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

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| UNITED STATES OF AMERICA, | 17 Cr. 19 (RMB) |
| Government, | **DECISION & ORDER** |
| -against- | |
| RICHARD USHER, ROHAN RAMCHANDANI, and CHRISTOPHER ASHTON, | |
| Defendants. | |

## I. Background

On January 10, 2017, Richard Usher, Rohan Ramchandani, and Christopher Ashton (collectively, "Defendants") were charged in the Southern District of New York in a one-count indictment ("Indictment") with conspiracy to restrain trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The Government alleges that from at least as early as December 2007 and continuing at least through January 2013, Defendants and others "participated in a combination and conspiracy to suppress and eliminate competition for the purchase and sale of EUR/USD [i.e. Euros/U.S. Dollars] in the United States and elsewhere by fixing, stabilizing, maintaining, increasing, and decreasing the price of, and rigging bids and offers for, EUR/USD in the FX Spot Market [i.e. the foreign currency exchange spot market]." Indict. ¶ 18. The Indictment alleges that Defendants' conspiracy "involved trade or commerce within the United States and U.S. import trade." Id. ¶ 24.

Defendants are former currency traders from the United Kingdom who during the relevant time period were employed by dealers in the FX Spot Market that were "affiliates" of The Royal Bank of Scotland plc., JPMorgan Chase & Co, Citicorp, and Barclays PLC,

respectively.[1] See id. ¶¶ 13-16. According to the Indictment, Defendants and their co-conspirators "refrain[ed] from trading against each other's interests and coordinat[ed] their bidding, offering, and trading . . . for the purpose of increasing, decreasing, maintaining, and stabilizing the price of EUR/USD, including by refraining from bidding, offering, and trading at certain times." Id. ¶ 23. Defendants allegedly manipulated two benchmarks of the EUR/USD exchange rate, namely, the World Markets/Reuters fix ("WMR Fix") and the European Central Bank's reference rate ("ECB Fix"). See id. They did this by "coordinating their bidding, offering, and trading . . . around the time of certain ECB and WMR fixes." Id. "Fix prices can be used in many ways, including as a point of reference for market participants who are monitoring the price of EUR/USD, or as an agreed-upon price for a currency trade that will take place at a future time." Id. ¶ 9. Defendants allegedly filled customer orders at prices determined by such fix rates. Id. ¶ 23.

In furtherance of the conspiracy, Defendants and their co-conspirators allegedly "participat[ed] in telephone calls and electronic messages, including engaging in near-daily conversations in a private electronic chat room, which the chat room participants, as well as others in the FX Spot Market, at times referred to as 'The Cartel' or 'The Mafia.'" Id. They discussed with one another, among other things, past, current, and future customer orders and trades; customer names; and risk positions. Id.

In March 2016, the U.K. Serious Fraud Office ("SFO") informed Defendants that, following their investigation, "based on the information and material we have obtained . . . there

[1] Richard Usher was allegedly employed by a dealer in the FX Spot Market that was an affiliate of The Royal Bank of Scotland plc. and later by an affiliate of JPMorgan Chase & Co. Indict. ¶ 13. Rohan Ramchandani was employed by a dealer in the FX Spot Market that was an affiliate of Citicorp. Id. ¶ 14. Christopher Ashton was employed by a dealer in the FX Spot Market that was an affiliate of Barclays PLC. Id. ¶ 15.

is insufficient evidence for a realistic prospect of conviction in this jurisdiction." See Tewksbury Decl. Supp. Mot. Dismiss Indictment, dated Nov. 17, 2017, Ex. H ("SFO Letter"). The SFO also stated that **"[t]his does not reflect or impact on any decision which might be taken by any other agency, whether domestic or overseas, in relation to the same conduct."** Id. (emphasis added).

On November 17, 2017, Defendants filed a motion to dismiss the Indictment arguing, among other things, that: **(1)** the Indictment "fails to allege that Defendants competed on the same side of the FX spot market, a necessary condition to describing a horizontal restraint among competitors." Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss, dated Nov. 17, 2017 ("Defs. Mem."), at 10. And, according to Defendants, "[c]ourts lack the 'considerable experience' with the practices intrinsic to FX trading that is necessary to support a conclusion that the conduct alleged here is per se unlawful" under the Sherman Act, id. at 13**; (2)** the Indictment alleges conduct outside the Sherman Act's extraterritorial scope because it "charges three British citizens, working for banks in London, with conspiring to manipulate a 'global market' through trades made entirely outside the United States," id. at 19**; (3)** the Indictment violates the Due Process Clause of the U.S. Constitution, id. at 2**;** and **(4)** the Court should decline to exercise jurisdiction on international comity grounds, id.

On December 8, 2017, the Government filed its opposition contending, among other things, that: **(1)** Defendants' alleged conduct "is the classic definition of horizontal price fixing." Hr'g Tr., dated March 26, 2018, at 17. "What they're accused of is working in the market as a whole to fix the market price." Id. at 20. And, according to the Government, "Defendants misconstrue the per se standard when they caution that the FX industry is somehow different from those with which [U.S.] courts have experience," Gov.'s Mem. of Law in Opp'n to Def.'s

Mot. to Dismiss, dated Dec. 18, 2017 (Opp'n) at 13; **(2)** Defendants' alleged conduct falls squarely within the Sherman Act's territorial scope. Defendants "knowingly joined a conspiracy that centered on the official currency of the United States [U.S. dollars], **and** also involved U.S. interstate and U.S. import commerce and sales to customers in the United States," id. at 1 (emphasis added); **(3)** the instant prosecution is consistent with Due Process because Defendants' conduct had a "sufficient nexus" to the United States and Defendants had "fair warning" of the potential criminality of their alleged actions, id. at 28; and **(4)** principles of "international comity [are] not a relevant issue in this criminal case." Id. at 3. There is no conflict between the U.K. and the U.S. as to this prosecution, as reflected in the SFO letter quoted at p. 3 supra. Id. at 32.

On December 18, 2017, Defendants filed a reply. Defs.' Reply Mem. of Law in Supp. of Defs.' Mot. to Dismiss, dated Dec. 18, 2017 ("Defs. Reply"). Helpful oral argument was held on March 26, 2018. See Hr'g Tr., dated March 26, 2018.

**For the reasons set forth below, the Defendants' motion to dismiss the Indictment [#62] is denied.**[2]

## II. Legal Standard

The dismissal of an indictment is an extraordinary remedy and is "reserved only for extremely limited circumstances implicating fundamental rights." United States v. De La Pava, 268 F.3d 157, 165 (2d Cir. 2001) (internal quotations omitted).

"It is generally sufficient that the indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any

[2] Any arguments raised by the parties but not specifically addressed herein have been considered by the Court and rejected.

uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" DeVonish v. Keane, 19 F.3d 107, 108 (2d Cir. 1994) (quoting Hamling v. United States, 418 U.S. 87, 117 (1974)). "[I]n reviewing the facial sufficiency of an indictment, we assume that the facts recited in it are true." United States v. Capoccia, 354 F. App'x 522, 524 (2d Cir. 2009).

Courts have long held that horizontal price-fixing conspiracies are per se illegal under the Sherman Act when they include agreement among competitors "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); see also Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980). A horizontal agreement to fix prices, is "an agreement among competitors on the way in which they will compete with one another," Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 99 (1984), and is the "archetypal example" of per se illegality. Gelboim v. Bank of Am. Corp., 823 F.3d 759, 771 (2d Cir. 2016), cert. denied, 137 S. Ct. 814 (2017). Horizontal price fixing is "anathema to an economy predicated on the undisturbed interaction between supply and demand." Id. at 774.

"Vertical relationships, buy-sell relationships exist in every market. But the question of what one defendant is doing with another defendant at some random snapshot in time is not the relevant question in a Section 1 Sherman Act case. The relevant question is whether the nature of the restraint, the nature of the collusion that the defendants agreed to is horizontal; meaning, is it a restraint of trade between parties who compete in the market." Hr'g Tr., dated March 26, 2018, at 19.

The jurisdictional element of the Sherman Act may be pleaded by alleging that "the offending activities took place in the flow of interstate commerce" or that "the defendants'

general business activities had or were likely to have a substantial effect on interstate commerce." United States v. Giordano, 261 F.3d 1134, 1138 (11th Cir. 2001).

The Supreme Court has "definitively" established that Section One of the Sherman Act "applies to wholly foreign conduct which has an intended and substantial effect in the United States." United States v. Nippon Paper Indus. Co., 109 F.3d 1, 9 (1st Cir. 1997) (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993)).

"Comity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation." Id. at 8. "[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is [] reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 156 (2004) (emphasis in original).

## III. Analysis

### (1) The Indictment Sets Forth a Per Se Violation of the Sherman Act

Price-fixing conspiracies which entail agreements among competitors formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price are (clearly) per se restraints of trade under the Sherman Act. Socony-Vacuum Oil Co., 310 U.S. at 223. The Indictment in this case plainly alleges that Defendant competitors agreed to coordinate their bidding, offering, and trading (including their agreement to refrain from bidding, offering, and trading) in and around the time of ECB and WMR "fixes." Indict. ¶ 23. Defendants are alleged to have conspired "for the purpose of increasing, decreasing, maintaining, and stabilizing the price of EUR/USD by the time of the fix, profiting from trading in and around the time of the fix, and avoiding or lessening any loss from trading in and around the time of the fix." Id.

Defendants argue unpersuasively that the Indictment "fails to allege a horizontal restraint of trade," because Defendants "were not always buyers, or always sellers, in the FX spot market." Defs. Mem. at 8, 10. A horizontal agreement is between competitors at "the *same level* of the market structure." United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (emphasis added). A vertical agreement is one between persons at "*different levels* of the market structure," such as manufacturers and distributors. Id. (emphasis added); see also Hr'g Tr., dated March 26, 2018, at 19 ("The relevant question is whether the nature of the restraint, the nature of the collusion that the defendants agreed to is horizontal; meaning, is it a restraint of trade between parties who compete in the market.").

Defendants' alleged behavior constitutes a horizontal restraint of trade because it is an agreement among competitors at the same level of the market, i.e., they were traders working for dealers in the FX spot market who agreed "on the way in which they will compete with one another." See Nat'l Collegiate Athletic Ass'n, 468 U.S. at 99. Defendants are alleged to have agreed to "rig the euro-dollar auction that sets th[e] market price by coordinating their trading, and thus fixing the market price of the very product over which they compete." See Hr'g Tr., dated March 26, 2018, at 17. The Indictment clearly states that Defendants were traders in competition with one another in the FX Spot Market, and that their actions "to bid or not bid, to offer or not offer, to trade or not to trade, at certain times, and using certain tactics [] cause[d] or contribute[d] to a change in the exchange rate . . . ." Indict. ¶¶ 8, 13-15. Defendants in this case were competing at the "same level" of the market whether or not they were buying or selling at any given moment. See Topco Assocs., Inc., 405 U.S. at 608; see also In re Foreign Exchange Benchmark Rates Antitrust Litigation, 74 F. Supp. 3d 581, 592 (S.D.N.Y. 2015).

US courts have experience assessing price fixing. See, e.g., In re Foreign Exchange Benchmark Rates Antitrust Litigation., 74 F. Supp. 3d at 592 (where U.S. plaintiffs alleged a long-running conspiracy among the world's largest banks to manipulate the benchmark rates in the FX market, the court determined that "the U.S. Complaint plausibly alleges a price-fixing conspiracy among horizontal competitors, a per se violation of the antitrust laws"); see also Gelboim, 823 F.3d at 771. The Supreme Court has also explained:

> We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry. . . . In unequivocal terms, we stated that, '[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.'

Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 349 (1982).

**2. The Sherman Act Applies to Defendants' Conduct**

Defendants argue that their conduct falls outside the Sherman Act's reach, because the Indictment alleges only foreign transactions conducted by foreigners in foreign commerce. Defs. Mem. at 19. The Government responds that Defendants' conspiracy had the requisite nexus to the United States in at least two ways: first, the Indictment alleges price fixing and bid rigging involving U.S. interstate commerce, Opp'n at 17; and second, the Indictment alleges Defendants' foreign conduct was "import trade" that had a "substantial and intended effect in the United States." Id. at 19, 25 (emphasis removed).

Section 1 of the Sherman Act outlaws agreements in restraint of trade or commerce among the several States. 15 U.S.C. § 1. At the same time, the 1982 Foreign Trade Antitrust Improvements Act (15 U.S.C. § 6a, "FTAIA") "lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct [] sufficiently affects

American commerce, *i.e.,* it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce . . . ." Empagran S.A., 542 U.S. at 162 (quoting 15 U.S.C. § 6a). "[T]he FTAIA does not alter the Sherman Act's coverage of import trade; import trade is excluded from the FTAIA altogether." United States v. Hui Hsiung, 778 F.3d 738, 754 (9th Cir. 2015).

**Interstate Commerce**

Defendants contend that "payments from U.S. bank accounts do not transform foreign transactions—including currency transactions—into U.S. [] interstate commerce." Defs. Reply. at 7. The Government responds that the Indictment alleges conduct involving U.S. interstate commerce insofar as Defendants "engag[ed] in a scheme of anticompetitive price-fixing and bid-rigging activity involving customers in the United States, counterparties in the United States, and the transfer of U.S. Dollars between U.S. banks in different states." Opp'n at 18.

The Indictment sets forth that the "conspiracy engaged in by Defendants and their co-conspirators unreasonably restrained interstate commerce in violation of Section 1 of the Sherman Act." Indict. ¶ 18. The Government claims that Defendants received orders from customers in the United States and "fulfilled those orders through money traded at manipulated prices, often through trades with U.S. counterparties." Opp'n at 18 (citing Indict. ¶ 28). Defendants' trading directed "the transfer of substantial quantities of Euros and U.S. Dollars in a continuous and uninterrupted flow of interstate . . . commerce to counterparties located in various states in the United States from other states." Indict. ¶ 25; see also Giordano, 261 F.3d at 1138 (where the indictment alleged that "[t]he business activities of the defendants and co-

conspirators . . . were within the flow of, and substantially affected, interstate and foreign trade and commerce").[3]

**Import Trade**

Defendants argue that the Indictment "nowhere describes actual import commerce, namely 'transactions in which the seller is located abroad while the buyer is domestic and the goods flow into the United States.'" Defs. Mem. 21 (citation omitted). And, even if the conduct alleged is import trade, according to Defendants, it "neither had a substantial or intended effect in the United States," citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993). Defs. Mem. at 19. The Government responds that the alleged conduct constitutes import trade because "U.S. Dollars (and Euros) *were* the goods whose prices were fixed as the object of the alleged conspiracy and [were] imported into the United States." Opp'n at 21. And, according to the Government, "Defendants' criticism is unfounded because the Indictment pleads precisely that . . . [the] conspiracy had a substantial and intended effect in the United States." Id. at 25 (internal quotation marks and citation omitted).

The Government persuasively argues that Defendants' foreign conduct falls outside the scope of the FTAIA because the Indictment alleges that "the conspiracy involved . . . U.S. import trade or commerce in EUR/USD transactions."[4] Indict. ¶ 18; see also Hui Hsiung, 778 F.3d at 754 (where the Government "track[ed] the language of the Sherman Act in the indictment . . .

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[3] As noted, it is "generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." Hui Hsiung, 778 F.3d at 754 (quoting United States v. Morrison, 536 F.2d 286, 288 (9th Cir.1976)).

[4] The Government also argues the Indictment's allegations satisfy the requirement that "Defendants' conspiracy had a direct, substantial, and reasonably foreseeable effect on U.S. interstate and import commerce." Opp'n at 17-18.

[and] plead[ed] that defendants engaged in import trade."). As members of the conspiracy, Defendants allegedly "purchased, sold, and caused the transfer of substantial quantities of Euros and U.S. Dollars in a continuous and uninterrupted flow of [] U.S. import trade and commerce to counterparties located in various states in the United States from other states and foreign countries." Indict. ¶ 25. "U.S. Dollars (and Euros) *were* the goods whose prices were fixed as the object of the alleged conspiracy and [were] imported into the United States." Opp'n at 21 (emphasis in original); see also Indictment ¶¶ 18-28 ("the USD portion of affected EUR/USD transactions . . . flowed in and out of USD accounts in New York and Connecticut in . . . U.S. import trade and commerce").

The allegations in the Indictment satisfy Hartford Fire's requirements. That is, the Government pleads that Defendants' U.K. activities "had a substantial and intended effect in the United States on EUR/USD transactions." Indict. ¶ 28. And, as an example, the Indictment points out that the conduct alleged "affected prices for EUR/USD as set by ECB and WMR Fixes, at which counterparties in the United States purchased and sold U.S. Dollars." Id.; see Hr'g Tr., dated March 26, 2018, at 22 ("Defendants' conduct allegedly impacted parties in the United States [who] traded with the defendants and others at exchange rates fixed by the co-conspirators." As a result, those U.S.-based parties "paid more or received less when the defendants and their co-conspirators colluded to manipulate the euro-U.S. dollar for their benefit.").

**Criminal Conduct**

Defendants also contend that "the Sherman Act's criminal provisions [do not] reach wholly extraterritorial conduct." Defs. Mem. at 30. The Government counters that "the extraterritorial reach of the Sherman Act is not more limited in criminal cases." Opp'n at 26

(emphasis removed). While the Second Circuit has not yet addressed the issue, other courts have held persuasively that "activities committed abroad which have a substantial and intended effect within the United States may form the basis for a criminal prosecution under Section One of the Sherman Act." Nippon Paper Indus. Co., 109 F.3d at 3 n. 2; see also Hsiung, 778 F.3d 744, 749 (finding that a jury instruction "passes legal muster" if it states that "the Sherman Act applies to conspiracies that occur entirely outside the United States if they have a substantial and intended effect in the United States").

**3. Prosecution of Defendants Does Not Violate Due Process**

Defendants argue that the Government's prosecution violates their due process rights for two reasons as follows: **(1)** Defendants' conduct did not have a sufficient nexus to the United States (the Indictment "targets conduct by three British traders acting entirely in the United Kingdom with no identified *harmful* effect in the United States"), and the "aim" of Defendants was not shown to cause harm inside the United States or to U.S. citizens. Defs. Mem. at 33; and **(2)** Defendants did not have notice that their conduct was criminal because the "Indictment is premised on an unprecedented theory of criminal Sherman Act liability." Id. at 34. The Government persuasively responds that **(1)** it has been demonstrated (above) that the Indictment pleads a sufficient nexus between Defendants' conduct and the United States, see Part 2 supra; and, that a sufficient nexus does not depend on a defendant "aiming" to harm or targeting U.S. citizens or interests; and **(2)** Defendants had notice because, among other reasons, "ample precedent supports the Government's charge in this case," Opp'n at 30, and the SFO's investigation indicates that their activity may be prosecutable in other jurisdictions. See SFO Letter ("This does not reflect or impact on any decision which might be taken by any other agency, whether domestic or overseas, in relation to the same conduct.").

Due process requires (1) "a sufficient nexus between [] [D]efendant[s] and the United States, so that such application [of the Sherman Act] would not be arbitrary or fundamentally unfair;" and (2) "fair warning" that "conduct was criminal and would subject [Defendants] to prosecution somewhere." United States v. Al Kassar, 660 F.3d 108, 118-19 (2d Cir. 2011).

"Cases in which the extraterritorial application of a federal criminal statute has been 'actually deemed a due process violation' are exceedingly rare, and a defendant's burden 'is a heavy one.'" United States v. Hayes, 99 F. Supp. 3d 409, 422 (S.D.N.Y.) (quoting United States v. Ali, 718 F.3d 929, 944 n. 7 (D.C. Cir. 2013)). This is particularly true where, as here, the prosecution is challenged at the pleading stage. Id.

**Nexus**

There is a sufficient nexus between Defendants' conduct and the U.S. because of the effects such conduct had in the U.S. For one thing, the Government alleges that Defendants sought to "suppress and eliminate competition for the purchase and sale of EUR/USD in the United States." Indict. ¶ 22. For another, the Government alleges that the Defendants' "conspiracy purchased, sold, and cause[d] the transfer of substantial quantities of Euros and U.S. Dollars . . . to counterparties located in various states in the United States." Indict. ¶ 25. And, the Government alleges that "a substantial number of EUR/USD transactions conducted by defendants . . . were settled through the Settlement Bank in the United States." Indict. ¶ 26.

The Indictment also alleges that Defendants' actions affected significant American interests, including the dollar currency of the United States. See discussion at Part 2 supra; see also United States v. Mostafa 965 F. Supp. 2d 451, 459 (S.D.N.Y. 2013) (where the court found that Defendants' "acts could be expected to or did produce an effect in the United States," even though he did not "intend[] to harm the United States or its citizens." (internal quotations and

citations omitted)); United States v. Murillo, 826 F.3d 152, 157 (4th Cir. 2016) (no violation of due process in prosecuting Colombian defendant "if his actions affected significant American interests — even if the defendant did not mean to affect those interests").

**Fair Warning or Notice**

The principle underlying "fair warning" is that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." Bouie v. City of Columbia, 378 U.S. 347, 351 (1964). Defendants had notice or fair warning that their conduct was criminal. For one thing, Defendants were (criminally) investigated for this very same conduct in the U.K. See SFO Letter. And, Defendants were specifically warned by the SFO that its decision to not pursue prosecution "does not reflect or impact on any decision which might be taken by any other agency, whether domestic or overseas, in relation to the same conduct." Id. Second, it is widely understood that price fixing is unlawful conduct subject to prosecution, including price fixing in the FX market. See, e.g., Nash v. United States, 229 U.S. 373, 378 (1913); see also United States v. Miller, 771 F.2d 1219, 1225 (9th Cir. 1985) (where defendant was convicted under the Sherman Act of conspiring with competitors to fix gasoline prices, the court found that defendant's lack of fair notice argument was "frivolous" because "price-fixing has repeatedly been held to be *per se* illegal"); United States v. Cinemette Corp. of Am., 687 F. Supp. 976, 979 (W.D. Pa. 1988) (where defendants argued that they were not given fair notice that their bid-rigging agreement was prohibited under the Sherman Act, the court found defendants had clear notice because of "substantial case law holding that restrictions upon competitive bidding . . . [are] a *per se* violation of the Sherman Act"); see also In re Foreign Exchange Benchmark Rates Antitrust Litigation., 74 F. Supp. 3d at 592. Third, "[f]air warning does not require that the defendants understand that they could be subject to criminal

prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere." See Al Kassar, 660 F.3d at 119." (emphasis in original).[5]

**4. International Comity Does Not Provide a Basis to Dismiss the Indictment**

Defendants argue that the Court should abstain from exercising jurisdiction because the principle of international comity "militate[s] against the Court's exercise of criminal jurisdiction over foreign defendants who engaged in entirely foreign conduct." Defs. Mem. at 35. Defendants suggest that a balancing of the factors set forth in In re Vitamin C Antitrust Litig., 837 F.3d 175, 184 (2d Cir. 2016), supports the Court's abstention. Defs. Mem. at 35. The Government responds that abstention by the U.S. is inappropriate because nearly all of the Vitamin C factors support this Court exercising jurisdiction. Opp'n at 32.

To determine whether abstention from asserting jurisdiction on comity grounds is appropriate, courts "balance" the following Vitamin C factors:

> (1) Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) The extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) Whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue. 837 F.3d at 184-85.[6]

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[5] Defendants' nicknames may have been suggestive of illegal conduct, e.g., "The Cartel" and "The Mafia." See Indict. ¶ 23.

[6] While the Supreme Court in Hartford Fire relied solely on the first factor, concluding that there was "no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity," 509 U.S. at 798, the

Such balancing clearly supports this Court's exercise of jurisdiction as follows:

- Factor (1): This factor weighs in favor of exercising jurisdiction because there is no "true conflict" between U.K. and U.S. law. Defendants do not argue that "British law require them to act in some fashion prohibited by the law of the United States . . . [Nor do they] claim that compliance with the laws of both countries is otherwise impossible." See Hartford Fire, 509 U.S. at 798; see also SFO Letter.

- Factor (2): This factor is neutral as the U.K. has decided not to prosecute Defendants while acknowledging that "[t]his does not reflect or impact on any decision which might be taken by any other agency, whether domestic or overseas, in relation to the same conduct." See SFO Letter; see also Hartford Fire, 509 U.S. at 798.

- Factor (3): This factor weighs in favor of exercising jurisdiction because the alleged conspiracy – which centered on the U.S. dollar – involves conduct that may be of greater relevance to the U.S. than to the U.K.

- Factor (4): This factor weighs in favor of exercising jurisdiction because, among other things, the U.K. has abstained from prosecuting Defendants. See SFO Letter.

- Factor (5): This factor weighs in favor of exercising jurisdiction given the likelihood that price fixing of the EUR/USD exchange rate affects U.S. commerce. See Part 2 supra.

- Factor (6): This factor weighs in favor of exercising jurisdiction because the U.S. decision to bring an indictment suggests that it does not believe this prosecution threatens foreign relations. The SFO letter confirms that conclusion. See SFO Letter.

- Factor (7): This factor weighs in favor of exercising jurisdiction because the relief sought here would not "force [Defendants] to perform an act illegal in either country." See id.

- Factor (8): This factor weighs in favor of exercising jurisdiction because there appears to be no impediment to order effective relief.

- Factor (9): This factor weighs in favor of exercising jurisdiction because it would likely be acceptable if relief were ordered by the U.K. under similar circumstances.

- Factor (10): This factor weighs in favor of exercising jurisdiction because there appears to be no treaty precluding this prosecution. See Opp'n at 33; see also 2, U.K.-U.S., Mar. 31, 2003, S. Treaty Doc. No. 108-23 (2004).

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Second Circuit read Hartford Fire more narrowly, concluding that "the remaining Factors in the comity balancing test are still relevant to an abstention analysis." Vitamin C, 837 F.3d. at 185.

Based upon the Court's balancing of the Vitamin C factors, "the principle of international comity does not preclude District Court jurisdiction over the foreign conduct alleged." Hartford Fire, 509 U.S. at 798.

## IV. Conclusion & Order

For the reasons stated above, Defendants' motion to dismiss [#62] is denied.

Dated: May 4, 2018
New York, New York

Richard M. Berman

**RICHARD M. BERMAN**
**U.S.D.J.**