UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEFFREY LAYDON, on behalf of himself and all others similarly situated,

Plaintiff,

v.

MIZUHO BANK, LTD., THE BANK OF TOKYO-MITSUBISHI UFJ, LTD, THE SUMITOMO TRUST AND BANKING CO., LTD., THE NORINCHUKIN BANK, MITSUBISHI UFJ TRUST AND BANKING CORPORATION, SUMITOMO MITSUI BANKING CORPORATION, RESONA BANK, LTD., J.P. MORGAN CHASE & CO., J.P. MORGAN CHASE BANK, NATIONAL ASSOCIATION, J.P. MORGAN SECURITIES PLC, MIZUHO CORPORATE BANK, LTD., DEUTSCHE BANK AG, MIZUHO TRUST AND BANKING CO., LTD., THE SHOKO CHUKIN BANK, LTD., SHINKIN CENTRAL BANK, UBS AG, UBS SECURITIES JAPAN CO. LTD., THE BANK OF YOKOHAMA, LTD., SOCIÉTÉ GÉNÉRALE SA, THE ROYAL BANK OF SCOTLAND GROUP, PLC, ROYAL BANK OF SCOTLAND PLC, RBS SECURITIES JAPAN LIMITED, BARCLAYS BANK PLC, CITIBANK, NA, CITIGROUP, INC., CITIBANK, JAPAN LTD., CITIGROUP GLOBAL MARKETS JAPAN, INC., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., HSBC HOLDINGS PLC, HSBC BANK PLC, ICAP PLC, R.P. MARTIN HOLDINGS LIMITED AND JOHN DOES NOS. 1-50,

Defendants.

Case No: 12-cv-3419 (GBD)

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S ANTITRUST AND UNJUST ENRICHMENT CLAIMS

Table of Contents

TABLE OF AUTHORITY

Cases

Page

Statutes

Other Authorities

Defendants respectfully submit this memorandum of law in support of their motion to dismiss the Sherman Act Section 1 antitrust claim and unjust enrichment claim asserted in Plaintiff Jeffrey Laydon's ("Plaintiff") Second Amended Class Action Complaint (the "Complaint").[1]

PRELIMINARY STATEMENT

Plaintiff's antitrust and unjust enrichment claims should be dismissed. As explained below, the Complaint fails to state a claim under Section 1 of the Sherman Act for multiple reasons. Moreover, Plaintiff has failed to adequately allege the necessary elements of an unjust enrichment claim under New York law.

<u>Plaintiff Has Failed To State A Section 1 Antitrust Claim</u>

First, and most significantly, Plaintiff lacks standing to bring an action under the Sherman Act because he has failed to plead an "antitrust injury," *i.e.*, an injury flowing from a reduction in competition. Plaintiff's antitrust claim is identical in every material respect to antitrust claims that were dismissed on precisely this basis by Judge Naomi Reice Buchwald on March 29, 2013, as part of the U.S. Dollar LIBOR multidistrict litigation ("USD LIBOR MDL"). The result here should be no different. At most, Plaintiff alleges that certain bank Defendants submitted artificial submissions to two foreign banking associations for use in the compilation of

---

[1] This memorandum of law is submitted on behalf of the following defendants: (i) Mizuho Corporate Bank, Ltd.; (ii) Mizuho Bank, Ltd.; (iii) Mizuho Trust & Banking Co., Ltd.; (iv) Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.; (v) Citigroup Inc.; (vi) Citibank, N.A.; (vii) JPMorgan Chase & Co.; (viii) JPMorgan Chase Bank, N.A.; (ix) J.P. Morgan Securities plc; (x) ICAP plc; (xi) Deutsche Bank AG; (xii) Société Générale; (xiii) Sumitomo Mitsui Banking Corporation; (xiv) The Bank of Tokyo-Mitsubishi UFJ, Ltd.; (xv) Mitsubishi UFJ Trust and Banking Corporation; (xvi) Shinkin Central Bank; (xvii) R.P. Martin Holdings Ltd.; (xviii) Resona Bank, Ltd.; (xix) HSBC Holdings plc; (xx) HSBC Bank plc; (xxi) The Shoko Chukin Bank, Ltd.; (xxii) Sumitomo Mitsui Trust Bank, Ltd. f/k/a The Sumitomo Trust and Banking Co., Ltd.; (xxiii) The Norinchukin Bank; and (xxiv) The Bank of Yokohama, Ltd. (collectively, "Defendants").

Citibank Japan Ltd. and Citigroup Global Markets Japan Inc. are named as purported defendants in the Complaint, but Plaintiff has failed to serve either of these Japanese entities, even though well over 120 days have passed since the filing of the initial pleading purporting to name these entities as defendants. "In the absence of service of process . . . a court ordinarily may not exercise power over a party the complaint names as defendant." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999).

a pair of informational benchmarks that are set overseas: Euroyen TIBOR (the Tokyo Interbank Offered Rate) and Yen LIBOR (the London Interbank Offered Rate for the Japanese yen). Plaintiff claims that he and other putative class members were harmed because they transacted in futures contracts solely referencing Euroyen TIBOR, which was purportedly affected by the manipulation of submissions for Euroyen TIBOR itself and/or Yen LIBOR, which is an entirely separate and different benchmark rate. But even if one accepts as true Plaintiff's allegations that the published Euroyen TIBOR benchmark rate would have been different in the absence of any manipulated submissions, and that this adversely affected Plaintiff and others who voluntarily transacted in products referencing Euroyen TIBOR, this would still fall short of stating a legally cognizable private antitrust claim.

The allegations in the Complaint are insufficient to confer antitrust standing on Plaintiff for the same reasons identified by Judge Buchwald in the USD LIBOR MDL. Like the USD LIBOR plaintiffs, Plaintiff alleges that he lost money on derivatives tied to an informational benchmark – in this case, Euroyen TIBOR. And like those plaintiffs, Plaintiff traces these alleged losses *not* to any actual reduction in competition with respect to the derivatives in which he allegedly transacted or competition in general but, rather, to a purported conspiracy to manipulate the processes of setting certain informational benchmarks – in this case, Euroyen TIBOR and Yen LIBOR. But the processes of setting Euroyen TIBOR and Yen LIBOR are cooperative, not competitive: Defendants do not compete to make Euroyen TIBOR and Yen LIBOR submissions, there are no buyers and sellers of Euroyen TIBOR or Yen LIBOR submissions, and no market exists for these submissions. Plaintiff and others are free to engage in interbank transactions at any rate they choose, and they are free to incorporate whatever benchmark rates they choose into their derivatives transactions. As a result – and just as Judge

Buchwald held in the USD LIBOR MDL – any injury that Plaintiff may have suffered as a result of the bank Defendants' alleged manipulation of their Euroyen TIBOR or Yen LIBOR submissions would not be attributable to any harm to competition.

Even assuming Plaintiff had pled a cognizable antitrust injury, he has also failed to establish antitrust standing because his alleged injury is too remote and speculative. Plaintiff's claim is contingent upon a highly attenuated chain of alleged events that purports to connect the bank Defendants' individual Euroyen TIBOR and Yen LIBOR submissions to the futures market's perception of what the final Euroyen TIBOR benchmark rate will be at some later point in time, which (according to Plaintiff) is then, in turn, incorporated into the actual prices of Euroyen TIBOR futures contracts. Even if Plaintiff were somehow able to connect each of these dots coherently and overcome the absence of any allegation that he transacted with any of the Defendants, the Court would be left with the extremely complicated (and arguably impossible) task of determining what Euroyen TIBOR benchmark rates, Yen LIBOR benchmark rates, and prices of Euroyen TIBOR futures contracts "would have been" in the absence of any alleged misreporting. Because neither Euroyen TIBOR nor Yen LIBOR purports to reflect actual borrowing rates from actual transactions, but rather (as explained below) comprise an average of a subset of the panel banks' answers to hypothetical questions, establishing any injury would entail exactly the sort of hopelessly speculative slog that antitrust standing doctrine exists to avoid.

Second, and for similar reasons, Plaintiff has utterly failed to allege a restraint of trade. Again, Plaintiff's specific allegations of misconduct concern a cooperative undertaking necessarily involving multiple banks, rather than competition in any identifiable market.

Third, Plaintiff cannot maintain his antitrust claim because it is impermissibly extraterritorial in nature and precluded by the Foreign Trade Antitrust Improvements Act ("FTAIA"). Plaintiff's antitrust claim is premised on purely extraterritorial conduct: the alleged contribution of Euroyen TIBOR and Yen LIBOR submissions to the Japanese Bankers' Association ("JBA") in Tokyo and the British Bankers' Association (the "BBA") in London, respectively. To support a Sherman Act claim, the FTAIA requires the effects of such extraterritorial conduct on domestic commerce to be direct, substantial and reasonably foreseeable. Plaintiff, however, alleges only a highly attenuated relationship between overseas Euroyen TIBOR and Yen LIBOR submissions and Plaintiff's purported losses on unspecified Euroyen TIBOR futures contracts, all of which is contingent on a number of intervening acts, including: (i) the JBA's and BBA's determination of the published TIBOR and LIBOR benchmark rates; and (ii) the interactions of countless futures market participants whose perceptions and transactions actually establish the prices for Euroyen TIBOR futures contracts. Plaintiff likewise fails to allege facts sufficient to show that any purported impact on domestic commerce was "reasonably foreseeable;" rather, at best, he alleges a sporadic effort by a few traders at different *subsets* of Defendants to allegedly benefit certain of their own trading positions in overseas markets.

Finally, Plaintiff has failed to allege an anticompetitive conspiracy with sufficient plausibility to support his Sherman Act claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), and its progeny. Most significantly, Plaintiff alleges no facts sufficient to support his contention that Defendants conspired to manipulate Euroyen TIBOR (the only benchmark rate to which the Euroyen TIBOR futures contracts he purchased are priced), instead relying on allegations regarding the purported manipulation of Yen LIBOR – an entirely different index based on submissions provided by a different panel of banks using different criteria, maintained by a different overseas banking association, and reflecting lending activity in a different interbank market. Plaintiff never explains why, if Defendants could allegedly directly influence Euroyen TIBOR via their submissions, they would also make Yen LIBOR submissions with the purpose of indirectly influencing Euroyen TIBOR. And even if there were a basis for the convoluted relationship between the two benchmarks that Plaintiff has attempted to construct, nothing in the Complaint supports Plaintiff's sweeping allegation of a five-year conspiracy among 32 defendants located on three continents to do anything of the sort.

Plaintiff Has Failed To State An Unjust Enrichment Claim

Plaintiff has not alleged that he purchased any of his Euroyen TIBOR futures contracts from any bank Defendants or that he otherwise had any direct dealings or relationship with any of the bank Defendants. In the USD LIBOR MDL, Judge Buchwald dismissed a New York state law unjust enrichment claim that is legally indistinguishable from Plaintiff's claim here because the plaintiffs failed to allege that they purchased any of the Eurodollar futures contracts that were at issue from any defendant or that they had any other direct dealings with the defendants. This reasoning applies with equal force here. Plaintiff's unjust enrichment claim should also be dismissed on the separate and independent ground that he has failed to allege any facts showing how the bank Defendants have been enriched at his expense.

BACKGROUND[2]

A. The Parties

1. Plaintiff And The Proposed Class

Plaintiff Jeffrey Laydon is a Florida resident who alleges that he "initiated short positions in . . . [three-month] Euroyen TIBOR futures contracts" on the Chicago Mercantile Exchange ("CME") during the Class Period,[3] (Compl. ¶ 56), and, therefore, did not directly purchase from or sell directly to any Defendant. Plaintiff asserts that he "suffered net losses on [three-month Euroyen TIBOR futures] contracts due to the presence of artificial Euroyen TIBOR futures prices," (*id.*), and seeks to bring this action on behalf of "[a]ll persons or entities that engaged in a U.S. based transaction in a Euroyen TIBOR futures contract during [the Class Period]." (*Id.* ¶ 704.)[4] Plaintiff commenced this action after Judge Buchwald rejected his efforts to be appointed interim lead plaintiff for the proposed exchange-based class in the USD LIBOR MDL. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262 (NRB), Docket No. 66, (S.D.N.Y. Nov. 29, 2011).

2. Defendants

The defendants in this action are 30 financial institutions (the "Bank Defendants") and 2 brokerage firms (the "Broker Defendants"). Among the Bank Defendants are 18 banks allegedly designated by the JBA to contribute to the determination of Euroyen TIBOR at various points during the Class Period. (Compl. ¶¶ 78, 90-93.) These banks are predominantly headquartered

---

[2] Unless otherwise noted, the facts set forth herein have been taken from Plaintiff's Complaint.

[3] The Complaint defines the Class Period as encompassing the "period of at least January 1, 2006 through at least December 31, 2010." (Compl. ¶ 704.)

[4] The Complaint defines "[a] U.S. based transaction in a Euroyen TIBOR futures contract" to mean "either: (a) a purchase or sale of a Euroyen TIBOR futures contract on the CME, or (b) a purchase or sale of a TFX, SGX or LIFFE Euroyen TIBOR futures contract by a U.S. person or entity from a location within the U.S." (Compl. ¶ 704.)

in Tokyo. Also among the Bank Defendants are 13 banks allegedly designated by the BBA to contribute to the determination of Yen LIBOR at various points during the Class Period. (*Id.* ¶¶ 79, 94-96.) These banks are predominantly headquartered in Europe and the U.S. Seven of the 30 Bank Defendants allegedly served as panel banks on both the JBA's Euroyen TIBOR panel and the BBA's Yen LIBOR panel during the Class Period. (*Id.* ¶¶ 58, 60, 62, 65-66, 70, 73.)

The Broker Defendants are two non-U.S. brokerage firms that "are involved in the brokering of cash deposits and derivatives based on Euroyen TIBOR and Yen-LIBOR between banks." (*Id.* ¶¶ 82-83.)

B. Euroyen TIBOR And Yen LIBOR Overview[5]

Euroyen TIBOR and Yen LIBOR are two different benchmarks that are used in certain financial transactions. Euroyen TIBOR, established by the JBA, is calculated each day based on individual submissions from panel banks designated by the JBA. In calculating Euroyen TIBOR, the JBA receives from each panel bank an estimate of what the bank deems to be the prevailing market rate, assuming transactions between hypothetical prime banks on the Japanese offshore market as of 11 a.m. Tokyo time each day, unaffected by the bank's own positions. The JBA discards the two highest and two lowest submissions, averages the remaining submissions, and publishes the result, through contracted information providers, as the daily Euroyen TIBOR benchmark rate. The panel banks' daily Euroyen TIBOR submissions are non-public prior to their submission, but subsequently become public when they are published by the JBA's contracted information providers.

Although Yen LIBOR is also calculated each day, it is determined differently from the way Euroyen TIBOR is determined. Yen LIBOR, established by the BBA, is calculated based

[5] *See generally* Compl. ¶¶ 87-97; http://www.zenginkyo.or.jp/en/tibor/the_jba_tibor/ (last visited June 14, 2013); http://bbalibor.com/bbalibor-explained/the-basics (last visited June 14, 2013).

on individual submissions from panel banks designated by the BBA. The panel of banks, however, are wholly distinct from the panel of banks used for Euroyen TIBOR, even if certain individual entities serve on both panels. Unlike Euroyen TIBOR, each Yen LIBOR panel bank reports to an independent administrator the rate at which the bank believes it – rather than a hypothetical “prime bank” – could borrow yen on an unsecured basis, in “reasonable market size,” for a particular maturity, from other banks in the London interbank market as of 11 a.m. London time each day. The independent administrator then ranks the submissions from highest to lowest, discards the top and bottom quartiles, averages the remaining submissions, and publishes, through Thomson Reuters, the result as the daily Yen LIBOR benchmark rate. The panel banks’ daily Yen LIBOR submissions are non-public before their communication to the administrator, but become public thereafter.

C. Plaintiff’s Euroyen TIBOR Futures Contracts

Plaintiff alleges that he purchased three-month CME Euroyen TIBOR futures contracts. Three-month Euroyen TIBOR futures contracts are agreements to purchase or sell a Euroyen time deposit having a principal value of 100 million Japanese Yen with a three-month maturity commencing on a specific future date. (Compl. ¶ 98.) These contracts are “quoted in terms of 100 minus the Three-month Euroyen TIBOR rate on an annual basis over a 360 day year.” (*Id.* ¶ 102.) The contract months for a three-month Euroyen TIBOR futures contract are March, June, September and December, extending over five years. (*Id.* ¶ 104.) Euroyen TIBOR futures contracts terminate trading at 11 a.m. Tokyo time on the second Tokyo bank business day immediately preceding the third Wednesday of the contract’s named month of delivery (*e.g.*, March, June, September or December). (*Id.* ¶ 105.)

The final settlement price of a three-month CME Euroyen TIBOR futures contract is defined as “cash settlement to 100 minus the Three-month Euroyen TIBOR rate published by the

JBA at 11:00 a.m. Tokyo time on the second Tokyo bank business day immediately preceding the third Wednesday of the contract month's named month of delivery." (*Id.* ¶ 106.) Thus, these Euroyen TIBOR futures contracts – the only futures contracts at issue in this action – are priced solely in reference to the three-month Euroyen TIBOR benchmark rate, not Yen LIBOR, which, as noted above, is an entirely different benchmark based on submissions provided by a different panel of banks using different criteria and reflecting lending activity in a different interbank market. Moreover, these "Euroyen TIBOR futures contracts trade based on what Euroyen [TIBOR] is *expected to be in the future*," rather than what Euroyen TIBOR actually *is* on the day on which the trade is executed. (*Id.* ¶ 110 (emphasis added).)

D. Plaintiff's Antitrust Allegations

Plaintiff alleges that 32 banks and brokers from across three continents all jointly conspired to manipulate Euroyen TIBOR and Yen LIBOR throughout a period of at least five years by collectively making (or, with respect to the Broker Defendants, facilitating the making of) false submissions to the JBA and BBA. Plaintiff contends that this purported conspiracy unlawfully restrained trade because it: (i) "directly restrained competition in the Euroyen TIBOR and Yen-LIBOR rate submission process;" (ii) "skewed the Euroyen interbank lending market away from [competitively set rates];" and (iii) caused "Euroyen TIBOR futures contracts [to be] traded, price settled and benchmarked to the collusively-set Euroyen TIBOR and Yen-LIBOR rates." (*Id.* ¶ 691; *see also id.* ¶¶ 693-99.) Plaintiff also contends that this purported conspiracy constitutes an unlawful horizontal restraint of trade because the Bank Defendants also "competed in the market for Euroyen lending." (*Id.* ¶ 692; *see also id.* ¶¶ 693-99.)

Plaintiff alleges that Defendants' purported conspiracy to manipulate Euroyen TIBOR and Yen LIBOR "proximately caused" him to "suffer[ ] net losses" on CME three-month Euroyen TIBOR futures contracts that he held during the Class Period because it resulted in "the presence of artificial Euroyen futures prices." (*Id.* ¶ 56.) However, Plaintiff expressly concedes that the prices of CME Euroyen TIBOR futures contracts are settled *only* to Euroyen TIBOR, not Yen LIBOR. (*Id.* ¶ 89.) Thus, Plaintiff's antitrust conspiracy claim is seemingly based on the theory that Yen LIBOR was manipulated and that artificial Yen LIBOR, in turn, affected Euroyen TIBOR, which, in turn, resulted in the prices of Euroyen TIBOR futures contracts being artificially manipulated. (*Id.* ¶¶ 619-28.) Because CME "Euroyen TIBOR futures contracts trade based on what Euroyen TIBOR is *expected to be in the future*," rather than what Euroyen TIBOR actually *is* on the day on which the trade is executed, (*id.* ¶ 110 (emphasis added)), Plaintiff's purported injury is dependent, at least in part, upon the market's *perception* of what Euroyen TIBOR rates would be at various times in the future.

In purported support of his claim that Defendants engaged in a continuous international conspiracy to manipulate *both* Euroyen TIBOR and Yen LIBOR for *at least five years*, Plaintiff draws upon the below sources, which, as detailed herein, do not support Plaintiff's claim or any of the inferences or conclusions that he draws from these sources.

1. Plaintiff's "Direct Evidence" Allegations

(a) UBS' Regulatory Settlements

In December 2012, Defendant UBS AG entered into agreements that resolved investigations against it and its subsidiary, UBS Securities Japan Co., Ltd. ("UBS Japan") (collectively, "UBS"), by the U.S. Department of Justice ("DOJ"), the U.S. Commodity Futures Trading Commission ("CFTC") and the U.K. Financial Services Authority ("FSA").[6] Contrary

---

[6] As part of the Non-Prosecution Agreement with the DOJ ("UBS DOJ Settlement"), UBS admitted certain facts and UBS Japan agreed to plead guilty to one count of wire fraud. UBS did not admit any facts in the FSA settlement and only admitted allegations recited in the CFTC settlement if and to the extent that those same facts were also admitted in the DOJ settlement. In addition, UBS has publicly disclosed that it was granted conditional leniency by the DOJ's Antitrust Division in connection with certain Yen LIBOR and Euroyen TIBOR conduct. (Compl. ¶ 6.) UBS is cooperating fully with both the Criminal and Antitrust Divisions. As alleged in the Complaint, criminal

to the Complaint's misleading characterization of the UBS DOJ Settlement, CFTC settlement, and FSA Final Notice (collectively, the "UBS Settlements"), they do not admit to a world-wide conspiracy to manipulate both Euroyen TIBOR and Yen LIBOR between UBS and 31 other banks and brokers as alleged in the Complaint.[7]

For instance, the DOJ Settlement recites only two types of coordinated conduct by UBS: (i) the use of certain brokers to influence the Yen LIBOR submissions of other panel banks; and (ii) efforts to influence the Yen LIBOR submissions of other Yen LIBOR panel banks through employees at those banks. (Compl. ¶ 152 (citing UBS DOJ Settlement ¶ 22).) In other words, the UBS DOJ Settlement (upon which the Complaint relies so heavily) does not cite a single fact that implicates collusive conduct with respect to Euroyen TIBOR.

While the FSA settlement with UBS makes no reference to Euroyen TIBOR, all that the CFTC settlement alleges, insofar as is relevant in this action, is that a UBS trader infrequently and sporadically communicated with traders at some other banks and brokers about Euroyen TIBOR. *See* Rice Decl., Ex. B (UBS CFTC Settlement) at 18-20. Importantly, despite the CFTC's lengthy investigation, the CFTC settlement does not state that these occasional contacts were successful in moving any other panel bank's submissions, let alone the price of CME Euroyen TIBOR futures contracts. In fact, the CFTC settlement does not specifically link those occasional contacts to the three-month Euroyen TIBOR benchmark, which is the sole benchmark

---

charges were recently filed against a former UBS trader, Thomas Hayes. (Compl. ¶ 140.). These criminal charges, however, do not allege an antitrust violation with respect to Euroyen TIBOR.

[7] For a detailed discussion of the UBS Settlements, *see generally* UBS' separate memorandum of law. A copy of the UBS Settlements is attached to the Declaration of Thomas C. Rice, dated June 14, 2013 (Rice Declaration"), at Exhibits A-C. The Complaint relies upon these settlements, as well as the RBS settlements and Barclays settlements, to try to allege an antitrust conspiracy as evidenced by the fact that they are incorporated by reference in the Complaint.

rate used to price the three-month Euroyen TIBOR futures contracts traded on the CME which are at issue in this action.[8]

(b) RBS' Regulatory Settlements

In February 2013, Defendant The Royal Bank of Scotland plc ("RBS") announced settlements with the DOJ, CFTC and FSA to resolve investigations into RBS' submissions to the bodies that set various interbank offered rates, including Yen LIBOR (collectively, the "RBS Settlements"). (Compl. ¶ 322.)[9] In addition, Defendant RBS Securities Japan Limited ("RBS Japan") agreed with the DOJ to plead guilty to one count of wire fraud in connection with Yen LIBOR. (*Id.* ¶¶ 12, 322.) None of the regulatory settlements entered into by RBS describes a single attempt by any RBS trader to manipulate Euroyen TIBOR, let alone the price of Euroyen TIBOR futures contracts.[10]

Thus, it is not surprising that Plaintiff's own allegations based on the RBS settlements relate solely to Yen LIBOR. Moreover, most of Plaintiff's allegations based on the RBS Settlements concern internal conduct, to wit, attempts by a handful of RBS traders to benefit their own Yen LIBOR-based trading positions by influencing RBS' Yen LIBOR submissions. (*Id.* ¶¶ 335-56, 398-421.) Plaintiff's settlement-based allegations of external conduct concern conduct by an even smaller number of individuals. Specifically, Plaintiff alleges that, on certain occasions, (i) two RBS traders discussed Yen LIBOR submissions with a single trader at UBS,

[8] As discussed in UBS' separate memorandum of law, the only "evidence" from the UBS Settlements that Plaintiff cites in support of his Euroyen TIBOR conspiracy allegations is either mischaracterized or otherwise devoid of any basis in the settlement materials themselves.

[9] RBS only admitted facts in its settlement with the CFTC to the extent these facts were admitted in the settlement with the DOJ. Further, as Plaintiff concedes, nothing in RBS' settlement with the FSA constituted an admission of fact in any way. (Compl. ¶ 443.)

[10] For a detailed discussion of the RBS Settlements, *see generally* RBS' separate memorandum of law. A copy of the RBS Settlements is attached to the Rice Declaration at Exhibits D-F.

(ii) after leaving RBS to work for a brokerage firm, one of those (now-former) RBS traders tried to influence the submissions made by one RBS Yen LIBOR submitter, and (iii) one RBS trader collaborated with an interdealer broker. (*Id.* ¶¶ 357-81, 422-33.)

Ultimately, Plaintiff's allegations based on the RBS Settlements describe mostly internal conduct by a small number of individuals at RBS that related solely to Yen LIBOR – not the far-reaching, multi-year, Euroyen TIBOR-focused conspiracy Plaintiff attempts to allege.

(c) Barclays' Regulatory Settlements

In June 2012, Defendant Barclays Bank plc ("Barclays") announced settlements with the DOJ, the CFTC, and the FSA (collectively, the "Barclays Settlements") resolving investigations concerning Barclays' submissions to the bodies that set various interbank offered rates.[11] The vast majority of findings in the Barclays Settlements pertain to USD LIBOR and EURIBOR, not Euroyen TIBOR or Yen LIBOR. To the extent the Barclays Settlements describe any conduct at all with respect to Yen LIBOR, they identify only (i) "some instances" on which "Barclays Yen swaps traders made requests for favorable Yen LIBOR settings to the Barclays Yen LIBOR submitters," and (ii) "a few occasions" on which "Barclays submitted improperly low LIBOR contributions for Yen . . . in response to concerns of inaccurate, negative media attention about Barclays' high LIBOR submissions compared to other Contributor Panel banks" which, Barclays believed, "were submitting unrealistically low LIBORs." Rice Decl., Ex. G (Barclays DOJ Statement of Facts) at ¶¶ 20, 49. Moreover, these findings are limited to *internal* Barclays communications, *i.e.*, none of these Yen LIBOR-related communications involved communications between Barclays employees and employees of other panel or non-panel banks. Indeed, the trader requests were made *within Barclays* and do not include communications with

[11] A copy of the Barclays Settlements is attached to the Rice Declaration at Exhibits G-I.

other panel or non-panel banks requesting or accommodating requests for Yen LIBOR submissions. Thus, contrary to Plaintiff's misleading characterization of the Barclays Settlements, (*see* Compl. ¶¶ 474-75), these settlements do not include any findings that Barclays employees engaged in interbank communications concerning Yen LIBOR, or any findings whatsoever with respect to the Euroyen TIBOR benchmark or Euroyen TIBOR futures contracts.

(d) Other Publicly Available Information About Certain Government Investigations and Judicial Proceedings

Plaintiff alleges that Defendants UBS, RBS, Deutsche Bank, Citibank, JPMorgan and HSBC have been directly implicated in the alleged conspiracy to manipulate Euroyen TIBOR and Yen LIBOR because they have been expressly referenced in at least one of the following documents: (i) an affidavit submitted in a Canadian court by a Canadian regulator conducting a LIBOR-related investigation, (ii) the findings of a Japanese regulator concluding that a few traders at Defendants UBS Japan, Citigroup Global Markets Japan, Inc. ("Citigroup Japan"), and RBS Japan periodically engaged in manipulative rate-setting (in some instances, only with respect to Yen LIBOR) in an attempt to increase the profitability of their respective trading books; and (iii) criminal complaints filed by the DOJ against two former UBS traders based on alleged manipulation of Yen LIBOR. (*Id.* ¶¶ 499-514, 518-39.)

However, the bulk of this supposed "direct" evidence pertains only to Yen LIBOR and has nothing whatsoever to do with Euroyen TIBOR, which is the sole benchmark rate for the prices of the Euroyen TIBOR futures contracts that are the subject of the Complaint. (*Id.* ¶¶ 45, 324-463, 464-98, 523-39, 671-82.) Moreover, none of this purported "direct" evidence remotely suggests the over-arching five-year, 32-defendant conspiracy alleged by Plaintiff.

2. Plaintiff's "Circumstantial Evidence" Allegations

Plaintiff alleges that the Bank Defendants had two motives to conspire to manipulate Euroyen TIBOR and Yen LIBOR: (i) to obtain "trading profits on Euroyen TIBOR futures and other Euroyen derivative contracts held by them or others," and (ii) to present themselves as financially stronger than they actually were during the financial crisis. (*Id.* ¶¶ 14, 223-27, 485.) Plaintiff also alleges that the Broker Defendants conspired to manipulate Euroyen TIBOR and Yen LIBOR because they received "bribes and other illicit and illegitimate compensation" from certain Bank Defendants. (*Id.* ¶ 31; *see also id.* ¶¶ 276-84, 428-33, 451-53.) As Judge Buchwald found in the USD LIBOR MDL, these alleged motives do not support an inference of a conspiracy because they are equally, if not more, consistent with parallel action than collusion.

Plaintiff tries to buttress his antitrust conspiracy allegations by referencing (i) various ongoing government investigations and judicial proceedings, and (ii) the JBA's and BBA's independent decisions to reevaluate their roles and processes for the setting of Euroyen TIBOR and Yen LIBOR. (*Id.* ¶¶ 502-13, 515-53, 562-605.) Plaintiff also attempts to bolster his antitrust conspiracy allegations by citing statistical analyses and "studies" purportedly showing that: (i) there was a lack of volatility and variability in the Bank Defendants' Yen LIBOR and Euroyen TIBOR submissions during the Class Period, (*id.* ¶¶ 606-18); (ii) Euroyen TIBOR and Yen LIBOR diverged from their historical relationship with other supposed measures of borrowing costs during the Class Period, (*id.* ¶¶ 629-47, 657-64); and (iii) Euroyen TIBOR and Yen LIBOR diverged from their historical relationships with each other during the Class Period, (*id.* ¶¶ 648-56). None of these allegations is sufficient to provide a factual basis from which to plausibly infer that Defendants engaged in the broad and multi-layered conspiracy alleged in the Complaint because: (i) it is well-settled that allegations concerning ongoing investigations or judicial proceedings are irrelevant and should be stricken at the pleading stage; (ii) the JBA's and

BBA's independent decisions to reevaluate their roles and criteria for the setting of Euroyen TIBOR and Yen LIBOR say nothing about whether Defendants participated in the alleged conspiracy; and (iii) Plaintiff's purported analyses and "studies" do not plausibly suggest that Defendants engaged in collusive action and, in fact, undermine Plaintiff's conspiracy claim.

3. Plaintiff's "Plus Factor" Allegations

Finally, Plaintiff seeks to rope in Defendants "that have not . . . settled with government regulators or which have not otherwise been publicly identified as co-conspirators" by alleging two purported "plus factors": (i) the "Euroyen TIBOR and Yen-LIBOR rate submission process is highly susceptible to a successful antitrust conspiracy," and (ii) that publicly available information shows, "through contextual reverse engineering" and other purported "process-of-elimination strategies," that these Defendants, some of which have been referenced but not identified in the regulatory settlements and proceedings, participated in the alleged conspiracy to manipulate Euroyen TIBOR and Yen LIBOR. (*Id.* ¶¶ 666-90.) Neither of these alleged "plus factors," however, is sufficient to support a plausible inference that these Defendants, or any other Defendants, conspired to manipulate Euroyen TIBOR and Yen LIBOR.

E. Judge Buchwald's Dismissal Of Similar Antitrust And Unjust Enrichment Claims In The USD LIBOR Multidistrict Litigation

On March 29, 2013, Judge Buchwald issued a 161-page opinion in the USD LIBOR MDL dismissing, among other claims, antitrust claims that are legally indistinguishable from those asserted by Plaintiff in this case. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR Litig.*"), No. 11-MD-2262 (NRB), 2013 WL 1285338, at *2-3 (S.D.N.Y. Mar. 29, 2013). Similar to Plaintiff's allegations here, the plaintiffs in the USD LIBOR MDL alleged that they received depressed rates of return and/or overpaid for financial instruments referencing USD LIBOR because the USD LIBOR panel banks supposedly conspired to artificially lower their submissions to the BBA. Like Plaintiff here, the plaintiffs in the USD LIBOR MDL asserted claims under the Sherman Act and the Commodity Exchange Act ("CEA"), as well as an unjust enrichment claim. *Id.* at *2.

Judge Buchwald dismissed the plaintiffs' Sherman Act claims in their entirety for lack of antitrust injury, holding that the LIBOR setting process is a non-competitive activity. *Id.* at *61. Judge Buchwald's analysis proceeded in three steps. *First*, she determined that the process of setting LIBOR is not a competitive activity but is instead "a cooperative endeavor" in which panel banks submit estimated borrowing costs to the BBA for purposes of calculating a benchmark rate. *Id.* at *12. Thus, any alleged losses suffered by the plaintiffs as a result of a collective effort to make artificial LIBOR submissions would not have stemmed from a reduction in competition. *Id.*

Second, Judge Buchwald concluded that the plaintiffs' alleged injury could equally have resulted from normal competitive conduct, rather than anticompetitive conduct, because the defendants' purported conspiracy was allegedly motivated by their desire to (i) appear more financially healthy than they actually were during the financial crisis, and (ii) increase their profits on financial instruments referencing USD LIBOR. *Id.* at *13-15. Indeed, Judge Buchwald concluded that it "would have been consistent with normal commercial incentives facing [the] defendants" for each defendant to have unilaterally acted to accomplish these self-interested objectives. *Id.* at *14.

Third, Judge Buchwald rejected the plaintiffs' arguments that they suffered an antitrust injury because LIBOR benchmark rates are somehow a "proxy" for competition on the interbank market. *Id.* at *16. Judge Buchwald explained that, regardless of whether the alleged collusion reduced LIBOR's "value as a proxy for that competition," "the fact remains that competition in the interbank lending market and in the market for LIBOR-based financial instruments proceeded unimpaired." *Id.* Judge Buchwald also rejected the plaintiffs' contention that manipulating LIBOR was essentially the equivalent of manipulating a component of the price of LIBOR-referencing financial instruments, reiterating that LIBOR was not the product of a competitive process and that, in any event, LIBOR had always been a "fixed" component of the price of LIBOR-based financial instruments "and thus defendants' alleged conspiracy . . . did not displace competition." *Id.* at *16.

Finally, Judge Buchwald also dismissed the New York state law unjust enrichment claim asserted by certain plaintiffs, holding that these plaintiffs failed to allege that they "purchased [any] contracts from [the] defendants or that they had any other relationship with the defendants." *Id.* at *61.

ARGUMENT

I. PLAINTIFF LACKS ANTITRUST STANDING

The Second Circuit has established a two-part test for assessing antitrust standing. *See, e.g.*, *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009). *First*, a court must determine whether a plaintiff has alleged an "antitrust injury," which is an injury "'stem[ming] from a competition-*reducing* aspect or effect of the defendant's behavior.'" *LIBOR Litig.*, 2013 WL 1285338, at *11 (citation omitted). *Second*, a court must determine whether a plaintiff's alleged injuries are sufficiently direct and non-speculative such that the plaintiff would be an "efficient enforcer" of the antitrust laws. *See, e.g.*, *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 66 (2d Cir. 1988). Plaintiff's allegations do not satisfy either prong of this test.

A. Plaintiff Has Failed To Allege An Antitrust Injury

A private plaintiff asserting a claim under Section 4 of the Clayton Act must allege an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.*, 467 F.3d 283, 290 (2d Cir. 2006) (internal quotation omitted). To satisfy this pleading burden, a plaintiff cannot contend merely that he suffered "an injury" stemming from the defendants' purported wrongdoing; rather, a plaintiff must allege a type of injury that flows "from the anticompetitive nature of [defendants' alleged wrongful] conduct." *LIBOR Litig.*, 2013 WL 1285338, at *11.

As in the USD LIBOR MDL, Plaintiff has failed to allege that he suffered a cognizable antitrust injury because his alleged injury did not result from any reduction in competition. Indeed, Plaintiff has not only failed to allege an injury flowing from a reduction to competition, he has failed to allege any harm to competition whatsoever. As Judge Buchwald recognized in the USD LIBOR MDL: "[T]he process of setting LIBOR was never intended to be competitive. Rather, it was a cooperative endeavor wherein otherwise competing banks agreed to submit estimates of their borrowing costs to the BBA each day to facilitate the BBA's calculation of an interest rate index." *Id.* at *12. Because the LIBOR-setting process lacks any competitive dimension, "even if [this Court] were to credit [Plaintiff's] allegations that [D]efendants subverted this cooperative process by conspiring to submit artificial estimates instead of estimates made in good faith, it would not follow that [Plaintiff] ha[s] suffered [an] antitrust injury." *Id.* Like the plaintiffs in the USD LIBOR MDL, Plaintiff has asserted, at most, that Defendants made artificial Euroyen TIBOR and Yen LIBOR submissions as part of a cooperative process managed by two foreign banking associations.

Indeed, the Euroyen TIBOR and Yen LIBOR setting processes – which, like the USD LIBOR setting process, are overseen by banking associations and determined based on an average of the submissions contributed by panel banks – lack any competitive dimension. There is no "market" for Euroyen TIBOR or Yen LIBOR, and the submission of data to banking associations is not an activity in which Defendants compete.[12] Euroyen TIBOR and Yen LIBOR are not "goods" or "services" that can be bought or sold by consumers, Defendants do not have Euroyen TIBOR or Yen LIBOR "customers," and Plaintiff does not have Euroyen TIBOR or Yen LIBOR "suppliers." Unlike a market where lower prices should improve sales, a bank which lowers (or raises) its submissions experiences no change in the number of its submissions. Defendants could not have conspired to reduce competition where none previously existed.

Plaintiff's efforts to depict the processes of making Euroyen TIBOR and Yen LIBOR submissions as effectively "competition by association" with interbank lending and derivatives transactions are equally unavailing. *First*, Plaintiff alleges that purported collusion in Euroyen TIBOR and Yen LIBOR setting had a "reverberatory" and "echo chamber" effect on the price for interbank yen cash, which was then incorporated back into Euroyen TIBOR and Yen LIBOR benchmark rates in some sort of attenuated feedback loop. (Compl. ¶¶ 694-95.) Plaintiff cannot, however, transform the cooperative activities of Euroyen TIBOR-setting and Yen LIBOR-setting into competitive endeavors by vaguely asserting some claimed "echo chamber" effect on the "interbank lending market" (a market in which Plaintiff does not allege he participated). As Judge Buchwald correctly recognized, LIBOR "is an index intended to convey information about

[12] Competition within the meaning of the antitrust laws exists where two or more products are reasonably interchangeable, such that a consumer will respond to a price increase by one firm by purchasing a substitute product sold by another firm. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1964); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003). Consumers may reference the published Euroyen TIBOR and/or Yen LIBOR benchmark rates for various purposes, but they clearly do not "choose between" various panel banks' Euroyen TIBOR and Yen LIBOR submissions for any purpose.

the interest rates prevailing in the London interbank loan market, but it does not necessarily correspond to the interest rate charged for any actual interbank loan" – a characterization that applies with equal force to Euroyen TIBOR. *LIBOR Litig.*, 2013 WL 1285338, at *13. And just as in the USD LIBOR MDL, Plaintiff's theory is essentially "that defendants competed normally in the interbank loan market and then agreed to lie about the interest rates they were paying in that market when they were called upon to truthfully report their expected borrowing costs," which, as Judge Buchwald correctly held, is "not [a theory] of failure to compete." *Id.*

Nor can Plaintiff credibly characterize the alleged making of artificial Euroyen TIBOR and Yen LIBOR submissions as a "restraint" on the underlying interbank loan market. Although Euroyen TIBOR and Yen LIBOR are benchmarks "intended to convey information about the interest rates prevailing" in the market for unsecured yen-denominated loans, borrowers and lenders are not required in any way to use these informational benchmarks to price their loans. *Id.* As is the case here, "when a trade association," such as the JBA or BBA, "provides information . . . but does not constrain others to follow its recommendation, it does not violate the antitrust laws." *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989) (Easterbrook, J.).

Second, Plaintiff tautologically, but incorrectly, asserts that, because the Bank Defendants supposedly "tried to influence the ultimate Euroyen TIBOR and Yen-LIBOR rates that were set in order to achieve anticompetitive profits in their proprietary positions in Euroyen derivatives tied to and priced off of these rates," they therefore "vigorously competed with one another when they set Euroyen TIBOR and Yen-LIBOR rates." (Compl. ¶ 696.) As Judge Buchwald's decision makes clear, there is a fundamental difference between the "cooperative" LIBOR determining process, which "was never set through competition, even under normal circumstances," and the competitive character of the market for LIBOR-referencing instruments. *LIBOR Litig.*, 2013 WL 1285338, at *15. Thus, "[w]hile it is true that the prices of LIBOR-based financial instruments are set through competition, and that a change in LIBOR may have altered the baseline from which market actors competed to set the price of LIBOR-based instruments, competition proceeded unabated and plaintiffs have alleged no sense in which it was displaced." *Id*. Plaintiff cannot bridge this same conceptual gulf simply by noting that Euroyen TIBOR and Yen LIBOR are sometimes incorporated into financial instruments.[13]

Moreover, Plaintiff's conclusory allegation that Defendants' supposed conspiracy to manipulate Euroyen TIBOR and Yen LIBOR had an anticompetitive impact on the prices of Euroyen TIBOR futures contracts is insufficient to establish an antitrust injury conferring upon Plaintiff standing to bring his Section 1 claim.[14] As Judge Buchwald held in the USD LIBOR MDL, Plaintiff's allegation that the prices of his Euroyen TIBOR futures contracts "'were affected by Defendants' [purported] unlawful behavior,' such that 'Plaintiff[ ] paid more or received less than [he] would have in a market free from Defendants' [supposed] collusion,' . . . does not indicate that [Plaintiff's] injury resulted from an anticompetitive aspect of [D]efendants' conduct." *Id.* at *13. "In other words, it is not sufficient that [Plaintiff supposedly] paid [artificial] prices because of [D]efendants' [purported] collusion; that collusion must have been anticompetitive, involving a failure of [D]efendants to compete where they otherwise would have." *Id.* "Yet here, . . . the alleged collusion occurred in an arena [the Euroyen TIBOR and

[13] The same reasoning dispatches Plaintiff's further tautological allegation that "the alleged rate-setting collusion harmed competition among sellers and buyers of Euroyen derivatives" because "[t]he price of Euroyen derivative contracts . . . became inherently anticompetitive in the same manner as Euroyen TIBOR and Yen-LIBOR themselves became anticompetitive." (Compl. ¶ 699.)

[14] Notably, Plaintiff never alleges that trading in the market for Euroyen TIBOR futures contracts was lessened as a result of Defendants' alleged conspiracy to manipulate Euroyen TIBOR and Yen LIBOR. To the contrary, Plaintiff notes the large volume of trading that occurred in this market during the Class Period. (Compl. ¶ 111.)

Yen LIBOR setting processes] in which defendants never did and never were intended to compete." *Id.* And Plaintiff has not alleged any facts showing that Defendants failed to compete in any market, including the interbank loan and Euroyen TIBOR futures markets, in which Defendants do compete.

Furthermore, Plaintiff's allegation that Euroyen TIBOR and Yen LIBOR benchmark rates are components of the prices of Euroyen TIBOR and Yen LIBOR-referencing financial instruments is wholly irrelevant to assessing the competitive character of the Euroyen TIBOR and Yen LIBOR-setting processes themselves. As Judge Buchwald noted, "the price of LIBOR-based financial instruments ha[s] always contained a 'fixed' component—LIBOR." *Id.* at *17. The same is true of financial instruments referencing Euroyen TIBOR: the benchmark rates are "value[s] uniform throughout the market" and are not set through competition. *Id.* Thus, no competition in the market for these instruments could be displaced by the alleged collusion to make artificial Euroyen TIBOR and Yen LIBOR submissions because participants in the markets for these financial instruments compete over other, non-uniform terms.

B. Plaintiff's Alleged Injury Is Too Remote And Speculative To Establish Standing

Plaintiff's Sherman Act claim should also be dismissed because Plaintiff's antitrust injury allegations fail to satisfy basic pleading standards and because the alleged injury is too remote and speculative to allow Plaintiff to be an "'efficient enforcer of the antitrust laws.'" *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 443 (2d Cir. 2005) (citation omitted). In determining whether a plaintiff would be an "efficient enforcer," courts consider factors derived from the Supreme Court's decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters* ("*AGC*"), 459 U.S. 519 (1983), including "'the directness or indirectness of the asserted injury" and "the speculativeness of the alleged injury.'" *Volvo*, 857

F.2d at 66 (citing *AGC*, 459 U.S. at 540-45). Each of these factors weighs strongly in favor of dismissing Plaintiff's antitrust claim.

1. Plaintiff's Injury Allegations Fail To Satisfy Basic Pleading Standards

As a threshold matter, Plaintiff's allegations of injury are so vague and conclusory that they fail to meet even the most basic pleading standards. For example, while Plaintiff alleges that he "initiated short positions in CME Euroyen TIBOR future contracts . . . and suffered net losses on such contracts," (Compl. ¶ 56), he fails to provide any details about these positions, such as when they were initiated, how long they were held, and whether he exited those positions by entering into offsetting transactions or held them until their settlement dates. Plaintiff also does not allege the prices at which he entered into these short positions, the prices of any offsetting positions he may have taken, or the prices of the futures contracts on their settlement dates. Indeed, Plaintiff does not identify (much less describe) a single actual transaction underlying his claim. Plaintiff never even mentions whether it was an *increase* or *decrease* in the price of Euroyen TIBOR futures contracts that caused his purported losses. These basic pleading deficiencies alone require dismissal of Plaintiff's antitrust claim. *See In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 402 (S.D.N.Y. 2011) (characterizing bare allegation that CD music purchasers were forced to pay supra-competitive prices because of the defendants' conspiracy to fix price of digital music as "nothing more than *ipse dixit*," and dismissing antitrust claim for lack of antitrust standing).

2. Plaintiff's Alleged Injuries Are Too Indirect And Attenuated

The inquiry into whether a plaintiff's injury is sufficiently direct to establish antitrust standing requires a careful examination of the causal chain between the alleged harm and the purported restraint of trade. A "chain of causation . . . contain[ing] several somewhat vaguely defined links" is insufficient to provide antitrust standing. *AGC*, 459 U.S. at 540. Plaintiff cannot demonstrate the direct connection between Defendants' alleged conduct and his alleged injury necessary to establish antitrust standing. Plaintiff alleges a causal chain with at least four discrete links: (i) Defendants allegedly conspired to make artificial Euroyen TIBOR and Yen LIBOR *submissions* to the banking associations that publish Euroyen TIBOR and Yen LIBOR; (ii) the banking associations compiled those submissions, threw out certain high and low submissions, and then calculated Euroyen TIBOR and Yen LIBOR benchmark *rates* that were also allegedly artificial; (iii) the artificial Euroyen TIBOR and Yen LIBOR *current* benchmark rates then impacted the market's *perception* of what Euroyen TIBOR benchmark rates would be at various times in the future; and (iv) that perception impacted the prices of Euroyen TIBOR *futures contracts* that were bought and/or sold by Plaintiff.

Merely reciting these multiple steps demonstrates that Plaintiff's "theory of antitrust injury depends upon a complicated series of market interactions" and that, "[t]o establish a causal chain, the actions of innumerable individual decision-makers must be reconstructed." *De Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510, 515-16 (S.D.N.Y. 1985). Indeed, "to find antitrust damages in this case would engage the [C]ourt in hopeless speculation concerning the relative effect" of allegedly artificial submissions by multiple banks, the methodology used by the two banking associations to calculate Euroyen TIBOR and Yen LIBOR benchmark rates for a given day, the impact of that day's benchmark rates on market perceptions about one of the two rates in the future and, finally, the price of the relevant futures contracts but for the alleged manipulation. *Id.* at 516. Needless to say, "countless other market variables could have intervened to affect those pricing decisions," *id.* (internal quotation omitted), including the start of the most severe financial crisis in recent history and the fall of Lehman Brothers, (Compl. ¶¶ 612, 615).

Moreover, Plaintiff's factual allegations are heavily focused upon the purported manipulation of Yen LIBOR, further demonstrating Plaintiff's lack of standing.[15] For the reasons set forth in Defendants' CEA memorandum of law, Plaintiff cannot point to any direct, clearly traceable means by which Defendants' alleged manipulation of one benchmark led to a loss on contracts linked to an entirely separate benchmark.[16]

Reconstructing all of the links in Plaintiff's causal chain would be precisely the sort of complex investigation into the actions and motives of multiple third parties and the effects of intervening market variables that antitrust standing doctrine sets out to avoid. *See, e.g.*, *Reading Indus., Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 13-14 (2d Cir. 1980); *Mid-West Paper Prods. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 584-86 (3d Cir. 1979). Indeed, the causation theory alleged here is strikingly similar to those rejected by the courts in *Ocean View Capital, Inc. v. Sumitomo Corp.*, No. 98-CV-4067 (LAP), 1999 WL 1201701 (S.D.N.Y. Dec. 15, 1999), and *De Atucha v. Commodity Exchange, Inc.*, 608 F. Supp. at 511-12, both of which alleged anticompetitive conspiracies in commodities markets with a supposedly direct relationship between futures contracts and the commodity. In each case, the court found that there was not a sufficient causal nexus between the alleged anticompetitive conduct in the commodity market to afford standing for an injury occurring in the futures contract market. *See Ocean View*, 1999 WL 1201701, at *4 (finding the alleged causal chain was too attenuated to satisfy the directness factor articulated by *AGC*); *De Atucha*, 608 F. Supp. at 515-16 (finding that the alleged

[15] Notably, despite focusing heavily on the supposed manipulation of Yen LIBOR, Plaintiff fails entirely to address the fact that the alleged Yen LIBOR manipulation relates to maturities that are different from the tenor linked to his three-month Euroyen TIBOR futures contracts.

[16] While the Complaint includes statistical analyses purporting to show some correlation between Yen LIBOR and Euroyen TIBOR, these analyses do not indicate any causal connection between the two benchmarks, let alone to futures contracts that are priced solely in reference to one of these benchmarks. Plaintiff's conclusory allegations that such a causal connection does exist are either contradicted by other allegations within the Complaint or are otherwise implausible. *See generally* Defendants' CEA memorandum of law.

relationship between U.S. silver cash prices and London Metals Exchange-traded futures was too indirect to support antitrust standing); *see also In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d at 403 (identifying additional variables in CD music pricing that rendered causal relationship to changes in digital music prices too attenuated to support antitrust standing).

Even if Plaintiff were capable of alleging something more than an extremely attenuated relationship between Defendants' alleged misconduct and his purported injury, he would nevertheless lack antitrust standing because he cannot identify any market-based connection whatsoever to Defendants themselves. Plaintiff refers to his alleged exposure to "artificial" Euroyen TIBOR and Yen LIBOR owing to unspecified "short positions" in CME Euroyen TIBOR futures contracts, (Compl. ¶ 56), but he does not allege either that he actually purchased these contracts from any Defendants, or that any Defendants ever bought any contracts from him. Instead, Plaintiff vaguely claims that inaccurate Euroyen TIBOR and Yen LIBOR submissions resulted in "artificial . . . prices" at which he entered and exited his positions. (*Id.*) Under this theory, anyone with potential exposure to Euroyen TIBOR or Yen LIBOR benchmark rates – not just traders in futures contracts – could recover for the type of misconduct alleged in the Complaint, thereby imposing precisely the sort of limitless liability that is contrary to the aims of antitrust standing doctrine. *See, e.g.*, *Reading*, 631 F.2d at 12 (antitrust defendants are not liable "to every person who can persuade a jury that he suffered a loss in some manner that might conceivably be traced to the conduct of the defendants" (internal quotation omitted)). To have antitrust standing, Plaintiff must demonstrate, at a minimum, some cognizable market-based connection to Defendants, whether as a competitor, as a customer, or as a party to some other commercial relationship. *Id.* at 14; *see also Ocean View*, 1999 WL 1201701, at *6 (collecting Second Circuit cases).[17]

3. Plaintiff's Purported Injury Is Speculative

Like the claims rejected in *AGC*, Plaintiff's claims "rest[ ] at bottom on some abstract conception or speculative measure of harm." 459 U.S. at 543 (internal citations and quotations omitted); *see also Mid-West Paper Prods. Co.*, 596 F.2d at 585 (holding that plaintiff had no antitrust standing where determination of any injury suffered would "require complex and ultimately unrewarding economic analyses at trial, particularly where, as here, such analyses invariably are a prerequisite to establishing that the plaintiff has suffered compensable injury altogether"). Any attempt to analyze how Plaintiff has been injured by Defendants' alleged manipulation of Euroyen TIBOR and Yen LIBOR would be an exercise in conjecture and speculation of exactly the sort that well-established antitrust law cautions against.

To start, the analysis would require the reconstruction of hypothetical "but-for" Euroyen TIBOR and Yen LIBOR benchmark rates during whatever period Plaintiff held his positions. This alone would necessitate speculation as to what submissions the Euroyen TIBOR panel banks *and* the Yen LIBOR panel banks "should" have contributed each day of the Class Period. Significantly, these are two separate analyses, as Euroyen TIBOR and Yen LIBOR require panel banks to answer two different "questions" in determining their submissions: the JBA asks Euroyen TIBOR panel banks to submit what they believe to be the prevailing market rate for prime banks in unsecured yen cash, while the BBA asks Yen LIBOR panel banks to answer a

[17] A holding to the contrary would not only be at odds with the *AGC* analysis discussed above, but would also be highly anomalous under the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which precludes antitrust claims brought by indirect, "downstream" purchasers allegedly harmed by a price-fixing conspiracy. The *Illinois Brick* "indirect purchaser doctrine" requires denial of standing even to parties that did suffer a loss specifically intended by defendants (*i.e.*, an overcharge resulting from an inflated price), and at whose expense defendants did profit, for reasons of efficiency and manageability of antitrust enforcement. *Id.* at 728-29; *see also Simon v. KeySpan Corp.*, 694 F.3d 196, 202-03 (2d Cir. 2012).

subjective and hypothetical question about the rate that each bank believes *it could* pay to borrow yen in a "reasonable market size" in the London interbank market at a particular time. (*Id.* ¶¶ 93, 96.) In both cases, reconstructing "but-for" submissions would not be a simple matter of looking back at historical borrowing rates because there is no objectively "right" answer, particularly in light of the fact that the Class Period encompasses a severe period of worldwide financial turmoil and volatility unseen since the inception of either Euroyen TIBOR or Yen LIBOR (as the Complaint itself notes).[18]

The Court would then be left to hypothesize the impact of these "but-for" benchmark rates on the perceptions of the market participants whose activities would have influenced the prices of Euroyen TIBOR *futures* contracts. This complex exercise in guesswork would require two further layers of speculation to the extent Plaintiff's allegations are based on manipulation of Yen LIBOR: (i) determining how shifts in Yen LIBOR each day would have informed future expectations as to movements in Euroyen TIBOR, and (ii) determining how these expectations would have filtered into the prices of Euroyen TIBOR futures contracts, because these products trade at prices based on "what Euroyen [TIBOR] is expected to be *in the future*." (Compl. ¶ 110 (emphasis added).) Finally, it would be necessary to determine for each transaction whether Plaintiff was actually damaged by the purported impact on the prices of Euroyen TIBOR futures contracts, or whether he both bought *and* sold the same Euroyen TIBOR futures contracts at allegedly artificial prices, and thus may have suffered no economic damage whatsoever.

[18] *See* Compl. ¶ 615 (describing financial crisis as a period when "the default risk of the Defendant banks significantly increased" because, among other things, there was a "systemic risk" that could have resulted in the "collapse of the overall financial system").

II. PLAINTIFF HAS FAILED TO ALLEGE A RESTRAINT OF TRADE

Because the only conduct challenged here concerns submissions to the Euroyen TIBOR and Yen LIBOR panels, and not a restriction on competition in a marketplace, Plaintiff has failed to allege an agreement to restrain trade, as expressly required by Section 1 of the Sherman Act, and therefore his antitrust claim should be dismissed. As Judge Buchwald correctly held in the USD LIBOR MDL, USD LIBOR submissions are not marketplace transactions. The same is true for the benchmark rates at issue in this case. Applying that principle, which Judge Buchwald recognized in holding that the USD LIBOR MDL plaintiffs failed to allege an antitrust injury, also requires dismissal of Plaintiff's antitrust claim here.

The pertinent legal principles are well-established. Section 1 of the Sherman Act prohibits only conspiracies "in restraint of trade or commerce." 15 U.S.C. § 1. An agreement among industry participants to create a policy or benchmark that nonetheless leaves members free to compete in the marketplace does not restrain trade. For instance, in *Schachar v. American Academy of Ophthalmology, Inc.*, an association of doctors published a joint statement that a procedure was "experimental." 870 F.2d at 397. The plaintiffs, who were doctors that performed the procedure, claimed that the statement constituted a conspiracy to discourage the use of the procedure. *Id.* In a unanimous decision authored by Judge Easterbrook, the Seventh Circuit disagreed, explaining that "[t]here can be no restraint of trade without a restraint." *Id.* The Seventh Circuit determined that the association's statement did not "restrain conduct in the marketplace" because it "did not require its members to desist from performing the operation or associating with those who do." *Id*. at 398.; *see also United States v. Am. Soc'y of Anesthesiologists, Inc.*, 473 F. Supp. 147, 155 (S.D.N.Y. 1979) (holding that trade association's creation of relative value guide for anesthesiology services did not restrain trade because the association "has never employed formal or informal sanctions to discourage individual anesthesiologists from independently determining their own fees").

Here, Plaintiff cannot allege that the challenged Euroyen TIBOR or Yen LIBOR submissions are sold in commerce or that they constitute "trade." Plaintiff's conclusory allegation of "restrained competition in the Euroyen TIBOR and Yen-LIBOR rate submission process" is unsupported by any facts showing that the submission processes themselves are marketplaces in which the submissions are bought or sold. Plainly they are not. Nor does the purported inaccuracy of the submissions obviate Plaintiff's obligation to allege an actual restraint of trade. *See Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413 (7th Cir. 1989) (holding that the Sherman Act "does not reach conduct that is only unfair, impolite or unethical"). Rather, "[u]nless one group of suppliers diminishes another's ability to peddle its wares . . . there is not even the beginning of an antitrust case." *Schachar*, 870 F.2d at 399. Plaintiff does not allege that the "trade" that is the subject of the Complaint, *i.e.*, trades in Euroyen TIBOR futures contracts, was in any way restrained by the challenged conduct. Each Defendant remained fully incentivized to compete against other banks and other market participants for transactions in the Euroyen TIBOR futures market, if it chose to engage in such transactions. These deficiencies constitute another, independent ground for dismissing Plaintiff's Section 1 claim.

III. PLAINTIFF'S ANTITRUST CLAIM IS BARRED BY THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

Plaintiff's antitrust claim should also be dismissed on the independent ground that it is barred by the FTAIA, which precludes a plaintiff from bringing a Sherman Act claim that is based on non-U.S. conduct that does not significantly harm U.S. imports, commerce or exporters. *See* 15 U.S.C. § 6a.

The FTAIA defines the extraterritorial reach of the Sherman Act and exempts certain conduct directed at foreign markets from the statute's scrutiny. In order for an antitrust claim premised on extraterritorial conduct to survive a FTAIA challenge, the effect on U.S. commerce must be (i) direct, substantial and reasonably foreseeable, and (ii) "of a kind that antitrust law considers harmful." *Lotes Co. v. Hon Hai Precision Indus. Co.*, No. 12 Civ. 7465, 2013 WL 2099227, at *6 (S.D.N.Y. May 14, 2013); *see also F. Hoffmann-LaRoche Ltd. v. Empagran S.A* ("*Empagran*"), 542 U.S. 155, 158, 169 (2004); *United States v. LSL Biotechnologies* ("*LSL Biotechs*"), 379 F.3d 672, 678 (9th Cir. 2004). Plaintiff's allegations are insufficient to establish either of these elements.[19]

According to the Complaint, the JBA in Tokyo and the BBA in London gather information submitted by the non-U.S. offices of their respective panel banks, compile and analyze that information, and then publish the results of their analyses as reflections of the lending rates for interbank yen loans in the Japanese offshore and London markets, respectively. (Compl. ¶¶ 87-97, 691.) Plaintiff alleges that the Bank Defendants made false submissions to the JBA and/or BBA and that this foreign conduct was aimed at manipulating Euroyen TIBOR and Yen LIBOR rates, two benchmarks calculated outside the U.S. reflecting funding rates of a foreign currency in the Euroyen market, which exists only outside the U.S. (*Id.* ¶¶ 3, 14.) The only transactions Plaintiff identifies as the source of his purported injuries (*i.e.*, the only purported tie of Plaintiff's claims to the U.S.) involve unidentified "short positions in CME Euroyen TIBOR futures contracts." (*Id.* ¶ 56.)

[19] While there appears to be a circuit split with respect to whether the FTAIA is jurisdictional or instead merely identifies an additional element of an antitrust claim, the Complaint fails to state an antitrust claim under either of these positions. *See Lotes*, 2013 WL 2099227, at *6 (contrasting view of the Third Circuit and Seventh Circuits with that of the Ninth and Second Circuits and noting that the Second Circuit's determination that the question is jurisdictional may be in doubt given the Supreme Court's holding in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010)). Thus, the FTAIA requires the dismissal of Plaintiff's antitrust claim under Rule 12(b)(1) and/or Rule 12(b)(6).

Courts have repeatedly held that a "ripple effect" from a defendant's non-U.S. conduct is insufficient to escape the FTAIA's bar. *See, e.g.*, *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d at 555, 561 (D. Del. 2006); *Lotes*, 2013 WL 2099227, at *7. Nonetheless, that is all that Plaintiff alleges here. As Plaintiff concedes, the domestic impact of Defendants' alleged wrongdoing was, at most, a "reverberatory" effect similar to that found in an "echo chamber," (Compl. ¶¶ 694-95), not "an immediate consequence of the [D]efendants' activity" as the FTAIA requires. *LSL Biotechs*, 379 F.3d at 680.

Indeed, the alleged effect on U.S. domestic commerce is not direct if obvious intervening events could have caused the loss and speculation is required to connect the dots between the challenged conduct and the claimed result. *See, e.g., LSL Biotechs,* 379 F.3d at 680; *Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F. Supp. 920, 924-25 (E.D.N.Y. 1986). Both defects are apparent in Plaintiff's allegations.

According to the Complaint:

(i) Defendants *outside* the U.S. provided inaccurate submissions regarding the prevailing rate for unsecured cash loans in a foreign currency in foreign interbank markets, (Compl. ¶¶ 301-05, 328-33, 487-88, 720-21);

(ii) Two foreign banking associations took those submissions and aggregated them to produce benchmark rates relating to unsecured cash lending in a foreign currency in a foreign market, (*id.* ¶¶ 90-96);

(iii) Unidentified third parties, in unidentified locations, elected to trade in a type of product – traded on various exchanges around the world – whose prices were set by reference to the perception of what one of those benchmark rates (Euroyen TIBOR) *would be in the future* (*id.* ¶¶ 89, 111); and

(iv) Plaintiff acquired unspecified short positions in such products, (*id.* ¶ 56).

As the discussion in Section I.B *supra* demonstrates, such an elongated, disjointed chain of events is too attenuated to establish the proximate causation necessary for Plaintiff to show that he has antitrust standing. For the same reasons, the Complaint's allegations cannot satisfy the FTAIA's directness requirement. *See, e.g.*, *Lotes*, 2013 WL 2099227, at *8 (holding that the alleged effect of defendants' conduct on U.S. domestic commerce was "simply too attenuated to establish proximate causation"); *Intel Corp.*, 452 F. Supp. 2d at 560-61 (holding that plaintiff failed to adequately allege a direct effect through a story "full of twists and turns . . . contingent upon numerous developments").

Plaintiff also fails to meet the FTAIA's foreseeability test. Reasonable foreseeability means that the alleged effect must "have been evident to a reasonable person making practical business judgments." *Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 471 (3d Cir. 2011). This element also requires a showing that the alleged foreign conduct was intended to affect the domestic marketplace. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."); *see also* 1B Areeda & Hovenkamp ¶ 272 (3d ed. 2006); H.R. Rep. 97-686 (1982) ("[I]t would be a miscarriage of Congressional intent to apply the Sherman Act to foreign activities which have no direct or intended effect on United States consumers . . . ." (internal quotations omitted)). The Complaint, however, is completely devoid of allegations even suggesting, much less plausibly alleging, that Defendants foresaw or intended that their alleged conspiracy to manipulate a reflection of interbank lending in a foreign currency would affect transactions in CME Euroyen TIBOR futures contracts in the U.S.

Moreover, for the reasons explained in Section I, Plaintiff also fails the second part of the FTAIA test because the conduct he challenges did not result in any reduction in competition and therefore cannot give rise to a Sherman Act claim. *See Lotes*, 2013 WL 2099227, at *6 (citing *Empagran*, 542 U.S. at 162).

Even if Plaintiff's allegations of initiating CME-based trades could satisfy the FTAIA's requirements (which they plainly do not), the FTAIA would still bar all of Plaintiff's claims based on transactions on futures exchanges outside the U.S. – in particular, on the Tokyo Futures Exchange, the Singapore Exchange, or the London International Financial Futures and Options Exchange on which proposed class members allegedly traded. (Compl. ¶ 704.) It is well-established that, by itself, some effect on foreign commerce cannot support a Sherman Act claim. *See, e.g.*, *Empagran*, 542 U.S. at 164. That Plaintiff's proposed class members are "U.S. person[s] or entit[ies]" who transacted on these foreign exchanges is insufficient, on its own, to demonstrate a "direct effect" on domestic commerce. (Compl. ¶ 704.) The relevant inquiry focuses on the geographic target of the alleged anticompetitive conduct, which, in this case, would be Tokyo and London, where the supposedly manipulated Euroyen TIBOR and Yen LIBOR submissions were made to the JBA and BBA. *See McLafferty v. Deutsche Lufthansa AG*, Civ. No. 08-1706, 2009 WL 3365881, at *4 (E.D. Pa. Oct. 16, 2009) (internal footnote omitted) (finding no direct effect on domestic commerce where U.S. persons allegedly paid supra-competitive prices for non-domestic flights due to an alleged price-fixing conspiracy among foreign carriers). Nor is it sufficient to allege that U.S. persons can transact in these futures from within the U.S. The mere fact that a foreign transaction originated from the U.S. does not satisfy the need to demonstrate a direct and reasonably foreseeable effect on U.S. commerce. *Id.* at *4 & n.3 (dismissing antitrust claim as impermissibly extraterritorial even "assum[ing] that payments from putative class members did originate from the United States").

IV. PLAINTIFF HAS FAILED TO ADEQUATELY ALLEGE A CONTRACT, COMBINATION OR CONSPIRACY

Plaintiff alleges that 32 defendants located on three separate continents conspired to fix the prices of Euroyen TIBOR futures contracts by collectively agreeing to manipulate Euroyen

TIBOR and Yen LIBOR benchmark rates – which are set by two different banking associations and panels of banks – for a period of five years or more. Despite having been afforded the opportunity to file *three* complaints, Plaintiff has not come close to alleging any facts from which this Court can plausibly infer that Defendants engaged in this broad and multi-layered conspiracy.

A. Plaintiff Has The Burden Of Alleging A Plausible Antitrust Conspiracy

Section 1 of the Sherman Act prohibits the restraint of trade "'effected by a contract, combination or conspiracy.'" *Twombly*, 550 U.S. at 553 (citation omitted). Because "[i]ndependent action is not proscribed [under Section 1]," *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984), "'[t]he crucial question' [in a Section 1 case] is whether the [alleged] anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Twombly*, 550 U.S. at 553 (citation omitted).[20]

To state a plausible Section 1 claim, a plaintiff must allege "enough factual matter . . . to suggest that an agreement was made," *i.e.*, a plaintiff's factual averments must "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556. It is well-established that conclusory allegations alone are inadequate to survive a motion to dismiss. *Id.* at 555 (holding that mere "labels and conclusions" and a "formulaic recitation of the elements of a cause of action" are wholly insufficient to "raise a right to relief above the speculative level"). Nor is it "enough [for a plaintiff] to make allegations of an antitrust conspiracy that are *consisten*t with an unlawful agreement," *Transhorn, Ltd. v. United Techs. Corp. (In re Elevator Antitrust Litig.)*, 502 F.3d 47, 50 (2d Cir. 2007) (emphasis added), or to allege solely parallel

[20] A plaintiff asserting a Section 1 claim must allege sufficient facts "to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The Supreme Court has made clear that requiring plaintiffs to plead a facially plausible Section 1 claim serves a critical gate-keeping role given that antitrust cases impose "obvious" high discovery costs and burdens on defendants which, in turn, can allow plaintiffs to extract "*in terrorem*" settlements even if their lawsuits are groundless. *Id.* at 557-59.

conduct among the defendants because "neither parallel conduct nor conscious parallelism, taken alone, raise[s] the necessary implication of conspiracy," *Twombly*, 550 U.S. at 561 n.7.

Furthermore, a plaintiff asserting a Section 1 claim must allege facts specific to *each* defendant that supposedly participated in the alleged unlawful conspiracy. Consequently, the use of the "'global term[s] defendants [and cartel] to apply to numerous parties without any specific allegations that would tie each particular defendant to the conspiracy is not sufficient' under *Twombly*." *BanxCorp v. Apax Partners, L.P.*, No. 10-cv-4769 (SDW) (MCA), 2011 WL 1253892, at *4 (D.N.J. Mar. 28, 2011) (citation omitted); *accord In re Elevator Antitrust Litig.*, 502 F.3d at 50-51 (general allegations "without any specification of any particular activities by any particular defendant . . . do[ ] not supply facts adequate to show illegality" (internal quotation marks and citation omitted)).[21]

To raise an inference of an agreement through allegations of parallel conduct, the complaint must contain factual allegations that place the parallel conduct "in a context that raises a suggestion of a preceding agreement." *Twombly*, 550 U.S. at 557. Thus, "parallel conduct that could just as well be independent action," "independent responses to common stimuli, or mere interdependence unaided by an advanced understanding among the parties" is insufficient to allege a plausible antitrust conspiracy. *Id.* at 556 n.4, 557.

[21] Plaintiff has not even attempted to allege any facts specific to the Defendants against whom he does not claim to have "direct" evidence. Plaintiff's antitrust claim against these Defendants should be dismissed on this basis alone. *See, e.g.*, *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 334 (D. Vt. 2010) (dismissing antitrust claim against defendant based on failure to allege any facts regarding defendant's alleged agreement to conspire); *Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556, 577 (S.D.N.Y. 2007) (complaint did "not allege any facts identifying which record companies were actually approached," which companies refused to deal or required a license, "when such refusals took place or how they were effectuated, or whether any of the companies were aware of each other's actions").

B. Plaintiff Has Not Alleged Facts That Raise An Inference Of A Broad And Multi-Layered Price Fixing Conspiracy

Plaintiff alleges that Defendants engaged in a five-year combination, agreement or conspiracy to fix the prices of Euroyen TIBOR futures contracts by collectively manipulating Euroyen TIBOR and Yen LIBOR. (Compl. ¶¶ 56, 704-06.) Plaintiff has failed to satisfy his burden of pleading a plausible Section 1 claim because the Complaint lacks "enough factual matter . . . to suggest that [such] an agreement was made" among the 32 defendants. *Twombly*, 550 U.S. at 556.

First, the Complaint does not contain any allegations of communications that show any Defendant-wide agreement to manipulate Euroyen TIBOR or Yen LIBOR across the Class Period. "[A]llegations that, for the purpose of forming and effectuating their combination and conspiracy, the defendants and their co-conspirators did those things which they combined and conspired to do, including, among other things, discussing, forming and implementing agreements to raise and maintain [prices] at artificially high levels . . . is . . . merely a tautology, not an allegation of additional facts." *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 768 F. Supp. 2d 961, 974 (N.D. Iowa 2011) (dismissing antitrust claims because "[t]here is no 'further factual enhancement' in the Amended Consolidated Complaint to push the allegations of an antitrust conspiracy across the line between possible and plausible" (internal quotation marks omitted)); *see also Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008) (affirming dismissal of complaint where it failed to plead when defendants joined the conspiracy, where or how this was accomplished, by whom, or for what purpose).

Second, Plaintiff has not alleged how prices were purportedly fixed or how the panel banks' submissions were supposedly manipulated. For instance, Plaintiff does not allege whether Defendants agreed to artificially suppress or inflate the price of Euroyen TIBOR futures contracts during the Class Period. Similarly, Plaintiff has not alleged whether the Bank Defendants manipulated their Euroyen TIBOR and Yen LIBOR submissions upward or downward during the Class Period. To the extent the Complaint provides any information about Defendants' purported conspiracy, it is self-contradictory. For example, Plaintiff alleges that some Bank Defendants were motivated by a desire to avoid being perceived by the market as financially weak or less creditworthy than other banks during the financial crisis, which suggests that the object of the conspiracy was to *suppress* Euroyen TIBOR and Yen LIBOR.[22] (Compl. ¶¶ 223-27, 485.) But Plaintiff posits elsewhere in the Complaint that for significant portions of the Class Period, Defendants caused Euroyen TIBOR to be *inflated*.[23] (*Id.* ¶¶ 634-38.)

Third, Plaintiff does not plausibly allege the object of Defendants' supposed conspiracy. Plaintiff baldly alleges that manipulation of Euroyen TIBOR and Yen LIBOR allowed the Bank Defendants to earn "trading profits on Euroyen TIBOR futures and other Euroyen derivative contracts." (*Id.* ¶ 14.) However, Plaintiff has not pled any facts suggesting, let alone supporting a plausible inference, that all 30 Bank Defendants' trading positions in various Euroyen TIBOR-

[22] As noted below, this alleged motive is directly contradictory to Plaintiff's conspiracy claim because this purported objective (*e.g.*, a bank's supposed desire to improve its financial appearance in the market relative to other banks) would have been defeated if all the panel banks lowered their Euroyen TIBOR and Yen LIBOR submissions.

[23] The Complaint's "analysis" of Euroyen TIBOR compared to the Euroyen Deposit Rate (the "EYDR") posits that Euroyen TIBOR was historically slightly higher than the EYDR and that this positive spread between Euroyen TIBOR and the EYDR remained fairly narrow. (Compl. ¶ 634.) Plaintiff contends that the alleged conspiracy involved (and is evidenced by) a change to this pattern early in the Class Period when Euroyen TIBOR was allegedly suppressed and became lower than the EYDR, a trend that reversed later in the Class Period such that Euroyen TIBOR was inflated and became higher than the EYDR. (*Id.* ¶¶ 634-38.) The allegation that Euroyen TIBOR was substantially higher than it should have been for much of the Class Period is fundamentally at odds with the allegation that Defendants were motivated to suppress Euroyen TIBOR to avoid being perceived as financially weak. Indeed, the definition of Euroyen TIBOR – which asks panel banks to estimate the rate at which they believe prime banks, rather than themselves, could borrow on the Japanese offshore market, (*id.* ¶ 93) – means that manipulating Euroyen TIBOR could not, by definition, show a submitting bank's economic strength. Moreover, Plaintiff offers no theory, let alone factual allegations, as to why Defendants would have been motivated to first suppress and then later inflate Euroyen TIBOR, or why it is not equally possible (or even more likely), that the movements in Euroyen TIBOR relative to the EYDR were caused by the volatility of the financial crisis that occurred during the Class Period.

related product markets were uniformly favored by the same movements in Euroyen TIBOR and Yen LIBOR so as to incentivize them to pursue a common scheme to manipulate these benchmark rates for a period of five years or more.[24]

Fourth, Plaintiff does not plausibly allege the involvement of Yen LIBOR panel banks in the purported scheme to fix the prices of Euroyen TIBOR futures contracts through manipulated Euroyen TIBOR and Yen LIBOR. In bringing this action, Plaintiff seeks to recover damages for losses that he and the putative class allegedly suffered from positions they took in Euroyen TIBOR futures contracts. (*Id.* ¶¶ 56, 704-06.) As Plaintiff concedes, Euroyen TIBOR futures contracts are priced solely in reference to Euroyen TIBOR. (*Id.* ¶ 89.) Despite this fact, Plaintiff offers virtually no factual allegations concerning Euroyen TIBOR. Instead, Plaintiff attempts to fill the substantial gaps between his asserted harm and a plausible price fixing conspiracy by including in the Complaint hundreds of pages of allegations pertaining to a wholly different benchmark, Yen LIBOR, which relates to a different lending market and is set by a different association based on different submissions by a different panel of banks using different criteria. These allegations do not satisfy *Twombly*'s pleading requirements.[25]

Moreover, as fully discussed in Defendants' CEA memorandum of law, *see* pp. 19-20, Plaintiff's claim that Yen LIBOR influences Euroyen TIBOR is contradicted by his own allegation that during the Class Period, Euroyen TIBOR did not follow Yen LIBOR, but instead

---

[24] In fact, it defies logic that the 30 Bank Defendants – each with different business models, unique corporate structures, and varying clients and investors – would be similarly situated in such a way that their respective positions in Euroyen TIBOR-related products could be uniformly favored by the same directional movements in both Euroyen TIBOR and Yen LIBOR throughout the Class Period. This is particularly true where a bank is a market maker with a flat book, *i.e.,* the bank has no exposure to movements in the relevant benchmark rate.

[25] Indeed, Plaintiff's counsel affirmatively argued that Euroyen TIBOR and Yen LIBOR are independent benchmarks when asking Judge Buchwald to exclude this action from the USD LIBOR MDL: "YEN LIBOR, Euroyen TIBOR, and USD LIBOR interest rates are not only set by different bank panel members, they are set according to different protocols, rules, and procedures, at different times of day . . . and are published by different reporting bodies." Rice Decl., Ex. N (Letter to Judge Buchwald from Vincent Briganti) at 2.

the two dramatically diverged.[26] (Compl. ¶ 642 *et seq.*) Plaintiff, moreover, offers no explanation, let alone a plausible one, as to why the Euroyen TIBOR and Yen LIBOR panel banks would attempt to indirectly manipulate Euroyen TIBOR through the manipulation of Yen LIBOR rather than directly manipulating Euroyen TIBOR, which Plaintiff alleges could have been accomplished directly through certain Defendants' alleged membership on the Euroyen TIBOR panel.

C. There Is No "Direct Evidence" Of The Alleged Price Fixing Conspiracy

Plaintiff alleges four categories of supposed "direct" evidence of Defendants' purported conspiracy: (i) the UBS Settlements, RBS Settlements and Barclays Settlements; (ii) an affidavit submitted in a Canadian court by a Canadian regulator conducting a LIBOR-related investigation; (iii) certain findings by a Japanese regulator conducting a LIBOR-related investigation; and (iv) a criminal complaint that the DOJ has filed against two former UBS traders. (*Id.* ¶¶ 14-16, 502-13, 518-39.) There are two fundamental disconnects between this purported "direct" evidence and the alleged conspiracy to manipulate Euroyen TIBOR and Yen LIBOR.

First, a significant portion of this supposed "direct" evidence pertains only to Yen LIBOR and has nothing whatsoever to do with Euroyen TIBOR, which serves as the sole benchmark rate for the prices of the Euroyen TIBOR futures contracts that are the subject of the Complaint. (*Id.* ¶¶ 45, 324-463, 464-98, 523-39, 671-82.) For instance, Plaintiff's allegations about the RBS Settlements and the Barclays Settlements never mention Euroyen TIBOR.[27]

[26] For a further discussion of the lack of causation between alleged Yen LIBOR manipulation and the pricing of Euroyen TIBOR futures contracts, *see* Defendants' CEA memorandum of law at pp. 12-18.

[27] Moreover, most of the Yen LIBOR findings in the regulatory settlements pertain to different maturities from the tenor linked to Plaintiff's three-month Euroyen TIBOR futures contracts. As Plaintiff acknowledges, Euroyen TIBOR and Yen LIBOR are calculated daily for more than a dozen different maturities, with each calculation resulting in a separate and distinct benchmark. (Compl. ¶¶ 91, 95.) Plaintiff asserts that the Euroyen TIBOR futures

Second, none of this "direct" evidence remotely suggests the overarching five-year, 32 defendant conspiracy alleged by Plaintiff. While the UBS Settlements reference Euroyen TIBOR, the alleged Euroyen TIBOR-related findings are very limited.[28] *See, e.g.*, Rice Decl., Ex. B (UBS CFTC Settlement) at 1 (stating that certain UBS traders only "periodically" and only "at times" sought to influence UBS' Euroyen TIBOR submissions to benefit their individual trading positions); (Compl. ¶¶ 168-70) (alleging that only "on some occasions" did "UBS Yen derivatives traders also request[ ] that UBS Euroyen TIBOR submitters contribute TIBOR submissions to benefit their trading positions" between "2007 and 2009" and citing only two such instances). While the Japanese regulator's findings with respect to UBS Japan and Citibank Japan reference Euroyen TIBOR, the alleged Euroyen TIBOR-related findings are equally limited. (Compl. ¶¶ 504-06) (discussing conduct of one UBS Japan trader); (*id.* ¶¶ 507-08) (discussing conduct of two Citibank Japan traders beginning in "December 2009" and "April 2010" respectively, which is near the end of the Class Period).

Thus, the aforementioned findings suggest, at most, the existence of opportunistic conduct from time to time among individual traders aimed at helping their individual trading positions rather than any broad, five-year conspiracy among 32 defendants as alleged in conclusory fashion in the Complaint.

---

contracts at issue in this case are priced in terms of only the three-month Euroyen TIBOR benchmark. (*Id.* ¶¶ 102, 106.) Thus, to the extent the regulatory settlements contain any findings or reference communications concerning other maturities, such as one-month or six-month Yen LIBOR, these findings and communications are completely irrelevant to, and thus cannot constitute "direct evidence," of Defendants' purported conspiracy to fix the prices of the Euroyen TIBOR futures contracts at issue, which are priced solely in reference to the three-month Euroyen TIBOR benchmark, (*id.*), through the manipulation of Euroyen TIBOR and Yen LIBOR.

[28] For a further discussion of the UBS Settlements, *see generally* UBS' separate memorandum of law.

D. There Is No "Circumstantial Evidence" That Defendants Conspired To Fix The Prices Of Euroyen TIBOR Futures Contracts By Manipulating Euroyen TIBOR And Yen LIBOR

1. Defendants' Alleged Motives For Manipulating Euroyen TIBOR And Yen LIBOR Directly Undermine Plaintiff's Antitrust Conspiracy Claim

An alleged motive to enter into an antitrust conspiracy by itself is insufficient to adequately plead that the purported conspiracy actually occurred. *See, e.g.*, *Williams v. Citigroup, Inc.*, No. 08 CV 9208(LAP), 2009 WL 3682536, at *3 (S.D.N.Y. Nov. 2, 2009), *aff'd in part, vacated in part on other grounds*, 433 F. App'x 36 (2d Cir. 2011). However, Plaintiff's motive allegations not only are insufficient to support a plausible inference that Defendants participated in the alleged conspiracy, they actively undermine any such inference.

Plaintiff alleges that the Bank Defendants agreed to manipulate Euroyen TIBOR and Yen LIBOR "for the express purpose of obtaining . . . trading profits on Euroyen TIBOR futures and other Euroyen derivative contracts . . . ." (Compl. ¶ 14.) Similarly, Plaintiff alleges that the Broker Defendants conspired to manipulate Euroyen TIBOR and Yen LIBOR in order to receive "bribes and other illicit and illegitimate compensation" from certain Bank Defendants. (*Id.* ¶ 31; *see also id.* ¶¶ 276-84, 428-33, 451-53.) These alleged motives alone do not support an inference of a conspiracy because they are equally, if not more, consistent with parallel action than collusion. They do not exclude the possibility that a Defendant, based on its own observations of the market and acting to promote its own economic self-interest, would have had an incentive to independently and unilaterally increase its profits and compensation by manipulating Euroyen TIBOR and Yen LIBOR during the Class Period. *See, e.g., Twombly*, 550 U.S. at 554-57, 564 (holding that a plaintiff fails to allege a plausible antitrust conspiracy by asserting that the defendants engaged in conduct that "could just as well be independent action" and that is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market"); *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 138-39 (2d Cir. 2013) (affirming dismissal of antitrust conspiracy claim because the defendants' alleged concerted action could have equally been caused by the defendants' independent reactions to market conditions and efforts to promote their respective economic self-interests). Indeed, in dismissing similar antitrust conspiracy claims alleged in the USD LIBOR MDL, Judge Buchwald concluded that the defendants' alleged conspiracy to manipulate USD LIBOR could equally have resulted from unilateral conduct that "would have been consistent with normal commercial incentives facing [the] defendants" because the defendants, like Defendants here, were allegedly motivated by the desire to increase their trading profits on LIBOR-based financial instruments. *LIBOR Litig.*, 2013 WL 1285338, at *14.

Plaintiff also alleges that certain Bank Defendants conspired to manipulate Euroyen TIBOR and Yen LIBOR because they did not want the market to view them as financially weak or less creditworthy than other banks during the financial crisis. (Compl. ¶¶ 223-27, 485.) This alleged motive is directly contradictory to Plaintiff's conspiracy claim because collusion would have thwarted a Bank Defendant's ability to improve its appearance in the market *relative to its own alleged co-conspirators*. *See, e.g.*, *Twombly*, 550 U.S. at 554-57, 564; *City Council of Baltimore*, 709 F.3d at 138-39. Moreover, this alleged motive is consistent with unilateral action. In the USD LIBOR MDL, Judge Buchwald concluded that it was equally possible that "each defendant decided independently to misrepresent its borrowing costs to the BBA" in order "'to portray [itself] as economically healthier than [it] actually [was]'" because such conduct "would have been consistent with normal commercial incentives facing [the] defendants." *LIBOR Litig.*, 2013 WL 1285338, at *14.[29]

Thus, the alleged conduct would not have been "contrary to [Defendants'] self-interest unless pursued as part of a collective plan,"[30] as Plaintiff himself alleges an "obvious alternative explanation" for Defendants' alleged wrongful conduct. *Twombly*, 550 U.S. at 567.

2. Plaintiff's Allegations About Ongoing Government Investigations And Other Proceedings Are Insufficient To Support A Plausible Inference Of A Conspiracy

Plaintiff's allegation that "Defendants' unlawful conduct has led to numerous government investigations, both domestically and abroad," (Compl. ¶ 501), is insufficient to plausibly plead the existence of an antitrust conspiracy. As discussed above, most of these allegations pertain to alleged conduct with respect to Yen LIBOR or other benchmarks distinct from Euroyen TIBOR, which is the sole benchmark rate for the prices of the Euroyen TIBOR futures contracts that are at issue in this litigation. *See* Section IV.C *supra*. In any event, the existence of ongoing government investigations "'carries no weight in pleading an antitrust conspiracy claim.'" *LaFlamme v. Societe Air France*, 702 F. Supp. 2d 136, 154 (E.D.N.Y. 2010) (citation omitted); *see also Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 118 n.14 (2d Cir. 2005) (holding that a request by the House of Representatives to the Attorney General for an antitrust investigation was "irrelevant at the pleading stage" because "[a]n allegation that someone has made a similar allegation does not, without more, add anything to the complaint's allegations of fact"), *rev'd on other grounds*, 550 U.S. 544 (2007). Moreover, any inferences drawn from

[29] In addition, as noted above, the definition of Euroyen TIBOR – which asks panel banks to estimate the rate at which they believe prime banks, rather than themselves, could borrow on the Japanese offshore market, (id. ¶ 93) – makes it implausible that a bank would manipulate Euroyen TIBOR to show its own economic strength.

[30] *Stephens v. CMG Health*, No. 96 Civ. 7798 (KMW), 1997 U.S. LEXIS 23797, at *18 n.13 (S.D.N.Y. July 22, 1997).

pending confidential government investigations would amount to "pure speculation" because these investigations "may be broader or narrower than the allegations at issue." *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) (holding that allegations that the DOJ "served defendants with subpoenas and [was] conducting a grand jury investigation" were insufficient to state antitrust conspiracy claim).

Even settlements with government regulators are insufficient to support an inference of a conspiracy. "[C]ourts hold that references in pleadings to administrative investigations that do not result in adjudication of underlying issues are immaterial and can properly be stricken under [Federal] Rule 12(f)." *Gotlin v. Lederman*, 367 F. Supp. 2d 349, 363-64 (E.D.N.Y. 2005) (listing cases); *see also In re Platinum*, 828 F. Supp. 2d at 591-94 (striking references to CFTC Order on the basis that the plaintiffs were "prohibited from relying on the CFTC Order" because the Order, despite containing certain factual findings, "was the product of a settlement between the CFTC and the Respondents, not an adjudication of the underlying issues in the CFTC proceeding"); *Footbridge Ltd. v. Countrywide Home Loans, Inc.*, No. 09 Civ. 4050(PAK), 2010 WL 3790810, at *5 (S.D.N.Y. Sept. 28, 2010) (striking allegations in complaint "based on pleadings and settlements in other cases and government investigations"); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 218 F.R.D. 76, 78-79 (S.D.N.Y. 2003) (striking allegations concerning pending government and private actions against defendants because "Second Circuit case law makes it clear that references to preliminary steps in litigations and administrative proceedings that did not result in an adjudication on the merits or legal or permissible findings of fact are, as a matter of law, immaterial under Rule 12(f) . . . .").

3. Plaintiff's Purported Statistical Evidence Does Not Support A Plausible Inference Of A Conspiracy To Manipulate Euroyen TIBOR And Yen LIBOR

The Complaint includes nearly 100 pages of statistics and charts purporting to compare Euroyen TIBOR and Yen LIBOR to each other and to various other purported measures of risk. (Compl. ¶¶ 606-64.) None of these supposed economic analyses and "studies" supports Plaintiff's broad and multi-layered conspiracy claim.

(a) The Purported Decrease In The Variability And Volatility Of Defendants' Euroyen TIBOR And Yen LIBOR Submissions Does Not Give Rise To A Plausible Inference Of A Conspiracy

Plaintiff purports to show collusion through an "Intraday Coefficient of Variation" analysis, which allegedly measures the daily standard deviation divided by the mean of panel banks' Euroyen TIBOR and Yen LIBOR submissions.[31] (*Id.* ¶ 607.) Recognizing that a mere showing of decreased variability and volatility of submissions during the Class Period would not support a plausible inference of collusion among the panel banks,[32] Plaintiff cites a paper by Rosa M. Abrantes-Metz *et al.*, *A Variance Screen for Collusion*, 24 Int'l J. Ind. Org. 467 (2007) (the "Abrantes-Metz paper"),[33] purporting to support the allegation that any alleged convergence among daily submissions would be "strongly indicative" of collusion.[34] In truth, the Abrantes-

[31] Even accepting as true Plaintiff's numbers and formula, Plaintiff's assertion that this purported "analysis" shows collusion is unreasonable on its face. The time period series pattern shown in Figure 1 in the Complaint is driven not by variation in submissions as Plaintiff erroneously contends, but by changes in the level of interest rates. This is underscored by Plaintiff's Figure 25. This figure shows the average interest rate over the period. A comparison of these figures shows that Figure 1 follows Figure 25, thus indicating that the changes in Figure 1 are driven by interest rate levels and not necessarily by the variability of submissions as Plaintiff contends.

[32] At most, this alleges parallel conduct and thus cannot constitute a "plus" factor. *See City Council of Baltimore*, 709 F.3d at 136 (concluding that "merely observing parallel conduct among competitors does not necessarily explain its cause").

[33] A copy of the Abrantes-Metz paper is attached to the Rice Declaration as Exhibit J.

[34] The Complaint also cites a working document prepared by the European Commission, (Compl. ¶ 606), which is attached to the Rice Declaration as Exhibit K. However, the European Commission's working document does not

Metz paper fails to support, and indeed undermines, the allegation that convergence supports an inference of collusion.

First, the Abrantes-Metz paper does not actually conclude that decreased variability and volatility of retail prices supports an inference of collusion. The paper only states that decreased variability and volatility can in some industries serve as a "screen," *i.e.*, a threshold indicator of unexpected observations that might justify further inquiry. As the authors conclude, the "volatility of prices depends on so many different factors beyond price setting," Rice Decl., Ex. J (Abrantes-Metz paper) at 484, and a screen does not preclude independent action as the cause of the decreased variability and volatility. Accordingly, the authors acknowledge that this screen is not itself evidence of collusion, and that no inference of collusion can reasonably be drawn merely from the presence of decreased variability and volatility.

Second, the Abrantes-Metz paper, which examined retail gas prices, counsels against wholesale application of the screen to other industries. Not only does price volatility depend on many factors (as noted above), but these factors manifest "in a different way depending on the industries considered, which makes the comparison across industries difficult to establish." *Id.* at 465. As a result, no matter how suggestive low variability and volatility may be of collusion in some industries, the weight such factors should be afforded necessarily varies across industries. Plaintiff wholly fails to demonstrate that the paper's screening method has any applicability to the submissions processes for Euroyen TIBOR and Yen LIBOR or to the pricing of Euroyen TIBOR futures contracts.

Third, applying the Abrantes-Metz "screen" method to infer collusion here would be particularly inappropriate, as demonstrated by another paper published by Abrantes-Metz (and

---

perform a separate analysis and instead simply references the Abrantes-Metz paper upon which Plaintiff bases his observations.

others) that considered the same screen to examine potential manipulation with respect to USD LIBOR. That paper expressly declined to infer USD LIBOR collusion. *See* Rosa Abrantes-Metz, *et al.*, *Libor Manipulation?*, J. of Bank. & Fin. 136 (2012).[35]

Simply put, a decrease in variability or volatility of Euroyen TIBOR or Yen LIBOR submissions does not establish collusive or manipulative conduct, nor does Plaintiff's "study" exclude the possibility that the decrease in his measurement of variation or volatility of the submissions (if any) was caused by the financial crisis or other events or constituted independent or parallel conduct.

(b) A Plausible Conspiracy Cannot Be Inferred From The Supposed Divergence Between Euroyen TIBOR And Yen LIBOR

Although the Complaint devotes eight pages to an apples-to-oranges comparison between the allegedly divergent Euroyen TIBOR and Yen LIBOR fixings, nowhere does the Complaint allege that any supposed divergence evidences a conspiracy among Defendants to manipulate Euroyen TIBOR or Yen LIBOR submissions. Any divergence in these rates during the Class Period would be unremarkable because, as Plaintiff acknowledges, Euroyen TIBOR and Yen LIBOR submissions are made by different sets of banks being asked different questions at different local times about the costs of borrowing in different markets.[36] (Compl. ¶¶ 3, 78-79, 90-97.) Moreover, recent history cautions against assuming, as the Complaint does, that any divergence was caused by artificial Euroyen TIBOR or Yen LIBOR fixings, since these benchmarks had diverged for a period of years prior to the Class Period during which no one contends there was any collusion or manipulation of Euroyen TIBOR or Yen LIBOR

[35] A copy of this paper is attached to the Rice Declaration at Exhibit L.

[36] As noted above, any divergence between Euroyen TIBOR and Yen LIBOR belies Plaintiff's allegation that the supposed manipulation of Yen LIBOR indirectly led to the purported manipulation of Euroyen TIBOR during the Class Period because Euroyen TIBOR followed Yen LIBOR.

submissions. A news article in the *Financial Times* upon which Plaintiff relies in the Complaint, (*id.* ¶ 620), reports that Euroyen TIBOR and Yen LIBOR diverged from 1997 to 1999 as a result of bankruptcies that rocked the Japanese banking system, without any suggestion that the divergence resulted from collusion or manipulation.[37] Therefore, a divergence between Euroyen TIBOR and Yen LIBOR is not in and of itself evidence of collusive or manipulative conduct, and certainly does not preclude the possibility that such a divergence was the result of unilateral action in response to independent market stimuli.[38]

(c) Plaintiff's Conspiracy Claim Is Not Supported By The Alleged Divergences Between Euroyen TIBOR And Yen LIBOR And Euroyen Deposit Rates

The Complaint also devotes many more pages to an apples-to-oranges-to-pears comparison asserting that the Bank Defendants' Euroyen TIBOR and Yen LIBOR submissions were significantly lower in the Class Period than the then-prevailing EYDR, deviating from their supposed historical relationship with EYDR. (Compl. ¶¶ 642-81.) Nowhere, however, does the Complaint allege that either of these supposed changes was the product of collusive conduct. These supposed changes are insufficient to support a plausible inference that Defendants conspired to manipulate Euroyen TIBOR and Yen LIBOR.

First, a divergence between Euroyen TIBOR and Yen LIBOR, on the one hand, and the EYDR, on the other hand, in and of itself, does not evidence collusion or even artificiality of the

[37] *See* Ben McLannahan, *Japanese Banks Accused of Tibor Fixing*, Financial Times, Feb. 6, 2013 (stating that the divergence between Euroyen TIBOR and Yen LIBOR that "existed between 1997 and 1999 when the Japanese banking system was rocked by bankruptcies may have been justified," and noting that Euroyen TIBOR and Yen LIBOR again diverged "when fears over US and European banks began to emerge"). A copy of this article is attached to the Rice Declaration as Exhibit M.

[38] Indeed, the facts alleged by Plaintiff are inconsistent with directional shifts. For instance, Plaintiff alleges that a former UBS trader, Tom Hayes, sought to move LIBOR upward and downward during the Class Period. (Compl. ¶¶ 33, 358-81.) Thus, it makes no sense that there would be directional shifts between Euroyen TIBOR and Yen LIBOR when the manipulation that is alleged is both upward and downward depending on a trader's positions on a specific day.

former. Just as Euroyen TIBOR and Yen LIBOR are different benchmark rates resulting from different processes intended to measure different market factors, it is unexceptional that an entirely different composite rate such as the EYDR, which is based on submissions from entities that include banks and brokers other than Defendants, does not perfectly track Euroyen TIBOR or Yen LIBOR. (*Id.* ¶ 631.) For the reasons set out above, a divergence between Euroyen TIBOR and Yen LIBOR and the EYDR cannot be assumed to be the result of conspiracy or artificiality.[39] Indeed, it defies common sense to argue that such divergence supports an alleged conspiracy whose goal (according to the Complaint) was to manipulate both Euroyen TIBOR and Yen LIBOR, or for Yen LIBOR to artificially influence Euroyen TIBOR.

Second, Plaintiff attempts to support his allegations as to a spread involving the EYDR with misleading and flawed statistics. The Complaint analyzes the data inconsistently by either averaging it over extended periods, (*id.* Figs. 30, 50), or limiting the analysis to four selected dates for each Bank Defendant, (*id.* Figs. 29, 49), or a single maturity (or "tenor") (*id.* Figs. 31-48, 51-63). But even the charts purporting to show variations between Euroyen TIBOR and Yen LIBOR and the EYDR contradict Plaintiff's conclusions. Figures 51 and 56, for example, show that for many months during the time of the alleged manipulation, the spread between Euroyen

[39] The Complaint also alleges that artificiality is demonstrated because the Bank Defendants submitting both Euroyen TIBOR and Yen LIBOR supposedly submitted Euroyen TIBOR submissions that were lower than their Yen LIBOR submissions. (Compl. ¶¶ 652-53.) However, the Complaint does not contend that this supports a claim of conspiracy. Nor does this supposed divergence in submissions support a manipulation claim for the reasons set out above as to why Euroyen TIBOR and Yen LIBOR became delinked. In addition, any supposed divergence between the Bank Defendants' Euroyen TIBOR and Yen LIBOR submissions would not be surprising given the different definitions of these benchmark rates.

Furthermore, any manipulation claim is also belied by other allegations in the Complaint. For instance, while the joint submitters occasionally made lower Euroyen TIBOR submissions, all of the Bank Defendants also periodically made Euroyen TIBOR submissions that were greater than or equal to their Yen LIBOR submissions during the Class Period. This occurred more that 50% of the time, and in fact anywhere between 54% and 76% of the time, depending on the Bank Defendant. (*See, e.g.*, *id.* ¶ 653, Fig. 66.) The Euroyen TIBOR submissions were also greater than or equal to the actual Yen LIBOR fixing between 49% and 61% of the time. (*Id.* Fig. 68.) These factual allegations in the Complaint undermine Plaintiff's conspiracy theories and instead are consistent with independent conduct.

TIBOR and Yen LIBOR and the EYDR was either roughly equal to or actually narrower than the spreads prior to the start of the alleged manipulation. This conflicts directly with Plaintiff's conclusion that an *increase* in the spread indicates manipulation. The fact that Plaintiff attributes both variation *and* convergence to collusion renders both of these conclusory allegations logically meaningless.

(d) Plaintiff's Purported Analysis Of The Bank Defendants' Credit Default Swap Spreads Undermines His Conspiracy Claim

The Complaint asserts that the artificiality of Yen LIBOR submissions is evidenced by the alleged fact that the Bank Defendants' intraday ranking of submissions differs from their intraday rankings of credit default swap spreads ("CDS Spreads") during the Class Period. (*Id.* ¶¶ 657-664.) But these supposed disparities do not suggest a conspiracy, and the Complaint does not contend otherwise. Indeed, the Complaint itself sets out data showing that the Bank Defendants varied widely in the frequency with which their intraday rankings in Yen LIBOR submissions varied from intraday rankings based on their CDS Spreads, (*id.* ¶ 663), as well as the degree to which their respective intraday Yen LIBOR submission ranking diverged from their respective intraday CDS spread ranking, (*id.* ¶ 664.) All of this is inconsistent with coordinated conduct and, in fact, is consistent with each Bank Defendant acting independently.

4. Plaintiff Has Failed To Adequately Allege The Existence Of Any "Plus Factors"

Recognizing additional weakness in his conspiracy claim against the Defendants "that have not . . . settled with government regulators or which have not otherwise been publicly identified as co-conspirators," (*id.* ¶ 666), Plaintiff attempts to state a claim against these Defendants by alleging certain purported "plus factors," none of which is sufficient to support a plausible inference that these Defendants, or any other Defendants, conspired to manipulate Euroyen TIBOR and Yen LIBOR.

First, Plaintiff alleges that the statistical analyses and "studies" cited in the Complaint indicate that these non-settling and non-identified Defendants participated in the supposed conspiracy to manipulate Euroyen TIBOR and Yen LIBOR. (*Id.* ¶ 667.) For the reasons discussed in Section III.D.3 *supra*, these purported statistical analyses and "studies" are insufficient to state a plausible conspiracy claim against any Defendants.

Second, Plaintiff alleges that a link to these non-settling and non-identified Defendants can be established because the "Euroyen TIBOR and Yen-LIBOR rate submission process" is "oligopolistic" and "highly susceptible to a successful antitrust conspiracy." (*Id.* ¶¶ 668-69.) It is well-settled, however, that the "mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 545 (2d Cir. 2003); *see also Maric v. St. Agnes Hosp. Corp.*, 65 F.3d 310, 313 (2d Cir. 1995) (same).[40] Moreover, evidence indicating "simply that the defendants operate in an oligopolistic market . . . may simply restate the (legally insufficient) fact that market behavior is interdependent and characterized by conscious parallelism." *City of Baltimore*, 709 F.3d at 139 (internal quotations and citation omitted); *accord Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1317 (11th Cir. 2003) (noting that "the majority of the market characteristics on which the class focuses are simply indicia that

[40] Plaintiff's allegation that the JBA and BBA have independently decided to reevaluate their role and processes for the setting of Euroyen TIBOR and Yen LIBOR cannot support a plausible inference that Defendants colluded to manipulate these benchmark rates because these independent decisions by the JBA and BBA say nothing about whether Defendants engaged in the alleged wrongdoing.

the tobacco industry is an oligopoly" and concluding that such characteristics are "perfectly legal" and thus cannot be a "plus" factor).[41]

Finally, Plaintiff alleges that the publicly available information concerning the various Euroyen TIBOR and Yen LIBOR investigations plausibly suggests that certain non-settling and non-identified Defendants participated in the alleged conspiracy when one conducts "contextual reverse engineering" and other supposed "process-of-elimination strategies." (Compl. ¶¶ 666, 670.) None of the publicly available information cited by Plaintiff supports a plausible inference that these Defendants, or any Defendants, collectively manipulated Euroyen TIBOR and Yen LIBOR as Plaintiff alleges. At most, as described above, this material shows that a few traders at certain Bank Defendants periodically engaged in opportunistic conduct to bolster the profitability of their respective trading books by trying to influence the Euroyen TIBOR and/or Yen LIBOR submissions of their respective banks or other banks. Such self-interested conduct by traders seeking to promote their individual economic interests does not provide a factual basis from which to infer that 32 defendants entered into a multi-year conspiracy to manipulate Euroyen TIBOR and Yen LIBOR because this conduct is fully consistent with "a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Twombly*, 550 U.S. at 554. This is especially true when considering, as Plaintiff expressly acknowledges, that the self-interested actions of these traders occasionally conflicted with the interests of their own institutions. (Compl. ¶¶ 223-27.)

[41] *See also Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1305 (N.D. Ga. 2002) (plaintiff's arguments regarding the structure of the cigarette market "are simply statements of the characteristics of an oligopolistic market and, thus, are not plus factors that tend to exclude the likelihood that Defendants were engaged in competitive conduct"); *Superior Offshore Int'l, Inc. v. Bristow Group Inc.*, 738 F. Supp. 2d 505, 513-14 (D. Del. 2010). (allegations of an oligopoly do not "justif[y] an inference of conspiracy or state[ ] a plausible claim of price fixing").

V. THE COMPLAINT FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT

To state a claim for unjust enrichment under New York law, Plaintiff must plead facts showing how each of the Bank Defendants has been enriched at Plaintiff's expense.[42] *See, e.g.*, *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 532 (S.D.N.Y. 2008). Plaintiff's conclusory assertions that the Bank Defendants "financially benefited from the unlawful manipulation" and that "[t]hese unlawful acts caused Plaintiff . . . to suffer injury," (Compl. ¶¶ 745-47), fail to satisfy this threshold pleading requirement. *Id.*

Moreover, an unjust enrichment claim "requires some type of direct dealing or actual, substantive relationship with a defendant." *Reading Int'l, Inc. v. Oaktree Capital Mgmt.*, 317 F. Supp. 2d 301, 334 (S.D.N.Y. 2003). Here, Plaintiff does not (and, given that this is his third attempt, manifestly cannot) allege any direct dealing or relationship with any of the Bank Defendants. In her decision in the USD LIBOR MDL, Judge Buchwald dismissed a legally indistinguishable New York state law unjust enrichment claim on this very basis:

> [T]he relationship between plaintiffs and defendants, to the extent that there was any relationship, is surely too attenuated to support an unjust enrichment claim. Although plaintiffs have alleged that they "purchased standardized CME Eurodollar futures contracts" and that "Defendants . . . manipulated and directly inflated CME Eurodollar futures contract prices to artificially high levels," they have not alleged that they purchased Eurodollar contracts from defendants or that they had any other relationship with defendants. In other words, even if plaintiffs are correct that "the direct and foreseeable effect of the Defendants' intentional understatements of their LIBOR rate was to cause Plaintiffs and the Class to pay supra-competitive prices for CME Eurodollar futures contracts," this does not establish a relationship, of any sort, between plaintiffs and defendants.

LIBOR Litig., 2013 WL 1285338, at *61 (citation omitted). Judge Buchwald's decision is consistent with previous decisions considering this same issue, namely, whether an unjust enrichment claim can proceed where the plaintiff alleges improper influence on a market

[42] Plaintiff has not alleged an unjust enrichment claim against the Broker Defendants.

generally but no direct relationship between the plaintiff and any of the defendants. *See, e.g.*, *In re Amaranth*, 587 F. Supp. 2d at 547 (dismissing unjust enrichment claim based on alleged market manipulation that impacted prices of natural gas futures contracts because plaintiffs did not "allege[ ] any direct relationship, trading or otherwise, between themselves and any [defendant]"); *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 516-19 (2012) (where plaintiff and defendant "simply had no dealings with each other," their relationship is "too attenuated" to support an unjust enrichment claim); *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215-16 (N.Y. App. 2007) (affirming dismissal of unjust enrichment claim where plaintiff alleged that chemical manufacturers entered into a price fixing agreement to overcharge tire manufacturers for certain chemicals, and that the overcharges "trickled down the distribution chain to consumers" such as the plaintiff).

Because Plaintiff cannot possibly plead around the acknowledged absence of any direct transactional relationship with any of the Bank Defendants, his unjust enrichment claim should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Plaintiff's Sherman Act Section 1 claim (Count IV) and unjust enrichment claim (Count V) should be dismissed with prejudice.

Dated: New York, New York
June 14, 2013

Respectfully submitted,

/s/ Jerome S. Fortinsky
Jerome S. Fortinsky
John A. Nathanson
Jeffrey J. Resetarits
SHERMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
jfortinsky@shearman.com

/s/ Daryl A. Libow
Daryl A. Libow
Christopher M. Viapiano
SULLIVAN & CROMWELL LLP
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
libowd@sullcrom.com
viapianoc@sullcrom.com

john.nathanson@shearman.com
jeffrey.resetarits@shearman.com
Telephone: (212) 848-4000
Fax: (212) 848-7179

Attorneys for Defendants Mizuho Corporate Bank, Ltd., Mizuho Bank, Ltd. and Mizuho Trust & Banking Co., Ltd.

Telephone: (202) 956-7500
Fax: (202) 956-7056

Attorneys for Defendants The Bank of Tokyo-Mitsubishi UFJ, Ltd. and Mitsubishi UFJ Trust and Banking Corporation

/s/ Andrew A. Ruffino
Andrew A. Ruffino
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018
aruffino@cov.com
Telephone: (212) 841-1000

Alan M. Wiseman
Thomas A. Isaacson
Jonathan Gimblett
1201 Pennsylvania Avenue N.W.
Washington, D.C. 20004
awiseman@cov.com
tisaacson@cov.com
jgimblett@cov.com
Telephone: (202) 662-6000

Michael R. Lazerwitz
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
mlazerwitz@cgsh.com
Telephone: (212) 225-2000

Attorneys for Defendants Citibank, N.A. and Citigroup Inc.

/s/ David R. Gelfand
David R. Gelfand
Sean M. Murphy
MILBANK TWEED HADLEY & McCLOY LLP
One Chase Manhattan Plaza
New York, New York 10005
dgelfand@milbank.com
smurphy@milbank.com
Telephone: (212) 530-5000

Attorneys for Defendant Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.

/s/ Brian S. Fraser
Brian S. Fraser
Shari A. Brandt
H. Rowan Gaither
Rebecca Carvalho
Katherine Kern
RICHARDS KIBBE & ORBE LLP
One World Financial Center
New York, NY 10281-1003
bfraser@rkollp.com
sbrandt@rkollp.com
rgaither@rkollp.com
rcarvalho@rkollp.com
kharrington@rkollp.com
Telephone: (212) 530-1800
Facsimile: (212) 530-1801

Attorneys for Defendant ICAP plc

/s/ Moses Silverman
Moses Silverman
Andrew C. Finch
Ankush Khardori
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
msilverman@paulweiss.com
afinch@paulweiss.com
akhardori@paulweiss.com
Telephone: (212) 373-3355

Attorneys for Defendant Deutsche Bank AG

/s/ Steven Wolowitz
Steven Wolowitz
Henninger S. Bullock
Andrew J. Calica
MAYER BROWN
1675 Broadway
New York, New York 10019
swolowitz@mayerbrown.com
hbullock@mayerbrown.com
acalica@mayerbrown.com
Telephone: (212) 506-2500
Fax: (212) 262-1910

Attorneys for Defendant Société Générale

/s/ Thomas C. Rice
Thomas C. Rice
Juan A. Arteaga
Omari L. Mason
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
trice@stblaw.com
jarteaga@stblaw.com
omason@stblaw.com
Telephone: (212) 455-2000
Fax: (212) 455-2502

Attorneys for Defendants JPMorgan Chase & Co., JPMorgan Chase Bank, N.A. and J.P. Morgan Securities plc

/s/ Frederick A. Brodie
Frederick A. Brodie
Tameka M. Beckfoord-Young
PILLSBURY WINTHROP SHAW PITTMAN LLP
1540 Broadway
New York, New York 10036-4039
fab@pillsburylaw.com
tameka.beckfordyoung@pillsbury.com

/s/ Jon R. Roellke
Jon R. Roellke
Michael Lloyd Spafford
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006-1806
jon.roellke@bingham.com
michael.spafford@bingham.com
Telephone: (202) 373-6000

Telephone: (212) 858-1000
Fax: (212) 858-1500

Attorneys for Defendant Shinkin Central Bank

Fax: (202) 373-6001

Erika J. Gasaway
1117 S. California Avenue
Palo Alto, CA 94304-1106
erika.gasaway@bingham.com
Telephone: (650) 849-4962
Fax: (650) 849-4800

Attorneys for Defendant Sumitomo Mitsui Banking Corporation

/s/ Keith W. Miller
Keith W. Miller
PERKINS COIE LLP
30 Rockefeller Center, 22nd Floor
New York, NY 10112-0085
keithmiller@perkinscoie.com
Telephone: (212) 262-6900
Fax: (212) 977-1641

Sean C. Knowles (admitted *pro hac vice*)
Karen B. Bloom (admitted *pro hac vice*)
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
sknowles@perkinscoie.com
kbloom@perkinscoie.com
Telephone: (206) 359-8000
Fax: (206) 359-9000

Attorneys for Defendant R.P. Martin Holdings Limited

/s/ Paul B. Hewitt
Paul B. Hewitt
C. Fairley Spillman
Diana Gillis
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
phewitt@akingump.com
fspillman@akingump.com
dgillis@akingump.com
Telephone: (202) 887-4120
Fax: (202) 887-4288

Michael Asaro
One Bryant Park
New York, NY 10036-6745
masaro@akingump.com
Telephone: (212) 872-8100
Fax: (212) 872-1002

Attorneys for Defendant Resona Bank, Ltd.

/s/ Dale C. Christensen, Jr.
Dale C. Christensen, Jr.
Michael B. Weitman
SEWARD & KISSEL LLP
One Battery Park Plaza
New York, NY 10004
christensen@sewkis.com
weitman@sewkis.com
Telephone: (212) 574-1200
Fax: (212) 480-8421

/s/ Edwin R. DeYoung
Edwin R. DeYoung
Roger B. Cowie
LOCKE LORD LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-6776
edeyoung@lockelord.com
rcowie@lockelord.com
Telephone: (214) 740-8000
Fax: (214) 740-8800

Attorneys for Defendant Sumitomo Mitsui Trust Bank, Ltd.

Gregory T. Casemento
Three World Financial Center
New York, NY 10281-2101
Telephone: (212) 415-8600
Fax: (212) 303-2754

Attorneys for Defendants HSBC Holdings plc and HSBC Bank plc

/s/ Robert C. Mason
Robert C. Mason
ARNOLD & PORTER LLP
399 Park Avenue
New York, NY 10022
robert.mason@aporter.com
Telephone: (212) 715-1088
Fax: (212) 715-1399

James W. Thomas, Jr. (admitted *pro hac vice*)
Ingrid A. Epperly (admitted *pro hac vice*)
555 Twelfth Street, N.W.
Washington, D.C. 20004
james.thomas@aporter.com
ingrid.epperly@aporter.com
Telephone: (202) 942-5000
Fax: (202) 942-5999

Attorneys for Defendant The Shoko Chukin Bank, Ltd.

/s/ Gary W. Kubek
Gary W. Kubek
Jeffrey S. Jacobson
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
gwkubek@debevoise.com
jsjacobson@debevoise.com
Telephone: (212) 909-6000
Fax: (212) 909-6836

Attorneys for Defendant The Bank of Yokohama, Ltd.

/s/ Andrew W. Stern
Andrew W. Stern
Alan M. Unger
Nicholas P. Crowell
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
astern@sidley.com
aunger@sidley.com
ncrowell@sidley.com
Telephone: (212) 839-5300
Fax: (212) 839-5599

Attorneys for Defendant The Norinchukin Bank