UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM AND PALLADIUM ANTITRUST LITIGATION

Civ. No. 14-cv-9391 (GHW)

ORAL ARGUMENT REQUESTED

DEFENDANT ICBC STANDARD BANK PLC'S REPLY TO PLAINTIFFS' CONSOLIDATED OPPOSITION AND IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(2) AND 12(B)(6)

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Plaintiffs' Opposition ("Opp.," ECF No. 128) concedes that (1) ICBC Standard is not subject to general jurisdiction in the forum; (2) ICBC Standard participated in the Auctions entirely in England, rather than in the forum; and (3) most of the Complaint's sparse allegations specific to ICBC Standard are irrelevant for jurisdictional purposes. Opp. 2. As a result, Plaintiffs are left with just three asserted bases for the exercise of *specific* jurisdiction over ICBC Standard. Yet none establish the requisite minimum contacts between ICBC Standard and the forum necessary to comport with due process.

I. ICBC STANDARD IS NOT SUBJECT TO SPECIFIC JURISDICTION[1]

The Opposition incorrectly argues ICBC has "significant contacts" with the forum justifying this Court's assertion of specific jurisdiction over it, Opp. 2, simply because ICBC Standard participated in the Auctions in London and allegedly traded futures on the NYMEX trading division of the New York Mercantile Exchange. *Id.* 5. These allegations fall well short of establishing the necessary "substantial connection" between ICBC Standard's suit-related conduct and the forum. *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

First, Plaintiffs argue their claims "arise out of" NYMEX trades by ICBC Standard in the forum, but they cannot show how any such trading activity was the cause of their of injuries, as due process requires. *Second*, though Plaintiffs claim the Auctions set prices worldwide, they insist ICBC Standard's (alleged) manipulation of the Auctions in London was "expressly aimed" at the forum. That claim lacks factual support and is contrary to recent decisions in this District. *Third*, Plaintiffs argue that the Auctions were a conspiracy, and that ICBC Standard should be subject to jurisdiction on the basis of its co-conspirators' conduct in the forum, but they allege no facts connecting ICBC Standard to any such conspiracy or to any non-Moving Defendant.

[1] ICBC Standard joins in and incorporates by reference all of the arguments made in the LPPFC's Reply regarding lack of jurisdiction (ECF No. 131).

A. Plaintiffs' Claims Do Not "Arise out of" ICBC Standard's NYMEX Trades

Plaintiffs concede that specific jurisdiction demands their claims must "arise out of" ICBC Standard's contacts with the forum, but they do not even attempt to make the showing required to satisfy that standard. Opp. 5 Nowhere does the Opposition argue that ICBC Standard's NYMEX trades were even a "but for" cause of their injuries, let alone a proximate cause, as due process requires here. *See Chew v. Dietrich*, 143 F.3d 24, 29-31 (2d Cir. 1998); *SPV OSUS Ltd. v. UBS AG*, 2015 WL 4394955, at *5-6 (S.D.N.Y. July 20, 2015).[2]

Instead, Plaintiffs argue specific jurisdiction exists because NYMEX trades were "a central means" by which ICBC Standard "profited from" manipulating the Auctions. Opp. 5-6. But Plaintiffs cite no authority supporting a specific jurisdiction test that focuses only on the *motive* behind a defendant's in-forum contacts, rather than the causal connection those contacts bear to the alleged injury. Nor can they: abandoning a causal nexus requirement altogether would "confuse or blend general and specific jurisdiction inquiries," allowing foreign defendants to be haled into court for their "*non*-suit related" conduct in the forum. *In re LIBOR IV*, 2015 WL 6243526, at *28 (quotations omitted). Due process does not permit this. Indeed, Judge Gardephe rejected similar in-forum trading allegations as a basis for specific jurisdiction in another recent case, holding that foreign banks' "[g]eneral contacts with New York" were

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[2] The Second Circuit in *Chew* held that something less than proximate cause can apply only when a defendant's relevant in-forum contacts are "more substantial." 143 F.3d at 29. At a minimum, however, due process requires those contacts to be a "but for" cause of the injury. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*In re LIBOR IV*"), 2015 WL 6243526, at *27-28 & n.46 (S.D.N.Y. Oct. 20, 2015) (finding no federal appellate court has upheld specific personal jurisdiction on "a lesser showing of relationship" than "but for" causation). Here, the required showing is proximate cause, because Plaintiffs do not identify "substantial" relevant in-forum contacts. *See SPV OSUS Ltd.*, 2015 WL 4394955, at *5-6 (proximate cause standard applied to foreign bank defendant that processed relevant transactions and performed due diligence in forum). But the Court need not reach that issue, because Plaintiffs do not argue that ICBC Standard's NYMEX trading had *any* causal connection to their injuries. Rather, Plaintiffs allege that Defendants' unlawful manipulation of the *Auctions* is what "artificially lowered prices on NYMEX," Compl. ¶¶ 97, 259, proximately causing their losses, *id.* at 13-14, ¶¶ (a)-(f). Of course, since Plaintiffs concede the Auctions took place in London, that conduct cannot serve as the in-forum, suit-related contacts necessary to confer specific jurisdiction.

insufficient to establish specific jurisdiction. *7 W. 57th St. Realty Co., LLC v. Citigroup, Inc.* ("*Citigroup*"), 2015 WL 1514539, at *10 (S.D.N.Y. Mar. 31, 2015).

B. ICBC Standard Did Not "Expressly Aim" Its Foreign Conduct at the Forum

For the reasons set forth in the LPPFC's Reply Memorandum, the Complaint fails to establish that ICBC Standard engaged in any tortious conduct abroad that was "expressly aimed" at the forum. Further, Plaintiffs' bare assertion that ICBC Standard traded NYMEX contracts, Opp. 7, is incapable of demonstrating that ICBC Standard's alleged manipulation of the Auctions an ocean away in London was done with the express aim of causing an effect in the forum. *See Laydon v. Mizuho Bank, Ltd.*, 2015 WL 1515358, at *2, *6 (S.D.N.Y. Mar. 31, 2015) (allegation that defendants took "purposeful action to facilitate the manipulation" of U.S.-traded derivatives "failed to plead *facts* showing that [defendants] 'expressly aimed' any actions at the United States") (emphasis added); *Citigroup*, 2015 WL 1514539, at *10-11 (conclusory allegations of "express aim" insufficient in benchmarking case).

In fact, Plaintiffs allege just the opposite: they assert that (1) the Auctions were "an integral part" of the "global markets," Compl. ¶ 77; (2) the Auction prices served as "global benchmarks" for an array of platinum- and palladium-denominated products worldwide, *id*. ¶¶ 91-96; (3) ICBC Standard transacts in many such Auction-priced products, *id.* ¶¶ 38-39, 190; (4) manipulating the Auctions "affected *market-wide* pricing," Plaintiffs' Opposition 28 (ECF No. 129) (emphasis added); and (5) the manipulation enabled Defendants to profit in "*numerous* outlets for platinum and palladium investments," Compl. ¶ 9 (emphasis added). Against that background, Plaintiffs identify *no* specific facts demonstrating that ICBC Standard manipulated the Auctions with the express intent to influence NYMEX contract prices in the forum, rather

than the price of any other Auction-influenced platinum or palladium product in any other market around the world. *See In re LIBOR IV*, 2015 WL 6243526, at *32.[3]

C. There Is No Basis for Conspiracy Jurisdiction Over ICBC Standard

Even if "conspiracy jurisdiction" remains viable post-*Walden*,[4] Plaintiffs have not adequately pleaded the existence of a conspiracy, Defs.' Joint Br. 11-25 (ECF No. 116); Defs.' Joint Reply 3-9 (ECF No. 132), let alone that ICBC Standard participated in it. Plaintiffs concede that none of the purported ICBC Standard price quotes in the Complaint were even anticompetitive, Opp. 24-25, and they ignore the argument that Auction membership fails to establish jurisdiction on conspiracy grounds. *See Aluminum I*, 90 F. Supp. 3d at 233-34. Further, Plaintiffs' conclusion that, simply as Chair of the Auctions, ICBC Standard "was intimately involved with (and obviously aware of)" the conspiracy, Opp. 7, is unsupported by any facts and is not entitled to the presumption of truth. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680-81 (2009).[5]

Finally, for the reasons set forth in the LPPFC Reply Memorandum, Plaintiffs have not adequately pleaded that any activity of the non-Moving Defendants in New York was "to the benefit of," or was done "at the direction or under the control [of]," ICBC Standard. *Tarsavage*

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[3] Plaintiffs' reliance on *In re Aluminum Warehousing Antitrust Litig.* ("*Aluminum II*"), 2015 WL 6472656 (S.D.N.Y. Oct. 23, 2015), is misplaced. Opp. 10-11 & n.11. There, plaintiffs made a *prima facie* showing of "express aim" by citing specific communications in which the defendant referenced "multiple [specific] regions of the United States," demonstrating that defendant "intended" that his plan to manipulate aluminum prices "would primarily have effects within the United States." *Aluminum II*, 2015 WL 6472656, at *11-13.

[4] Plaintiffs cite pre-*Walden* cases supporting the exercise of conspiracy jurisdiction under New York's long-arm statute, N.Y. C.P.L.R. § 302(a)(2), but they ignore *Walden*'s clear admonition that constitutional due process requires specific jurisdiction to be "based on [a defendant's] *own* affiliation with the State," rather than "attenuated contacts he makes by interacting with *other persons* affiliated with the State." *Walden*, 134 S. Ct. at 1123 (emphasis added). For that reason, Plaintiffs' attempt to distinguish the holding of *In re Aluminum Warehousing Antitrust Litig.* ("*Aluminum I*"), 90 F. Supp. 3d 219 (S.D.N.Y. 2015), as limited to the applicability of conspiracy jurisdiction under Fed. R. Civ. P. 4(k)(2), is unavailing. Opp. 22. There, Judge Forrest held that "*irrespective* of the [statutory basis] for a given assertion of personal jurisdiction, the Court must *always* engage in a due process inquiry." *Aluminum I*, 90 F. Supp. 3d at 223 (emphasis added).

[5] Plaintiffs' failure to plead any substantive allegations specific to ICBC Standard is an independent basis for with-prejudice dismissal of all claims against it pursuant to Fed. R. Civ. P. 12(b)(6).

v. Citic Trust Co., 3 F. Supp. 3d 137, 147-48 (S.D.N.Y. 2014) (quotations omitted). The only alleged in-forum conduct by non-Moving Defendants is their NYMEX trading activity, Opp. 22, which benefitted only those Defendants, not ICBC Standard. Compl. ¶¶ 12, 15. And Plaintiffs never once allege ICBC Standard exercised any sort of control over any non-Moving Defendant.

II. PLAINTIFFS ARE NOT ENTITLED TO JURISDICTIONAL DISCOVERY

Jurisdictional discovery would be inappropriate because Plaintiffs' bare allegations of ICBC Standard's Auction membership and NYMEX trading lack the factual specificity necessary to support a *prima facie* showing of jurisdiction. *See Aluminum I*, 90 F. Supp. 3d at 240 (holding that allegations of defendants' role in LME's Warehousing Committee were "too devoid of meaningful context" to provide a *prima facie* basis for jurisdiction, and distinguishing *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206-08 (2d Cir. 2003), where complaint cited meeting minutes "at which a price-fixing conspiracy was allegedly discussed").[6] Jurisdictional discovery would also be futile, because the Plaintiffs seek only information about "the extent of" ICBC Standard's contacts with NYMEX. Opp. 26. As set forth above, no such contacts can give rise to specific jurisdiction. *See Laydon*, 2015 WL 1515358, at *7.

CONCLUSION

For the foregoing reasons, and for the reasons stated in ICBC Standard's opening brief, the Court should dismiss the Complaint as to ICBC Standard, with prejudice.

[6] Plaintiffs' cited cases are inapposite, because they involved extensive fact-specific jurisdictional allegations found nowhere in the Complaint. *See Dorchester Fin. Secs., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 85 (2d Cir. 2013) (contract showed defendant consented to jurisdiction); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981) (*prima facie* showing of jurisdiction established by deposition testimony and affidavits). Seeking to evade their pleading burden, Plaintiffs claim they should receive discovery because they have shown a "colorable basis" for jurisdiction that discovery could develop, Opp. 25, but even the unusual circumstances where courts have granted such discovery involved more fact-specific jurisdictional allegations than Plaintiffs put forth here. *See, e.g.*, *Leon v. Shmukler*, 992 F. Supp. 2d 179, 195 (E.D.N.Y. 2014) (granting limited discovery where plaintiffs presented documents identifying defendant as key employee of company at issue).

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Respectfully submitted,

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