

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE PLATINUM AND PALLADIUM
ANTITRUST LITIGATION

)
)
) Lead Case No. 14-CV-9391
)
) Hon. Gregory H. Woods
)
) ORAL ARGUMENT REQUESTED
)
)
)
)
)
)
)

**DEFENDANTS BASF METALS LIMITED AND BASF CORPORATION'S
REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(b)(2) AND 12(b)(6)**

INTRODUCTION

Apparently accepting that they had sued an entirely foreign BASF SE subsidiary—BASF Metals Limited—over which this Court has no personal jurisdiction, Plaintiffs attempted to cure that fatal deficiency by adding a U.S.-based BASF SE subsidiary—BASF Corporation—to their Second Consolidated Amended Complaint. Plaintiffs do not dispute that BASF Corp. never participated in the fixing auctions for platinum and palladium, never served as a member of the LPPFC that administered the auctions, and never maintained a net short position in those metals during the Class Period.¹ Instead, Plaintiffs assert that those facts are “immaterial” and argue—without citing any authority—that BASF Metals and BASF Corp. share a “meaningful connection” that somehow establishes personal jurisdiction over the entirely foreign BASF Metals when none would otherwise exist; and makes BASF Corp. liable for BASF Metals’ alleged foreign conduct. Both arguments fail. BASF Corp.’s presence in the suit is irrelevant to whether this Court has personal jurisdiction over BASF Metals. For this reason and those stated in the original motion to dismiss,² the Complaint should be dismissed as to BASF Metals for lack of personal jurisdiction. *See* Fed. R. Civ. P. 12(b)(2). And because Plaintiffs failed to allege any facts that plausibly connect BASF Corp. to the alleged conspiracy to manipulate the platinum and palladium auctions, the Complaint should be dismissed as to BASF Corp. for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6).

ARGUMENT

I. Plaintiffs Fail to Establish Personal Jurisdiction over BASF Metals

Plaintiffs do not dispute that they must make a prima facie showing of personal jurisdiction over BASF Metals to defeat a motion to dismiss, *Troma Entm’t, Inc. v. Centennial Pictures Inc.*, 729

¹ Capitalized terms have the meaning ascribed to them in the Defendants’ Joint Memorandum of Law in Support of Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (“Defs.’ Joint Mot. to Dismiss”) [ECF No. 116].

² *See* Defs. BASF Metals Limited & BASF Corp.’s Mem. of Law in Supp. of Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) & 12(b)(6) (“BASF Metals & BASF Corp. Supp. Mot. to Dismiss”) [ECF No. 117].

F.3d 215, 217 (2d Cir. 2013), and they concede that this Court lacks *general* personal jurisdiction over BASF Metals. Plaintiffs argue only that “BASF Metals is subject to *specific* personal jurisdiction,” alleging three supposed jurisdictional hooks, none of which establishes the requisite jurisdiction to overcome a motion to dismiss.³

First, Plaintiffs fail to identify tortious actions by BASF Metals that were “expressly aimed” at New York. *7 W. 57th St. Realty Co., LLC v. Citigroup, Inc.*, No. 13 Civ. 981 (PGG), 2015 WL 1514539, at *9 (S.D.N.Y. Mar. 31, 2015); *see also In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 38 (2d Cir. 2014) (“[S]pecific jurisdiction cases are limited to those involving ‘issues deriving from, or connected with, the very controversy that establishes jurisdiction.’”). It is not sufficient for Plaintiffs to allege that BASF Metals’ conduct—all of which occurred outside the forum—“incidentally had an effect in the forum, or even that effects in the forum were foreseeable.” *Citigroup*, 2015 WL 1514539, at *9. Rather, Plaintiffs must allege facts sufficient to establish that BASF Metals “intentionally caused” an effect in New York through its conduct elsewhere. *Id.*

For all the reasons set forth in LPPFC’s Reply Memorandum,⁴ Plaintiffs have failed to establish that BASF Metals engaged in any conduct that was “expressly aimed” at this forum. It is well-settled that conclusory allegations of indirect price manipulation in secondary markets fail to establish that a foreign defendant “intentionally caused” an effect in New York through its foreign conduct. *See, e.g., Citigroup*, 2015 WL 1514539 at *9, *11; *Laydon v. Mizuho Bank, Ltd.*, No. 12 CIV. 3419 GBD, 2015 WL 1515358, at *4-6 (S.D.N.Y. Mar. 31, 2015); *In re Aluminum Warehousing Antitrust Litig.* (“*Aluminum*”), 90 F. Supp. 3d 219 (S.D.N.Y. 2015).

³ *See* Pls.’ Consolidated Opp’n to Defs.’ Mots. (“Opp’n”) 2 [ECF No. 128]. Plaintiffs’ additional reliance on the service-of-process provisions in the CEA and the Clayton Act also fails. The very case they cite makes clear that determination of jurisdiction in the face of such provisions is still limited by due process and requires the establishment of “minimum contacts,” *In re Amaranth Natural Gas Commodities Litigation*, 587 F. Supp. 2d 513, 527-28 (S.D.N.Y. 2008), which as explained previously and below, Plaintiffs have failed to do.

⁴ BASF Metals and BASF Corp. agree with LPPFC’s Reply and incorporate its arguments here.

Second, Plaintiffs cannot manufacture specific personal jurisdiction over BASF Metals by asserting that it conspired with other defendants who are subject to this Court’s jurisdiction. *See Aluminum*, 90 F. Supp. 3d at 227 (rejecting participation in conspiracy as standalone basis for personal jurisdiction). As a threshold matter—and as explained in Defendants’ other briefs⁵—the Complaint fails to allege direct evidence or circumstantial facts that support any inference that a conspiracy actually existed. Nevertheless, even if Plaintiffs successfully pleaded a conspiracy among certain Defendants, that alone would not suffice to establish specific personal jurisdiction over BASF Metals. *See Aluminum*, 90 F. Supp. 3d at 227 (rejecting the “nebulous ‘conspiracy jurisdiction’ doctrine”); *Tymoshenko v. Firtash*, No. 11-CV-2794 KMW, 2013 WL 1234943, at *4 (S.D.N.Y. Mar. 27, 2013) (noting that the conspiracy theory of personal jurisdiction “has been widely criticized by courts and scholars”); *Davis v. A. & J. Elec.*, 792 F.2d 74, 76 (7th Cir. 1986) (there is no “independent federal ‘civil co-conspirator’ theory of personal jurisdiction”).

Finally, Plaintiffs cannot bolster their meritless arguments for specific jurisdiction over BASF Metals through unexplained references to BASF Corp., including that the two entities share a “meaningful connection.” *See, e.g.*, Opp’n 7 (“Various BASF subsidiaries held memberships in the NYMEX and CME and engaged in trading on NYMEX.”); *id.* at 21 n.23 (“BASF Corp. serves as an approved carrier, assayer, and refiner of platinum and palladium for CME [Chicago MercantileExchange] Group in the U.S.”); *id.* at 26 (“Plaintiffs have provided a meaningful connection between BASF Metals, the Fixing member, and BASF Corp.”). As previously explained,⁶ BASF Metals and BASF Corp. are separate corporate entities—neither of which is the parent or subsidiary of the other—that share no legal accountability for the other’s actions. *See Capmark Fin. Grp. Inc. v. Goldman Sachs Credit Partners L.P.*, 491 B.R. 335, 346 (S.D.N.Y. 2013)

⁵ *See* Defs.’ Joint Mot. to Dismiss 11-19; Defs.’ Joint Reply 3-8.

⁶ *See* BASF Metals & BASF Corp. Supp. Mot. to Dismiss 6-7.

(“Well-established precedent holds that in order for one company to be held responsible for the actions of a related company, it is necessary that there be sufficient facts to pierce the corporate veil.”). Plaintiffs have neither pleaded nor even argued any facts establishing that any BASF company ignored the separate legal status of, and dominated the affairs of, another BASF company. BASF Corp.’s existence as a defendant provides no basis for asserting personal jurisdiction over BASF Metals—a foreign company with no “minimum contacts” with New York.⁷

II. Plaintiffs Fail to Plead A Valid Claim Against BASF Corp.

Plaintiffs also fail to identify “sufficient factual matter” to survive BASF Corp.’s Rule 12(b)(6) motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Beyond noting that BASF Corp. participates in the platinum and palladium market, *see* Second Consolidated Am. Class Action Compl. (“Compl.”) ¶ 30, Plaintiffs allege almost no facts about BASF Corp., which is unsurprising given that Plaintiffs only named BASF Corp. in a fruitless attempt to establish personal jurisdiction over BASF Metals. Plaintiffs do not dispute that BASF Corp. played no role in the fixing auctions, never served as a member of the LPPFC, and never maintained a net short position in platinum or palladium during the Class Period, summarily dismissing those facts as “immaterial.” Opp’n 27. Instead, with only one citation to the Complaint,⁸ Plaintiffs argue that they “provided a meaningful connection between BASF Metals, the Fixing member, and BASF Corp.,” *id.* at 26, and that “BASF Corp. engaged in acts in furtherance of the conspiracy and shared a common interest with BASF Metals and the other Defendants,” *id.* at 27. Plaintiffs offer no explanation how BASF Corp., which was not even mentioned in the first two iterations of the Complaint, acted “in

⁷ Plaintiffs’ request for jurisdictional discovery should be denied in light of their failure to establish a prima facie basis for personal jurisdiction. *See Laydon* 2015 WL 1515358, at *7 (“District courts in this Circuit routinely reject requests for jurisdictional discovery where a plaintiff’s allegations are insufficient to make out a prima facie case of jurisdiction.” (alteration omitted)); *Aluminum*, 90 F. Supp. 3d at 239-40.

⁸ Curiously, Plaintiffs cite their Complaint only once in the section of the Opposition arguing that the Complaint states claims against BASF Corp. *See* Opp’n 26-28 (citing only paragraph 30 of the Complaint for the unremarkable and irrelevant proposition that “BASF Corp. is also a member of the CME, the parent company of NYMEX.”).

furtherance of the conspiracy,” and the claim that BASF Metals and BASF Corp. share a “meaningful connection” appears to be based entirely on the fact that both companies—like many other BASF companies—have operations in BASF’s Catalysts Division.⁹ According to Plaintiffs, every BASF company with operations in the Catalysts Division—although only BASF Metals had any role in the conduct of the fixing auctions—could be liable for the alleged price-fixing conspiracy during those auctions because “BASF entities are highly interrelated and each entity is connected to BASF’s platinum and palladium trading and role in the Fixing.” Opp’n 26 n.26. This novel liability-by-association theory is not a substitute for Rule 12(b)(6)’s requirement that Plaintiffs allege actual *facts* stating a facially plausible claim for relief as to each Defendant. *See Iqbal*, 556 U.S. at 678-79.¹⁰

Additionally, Plaintiffs misrepresent BASF Corp.’s point regarding their use of “BASF” to refer jointly to BASF Corp. and BASF Metals. *See* Opp’n 27-28. BASF Corp. stated no objection to using the joint term, but merely noted that the Complaint only did so a few times and even then, never to tie BASF Corp. to the alleged conspiracy. *See* Compl. ¶¶ 12, 46, 66, 182, 193 n.64, 196 n.65, 187. Otherwise, BASF Corp. is only explicitly mentioned in the three paragraphs identifying BASF Corp. as a Defendant. *Id.* ¶¶ 30-32. Given the dearth of factual allegations against BASF Corp., Plaintiffs have failed to plausibly state any claims for relief against BASF Corp.

CONCLUSION

For these reasons, the Complaint should be dismissed as to BASF Metals for lack of personal jurisdiction under Rule 12(b)(2), and as to BASF Corp. for failure to state a claim under Rule 12(b)(6).

⁹ *See* <http://www.catalysts.basf.com>. Notably, BASF Corp. has many operations that are wholly unconnected to the Catalysts Division. *See* https://www.basf.com/documents/us/en/reports/BASF_2014_NAReport.pdf.

¹⁰ Plaintiffs accuse BASF of removing the Catalysts Division’s website after the filing of the Complaint, Opp’n 21 n.22, which is bizarre, patently false, and ignores the fact that BASF Metals and BASF Corp. directed the Court to the website in their own supplemental motion to dismiss. *See* BASF Metals & BASF Corp. Supp. Mot. to Dismiss 3 n.6.

Dated: December 11, 2015
New York, New York

Respectfully submitted,

/s/ Joseph Serino, Jr.
Joseph Serino, Jr., P.C.
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
Tel: (212) 446-4913
Fax: (212) 446-6460
jserino@kirkland.com

*Attorneys for Defendant
BASF Metals Limited and
BASF Corporation*