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

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| IN RE PLATINUM AND PALLADIUM ANTITRUST LITIGATION | Lead Case No. 14-CV-9391<br>Hon. Gregory H. Woods<br>ORAL ARGUMENT REQUESTED |

**DEFENDANT THE LONDON PLATINUM AND PALLADIUM FIXING COMPANY'S REPLY TO PLAINTIFFS' CONSOLIDATED OPPOSITION AND IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(2)**

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## PRELIMINARY STATEMENT

Plaintiffs have alleged a conspiracy concerning manipulation of a foreign benchmark, the London Fixing for platinum and palladium. Plaintiffs concede, as they must, that the Fixing was conducted in London, concerned an auction held in London, regarding platinum and palladium that was traded in London. Plaintiffs also concede that LPPFC was not present and did not engage in any activities in New York or anywhere else in the United States.

Accordingly, Plaintiffs do not argue that LPPFC is subject to the general jurisdiction of New York. Plaintiffs also concede that specific jurisdiction cannot be asserted over LPPFC under a purposeful availment theory (other than as the alter ego of its members), because LPPFC's suit-related conduct occurred entirely in London. Instead, Plaintiffs argue that LPPFC is subject to specific jurisdiction because its suit-related conduct was nonetheless "expressly aimed" at New York. Plaintiffs' argument is, however, contrary to several recent decisions in this District, which have uniformly held that the manipulation of a foreign benchmark that was used globally was not "expressly aimed" at the forum, even if those defendants could foresee that their actions could and allegedly did have consequences in New York.

Plaintiffs other arguments are similarly unavailing. *First*, Plaintiffs cannot use alter ego law to rescue their purposeful availment theory of jurisdiction because they have not met the rigorous standard for pleading that LPPFC is the alter ego of its members, under either English or federal law. *Second*, neither the Clayton Act nor the Commodity Exchange Act ("CEA") provides an independent basis for jurisdiction, because Plaintiffs have not alleged that LPPFC had sufficient "minimum contacts" with the United States to satisfy due process concerns. *Finally*, conspiracy jurisdiction cannot be asserted over LPPFC here because Plaintiffs have not alleged facts that connect LPPFC to any acts by any of the other Defendants in New York in furtherance of the alleged conspiracy.

## ARGUMENT

### I. LPPFC'S SUIT-RELATED CONDUCT WAS NOT "EXPRESSLY AIMED" AT NEW YORK

Where "the conduct that forms the basis for the controversy occurs entirely out-of-forum, and the only relevant jurisdictional contacts with the forum are therefore in-forum effects harmful to the plaintiff," a defendant may be subject to personal jurisdiction only "if the defendant expressly aimed its conduct at the forum." *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). Here, Plaintiffs allege that Defendants conspired (in London, SAC ¶ 1) to manipulate an auction (held in London, SAC ¶¶ 49-52), concerning the price of platinum and palladium (traded in London, SAC ¶ 52, 75), which produced "the Fixing" (a benchmark that was used globally, SAC ¶ 77). Plaintiffs, who traded on NYMEX here in New York, claim that they were harmed by the alleged conspiracy in London.

When faced with similar facts, courts in this District have consistently declined to assert personal jurisdiction over defendants whose wrongful conduct was aimed globally but affected plaintiffs locally. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-MDL-2262 (NRB), 2015 WL 6243526, at *30, 32 (S.D.N.Y. Oct. 20, 2015) ("*LIBOR IV*") (noting that it is "incontrovertible that the importance of LIBOR was its universal significance, not its projection into any particular state," rejecting the assertion "that foreign [LIBOR panel banks] aimed their manipulative conduct at the United States or any particular forum state" and finding that "merely foreseeable effects of defendants' conduct do not support personal jurisdiction"); *7 West 57th St. Realty*, 2015 WL 1514539, at *11 (holding that absent allegations that manipulation of a foreign benchmark, LIBOR, "was done with the express aim of causing an effect in New York," the court lacked personal jurisdiction over the foreign banks); *In re LIBOR-Based Fin. Instruments*

*Antitrust Litig.*, No. 11-MDL-2262 (NRB), 2015 WL 6696407, at *19 (S.D.N.Y. Nov. 3, 2015) ("*LIBOR V*") (rejecting argument that "personal jurisdiction existed in the United States because the [LIBOR panel banks'] manipulative actions had a foreseeable effect on the Eurodollar futures contract prices" traded on the Chicago Mercantile Exchange); *Laydon v. Mizuho Bank, Ltd.*, No. 12-CIV-3419 (GBD), 2015 WL 1515358, at *2-3, 5-6 (S.D.N.Y. Mar. 31, 2015) (finding insufficient minimum contacts under the effects test where plaintiffs alleged "purposeful action to facilitate the manipulation of the price of Euroyen-based derivatives traded in the United States" as part of foreign benchmark manipulation claim).

Each of Plaintiffs' arguments to the contrary is unavailing. *First*, the fact that the Fixing was set in U.S. dollars is irrelevant. Op. at 8 (ECF No. 128). The U.S. dollar is the standard unit of currency in international commodities markets, including for the London and leading European markets that trade platinum and palladium.[1] It is not plausible that the Fixing would be set in any currency other than U.S. dollars.

*Second*, Plaintiffs' conclusory allegation that the PM Fixing was timed to "accommodate the U.S. trading day" (SAC ¶ 62; Op. at 8) is contradicted by Plaintiffs' more specific allegation that "[f]or various reasons, such as changing daylight savings times, the Fix occurred at different times during the New York trading day, and sometimes did not occur at all." SAC at fn. 3 Plaintiffs' conclusion that the PM Fixing was timed "each day to coordinate with the start of the U.S. trading day" (Op. at 1) is, therefore, simply implausible. To the contrary, the PM Fixing was timed, as its name suggests, to occur during afternoon trading in London (SAC ¶ 1), where the Fixing was held and "is an integral part of the market." SAC ¶ 77.

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1. *See* London Metal Exchange, available at http://www.lme.com/pricing-and-data/pricing/official-price/; Eurex, available at http://www.eurexchange.com/exchange-en/products/com and following links to specific products). A court may consider facts outside of the pleadings on a motion to dismiss for lack of personal jurisdiction. *See Liberty Cable Co. v. City of New York*, 893 F. Supp. 191, 199 n.11 (S.D.N.Y. 1995).

*Third*, Plaintiffs' allegations that ICBC Standard and BASF Metal traded on NYMEX (Op. at 8) is irrelevant to the jurisdictional question because Plaintiffs allege that their injuries were proximately caused by the London Fixing, not by Defendants' NYMEX trading activities. *See SPV OSUS Ltd. v. UBS AG*, No. 14-CV-9744 (JSR), 2015 WL 4394955, at *5 (S.D.N.Y. July 20, 2015) (holding that the court will exercise personal jurisdiction over a defendant only "if the plaintiff's injury was *proximately caused* by those contacts") (emphasis added) (citing *Chew v. Dietrich,* 143 F.3d 24, 29 (2d Cir.1998)); *see also Walden v. Fiore*, 134 S. Ct. 1115, 1121-22 (2014) ("the defendant's conduct [] must form the necessary connection with the forum State that is the basis for its jurisdiction over him").[2] For the foregoing reasons, even if LPPFC was the "vehicle" used to facilitate the Fixing, Plaintiffs' pleadings demonstrate that the Fixing itself was not "expressly aimed" at New York.[3]

The market manipulation cases cited by Plaintiffs are therefore all distinguishable—in those cases, the complained-of manipulation was effected directly by the foreign defendants' trading on U.S. exchanges. *Compare LIBOR V*, 2015 WL 6696407, at *19 (rejecting personal jurisdiction based on allegations that defendants' manipulation of LIBOR in London had a foreseeable effect on the Eurodollar futures contract prices in the U.S.) *with In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 536 (S.D.N.Y. 2008) (personal jurisdiction asserted over defendant who manipulated NYMEX futures prices through trading on NYMEX); *In re Sumitomo Copper Litig.*, 120 F. Supp. 2d 328, 333-38 (S.D.N.Y. 2000)

2. Even assuming, *arguendo*, that such trading activity were deemed sufficient grounds for asserting personal jurisdiction over ICBC Standard and BASF Metals, such trading activity cannot be imputed to LPPFC for the reasons set forth in Section II, *infra*.

3. The Plaintiffs' citations are therefore inapposite to their pleadings. *See In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206-208 (2d Cir. 2003) (minimum contacts may exist where defendant allegedly fixed the prices of audiotape *in* the U.S. via its U.S. subsidiary); *Global Intellicom v. Thomson Kernaghan & Co*, No. 99 CIV 342(DLC), 1999 WL 544708, at *1, 19 (S.D.N.Y. July 27, 1999) (minimum contacts satisfied because the defendant, a foreign individual who acted as an agent for conspirators, allegedly purchased securities from a New York-based corporation as part of a scheme to devalue that corporation's stock).

(personal jurisdiction asserted over defendants that caused purchases of large amounts of COMEX copper futures contracts in order to artificially inflate COMEX copper futures prices).[4]

This case is analogous to *LIBOR* in this critical respect: the complained-of manipulation concerns a foreign benchmark only. Plaintiffs do not allege that Defendants manipulated NYMEX pricing through their NYMEX trading; nor do Plaintiffs allege that Defendants *intended* to manipulate NYMEX prices. Even if this Court were to credit Plaintiffs' argument that Defendants were "obviously aware" and "not naïve to [the] realities" that manipulating the auction could have on NYMEX futures (Op. at 7-8) as well-pled in the SAC, such allegations cannot establish personal jurisdiction as a matter of law. *See LIBOR V*, 2015 WL 6696407, at *14 ("supposed awareness that harm would be felt disproportionately in [the jurisdiction] fails [to establish personal jurisdiction] as a matter of law, because it improperly equates the foreseeability of harm in a forum with the defendants' intent to aim their conduct at a forum."); *LIBOR IV*, 2015 WL 6243526, at *32 ("[i]t is bedrock law that merely foreseeable effects of defendants' conduct do not support personal jurisdiction"); *In re Terrorist Attacks on Sept. 11*, 714 F.3d 659, 674 (2d Cir. 2013) (same).

## II. LPPFC IS NOT SUBJECT TO "ALTER EGO JURISDICTION"

### A. Under Applicable English Law, LPPFC is Not the Alter Ego of its Members

Plaintiffs are incorrect that in federal question cases, "federal interests are implicated and courts *must* look to federal common law." Op. at 13 (emphasis added). Indeed, the U.S.

4. The non-market manipulation cases cited by Plaintiff similarly concern injuries that were proximately caused by wrongdoing in the United States. *See Atlantica Holdings, Inc. v. BTA Bank JSC*, No. 13-CV-5790 (JMF), 2015 WL 144165, at *1 (S.D.N.Y. Jan. 12, 2015) (defendants made misrepresentations concerning notes it offered for sale, and issued to purchasers located, in the U.S.); *In re Vitamin C. Antitrust Litig.*, No. 06-MD-1738 (BMC)(JO), 2012 WL 12355046, at *1 (S.D.N.Y. Aug. 8, 2012) (defendants directly exported price fixed Vitamin C to the U.S.); *Simon v. Phillip Morris Inc.*, 86. F. Supp. 2d 95, 100 (E.D.N.Y. 2000) (defendants conspired to deceive American consumers about the adverse health effects of smoking); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 435-37 (6th Cir. 2012) (defendants fixed prices of copper tubing specifically designated for export to the U.S.); *Vizant Techs. v. Whitchurch*, 97 F. Supp. 3d 618, 632 (E.D. Pa 2015) (defendant misappropriated the trade secrets of a Pennsylvania entity).

Supreme Court and the Second Circuit have repeatedly held to the contrary. *See Starr Int'l. Co. Inc. v. Fed. Reserve Bank of N.Y.*, 742 F.3d 37, 41 (2d Cir. 2014) (noting that "the Supreme Court has specified that displacement of state law by federal common law occurs in areas of 'uniquely federal interest' when 'a significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law'") (alteration in original) (citing *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504, 507 (1988)).[5] Plaintiffs have not identified any such "significant conflict" to justify ignoring state law, especially where, as here, applying English law furthers the important policy of international comity. *See Soviet Pan Am. Travel Effort v. Travel Comm., Inc.*, 756 F. Supp. 126, 131 (S.D.N.Y. 1991) ("Because a corporation is a creature of state law whose primary purpose is to insulate shareholders from legal liability, the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away.").

As set forth more fully in LPPFC's moving brief, Plaintiffs fail to meet the pleading standard for alter ego under English law because (i) Plaintiffs do not allege that Defendants placed LPPFC between Defendants and Plaintiffs *after* Plaintiffs had incurred liability, and (ii) Plaintiffs can recover directly from at least some of the alleged wrongdoers.[6]

Plaintiffs do not address either defect in their Opposition; instead, they cite English law for the unremarkable proposition that plaintiffs may recover on competition law claims against a "single economic entity" or "undertaking." Op. at 13-14. But LPPFC and its members do not

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5. Indeed, Plaintiffs' argument that this Court *must* apply federal common law to decide the alter ego question is belied by prior cases involving antitrust and CEA claims in which courts applied state law of alter ego. *See, e.g.*, *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 417-18 (S.D.N.Y. 2011) (antitrust case); *Hinds Cty., Miss. v. Wachovia Bank N.A.*, 708 F. Supp. 2d 348, 366 (S.D.N.Y. 2010) (antitrust case); *see also Apex Oil Co. v. DiMauro*, 713 F. Supp. 587, 610 (S.D.N.Y. 1989) (CEA case).

6. Contrary to Plaintiffs assertions regarding the fact that liability under U.S. antitrust law is joint and several, Plaintiffs inability to proceed against LPPFC would have no effect on Plaintiffs' recovery, should it prove its case on the merits.

constitute a "single economic entity" or "undertaking."[7] LPPFC is a joint venture that is controlled by *four separate and independent* economic entities. SAC ¶ 45. LPPFC is therefore completely unlike the "undertakings" at issue in the English cases cited by Plaintiffs. *See Provimi Ltd. v. Roche Products Ltd*, [2003] EWHC 961 ¶ 31 (controlled subsidiary held to be liable for cartel conduct of its parent because knowledge of the parent is imputed to its subsidiary); *Toshiba Carrier UK Ltd v. KME Yorkshire Ltd*, [2012] EWCA Civ. 1190 ¶ 38 (where a corporate parent exercises decisive control over its subsidiary, the unlawful activity of the parent will be imputed to the parent).

**B. Plaintiffs Have Not Pled Alter Ego Jurisdiction Under Federal Law**

Even under the most generous reading of federal common law, Plaintiffs do not dispute that they must, at a minimum, allege that the Member Defendants so dominated and controlled LPPFC so as to deprive LPPFC of its separate identity. Op. at 15-16. Yet Plaintiffs fail to plead any of the classic indicia of domination. Plaintiffs do not allege that LPPFC failed to observe corporate formalities; to the contrary, Plaintiffs concede that LPPFC was duly incorporated in England, has directors who were appointed by its four members, and has filed a Memorandum of Association. SAC ¶¶ 45-47 and fn. 24. Plaintiffs do not allege that LPPFC was inadequately capitalized, confusing capitalization with revenue.[8] SAC ¶ 46. Plaintiffs do not allege that LPPFC's funds were intermingled with those of its members, or that they share common office

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7. The concept of an "undertaking" has its roots in European law. As the European Commission has explained: "Companies that form part of the same 'undertaking' … are not considered to be competitors for the purposes of these guidelines. Article 101 only applies to agreements between independent undertakings. When a company exercises decisive influence over another company they form a single economic entity and, hence, are part of the same undertaking. . . . They are consequently not considered to be competitors even if they are both active on the same relevant product and geographic markets." GUIDELINES ON THE APPLICABILITY OF ARTICLE 101 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION TO HORIZONTAL CO-OPERATION AGREEMENTS, 2001/C 11/01, at ¶ 11.

8. The same allegations that the majority of LPPFC's revenues are derived from membership fees could be made against any number of trade associations and other industry groups.

space, addresses or phone numbers. Plaintiffs do not allege that LPPFC's ownership is the same as those of its members, or that they share the same directors.[9] In short, Plaintiffs have done little more than allege that LPPFC is a "mere shell," which is simply a conclusion and plainly insufficient to plead alter ego, even for jurisdictional purposes. *See Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009) ("bare assertions" that Attorney General was "principal architect" of the complained of policy, and that FBI Director was "instrumental" in its implementation, were "conclusory and not entitled to be assumed true").

## III. THERE ARE NO OTHER BASES FOR EXERTING PERSONAL JURISDICTION OVER LPPFC

### A. No Statutory Personal Jurisdiction

As discussed above, due process concerns prohibit the exercise of specific personal jurisdiction over LPPFC because it did not "expressly aim" its suit-related conduct at New York or anywhere else in the United States. Simply put, the worldwide service of process provision of the Clayton Act and the CEA cannot obviate the constitutional concerns of exerting personal jurisdiction over a defendant that lacks sufficient minimum contacts with the United States. *See LIBOR IV*, 2015 WL 6243526, at *23 ( "the Second Circuit has consistently held that the minimum-contacts test in such circumstances looks to contacts with the entire United States rather than with the forum state" in cases brought pursuant to the Clayton Act and the CEA); *see also In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d at 207 (Section 12 of the Clayton Act requires the court to assess minimum contacts [by looking to] a corporation's contacts with the United States as a whole to determine if the federal court's exercise of personal jurisdiction comports with due process").

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9. The same allegations that LPPFC's directors are each employees of its members could be made against many joint ventures. Indeed, under Plaintiffs' theory, alter ego jurisdiction could be asserted over many joint ventures (100% controlled by its members; directors appointed by its members; given a specific and narrowly defined business purpose), an outcome that is illogical on its face.

**B. No Conspiracy Jurisdiction**

Assuming *arguendo* that Plaintiffs have properly pled the existence of a conspiracy,[10] to justify the exercise conspiracy jurisdiction over LPPFC, Plaintiffs must further plead that "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control or at the request of or on behalf of the out-of-state defendant." *Tarsavage v. Citic Trust Co. Ltd.*, 3 F. Supp. 3d 137, 147 (S.D.N.Y. 2014) (quoting *Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 442-43 (S.D.N.Y. 2008).[11] Plaintiffs have failed to allege at least two of these elements.

*First*, Plaintiffs have not—and cannot—plead that any actions undertaken by any of the other Defendants in New York benefitted LPPFC. As noted above, unlike the defendants in *Sumitomo Copper* or *Amaranth*, Plaintiffs do not allege here that the complained-of price manipulation was effected through NYMEX trading. Plaintiffs allege that the manipulation was effected through the London Fixing and that Defendants allegedly unilaterally profited from their own NYMEX trading as a result. *See* SAC ¶ 9 ("By manipulating the price around the Fixing, the Defendants were creating opportunities to profit in numerous outlets for platinum and palladium."), ¶ 12 ("The Defendants can and did profit because they were holders of massive short positions in the futures markets (including the New York Mercantile Exchange ("NYMEX") market."). *Second*, Plaintiffs do not allege that the other Defendants' New York activities (*i.e.*, their NYMEX trading) was undertaken "at the direction or under the control or at

10. They have not done so. *See* Defendants' Joint Reply Memorandum of Law in Support of Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), at Section I.A, filed concurrently with this memorandum.

11. It should be noted that conspiracy jurisdiction is a disfavored theory in the Second Circuit, where many district courts have recently rejected its use. *See*, *e.g.*, *In re Aluminum Warehousing Antitrust Litig.*, 90 F. Supp. 3d 219, 227 (S.D.N.Y. 2015) (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").

the request of or on behalf of" LPPFC. Indeed, Plaintiffs plead the converse, insisting that LPPFC was nothing more than a "shell", and therefore incapable of directing or controlling the actions of any of its members. SAC ¶¶ 46-47.

As Plaintiffs do not connect LPPFC to any acts committed in New York in furtherance of the alleged conspiracy, Plaintiffs' conspiracy jurisdiction arguments must fail. *See In re Satyam Computer Servs. Sec. Ltd. Litig.*, 915 F. Supp. 2d 450, 485 (S.D.N.Y. 2013) (refusing to exercise jurisdiction over foreign defendants where no allegations "connect [the foreign defendants] with transactions occurring in the United States, and thus [plaintiffs] have not alleged sufficient minimum contacts to exercise [conspiracy] jurisdiction over this group of defendants").

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For these reasons, the Second Consolidated Amended Class Action Complaint should be dismissed as to The London Platinum and Palladium Fixing Company Ltd. for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2).

Dated: December 11, 2015
New York, New York

Respectfully submitted,

*/S/ Ethan E. Litwin*

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