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Civil Litigation Developments: Class Actions Alleging Manipulation

Louis F. Burke[1]

The methods of "manipulation are limited only by the ingenuity of man."[2] In 1974, the Commodity Exchange Act ("CEA") was radically amended because of perceived widespread manipulative conduct and other abuses. The Commodity Exchange Authority was replaced by the Commodity Futures Trading Commission ("CFTC"), the regulatory agency instrumental in combating market manipulators.[3] The CFTC, however, does not pursue litigation to compensate individuals and organizations harmed by market manipulators' uneconomic trading practices. The class action device has developed as the best tool to cast a wide net and provide a remedy at law for the majority of the victims of market manipulation. Below is a summary of some of the most recent CEA class action litigation.

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[1] Louis F. Burke PC is a boutique law firm located in New York City specializing in futures litigation and regulatory matters. The Firm is engaged in commercial litigation, including class actions, before federal and state courts, arbitration proceedings before securities and commodities exchanges and their regulatory counterparts, and administrative proceedings before federal government agencies including the Securities and Exchange Commission, Commodity Futures Trading Commission and the National Futures Association. Elspeth Gibb, an associate at the firm, assisted in drafting this article.

[2] *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir.1971).

[3] *See*, Markham, Jerry W., Commodities Regulation: Fraud, Manipulation & Other Claims § 16:1 (2005).

I. Recently Settled Class Actions:

Anderson v. Dairy Farmers of America, Inc.[4]

Plaintiffs brought this action against defendant Dairy Farmers of America, Inc. ("DFA"), alleging that DFA violated Section 9 of the CEA by manipulating prices for cheddar cheese and Class III milk futures on the Chicago Mercantile Exchange ("CME").[5] DFA moved for summary judgment arguing "that its purchases of cheese were part of legitimate supply and demand as a matter of law, and as a result [...] no artificial prices for [cheddar] cheese or class III milk existed."[6] The court denied the defendant's motion for summary judgment and found that plaintiffs sufficiently alleged that DFA's actions, purchasing "cheese on the Cheese Spot Call to prop up class III milk futures prices to enable DFA to liquidate its long class III milk futures position at a profit," did not constitute legitimate forces of supply and demand.[7]

DFA then petitioned the court for an interlocutory appeal of its denial of summary judgment.[8] The court was not persuaded by DFA "that there [was] substantial ground for difference of opinion on this issue warranting an interlocutory appeal."[9] The court determined that "manipulation cases tend to be characterized by a fact-intensive analysis, a fully developed factual record will benefit any future appellate review."[10]

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[4] *Anderson v. Dairy Farmers of Am., Inc.*, No. 08-4726 (D. Minn. July 17, 2008) (Complaint).
[5] *Anderson v. Dairy Farmers of America, Inc.*, No. 08-4726, 2010 U.S. Dist. LEXIS 104191 *1 (D. Minn. Sept. 30, 2010).
[6] *Id.* at *22.
[7] *Id.* at *23.
[8] *Anderson v. Dairy Farmers of America, Inc.*, No. 08-4726, 2010 U.S. Dist. LEXIS 145342 *1 (D. Minn. Oct. 27, 2010).
[9] *Anderson v. Dairy Farmers of America, Inc.*, No. 08-4726, 2010 U.S. Dist. LEXIS 145342 *3 (D. Minn. Oct. 27, 2010).
[10] *Anderson v. Dairy Farmers of America, Inc.*, No. 08-4726, 2010 U.S. Dist. LEXIS 145342 *4 (D. Minn. Oct. 27, 2010).

In December of 2010, the parties settled for an undisclosed amount, and stipulated to dismissal of the action.[11] On January 5, 2011, the District Court of Minnesota ordered the action to be dismissed with prejudice.[12]

***Kohen v. Pacific Inv. Management, Co., LLC*[13]**

Class-Plaintiffs [14] alleged that defendant purchased "an extraordinarily large long position of in excess of $16,000,000,000 worth of June 2005 Ten Year Treasury Note Futures Contracts."[15] Then defendant did not liquidate its large June long contract position when open interest in the June contract "plunged by 70%"[16] and defendant purchased large "holding, of $13.3 billion worth, of U.S. Treasury Notes that were cheapest to deliver on June Contract"[17] resulting in defendant holding a substantial portion of the contract. Defendant's position caused the June contract to be manipulated to artificially high levels and increased its volatility.[18]

In late 2010, the parties agreed to a settlement of $92 Million.[19] The settlement was approved in early 2011,[20] and as late as June 2012, late-comers were being allowed to intervene in the settlement.[21]

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[11] *See Anderson v. Dairy Farmers of America, Inc.*, No. 08-4726, (D. Minn. Dec. 08, 2010).
[12] *See Anderson v. Dairy Farmers of America, Inc.*, No. 08-4726, (D. Minn. Jan. 05, 2011).
[13] First complaint filed on August 16, 2005, in the Northern District of Illinois, as *Chiu v. Pac. Inv. Mgmt., LLC*, No. 05-4681.
[14] "All persons who purchased, between May 13, 2005 and June 30, 2005 ("Class Period"), inclusive, a June 10-year Treasury note futures contract in order to liquidate a short position, or who delivered on the June 2005 futures contract in order satisfy a short position (the "Class")."' *Kohen v. Pac. Inv. Mgmt., LLC*, No. 05-4681, Corrected Consolidated Amended Complaint. Doc. # 40, ¶ 94. (N.D. Ill. Dec. 29, 2005).
[15] *Kohen v. Pac. Inv. Mgmt., LLC*, No. 05-4681, Corrected Consolidated Amended Complaint. Doc. # 40, ¶¶ 3-8. (N.D. Ill. Dec. 29, 2005).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Bhaktavatsalam, Vidya. "Pimco to Pay $92 Million to Settle Market Manipulation Lawsuit." Bloomberg.com. Dec. 31, 2010. <http://www.bloomberg.com/news/2010-12-30/pimco-to-pay-92-million-to-settle-futures-lawsuit.html>. (Accessed March 26, 2013).
[20] *Kohen v. Pac. Inv. Mgmt., LLC*, No. 05-4681, Order Preliminarily Approving Settlement. Doc. # 563. (N.D. Ill. Jan. 26, 2011).

In re: Amaranth Natural Gas Commodities Litigation[2223]

Amaranth, a hedge fund once valued at $9.3 billion, collapsed after losing more than $6 billion in poorly made bets on the natural gas sector over the course of a few days in September 2006. In July 2007, Plaintiffs filed their class action complaint alleging that Amaranth exploited its influence in order to drive up prices on natural gas futures in violation of sections 6(c), 6(d), and 9(a)(2) of the CEA.[24] Plaintiffs alleged that, at one point, Amaranth held as many as 100,000 natural gas futures contracts, which represented five percent of the natural gas used in the U.S. in one year. After the denial of a motion to dismiss the complaint, Amaranth responded to the complaint by arguing that merely buying and selling large contracts was not market manipulation.[25]

On September 30, 2010, Judge Shira A. Scheindlin issued an opinion certifying a class consisting of persons who purchased New York Mercantile Exchange ("NYMEX") natural gas futures contracts, which had certain expiration dates and fulfilled other criteria, between Feb. 16, 2006, and Sept. 28, 2006.[26] The certified class included more than 1,000 potential claimants.

Amaranth claimed that the proposed class was impractical because it would be too difficult for the court to ascertain whether potential members had net short or long positions, as required by the class definition, but the judge ruled that would not be a problem. "Although plaintiffs' proposed class is more complex than others previously

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[21] *Kohen v. Pac. Inv. Mgmt., LLC*, No. 05-4681, Order. Doc. #623. (N.D. Ill. June.15, 2012).
[22] The author's firm, Louis F. Burke P.C., was co-lead counsel for plaintiffs along with two other firms.
[23] *In Re Amaranth Natural Gas Commodities Litigation,* No. 07-6377 (S.D.N.Y.Complaint filed July 12, 2007).
[24] *In re Amaranth Natural Gas Commodities Litigation*, No. 07-Civ.-6377 Complaint Doc. #1 (S.D.N.Y. filed July 12, 2007).
[25] *In re Amaranth Natural Gas Commodities Litigation*, No. 07-Civ.-6377 Motion to Dismiss Complaint, (S.D.N.Y. filed April 18, 200).
[26] *In re Amaranth Natural Gas Commodities Litigation*, 269 F.R.D. 366 (S.D.N.Y. 2010).

certified by courts in commodities actions, it is not so complex as to prevent certification," Scheindlin wrote. "Although it will require some complex math, whether a proposed class member held a net long or short position on a particular contract can be determined objectively through mechanical calculation."[27]

While Amaranth argued that the proposed class representatives failed to provide evidence of injury and therefore lack standing, the judge noted that plaintiffs were not required to prove they suffered an injury at the class certification stage. For the purposes of certification, Judge Scheindlin ruled that plaintiffs adduced sufficient evidence that they suffered a net loss. The judge also ruled that the class is sufficiently numerous to warrant certification, and that the class members will all make similar legal arguments about their claims.[28]

In a rare twist, on May 17, 2010, the court granted plaintiffs' motion seeking a prejudgment attachment of $72.4 million against a master fund entity (Amaranth LLC) associated with Amaranth.[29] The Amaranth master fund had sought to distribute the $72.4 million to its feeder fund investors (including offshore entities) and also to its former employees as deferred compensation. Plaintiffs argued that if the money were distributed, plaintiffs would likely be unable to collect any final judgment won in the case since the potential judgment would far exceed the approximately $110 million that the Amaranth master fund would have had left after the proposed $72.4 million distribution. Plaintiffs further argued that they were likely to prevail at trial on their claims given, among other things, the fact that Amaranth's head trader Brian Hunter had been found liable for market manipulation by the Federal Energy Regulatory Commission ("FERC") in a

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[27] *Id.*
[28] *In re Amaranth Natural Gas Commodities Litigation*, 269 F.R.D. 366 (S.D.N.Y. 2010).
[29] *In re Amaranth Natural Gas Commodities Litigation*, 711 F.Supp. 2d 301 (S.D.N.Y. 2010).

proceeding that was premised on some of the same trading that underlies the Amaranth class action.

The Amaranth master fund argued that plaintiffs should not be granted attachment because they were unlikely to prevail on their CEA Section 2(a)(1) agency claims against the Amaranth master fund, because, defendant argued, Amaranth's trading advisor entity was not its agent. Under the court's ruling, Amaranth LLC was prohibited from distributing the $72.4 million in question during the pendency of the class action.[30]

Late in 2011, the parties agreed to settle[31] for approximately $77.1 million.[32] On April 11, 2012, the court made a final certification of the Amaranth class, superseding the certification reflected in the Order entered by the court on September 30, 2010, [33] and approved the settlement in accordance with Federal Rule of Civil Procedure 23.[34]

In Re Dairy Farmers of America, Inc., Cheese Antitrust Litigation

Plaintiffs alleged that defendants conspired to "to fix, stabilize, raise and maintain the prices of Class I & III Milk and products containing Class I & III Milk including all cheeses (other than cottage cheese) ("Dairy Products") through the manipulation of trading on the Chicago Mercantile Exchange ("CME"). To further their conspiracy, defendants manipulated and raised prices for cheese on the CME Cheese Spot Call Auction ("Cheese Spot") Market and June, July and August 2004 futures contracts on the CME Class III Milk Futures ("Milk Futures") Market. The Cheese Spot

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[30] *In re Amaranth Natural Gas Commodities Litigation*, 711 F.Supp. 2d 301 (S.D.N.Y. 2010).
[31] *See In Re: Amaranth Natural Gas Commodities Ligation*, No. 07-6377, Order Preliminarily Approving Proposed Settlement, Scheduling Hearing for Final Approval Thereof, and Approving the Proposed Form and Program of Notice to the Class. Doc. # (S.D.N.Y. Dec. 16, 2011).
[32] *In Re: Amaranth Natural Gas Commodities Ligation*, No. 07-6377, Memorandum in Support of Motion for Preliminary Approval of Class Action Settlement, Doc. # 365. (S.D.N.Y. Dec. 13, 2011).
[33] *In Re: Amaranth Natural Gas Commodities Ligation*, No. 07-6377, Final Order and Judgment, (S.D.N.Y. April 11, 2012). Doc. #404 and 408 Final Order and Judgment, (S.D.N.Y. April 17, 2012).
[34] *Id.*

market is thinly traded and the defendants knowingly inflated the prices of Milk Futures Contracts".[35]

On March 21, 2013, certain defendants agreed to a $46 million settlement with plaintiffs. [36]

II. Recently Dismissed Class Actions

Hershey v. Energy Transfer Partners[37]

In 2007, plaintiffs filed a CEA based class action alleging that between December 29, 2003 and December 31, 2005, defendants manipulated natural gas prices by "selling massive amounts of fixed natural gas for prompt month delivery at artificially low, non-competitive prices at major natural gas trading hubs."[38] Then, the defendants intentionally submitted price and volume trade information for the artificial natural gas trades to trade publications that play an integral role in determining the spot, futures and options contract prices for natural gas that traded on NYMEX.

Defendants responded to plaintiff's allegations with a motion to dismiss arguing that plaintiffs failed to plead facts demonstrating defendant's specific intent to affect the major natural gas hubs or NYMEX futures prices. Defendants continued that because plaintiffs failed to properly plead defendant's intent to manipulate natural gas prices, plaintiffs failed to establish a CEA claim. The district court agreed with the defendants

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[35] *In Re Dairy Farmers of Am. Inc., Cheese Antitrust Litig.*, No 09-3690 (N.D. Ill. Complaint filed June 15, 2009).
[36] *In Re Dairy Farmers of Am. Inc., Cheese Antitrust Litig.*, No 09-3690, Notice of Motion for Settlement, Doc. # 328 (March 21, 2013).
[37] *Hershey v. Energy Transfer Partners, L.P., et. al*, No. 07-03349, (S.D. Tex. Complaint filed Oct. 10, 2007).
[38] *Id.*

that the plaintiffs failed to properly plead defendant's specific intent to manipulate natural gas prices and granted defendant's motion to dismiss.[39] Plaintiffs appealed.[40]

On June 23, 2010, the Fifth Circuit affirmed the district court's dismissal of *Hershey v. Energy Transfer Partners, L.P,*[41] and reiterated the district court's finding that the plaintiffs failed to allege facts demonstrating the defendant's specific intent to manipulate natural gas prices. The Fifth Circuit also found that defendant's mere knowledge, that their actions could influence natural gas prices, was not enough to sustain an action under the CEA.[42]

In re Western States Wholesale Natural Gas Antitrust Litigation[43]

In Re: Western States Wholesale Natural Gas Antitrust Litigation, is a complex, almost decade long, consolidated multidistrict litigation, arising out of the energy crisis of 2000-2001. Plaintiffs alleged defendant-natural gas providers conspired to engage in anti-competitive activities with the intent to manipulate and artificially increase the price of natural gas for consumers. "Specifically, [d]efendants conspired to knowingly deliver false reports concerning trade information to price indices, and engaged in wash trades."[44]

Defendants moved to dismiss plaintiff's complaint and argued that the Natural Gas Act "preempted plaintiff's state law claims under the doctrines of field and conflict

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[39] *Hershey v. Energy Transfer Partners, L.P.*, 610 F. 3d 239 (5th Cir. 2010).
[40] *Id.*
[41] 610 F.3d 239 (5th Cir. 2010).
[42] *Id.*
[43] *In Re Western States Wholesale Natural Gas Antitrust Litigation,* No. 03-1431 (D. Nev. Complaint filed Nov. 14, 2003).
[44] *In re Western States Wholesale Natural Gas Antitrust Litigation,*No. 03-1431 Order. Doc. # 1972. (D. Nev. July 18, 2011).

preemption."[45] The defendants argued that FERC, was the entity that the federal government had designated to have jurisdiction over the defendant, and that FERC's federal authority preempted state law authority over the defendant. The district court dismissed plaintiff's claims and "suggested, FERC's exclusive jurisdiction over the transportation of natural gas interstate commerce, the sale of natural gas in interstate commerce for resale, and the natural gas companies engaged in such transportation or sales may preempt plaintiff's state law claims."[46]

The plaintiffs clarified that "they did not concede the question of defendant's participation in the interstate market during the relevant time period."[47] The court reconsidered its decision, and determined that it was not clear from the face of the amended complaint that defendants engaged in sales within the jurisdiction of FERC, and, procedurally, on a motion to dismiss the court had to construe the amended complaint in the plaintiff's favor.

Defendants then moved for summary judgment arguing "they were natural gas companies subject to FERC's exclusive jurisdiction during the relevant time period, and consequently, plaintiff's claims are pre-empted."[48] The court denied defendant's motion for summary judgment finding that "defendant's status as jurisdictional sellers during the relevant time period, did not preclude the possibility that defendants engaged in manipulative conduct in non-jurisdictional transactions."[49]

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[45] *In re Western States Wholesale Natural Gas Antitrust Litigation*,No. 03-1431 Order. Doc. # 1972. (D. Nev. July 18, 2011).
[46] *In re Western States Wholesale Natural Gas Antitrust Litigation*,No. 03-1431 Order. Doc. # 1972. (D. Nev. July 18, 2011).).
[47] *In re Western States Wholesale Natural Gas Antitrust Litigation*,No. 03-1431 Order. Doc. # 1972. (D. Nev. July 18, 2011).
[48] *Id.*
[49] *Id.*

Defendants filed a motion to reconsider which the court granted and directed defendants to refile their motion for summary judgment and contend that "their alleged practices of false price reporting and wash trades directly affected a jurisdictional rate, and fall within FERC's exclusive jurisdiction."[50]

Plaintiffs responded by seeking reconsideration of the court's November 2, 2009 Order, again arguing that their state law claims were not preempted.[51]

In 2011, the district court granted the defendant's motion for summary judgment, in part, finding that defendants were jurisdictional sellers during the relevant time period, no issue of material fact remained, and defendant's practices affected a jurisdictional rate to which FERC's exclusive jurisdiction attaches.[52] The plaintiffs appealed the district court's determination, but at least one plaintiff has withdrawn their appeal pending in the Ninth Circuit.[53]

In Re Commodity Exchange, Inc., Silver Futures and Options Trading Litigation[54][55]

Over 40 complaints were filed in late 2010 and early 2011, by proposed class plaintiffs that were "individuals who transacted in [Commodity Exchange, Inc. ("COMEX")] silver futures and options contracts on June 6, 2007 and also between March 17, 2008 and October 27, 2010."[56] Plaintiffs alleged that various J.P. Morgan entities, as well as 20 unnamed "John Doe" defendants, manipulated the silver futures

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[50] *Id.*
[51] *In re Western States Wholesale Natural Gas Antitrust Litigation*,No. 03-1431 Order. Doc. # 1972. (D. Nev. July 18, 2011).
[52] *Id.*
[53] *In re Western States Wholesale Natural Gas Antitrust Litigation,* No. 03-1431 Order. Doc. # 2112. (D. Nev. Nov. 16, 2012).
[54] The author's firm, Louis F. Burke P.C., filed a complaint in this action.
[55] No. 10-08254 (S.D.N.Y. filed Nov. 1, 2010).
[56] *In Re Commodity Exchange, Inc., Silver Futures and Options Trading Litigation*, No. 11-2213, Doc. # 146 (S.D.N.Y. March 18, 2013).

market, in violation Section 9(a) and 22(a) of the CEA, 7 U.S.C. §§ 13(a), 25(a), and Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1.

On December 21, 2012, Judge Patterson dismissed plaintiff's consolidated class action complaint, finding "plaintiffs had failed to allege adequately scienter, the existence of artificial prices, or causation as required by the CEA."[57] The court also found that plaintiffs failed to adequately "allege the existence of a conspiracy to manipulate market prices as required by the Sherman Antitrust Act."[58]

The plaintiffs argued that it was necessary for the court to grant leave to amend their complaint. The court gave plaintiffs 30 days to file a motion for leave to amend their complaint, and plaintiffs filed their motion on January 22, 2013. Defendants responded to plaintiff's motion with a memorandum in opposition. Defendants argued that plaintiff's proposed amended complaint still failed to adequately plead violations of the CEA or Sherman Antitrust Act. The defendants also argued that the plaintiff's proposed amended complaint was "futile and 'dilatory,'"[59] would cause defendants undue prejudice, and would waste judicial resources.

On March 18, 2013, Judge Patterson denied the plaintiff's motion for leave to file an amended consolidated class action complaint and dismissed the action.[60] The court found that the plaintiffs failed to remedy the deficiencies of their previous pleadings. Specifically, the court found that the plaintiffs failed to properly plead the specific intent element of their CEA claim, and failed to allege that defendant's knowledge that their

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[57] *In Re Commodity Exchange, Inc., Silver Futures and Options Trading Litigation*, No. 11-2213, Doc. # 146 (S.D.N.Y. March 18, 2013).
[58] *Id.*
[59] *Id.*
[60] *Id.*

actions would impact the market, without more,[61] was not enough to demonstrate intent. Plaintiffs also failed to demonstrate that defendant's actions actually moved the price of silver futures contracts. Finally, the court found that the plaintiffs failed to show good cause as to why they should be granted leave to re-plead the antitrust claim and dismissed the case.[62]

On April 16, 2013, plaintiffs appealed the Southern District's dismissal of the case.[63]

III. ACTIVE CEA CLASS ACTIONS

In Re: Platinum and Palladium Commodities Litigation[64]

In 2010, class-plaintiffs alleged that between October 17, 2007, and June 6, 2006, defendants "engaged in a scheme to cause, and did cause, artificially high prices of platinum futures contracts traded in this District on NYMEX, as well as artificially high physical prices of platinum and palladium."[65]

In the summer of 2012, the Defendants responded to the plaintiff's third amended complaint by filing, and then withdrawing, their motion to dismiss plaintiffs amended class action complaint. In early March, the Court extended the time for the defendants to file their motion to dismiss until May 2013.[66]

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[61] The court cited, *CFTC v. Parnon Energy, Inc.*, "where complaint alleged that defendants had "awareness of the tight [crude oil] market" and engaged in contemporaneous communications discussing plans to execute a market manipulation strategy"' 875 F. Supp. 2d 233, 249-50 (S.D.N.Y. 2012). In this case, the plaintiffs failed to allege that defendant engaged contemporaneous communications discussing intent to manipulate silver the silver market.

[62] *In Re Commodity Exchange, Inc., Silver Futures and Options Trading Litigation*, No. 11-2213, Doc. # 146 (S.D.N.Y. March 18, 2013).

[63] *In Re Commodity Exchange, Inc., Silver Futures and Options Trading Litigation*, No. 11-2213, Doc. # 149 (S.D.N.Y. April 16, 2013).

[64] *In Re Platinum and Palladium Commodities Litigation*, No. 10-3617 (S.D.N.Y. Complaint filed April 30, 2010).

[65] *Id.*

[66] *In Re Platinum and Palladium Commodities Litigation*, No. 10-3617, Revised Scheduling Order, Doc. #129 (S.D.N.Y. March 7, 2013).

In Re Crude Oil Commodity Futures Litigation[67]

Plaintiffs filed a complaint alleging that between at least January 1, 2008, and at least May 15, 2008, defendant's acted to intentionally manipulate the prices of NYMEX WTI Crude Oil Futures contracts in violation of section 9(a) of CEA.[68]

Plaintiffs alleged that defendant's scheme consisted of defendant's purchasing long positions that would profit if spreads increased to above what defendants paid to purchase. Prices would increase if market participants perceived WTI Crude Supplies were at low levels. To create the perception of low supplies of WTI Crude, defendants purchased large amounts of physical WTI crude oil for which they had no commercial need. Defendant's false signals of scarcity inflated the WTI crude oil prices and NYMEX crude oil futures contracts prices. Then, defendants sold their long positions and bought their short positions. Defendant's short positions would profit if the market perceived that WTI crude oil prices were significantly increasing. After defendant's purchase of short positions, they dumped their physical crude on the market which reduced the price of the WTI crude oil futures contract prices and defendants profited.[69]

In January 2013, Defendants submitted an answer to the plaintiff's consolidated class action complaint. Defendant's answer contained simple paragraph by paragraph denials of the plaintiff's allegations without further analysis.[70]

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[67] *In Re Crude Oil Commodity Futures Litigation*, No. 11-3600 (S.D.N.Y. Complaint Filed May 26, 2011).
[68] *Id.*
[69] *Id.*
[70] *Id.*

In Re Term Commodities Cotton Futures Litigation[71]

Plaintiffs alleged that defendants manipulated and artificially inflated the prices of Intercontinental Exchange ("ICE") Cotton No. 2 futures contract expiring in May 2011, and the cotton futures contract expiring in July 2011.[72] Plaintiffs alleged, *inter alia,* that the defendants "record ratio of deliveries caused May 2011 Contract prices relative to July 2011 Contract prices to move to the highest percentage backwardation[73] and the highest absolute backwardation of any May-July Contract in the history of cotton futures trading for the time period of April 1 – May 6 of each year from 2000 – 2011, inclusive."[74]

The defendant's motion to dismiss the plaintiff's consolidated amended complaint argues, *inter alia,* that defendants lacked the ability or intent to manipulate prices, plaintiffs have avoided the requirement of alleging market congestion, and plaintiffs failed to allege that prices were artificial or that defendants caused artificial prices.[75]

Currently, the parties are arguing defendant's motion to stay discovery.[76]

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[71] *In Re Term Commodities Cotton Futures Litigation*, No. 12-05126 (S.D.N.Y. Complaint Filed June 29, 2012).
[72] *In Re Term Commodities Cotton Futures Litigation*, No. 12-05126 Amended Complaint. Doc. #15. (S.D.N.Y.Sept. 12, 2012).
[73] Backwardation is defined in footnote 2 of the complaint as: "a condition in which the price of the earliest expiring futures contract price exceeds the prices of later expiring futures contracts. In contrast to a backwardation, a "carrying charge" means that the price of the later expiring futures contracts are higher than the price of the earliest expiring futures contract. This is called a "contango" or, often, a "carrying charge" market because the somewhat higher prices of the deferred contracts, compensate the holder of the commodity for the "carrying charges" of continuing to store the commodity (here, cotton) until the later delivery dates." *See, infra.*
[74] *Id.*
[75] *In Re Term Commodities Cotton Futures Litigation*, No. 12-05126 Motion to Dismiss Consolidated Amended Complaint. Docs. #25-26. (S.D.N.Y. Nov. 28, 2012).
[76] *In Re Term Commodities Cotton Futures Litigation*, No. 12-05126 *e.g.* Docs. #48 and 52 . (S.D.N.Y. 2013).

IV. LIBOR

The litigation involving manipulation of the London Interbank Offered Rate ("Libor") has exploded over the past two years. Libor "is the primary benchmark for short term interest rates globally."[77] Libor is used to determine interest rates for complicated derivative and loan documentation for large investors and, in contrast, to determine interest rates for retail products for the average consumer, such as college loans and mortgages. Libor is also "used as a barometer to measure strain in money markets and as a gauge of market expectation for future central bank interest rates. It is also the basis for settlement of interest rate contracts on many of the world's major futures and options exchanges."[78]

Libor "affects the pricing of trillions of dollars' worth of financial transactions."[79] Libor litigation has become so large it has been compared to asbestos class action litigation,[80] and called "The Next Big Wave in Financial Crisis Lawsuits."[81] Since the August 12, 2011, order to consolidate cases into Multi-District Litigation ("MDL"), 46 cases[82] have been consolidated under the caption *In Re Libor-Based Financial Instruments Antitrust Litigation*, MDL No. 2262.

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[77] "What is Libor used for." http://www.bbalibor.com/bbalibor-explained/the-basics (Accessed March 27, 2013).
[78] *Id.*
[79] *In Re: Libor Based Financial Instruments Antitrust Litigation,* No. 11-MD-2262, 2013 U.S. Dist. LEXIS 4509 *31 (S.D.N.Y. March 29, 2013).
[80] Farzard, Roben. "Libor, the New Asbestos." Bloomberg Businessweek. Aug. 1, 2012 http://www.businessweek.com/articles/2012-08-01/libor-the-new-asbestos. (Accessed March 27, 2013).
[81] Perrow, Robert D. "Libor Litigation: The Next Big Wave in Financial Crisis Lawsuits?" Martindale.com. Sept. 18, 2012. http://www.martindale.com/litigation-law/article_Williams-Mullen_1588598.htm. (Accessed March 27, 2013).
[82] This number is accurate as of April 22, 2013.

The variety of products at issue in the litigation range from Libor-Based Derivatives sold on the Chicago Mercantile Exchange or the Chicago Board of Trade,[83] futures or options based on Eurodollar deposits,[84] and retail loans with interest rates tied to Libor.[8586] Even though the products at issue vary, the complaints filed similarly allege that the Libor panel bank defendants ("defendants") manipulated Libor by "collusively and systematically [suppressing] LIBOR."[87]

On June 29, 2012, defendants filed motions to dismiss, and the cases that were subject to defendants' motion to dismiss were organized into four categories: "cases brought by (1) over-the-counter ("OTC") plaintiffs, (2) exchange-based plaintiffs, (3) bondholder plaintiffs, and (4) Charles Schwab plaintiffs (the "Schwab plaintiffs")." Each category is represented by a single lead plaintiff.[88]

On August 14, 2012, the complaints filed became so numerous that the Southern District of New York issued a "Memorandum and Order Imposing a Stay on All Complaints not then subject to defendants' motion to dismiss."[89] The court encouraged prompt filing of new complaints, but stated that those complaints would not be addressed until the Court clarified the legal landscape with a decision on defendants' motions.[90]

On March 29, 2013, the defendants' motions to dismiss were granted in part and denied in part. The Court dismissed the plaintiffs' anti-trust claim finding the "process by which banks submit Libor quotes to the [British Bankers Association ("BBA")] is not

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[83] *See, e.g., Hershey v. Credit Suisse, et al.* No. 11-02625 (N.D. Ill. Complaint Filed April 19, 2011).
[84] *See, e.g., Gary Francis v. Bank of America Corp., et. al.,* No. 11- 3423 (S.D.N.Y. Complaint Filed May 19, 2011).
[85] *See, e.g., The Berkshire Bank v. Bank of America Corp., et al,* No. 12-5723 (S.D.N.Y. Complaint Filed July 25, 2012).
[86] This list is non-exclusive it is merely a few examples of products at issue.
[87] *In Re: Libor Based Financial Instruments Antitrust Litigation,* at *31.
[88] *Id.* at *23-24.
[89] *Id.* at *24.
[90] *Id.* at *25.

itself competitive."[91] Because the process by which the banks submitted Libor quotes is not competitive, the plaintiffs failed to allege "that their injury resulted from any harm to competition" or "defendants' conduct has an anticompetitive effect in any market in which defendants compete."[92]

Next, the court dismissed plaintiffs' "claims based on contracts entered into between August 2007 and May 29, 2008" as time-barred[9394] because the court found that "numerous articles published in April and May 2008 in prominent national publications placed plaintiffs on notice their injury."[95] The court also dismissed the plaintiffs' RICO claim because it is barred by the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the enterprise alleged by plaintiffs is based in England. The court dismissed all state law claims it did not exercise supplementary jurisdiction over without prejudice.[96]

The court denied defendant's motion to dismiss plaintiffs' CEA claims based on contracts entered into between April 15, 2009 and May 2010.[97] On April 12, 2013, three defendants, The Bank of Tokyo-Mitsubishi UFJ, Ltd., Credit Suisse Group AG and the Norinchukin Bank (collectively, movants), submitted a motion for reconsideration or reargument to the court. The three movants argued that the remaining CEA claims should be dismissed against them. The movants explained that "the court did not apply well-

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[91] *In Re: Libor Based Financial Instruments Antitrust Litigation*, at *206.
[92] *Id.*
[93] *In Re: Libor Based Financial Instruments Antitrust Litigation*, at *206-207.
[94] Claims based on contracts purchased between May 30, 2008 and April 14, 2009, may or may not be barred, but the court did not dismiss them. *See, In Re: Libor Based Financial Instruments Antitrust Litigation*, at *207.
[95] *Id.* at *206-207.
[96] The Court exercised supplementary jurisdiction over the Cartwright Act Claims and the New York Common Law unjust enrichment claim by dismissing those state law claims with prejudice. *In Re: Libor Based Financial Instruments Antitrust Litigation*, at 208.
[97] *In Re: Libor Based Financial Instruments Antitrust Litigation*, No. 11-MD-2262, Motion to Reconsider, Docs. # 296 and 297 (S.D.N.Y. April 12, 2013).

settled law requiring plaintiffs to allege particularized facts that give rise to a strong inference of scienter for defendant" and because the plaintiff's did not allege specific facts about the movants in their complaint, "the Court should dismiss the CEA claims as to movants."[98]

V. CONCLUSION

In reviewing the most recent CEA class actions, the following two trends emerge. First, where courts have approved class certification, denied defendant's motion to dismiss or denied defendant's motion for summary judgment, the parties quickly become amicable to settlement. Where the plaintiff has been unable to plead facts that show that defendant acted with specific intent, or created an artificial price in the market, the courts have granted defendants' motions to dismiss. Without properly pleading facts that demonstrate the defendant's intent to manipulate the markets, plaintiffs cannot prevail on their CEA claim.[99]

[98] *In Re: Libor Based Financial Instruments Antitrust Litigation*, No. 11-MD-2262, Motion to Reconsider, Docs. # 296 and 297 (S.D.N.Y. April 12, 2013).

[99] *In Re Western States'* dismissal based on FERC's jurisdiction preempting the authority of state law claims seems to be an outlier, but may have an impact on future cases based on manipulation of energy contracts.