UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MEXICAN GOVERNMENT BONDS ANTITRUST LITIGATION	No. 18-cv-02830 (JPO) ORAL ARGUMENT REQUESTED
This Document Pertains To: *ALL ACTIONS*	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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Defendants respectfully submit this memorandum in support of their motion to dismiss Plaintiffs' Consolidated Amended Complaint ("Complaint" or "CAC") (ECF No. 75) for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

Plaintiffs accuse 52 Defendants[1] associated with ten different financial institutions of engaging in an eleven-year antitrust conspiracy to fix the prices of Mexican Government Bonds ("MGBs") in two distinct ways: (1) by suppressing the bids submitted at government auctions of MGBs and then re-selling the auctioned MGBs at inflated prices, and (2) by agreeing to charge artificially wide bid-ask spreads for MGBs in secondary market trading.

The wide-ranging scope of this purported "conspiracy" contrasts sharply with the striking paucity of facts alleged to support it. Plaintiffs never identify a single communication among Defendants that supposedly resulted in price-fixing either at government auctions or in secondary market trading. They do not describe who at any of the 52 Defendants purportedly entered into a conspiratorial agreement or when, where, or how they did so. They do not plead facts suggesting that any individual MGB transaction occurred at an inflated price. And perhaps most striking of all, they fail to allege a single fact about the auction bids or the bid-ask spreads supposedly offered by any of the Defendants over the entire eleven-year "conspiracy period."

Instead of pleading any of these basic components of the alleged conspiracy, Plaintiffs base their conspiracy claims on two types of wholly inadequate allegations: (i) allegations of media reports that the Mexican government has opened an investigation of MGB auctions, and (ii) crude statistical allegations that there were differences in the average prices charged for MGBs during

[1] While Plaintiffs have not served Banco Barclays S.A. with the summons or complaint, Plaintiffs have agreed to voluntarily dismiss Banco Barclays S.A. as a Defendant, and a submission to the Court memorializing that agreement will be made in due course.

the eleven-year period before the announcement of the government investigation and the one-year period afterwards. Under settled law, these allegations do not come close to stating a plausible antitrust claim with respect to either MGB auctions or secondary market trading of MGBs.

First, Plaintiffs have not adequately alleged a conspiratorial agreement among Defendants, a fundamental requirement of an antitrust claim. Plaintiffs have not identified any direct evidence of a collusive agreement or any circumstantial evidence from which the Court could draw a plausible inference of such an agreement. Plaintiffs' reliance on news reports of the opening of an investigation is plainly inadequate, both because the mere opening of an investigation does not support an inference of conspiracy and because the news reports at issue do not clearly identify what is being investigated—let alone describe the type of grandiose conspiracy that Plaintiffs allege. Nor are Plaintiffs' statistical allegations sufficient to sustain their claims. Those allegations rely on broad market-wide averages that say nothing about the conduct of individual Defendants; they do not purport to demonstrate statistically significant results; and at most they show mere long-term market trends that "suggest competition at least as plausibly as [they] can suggest anticompetitive conspiracy." *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007).

Second, even if Plaintiffs had pled a plausible antitrust conspiracy in the abstract, they still would lack sufficient factual allegations to link any individual Defendant to the purported conspiracy. There are no allegations anywhere in the Complaint of specific misconduct by specific Defendants, let alone by *each* Defendant. Instead, Plaintiffs rely entirely on vague and conclusory group-pleading allegations about "Defendants" in the aggregate. This critical failing provides an independent basis for dismissing Plaintiffs' claims.

Third, Plaintiffs lack antitrust standing to assert either their auction-related claims or their spread-widening claims. Plaintiffs fail to plead any instances in which *they* bought or sold MGBs

purportedly affected by a supposed auction conspiracy. Nor do they plausibly allege that any of *their* MGB trades were impacted by an alleged conspiracy to widen bid-ask spreads. Finally, Plaintiffs lack standing to sue over their MGB transactions with non-defendants because they are not "efficient enforcers" of the antitrust laws with respect to those transactions.

Fourth, Plaintiffs' auction-related claims are independently barred by the Foreign Trade and Antitrust Improvements Act ("FTAIA") because Plaintiffs fail to plead the requisite connection between the alleged auction misconduct in Mexico and the injuries that Plaintiffs allegedly sustained in the United States.

Fifth, Plaintiffs' unjust enrichment claims should be dismissed because, among other things, they are derivative of and duplicative with Plaintiffs' defective antitrust claims.

Lastly, although Plaintiffs are attempting to sue over MGB purchases dating all the way back to January 1, 2006, the applicable statutes of limitations bar the majority of their claims.

For these reasons and the additional reasons set forth below, Defendants respectfully request that the Court dismiss the Complaint with prejudice.

BACKGROUND

The following background statement is based on the allegations in the Complaint, the materials referenced and relied upon in the Complaint, and matters of public record, all of which may be considered in ruling on a motion to dismiss.[2]

The Parties. Plaintiffs are eight U.S. pension funds that allegedly traded MGBs during the alleged conspiracy period. (CAC ¶¶ 65-72.) Plaintiffs assert claims under the Sherman Act

[2] *See*, *e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 n.13 (2007) (courts may take "notice of the full contents of the published articles" quoted in complaint); *Garber v. Legg Mason, Inc.*, 347 F. App'x 665, 669 (2d Cir. 2009) (courts may take judicial notice of "press articles"); *Wells Fargo Bank, N.A. v. Wrights Mills Holdings, LLC*, 127 F. Supp. 3d 156, 166 (S.D.N.Y. 2015) (same regarding "documents filed with governmental entities and available on their official websites").

and the common law of unjust enrichment on behalf of a proposed class of all U.S. entities that purchased MGBs from January 1, 2006 through April 19, 2017. (*Id.* ¶¶ 382, 394-408.)

Defendants are ten Mexican banks that served as government-designated "market makers" for MGBs during the proposed class period, together with 42 of their corporate parents and affiliates.[3] (CAC ¶¶ 73-197.) Of the 52 Defendants named in the Complaint, 13 are based in Mexico, and the remainder are based in Europe, the United States, and Latin America.

Mexican Government Bonds (MGBs). MGBs are "debt securit[ies] that [are] issued by the Mexican government during regularly scheduled auctions." (CAC ¶ 1.) These debt securities come in a variety of maturity periods or "tenors" ranging from as short as 30 days to as long as 30 years. (*Id.* ¶¶ 253, 258, 263.)

There are four main types of MGBs: (i) "Cetes" are short term zero coupon bonds that mature in less than a year; (ii) "Bondes D" are medium-term floating-rate bonds that normally mature in three to seven years; (iii) "Udibonos" are medium and long-term bonds denominated in inflation-indexed units; and (iv) "Bonos" are medium and long-term bonds denominated in pesos that mature in three to 30 years. (CAC ¶¶ 258-71.) Plaintiffs allegedly traded only Cetes, Udibonos, and Bonos; they do not allege that they traded Bondes D. (*Id.* ¶¶ 65-72.)

Between 2006 and 2017, the volume of MGBs held by investors outside Mexico grew substantially, and the rate of growth varied considerably across different tenors of MGBs. (*Id.* ¶¶ 261, 265, 268, 271 & accompanying charts.)

MGB Auctions. MGBs are issued in periodic auctions that usually occur on Tuesdays. (CAC ¶ 250.) During the auctions, auction participants simultaneously submit confidential bids

[3] The Defendants that allegedly acted as market-makers for some or all of the class period are listed in Exhibit A accompanying the Declaration of Claire C. Dean ("Dean Decl.").

for specified quantities of MGBs. (*Id.* ¶ 251.) The winning bidders ordinarily receive their bonds two days after the auction. (*Id.* ¶ 250.)

Mexico's Ministry of Finance has appointed certain banks to serve as "market makers" for particular tenors of MGBs. (CAC ¶ 197.) These market-makers are required to place auction bids for at least their minimum share of each type of MGB for which they serve as a market-maker. (*Id.* ¶ 274.) A market-maker's minimum share is the lower of (i) 20 percent of the total quantity available at the auction or (ii) the market-maker's per capita share among all market-makers if there are more than five market-makers for the relevant MGB. (*Id.*) Market-makers can also participate in the Bank of Mexico's ("Banxíco's") Market Maker Option Program, which grants market-makers an option to buy more of an issuance the day after it is auctioned. (*Id.* ¶ 320.)

As the Complaint acknowledges, MGB auctions are not limited to government-designated market-makers. (CAC ¶ 313 & pp. 70-71, Figures 3 & 4.) Auction participants also include numerous non-defendant banks, pension funds, mutual funds, brokerage houses, and governmental entities. (*See id.*)

The Secondary Market. Once MGBs have been auctioned by Banxíco, they begin trading in a secondary market. (CAC ¶ 277.) Government-appointed market-makers are required to sustain this secondary market by standing ready to buy and sell MGBs upon demand, and numerous unofficial market-makers likewise stand ready to buy and sell MGBs in the secondary market. (*See id.* ¶¶ 272-73, 275.) The difference between the price at which these official and unofficial market-makers offer to buy and sell MGBs is called the "bid-ask spread." (*Id.* ¶ 276.) The Complaint does not identify the share of secondary market trading conducted by government-appointed market-makers as opposed to other market participants.

Plaintiffs' Allegations. Plaintiffs essentially allege two distinct conspiracies relating to MGBs: (i) a conspiracy to submit artificially low auction bids for MGBs and then re-sell the auctioned MGBs at "artificially higher prices," and (ii) a conspiracy to "fix the 'bid-ask spread' artificially wider" in secondary market trading. (CAC ¶ 6.) Both conspiracies allegedly lasted from January 1, 2006 through April 19, 2017. (*Id.* ¶ 382.)

Despite the eleven-year duration of the alleged conspiracies, Plaintiffs say remarkably little about the particulars of either one of them. For example, Plaintiffs never identify the individuals that supposedly entered into conspiratorial agreements, when they did so, where they did so, or the terms of the purported agreements. Nor do Plaintiffs identify any illicit communications between any of the Defendants, let alone all Defendants. Plaintiffs likewise neglect to plead any facts regarding the bids that any Defendant placed at MGB auctions, the re-sale prices that any Defendant charged after the auctions, or the bid-ask spreads that any Defendant quoted in the secondary market.

Rather than pleading these fundamental aspects of the alleged conspiracies, Plaintiffs rely on bare bones news reports of an alleged government investigation into MGBs by Mexico's securities regulator ("CNBV") and its competition authority ("COFECE"). (CAC ¶¶ 280-97.) These news reports, however, do not clearly identify what is being investigated, do not say that any wrongdoing has been found, and make no mention of any investigation into bid-ask spreads in the secondary market. (*See id.*) Plaintiffs also present a series of charts that purport to show, on average, that MGB markets behaved somewhat differently in the eleven-year period before the announcement of the government investigation than in the eight-to-twelve month period afterwards. (*Id.* ¶¶ 302-31.) But there are no accompanying factual allegations indicating that

these alleged changes in long-term averages reflect anything more than evolution and change in the underlying fundamentals of the MGB markets.

ARGUMENT

I. PLAINTIFFS FAIL TO ALLEGE A PLAUSIBLE ANTITRUST CONSPIRACY.

Plaintiffs accuse Defendants of engaging in two distinct types of conspiratorial conduct: (1) "rigging MGB auctions" and then "selling MGBs purchased at auction to consumers at artificially higher prices," and (2) "agreeing to fix the 'bid-ask spread' artificially wider" in secondary market trading. (CAC ¶ 6; *id.* ¶ 302.) To plead an antitrust violation with respect to either of those theories, Plaintiffs must allege "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. "The ultimate existence of an 'agreement' under antitrust law [] is a legal conclusion, not a factual allegation." *Mayor of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 135-36 (2d Cir. 2013). Plaintiffs must therefore plead "evidentiary facts" that sustain a plausible inference of an unlawful agreement, including "who, did what, to whom (or with whom), where, and when." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 n.6 (9th Cir. 2015).[4]

Under Second Circuit law, there are two ways for a plaintiff to satisfy these requirements. First, a plaintiff may plead the existence of "direct evidence" of conspiracy, *i.e.*, "smoking gun" evidence such as "a recorded phone call in which two competitors agreed to fix prices at a certain level." *Citigroup*, 709 F.3d at 136. Second, a plaintiff may plead "circumstantial" evidence of a conspiracy by alleging that the defendants engaged in parallel conduct that "raises a suggestion of a preceding agreement." *Id.* at 136-37. "Generally, however, alleging parallel conduct alone is

[4] Unless otherwise noted, all emphasis is added, and internal citations and quotation marks are omitted.

insufficient, even at the pleadings stage." *Id.* at 136. Parallel conduct often results from "coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Twombly*, 550 U.S. at 556 n.4. Thus, to state a plausible conspiracy claim, allegations of parallel conduct must be reinforced by additional facts and circumstances known as "plus factors" indicating that the parallel conduct "flowed from a preceding agreement rather than from [defendants'] own business priorities." *Citigroup*, 709 F.3d at 138.

Plaintiffs fall far short of satisfying these pleading standards with respect to both their auction claims and their spread-widening claims. Plaintiffs make no attempt to plead any "direct evidence" of conspiracy; they plead no parallel conduct or "plus factors" supporting a circumstantial inference of conspiracy; and the statistical charts they offer in lieu of such allegations are plainly insufficient to sustain their claims.

A. Plaintiffs Fail to Allege a Plausible Auction Conspiracy.

Plaintiffs' auction allegations assert that ten Defendants that served as MGB market-makers and 42 of their corporate affiliates conspired to rig several thousand MGB auctions over an eleven-year period. (CAC ¶¶ 6, 73-197, 382.) Defendants supposedly accomplished this herculean feat by "secretly disseminating confidential bidding schedules to each other and agreeing on bids in MGB auctions" and then "sell[ing] MGBs following the auction at fixed artificially higher prices." (*Id.* ¶¶ 6, 302, 317, 391.)

Despite the enormous scope of this alleged conspiracy and the extensive coordination it would have required, Plaintiffs never identify any direct evidence of a conspiratorial agreement or any circumstantial evidence supporting a plausible inference of such an agreement. Instead, Plaintiffs urge this Court to infer the existence of a massive, eleven-year antitrust conspiracy from a few vague media reports that the Mexican government is investigating MGB auctions and a

handful of contrived statistical charts. These allegations fail to support an inference of conspiracy under *Twombly*.

1. Plaintiffs fail to allege direct evidence of an auction conspiracy.

Plaintiffs have not even *attempted* to plead direct evidence of an auction conspiracy. Direct evidence of conspiracy is "explicit and requires no inferences to establish the proposition or conclusion being asserted." *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225 (3d Cir. 2011); *see also Citigroup*, 709 F.3d at 136 (direct evidence is "smoking gun" evidence such as "a recorded phone call"). Plaintiffs have not alleged that there is any such evidence of conspiracy at a single auction, let alone direct evidence of an eleven-year conspiracy to fix prices at *thousands* of auctions.

Plaintiffs' inability to plead direct evidence of the alleged conspiracy is telling. According to Plaintiffs, 52 distinct Defendants committed themselves to "secretly disseminating confidential bidding schedules to each other," "agreeing on bids in MGB auctions," and agreeing to "sell MGBs following the auction at fixed artificially higher prices." (CAC ¶ 317, 391.) The conspiracy purportedly encompassed over four thousand auctions held between January 1, 2006 and April 19, 2017. (*See id.* ¶¶ 304, 306, 382.) Such a "long-term cartel" involving so many entities and auctions could hardly arise, much less survive, without "explicit agreements" among the participants. 6 Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1413 (4th ed. 2016 & Supp. 2017). Plaintiffs nevertheless are unable to cite a single instance of alleged collusion, coordination, or agreement anywhere in their 96-page Complaint. In the absence of any such allegations, "the sheer breadth and scope of the conspiracy alleged . . . renders Plaintiff[s'] claims facially implausible" because sustaining such a conspiracy would require a degree of "organization and cooperation [that is] practically impossible." *Chubirko v. Better Bus. Bureau of S. Piedmont, Inc.*, 763 F. Supp. 2d 759, 765 (W.D.N.C. 2011) (dismissing complaint

under *Twombly*); *see also Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987) ("long-term" conspiracies involving "complex relationships among competitors" are more susceptible to direct proof than conspiracies that are "short term and relatively simple in operation").

Plaintiffs' vague allegations regarding a purported "leniency applicant" do not alter these conclusions. (CAC ¶¶ 284-86.) Citing a Bloomberg article, Plaintiffs assert that "one unidentified Defendant had applied for, and been granted, leniency under Mexico's cartel leniency program." (*Id.* ¶ 284.) The cited article, however, does not say that anyone has applied for or been accepted into a "cartel leniency program." Rather, it states only that "[o]ne institution has agreed to cooperate with the probe in exchange for a lighter punishment . . . ."[5] Moreover, the article gives no indication of the focus of the reported "probe," the scope of the reported "cooperation," or even whether the reported "cooperator" is a Defendant. Finally, even if Bloomberg had actually reported that a market participant had entered into a "cartel leniency program," such a report would tell us nothing about whether that entity fixed a single price on a single date or engaged in broader misconduct. Plaintiffs' citation to the Bloomberg article therefore provides no "direct evidence" of the eleven-year conspiracy alleged in the Complaint. *See, e.g.*, *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 368-70 (S.D.N.Y. 2016) (allegations regarding defendants' conduct at "only one point in time" were insufficient to "support the broad scheme alleged"); *In re Optical Disk Drive Antitrust Litig.*, 2011 WL 3894376, at *9 (N.D. Cal. Aug. 3, 2011) (allegations of discrete incidents

[5] *See* Isabella Cota, et al., *Seven Banks Said to be Focus of Mexico Bond Collusion Probe*, Bloomberg (May 16, 2017), www.bloomberg.com/news/articles/2017-05-16/seven-dealers-said-to-be-focus-of-mexico-bond-collusion-probe (cited at CAC ¶¶ 283-84). An entity could cooperate with Mexican regulators without applying for leniency. Indeed, the presentation cited in the Complaint explains that a corporation may receive a program "marker" merely for providing information sufficient to "allow for the *initiation* of an investigation procedure or to *assume* the existence of a cartel." Carlos Mena Labarthe, *The Leniency Program in Mexico*, Latin American and Caribbean Competition Forum at 12 (Apr. 2016), www.cofece.mx/wp-content/uploads/2017/11/leniency_in_mexico_eventoocde_060416.pdf (quoted at CAC ¶ 285).

of bid-rigging, even if true, were a "far cry from establishing plausibility for a broad six year [conspiracy]"); *In re Graphics Processing Units Antitrust Litigation*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) (holding that the existence of a government investigation "carries no weight in pleading an antitrust conspiracy claim").

2. Plaintiffs fail to allege parallel conduct suggestive of conspiracy.

Plaintiffs likewise fail to plead any "parallel conduct" suggestive of an auction conspiracy. Parallel conduct often provides no basis for inferring a conspiracy because "the mere fact that firms are rational profit maximizers in the same market implies that they will do a fair number of things in parallel fashion." 2 Areeda & Hovenkamp, *Antitrust Law* ¶ 307d1 (4th ed. 2014). In some cases, however, parallel conduct is so pronounced or unusual that it can "'raise[] a suggestion of a preceding agreement.'" *Citigroup*, 709 F.3d at 137. Allegations of parallel conduct that "might be sufficient under *Twombly*'s standard" would consist, for example, of allegations of "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason." *Id*.

Here, Plaintiffs have not pled any parallel conduct whatsoever, much less parallel conduct that meets the *Twombly* standard. Although Plaintiffs assert that Defendants rigged auction bids and post-auction trading prices in connection with thousands of MGB auctions, they never identify a single instance in which Defendants engaged in parallel bidding or trading activity. Indeed, Plaintiffs fail to plead any specific bidding or trading activity of any kind by any Defendant. Plaintiffs' allegations thus lack the "specification of any particular activities by any particular defendant" that courts require in antitrust conspiracy cases. *See In re Elevator*, 502 F.3d at 50-51; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) (requiring "well-pleaded, nonconclusory *factual* allegation[s] of parallel behavior").

Plaintiffs' failure to plead either direct evidence of conspiracy or parallel conduct suggestive of conspiracy—the "basic building block[s] of an antitrust conspiracy"—alone merits dismissal of their claims. *See LLM Bar Exam, LLC v. Barbri, Inc.*, 271 F. Supp. 3d 547, 579 (S.D.N.Y. 2017); *see also In re Interest Rate Swaps Antitrust Litig. ("In re IRS")*, 261 F. Supp. 3d 430, 464 (S.D.N.Y. 2017) (dismissing antitrust claims based on limited "shards" of parallel conduct); *RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, 661 F. Supp. 2d 218, 237 (E.D.N.Y. 2009) (dismissing antitrust claims where it was "questionable whether Plaintiff's allegations even establish a pattern of parallel conduct"), *aff'd*, 391 F. App'x 59 (2d Cir. 2010).

3. Plaintiffs fail to allege any meaningful "plus factors."

Although Plaintiffs attempt to plead certain "plus factors" in an effort to bolster the plausibility of their claims, that effort is unavailing. "Plus factor" is a catch-all label that courts have given to miscellaneous factors that do not themselves support an inference of conspiracy, but that might enhance the plausibility of such an inference if combined with "very specific allegations about the nature of the defendants' parallel conduct." *Citigroup*, 709 F.3d at 137. Here, there is no need to inquire into the existence of such factors because "[p]lus factors are relevant only if the complaint adequately alleges parallel conduct among the defendants." *Bona Fide Conglomerate, Inc. v. SourceAmerica*, 691 F. App'x 389, 391 (9th Cir. 2017). In any event, none of the so-called "plus factors" urged by Plaintiffs provides any support for their claims.

News reports of government investigations. Plaintiffs begin by citing news reports that Mexican regulators have opened an investigation of MGB auctions. (CAC ¶¶ 280-97.) According to Plaintiffs, these articles indicate that Mexican regulators have "uncovered evidence of collusion" among Defendants (*id.* ¶ 293), but the articles report no such thing. They note only that an investigation has been opened and that one un-named institution has agreed to cooperate with

the investigation, and they never even mention several Defendants.[6] *See supra* at 10-11. Under settled law, "the mere fact that regulatory entities have investigated, and may still be investigating, the possibility of misconduct" does not provide a "plus factor." *In re Commodity Exch., Inc. Gold Futures & Options Trading Litig.*, 213 F. Supp. 3d 631, 662 (S.D.N.Y. 2016); *see also In re London Silver Fixing, Ltd., Antitrust Litig.* 213 F. Supp. 3d 530, 560 (S.D.N.Y. 2016) (finding that government investigations into possible manipulation of precious metals markets did not support an inference of conspiracy); *In re Zinc*, 155 F. Supp. 3d at 373 (evidence that government entities commenced investigations concerning warehousing practices did not render conspiracy allegations plausible); *Hinds Cnty., Miss. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 514 (S.D.N.Y. 2009) ("*Hinds I*") ("investigations, inquiries, and subpoenas do not make the [complaint]'s allegations plausible"); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d at 1024 (existence of a pending investigation "carries no weight" in pleading an antitrust claim).

Interfirm communications. Although a "high level of inter-firm communications" sometimes can serve as a plus factor, *see Citigroup*, 709 F.3d at 136, Plaintiffs' attempt to plead this factor is unsuccessful. Plaintiffs allege only that (a) a handful of Defendants' employees changed jobs over the eleven-year period at issue and sometimes moved from one Defendant to another, and (b) a single employee "maintained substantial contacts with his former colleagues" at a different Defendant. (CAC ¶¶ 291, 332-45.) There are no accompanying allegations that these employees engaged in communications at or around the time of MGB auctions or even that they traded MGBs. (*Id.* ¶¶ 332-45.) Furthermore, unlike other antitrust complaints that have survived motions to dismiss, the Complaint here does not describe any emails, chats, or other

[6] The Defendants that are not mentioned in the cited articles include the Credit Suisse, Deutsche Bank, and ING defendants.

communications among Defendants. *See, e.g.*, *Gelboim v. Bank of America Corp.*, 823 F. 3d 759, 782 & 782 n.19 (2d Cir. 2016) (observing that the plaintiffs had pled "a high number of interfirm communications" including specific email correspondence by specific defendants). Plaintiffs' allegations thus fall far short of showing the "high level" of relevant inter-defendant communications that would be necessary to provide a plus factor. *See In re Commodity Exch., Inc., Gold Futures & Options Trading Litig.*, 2018 WL 3585276, at *7 (S.D.N.Y. July 25, 2018) ("the probative value of [inter-defendant communications] depends on the participants, the information exchanged, and the context—specifically, the connection between the content and the price-fixing conspiracy alleged"); *see also Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 545 (2d Cir. 1993) ("The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred.").

Prior cases in unrelated markets. Plaintiffs' claims are not improved by their gratuitous references to prior cases and investigations involving LIBOR, FX, and precious metals. (CAC ¶¶ 346-78.) As the court in *In re Commodity Exchange* recently explained, "evidence of [certain] Defendants' wrongdoing with respect to LIBOR and FX and the existence of regulatory investigations into the precious metals markets do[es] not substantiate Plaintiffs' antitrust claims" with respect to other markets. 213 F. Supp. 3d at 661. At best, such allegations amount to nothing more than the kind of "if it happened there, it could have happened here" allegations that the Second Circuit has emphatically rejected. *See In re Elevator*, 502 F.3d at 52.

4. Plaintiffs' statistical charts do not salvage their claims.

Unable to plead any direct evidence, parallel conduct, or plus factors that support an inference of an auction manipulation conspiracy, Plaintiffs are forced to rely heavily on six statistical charts to try to sustain their auction claims. (CAC ¶¶ 302-24 & pp. 68-74, Figures 1-6.) These charts show only that Plaintiffs can manipulate auction statistics, not that Defendants

manipulated MGB auctions. Plaintiffs' charts suffer from numerous fatal defects that render them useless for purposes of pleading a plausible conspiracy.

a. Plaintiffs' charts suffer from a series of common flaws.

All six of Plaintiffs' auction charts suffer from a common set of flaws that strip them of any value for purposes of pleading an antitrust conspiracy.

First, all of Plaintiffs' charts depict meaningless "averages" that mask all variation in the underlying data. Three of their charts compare (i) average auction outcomes during an eleven-year "conspiracy period" running from January 2006 through April 2017 to (ii) average auction outcomes during a "post-conspiracy period" of a single year or less. (CAC ¶¶ 308-11, 323 & pp. 68-69, 74, Figures 1, 2, 6.) A fourth chart makes a similar before-and-after comparison using an arbitrarily truncated fifteen-month conspiracy period and a nine-month post-conspiracy period. (*Id*. at p. 70, Figure 3.) The two remaining charts compare average auction outcomes for "market makers" and "non-market makers" from 2006 through 2017. (*Id.* at pp. 71-72, Figures 4 & 5.) Each of the broad averages shown in the charts lumps together as many as thousands of different auctions and MGB tenors. The charts thus obscure any underlying trends, variations, or outliers that drive or depart from the aggregated averages. In addition, Plaintiffs' raw comparisons of average auction outcomes before and after April 2017 utterly ignore the effects of powerful economic forces such as:

- the global financial crisis;
- changes in Mexico's credit rating;
- changes in trade tensions with the United States;
- changes in Mexican and U.S. presidential administrations;
- changes in Mexican and U.S. central bank policies;
- fluctuations in the Mexican peso; and
- evolutions in MGB markets resulting from changing regulations and technology.

For all these reasons, Plaintiffs' charts provide no support for their claims. *See, e.g.*, *In re Commodity Exch., Inc. Silver Futures & Options Trading Litig.*, 2013 WL 1100770, at *4-5 & n.4 (S.D.N.Y. Mar. 18, 2013) (rejecting "statistical analyses [that] reflect generalized fluctuations" and "do not include allegations that are sufficiently factual"), *aff'd*, 560 F. App'x 84 (2d Cir. 2014); *Hinds Cnty. Miss. v. Wachovia Bank, N.A.*, 708 F. Supp. 2d 348, 361 (S.D.N.Y. 2010) ("*Hinds II*") (rejecting statistical analysis of municipal bond auctions as "insufficient to state a plausible § 1 claim" because bid differentials did not suggest collusion).

Second, even if Plaintiffs' charts could be read to show meaningful changes in the behavior of MGB markets, the charts would fail to connect those changes to Defendants. As Plaintiffs recognize, participants in auctions and post-auction MGB trading include non-defendant banks, pension funds, mutual funds, brokerage houses, and governmental entities.[7] Yet three of Plaintiffs' auction-related charts wholly fail to differentiate between the activities of Defendants and non-defendants (CAC at pp. 68-69, 71, Figures 1, 2, 5), thus obscuring whether the conduct of the alleged conspirators was any different than that of non-conspirators. Moreover, *none* of Plaintiffs' charts purports to identify the bidding and trading activity of individual Defendants. The charts thus shed no light on whether the *disaggregated* bids and trades of individual Defendants would track each other any more closely than one would expect in competitive trading markets. As a result, Plaintiffs' charts are "not sufficient to meet the plausibility test under *Iqbal*" and cannot "establish the presence of a conspiracy." *See 7 W. 57th St. Realty Co. v. Citigroup, Inc.*, 2015

[7] *See* CAC ¶ 313 (acknowledging that auction participants include non-market makers such as governmental entities and pension plans); *id.* at pp. 70-71, Figures 3 & 4 (comparing auction fill rates and bid dispersion between market makers and non-market makers); *see also* BBVA Research, *Handbook of Mexican Financial Instruments* at 19 (2011), *at* https://www.bbvaresearch.com/KETD/fbin/mult/100921_HandbookMexico_tcm348-233218.pdf ("The authori[z]ed participants in primary auctions are mainly commercial banks, brokerage houses, and mutual funds.") (cited in CAC ¶ 20).

WL 1514539, at *12 (S.D.N.Y. Mar. 31, 2015) (dismissing antitrust claims founded on "econometric evidence" that allegedly showed an "unexpected [pricing] pattern").

Third, Plaintiffs do not assert that *any* of the results shown in their charts are statistically significant, an omission that suffices by itself to deprive those results of probative value. *See Hinds II*, 708 F. Supp. 2d at 361 (discounting plaintiffs' statistical analysis where plaintiffs did not "allege the statistical significance of the set of [] transactions they selected"); *see also Burgis v. N.Y.C. Dep't of Sanitation*, 798 F.3d 63, 69 (2d Cir. 2015) ("the statistics must not only be statistically significant in the mathematical sense, but they must also be of a level that makes other plausible non-discriminatory explanations very unlikely").

Finally, Plaintiffs' charts use cherry-picked and inconsistent methodologies to manufacture the desired results. For example, although four of the charts purport to compare auction outcomes before and after April 18, 2017, Plaintiffs arbitrarily select three different combinations of "before" and "after" periods to construct those charts.[8] Similarly, although Plaintiffs purport to plead a conspiracy affecting *all* types of MGBs (CAC ¶ 382), each set of charts arbitrarily excludes different classes of MGBs from the underlying data.[9] Plaintiffs' self-serving manipulation of time periods and datasets further discredits their charts. *See, e.g.*, *In re Commodity Exch., Inc., Silver Futures and Options Trading Litig.*, 2012 WL 6700236, at *12-13 (S.D.N.Y. Dec. 21, 2012) (rejecting statistical allegations based on comparisons of dissimilar data sets); *FrontPoint Asian*

[8] *See* CAC ¶ 306 & pp. 68-69, Figures 1-2 ("before" period starting in January 2006; "after" period ending in November 2017); *id.* at p. 70, Figure 3 ("before" period starting in July 2016; "after" period ending in January 2018); *id.* at p. 74, Figure 6 ("before" period starting in January 2006; "after" period ending in April 2018).

[9] *See, e.g.*, CAC at p. 68, Figure 1 (excluding Bondes, Udibonos, and 5-year Bonos); *id.* at p. 69, Figure 2 & Appendix B (excluding Cetes, Bondes, and Udibonos); *id.* at p. 70, Figure 3 (excluding Cetes); *id.* at p. 71, Figure 4 (excluding Cetes and Bondes); *id.* at p. 72, Figure 5 & Appendix C (excluding everything except certain Bonos and Cetes); *id.* at p. 74, Figure 6 (excluding Cetes and Bondes).

Event Driven Fund, L.P. v. Citibank, N.A., 2017 WL 3600425, at *11 (S.D.N.Y. Aug. 18, 2017) (same).

b. Each chart also suffers from its own particular flaws.

Apart from these common and overarching defects, each set of auction charts also suffers from its own individual defects. Plaintiffs' charts are intended to support an inference that Defendants engaged in bidding and trading conduct that could only result from conspiracy. Under *Twombly*, however, no inference of conspiracy may be drawn from conduct that "can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy," *In re Elevator*, 502 F.3d at 51, or from behavior that is "just as much in line with a wide swath of rational and competitive business strategy" as with conspiracy. *Twombly*, 550 U.S. at 554. Each of Plaintiffs' charts runs afoul of these principles.

Bid dispersion charts. Plaintiffs' first two charts purport to show that average bid dispersion at selected types of auctions was slightly higher in the seven-month period *after* April 18, 2017 than in the eleven-year period *before* April 18, 2017. (CAC ¶¶ 306-11 & pp. 68-69, Figures 1 & 2.) Plaintiffs assert that this minor uptick in bid dispersion is a product of increased competition after the alleged conspiracy ended (*id.* ¶ 307 & n.14), but the very article they cite for that proposition supports the opposite conclusion. According to that article, "There is an *inverse* relationship between the intensity of bidding competition and the dispersion of bids," *i.e.*, all other things being equal, increased bid dispersion would be a sign of *less* competition, not more.[10] Plaintiffs' bid dispersion charts thus undermine their assertions of an auction conspiracy.

Fill rate charts. Three more charts purport to show that (i) a higher percentage of

[10] Paul F. Malvey, et al., *Uniform-Price Auctions: Evaluation of the Treasury Experience*, Office Of Market Finance, U.S. Treasury, at 22 (1998) (cited in CAC ¶ 307, n.14), https://www.treasury.gov/resource-center/fin-mkts/Documents/final.pdf.

Defendants' auction bids were filled before April 18, 2017 than afterwards, (ii) Defendants had higher "option" fill rates before April 18, 2017 than afterwards, and (iii) Defendants' fill rates were more stable (*i.e.*, less volatile) than those of non-defendants. (CAC¶¶ 313-16, 323-24, & pp. 70-71, 74, Figures 3, 4, & 6.) Even taking those charts at face value, they "suggest competition at least as plausibly as [they] suggest conspiracy." *In re Elevator*, 502 F.3d at 51; *In re IRS*, 261 F. Supp. 3d at 462. All other things being equal, Defendants' higher fill rates before April 18, 2017 would suggest that Defendants submitted highly *competitive* bids at auctions in that period, not *non*-competitive bids that were artificially lowered by a bid-rigging conspiracy. Similarly, Plaintiffs' assertion that Defendants' fill rates were more stable than those of non-defendants is exactly what one would expect in the absence of a conspiracy. The principal Defendants here are designated market-makers who operated under a government *mandate* to bid reasonable prices at every auction. *See supra* at 5. It only stands to reason that these market-makers would have more stable fill rates than non-market-makers who had no similar obligation. *See, e.g.*, *Barbri, Inc.*, 271 F. Supp. 3d at 578 (no inference of conspiracy should be drawn in the face of "obvious alternative explanations" for the facts alleged).

Auction day chart. Plaintiffs' final auction chart purports to show that, during the alleged conspiracy period, average trading prices for auctioned MGBs tended to rise following the announcement of auction results. (CAC ¶ 318 & p. 72, Figure 5.) But the Complaint nowhere suggests (nor could it) that this average pricing pattern ended when the alleged conspiracy ended. Plaintiffs' failure to address that obvious question is grounds for drawing a negative inference. *See, e.g.*, *Muhammad v. Oliver*, 547 F.3d 874, 880 (7th Cir. 2008) ("The longer and more detailed a complaint is, the more compelling the inference that any omission from it was deliberate and should bind the plaintiff."). In any event, the alleged auction-day pricing pattern is "not only

compatible with, but indeed [] more likely explained by, lawful, unchoreographed free-market behavior" than an antitrust conspiracy. *Iqbal*, 556 U.S. at 680. Economic theory predicts, and judicially-noticeable documents confirm, that prices of auctioned securities tend to dip before an auction and rise once the auction is complete, due to the supply and information effects of the auction.[11]

In sum, Plaintiffs' charts consist of contrived and cherry-picked statistics that support no inferences at all regarding Defendants' conduct, or at most support an inference of rational and non-conspiratorial market conduct.

B. Plaintiffs Fail to Allege a Plausible Spread-Widening Conspiracy.

Plaintiffs separately allege that Defendants "fix[ed] the 'bid-ask spread'" on all of their MGB transactions in the secondary market from January 2006 through April 2017 (CAC ¶¶ 6, 382), but these spread-widening allegations are even thinner than Plaintiffs' defective auction allegations. Plaintiffs once again lack any allegations of direct evidence, parallel conduct, or even "plus factors" to support their conclusory allegations of an eleven-year conspiracy. Indeed, Plaintiffs do not offer a single factual allegation describing "who, did what, to whom (or with whom), where, and when" to carry out a purported spread-widening conspiracy. *In re Musical Instruments*, 798 F.3d at 1194 n.6. Plaintiffs' threadbare allegations fail as a matter of law because they lack "any specification of any particular activities by any particular defendant" and provide "nothing more than a list of theoretical possibilities, which one could postulate without knowing

[11] *See* Michael J. Fleming, et al., *Intraday Pricing and Liquidity Effects of U.S. Treasury Auctions*, Federal Reserve Bank of New York, at 1 (2014), www.greta.it/sovereign/sovereign1/papers/H_Fleming.pdf ("We find that prices significantly decrease in the hours preceding auction and recover in the hours following auction, a pattern not observed on non-auction days … Our results corroborate the idea that Treasury supply shocks lead to price pressure effects and that dealers' limited risk-bearing capacity helps explain such effects.").

any facts whatever." *In re Elevator*, 502 F.3d at 50-51 (affirming dismissal of antitrust complaint); *see also Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556, 577, 579 (S.D.N.Y. 2007) (dismissing antitrust claim where plaintiffs "sprinkle[d] the words 'conspired,' 'concerted,' and 'concertedly' throughout" the complaint but failed to describe the who, when, and where of the alleged conspiracy or how the conspiracy was effectuated).

When Plaintiffs' conclusory allegations of "conspiracy" are stripped away, all that remains of their spread-widening claims are (i) allegations that the press has reported that the Mexican government is investigating MGB markets (CAC ¶¶ 280-97), and (ii) a pair of statistical charts depicting average bid-ask spreads from 2006 through 2017 (*id.* ¶¶ 306, 328-31 & pp. 76-77, Figures 7 & 8). But Plaintiffs never allege that the reported investigation is inquiring into purported spread-widening (*see id.* ¶¶ 280-97), and none of the news reports cited in the Complaint so much as mentions an investigation of bid-ask spreads. Plaintiffs' allegations of a pervasive, eleven-year conspiracy to widen bid-ask spreads thus rests almost entirely on a pair of crude statistical charts that cannot carry the heavy burden that Plaintiffs have assigned them.

As a threshold matter, Plaintiffs' charts cannot overcome the fact that the alleged spread-widening conspiracy is facially implausible and "makes no economic sense." *United Magazine Co. v. Murdoch Magazines Distrib., Inc.*, 146 F. Supp. 2d 385, 401 (S.D.N.Y. 2001), *aff'd sub nom. United Magazine Co. v. Curtis Circulation Co.*, 279 F. App'x 14 (2d Cir. 2008). Plaintiffs acknowledge that Defendants were not the only participants in the secondary trading market, and they make no allegations regarding Defendants' share of that market. *See supra* at 5. It therefore makes no sense to suggest that Defendants somehow widened the bid-ask spread on all secondary

market transactions over an eleven-year period when customers in the secondary market were free to seek competitive prices from non-defendant suppliers of MGBs.[12]

Even setting aside this threshold obstacle to Plaintiffs' claims, their spread-widening charts fail to show any manipulation of bid-ask spreads. These two charts purport to show that median bid-ask spreads for MGBs were marginally wider during the eleven-year period before April 19, 2017 than in the eight-month period afterwards. (CAC ¶¶ 329-31 & pp. 76-77, Figures 7 & 8.) The spread-widening charts thus suffer from the same basic defects as Plaintiffs' auction charts: (i) they rely on crude median figures that obscure all variation in bid-ask spreads over a period of more than a decade, (ii) they provide no evidence of the spreads quoted by individual Defendants, much less evidence that all Defendants quoted identical spreads, and (iii) they do not claim to show statistically significant results. The charts thus lack any value at all for purposes of pleading an antitrust conspiracy. *See supra* at 14-17.

Plaintiffs contend that the charts show bid-ask spreads that "suddenly and dramatically *narrowed*" after the Mexican government announced its investigation of MGBs (CAC ¶ 330 (emphasis in original)), but the charts show nothing of the kind. All they show is that the *median* spread on all MGB transactions over an eleven-*year* period is wider than the *median* spread on all

[12] In other Section 1 cases alleging market manipulation, plaintiffs have, at the very least, pled a means by which conspirators could broadly affect the price of the relevant financial products and thereby profit collectively. For example, in *In re Foreign Exchange Benchmark Rates Antitrust Litigation* ("*In re Forex*"), the plaintiffs alleged that, by engaging in certain trading practices, traders were able to affect the "fix," a closing benchmark rate set daily by WM/Reuters on which traders and investors relied in their transactions. 74 F. Supp. 3d 581, 587 (S.D.N.Y 2015). Similarly, in *Alaska Electrical Pension Fund v. Bank of America Corp.*, the plaintiffs alleged that the defendants conspired to engage in manipulative transactions and made false submissions in order to affect USD ISDAfix, "a benchmark interest rate incorporated into a broad range of financial derivatives." 175 F. Supp. 3d 44, 49-51 (S.D.N.Y. 2016). Here, no such mechanism is alleged. To the contrary, Plaintiffs allege MGBs are traded in individualized, over-the-counter transactions.

transactions over a subsequent eight-*month* period. The charts are therefore fully consistent with the conclusion that bid-ask spreads fluctuated all over the place during the alleged conspiracy period—sometimes wider and sometimes narrower than those in the subsequent period. The charts are likewise consistent with spreads that steadily declined throughout *both* periods, with the lower median in the "after" period simply a continuation of a long-term trend. An example will help to illustrate the limitations of Plaintiffs' "median" figures. For a group of children born in January 2006, the median of the daily weights of all group members between January 2006 and April 2017 will be significantly lower than the group's median daily weight from April 2017 through December 2017. But that does not remotely suggest that the children in the group experienced "sudden" or "dramatic" weight gain in April 2017. Indeed, the difference in the two medians likely would hold even if the children began *losing* weight in April 2017.

Moreover, the complaint itself identifies non-conspiratorial reasons why median bid-ask spreads were likely to narrow over time. Plaintiffs allege in detail (and graphically illustrate) that holdings of MGBs by global investors outside Mexico grew as much as ten-fold from 2006 through 2017. (CAC ¶¶ 261, 265, 268 & accompanying charts.) It would hardly be surprising if MGB spreads narrowed as increasing global demand for MGBs increased liquidity in MGB markets. Plaintiffs' observations about declining "medians" are therefore unremarkable, and a conspiracy cannot be pled on the basis of facts "that could just as easily turn out to have been rational business behavior as they could a proscribed antitrust conspiracy." *Citigroup*, 709 F.3d at 137.

For all these reasons, Plaintiffs' spread-widening allegations—like their auction allegations—should be dismissed.

II. PLAINTIFFS' GROUP PLEADING IS FATAL TO THEIR CLAIMS.

Plaintiffs' claims also fail because they rely on impermissible "group pleading." To survive a motion to dismiss, Plaintiffs must plead that each of the Defendants, "in their individual

capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective." *AD/SAT, a Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999). To meet that burden, Plaintiffs must allege "particular activities" by "particular defendant[s]," *Am. Sales Co., Inc. v. AstraZeneca AB*, 2011 WL 1465786, at *5 (S.D.N.Y. Apr. 14, 2011), showing "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement," *Monsanto Co. v. Spray-Rite Serv. Corp*., 465 U.S. 752, 764 (1984). Collective allegations that generalize about "defendants" as a group are therefore "insufficient to withstand review on a motion to dismiss." *Concord Assocs., L.P. v. Entm't Props. Tr*., 2014 WL 1396524, at *24 (S.D.N.Y. Apr. 9, 2014), *aff'd*, 817 F.3d 46 (2d Cir. 2016).

Plaintiffs have not satisfied these basic pleading requirements. Instead, they rely throughout their Complaint on generalized allegations directed at "Defendants" as an undifferentiated whole. (*See, e.g.*, CAC ¶¶ 251, 274, 277-78, 302-06, 308, 313-17, 320-22, 325-31, 386.) Their claims should be dismissed for that reason alone.

A. Plaintiffs Fail to State a Claim Against the Market-Maker Defendants.

Plaintiffs allege that "government-approved market makers for MGBs" conspired to rig MGB auctions, re-sell auctioned MGBs at inflated prices, and widen bid-ask spreads. (CAC ¶¶ 2, 6.) But Plaintiffs fail to plead facts sufficient to link any of the ten individual market-maker Defendants to the alleged conspiracy. Indeed, although Plaintiffs assert that "Defendants" rigged more than four thousand MGB auctions and widened the bid-ask spread on countless secondary market trades, they fail to identify a single collusive act or communication by any individual Defendant.

Plaintiffs' claims therefore should be dismissed in keeping with a series of recent dismissals in this District based on failures to allege conspiratorial conduct by specific defendants. *See In re Interest Rate Swaps Antitrust Litig.* ("*IRS II*"), 2018 WL 2332069, at *15 (S.D.N.Y. May

23, 2018) ("claims as to the motivations or actions of 'the Dealer Defendants' as a general collective bloc, or generalized claims of parallel conduct, must also be set aside . . . as impermissible group pleading"); *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 536 (S.D.N.Y. 2017) (dismissing antitrust complaint that, with the exception of one defendant, did not contain "specific or plausible allegations that defendants . . . conspired with each other"); *In re Zinc*, 155 F. Supp. 3d at 384 (dismissing antitrust complaint for failing to "separately state a claim against each and every defendant"); *In re Aluminum Warehousing Antitrust Litig.*, 2015 WL 1344429, at *3 (S.D.N.Y. Mar. 23, 2015) (same where "[n]either of the two complaints sets forth any specific facts that suggest any participation by any one of these specific entities in the allegedly unlawful conduct"); *In re London Silver Fixing, Ltd., Antitrust Litig.*, 213 F. Supp. 3d 530, 575 (S.D.N.Y. 2016) ("The fact that [defendant] is a market maker and a large bullion bank does not constitute circumstantial evidence of misconduct; such allegations could apply to any number of large banks, none of which is (or could be) named as defendants on that basis."); *In re LIBOR-Based Financial Instruments Antitrust Litig.*, 27 F. Supp. 3d 447, 463 (S.D.N.Y. 2014) (same where complaint "provide[d] no basis to impute [one defendant's] actual conduct to other particular defendants").

Any suggestion that Plaintiffs' statistical charts somehow excuse their reliance on group pleading would be mistaken. Plaintiffs' charts are just group pleading in another form: none of them addresses data specific to Defendants, let alone to any particular Defendant. The charts do not purport to show that *each* Defendant sold MGBs at inflated prices on auction days, that *each* Defendant's bid-ask spreads were artificially wide, that *each* Defendant's auction bids were non-dispersed, or that *each* Defendant had an atypical fill rate. (*See* CAC ¶¶ 309-31 & pp. 68-77, Figures 1–8). In short, there is nothing to indicate that any particular market-maker Defendant

acted in the way that Plaintiffs' aggregated averages supposedly suggest that Defendants acted.

Nor is Plaintiffs' reliance on group pleading excused by their citations to news reports of a government investigation into MGBs. The mere opening of an investigation does not support an inference of conspiracy, and the cited news reports do not describe a single substantive act undertaken by any Defendant in furtherance of an alleged conspiracy. *See supra* at 12-13. In addition, the news reports fail to mention several Defendants at all. *See supra* n.6. Plaintiffs appear to rely on a statement in one newspaper article that "all" of the "participants" in the "market" are being investigated (CAC ¶ 287), but such vague and generalized statements are insufficient to link any individual defendant to an antitrust conspiracy. *In re Zinc*, 155 F. Supp. 3d at 384 ("Mere generalizations as to any particular defendant—or even defendants as a group—are insufficient.").

B. Plaintiffs Fail to State a Claim Against the Affiliates of the Market-Maker Defendants.

Plaintiffs' allegations regarding the 42 corporate parents and affiliates of the ten market-maker Defendants are defective as well.[13] As to those Defendants, there are *zero* individualized allegations that purport to link them to an antitrust conspiracy. Plaintiffs do not even allege that these "affiliate" Defendants participated in MGB auctions or are the subject of a government investigation.[14] The only allegations directed specifically at these Defendants consist of conclusory assertions that they "[d]irected and [c]ontrolled" the entities that bid at auctions or that

[13] The corporate affiliate and holding company Defendants are listed in Exhibit A to the Dean Declaration. *See* Dean Decl. Ex. A.

[14] The Complaint alleges in broad-brush strokes that "Defendants" participated in Banxíco's Market Maker Program and colluded to rig auctions (CAC ¶¶ 272, 392), but it also makes clear that the only Defendants who participated in that program were the ten Mexican banks that are "designated market makers." (CAC ¶ 197; *see also id.* ¶¶ 85, 99, 112, 127, 151, 158, 170, 183, 189); *see also* Dean Decl. Ex. A.

traded MGBs with Plaintiffs. It is well settled, however, that "[t]he fact that two separate legal entities may have a corporate affiliation—perhaps owned by the same holding company—does not alter" the requirement to state a claim against each individual defendant. *In re Zinc*, 155 F. Supp. 3d at 384. Accordingly, Plaintiffs' "conclusory statements that [a corporate parent] had knowledge of [its affiliate's] action[s] and exercised direction and control over [it] . . . are insufficient to survive a motion to dismiss." *Henneberry v. Sumitomo Corp. of Am.*, 2005 WL 1036260, at *3 (S.D.N.Y. May 3, 2005); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 426 (S.D.N.Y. 2003) ("The unadorned invocation of dominion and control is simply not enough [to state a claim].").

In the absence of well-pled factual allegations "that corporate formalities have been ignored, courts appropriately and routinely adhere to legal separateness." *In re Zinc*, 155 F. Supp. 3d at 384. Because Plaintiffs do not and cannot allege that corporate formalities have been ignored, Plaintiffs have no basis to assert their claims against the affiliate and holding company Defendants. *See Stoltz v. Fage Dairy Processing Industry, S.A.*, 2015 WL 5579872, at *30 (E.D.N.Y. Sept. 22, 2015) (dismissing claims against defendants despite conclusory assertions that affiliated defendants "operate[d] as a single integrated and common enterprise").

III. PLAINTIFFS' ALLEGATIONS FAIL TO ESTABLISH ANTITRUST STANDING.

Even if Plaintiffs had pled plausible antitrust claims, they would lack antitrust standing to assert them. "[A]ntitrust standing is a threshold, pleading-stage inquiry and when a [claim] by its terms fails to establish this requirement [courts] must dismiss it as a matter of law." *Gatt Commc'ns, Inc. v. PMC Assocs., LLC*, 711 F.3d 68, 75 (2d Cir. 2013).

To plead antitrust standing, plaintiffs must allege facts sufficient to demonstrate that they suffered an "antitrust injury" and that they are "efficient enforcers of the antitrust laws." *Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104, 115 (2d Cir. 2018). "Antitrust injury" consists of

"(1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute." *In re SSA Bonds Antitrust Litig.*, 2018 WL 4118979, at *6 (S.D.N.Y. Aug. 28, 2018). To determine whether a plaintiff is an "efficient enforcer" of the antitrust laws, courts consider (i) the directness of the plaintiff's injury, (ii) the existence of more direct victims of the anticompetitive conduct, (iii) the extent to which the plaintiff's alleged damages are "highly speculative," and (iv) the potential for duplicative recovery or complex questions regarding apportionment of damages. *See Gelboim*, 823 F.3d at 778. Any one of these factors can preclude efficient enforcer standing. *See, e.g.*, *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 443 (2d Cir. 2005); *IRS II*, 2018 WL 2332069, at *9-11. As shown below, Plaintiffs have not adequately alleged either that they suffered the requisite "injury-in-fact" or that they satisfy the efficient enforcer test for antitrust standing.

A. Plaintiffs Lack Standing to Assert Any of Their Antitrust Claims.

Plaintiffs allege that Defendants colluded to "(a) share price information and submit fixed bids during MGB auctions; (b) to sell MGBs purchased at auction to investors at artificially higher prices; and (c) to fix the bid-ask spread artificially wider in MGB transactions." (CAC ¶¶ 6, 302.) Plaintiffs have not pled antitrust standing with respect to any of those theories.

1. Auction rigging.

Plaintiffs' auction-rigging claims assert that Defendants conspired to submit artificially low bids at MGB auctions "through collusive bidding and information sharing." (CAC ¶¶ 6, 302, 314.) There are no allegations, however, that Plaintiffs were injured by Defendants' purported submission of low auction bids. Plaintiffs do not allege that *they* participated in MGB auctions; nor do they allege that the supposedly suppressed auction prices somehow raised the prices *they* paid for MGBs in the secondary market. Plaintiffs therefore fail to plead either injury-in-fact or that they are "efficient enforcers" with respect to their auction-rigging claims. *See, e.g.*, *Harry*,

889 F.3d at 110 (no antitrust standing unless plaintiffs "can establish that they themselves have been harmed by Defendants' activities"); *SSA Bonds*, 2018 WL 4118979, at *8 (no antitrust standing because "Plaintiffs have not plausibly alleged that they themselves were injured by the alleged conspiracy"); *Gelboim*, 823 F.3d at 779 (only those plaintiffs that suffer direct and non-speculative injuries are "efficient enforcers" of the antitrust laws).

2. Post-auction sale prices.

Plaintiffs next allege that Defendants agreed to re-sell the MGBs they purchased at auctions at artificially inflated prices following the announcement of auction results. (CAC ¶¶ 6, 302, 317, 322.) According to Plaintiffs, however, Defendants charged these inflated prices only in the post-auction period of the day that a given MGB was auctioned; Plaintiffs do *not* allege that prices were inflated "on Non-Auction Days, when Defendants do not have new inventory of MGBs to sell." (*Id.* ¶ 318; *see also* ¶ 317 & Figure 5 (depicting average price increases in the post-auction portion of auction days).) For at least two reasons, Plaintiffs have failed to plead that they were injured by an alleged conspiracy to inflate re-sale prices for recently-auctioned MGBs.

First, Plaintiffs have not identified a single instance in which they purchased an MGB *on the day it was auctioned*. That omission is fatal because Plaintiffs' own Complaint asserts that the purportedly inflated MGB prices "are absent on Non-Auction Days." (CAC ¶ 318.) Plaintiffs therefore lack antitrust standing to assert any claims relating to post-auction price-rigging. *See Harry*, 889 F.3d at 112 (dismissing antitrust claims where plaintiffs failed to plead "a specific manipulated transaction or set of transactions between a plaintiff and a defendant with the plaintiff on the (net) losing end and the defendant on the (net) winning end"); *SSA Bonds*, 2018 WL 4118979, at *6-7 (dismissing antitrust claims because "plaintiffs failed to allege any specific transactions that they entered into that harmed them through the defendants' misconduct").

The MGB purchases itemized in Appendix D to the Complaint do not alter this conclusion.

Most of those purchases took place on days when *no* MGBs were auctioned. Moreover, even for purchases that took place on a day when *some* type of MGB was auctioned, Plaintiffs do not allege that they purchased the auctioned MGB as opposed to one of the hundreds of other tenors circulating in the secondary market. (*See* CAC, App'x D; Ex. B, Dean Decl.)[15] Accordingly, Appendix D does not supply a basis for antitrust standing. *See In re London Silver Fixing, Ltd. Antitrust Litig.*, 2018 WL 3585277, at *27 n.36 (S.D.N.Y. July 25, 2018) ("The fact that Plaintiffs may have traded in the same 24 hour period as traders . . . discussed manipulation of the . . . markets is simply too thin a basis for the Court to infer that it is plausible that the traders' employers caused the Plaintiffs' actual damages."). Finally, Appendix D confirms that the auction-related claims of one of the Plaintiffs—Manhattan and Bronx Surface Transit Operating Authority—should be dismissed because that Plaintiff never purchased *any* form of MGB on an auction day.

Second, Plaintiffs have not alleged that they purchased an MGB in the *post*-auction portion of the day it was auctioned. According to Plaintiffs, investors may purchase a given tenor of MGB either before or after that tenor is auctioned because "the great majority" of auctions "reopen[] existing [MGB] issues instead of creating new issuances." (CAC ¶ 266.) Plaintiffs also contend that the alleged conspiracy *lowered* an MGB's price before it was auctioned and *raised* its price afterwards. (*See id.* ¶¶ 317-18 & p. 72, Figure 5.) Thus, under Plaintiffs' own allegations, whether they purchased a given tenor of MGB before or after it was auctioned is critical to determining whether they were helped or harmed by the alleged conspiracy—but Plaintiffs omit that information from their Complaint. Plaintiffs' claims should be dismissed for that reason as well.

[15] Exhibit B to the Dean Declaration identifies which of the purchases identified in Appendix D to the Complaint took place on a day in which *some* type of Bonos, Udibonos, Bondes D, or Cetes was auctioned, but not necessarily the specific tenor purchased by a Plaintiff. *See* Dean Decl. Ex. B.

See Harry, 889 F.3d at 115 (plaintiffs fail to plead antitrust injury when "their complaint provides just as much support for the proposition that they were benefited . . . as for the proposition that they were harmed"); *Dentsply Int'l Inc. v. Dental Brands for Less LLC*, 2016 WL 6310777, at *3 (S.D.N.Y. Oct. 27, 2016) (a plaintiff cannot plead antitrust injury when it "stand[s] to gain" from the alleged scheme).

3. Spread-widening.

Plaintiffs fare no better with their distinct and separate allegations that they were injured by a conspiracy to widen the bid-ask spread paid by customers in the secondary market. (CAC ¶ 380; *see also id.* ¶¶ 325-31.) Plaintiffs assert that as a result of the alleged spread-widening, they were "overcharged each time they purchased MGBs from Defendants and underpaid each time they sold MGBs to Defendants." (*Id.* ¶ 381.) But the only allegations offered in support of that conclusory assertion consist of Plaintiffs' crude comparisons of "median" bid-ask spreads from 2006 through 2017. (*Id.* ¶¶ 329-31.) These highly aggregated "medians" cannot possibly establish that Defendants widened the bid-ask spreads on *every* secondary market transaction over an eleven-year period. *See supra* at 22-23; *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 2010 WL 3855552, at *30 (E.D. Pa. Sept. 30, 2010) ("averaging by definition glides over what may be important differences"); *In re Silicon Storage Tech., Inc., Sec. Litig.*, 2007 WL 760535, at *19 (N.D. Cal. Mar. 9, 2007) ("generic averages across uncounted products through vague geographic areas provide[] insufficient support for the allegations"). Plaintiffs have alleged no more than a possibility that their own transactions were affected by the alleged spread-widening conspiracy, which is not enough to sustain their standing to sue. *See Harry*, 889 F.3d at 110; *Harry v. Total Gas & Power N. Am. Inc.*, 244 F. Supp. 3d 402, 415 n.5, 416 (S.D.N.Y. 2017) ("[F]ailure to allege a single specific transaction that lost value as a result of the defendants' alleged misconduct precludes a plausible allegation of actual injury."); *In*

re SSA Bonds, 2018 WL 4118979, at *7 (no antitrust standing where plaintiffs fail to plead that the alleged conspiracy "yielded higher prices on their own trades").

B. Plaintiffs Lack Standing To Assert Claims Regarding MGBs They Did Not Trade.

Plaintiffs lack standing to assert any claims regarding Bondes D for an additional reason: they do not allege they traded those bonds and thus could not have suffered any injury as to those bonds. According to the Complaint, Bondes D are distinct from the other MGBs that Plaintiffs allegedly traded and are priced differently based on different maturity dates and coupon payments. (CAC ¶¶ 269-70.) Because Bondes D are a distinct product that Plaintiffs never bought or sold, their claims relating to Bondes D should be dismissed. *See Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (the "'injury in fact' test requires . . . that the party seeking review be himself among the injured"); *see also Ret. Bd. of Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon*, 775 F.3d 154, 161 (2d Cir. 2014); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 23 F. Supp. 3d 203, 209 (S.D.N.Y. 2014) ("MissPERS could pursue its remaining direct claims, but its representative claims concerning tranches that it did not buy will fail for lack of a party with statutory . . . standing to assert them.").[16]

C. Plaintiffs Lack Standing To Assert Claims Arising Out of Transactions with Non-Defendants.

Plaintiffs are not "efficient enforcers" of the antitrust laws with respect to claims arising out of trades with non-defendants, otherwise known as "umbrella claims." Plaintiffs seek to certify a class including all persons that entered into an MGB trade during the class period, regardless of whether that person traded with a Defendant. (CAC ¶ 382.) Plaintiffs thus seek to assert umbrella

[16] Moreover, even if Plaintiffs had alleged an injury relating to Bondes D, they would not be efficient enforcers as to Bondes D claims because parties that actually traded those bonds would be the better enforcers. *See, e.g.*, *Daniel*, 428 F.3d at 443-44.

claims, but a long line of cases in this Circuit bars umbrella claims under the efficient enforcer doctrine. *See, e.g.*, *Sonterra*, 277 F. Supp. 3d at 558-59; *In re Platinum & Palladium Antitrust Litig.*, 2017 WL 1169626, at *22 (S.D.N.Y. Mar. 28, 2017); *Sullivan v. Barclays PLC*, 2017 WL 685570, at *15 (S.D.N.Y. Feb. 21, 2017); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2016 WL 7378980, at *15-16 (S.D.N.Y. Dec. 20, 2016) ("*LIBOR VI*"); *Ocean View Capital, Inc. v. Sumitomo Corp. of Am.*, 1999 WL 1201701, at *7 (S.D.N.Y. 1999); *Gross v. New Balance Athletic Shoe*, 955 F. Supp. 242, 246-47 (S.D.N.Y. 1997).

Sonterra is directly on point. There, the plaintiffs sought damages for transactions with non-defendants that incorporated Swiss Franc LIBOR, an interest rate benchmark allegedly manipulated by the defendants. 277 F. Supp. 3d at 558-59. The plaintiffs argued that they were "efficient enforcers" of the antitrust laws because the alleged manipulation of the benchmark directly impacted their transactions with non-defendants. *Id.* The court disagreed, holding that the impact of the alleged misconduct on transactions with non-defendants was too attenuated to satisfy the efficient enforcer standing test. *Id.* at 560-62.

Here, Plaintiffs' umbrella claims are even more attenuated than those dismissed in *Sonterra*. Plaintiffs do not allege that Defendants manipulated a benchmark price that directly impacted the prices that Plaintiffs paid under contracts that incorporated the benchmark; rather, they allege only that Defendants fixed the prices on *Defendants' own transactions*, which prices supposedly had some sort of unexplained ripple effect on Plaintiffs' transactions with non-defendants. Accordingly, this Court should follow *Sonterra* and "[t]he overwhelming majority of recent court decisions that have addressed the viability of the 'umbrella' theory," *LIBOR VI*, 2016 WL 7378980, at *15 n.24, and dismiss Plaintiffs' attempt to assert umbrella claims. Indeed, all four factors of the efficient enforcer doctrine support that outcome.

First, Plaintiffs' umbrella claims "seek to impose liability for transactions for which [D]efendants did not control and of which they were likely not even aware." *Sonterra*, 277 F. Supp. 3d at 560. Plaintiffs allege only in the most conclusory of terms that they "were injured and suffered harm in each MGB transaction conducted during the Class Period" (CAC ¶ 381), and do not explain how the alleged conspiracy supposedly impacted transactions with non-defendants. *See Laydon v. Mizuho Bank, Ltd.*, 2014 WL 1280464, at *9 (S.D.N.Y. Mar. 28, 2014) (dismissing antitrust claims "[w]here the chain of causation between the asserted injury and the alleged restraint in the market contains several somewhat vaguely defined links"). Where, as here, "there [were] two independent actors—the [nondefendants] and the [plaintiffs] themselves—who influence the [price] of the trades at issue in this case after Defendants' alleged overpricing," plaintiffs are not efficient enforcers. *Contant v. Bank of Am. Corp.*, 2018 WL 1353290, at *5 (S.D.N.Y. Mar. 15, 2018).[17]

Plaintiffs' claims arising from MGB transactions with non-defendants are impermissibly speculative. Plaintiffs do not allege that market participants were *required* to transact at any given bid or ask price (as opposed to somewhere in between), let alone that Plaintiffs were somehow required to transact *with third parties* at Defendants' bid or ask rates. Accordingly, the purported impact (if any) that alleged lower bid and higher ask prices from Defendants may have had on transaction prices between Plaintiffs and third parties is hopeless guesswork. Indeed, in any given MGB transaction between a Plaintiff and a third party, the alleged conspiracy could just as well have benefited a Plaintiff depending on (a) whether the purported bid-ask spread manipulation

[17] *See also LIBOR VI*, 2016 WL 7378980, at *16 (finding that the chain of causation between defendants' actions and plaintiff's injury was broken where third parties could independently decide to incorporate U.S. Dollar LIBOR into their transactions with plaintiffs, a decision "over which defendants had no control, in which defendants had no input, and from which defendants did not profit").

moved third-party MGB prices up, down, or not at all, and (b) whether the Plaintiff was a buyer or a seller. Plaintiffs cannot be efficient enforcers where "it may not even be apparent which party profited and which party was injured by the [] manipulation." *Sullivan*, 2017 WL 685570, at *19; *Sonterra*, 277 F. Supp. 3d at 559 ("In every transaction in CHF LIBOR based derivatives to which defendants were not a party, one side would benefit from an artificially high or low CHF LIBOR, and one side would be harmed.").

Second, Plaintiffs are not efficient enforcers of umbrella claims because parties that allegedly traded directly with a Defendant are "more direct victims" of any alleged conspiracy. *See Contant*, 2018 WL 1353290, at *3, *6; *see also Harry*, 244 F. Supp. 3d at 423 (plaintiffs were not efficient enforcers because "more direct victims" of alleged conspiracy purchased allegedly price-fixed product); *Sullivan*, 2017 WL 685570, at *18 (plaintiffs who transacted with non-defendants were not efficient enforcers in part because plaintiffs who dealt directly with defendants were more direct victims).

Third, it would be "exceptionally complex," if not impossible, to isolate any impact of Defendants' alleged conduct on umbrella claims. *Sonterra*, 277 F. Supp. 3d at 564. Calculating alleged umbrella damages would require the Court to speculate as to what the bid-ask spread and transaction price would have been absent the alleged conspiracy in every single transaction between a Plaintiff and a third party, and then to calculate damages for each transaction. Courts in this District have rejected umbrella claims where the court would have to speculate as to what plaintiffs' trading prices would have been absent the alleged manipulation. *See, e.g.*, *Sullivan*, 2017 WL 685570, at *15, *18-19 (plaintiffs were not efficient enforcers because, among other things, plaintiffs had not offered "a coherent explanation as to how their damages evidence would not be steeped in speculation"); *Sonterra*, 277 F. Supp. 3d at 563-64 (dismissing umbrella claims

for similar reasons).

Finally, any recoveries based on umbrella claims would "impose liability that is wildly disproportionate to [Defendants'] [alleged] gain[s]." *Sullivan*, 2017 WL 685570, at *16. By pursuing umbrella claims, Plaintiffs seek to recover on each of their MGB transactions regardless of any Defendant involvement in those transactions. Permitting umbrella claims would thus "enlarge[] the scope of private antitrust enforcement beyond the Sherman Act's intent." *Sonterra*, 277 F. Supp. 3d at 561. For example, under Plaintiffs' theory of liability, in the situation where person A buys an MGB from a Defendant and then sells that MGB to person B, who in turn sells that MGB to person C, persons A, B, and C all would be permitted to recover from Defendants for their alleged injuries. Such a recovery would be manifestly unfair: it would penalize Defendants three times over for the same conduct. *See, e.g.*, *Sullivan*, 2017 WL 685570, at *19 (finding that damages were duplicative with respect to non-defendant transactions because in some instances both sides to a transaction could claim to have suffered injury). And even if Plaintiffs argued that they should be entitled to only one recovery in the scenario described above, Plaintiffs do not explain how damages would be apportioned among the alleged "victims"—a highly complex task that would involve considering the timing, pricing, and sizes of individual trades. *See Sonterra*, 277 F. Supp. 3d at 565-66 (dismissing umbrella claims because "plaintiffs' injuries appear likely to be extraordinarily difficult to calculate and could lead to benumbing damages amounts that far exceed the aggregate harm to third parties").

All four "efficient enforcer" factors thus support dismissal of Plaintiffs' umbrella claims.

IV. THE FTAIA BARS PLAINTIFFS' AUCTION CONSPIRACY CLAIMS.

Plaintiffs' auction conspiracy claims are also barred by the Foreign Trade and Antitrust Improvements Act (the "FTAIA") because those claims are extraterritorial in nature.

Subject to two exceptions, the FTAIA excludes from the scope of the Sherman Act any conduct "involving trade or commerce . . . with foreign nations." 15 U.S.C. § 6a. Those exceptions are for import activity involving foreign commerce, *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 404 (2d Cir. 2014) (the "Import Exception"), and for conduct that "has a 'direct, substantial, and reasonably foreseeable effect' on U.S. domestic [or] import . . . commerce" and "'gives rise to a claim under' the Sherman Act," *id*. 404, 413-14 (the "Domestic Effects Exception"). To satisfy the Domestic Effects Exception, there must be a "reasonably proximate causal nexus" between the overseas conduct and its alleged domestic effects, reflecting "antitrust law's classic aversions to remote injuries." *Id.* at 411.

According to Plaintiffs' own allegations, Defendants' alleged conspiracy to "rig" MGB auctions by the Mexican government involves "trade or commerce . . . with foreign nations," 15 U.S.C. § 6a, because the auctions took place in Mexico and the allegedly rigged bids were submitted by Mexican entities. Although at times the Complaint conflates different legal entities by alleging in broad-brush strokes that "Defendants" participated in Banxíco's Market Maker Program (CAC ¶ 272), Plaintiffs' allegations make clear that the only Defendants who participated in that program were the ten Mexican banks that were "designated market makers." (*Id.* ¶ 197; *see also id.* ¶¶ 85, 99, 112, 127, 151, 158, 170, 183, 189.) And it was those Mexican market-maker Defendants that allegedly "participate[d] in the government-run MGB auctions" and allegedly coordinated their bids. (*Id.* ¶¶ 251, 278.)[18] Thus, Plaintiffs' allegations of manipulation of MGB auctions implicate only transactions between the Mexican market-maker Defendants and their auction counterparty, the government of Mexico, not any transactions with U.S-based investors.

[18] Similarly, the media reports regarding a Mexican government investigation of MGBs relate at most to the Mexican market-maker Defendants, not to non- market-makers. (CAC ¶¶ 85, 99, 112, 127, 151, 170, 183, 199.)

Accordingly, the Import Exception does not apply to the auction claims. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395-96 (2d Cir. 2002) (import exception did not apply to claims of price-fixing in foreign auction services because, "[w]hile some of the goods purchased in those auctions may ultimately have been imported by individuals in the United States, the object of the conspiracy was the price that the defendants charged for their auction services, not any import market for those goods"), *abrogated in part on other grounds by Empagran*, 542 U.S. 155; *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 599-600 (S.D.N.Y 2015) (holding that Import Exception does not apply to wholly foreign transactions).

With the Import Exception unavailable, Plaintiffs can overcome the FTAIA's extraterritoriality bar only by pleading that the alleged conduct falls within the Domestic Effects Exception, *i.e.*, that it had a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce. 15 U.S.C. § 6a(1); *Lotes*, 753 F.3d at 398. But Plaintiffs do not allege that the purported auction-rigging resulted in any domestic effects at all. And even if the alleged misconduct had any such effects, those effects would be limited ripple effects in secondary market prices that indirectly impacted separate transactions in the United States, not the "direct," let alone "substantial" and "reasonably foreseeable," effects on U.S. trade or commerce required to satisfy the Domestic Effects Exception. (*See, e.g.*, CAC ¶ 397 (alleging only that the conspiracy caused Plaintiffs to be injured, not that the conspiracy had a "direct, substantial, or reasonably foreseeable effect" on U.S. trade or commerce, as required by the exception).) Plaintiffs' allegations therefore do not satisfy the requirements of the Domestic Effects Exception.[19]

[19] *See Info. Res., Inc. v. Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411, 417 (S.D.N.Y. 2000) (holding that the Domestic Effects Exception was not satisfied where effect of foreign conduct on U.S. plaintiff was not "direct" but rather "indirect and derivative"); *Latino Quimica-Amtex*, 2005 WL 2207017, at *9 (S.D.N.Y. Sept. 8, 2005) ("As the allegation does not even plead that it was the effect on U.S. commerce, rather than an effect on foreign commerce, that gave rise to Plaintiffs'

Because Plaintiffs fail to satisfy either the Import Exception or the Domestic Effects Exception to the FTAIA, the FTAIA bars their auction conspiracy claims.

V. PLAINTIFFS FAIL TO STATE A CLAIM FOR UNJUST ENRICHMENT.

Plaintiffs' unjust enrichment claims should be dismissed for four independent reasons. *First*, Plaintiffs offer no basis other than their defective conspiracy allegations for concluding that any alleged enrichment of Defendants was "unjust." *See, e.g.*, *Kramer v. Pollock-Frasner Found.*, 890 F. Supp. 250, 257 (S.D.N.Y. 1995) (dismissing unjust enrichment claim that "hinge[d] on" defective antitrust allegations); *In re IRS*, 261 F. Supp. 3d at 500 (same).[20]

Second, where, as here, an unjust enrichment claim merely duplicates other recognized claims, the claim should be dismissed because unjust enrichment "is not a catchall cause of action to be used when others fail." *Leder v. Am. Traffic Solutions, Inc.*, 81 F. Supp. 3d 211, 227 (E.D.N.Y. 2015); *see also Ideavillage Prods. Corp. v. Bling Boutique Store*, 2018 WL 3559085, at *4 (S.D.N.Y. July 24, 2018); *Goldenberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F. Supp. 3d 467, 483-84 (S.D.N.Y. 2014).

Third, Plaintiffs' unjust enrichment claims based on direct transactions between a Plaintiff and a Defendant are barred because those transactions are governed by contracts between the parties. Unjust enrichment claims are available only "in the absence of an actual agreement between the parties." *FrontPoint*, 2017 WL 3600425, at *16.

Fourth, Plaintiffs cannot assert unjust enrichment claims against the majority of

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claim, it is patently inadequate to plead the necessary direct causal link."); *Biocad, JSC v. F. Hoffman-La-Roche, Ltd.*, 2017 WL 4402564, at *10 (S.D.N.Y. Sept. 30, 2017) (holding that "[p]laintiff's attenuated chain of causation is insufficient to establish a direct, substantial, or reasonably foreseeable effect under the FTAIA").

[20] Relatedly, Plaintiffs who lack antitrust standing also cannot bring a claim for unjust enrichment. *See Yong Ki Hong v. KBS Am., Inc.*, 951 F. Supp. 2d 402, 425 (E.D.N.Y. 2013).

Defendants that are not alleged to have traded MGBs with Plaintiffs. Plaintiffs bring their unjust-enrichment claim against "All Defendants" (CAC ¶ 402), but allege that they "transacted MGBs . . . directly" with only 22 of them (*id.* ¶ 403).[21] As to the remaining Defendants, Plaintiffs lack the type of direct dealings that are necessary to sustain an unjust enrichment claim. *See, e.g.*, *FrontPoint*, 2017 WL 3600425, at *16; *In re North Sea Brent Crude Oil Futures Litig.*, 256 F. Supp. 3d 298, 315-16 (S.D.N.Y. 2017).

VI. MOST OF PLAINTIFFS' CLAIMS ARE TIME-BARRED.

A. Plaintiffs' Antitrust Claims Are Partially Time-Barred.

A private claim brought under the Sherman Act is subject to a four-year statute of limitations that begins to run when the cause of action accrues—*i.e.,* when an MGB transaction occurs and the plaintiff pays an allegedly anticompetitive price—not when the plaintiff discovers the cause of action. 15 U.S.C. § 15b; *Johnson v. Nyack Hosp.*, 86 F.3d 8, 11 (2d Cir. 1996). Moreover, an antitrust plaintiff alleging causes of action arising out of facts that took place within and outside the statutory period may recover only for those acts that fall within the statutory period. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997). Thus, as the first MGB complaint was filed on March 30, 2018, Plaintiffs' claims relating to transactions that took place more than four years

[21] The Complaint is confused and inconsistent as to which Defendants actually directly transacted with Plaintiffs. Paragraph 8 alleges that Plaintiffs "collectively traded hundreds of millions of dollars' worth of MGBs in the United States during the Class Period, directly" with 22 Defendants. *See* CAC ¶ 8. Paragraph 379 and 403 make similar allegations with respect to the same 22 Defendants. Paragraph 12, however, alleges that certain Defendants "transacted MGBs at artificial prices," listing some of the Defendants listed in in Paragraphs 8 and 403 as well as others who are not (namely, HSBC Holdings plc, Citigroup Inc., ING Bank N.V., JP Morgan Chase & Co., Barclays PLC, and Credit Suisse AG). *See id.* ¶ 12. Further adding to the confusion, 3 of the 22 Defendants found in Paragraphs 8 and 403 are not included in the allegations laying out the various Defendant families. *See id.* ¶¶ 73-194 (not listing J.P. Morgan Securities plc, Citigroup Global Markets Limited, and Citibank NA as part of the relevant Defendant families).

before the filing of that complaint, *i.e.* before March 30, 2014, are time-barred.[22]

Plaintiffs contend that the statute of limitations should be tolled because Defendants purportedly fraudulently concealed the facts underlying Plaintiffs' claims, but Plaintiffs' allegations are insufficient to justify tolling. To successfully allege fraudulent concealment of an antitrust claim, a plaintiff must plead, with the particularity required by Rule 9(b): "(1) that the defendant concealed from [the plaintiff] the existence of his cause of action, (2) that [the plaintiff] remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that [the plaintiff's] continuing ignorance was not attributable to a lack of diligence on his part." *In re IRS*, 261 F. Supp. 3d at 487. Plaintiffs' allegations do not satisfy these requirements.

1. Plaintiffs do not allege affirmative acts of concealment.

To satisfy the first element of the fraudulent concealment test, a plaintiff must show "either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing." *State of N.Y. v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988). Plaintiffs fail adequately to allege either.

Plaintiffs' allegations of "affirmative acts of concealment" are nothing more than summaries of the allegations underlying their causes of action. Plaintiffs allege that Defendants

[22] The first MGB complaint, which was filed on March 30, 2018, did not name as Defendants the Credit Suisse Defendants, the ING Defendants, Barclays Capital Securities Limited, or J.P. Morgan Securities plc. The Credit Suisse Defendants were first named as Defendants in a complaint filed on May 14, 2018, and therefore the Sherman Act claims against the Credit Suisse Defendants are barred to the extent they relate to transactions that preceded May 14, 2014 (four years before the complaint was filed). The ING Defendants, Barclays Capital Securities Limited, and J.P. Morgan Securities plc were first named as defendants in the Consolidated Amended Class Action Complaint on July 18, 2018, and therefore Sherman Act claims against the ING Defendants, Barclays Capital Securities Limited, and J.P. Morgan Securities plc are barred to the extent they arise out of transactions that preceded July 18, 2014.

"(1) secretly disseminat[ed] confidential bidding schedules to each other and agree[d] on bids in MGB auctions; (2) implicitly represent[ed] that each Defendant was bidding competitively in the auction for MGB such that the final price represented a competitive auction; and (3) charg[ed] inflated spreads to customers without disclosing that the charges reflected an agreed price set by Defendants rather than a competitive price." (CAC ¶ 391.)

These allegations fail to show affirmative concealment for two independent reasons. First, they cannot satisfy Rule 9(b) because the allegations do not differentiate between the individual Defendants and "fail to specify the time, place, speaker, [and] even the content of alleged misrepresentations." *O'Brien v. Nat'l Prop. Analysts Partners*, 719 F. Supp. 222, 232 (S.D.N.Y. 1989). Second, because these allegations are mere summaries of Plaintiffs' claims, they are not allegations of *separate* affirmative acts of concealment that could otherwise toll the statute of limitations. *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 318-19 (S.D.N.Y. 2013) ("For equitable tolling to apply, a plaintiff may not rely on the same act that forms the basis for the claim."); *Moll v. U.S. Life Title Ins. Co. of N.Y.*, 700 F. Supp. 1284, 1290-91 (S.D.N.Y. 1988) (holding that affirmative concealment separate from the underlying conduct is necessary to toll the statute of limitations).[23] As such, Plaintiffs have failed to allege affirmative acts of concealment sufficient to toll the statute of limitations.

2. Plaintiffs' allegations show that the alleged conspiracy was not self-concealing.

To adequately allege that a defendant engaged in a "self-concealing" conspiracy, a plaintiff must plead facts demonstrating that the nature of the conspiracy was such that, simply by carrying it out, the defendants necessarily concealed it from the plaintiff. *See S.E.C. v. Jones*, 476 F. Supp.

[23] Courts often use "equitable tolling" and "fraudulent concealment" interchangeably. *See Pearl v. City of Long Beach*, 296 F.3d 76, 82 (2d Cir. 2002).

2d 374, 382 (S.D.N.Y. 2007) ("A fraud conceals itself when the defendant only does what is necessary to perpetrate the fraud, and that alone makes the fraud unknowable[.]"). Plaintiffs' allegations belie their claim that the conspiracy was self-concealing because Plaintiffs allege that the existence of the alleged conspiracy is apparent from publicly available information.

For example, Plaintiffs allege that "*dramatic*" price movements occurred only on auction days during the class period, but were "[t]ellingly . . . absent on Non-Auction Days," supposedly evidencing collusion. (CAC ¶ 318.)[24] If indeed there were such "dramatic" changes in price, then those changes should have been readily apparent to Plaintiffs, who had access to this pricing information throughout the eleven-year class period and allegedly experienced the impact of the alleged conspiracy throughout that time. *See In re IRS*, 261 F. Supp. 3d at 488 (holding that where the effects of an alleged antitrust conspiracy occur "in plain sight and in contrast to the market's expectations," the conspiracy is not "self-concealing"); *In re Publ'n Paper Antitrust Litig.*, 2005 WL 2175139, at *4 (D. Conn. Sept. 7, 2005) (rejecting allegations of a self-concealing conspiracy where resulting "price increases were *not* explainable by ordinary market forces").

Similarly, Plaintiffs allege that bid data obtained from Banxíco shows "dramatic changes [in bid dispersion that] are indicative of collusion among the Defendants" and that fill rate data similarly shows evidence of "collusion" among Defendants during the class period. (CAC ¶¶ 309, 314.) And Plaintiffs also allege that Defendants increased the size of bid-ask spreads by "29% to more than 50%" during the class period. (*Id.* ¶ 330.) Here again, if such "dramatic changes" actually occurred during the class period and indicated collusion, then Plaintiffs could have observed those changes at any point simply by comparing pricing information during the class

[24] More specifically, for example, Plaintiffs claim that the price of 30-year Bonos "increase[d] dramatically" on Auction Days, indicating that Defendants "agree[d] to sell MGBs following the auction at fixed artificially higher prices." (CAC ¶¶ 317-18.)

period to the same information before the class period. *See In re IRS*, 261 F. Supp. 3d at 488; *In re Publ'n Paper Antitrust Litig.*, 2005 WL 2175139, at *4.

In addition to such long-available pricing information, Plaintiffs have sought to support their allegations by relying on information that was available at least as early as October 2013. In a prior complaint filed by one of the Plaintiffs, Boston Retirement System ("BRS"), BRS cited comments that CNBV president Jaime Gonzalez Aguade made in 2017 referring to sanctions issued in October 2013 against two Defendants for engaging in "collusion and anticompetitive behavior" with respect to Bonos. (*Id.*) The Mexican press reported on those sanctions when they were publicly issued in October 2013.[25] Thus, if Plaintiffs are correct that these 2013 reports were indicative of "collusion and anticompetitive behavior," then the reports put Plaintiffs on notice of their allegations by at least October 2013.[26] Plaintiffs' consolidated Complaint deleted these allegations, but Plaintiffs cannot "by these omissions 'erase[]' the admissions" in their prior complaint. *Austin v. Ford Models, Inc.*, 149 F.3d 148, 155 (2d Cir. 1998) (alteration in original), *abrogated in part on other grounds*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). And in any event, the Court can take judicial notice of the articles. *Staehr v. Hartford Fin. Servs. Grp.,*

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[25] *See* El Financiero, *CNBV multa con 39 mdp a instituciones financieras* (Nov, 1, 2013), http://www.elfinanciero.com.mx/archivo/cnbv-multa-con-39-mdp-a-instituciones-financieras; Sentido Comun, *Bank of America, Barclays, Merrill Lynch, RBS multados por CNBV* (Nov. 1, 2013), http://bs.sentidocomun.com.mx/articulo.phtml?id=6596&auth=qkpzienvbq73btr; Jeanette Leyva, El Financiero, *La CNBV ya ha multado a bancos por los Bonos M* (July 24, 2017), http://www.elfinanciero.com.mx/economia/la-cnbv-ya-ha-multado-a-bancos-por-los-bonos-m. The articles refer to alleged misconduct concerning transactions in "BONOS M." "BONOS" and "BONOS M" are used interchangeably and refer to the same instruments. Rebeca Acosta-Arellano & Claudia Alvarez-Toca, Banco de Mexico, *The Mexican Government Securities Market* § 2.1 n.2, http://www.banxico.org.mx/elib/mercado-valores-gub-en/OEBPS/Text/iien.html.

[26] BRS also alleged that a 1993 analysis of Cetes weekly auctions and a 2001 study of the secondary market for Cetes both suggested that there was collusion in the MGB market, which further supports that Plaintiffs should have been monitoring the MGB auctions and secondary market for irregularities. (No. 18-cv-4294 (May 14, 2018), ECF No. 1, ¶ 163.)

Inc., 547 F.3d 406, 425 (2d Cir. 2008).

Plaintiffs cannot have it both ways. If there allegedly were "dramatic changes" in MGB prices and spreads during the alleged class period, and if press reports signaled collusion in the MGB market as early as 2013, then the alleged conduct was not self-concealing. *See In re IRS*, 261 F. Supp. 3d at 489 ("'[A]ll that is necessary to cause the tolling period to cease is for there to be reason to suspect the probability of any manner of wrongdoing."); *Woori Bank v. Merrill Lynch*, 923 F. Supp. 2d 491, 497 (S.D.N.Y. 2013) (plaintiff may not "simultaneously claim[] that the generalized evidence cited as the basis of its complaint—the vast majority of which involves factual allegations published prior to [the limitations period]—is sufficiently detailed to state a cognizable claim for relief and that, nevertheless, these facts were somehow insufficiently particular to cause the statute of limitations to run").

3. Plaintiffs do not allege the exercise of due diligence.

Plaintiffs also fail to satisfy the third prong of the fraudulent concealment test because they do not allege that they performed any due diligence or that the exercise of due diligence would have been futile. *See Hinds I*, 620 F. Supp. 2d at 521 (holding that plaintiffs failed to allege fraudulent concealment where they pled only that they did not discover and could not have discovered the alleged conspiracy through reasonable diligence). Plaintiffs do not allege, for example, that they ever engaged in any investigation to determine the source of the allegedly "dramatic" changes in MGB auction bids, post-auction prices, and bid-ask spreads during the class period. Nor do they allege that they ever investigated potential collusion in the MGB market following Mexican press reports of sanctions for alleged collusion and anticompetitive behavior in October 2013. Plaintiffs' failure to exercise due diligence prohibits them from invoking equitable tolling of the statute of limitations. *See Butala v. Agashiwala*, 916 F. Supp. 314, 320 (S.D.N.Y. 1996) (holding that plaintiffs failed to carry "the burden of pleading their own diligence

with particularity, [where the] Complaint [was] utterly lacking in the details of what steps the plaintiffs took to investigate . . . once they were on inquiry notice of the probability they had been defrauded").

B. Plaintiffs' Unjust Enrichment Claims Are Partially Time-Barred.

Plaintiffs' unjust enrichment claims are also partially time-barred. For the New York resident Plaintiffs, the applicable period is three years. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2015 WL 6243526, at *163 n.186 (S.D.N.Y. Oct. 20, 2015). For the non-New York resident Plaintiffs, under New York's borrowing statute, CPLR § 202, the limitations period is the shorter of (1) New York's statute of limitations or (2) the statutes of limitations of the states where the injuries occurred. *Pricaspian Development Corp. v. Total S.A.*, 2009 WL 4163513, at *6-7 (S.D.N.Y. Nov. 25, 2009). Under New York law, a claim for unjust enrichment "accrues at the time and in the place of the injury." *Id.* at *6.

With the exception of Plaintiff Oklahoma Firefighters Pension Retirement System ("OFPRS"), an Oklahoma resident, New York's statute of limitations for unjust enrichment is equal to, or shorter than, the statute of limitations in the state where the Plaintiff resided.[27] Because the first MGB complaint was filed on March 30, 2018, the unjust enrichment claims of the non-OFPRS Plaintiffs are time-barred insofar as they are based on transactions more than three years

[27] Plaintiffs Manhattan and Bronx Surface Transit Operating Authority and MTA Defined Benefit Pension Plan Master Trust are residents of New York, so their unjust enrichment claims are subject only to New York's statute of limitations. The remaining Plaintiffs, with the exception of OFPRS, are residents of Massachusetts, Pennsylvania, or the United States Virgin Islands, all of which have statutes of limitations equal to or longer than three years. *Sentinel Prods. Corp. v. Mobile Chem. Co.*, 2001 WL 92272, at *23 (D. Mass. Jan. 17, 2001) (six-year or three-year statute of limitations, depending on the essential nature of the claim, in Massachusetts); *Cole v. Lawrence*, 701 A.2d 987, 989 (Pa. Super. Ct. 1997) (four-year statute of limitations in Pennsylvania); *Patterson v. U.S. Virgin Islands*, 2013 WL 12250859, at *3 (D.V.I. May 8, 2013) (six-year statute of limitations in the Virgin Islands).

before that date—*i.e.*, March 30, 2015. OFPRS' unjust enrichment claims are subject to a two-year statute of limitations, *City of Tulsa v. Bank of Oklahoma*, 280 P.3d 314, 320-21 (Okla. 2011), so its unjust enrichment claims based on transactions occurring before March 30, 2016, are time-barred.[28]

The fraudulent concealment doctrine does not save Plaintiffs' unjust enrichment claims. For equitable tolling to apply under New York law, the plaintiff "must show that the defendant wrongfully concealed its actions, such that plaintiff was unable, despite due diligence, to discover facts that would allow him to bring his claim in a timely manner, or that defendant's actions induced plaintiff to refrain from commencing a timely action." *Martin Hilti Family Tr. v. Knoedler Gallery, LLC.*, 137 F. Supp. 3d 430, 467 (S.D.N.Y. 2015). Similarly, under Oklahoma law, "[o]ne relying on fraudulent concealment to toll the statute of limitations must not only show that he did not know the facts constituting a cause of action, but that he exercised reasonable diligence to ascertain said facts." *Masquat v. Daimler Chrysler Corp.*, 195 P.3d 48, 55 (Okla. 2008).[29] For the reasons explained above, Plaintiffs' allegations of fraudulent concealment are insufficient to toll New York's or Oklahoma's statutes of limitations. *See supra* at 41-46. In fact, Plaintiffs have an even weaker case for tolling these states' statutes of limitations, as neither New York nor

[28] As noted above, because the Credit Suisse Defendants were not named as Defendants until May 14, 2018, and the ING Defendants, Barclays Capital Securities Limited, and J.P. Morgan Securities plc were not named as Defendants until July 18, 2018, the unjust enrichment statute of limitations bars non-OFPRS Plaintiffs from recovering on any transactions that preceded May 14, 2015, and OFPRS from recovering on any transactions that preceded May 14, 2016 against the Credit Suisse Defendants, and bars non-OFPRS Plaintiffs from recovering on any transactions that preceded July 18, 2015, and OFPRS from recovering on any transactions that preceded July 18, 2016 from the ING Defendants, Barclays Capital Securities Limited, and J.P. Morgan Securities plc.

[29] *See also Masquat*, 195 P.3d at 55 ("[I]f the means of knowledge exist and the circumstances are such as to put a man of ordinary prudence on inquiry, it will be held that there was knowledge of what could have been readily ascertainable by such inquiry.").

Oklahoma recognizes the theory of self-concealing wrongs in this context.[30] Plaintiffs' untimely unjust enrichment claims therefore should be dismissed.

CONCLUSION

For the foregoing reasons, all claims should be dismissed with prejudice.

[30] In New York, it is not clear that the doctrine exists at all, and if it does, it does not apply to unjust enrichment claims. *See Fertitta v. Knoedler Gallery, LLC*, 2015 WL 374968, at *9 (S.D.N.Y. Jan. 29, 2015) (Oetken, J.) (Under New York law, "the self-concealing fraud doctrine applies-if it applies at all-to ordinary fraud claims."). In Oklahoma, the doctrine has only been applied to breach of trust claims. *See Smith v. Baptist Found. of Okla.*, 50 P.3d 1132, 1142 (Okla. 2002). Therefore, in order to allege fraudulent concealment sufficient to toll the statute of limitations on their unjust enrichment claims, Plaintiffs would have to allege an affirmative act of concealment, which they have not done.

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Respectfully submitted,

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