni's articulation is a relationship between a defendant's knowledge, intent, and the nature of assistance given. Accordingly, in evaluating a complaint alleging the aiding and abetting of a violation of the CEA, allegations about the defendant's knowledge, intent, and actions should not be evaluated in isolation, but rather in light of the complaint as a whole.

Id. at 183. In this case, "because aiding and abetting requires knowledge of the primary violation and an intent to assist it[,]" Plaintiffs must allege the aiding and abetting Defendants knew the

principal intended to manipulate the price of ICE cotton futures and the aiders and abettors intended to help the principal and did help the principal do so. Id.

Viewing the SCAC as a whole, Plaintiffs contend Defendant Nicosia was the principal behind the manipulative trading scheme and the corporate Defendants aided and abetted him in carrying out that scheme. Defendant Nicosia, on behalf of Allenberg, acquired large long positions and stopped large quantities of deliveries, (Id. ¶ 140), Defendant Allenberg purchased the contracts through Defendant Term Commodities, (Id. ¶ 141), and Defendants Louis Dreyfus Commodities B.V., Louis Dreyfus Commodities LLC, and LDC Holding, Inc. provided support to Allenberg through financial assistance, credit, and physical facilities. (Id. ¶ 142.) Notably, Nicosia occupied high-level positions in the Louis Dreyfus Commodities group, including his role as the Senior Platform Head Cotton Trader, membership on the Louis Dreyfus Commodities Executive Committee, and manager of LDC Holding Inc., and oversaw "the day-to-day activities of Defendants . . . ." (Id. ¶¶ 16-(a).) The intimate relationship between Nicosia and the Louis Dreyfus entities and his continuous involvement in the affairs and management of the corporate Defendants reasonably suggest the corporate Defendants knew about Nicosia's unlawful plan to manipulate the cotton futures market.

Moreover, Plaintiffs claim information flowed between the Louis Dreyfus entities in such a way that they would have been alerted to the unusual and uneconomic trading practices of Nicosia through Allenberg during the relevant time period.

> Each [of Defendants] well knew of the price distortions and the other publicly available information. Each actually knew or actually received reports indicating the cotton futures contract positions and conduct of Allenberg, Term Commodities, Inc., and their affiliates. Each had readily available to them the full information regarding such long positions and deliveries.

(Id. ¶ 143.) Aware of this information, the corporate Defendants sustained Nicosia's trades with the intention to "move or support the prices of, first, May 2011 Contract prices to that [sic] artificial levels and, later, move or support July 2011 Contract prices to or at artificial levels." (Id. ¶ 145.) Indeed, their alleged manipulation of cotton futures prices resulted in "great net profits for Defendants." (Id. ¶ 52(u).) Consequently, the corporate Defendants allegedly knew of Nicosia's plan to manipulate the cotton futures market, intended to assist him with the goal of profiting from artificial prices, and did assist him by financing and effectuating his trades. See Natural Gas I, 337 F. Supp. 2d at 512 (finding a claim for aiding and abetting where plaintiffs alleged defendants "were in regular and virtually continuous contact with one another" and "[during these ongoing communications, Defendants worked to report misinformation and to create false impressions of trading activity, specifically intending to manipulate the prices of natural gas futures"). Plaintiffs have supplied facts from which the Court can plausibly infer the corporate Defendants knew of Defendant Nicosia's intent to manipulate cotton futures prices and aided and abetted him in that activity.

D. *Remaining Claims*

Plaintiffs' remaining claims include antitrust violations under § 1 and § 2 of the Sherman Act and unjust enrichment by Defendants as a result of their unlawful acts.

i. *Sherman Act Section 1 Claim*

Pursuant to § 1 of the Sherman Act, "[e]very contract, combination[,] . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." 15 U.S.C. § 1. "'[T]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision

or from an agreement, tacit or express[.]'" Twombly, 550 U.S. at 553 (quoting Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954)). Defendants argue Plaintiffs' § 1 claim must fail because all of the corporate Defendants are part of the same business umbrella and are considered a single entity for antitrust purposes.

The United States Supreme Court examined the issue of when the conduct of affiliated entities should be viewed as a single enterprise under § 1 in American Needle, Inc. v. National Football League, 130 S. Ct. 2201, 2208 (2010). The Court found "conduct by legally related entities can violate § 1 when it stems from an agreement among 'separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking . . . .'" Platinum & Palladium, 828 F. Supp. 2d at 596 (quoting Am. Needle, 130 S. Ct. at 2212).

Based on the limited record, the Court declines to determine whether Defendants acted as a single entity for purposes of § 1 antitrust analysis at this juncture. American Needle clearly states it is not "determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture." 130 S. Ct. at 2212. Further, there is no evidence as to how decisions were made within and between the Defendant entities. At this early stage in the case, the Court is not equipped with factual evidence from the parties to undertake an inquiry into the "competitive reality" of whether "the [alleged] agreement joins together 'independent centers of decisionmaking.'" Id. (citation omitted).

Defendants also question the sufficiency of Plaintiffs' allegations to state a claim under § 1 of the Sherman Act. In Twombly, the Supreme Court set forth the pleading standards for a § 1 claim. See generally 550 U.S. 544. "To survive a motion to dismiss under Twombly, it is not

enough to make allegations of an antitrust conspiracy that are consistent with an unlawful agreement; to be viable, a complaint must contain 'enough factual matter (taken as true) to suggest that an agreement [to engage in anticompetitive conduct] was made.'" In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007) (citation omitted). "A plausible suggestion of agreement can be derived from specific allegations of actual agreement among defendants . . . [or] a plausible suggestion of agreement may be derived from allegations of parallel conduct." LaFlamme v. Societe Air France, 702 F. Supp. 2d 136, 146 (E.D.N.Y. 2010) (internal citations omitted). Importantly, "Section 1 does not cover wholly unilateral action." Tese-Milner v. Diamond Trading Co., Ltd., No. 04 Civ. 5203 (KMW), 2011 WL 4501336, at *5 (S.D.N.Y. Sept. 29, 2011), rev'd on other grounds, 507 Fed. App'x 67 (2d Cir. 2013). "[A] plaintiff must allege 'a combination or some form of concerted action between at least two legally distinct economic entities' that 'constituted an unreasonable restraint of trade . . . .'" Primetime 24 Joint Venture v. Nat'l Broad., Co., Inc., 219 F.3d 92, 103 (2d Cir. 2000) (citation omitted).

Plaintiffs offer the following allegations to demonstrate the existence of an agreement between Defendants:

> (1) "In manipulating a public market, it is better to work in concert with associates. The record backwardation and dislocations that Defendants relentlessly caused, during March 30 – May 6, 2011 and June 7 – July 7, 2011 enabled Defendants to gain financially from, first, the artificially high May 2011 Contract prices and, later, the artificially high July 2011 Contract prices compared to Defendants' financial return if normal price relationships had prevailed." (Id. ¶ 119 (internal citation omitted));
>
> (2) "Beginning on approximately March 30, 2011, and continuing until at least May 6, 2011, and again beginning on approximately June 7, 2011 and continuing until at least July 7, 2011, the exact dates being unknown to Plaintiffs, Defendants and their unknown co-conspirators engaged in a continuing agreement, understanding, or conspiracy in restraint of trade to artificially fix, maintain, suppress, and/or stabilize the prices of, first, the May 2011 Contract and, later, the July 2011 Contract." (Id. ¶ 132);
>
> (3) "In formulating and effectuating the contract, combination, or conspiracy, Defendants and their co-conspirators engaged in anticompetitive, restrictive and exclusionary

> activities, the purpose and effect of which were to restrain trade in, fix or manipulate prices ICE cotton futures and options contracts. These activities included the following: (a) Defendants took deliveries on (i) 3,898 of 3,928 May 2001 Contracts (99.23% of stops by all clearing member firms), and (ii) 1,613 of 1,629 July 2011 Contracts (99.01% of stops by all clearing member firms)[;] (b) Defendants acted uneconomically by taking delivery on May 2011 ICE Cotton No. 2 contracts while rejecting offers at lower prices for substantial amounts of equivalent physical cotton prior to the First Notice Day of such contract; (c) Defendants acted uneconomically by taking delivery on July 2011 ICE Cotton No. 2 contracts because substantial amounts of equivalent physical cotton were available in the cash market prior to the First Notice Day of such contract; (d) Defendants otherwise knowingly and collusively acted in order to restrain trade with or through its co-conspirators." (Id. ¶ 134); and
>
> (4) "In violation of Section 1 of the Sherman Act, Defendants entered an agreement, understanding or concerted action between and among Defendants. In furtherance of this agreement, Defendants fixed and artificially inflated prices for, first, the May 2011 Contract and, later, the July 2011 Contract." (Id. ¶ 159.)

These allegations are put forth in addition to the ones supporting the aiding and abetting claim, whereby Plaintiffs contend Nicosia engaged in manipulative market behavior through Allenberg. The remaining Defendants were aware of Allenberg's uneconomic market conduct due to the information passed between the Louis Dreyfus entities and Nicosia's leadership role within the Louis Dreyfus Commodities group. Even so, the corporate Defendants facilitated Nicosia's trading by, inter alia, providing financing and resources with the intention of artificially inflating prices, resulting in substantially higher profits.

The Second Circuit has made clear that the reasoning behind Twombly should steer the analysis of the allegations to state a claim under § 1: "'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.'" Starr v. Sony BMG Music Entm't, 592 F.3d 314, 322 (2d Cir. 2010) (quoting Twombly, 550 U.S. at 556). In faithfully adhering to this guidance, the Court finds there is enough factual matter in the SCAC to suggest the existence of an agreement between

Defendants. Plaintiffs pinpoint approximate dates when the alleged agreement was made and identify the principal of the plan as well as the aiders and abettors, who all jointly collaborated to engage in anticompetitive conduct. Plaintiffs allege a motive for the agreement, namely to reap considerable profits, and identify specific acts by both Nicosia and the corporate Defendants tending to show an agreement was made, either tacitly or expressly. In sum, the SCAC puts forth "plausible grounds to infer an agreement[,]" Twombly, 550 U.S. at 556, by Defendants to unreasonably restrain trade. As such, Plaintiffs' § 1 claim survives Defendants' Motion.

ii. *Sherman Act Section 2 Claim*

"[T]o state a claim for monopolization under Section 2 of the Sherman Act, a plaintiff must establish: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)). Inherent to the second element, there must be a showing of anticompetitive conduct. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct.*") (emphasis in original); Eatoni Ergonomics, Inc. v. Research In Motion Corp., 826 F. Supp. 2d 705, 708 (S.D.N.Y. 2011).

Defendants argue the allegations that they took deliveries in excess of 99% of the market share for two futures contracts, overpaid for cotton, and refused cotton that could have been purchased at a cheaper price do not raise an inference of monopoly power or demonstrate

Defendants engaged in anticompetitive conduct. (Second Con. Am. Compl. ¶¶ 108-09.) Plaintiffs contend Defendants had the ability to control the settlement price in the cotton futures market, which directly shows their monopoly power. Moreover, Plaintiffs allege Defendants intentionally created artificial prices through their uneconomic conduct. Plaintiffs define the relevant market as "the long position in the expiring ICE cotton futures contract or the market for taking deliveries on such Contract[f]rom March 30 until the end of May 2011 . . . [and f]rom June 7 until the end of July 2011[.]" (Id. ¶¶ 106-07.)

The preliminary argument Defendants advance is that in recent years, it has been common for competing trading firms to temporarily acquire 91% or more of the alleged relevant market. To support this contention, Defendants implore the Court to take judicial notice of a chart they compiled, containing publically available ICE data on delivery notices issued by various competitors from July of 2008 to October of 2012. Defendants synthesized that data to show the percentage of market share based on the deliveries. According to Defendants, their chart demonstrates several competitors temporarily acquired large market shares, which refutes any inference of monopoly power because there were no barriers to market entry.[18]

"There are two ways a plaintiff can show the possession of monopoly power: (1) through direct evidence of anticompetitive effects or (2) by defining a relevant market and showing defendants' excess market share." In re Crude Oil Commodity Futures Litig., 913 F. Supp. 2d 41, 51 (S.D.N.Y. 2012) (Pauley, J.) (citing PepsiCo, 315 F.3d at 107); see also Grinnell, 384 U.S. at 571 ("The existence of [monopoly] power ordinarily may be inferred from the predominant share of the market."). "A court will draw an inference of monopoly power only after full

[18] While the Court can take judicial notice of Defendants' chart, Ganino v. Citizens Utils. Co., 228 F.3d 154, 166 n.8 (2d Cir. 2000), it is not necessary for the disposition of Defendants' Motion with respect to the § 2 claim.

consideration of the relationship between market share and other relevant market characteristics." Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 98 (2d Cir. 1998). Other relevant market characteristics include "the 'strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand.'" Id. (citation omitted).

Defendants are correct in stating a large market share does not conclusively establish monopoly power. In fact, in Tops Markets, the Second Circuit found a competitor's successful entry into the market "refute[d] any inference of the existence of monopoly power that might be drawn from [defendant's] market share." Id. at 99. But, evaluating market characteristics to determine whether a large market share should lead to an inference of monopoly power is a fact intensive inquiry not suitable for a motion to dismiss. In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig., 562 F. Supp. 2d 392, 401 (E.D.N.Y. 2008) ("The existence of monopoly power . . . is heavily fact-dependent. . . . Market share is not the only factor in a court's analysis of whether the evidence supports an inference of the defendant's monopoly power; rather, courts consider it in the context of all of the evidence of the relevant market's dynamics."); Crude Oil, 913 F. Supp. 2d at 52.

Of further import, Plaintiffs set forth the existence of monopoly power not only through market share but also through Defendants' direct ability to influence prices. See Tops Markets, 142 F.3d at 98 (stating monopoly power "may be proven directly by evidence of the control of prices or the exclusion of competition"). In the 99 page, 167 paragraph SCAC, Plaintiffs detail how Defendants allegedly effectuated a squeeze in the cotton futures market, which in turn allowed Defendants to artificially manipulate futures prices during the May and July 2011 Contracts. This manipulative conduct allegedly allowed Defendants to "artificially fix, maintain,

suppress, and/or stabilize the prices of, first, the May 2011 Contract and, later, the July 2011 Contract." (Second Con. Am. Compl. ¶ 132.) Plaintiffs argue the market anomalies in 2011 – a "U-turn" in backwardation resulting in "the highest percentage backwardation and the highest absolute backwardation of any May-July Contract in the history of cotton futures trading for the time period of April 1 – May 6 of each year from 2000 – 2011 . . . ." (Id. ¶ 4(e)) – reasonably suggest Defendants' ability to control prices. The Court agrees. See Crude Oil, 913 F. Supp. 2d at 51 (citing a previous finding that "'Defendants' ability to change the market from backwardation to contango is . . . a 'direct measure' of control and demonstrates ability to influence the market [through direct evidence of monopoly power].'") (citation omitted).

Overall, Plaintiffs allege Defendants controlled 99% of the relative market during the relevant period and detail the market's U-turn in backwardation. (Second Con. Am. Compl. ¶¶ 42(b), 52(o).) They also allege Defendants intentionally acquired large long positions and added to them, knowing that if they stopped the contracts, there would not be adequate deliverable supplies and prices would rise accordingly. (Id. ¶¶ 31(j), 47.) These allegations are sufficient to infer Defendants were able to affect cotton futures prices directly.

In addition to monopoly power, Plaintiffs must also show "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." PepsiCo, 315 F.3d at 105. The facts set forth in the SCAC allege anticompetitive conduct by Defendants, describing an intentionally manipulative trading strategy to raise the prices of cotton futures in order to profit from their long positions. (Second Con. Am. Compl. ¶ 52(u).) Plaintiffs also claim Defendants acquired dominant long positions and demanded delivery even though their needs for physical cotton

could have been satisfied more cheaply in the cash markets. (Id. ¶ 56.) These facts lead to a reasonable inference of anticompetitive conduct.

Relying on Weyerhaeuser Co. v. Ross–Simmons Hardwood Lumber Co., Inc., 549 U.S. 312 (2007), Defendants argue overpaying for a good does not constitute anticompetitive conduct. Weyerhaeuser involved an alleged predatory bidding scheme, where one competitor in the input market for red alder saw logs accused another competitor of "'bid[ding] up the market price of a critical input to such high levels that rival buyers cannot survive (or compete as vigorously) and, as a result, the predating buyer acquires (or maintains or increases its) monopsony power.'"[17] Id. at 320 (citation omitted). The Supreme Court held predatory-pricing[18] and predatory-bidding claims are analytically similar, and given these similarities, the two-pronged test for predatory-pricing should also apply to predatory-bidding. Id. at 325. A predatory bidding claim requires proof that: (1) "the predator's bidding on the buy side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs[;]" and (2) the alleged predator had "a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."[19] Id. at 325. The Court found where the plaintiff only proved that the defendant had overpaid for alder saw logs to cause saw log prices to rise to artificially high levels as part of a plan to prevent the plaintiff from purchasing the materials it needed to compete, the plaintiff could not support a predatory bidding claim. Id. at 316-17.

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[17] "Monopsony power is market power on the buy side of the market. As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'" Weyerhaeuser, 549 U.S. at 320 (citation omitted).

[18] In a predatory pricing claim, "the predator reduces the sale price of its product (its output) to below cost, hoping to drive competitors out of business. Then, with competition vanquished, the predator raises output prices to a supracompetitive level." Id. at 318.

[19] To maintain a predatory pricing claim, a plaintiff must prove: (1) "the prices complained of are below an appropriate measure of its rival's costs[;]" and (2) the alleged predator had "a dangerous probabilit[y] of recouping its investment in below-cost prices." Id. at 318-19 (citation omitted).

Defendants are not the first to argue for the application of Weyerhaeuser in a case involving a § 2 claim through alleged manipulation of futures prices. In re Dairy Farmers of America, Inc. Cheese Antitrust Litigation, a case sharing significantly more similarities with the instant action than Weyerhaeuser, involved allegations that the defendants bought all of the available long positions in three months of milk futures contracts. 767 F. Supp. 2d 880, 888-89 (N.D. Ill. 2011). The defendants also purchased large quantities of cheese at escalated prices, which influenced prices in the milk futures market, thereby creating the false impression that milk prices were rising. Id. at 889. This scheme required the defendants to purchase cheese at an inflated price with the expectation that profits from the sales of the milk futures contracts would cover any losses from the purchase of the cheese. Id. at 890.

In response to the defendants' argument that Weyerhaeuser precluded the plaintiffs' claim under § 2, the Dairy Farmers Court stated,

> Defendants argue that the reasoning in Weyerhaeuser applies here as well. This is not so for at least three reasons. First, Weyerhaeuser involved a motion for judgment as a matter of law following a jury trial based on the evidence that had been admitted. Id. at 314–15, 127 S. Ct. at 1072. This case is before the Court on a motion to dismiss. Thus, Plaintiffs need only plead facts that make their claim plausible. Secondly, the facts of this case do not fit neatly into the prototypical descriptions of predatory pricing or predatory bidding schemes laid out in Weyerhaeuser. Defendants are alleged to have bid up the price of both milk futures and cheese at roughly the same time. They bid up the price of one in order to help maintain the inflated price of the other. And those products are not easily defined as inputs or outputs. For this reason, other investors (including Plaintiffs) were both competitors, in the sense that they may have also bought milk futures and cheese were it not for Defendants' manipulative tactics, and consumers, in the sense that their injury resulted simply from the purchase of those products at inflated prices (not their inability to compete in the manufacture and sale of some output).
>
> Finally, even accepting that Weyerhaeuser has some applicability here, Plaintiffs' allegations are in line with that case's driving principle. Weyerhaeuser identifies two significant links between predatory pricing and predatory bidding. First, "both claims involve the deliberate use of unilateral pricing measures for

> anticompetitive purposes." Id. at 322, 127 S. Ct. at 1076. Second, "both claims logically require firms to incur short-term losses on the chance that they may reap supracompetitive profits in the future." Id. Here, Plaintiffs allege both. . . . At the motion to dismiss stage, this is enough.

Id. at 905-06. This Court agrees with the reasoning in Dairy Farmers that although instructive, Weyerhaeuser is not dispositive of Plaintiffs' claim.

While the Court adopts all three rationales in the Dairy Farmers decision, the second and third grounds are expounded upon in the context of this case. Like Dairy Farmers, "the facts of this case do not fit neatly into the prototypical descriptions of predatory pricing or predatory bidding schemes laid out in Weyerhaeuser." Id. Although Plaintiffs may have sought to compete with Defendants in buying cotton futures, their injury, too, resulted from the inflated price of cotton as dictated by Defendants' influence over futures prices, "not their inability to compete in the manufacture and sale of some output[.]" Id. at 906.

Additionally, even if the main principles of Weyerhaeuser have some applicability to commodities manipulation, Plaintiffs' allegations in this case directly embody those principles – the deliberate use of unilateral pricing measures for anticompetitive purposes and incurring short-term losses in order to reap supracompetitive profits in the future. Weyerhaeuser, 549 U.S. at 322. Here, Defendants are alleged to have acquired large long positions in the cotton futures market and continued to add to them, holding their long positions while the rest of the market began to liquidate. By holding these positions, Defendants were able to lay the framework for forcing prices upward unilaterally. They turned down cheaper, higher quality cotton in the cash market and overpaid for cotton in the futures market in order to exact inflated prices from Plaintiffs at a later date. As such, Defendants' argument that Weyerhaeuser defeats Plaintiffs' § 2 claim is unpersuasive.

Based on the foregoing, Plaintiffs have stated a cause of action for Defendants' alleged violation of § 2 of the Sherman Act.

iii. *Unjust Enrichment Claim*

Plaintiffs' fourth claim alleges Defendants were unjustly enriched by their manipulative scheme and seeks the imposition of a constructive trust funded by the disgorgement of Defendants' profits. Defendants argue recovery under the theory of unjust enrichment is precluded because there is an express contract governing the subject matter at issue between the parties. The existence of the futures contracts excludes this claim even though Plaintiffs and Defendants are not parties to the same contracts, according to Defendants.[20]

Federal courts in the Second Circuit have routinely held the existence of a valid and enforceable contract can preclude an unjust enrichment claim relating to the subject matter of the contract. See, e.g., Granite Partners, L.P. v. Bear, Stearns & Co. Inc., 17 F. Supp. 2d 275, 311 (S.D.N.Y. 1998) (finding no unjust enrichment claim can lie where the sale and liquidation of securities were governed by contract); MacDraw, Inc. v. CIT Group Equip. Fin., Inc., 157 F.3d 956, 964 (2d Cir. 1998) (stating it is a well-settled principle that a valid and enforceable contract precludes recovery under a theory of unjust enrichment for subject matter governed by the contract). "This is true whether the contract is one between parties to the lawsuit, or where one party to the lawsuit is not a party to the contract." ABF Capital Mgmt. v. Askin Capital Mgmt., L.P., 957 F. Supp. 1308, 1333-34 (S.D.N.Y. 1997) (citing Graystone Materials, Inc. v. Pyramid Champlain Co., 604 N.Y.S.2d 295, 296 (App. Div. 3d Dep't 1993)).

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[20] In the futures market, "the parties do not transact directly—rather, the . . . clearinghouse sells to the buyer's clearing firm and simultaneously buys from the seller's clearing firm." Amaranth I, 587 F. Supp. 2d at 521.

Plaintiffs have not put forth any reasons why they should be permitted to maintain a claim in equity despite the existence of valid futures contracts. While futures contracts are between market participants and clearinghouses, not directly between market participants, Plaintiffs have not offered any authority stating an unjust enrichment claim should proceed under these circumstances. Even presuming the futures contracts did not preclude an unjust enrichment claim, Plaintiffs have failed to allege an adequate relationship to Defendants. Indeed, Plaintiffs define the proposed class as:

> All persons, corporations and other legal entities that (a) purchased between March 30 and May 6, 2011 a May 2011 Contract in order to liquidate a short position in such contract, including short positions held as part of spread positions; or (b) contracted to purchase cotton on call based on the May 2011 Contract price, and set the price on this contract between March 30 and May 6; or (c) purchased between June 7 and July 7, 2011, a July 2011 Contract in order to liquidate a short position therein, including short positions held as part of spread positions; or (d) contracted to purchase cotton on call based on the July 2011 Contract price, and set the price on this contract between June 7 and July 7, 2011.

(Second Con. Am. Compl. ¶ 124.) Nevertheless, there is only a strained connection between purchasers of cotton futures contracts or cotton on call and Defendants during the relevant time period. In the end, "[t]he alleged link between plaintiffs and defendants – from defendants' manipulations to the general [cotton] futures market to plaintiffs' trades – is too attenuated to support an unjust enrichment claim." Amaranth I, 587 F. Supp. at 547. As such, Plaintiffs fail to state a claim for unjust enrichment, and the fourth cause of action is dismissed.

E. *Personal Jurisdiction over Louis Dreyfus Commodities B.V.*

Solely with respect to Louis Dreyfus Commodities B.V., Defendants argue the Court does not have personal jurisdiction over the Netherlands-based entity. Accordingly, Defendants move to dismiss the SCAC against Louis Dreyfus Commodities B.V. pursuant to Rule 12(b)(2).

To establish jurisdiction, Plaintiffs allege: (1) Louis Dreyfus Commodities B.V. is a "holding company" that directly or indirectly owns or controls LDC Holding, Inc., which in turn, directly or indirectly owns or controls Louis Dreyfus Commodities Cotton LLC, also known as Allenberg Cotton Company (Second Con. Am. Compl. ¶¶ 13(a), (c), 150); (2) "Defendant Louis Dreyfus Commodities B.V. . . . originates approximately 20% of United States cotton production" (Id. ¶ 12); (3) Allenberg was owned or controlled by Louis Dreyfus Commodities B.V. (Id. ¶ 141); (4) "Louis Dreyfus Commodities B.V. . . . acted through Defendant Allenberg and other affiliates to manipulate prices as alleged" (Id. ¶ 142); and (5) "Louis Dreyfus Commodities B.V. . . . willfully aided, abetted, counseled, induced, or procured the commission of violations of the CEA by Defendants." (Id. ¶ 150.)

At the motion to dismiss stage, "'a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith . . . legally sufficient allegations of jurisdiction,' i.e., by making a 'prima facie showing' of jurisdiction." Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 184 (2d Cir. 1998). "The Court must construe the pleadings and supporting affidavits in the light most favorable to the plaintiff." Lechner v. Marco-Domo Internationales Interieur GmbH, No. 03 Civ. 5664 (JGK), 2005 WL 612814, at *2 (S.D.N.Y. Mar. 14, 2005) (citing PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997)).

Where a federal statute specifically provides for national service of process, personal jurisdiction is not determined by the forum state's rules. See PDK Labs, 103 F.3d at 1108 ("In a federal question case where a defendant resides outside the forum state, a federal court applies the forum state's personal jurisdiction rules 'if the federal statute does not specifically provide for national service of process.'") (citation omitted). Section 25 of the CEA states, "Process in such action may be served in any judicial district of which the defendant is an inhabitant or

wherever the defendant may be found." 7 U.S.C. § 25(c). "This language indicates a congressional intention to extend personal jurisdiction to the limit permitted by the Due Process Clause of the Fifth Amendment." Amaranth I, 587 F. Supp. 2d at 526 (citing Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1339 (2d Cir. 1972), abrogated by Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010)).

For the exercise of jurisdiction to comport with constitutional due process, "the 'minimum contacts' test and the 'reasonableness' inquiry" must be satisfied. Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 127 (2d Cir. 2002). The "minimum contacts" test analyzes "whether the defendant 'has certain minimum contacts [with the forum] . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" Id. (quoting U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135, 152 (2d Cir. 2001)). The "reasonableness" inquiry "asks 'whether the assertion of personal jurisdiction comports with traditional notions of fair play and substantial justice – that is, whether it is reasonable under the circumstances of the particular case.'" Id. at 129 (quoting Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996)).

Where the claim arises out of or relates to a defendant's contact with the forum, specific jurisdiction requires "the defendant 'purposefully availed' itself of the privilege of doing business in the forum and could foresee being 'haled into court' there."[21] U.S. Titan, 241 F.3d at 152 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)). "The Second Circuit has addressed the question of what activities of a foreign corporation satisfy the minimum contacts test and has listed the following factors for meeting the standard: (1) transacting

[21] As an alternative to specific personal jurisdiction, the minimum contacts test can be satisfied through general personal jurisdiction. "General personal jurisdiction, which . . . require[s] a finding of 'continuous and systematic' contacts, is only necessary when the cause of action does not arise from the defendant's contacts with the forum state." U.S. Titan, 241 F.3d at 152.

business in the United States, (2) doing an act in the United States, or (3) having an effect in the United States by an act done elsewhere." Norvel Ltd. v. Ulstein Propeller AS, 161 F. Supp. 2d 190, 206 (S.D.N.Y. 2001) (citing Leasco, 468 F.2d at 1340).

"The constitutionality of in personam jurisdiction in federal question cases where Congress has provided for worldwide service is to be determined by national, rather than local, contacts." SEC v. Softpoint, Inc., No. 95 Civ. 2951 (GEL), 2001 WL 43611, at *5 (S.D.N.Y. Jan. 18, 2001); accord U.S. Titan, 241 F.3d at 152 ("In determining whether personal jurisdiction exists over a foreign defendant who . . . has been served under a federal service of process provision, . . . a court should consider the defendant's contacts throughout the United States and not just those contacts with the forum."). Upon examining Louis Dreyfus Commodities B.V.'s activities on a national level, the Court finds the requisite minimum contacts through its business transactions and committing acts in the United States that made suit in this country reasonably foreseeable.

"Louis Dreyfus Commodities B.V. . . . originates approximately 20% of United States cotton production." (Second Con. Am. Compl. ¶ 12.) This allegation, coupled with other pervasive facts throughout the SCAC, such as the setting up entities in the United States to carry out various functions of its cotton merchandising business, lead to a reasonable inference that Louis Dreyfus Commodities B.V. had intentions of doing business and did do business at the national level. A sophisticated company, originating almost one quarter of all United States cotton production, could reasonably foresee being "haled into court" here.[22]

[22] Even though Louis Dreyfus Commodities B.V. has United States subsidiaries, the mere presence of those subsidiaries does not, on its own, establish personal jurisdiction. See Jazini, 148 F.3d at 184 ("Where . . . the claim is that the foreign corporation is present in New York state because of the activities there of its subsidiary, the presence of the subsidiary alone does not establish the parent's presence in the state. For New York courts to have personal

Once sufficient allegations of minimum contacts are established, the Court must determine whether the exercise of jurisdiction over Louis Dreyfus Commodities B.V. is reasonable under circumstances of this case.

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

Bank Brussels Lambert, 305 F.3d at 129 (quoting Metro. Life, 84 F.3d at 568). To avoid the exercise of jurisdiction, "a defendant must present 'a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" Id. (citation omitted).

The Court recognizes there would be some burden on Louis Dreyfus Commodities B.V. to litigate in New York, however, it is not an overwhelming one. Louis Dreyfus Commodities B.V. is not a fly-by-night operation that would be wholly unable to defend itself in this case. To the contrary, Plaintiffs allege it trades and markets commodities on an international level in all major world markets, implying the availability of significant international resources. (Second Con. Am. Compl. ¶ 12.) "Moreover, 'the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago [in litigating internationally].'" Norvel, 161 F. Supp. 2d at 207 (quoting Metro. Life, 84 F.3d at 574).

There is no question this forum has a strong interest in providing injured parties with relief from violations of the CEA and the Sherman Act. "The United States has a substantial interest in the enforcement of its commodities laws, and plaintiffs have a similarly substantial

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jurisdiction in that situation, the subsidiary must be either an 'agent' or a 'mere department' of the foreign parent."). Nowhere in the SCAC do Plaintiffs allege the United States subsidiaries are "agents" or "mere departments" of the foreign parent.

interest in obtaining relief for [the Defendants'] alleged violation of those laws." Amaranth I, 587 F. Supp. 2d at 536. The exercise of jurisdiction is further supported by the efficient resolution of the instant action by this Court.

With respect to the shared interest of the states, Louis Dreyfus Commodities B.V. contends if this Court exercises jurisdiction over it, a Pandora's box of discovery complications will ensue because of European privacy laws. "The presence of an entity subject to Dutch law would considerably complicate the discovery process, and potentially mire this Court in myriad disputes over European privacy laws and international regulations that restrict the extent of discovery that can be had in the United States." (Def.'s Mem. at 24-25.) Although it is likely discovery will be more complex with a European entity in the case, this factor, even in conjunction with the burden of international litigation, does not render the exercise of jurisdiction unreasonable. Courts have routinely made accommodations in the discovery process for issues that arise from European privacy laws. The Court is simply not persuaded that discovery would be as unmanageable as Louis Dreyfus Commodities B.V. suggests.

Accordingly, Plaintiffs have made a prima facie showing of personal jurisdiction over Defendant Louis Dreyfus Commodities B.V. Specific personal jurisdiction is alleged through Louis Dreyfus Commodities B.V.'s transacting business in the United States, which satisfies the minimum contacts inquiry. In addition, the Court's exercise of jurisdiction is entirely reasonable in light of Louis Dreyfus Commodities B.V.'s activity in this country, and conducting this litigation in New York will impose only a minimal burden given the company's global resources.

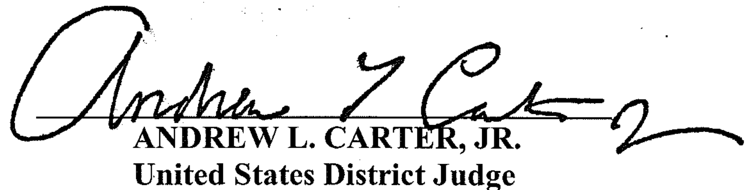
V. Conclusion

For the reasons set forth herein, Defendants' Motion to Dismiss is **GRANTED in-part** and **DENIED in-part**. The fourth cause of action for unjust enrichment is **DISMISSED** for failure to state a claim upon which relief can be granted. The Rule 12(b)(2) motion for lack of personal jurisdiction over Defendant Louis Dreyfus Commodities B.V. is **DENIED**. The Clerk of Court is respectfully directed to terminate the Motion at Dkt. No. 69.

The Court will hold a status conference on January 6, 2014 at 10 : 00 a .m. The parties shall appear in-person at the Thurgood Marshall United States Courthouse, 40 Foley Square, Courtroom 1306 at the above listed date and time.

SO ORDERED.

Dated: **New York, New York**
December 20, 2013



ANDREW L. CARTER, JR.
United States District Judge