UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

IN RE: FOREIGN EXCHANGE BENCHMARK RATES ANTITRUST LITIGATION

13 Civ. 7789 LGS
14 Civ. 1364 LGS
13 Civ. 9080 LGS

----------x

November 20, 2014
2:00 p.m.

Before:

HON. LORNA G. SCHOFIELD,

District Judge

(In open court)

(Case called)

THE COURT: Good afternoon, gentlemen.

So we are here for oral argument in the consolidated case that involves the American plaintiffs as well as the two foreign cases. I would like to focus primarily on the consolidated complaint, the sufficiency of the consolidated complaint, and my first question is to both the plaintiffs and the defendants. Who is speaking or have you divided up the topics or is there a method to your madness? Let me ask the defendants first?

MR. SERINO: Thank your Honor. Joe Serino for defendant Deutsche Bank.

Mr. Bershteyn is going to take the lead on dealing with matters related to the consolidated complaint, and he will take all of those matters, your Honor. If there are questions about the foreign plaintiffs' complaints, I will be handling that portion of the argument.

THE COURT: The plaintiffs?

MR. BURKE: Your Honor, Mr. Hausfeld and I were going to split the argument. There may be some antitrust issues that Mr. Hausfeld is better situated to comment on. I believe I know the FX market better, and I will be handling those.

THE COURT: Thank you very much.

Let me give you a little bit preview of what I am most

interested in. What I am most interested in and would like to discuss is antitrust injury. I am also interested in injury in fact, although I think that may be a shorter discussion, and I would also like to have a brief discussion about pleading with particularity.

Then with respect to the foreign actions, I am interested in the unjust enrichment claim, and if there is anything that the plaintiffs can bring to my attention under the FTAIA that is not in the briefs, I would be interested in hearing that as well.

Let's start with the consolidated complaint, and why don't we start with injury in fact, and let me hear a little bit from the defendants and then I'll ask some questions.

MR. BERSHTEYN: Thank you, your Honor.

With respect to injury in fact, the plaintiffs have to plead that the conduct of which the defendants are alleged to have committed has reduced competition and their injury is derived from the competition-reducing aspects of that conduct.

Here the defendants claim that they're asserting a standard price fixing case. There are two types of prices that the complaint talks about. The complaint talks about bid and ask separated by a spread that defendants charged our clients, and the complaints talk about the fix. With respect to the bid and ask spread, there are no allegations of any fixing or any other misconduct.

With respect to the fix, there is no allegation of price competition among defendants. So if a client were to come to Credit Suisse or Deutsche Bank or JP Morgan and ask to transact at the fix, that client understands that the client will be charged the same price and there is no price competition among them. Now, plaintiffs assert that the lack of a claim that competition is harmed is excused by the fact that this is not -- this is a price fixing conspiracy; and, thus, affecting competition.

THE COURT: Let me interrupt just for a moment there.

I don't think that the plaintiffs are saying that we should excuse that there is no allegation that competition is harmed. In fact, I think the plaintiffs take great pains to say that there is such an allegation in the complaint. So let me ask a question this way. Obviously, we're focused on the fix and not the bid and ask spread.

Let's assume that there were instances when the fix was manipulated just for the purposes of this argument, and obviously the complaint does allege that, and so we're required to assume that for the purposes of the argument. Then let's assume, just so we don't get confused with the bid and ask, let's just assume we're talking about a plaintiff who is on the buy side.

MR. BERSHTEYN: Okay.

THE COURT: And that as a result of this manipulation

of the fix, the price was higher for this plaintiff buyer than it would have been in a purely competitive market. Would you dispute making those assumptions that such a plaintiff would have suffered injury in fact?

MR. BERSHTEYN: Your Honor, just for clarification, we are speaking of injury in fact?

THE COURT: We are not talking about antitrust injury yet. We are just talking about injury in fact.

MR. BERSHTEYN: If we have a particular plaintiff who has alleged that they bought at the fix on a particular transaction, and on that day the fix priced had been manipulated, then on those assumptions, assuming all those things were true for that particular transaction, injury in fact would have been alleged.

THE COURT: So it seemed to me that the argument in your briefs and implicit in the answer you just gave is that your real complaint is a lack of specificity about particular transactions for injury in fact. Is that correct?

MR. BERSHTEYN: Focusing on injury in fact, it is, if you will, a style of a complaint about lack of specificity.

THE COURT: I am not hearing you. Just pick up the microphone a little bit closer.

MR. BERSHTEYN: Thank your Honor for letting me know.

THE COURT: That is much better. Thanks.

MR. BERSHTEYN: Great. It is a problem in the style

of lack of specificity in the following sense:

The plaintiffs allege a conspiracy that they assert has lasted for 11 years, covered something in the range of 159 currencies with many currency pairs, and they don't specify whether the fix was allegedly manipulated up or down. So we don't have any allegations about --

THE COURT: Let's just stop there for a minute.

I think we can reasonably infer they're saying the fix was manipulated both up and down sporadically and from time to time with or by various of the defendants, but I think you're correct they don't tell us with respect to any particular transaction or universally it was always up or always down.

MR. BERSHTEYN: Or any day or any currency, nor do they tell us some information that ought to be entirely in our possession; that is, when they transacted, in what currency and whether they bought or sold.

Even assuming --

THE COURT: Just interrupting again for a moment, you don't really expect, though, that with respect to an 11-year conspiracy with however many billions of dollars transacted per year, that they would or would be required to plead each transaction or even particular transactions if they can in good faith make general allegations?

MR. BERSHTEYN: Your Honor, truth be told, I am not sure that I agree.

THE COURT: Okay.

MR. BERSHTEYN: If we think about the scope of the conspiracy that is alleged, so 159 currencies over 11 years, sort of doing quick math in my head, it is about 2700 some trading days times 159 currencies, we are talking about something getting close to about half a million different fix occurrences.

We don't know because the complaint doesn't say on which of those instances. We know it is some number greater than one and we know from the opposition brief it is some number lower than all, but we don't know what instances of manipulation we have and we don't have a single data point from these particular plaintiffs about when they've transacted that might lead us to believe they actually have a add good-faith belief that on the day in which they transacted, there was a manipulation in the direction that injured them, that made them worse off.

THE COURT: Okay. If we take a normal -- put that in quotes -- price fixing case and there were an allegation of horizontal price fixing, you wouldn't expect the buyer to list every day they made purchases. Is that right?

MR. BERSHTEYN: That's right.

THE COURT: So explain why this is different and then, of course, I'll ask the plaintiffs to respond to that.

MR. BERSHTEYN: Of course, your Honor. This is

different for at least two different reasons:

First, in a price fixing case, let's say we were manufacturers of cars and the allegation was we all agreed to surcharge SUVs by 10 percent. So we can agree on that today, and that conspiracy can last sort of without further action for the next 11 years, and if a plaintiff says I bought a car, one can draw, the court can draw a reasonable inference that that individual was harmed.

Here let's consider the specific allegations here. The fix is a one-minute event of a day, so the fact that -- let's assume that there is an allegation from which one can infer that the fix was manipulated yesterday. That doesn't really tell us anything about today. Maybe nothing happened on the fix today. Maybe the fix was manipulated in the opposite direction, and so simply by knowing that a plaintiff transacted at the fix, one doesn't really know whether the plaintiff was injured or not.

THE COURT: So let me ask this question and then maybe I'll talk to the plaintiffs for just a little bit on this subject.

If the plaintiffs were to allege -- and they may have, I can't quote the complaint chapter and verse -- if they were to allege that the practice was pervasive and that the fix was manipulated a lot, for lack of better words, and that the claims are brought on behalf of a class of people who purchased

foreign exchange investments at the fix or at a price that was affected by the fix, and they bought from the defendants, why wouldn't that be enough at the motion to dismiss stage?

Certainly you, the defendants, are on notice what the claims are about. Certainly you would be able to defend those allegations. Why isn't that enough? And do you have a case that says it isn't?

MR. BERSHTEYN: Your Honor, I would submit it is not enough. I should say that it isn't. One can sort of quibble about how much plaintiffs can believe they don't know about a manipulation has occurred, and I am sure your Honor has questions on that subject as well.

As to the injury in our own transaction, it is much harder to see why it would not be an appropriate requirement of plaintiffs to allege exactly how they believe they had been hurt. Injury in fact is a requirement of antitrust laws. In a certain sense it is a certain constitutional standing requirement.

THE COURT: They do allege how they've been hurt. You just want them to say date and time and currency.

MR. BERSHTEYN: Yes. But that information, at least I'm not aware of any reason why that information would not be entirely in their possession.

THE COURT: I can think of lots of reasons, but that is not really what we are talking about right now.

Do you have any case law to support the proposition that they need to plead with that much specificity or what is your best case, Second Circuit or Supreme Court case?

MR. BERSHTEYN: Your Honor, probably the case that is most on the point factually is the LIBOR case that Judge Buchwald recently ruled on, and the argument was very, very similar in that the plaintiffs have alleged that manipulation of LIBOR had affected benchmarks.

THE COURT: Although I could be wrong, but I thought that she rested her opinion on the conclusion there was no antitrust injury, not that injury in fact was lacking. In fact, I think she almost went so far as to say there was price fixing. It just wasn't an antitrust injury.

MR. BERSHTEYN: Your Honor, Judge Buchwald, if my recollection is correct, Judge Buchwald undertook this particular reasoning in dealing with the Commodities Exchange Act claims.

THE COURT: Okay.

MR. BERSHTEYN: Which, of course, themselves require plaintiff to require injury. She spoke about it as sort of a showing of actual damages, but it is the same concept.

THE COURT: Okay. And, of course, I am not bound by Judge Buchwald's decision.

MR. BERSHTEYN: That's right, your Honor.

THE COURT: Thank you. Let me hear from Mr. Burke for

just a moment. Are you alleging that the fix was manipulated every day for the entire class period? And what I really should say does the complaint allege that?

MR. BURKE: The complaint alleges a --

THE COURT: Could you move the mike so it is right under your chin.

MR. BURKE: -- the complaint alleges that there was a long-running conspiracy to manipulate the fix. At this point, in perfect candor to the court, we lack the data points to establish exactly on which days, in which currency every time there was a manipulation of the fix. We could identify through statistical sampling certain exemplars, but standing here today I can't say exactly which day over 11 years there was a fix.

THE COURT: Okay. Given the fact this isn't the SUV case we just heard about, once the price is fixed, it applies to everyone for all time, why isn't it reasonable to expect more specificity about, take any plaintiff, that any plaintiff was actually injured by manipulation of the fix?

How do we know it is true as to any plaintiffs since it varied by day, varied by currency and so forth?

MR. BURKE: We do allege who the plaintiffs' counter-party was, who they traded with, and we do allege in the complaint their harm flowed from the manipulation of the fix. What we have at this point, in order to identify days where the fix was manipulated is financial analysis, in essence

analysis of trade records by the millisecond going back 11 years. What we don't have are the defendants' trading logs. We don't have the defendants' trading positions.

If I co--

THE COURT: You expect to get that in discovery, though. That is not something you would necessarily have at this point.

MR. BURKE: We certainly would, and then we could match up day-by-day, trade-by-trade.

THE COURT: Okay. So I asked the defense for their best case on this proposition. What is your best case that would support the idea that when you don't have one agreement that is in effect for the entire class period, but instead you have in effect an agreement every day that may be different from day-to-day, how is it sufficient simply to allege that there were many such agreements that may have varied from day-to-day over 11 years?

MR. HAUSFELD: Thank you, your Honor.

That's resolved by the fact that this is a class, and in the class it involves every entity that would have purchased literally on every day, every currency and every type of transaction. So although we cannot match at this point an exact person with an exact manipulation, because the class is there of everyone that dealt in this market, there had to have been injury in fact if, in fact, there was manipulation or

collusion.

THE COURT: Okay. It is a smaller point, but what about the issue that the defendants raise in their papers that these are essentially paired transactions?

So in any given situation you have someone on the buy side, you have someone on the sell side, if the fix is manipulated one direction or the other, one half of that equation is harmed, but the other one is not. So we don't know who was harmed and on which days and there are a lot of people who are in your class who were not harmed on many of those days.

MR. HAUSFELD: That may be, your Honor, but that's going to come out through the discovery and once we find out what the manipulation was.

If I may --

THE COURT: Could you speak into the mike.

MR. HAUSFELD: -- if I may, we have the benefit of understanding some of the conduct that has occurred. All of the agencies, the governmental agencies that have looked into this have clearly said there was collusion. So we know that competitors were getting together. What were they doing? And there are three types --

THE COURT: Well, we don't need to get into that. I understand what they were doing based on the complaint, and I think the complaint is very clear in that regard.

Let me just ask you one more question. It is a little bit off topic, but looking ahead, if the claims were to be sustained, given the fact that we're really talking about a different manipulation each day, different currencies could be manipulated up or down, how will you deal with commonality issues for the purposes of class certification?

MR. HAUSFELD: There is a difference between commonality whether or not there was manipulation and as a result of that manipulation there was injury.

The difference, if any, would come in the damage, and that could be estimated differently by the economists. This particular manipulation as to this group of individuals had this effect. That is going to be almost the easiest part once we see exactly which manipulations occurred, how they occurred and what the direction of the manipulation was.

THE COURT: But each one will have to be separately proofed. Isn't that right?

You'll have to prove for each day whether it was up or down and which plaintiffs were affected. Isn't that right?

MR. HAUSFELD: Yes.

THE COURT: Okay. All right.

So I think I have a clear understanding of your positions on the injury in fact issue, and frankly I think that's not nearly as difficult as the antitrust injury issue.

It is Mr. Bershteyn?

MR. BERSHTEYN: Yes.

THE COURT: If you'd like to begin and tee up the antitrust injury issue, I'd appreciate it.

MR. BERSHTEYN: Perhaps mistakenly I thought that is what you had wanted to begin with. I had started doing that already. So you will recall the spiel I started with, which is that with respect to competition, there is an allegation, a quite specific allegation in the complaint about how the defendants compete. They compete by quoting bids and asks. And then there are some allegations about the fix. With respect to the allegation on which we allegedly compete, there aren't any allegations of misconduct.

THE COURT: I think everybody in the room agrees about that.

MR. BERSHTEYN: But with respect to it is the contrast, I suppose that is important, and with respect to the fix, there isn't an allegation of price competition because the complaint is quite clear on its face that when a customer comes to buy or sell at the fix, because one chooses to transact at the fix price, the customer is choosing to take the price competition out of the equation.

THE COURT: Let's just stop there for a minute and make sure that I understand how the process works.

My understanding is that the fix is set in the 30 seconds, based on the 30 seconds of trading before and after

the London close. Is that right?

MR. BERSHTEYN: Yes.

THE COURT: And those trades are based on bid and ask prices that are provided by the defendants in what would ordinarily be a competitive setting. Isn't that right?

MR. BERSHTEYN: Your Honor, my understanding is that -- and my understanding may be somewhat imperfect and not entirely tethered to the complaint -- is that it is based on the information that W.M. Reuters Company draws from transactions in the market. Those transactions may or may not be by defendants. These are not the transactions between the client who comes to transact at the fix and the defendant. We are talking about a different market.

THE COURT: Okay. But, in any event, what happens is that Reuters bases the compiled data on actual trades in the market which in a normal world where there was no manipulation would be the product of different banks quoting different bids and asks and customers either agreeing to them or not.

Isn't that right?

MR. BERSHTEYN: Well, it could be, and I believe largely it is other banks because I think that kind of market is largely an interdealer market. Again, you know, I am just drawing from my limited knowledge of the market.

I think the important point is that the customer comes -- we compete for customers, that is what is alleged --

the customer comes to transact at the fix, but the banks don't compete for setting of the fix. There is not a market, there is not a competitive setting. The W.M. Reuters Company draws some data from transactions, and the customers may request that a bank transact with them at that to be determined price.

It is not alleged, and I don't think it can be said, that --

THE COURT: And then the allegation, though, is that the banks basically manipulate the price, which is the price that the customers already stated they want to deal at.

MR. BERSHTEYN: Your Honor, manipulation is what is alleged in these complaints, but a claim of manipulation is not sufficient to get a private remedy from the antitrust.

THE COURT: I understand that. Let me ask a question this way: Would you agree that if a plaintiff paid or plaintiffs paid supra-competitive prices as a result of defendants' manipulation of the fix, that would satisfy the antitrust injury requirement?

I am hearing you say no, but --

MR. BERSHTEYN: I suppose the part of the grammar of your sentence I am struggling with the supra-competitive pricing of the fix because we don't compete for the setting of the fix. I am not sure I understand what that would be.

THE COURT: Let me put it this way, and again let's just assume plaintiffs are on the buy side for the moment so we

don't have the ask and bid confusion.

If we were just talking about plaintiffs on the buy side, and they are having to pay a higher price, in other words, the fix set at a higher price than they would have had to had the fix not been manipulated, would that be antitrust injury, in your mind?

MR. BERSHTEYN: I don't think that would be sufficient for antitrust injury.

THE COURT: And the reason is that?

MR. BERSHTEYN: Is because it is not, while what your Honor has stated constitutes an injury, it is not an injury that is drawn from the diminution of the competition that is alleged here because the setting of the fix is not a competitive setting.

THE COURT: I thought that I heard there was, but let me ask about an argument that you make in your briefs which draws on the LIBOR decision.

You argue that manipulative practices could have occurred without any collusion, and the briefs explain that very clearly, you know, these various types of practices with colorful names that in my mind have nothing to do with what they are, so they're hard to remember, any defendant could do that alone.

Isn't it also true that the plaintiffs allege that here, in fact, those things were not done alone, they were done

collusively and they were done to ensure that the scheme would work and to minimize the risk of engaging in these practices?

MR. BERSHTEYN: That is what the plaintiffs allege.

The plaintiffs allege, if I understand correctly, these practices which I agree are characterized in a way that makes them impossible to engage in unilaterally, in a general way plaintiffs allege defendants engaged in these practices and then allege in a general way that those practices become less risky for defendants when engaged in together.

That is exactly an argument that was presented to Judge Buchwald and was rejected by Judge Buchwald. The reason is that the injury itself, as we just discussed, your Honor, has to derive from something that is a diminution of competition, just as with what happened in LIBOR, as I understand it, is that the plaintiffs alleged that working together allowed the defendants in that case to engage in clustering, which is a practice that made it easier to manipulate LIBOR, just as here the plaintiffs alleged made less risky.

Just because working together makes it less risky doesn't mean a practice itself that is a unilateral practice becomes a form of antitrust injury.

THE COURT: Although wasn't the LIBOR case an easier case from the point of view of antitrust injury than this case because, in fact, it wasn't based on trading, it was just based

on essentially predictions or estimations of the banks of what kind of rates they could get in certain kinds of transactions?

So there was, by definition there was nothing competitive about that, whereas here it seems -- I mean I understand your point and I struggle with it a little bit. In some ways it sounds like we're simply talking about a benchmark, and when you're talking about a benchmark, it is hard to understand how you're talking about harm to competition, but here the benchmark was set by market activity that was supposed to be competitive and allegedly was not.

Why isn't that a critical distinction with the LIBOR case?

MR. BERSHTEYN: Your Honor, I completely understand the difficulty of the question. It will not surprise you that we take the position that while the facts are different, they're no different in a way that is dispositive. I suppose one way I've tried to think about it is ask myself would Judge Buchwald have reached a different decision had the question in LIBOR been what was your last transaction actually at. Reading her opinion, it is very hard to believe that because that would make it a market type of transaction.

THE COURT: Okay. That is not entirely persuasive to me because I'm not certain that I agree with the reasoning in that case, but I'm also not certain that I disagree at this juncture, and that is why I wanted to talk to all of you.

MR. BERSHTEYN: Thank you.

THE COURT: Let me just go back for one moment to this argument that comes from the LIBOR case and was repeated in your briefs about the fact that the defendants could have taken these actions, undertaken these actions unilaterally and acknowledging that that is not really their claim. Of course, they claim the actions were taken in concert with the other defendants.

What is your best case, Second Circuit or Supreme Court case that suggests that that is a proper inquiry; in other words, could they have done this unilaterally, that that should be a test or that should be relevant at all?

MR. BERSHTEYN: Your Honor, there is in any number of cases that talk about the nature of antitrust injury that make that point. It is hard for me to find a case with a fact pattern. These benchmark manipulation cases are somewhat sui generis. That is why we keep turning to LIBOR because there aren't that many other cases, but cases like Gatt and other cases that talk about the nature of antitrust injury make the principles here very clear, and they also, they also, just to cheat a little and go back to your earlier question about injury in fact, I think they also very clearly lay out at least the principles of trying to match the alleged effects on the price with the alleged purchases, if they are purchases, of the plaintiffs.

THE COURT: Thank you. Let me hear from the plaintiffs now.

MR. CARY: Your Honor?

THE COURT: Yes.

MR. CARY: Could I clarify one point briefly?

THE COURT: Certainly, but tell me who you are.

MR. CARY: Your Honor, I am George Cary from Cleary Gottlieb, representing Goldman Sachs.

There is an important factual point implicit in your hypothetical, and that is that when the fixes is being made, there are buyers and there are sellers. The conspiracy is on the part of sellers, and that injures the buyer. I just wanted to clarify that that is not what is alleged in the complaint, the way I read the complaint.

The way I read the complaint, there are sellers through a process of banging the clothes, et cetera, on trying to move the market not up, as you would expect in an anticompetitive conspiracy, but down. The way you move the market is to flood the market with currency to move it down. Buyers are not hurt in that.

THE COURT: But orders, numbers of orders?

MR. CARY: Yes, buyers are not hurt in that. Suppose if you're on the other side of that transaction, you benefited, you are getting the product at a cheaper price.

Conversely, if you want to move the market up, you're

a buyer and you're buying up the currency, reducing the supply, creating more demand, raising the price, so the sellers are not hurt. That one-minute fix, it is not the case that a buyer is hurt if the sellers are conspiring.

What that tells you is that there is not an anticompetitive conspiracy. There is no conspiracy to restrict output. What is alleged here is that the banks got together to flood the market. A conspiracy to restrict competition would work against their goal of lowering the price in that setting, or on the buyers' side, if they want to raise the price, a conspiracy not to compete to buy up currency would work against the conspiracy.

I think that is what we're alluding to when we say in that fix there is no effect on competition. The only effect allegedly --

THE COURT: Let me just understand something.

I am sure the plaintiffs will try and help me out, but I thought that the allegation was that among these banks on any given day, and given their positions and what their clients' needs were, they were inclined to manipulate the fix either up or down depending on what would be advantageous to them.

MR. CARY: Yes.

THE COURT: And so given that, there is somebody who, when they are advantaged, there is somebody who is being disadvantaged, and as I understand it, those people are the

plaintiffs on that day. So I don't quite understand how what you're saying fits with what I just said.

MR. CARY: Right. The people that are disadvantaged are not the buyers and sellers at the fix on that day. The people that are disadvantaged, according to the allegations, are the people that two weeks ago or a month ago bought a contract based on the fix. The competition is for those people hurt a month ago or two weeks ago. That competition is over.

So this is a case where what is being alleged is somehow they're not getting what they should have gotten by virtue of that contract, but the competition for them is over, and the mechanism is not one to restrict competition, it is actually one to flood the market, to increase output.

That is why this is not an antitrust case. That is why it is a case like LIBOR, where the crux of the matter is what is that index and are these plaintiffs getting what they're entitled to pursuant to that index. It is not a restriction on the competition is the point.

THE COURT: I understand what you're saying. Could I hear from the plaintiffs on that.

MR. BURKE: Certainly, your Honor.

Antitrust injury flows from an agreement --

THE COURT: Could you speak into the microphone.

MR. BURKE: -- antitrust injury flows from an agreement to fix the price of the WMR spot rate. Our clients

paid more for buy orders than they should have and they received less for sell orders than they should have.

The court is quite right, if to use an example from the FCA, and not to pick on Skadden Arps' client JP Morgan, but it was an example of JP Morgan running with a group of traders. They had net buy orders, so that means they had net buy orders for their clients to fill at the fix. How could they make money and how could they make their clients pay more than they would have in a competitive market?

They started accumulating buy orders. When you buy more of a currency, the price goes up. JP Morgan kept buying. They bought more than they needed to manage the risk. They were picking proprietary trades, proprietary trades on my clients' dime. My client paid more to the WR clients than they, more than they would have in a competitive market had JPM and its co-conspirators not colluded to drive the price up at the fix.

Just the opposite happens if they have a net sell order. They're going to try and drive the price down and cause the plaintiff to get less for the currency they're going to sell than they would have in a competitive market. The same logic applies, and I know the court didn't ask, and we didn't, running a stop-loss is the exact same way.

Would you like me to explain that? I can or --

THE COURT: No, thank you. I have enough things to

worry about in the complaint. I will skip that.

MR. BURKE: In terms of how the fix is set, it is supposed to be set through competition in the market 30 seconds before and 30 seconds after. These are actual transactions. The defendants, they're the traders in this market that control 84 percent of -- they're the marketmakers. It is going to be their trades, and they're trading with some of us leading up to the fix as well.

If the defendants get together and exchange pricing information, which is what we allege they did, horizontal competitors getting together to exchange pricing information and making the decision we're either going to cause the price to go up or cause the price to go down, acting collusively to do so, my client pays more than they should have or received less than they should have as a result of that collusion. That is an easy call. That is antitrust injury, yes.

THE COURT: What about what we just heard, that the trades that are used as the basis for the fix on any given day are based on competition sometime in the past because they are orders that were placed to be executed at some later time so that there is a disconnect between the competition on the one hand and the manipulation on the other?

MR. BURKE: Not quite true. First of all, that is not pled in the complaint.

THE COURT: Good point!

MR. BURKE: Secondly, we know from recently released facts by FCA that a lot of these orders are coming in that day. In fact, JPM, HSB, RBS and the rest targeted making decisions based on the net direction of the orders right there, then and there 30 seconds leading up to the fix.

THE COURT: The complaint uses that as an example.

MR. BURKE: Exactly.

THE COURT: Let me ask. This is a question that in my mind sees some distinction between the trades at the time the fix is set and other trades that used the fix as a reference point, and we are assuming here all these trades are with the defendant so there is actually a buy-sell relationship between plaintiffs and defendants.

Why isn't the antitrust injury limited to the trades that were the product of collusion to set the fix, and so that the setting of the fix is not what is important, just the small universe of trades where there was actual manipulation?

MR. BURKE: Let me step back to make sure I understand the question. Is the question whether or not the antitrust injury flows more from the injury spot trades and also would include forwards and options and things like that?

THE COURT: It seems to me that the spot trades are the easiest in some sense because there is manipulation as to those trades at that time, sort of end of story.

But it seems in some ways that it is more attenuated

in time and perhaps otherwise for other kinds of trades that are based on the fix but that aren't within that one minute of trading. Maybe that is not a real distinction, but I want to hear your thoughts on that.

MR. BURKE: The banks are going to survey their order books and it could be spots, it could be forwards, but they know what their overall exposure is with respect to FX instruments that have to be sold at the fix. They know what their exposure is going to be at any given day. I don't think they're making that distinction.

If they realize they have a net buy of $150 million, and they're trading pounds to dollars, trading cable, they're going to at least get out and try to cover that 150 to cover their own risk. What they saw was, they're doing more than that and not distinguishing between spot and forward at that point.

They're sharing that information with their colleagues, finding out whether people in the chat room are altogether are net buy, net sell, and once they figure out whether they're net buy or net sell, they're going to engage in strategies to hide what they're doing, to they're net off with people outside the chat room and then they're going to build.

As we've seen from the facts that have come out, coupled with the strategy they are going to maybe prioritize trades above and beyond what they need to cover the risk and

cover in many cases the entire buyer order to one of the traders because that will give that trader an opportunity to what is called banging the clothes, you make up the order into at lot of little bits.

THE COURT: I understand. They don't weight according to amount, just on number of trades?

MR. BURKE: That makes easier to manipulate the ultimate price of the fix, exactly.

THE COURT: Let's go back to the argument that we heard a little while ago. LIBOR and the LIBOR case was not about fixing the price of something that the defendants compete to sell. It is about manipulating a benchmark. The benchmark in the LIBOR case is not a source of competition, and benchmarks in general conceptually are not a source of competition. They are benchmarks.

So here the London fix, like LIBOR, is a benchmark. It is not in competition, in and of itself in competition. So how can the manipulation of a benchmark -- I understand it might be price fixing, I understand that it might cause harm, and very clearly you allege that it caused harm, but how is that antitrust harm?

MR. BURKE: It is different in LIBOR. I don't mean to be flip because I heard someone plaintiffs' colleagues talking about this and defense colleagues as well. Nobody buys and sells LIBOR, but people buy and sell foreign exchange. While

the fix is a benchmark in a sense, it is also an actual rate at which people exchange pounds for dollars, euros to yen, dollars to yen and so on.

If the collusion resulted in an artificially higher price for buyers or an artificially lower price for sellers, that is an easy call. Even Judge Buchwald recognized had the agreement extended to what she called LIBOR-based instruments, she would have found it, possibly would have found antitrust injury. I think that is what we have here.

THE COURT: Okay. I don't have any other questions on this point. Let's move to a different topic.

Let me ask the defense, statute of limitations, I think you will all agree it is an affirmative defense. Defendants have the burden of proof. It is not appropriate to grant summary judgment on a motion to dismiss unless it is clear from the face of the complaint that the claims are obviously time-barred.

Could I persuade you to just withdraw that and save it for another day?

"Yes" would be the answer.

MR. BERSHTEYN: Has your Honor made up your mind?

THE COURT: Yes.

MR. BERSHTEYN: In that case, yes, your Honor.

THE COURT: Thank you. Thank you.

I would like to hear a little bit about the foreign

actions. Here's what is troubling me. It seems as though the statutes, the relevant statutes and even the common law have constraints against extraterritorial application, and it seems as though these claims have no relation to the United States at all except perhaps a very tenuous one.

And so my question is why -- talking about sort of policy for a moment before we talk about language of statutes -- why should U.S. Courts be involved in this business?

MR. COOPER: Patrick Cooper, your Honor.

First, just to start it off, if we look at the defendants, what they are are dealers in foreign currency. They buy foreign currency, they sell foreign currency, import foreign currency, export foreign currency, and I agree with the defendants that a foreign antitrust conduct that is directed toward just a foreign market doesn't apply here. We shouldn't be in here.

But when you have foreign antitrust conduct that is directed to both a foreign market and domestic market, as we have here, then that is when you have the argument we fall under the import trade exception, and that has -- again I have to say it is really not an exception. The Sherman Act has always covered import trade. It was never taken out by the FTAIA and then given back, for example, like the domestic injury. That exists. That has always been covered.

If you look at what the -- and quite honestly, Judge, there is not a better set of facts for a court to have to determine that, in fact, the import trade exception applies here. When you look at the Second Circuit case of Kruman, which defines what the test is in the Second Circuit for the application of the import trade exception, the question is whether the defendants' anticompetitive contact was directed at an import market.

The Second Circuit, in another case called Tourisentra, decided in the same year, 2002, as Kruman, actually defines what import is and it refers to Westlaw's dictionary where it says an import for the purposes of this exception is a product that is manufactured or made in a foreign country, that is then shipped to the United States and resold in the United States.

Then you have, you combined that, your Honor, with another Second Circuit case called Korin, which actually came out of the Southern District, and the facts were a foreign currency dispute, where a U.S. firm sent foreign currency to a Swiss bank, and the Swiss bank, upon receiving it, filed bankruptcy and never sent the return piece from Switzerland to the U.S. entity.

The Second Circuit had to decide whether the U.S. firm had an interest in it, and what the Second Circuit said was foreign currency, when it is traded, is a good. It is not a

medium. When it is actually the object of the transaction, it is a good.

What you have here is you have foreign currency under the Second Circuit that has been determined as a good. You have the banks, and they give an example of how it happens, how does good --

THE COURT: I will interrupt you for just a second. Let me ask you this. I want to focus on the unjust enrichment claim for just a moment.

What, if any, constraints are there on the extraterritorial application of common law claims like unjust enrichment?

MR. COOPER: Your Honor, just kind of a -- the unjust enrichment claim is something where we don't want to press it if it is going to interfere at all with clear analysis on the FTAIA.

THE COURT: That is a withdrawal of that claim?

MR. COOPER: Yes.

THE COURT: Thank you. Let me just hear from the defendants briefly on the foreign actions.

MR. SERINO: Thank your Honor.

THE COURT: Mr. Serino?

MR. SERINO: Yes. Thank your Honor. Joe Serino.

I think your Honor's instinct -- I'll follow up on the question you asked counsel -- I think your Honor's instinct is

exactly right, the court should be extremely reluctant to overextend, over-apply the Sherman Act to transactions that are admittedly exclusive foreign.

It is not just me saying that. The Supreme Court said that in Hoffman Laroche, and they said there is a very good reason why the court should be reluctant, and that is principles of comity. When we interpret a statute like the Sherman Act and the FTAIA, we have to be careful and mindful of principles of comity so we are not telling foreign nations how to regulate their commerce.

That is why this Court's instinct in not overreaching and applying the Sherman Act to extraterritorial transactions, which the plaintiffs concede, they concede these are exclusive foreign plaintiffs and in transactions outside the U.S. The court has to be mindful, we are not in the business of applying U.S. laws like the Sherman Act to injuries, foreign injuries that were caused by independent foreign factors.

THE COURT: What about their import-export trade argument?

MR. SERINO: I would say there are at least two reasons why they don't qualify for that exception. As I understand it, the import trade or commerce exception requires that the defendants' conduct targeted import commerce. That is the standard, as I understand it.

Simmtech doesn't even address import commerce. What

Larsen does is they say, at Paragraph 105 of their complaint, many of these Forex transactions involved defendants' importation of the currency received into U.S. accounts. That is their import commerce allegation.

Now, aside from the fact that is just incorrect, the Federal Reserve materials that they relied on show that currency doesn't move, it doesn't leave the domestic shores in these transactions. It just doesn't address the standard.

If for some reason currency did move on these transactions, that would be a consequence of a foreign exchange transaction. It wouldn't prove the defendants' conduct were targeting and set out to effect the movement of that currency. Certainly the fact there might be some U.S. intermittent use of U.S. bank accounts is a far cry from saying the defendants set out to target import commerce.

The second reason is, your Honor, I think the plaintiffs pled themselves out of that. I think if you look at Paragraph 38 of Larsen's amended complaint, they say that the conspiracy here was that the defendants conspired to manipulate, "A global decentralized market for the trading of currencies."

So not only do they fail to allege that the defendants' conduct targeted import commerce, they affirmatively allege that it targeted this decentralized global community. That is why, your Honor, they don't satisfy the

import commerce exception, and for reasons we previously talked about, they don't satisfy the domestic injury rung.

MR. COOPER: May I, your Honor, just to respond to his point?

THE COURT: 30 seconds.

MR. COOPER: You have a Norwegian buyer, he wants to exchange Norwegian Krone for U.S. Dollars. He is on loss. He makes the exchange, on mark with JPM. He gets U.S. Dollars. Morgan gets Norwegian Krone. It is then swept into U.S. Bank accounts that JP Morgan has. That is not denied by them in anything. It goes into accounts in New York, and then what happens is JP Morgan, a real reseller, seller of foreign exchanges, takes the Norwegian Krone which he can buy in any local JP Morgan branch, takes the krone and sells it to U.S. buyers.

THE COURT: Are those real krone?

MR. COOPER: Real krone brought from a JP Morgan branch the other day to demonstrate the point there is import of this good. Just because it is transmitted electronically doesn't mean it is not coming over here as an import. That is by definition being directed to a U.S. market here, and this is a market that they're in. That is why I started off with the point that what are they? They are dealers of foreign currency in the U.S., abroad, between countries, everywhere.

THE COURT: Okay. Thank you very much. This has been

very helpful, counsel. Thank you.

(Court adjourned)