UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COMMODITY FUTURES TRADING COMMISSION, **Plaintiff,** **v.** **DONALD R. WILSON AND DRW INVESTMENTS, LLC,** **Defendants.**	**Case No. 13-7884 (RJS)**

PLAINTIFF UNITED STATES COMMODITY FUTURES TRADING COMMISSION'S POST-TRIAL MEMORANDUM

U.S. Commodity Futures Trading Commission
Division of Enforcement
1155 21st Street, N.W.
Washington, D.C. 20581
(202) 418-5334 (telephone)
(202) 418-5523 (facsimile)

ATTORNEYS FOR PLAINTIFF
U.S. COMMODITY FUTURES TRADING COMMISSION

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I. INTRODUCTION

"The theory of a natural, unrigged market is that the competing judgments of buyers and sellers as to the fair price of the security brings about a situation where the market price reflects as nearly as possible a just price." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1466 (2d Cir. 1996) (quoting H.R. Rep. No. 1383, 73rd Cong., 2d Sess., at 11 (1934)) (internal quotation marks omitted). Here, the Commission proved that defendants rigged an illiquid market by intentionally employing a bidding strategy calculated to force the market price to reflect their unilateral view of the "fair price." Specifically, in August and September 2010, defendants entered into long positions in the Three-Month Contract at prices near the OTC rates, believing prices would inevitably rise. When prices did not rise as expected through the legitimate forces of supply and demand, defendants decided to force the price of the Three-Month Contract to settle higher, thereby increasing and accelerating their profits.

The critical issue in this case is defendants' intent. The Commission has the burden of showing, by a preponderance of evidence, that defendants placed their bids in order to change the contracts' prices to prices that did not reflect the forces of supply and demand. Proof of defendants' intent includes: (1) defendants' own admissions that they placed thousands of bids to move settlement prices; (2) their knowledge that there was "no one else around" when DRW was bidding; (3) the suspicious timing of their bids—496 exclusively during the settlement period; and (4) their motive, to benefit their enormous preexisting position and to increase their profits.

Defendants attempt to excuse their conduct by arguing that they were simply trading to take advantage of a price anomaly and drive the contract price to its fair value, as they defined it. But whether the contract was "flawed" or "mispriced" is irrelevant to the question of whether they acted with the requisite intent and should be liable for attempted or perfected manipulation.

"[M]arket manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone." *CFTC v. Wilson*, 27 F. Supp. 3d 517, 533 (S.D.N.Y. 2014) ("*Wilson I*") (quoting *CFTC v. Parnon Energy, Inc.*, 875 F. Supp. 2d 233, 246 (S.D.N.Y. 2012)) (citations and internal quotation marks omitted). Market manipulation may be accomplished by many means in many contexts. In this case, the defendants attacked an illiquid market where they knew there were no other participants and went to great length to ensure they, themselves, controlled the price. This is analogous to a congested market, where courts have in the past upheld claims of manipulation. In a congested market, supply becomes tight and there are fewer contracts available as the contract expires. The contract price becomes hyper-sensitive due to the lack of liquidity in the market, and thus it has been held illegal to exacerbate such a situation. *See In re Donald L. Koch*, Advisers Act Release No. 3836, 2014 WL 1998524, at *16 (S.E.C. May 16, 2014) (noting, in the securities context, that an investment advisor manipulated the market by marking the close for illiquid bank stocks, reasoning that "the market for thinly traded stocks is more easily manipulated and thus more often the target of manipulative schemes."), *aff'd*, 793 F.3d 147 (D.C. Cir. 2015); *In re DiPlacido*, CFTC No. 01-23, 2008 WL 4831204, at *28 (Nov. 5, 2008).

Here, defendants did more than the equivalent of exacerbating a congested market. They controlled nearly all the pricing points in an illiquid market for seven months, knowing that they would thereby control the settlement price. As in a congested market case, "[m]anipulative intent may be inferred . . . where, once the congested situation becomes known to [the long], the long exacerbates the situation by, for example, intentionally decreasing the cash supply or

increasing his long in the futures market." *In re Indiana Farm Bureau Coop. Ass'n Inc.*, CFTC No. 75-14, 1982 WL 30249, at *10, n.12 (Dec. 17, 1982).

Given this standard, the question of why there was no trading in this market is not relevant because the Commission has established that the defendants knew it was illiquid and sought to not only exacerbate the situation, but to take full control of the market. As Wilson testified, defendants found nothing wrong with completely controlling the market: "[e]ven if, by the way, we thought there was a **zero percent probability of transacting, zero percent**, if we knew that we were in an open pit, in an empty trading pit yelling out . . . I believe that as long as the bids that we were disseminating truly reflected levels at which we wanted to transact and levels at which we believed we would make money in transacting, that **there would be absolutely nothing wrong with that**." Trial Tr. 327:6-18 (emphasis added).

But there is quite a bit wrong with that. Defendants' theory, if accepted, would create a rule-swallowing free-pass for traders to move prices from their market-established equilibrium to a contract price more beneficial to themselves, based on a personal theory that the changed price is more "fair." Defendants' view is also contrary to decades of case law and Commission precedent interpreting the Commodity Exchange Act's (the "Act") anti-manipulation provisions. Indeed, it could weaken U.S. futures markets and undermine the very purpose of the Act's anti-manipulation provisions, which are designed to protect the integrity and orderly operation of those free markets based on supply and demand. However, in addition to lacking a basis under the law, defendants' view is not supported by evidence.

Defendants also make a misguided policy argument that if their behavior is prohibited, it would chill legitimate trading activity where any given trade may impact price. Finding that defendants manipulated the price of the Three-Month Contract here, in light of the extraordinary

amount of intent evidence, would not chill *legitimate* economic activity. Nor would it require market participants to abstain from bidding in an illiquid market. The Commission has the burden of proving intent and "[i]t is the intent of the parties which separates otherwise lawful business conduct from unlawful manipulative activity." *Indiana Farm Bureau*, 1982 WL 30249, at *6. Here, defendants bid not only with the *knowledge* that their bids would cause higher settlement prices that increased their profit, but they also admit and the evidence proved that they bid with the *specific intent* to move, set, and define prices for their own benefit. It is defendants' specific intent to move prices that sets their conduct apart from true legitimate economic activity and that renders their bidding behavior manipulation under the Act. In short, this case presents no threat to traders who place orders *for the purpose of trading*. Accordingly, the Commission met its burden of proof, none of defendants' arguments have any merit, and the Court should enter judgment in favor of the CFTC.

II. ARGUMENT

As demonstrated below, defendants' admissions and the evidence adduced at trial proves by a preponderance of the evidence that defendants violated Sections 6(c)[1] and 9(a)(2) of the Act by attempting to manipulate and manipulating the prices of the Three-Month Contract.[2]

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[1] The *Wilson II* Court quoted the incorrect, post-Dodd Frank version of Section 6(c), which sets forth a separate and distinct prohibition against manipulative or deceptive conduct with standards separate and distinct from pre-Dodd Frank sections 6(c) and 9(a)(2). *Compare CFTC v. Wilson*, No. 13 Civ. 7884, 25 (S.D.N.Y. Sept. 30, 2012) ("*Wilson II*") *with* 7 U.S.C. § 9 (2008). This error does not change the legal conclusion, however, because the legal standards articulated in *Wilson II* are based on the pre-Dodd Frank version of Section 6(c).

[2] The Commission addresses below the principal issues in dispute and those issues raised by the Court during summation. In addition, the Commission incorporates by reference its pretrial memorandum (ECF No. 158) and its proposed findings of fact and conclusions of law (ECF No. 169), which address (a) subject matter jurisdiction; (b) venue; (c) personal jurisdiction; and (d) that the Commission has met its burden of proving attempted and perfected manipulation.

A. Attempted Market Manipulation

To prove attempted manipulation, the Commission must show that the defendants (i) specifically intended to create an artificial price, *i.e.*, one that did not reflect the legitimate sources of supply and demand; and (ii) took action in furtherance of that intent. *Wilson II*, at 25-26 & n.14; *Wilson I*, 27 F. Supp. 3d at 531-32 (citation omitted); *see also CFTC v. Amaranth Advisors, LLC*, 554 F. Supp. 2d 523, 532 (S.D.N.Y. 2008) ("*Amaranth I*"). This is a practical test because, as the law informs us, "[t]he methods and techniques of manipulation are limited only by the ingenuity of man." *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971). As set forth below, the Commission has proven both elements. Unlike perfected manipulation, attempted manipulation does not require proof of an artificial price (or that DRW had the ability to influence market prices, or in fact, did so). *Wilson II* at 25.

1. Defendants Specifically Intended to Create an Artificial Price

Intent is "the essence of manipulation." *Indiana Farm Bureau*, 1982 WL 30249, at *4. A defendant intends to influence market prices if he acts with the purpose or conscious object of causing or effecting a price or price trend in the market that does not reflect the legitimate forces of supply and demand. *Wilson II* at 26 (relying on *Parnon*, 875 F. Supp. 2d at 249); *see also Indiana Farm Bureau*, 1982 WL 30249, at *4 (defining manipulation as "any and every operation or transaction or practice, the purpose of which is *not primarily* to facilitate the movement of the commodity at prices freely responsive to the forces to supply and demand") (emphasis added).

A transaction is undertaken with manipulative intent if it is calculated to produce a price distortion, such as a price that is higher than it would be if only the forces of supply and demand were operative. *See Volkart Bros., Inc. v. Freeman*, 311 F.2d 52, 58 (5th Cir. 1962); *see also*

Wilson II at 26 n.14. A "legitimate transaction combined with an improper motive is commodities manipulation." *In re Amaranth Nat. Gas Commodities Litig.*, 587 F. Supp. 2d 513, 534 (S.D.N.Y. 2008).

Proof of intent typically is circumstantial in nature and shown inferentially from the conduct of the accused, considering the totality of the evidence. *Parnon*, 875 F. Supp. 2d at 250; *In re Hohenberg Bros*., CFTC No. 75–4, 1977 WL 13562, at *7 (Feb. 18, 1977) (holding that "[i]ntent is a subjective factor and since it is impossible to discover an attempted manipulator's state of mind, intent must of necessity be inferred from the objective facts and may, of course, be inferred by a person's actions and the totality of the circumstances."). For example, manipulative intent can be inferred where defendants do not "simply seek the best price from an existing situation," but also knowingly exacerbate a market inequality in supply and demand. *Parnon*, 875 F. Supp. 2d at 250 (denying motion to dismiss because manipulative intent can be inferred where defendants' activity followed awareness of congested market); *Indiana Farm Bureau*, 1982 WL 30249, at *8. The fact that the trader may *also* believe a completed transaction would be beneficial does not negate culpability. *Indiana Farm Bureau*, 1982 WL 30249, at *4.

In fact, market participants have *an affirmative duty* not to act in a manner that aggravates such market conditions, including in illiquid markets that are more easily manipulated. *See, e.g.*, *DiPlacido*, 2008 WL 4831204, at *28 (finding manipulative intent where "a trader executed large orders all on the same side of an illiquid market during the Close" because a "duty exists to execute orders so as to minimize price impact"); *see also Indiana Farm Bureau*, 1982 WL 30249, at *10 n.12; *In re Abrams*, CFTC No. 88-10, 1995 WL 455791, at *6 (July 31, 1995) (stating that "we made clear in *Indiana Farm Bureau*[ ], even if a dominant long played no role

in the creation of a congested market, *he has a duty* to avoid conduct that exacerbates the situation") (emphasis added); *Koch*, 2014 WL 1998524, at *16.

Furthermore, although a profit motive is not necessary to prove manipulative intent, it renders the inference of intent more plausible. *See Amaranth I*, 554 F. Supp. 2d at 533; *DiPlacido*, 2008 WL 4831204, at *29 (noting that a "demonstrable" profit motive supports an inference of manipulative intent). Finally, to prove intent, the Commission is not required to show that defendants sought to create a price that would actually be artificial. *See Amaranth I*, 554 F. Supp. 2d at 533; *CFTC v. Johnson*, 408 F. Supp. 2d 259, 268 (S.D. Tex. 2005). All that is required is conduct that could *potentially* affect market prices outside of the legitimate forces of supply and demand. *Johnson*, 408 F. Supp. 2d at 268; *Amaranth I*, 554 F. Supp. 2d at 533.

a. Under *Wilson I* and *II*, the Commission proved that defendants intended to affect a price or price trend that did not reflect the legitimate forces of supply and demand

The Court held that the Commission can establish defendants' intent to affect prices outside the legitimate forces of supply and demand by showing "[d]efendants' intentional efforts to increase the daily settlement rates and move the IDEX Curve in order to affect market prices and produce profits for [d]efendants." *Wilson I*, 27 F. Supp. 3d at 533. The Court further held that the Commission can meet this burden by proving several factors. *Wilson II* at 27; *see also* ECF No. 156 at 2 (J. Sullivan).

The Commission has met this burden. The evidence established that defendants purposely implemented a strategy to "force" the Three-Month Contract to settle to DRW's above-OTC rate bids, which were not reflective of actual market supply and demand, in order to increase and accelerate the receipt of variation margin. We address each factor *seriatim*:

(1) "DRW first developed a large long position, and then placed electronic bids during the Settlement Period, without finalizing any corresponding transaction" (*Wilson II* at 27)

The Commission has proven that DRW only bid on the Three-Month Contract when it held a large long position in this contract, did so repeatedly during the close, and never consummated a single transaction between January and August 2011:

- By September 2010, DRW had established a $350 million notional long position in the Three-Month Contract. Trial Tr. 247:21-23; D. Ex. 165 ¶ 101.
- Shortly thereafter, Wilson realized that the Three-Month Contract did not have the arbitrage potential he anticipated. D. Ex. 165 ¶¶ 46, 63 (describing IDCH's prices as "inaccurately low"), 64 (admitting that DRW was not receiving the amount of variation margin it expected); Trial Tr. 236:7-237:12.
- "[A]t the direction of Wilson, DRW staff injected bids higher than the prevailing Corresponding Rates during the PM Settlement Period." P. Ex. 17, No. 20; Trial Tr. 229:1-4.
- On nine trading days during the relevant period, DRW placed 100% of its bids for the day during the PM Settlement Period and subsequently cancelled them. P. Ex. 93 ¶ 1781.
- Not a single one of DRW's electronic bids in the Three-Month Contract resulted in a consummated trade. *See* P. Ex. 17, Nos. 25, 29; Trial Tr. 95:8-16; 165:3-6.

(2) "DRW had the intent of affecting the IDEX Curve" (*Wilson II* at 27)

Likewise, the Commission established that DRW specifically intended to affect the IDEX Curve, which determined the value of DRW's open positions in the Three-Month Contract and, in turn, its daily profit and loss:

- Vander Luitgaren admitted that DRW's bids "placed into the settlement curve" were factored into the settlement price of the Three-Month Contract. Trial Tr. 34:19-22. Silberberg also testified that although DRW did not enter into a single transaction via electronic bidding, the electronic bids raised the settlement price. Trial Tr. 165:3-15.
- Vander Luitgaren testified that DRW placed bids with the specific intent of affecting the IDEX Curve. D. Ex. 162 ¶ 32 ("I also tried to make sure to have bids in during the 1:45 p.m. to 2:00 p.m. Central Time settlement period, so that our bids would be factored into the settlement price curve."); *see also* P. Ex. 20 (explaining that DRW was trying to bid during the settlement period to "force[]" IDCH "to settle to [DRW's] offers").

- Vander Luitgaren's testimony was consistent with a letter from DRW's General Counsel, written during the course of the manipulative scheme, admitting that DRW was placing bids with the specific intent of affecting the IDEX Curve. D. Ex. 76 at 2 (explaining that bids were placed at approximately 1:55 pm (CST) and recognizing that bids in the listed maturities of the Three-Month Contract "are used to determine the IDEX 3 Month Curve").

- Silberberg testified that DRW initially placed bids throughout the day but began focusing on the settlement period as time passed. Trial Tr. 200:7-201:25. This is reflected in Jeffrey Harris's declaration, D. Ex. 166 at Ex. 5 (showing that between April and June 2011, DRW reduced the number of bids placed throughout the day but kept the number of bids in the settlement period approximately the same). This change in behavior maximized the effectiveness of DRW's bids to set the price.

- Similarly, Wilson acknowledged that DRW placed bids "during the settlement period" in order "to provide additional data points to enable IDCH to fill out the swap curve." D. Ex. 165 ¶¶ 62, 78, 79.

- In fact, Wilson testified that part of the reason DRW retained Sky Road was to inject bids electronically to "affect the daily settlement price" of the contract. Trial Tr. 226:23-227:01.

- Only two weeks after DRW started placing electronic bids, DRW's head quantitative researcher described the IDEX Curve as "DRW *defined*" (P. Ex. 25) (emphasis added) and confirmed that DRW can "*move* the IDCG curve" (P. Ex. 28) (emphasis added).

- Defendants knew that IDCH was not considering anything other than DRW's bids in establishing settlement prices for the Three-Month Contract. Trial Tr. 323:04-16.

- In sum, over the course of 117 trading days, DRW placed 1,024 electronic bids that ultimately affected daily settlement prices. P. Ex. 110, Att. A ¶¶ 8, 59, 69, 71. Over the course of 94 trading days, DRW placed 496 bids on the Three-Month Contract over the Corresponding Rates (*i.e.*, OTC rates) (a) solely during the PM Settlement Period and (b) cancelled them after the close of the PM Settlement Period. P. Ex. 93 ¶¶ 4(a)-(e), 1778-1780, 1783-1792; *see generally* P. Ex. 33 at 6 (listing the 16 tenors of the Three-Month Contract).

(3) "DRW traders made statements suggesting that they did not believe that their bids would be accepted" (*Wilson II* at 27)

In addition, the Commission has proven that defendants believed the market was highly illiquid and did not expect their bids to be hit:

- "Defendants admit that, during the relevant period, they were aware that the market for the Three-Month contract was illiquid." P. Ex. 17, No. 27.

- Silberberg considered the Three-Month Contract to be the "ultimate of illiquid products." Trial Tr. 158:20-159:2.

- Given the extremely limited trading volume, DRW chose not to invest in an automated order management system which would have allowed DRW to easily maintain quotes throughout the day rather than use the cumbersome manual process. D. Ex. 76 p. 4 n.2.

- DRW engaged Sky Road to inject bids directly onto the exchange, but DRW traders did not want to enter into a year-long contract with Sky Road given that the contract had not traded. Trial Tr. 147:13-20, 148:09-149:08.

- Silberberg testified that there was "no one else around" when DRW was bidding on the Three-Month Contract. Trial Tr. 160:10-13.

- On February 4, 2011, MF Global accused Wilson and DRW of manipulating the price of the Three-Month Contract. Despite this accusation, DRW continued to do exactly what Laurie Ferber had complained about—placing bids during the settlement period to "set" prices to the detriment of DRW's counterparties. Trial Tr. 257:19-259:22.

- Silberberg testified that, as early as February 22, 2011, there was only a 5% to 10% chance that DRW's bids would be hit. Trial Tr. 178:11-179:10. He further testified that as time passed, it became even less surprising that DRW's bids were not hit. Trial Tr. 182:11-20.

- Wilson was unable to explain why DRW's bid prices plateaued for several months if DRW genuinely wanted to transact, but was unsuccessful at those prices. Trial Tr. 231:14-234:04.

Finally, the Commission presented the following evidence establishing that defendants sought to increase the daily settlement rates and move the IDEX Curve in order to "produce profits for [d]efendants" (*Wilson I*, 27 F. Supp. 3d at 533):

- Vander Luitgaren testified that DRW's profit and loss ("P&L") on its existing long positions would "go up" because DRW's bids "placed into the settlement curve" were factored into the settlement prices. Trial Tr. 34:19-22,35:15-22. Vander Luitgaren was well aware that DRW profited every time the settlement price rose. Trial Tr. 53:3-5, 36:05-09, 52:11-21. Vander Luitgaren considered anyone willing to become a counterparty to DRW in the Three-Month Contract to be a "sucker." P. Ex. 19.

- Wilson acknowledged that one of the reasons DRW continued to bid electronically all the way through August was because DRW had open positions. Trial Tr. 262:24-263:05.

- Similarly, Silberberg acknowledged that if DRW stopped bidding, its open positions would become less valuable on a mark-to-market basis, and that he knew this at the time he was bidding. Trial Tr. 187:13-19. Silberberg further testified that the higher settlement prices caused DRW to receive more variation margin (Trial Tr. 165:16-166:10) and a higher mark-to-market value on DRW's open positions, with a corresponding decrease in the mark-to-market value of the counterparties' positions (Trial Tr. 166:11-167:06).

- Although IDCH designed the Three-Month Contract to default to the OTC rates, Wilson complained that "IDCH's prices were inaccurately low" and "the proper amount of variation margin was not flowing" to DRW. Defendants sought to fix this "problem" of "inaccurate settlement prices" through DRW's bidding. Trial Tr. 90:25-91:14, 224:1-6; D. Ex. 165 ¶¶ 63-64, 72, 80, 85.

- Wilson admitted that it was better for DRW to realize its expected future profits—through the payment of variation margin—"sooner rather than later." Trial Tr. 223:14-20; D. Ex. 165 ¶ 53.

- Despite the futility of its bidding, DRW placed 1,024 electronic bids, equally distributed across the 7-, 8-, 9-, 10-, 12-, 15-, 20-, 25- and 30-year tenors of the Three-Year Contract, which affected the settlement prices for those tenors. P. Ex. 110, Att. A at Exs. 4, 7.

- Vander Luitgaren agreed with the Court that "a couple of hours" a day spent placing bids "had real payoff" because DRW's variation margin increased. Trial Tr. 51:11-53:05.

- DRW made net profits of $12,030,738.89 in the Three-Month Contract. P. Ex. 92 at 45:21-46:03, 47:17-24; P. Ex. 108.

This evidence conclusively proves that defendants acted with the specific intent to move the settlement prices of the Three-Month Contract to a point higher than it would have otherwise settled in order to increase and accelerate the amount of variation margin payments flowing to them on their open long positions. Defendants effected this scheme by placing thousands of unmatched bids that remained active during the settlement period all on the same side of an illiquid market, and then withdrawing those bids. *See generally DiPlacido*, 2008 WL 4831204.

In summary, defendants' conduct was not intended—primarily or otherwise—to "facilitate the movement of [the Three-Month Contract] at prices freely responsive to the forces of supply and demand." *See Indiana Farm Bureau*, 1982 WL 30249, at *4. It was calculated to distort, or "force," a settlement price that was outside those legitimate market forces, despite an affirmative duty to not exacerbate conditions in this extremely illiquid market. *DiPlacido*, 2008 WL 4831204, at *28; *Indiana Farm Bureau*, 1982 WL 30249, at *10 n.12; *Abrams*, 1995 WL 455791, at *6. The purpose of this distortion was to ensure that DRW profited.

b. Defendants' justifications for affecting market prices are unavailing

In light of the abundant evidence demonstrating defendants' improper intent to unilaterally define the prices of the Three-Month Contract, defendants attempt to justify their conduct by providing rationales for their bids that are implausible and not supported by the evidence. Defendants want the Court to view these justifications in a vacuum, without regard to the evidentiary record, legal precedent, or the actual, real-world market conditions of the Three-Month Contract. Even if these rationales were supported by credible evidence, which they are not, they do not change the uncontested fact that DRW injected bids for the purpose of moving the IDEX Curve away from where the market had set it and "forc[ing] IDCH to settle to [DRW's bids]." *See, e.g.*, P. Ex. 20. As noted above, any action undertaken with a purpose that "is *not primarily* to facilitate the movement of the commodity at prices freely responsive to the forces to supply and demand" is evidence of manipulative intent. *Indiana Farm Bureau*, 1982 WL 30249, at *4.

Moreover, if accepted by the Court, defendants' supposed rationales create a loophole undermining the purposes of the Act's anti-manipulation provisions—ensuring market integrity and the orderly operations of the markets regulated by the CFTC. For example, if a defendant were insulated from liability simply because it consummated a manipulative trade, or made claims without any credible evidence that it wanted to consummate a manipulative bid, it would create a roadmap for others to follow. Similarly, a defendant's subjective "belief" about the fair value or legitimacy of his own bids—even if reasonable, which is not conceded here—cannot negate an improper intent to affect a price or price trend that does not reflect the legitimate forces of supply and demand. *Wilson II* at 26. The absurdity of this rationale is highlighted by Wilson's testimony that there is nothing wrong with deciding to bid up prices, to force an unwind with a counterparty, if those prices reflected DRW's perception of fair value. *See* Trial

Tr. 361:11-21. Moreover, any defendant can construct a self-serving rationale to explain why its desired price was closer to fair value than one that existed before its manipulative conduct. Defendants have never cited a single case supporting this rule-swallowing interpretation of the Act.[3]

i. Defendants' purported intent to transact is not supported by any credible evidence

Defendants claim they did not intend to manipulate the market because they wanted to transact in the Three-Month Contract. Even if true, it would not absolve defendants of liability.

First, defendants have presented no credible evidence to support their contention that they "wanted to get hit." *See, e.g.*, Trial Tr. 170:13-15. The Commission proved that DRW was the only market participant capable of injecting electronic bids (or offers) onto the exchange. Trial Tr. 93:12-24. Thus, there was *never any risk* that DRW's bids would have been matched to a corresponding offer. Moreover, the traders knew there was "no one else around" that could hit their bids. Trial Tr. 160:10-13.[4] But perhaps most telling is that DRW only submitted electronic bids when it had an open position that would directly benefit from its bids, and immediately ceased bidding when it closed-out those positions. Trial Tr. 165:16-166:10, 223:14-20, 262:24-263:05, 325:4-17 (Wilson testified that DRW's decision to stop placing bids was related to the

[3] Defendants appear to believe that these justifications somehow also prove that artificial prices cannot exist. Whether they relate to intent or artificiality, the Court should reject defendants' justifications because they are contradicted by the evidence, inconsistent with legal precedent, and render the Act's anti-manipulation provisions obsolete.

[4] Through their own efforts to retain Sky Road, defendants were well aware of the significant barriers to entry into the electronic market, making it less likely that counterparties would be able to hit their bids. Trial Tr. 615:24-616:15 ("So there [are] barriers up front to entry . . . ."); D. Ex. 162 at ¶¶ 26-29 (from approximately December 20, 2010 through late January 2011, DRW was working to obtain the program allowing access to the electronic market).

fact that DRW had unwound its open positions, and they would no longer be receiving variation margin related to the Three-Month Contract). Not before, and not after.

The Commission also established that due to the timing and prices of DRW's bids, senior executives at IDCH and MF Global concluded that DRW was manipulating the market and "screw[ing] other people" by "set[ting] the marks." Trial Tr. 90:17-92:4 (John Shay testified that he was concerned by DRW's bidding activity in the settlement period because of their timing and because the bids were out of line with how IDCH was calculating the IDEX Curve); P. Ex. 3, 128:4-9 and 134:3-135:20 (Michael Dundon concluded that DRW was manipulating the price of Three-Month Contract and that DRW's bids were not an accurate view of supply and demand, but simply an attempt to move the settlement price). As Ferber explained, MF Global and, she presumed, other market participants expected the prices of the Three-Month Contract to settle near the OTC rates. P. Ex. 4 at 75:06-76:12. However, by continuously placing bids at a significant spread to the OTC rates, DRW was able to unilaterally affect the settlement price, and thus variation margin, which Ferber—and undoubtedly other market participants—knew would negatively affect the economic value of their interest rate swap positions. P. Ex. 4 at 74:08-75:04. DRW's conduct led to uncertainty among market participants about how to value their positions in, and how to hedge their exposure to, the Three-Month Contract. P. Ex. 4 at 76:06-12. The likely inference to be drawn from this evidence is that no counterparties wanted to enter the market because DRW was controlling settlement prices and would continue to do so to the detriment of new and existing counterparties.[5]

[5] Even if one of DRW's bids was hit, it would have enhanced the value of DRW's existing positions by supporting a settlement price above OTC rates. *See* Trial Tr. 53:3-5, 36:5-9, 52:11-21, 165:16-166:10. Further, it would be reasonable to infer that DRW would have increased the value of any new position by continuing to increase its bids to a rate higher than the price of that new position. MF Global apparently realized this when it took the opportunity to back out of the

On the other hand, aside from their own self-serving testimony, defendants did not present evidence to support their claim that they placed thousands of bids for seven months without a single transaction in order to find counterparties. For example, the contemporaneous emails do not reflect frustration on the part of defendants that their bids did not lead to consummated transactions. *See e.g.*, D. Ex. 162 Exhibits F-I. To the contrary, the evidence demonstrates that defendants were frustrated that IDCH was not using their bids to establish settlement prices, and thus the "proper amount of variation margin was not flowing" to defendants. *Id.*; D. Ex. 165 ¶¶ 63, 64.

Second, defendants' purported intent to transact cannot negate their manipulative intent because market manipulation routinely involves consummated trades (*i.e.*, bids that were placed, and subsequently hit, resulting in a realized trade and a transmission of risk). *See, e.g.*, *Amaranth I*, 554 F. Supp. 2d at 528. In fact, in a classic banging the close case, the manipulator consummates many trades during the settlement period in order to induce a price trend in the market. *Id*. at 527-29. This is true not only where trades are consummated at a loss, but also where the consummated trades are "economic" or profitable.[6]

"busted trade" even though such deals are "sacrosanct" and can result in ejection from the industry. D. Ex. 165 ¶ 103.

[6] Uneconomic trading is not a pre-requisite for price manipulation. *Cargill*, 452 F.2d at 1163 (holding that "one of the most common manipulative devices, the floating of false rumors which affect futures prices, does not involve the commission of an 'uneconomic act.'"); *see also In re Paul K. Kelly*, CFTC No. 08–01, 2007 WL 3130589, at *4 (Oct. 25, 2007) (finding respondent engaged in attempted manipulation by buying additional unleaded gasoline futures contracts during the settlement period in order to enhance the value of an existing position in the unleaded gasoline market; notably the conduct occurred in the same market where the trader had an existing position and trader did not engage in uneconomic trading). Moreover, intent is determined from the "totality of the circumstances" and whether the trading was uneconomic is only one type of intent evidence. *See Hohenberg Bros*., 1977 WL 13562, at *7.

ii. Defendants did not place bids for the supposedly altruistic goal of "correcting" pre-existing prices

Defendants suggested at trial that they placed bids with the goal of "correcting" the pre-existing prices of the Three-Month Contract. As demonstrated above, however, the evidence actually proves that DRW bid with the specific intent of distorting the prices of the Three-Month Contract. Moreover, additional evidence contradicts defendants' claim that they actually bid with the goal of "correcting" the pre-existing prices.[7]

As a threshold matter, defendants started placing electronic bids only after they had established their long positions. D. Ex. 165 ¶¶ 50, 55, 59; P. Ex. 110, Att. A at Ex. 4. And defendants only stopped placing electronic bids once they closed out those long positions at a profit. Trial Tr. 325:4-17; Trial Tr. 262:24-263:05; P. Ex. 92 at 45:21-46:03, 47:17-24; P. Ex. 108. Further, the evidence proved that defendants had no interest in attracting business to IDCG. P. Ex. 18. After all, IDCG was a competitor of ERIS, an exchange co-owned by DRW. Trial Tr. 84:12-13, 252:06-08, 252:21-253:05. Finally, Wilson and the DRW traders testified that they wanted to smooth out the IDEX Curve because it would be more attractive to market participants considering entering the market. Trial Tr. 34:23-35:14, 72:23-73:19, 230:18-25. But Wilson admitted that in a market like the Three-Month Contract, where it was apparent to market participants that "there is only one bidder and there is nobody transacting and there is nobody else putting [in offers]," DRW's action of smoothing out the curve would provide a prospective market participant with "*no value whatsoever*." Trial Tr. 306:04-15 (emphasis added). This admission alone is devastating to defendants' claim of an altruistic motive to "help" IDCH.

[7] Even if the evidence had shown that defendants bid with this goal in mind, that would not legitimize defendants' conduct because unilaterally setting prices under any circumstance does not "facilitate the movement of the commodity at prices freely responsive to the forces to supply and demand." *Indiana Farm Bureau*, 1982 WL 30249, at *4.

iii. Defendants' purported intent to aid in price discovery is not credible

Defendants' claim that they were engaged in price discovery is not credible. True "price discovery" involves an interaction of both buyers and sellers; otherwise, no one is discovering anything. P. Ex. 3, 168:4-15 (Dundon testified that placing bids is not price discovery when the bids are never hit and the bidder knows no other entities are participating on the exchange), 94:14-21 (price discovery is "a market methodology where *bids and offers* are on an order book. . . . It's where market participants will say where they—where they—at what prices they would *buy and sell* . . . .") (emphasis added), 436:5-8. When a party submits bids that are never hit, it is not contributing to price discovery. P. Ex. 3, 168:4-15. And, as proven at trial, defendants knew to a virtual certainty that their bids would not result in transactions.

iv. Subjective belief regarding fair value does not negate defendants' manipulative intent

Defendants contend that their bids were not manipulative because they were consistent with defendants' internal estimates of the fair value of the Three-Month Contract. Defendants' testimony on this point was not credible, and was contradicted by other evidence.[8]

Defendants introduced the White Paper as evidence of their state of mind regarding the intrinsic value of the Three-Month Contract, yet this paper is dated well after DRW entered into its long positions and was not updated after March 14, 2011, despite testimony to indicate that interest rates would move "every second, every minute," "all day long." Trial Tr. 51:24-52:03. The record is devoid of any contemporaneous modelling of the value of the Three-Month Contract. In fact, Wilson testified that the decision to raise the bid rates over time was "mostly

[8] Moreover, whether defendants' internal estimates of fair value were accurate is not dispositive because, as discussed below, defendants intended to drive up settlement prices by bidding at rates considerably higher than the OTC rates.

made by [him]" and that DRW "didn't have a formula" to indicate when bids should be raised. Trial Tr. 288:05-07. It defies logic to believe that over the course of five months—between mid-March and mid-August, 2011—defendants would have continued to increase the prices at which they were bidding without any real-time calculations of the contracts' value, if they were genuinely interested in transacting in this market. This disconnect is most pronounced in August, when DRW's bids for the 30-year contract accelerate up to 100 basis points over the OTC rates, yet the static White Paper analysis reflected a "fair value" of only 70 basis points over the OTC rates. P. Ex. 110 at Ex. 4; D. Ex. 45 at 21. But again, Wilson could not explain why in August (around the time DRW unwound its positions with Jefferies and MF Global) DRW began bidding at spreads considerably higher than the estimates reflected in the White Paper. Trial Tr. 352:23-360:7; *see also* Trial Tr. 368:5-12 (Wilson testified that it would be "unacceptable" to bid above the "fair value" of the Three-Month Contract prior to the unwind, and agreeing that DRW's bidding therefore must be "justified . . . by something to suggest that [DRW's estimate of] fair value was north of [its] bid[s]").

Furthermore, Harris's *post hoc* modelling does not support defendants' argument that their bids were below their own estimates of fair value. First, the evidence showed that a model can be generated to support almost any fair value. Trial Tr. 439:18-20. Second, Harris did not even review DRW's model (Trial Tr. 633:16-24), which he believed used a different interest rate product than the products he used in his models (Trial Tr. 673:25-674:05). In fact, the two models he used in his analysis of the 30-Year tenor, demonstrate that DRW's bids were above the fair value of at least one of those models throughout the entire period during which DRW was bidding. D. Ex. 166, Exhibit 3G.

2. Defendants Committed Overt Acts in Furtherance of Their Intent to Create Artificial Prices

An overt act in furtherance of the intent to influence prices can include, among other things, placing, making, or withdrawing offers or bids; causing offers or bids to be made, placed, or withdrawn; selling futures contracts, and entering into related transactions. *See Amaranth I*, 554 F. Supp. 2d at 533-35; *see also Volkart Bros.*, 311 F.2d at 58; *Indiana Farm Bureau*, 1982 WL 30249, at *7; *Hohenberg Bros.*, 1977 WL 13562, at *7-8. The Commission presented ample evidence at trial to support this conclusion, including that

- Once DRW realized its voice bids were not being factored into the settlement prices, it actively sought and obtained the ability to bid electronically with the specific purpose of entering bids that would be considered in determining the settlement price. D. Ex. 162 ¶¶ 26-29. It did so by "working with Sky Road to get DRW up and running with the application that enabled us to electronically stream bids for the Three-Month Contract." *Id*. at ¶ 27.
- DRW placed 1,024 bids before or during the PM Settlement Period above the OTC rates, which ultimately affected daily settlement prices. P. Ex. 110, Att. A ¶¶ 8, 59, 69, 71. These bids are overt acts, designed to distort the price of the Three-Month Contract.
- DRW placed 496 bids above the OTC rates (a) solely during the PM Settlement Period, and (b) cancelled them after the close of the PM Settlement Period. P. Ex. 93 ¶¶1778-1779. These bids are the most blatant examples of overt acts, and they too were designed to distort the price of the Three-Month Contract.

B. <u>Perfected Price Manipulation</u>

To prove perfected manipulation, the Commission must establish that (1) the accused had the ability to influence market prices; (2) he specifically intended to do so; (3) artificial prices existed; and (4) the accused caused the artificial prices. *See Wilson II* at 25; *Wilson I*, 27 F. Supp. 3d at 531. The Commission has proven each of these elements, as set forth below.

1. Defendants Had the Ability to Influence Market Prices

The ability to influence market prices may be proven by various means including, but not limited to, the exercise of market power, or buying or selling in a manner calculated to produce

the maximum effect upon prices, frequently in a concentrated fashion and in relatively large lots. *Cargill*, 452 F.2d at 1164-65; *In re Soybean Futures Litig*., 892 F. Supp. 1025, 1046-47 (N.D. Ill. 1995). Evidence of price changes resulting from defendants' actions also can demonstrate defendants' ability to influence the market. *Parnon*, 875 F. Supp. 2d at 246.

Defendants have never disputed that DRW had the ability to influence the price of the Three-Month Contract. To the contrary, Harris conceded that DRW had the "capacity to create artificial prices" (P. Ex. 54 at 39:16-20), and the Commission presented ample evidence at trial to support this conclusion. Specifically, the Commission proved that

- The market was illiquid, and DRW was the only participant injecting bids (or offers) into the market. P. Ex. 17 at No. 27; Trial Tr. 93:12-24, 158:20-159:2, 155:9-12, 160:10-13, 309:23-24.

- DRW placed 1,024 bids above the OTC rates that were active during the PM Settlement Period and cancelled after the close. P. Ex. 110, Att. A at Ex. 4; *see also* Trial Tr. 229:01-04; P. Ex. 110, Att. A ¶¶ 6-7; P. Ex. 93 ¶¶ 1778-83.

- IDCH incorporated these bids into the IDEX Curve, which determined the settlement price for the contract. Trial Tr. 34:19-22, 144:10-146:05, 230:18-22, 579:10-580:07; P. Ex. 20; P. Ex. 17 at No. 5; *Wilson I*, 27 F. Supp. 3d at 532; P. Ex. 110, Att. A at Ex. 4.

- DRW's head of research proclaimed that DRW was unilaterally setting prices by stating that the IDCG curve was "DRW defined." P. Ex. 25; *Wilson I*, 27 F. Supp. 3d at 532.

2. Defendants Caused Artificial Prices

To prove that defendants caused artificial prices, the Commission need only show that their actions *contributed* to the price movement. *See Wilson II* at 28-29; *Wilson I*, 27 F. Supp. 3d at 535; *Parnon*, 875 F. Supp. 2d at 248. Accordingly, the Commission does not need to prove that defendants' bids "automatically" moved the settlement prices of the Three-Month Contract to establish causation. *Wilson II* at 28 (noting that causation is proven where defendants' actions were "one of the proximate causes" of the price movement).

The evidence proved that defendants' bids contributed to, and therefore were a cause of, the price movement of the Three-Month Contract:

- DRW placed 1,024 bids at prices higher than the OTC rates that were active during the PM Settlement Period and cancelled after the close. P. Ex. 110, Att. A at Ex. 4; *see also* Trial Tr. 229:01-04; P. Ex. 110, Att. A ¶¶ 6-7; P. Ex. 93 ¶¶ 1778-83.

- During this time, DRW was the only entity connected through the API, and therefore was the only entity injecting bids electronically. Trial Tr. 88:12-20, 129:1-6.

- IDCH incorporated these bids into the IDEX Curve, which determined the value of DRW's open positions in the Three-Month Contract. Trial Tr. 34:19-22, 144:10-146:05, 230:18-22, 579:10-580:07; P. Ex. 20; P. Ex. 17 at No. 5; *see also Wilson I*, 27 F. Supp. 3d at 532.

- DRW's bids moved settlement prices higher than they would have been had IDCH set its daily settlement rates to the OTC rates. P. Ex. 17 at No. 23; P. Ex. 110, Att. A Ex. 4; Trial Tr. 172:21-173:20 (Silberberg confirmed that when DRW was injecting electronic bids, it "had open positions in . . . large amounts that would increase predictably *because the settlement price was higher*") (emphasis added).

- Absent DRW's bids, the price of the Three-Month Contract would have defaulted to the Corresponding Rates. P. Ex. 85 (showing that the settlement price of the 2-Year tenor (*see* "Futures implied" column), on which DRW never bid, remained at the OTC rate (*see* "OTC without" column) throughout the Relevant Period).

As the Court has noted, IDCH's incorporation of DRW's bids was "so predictable" that DRW's head researcher described the IDEX Curve as "DRW defined." *Wilson II* at 29.

3. Intent

The intent requirement for a manipulation claim and an attempted manipulation claim are the same. *Parnon*, 875 F. Supp. 2d at 250. As demonstrated above, the Commission presented a wealth of evidence that defendants specifically intended to affect prices of the Three-Month Contract that "did not reflect the legitimate forces of supply and demand." *Wilson I*, 27 F. Supp. 3d at 531-32 (quoting *Parnon*, 875 F. Supp. 2d at 249); *Wilson II* at 26.

4. Artificial Prices Existed

An artificial price is a price that "does not reflect basic forces of supply and demand." *Wilson I*, 27 F. Supp. 3d at 533 (quoting *Parnon*, 875 F. Supp. 2d at 246) (citations and internal

quotation marks omitted). This is not a subjective test, determined by what DRW "thought" the price should be. Nor is it an economic principle. It is a legal determination. The focus is more on "the nature of the factors causing [the prices]" than on the actual prices themselves. *Indiana Farm Bureau*, 1982 WL 30249, at *4 n.2; *In re Sumitomo Copper*, 182 F.R.D. 85, 91 (S.D.N.Y. 1998); *United States v. Reliant*, 420 F. Supp. 2d 1043, 1057 (N.D. Cal. 2006). "*When a price is affected by a factor which is not legitimate, the resulting price is necessarily artificial*." *Indiana Farm Bureau*, 1982 WL 30249, at *4 n.2 (emphasis added). Thus, the Court does not weigh legitimate factors against illegitimate ones, nor does it require the Commission to disprove every self-serving explanation proffered by defendants. *Id.*; *see also Wilson II* at 26-28; *Amaranth I*, 554 F.Supp.2d at 534.

The Court set forth the test for artificiality in this case. The Court in *Wilson I* held that the following types of bids could create artificial prices: (1) bids placed and quickly withdrawn during the PM Settlement Period; (2) bids that were not intended to consummate actual trades; (3) bids that were higher than the OTC rates; and (4) bids that did not result in the consummation of trades. *Wilson I*, 27 F. Supp. 3d at 533-34. The Court also held that defendants' knowledge that the prices were "not being determined through standard market forces but were, according to one DRW employee, 'DRW defined[,]'" was indicative of artificial prices. *Id*. at 534. Similarly, in *Wilson II*, the Court held that a reasonable fact-finder could conclude that artificial prices existed "by examining DRW's bidding practices and open positions and finding that (1) DRW did not intend to transact on its bids—*i.e.*, they were not a legitimate source of supply and demand . . . (2) the IDCH would have set the IDEX Curve to the Corresponding Rates in the absence of DRW's bids." *Wilson II* at 27-28.

a. The evidence satisfies the *Wilson I* and *II* test for artificiality

The Commission presented evidence that satisfies the test for artificiality set forth in *Wilson I* and *Wilson II*:

- Over the course of 117 trading days, DRW placed 1,024 electronic bids that ultimately affected daily settlement prices. P. Ex. 110, Att. A ¶¶ 8, 55, 56, 59, 60, 68; P. Ex. 17 at No. 23; *see generally* P. Ex. 33 at 6 (listing the 16 tenors of the Three-Month Contracts listed each trading day).

- During that same time, DRW placed 496 bids on the Three-Month Contract over the OTC rates (a) solely during the PM Settlement Period and (b) cancelled them after the close. P. Ex. 93 ¶¶ 4(a)-(e), 1778-1780, 1783-1792.

- DRW's bids were not actually intended to consummate trades. In fact, there is zero credible evidence that DRW's intent in submitting bids in fact was to trade. *See* Trial Tr. 178:11-179:10 (Silberberg testified that by February, the chance of transacting was "5, 10 percent"), 261:20-22 (Wilson testified that in March and April, they viewed the probability of transacting as diminishing), 324:19-325:3 (Wilson testified that by July the probability of trading was between 1 and 5 percent), 147:1-149:8 (DRW did not want to enter into a long-term contract with Sky Road in part because the contract had not traded), 262:24-263:05 (DRW's existing open positions was a factor that contributed to DRW continuing to place bids through August), 187:13-19 (DRW's open positions would become less valuable if DRW stopped bidding), 342:6-9 (after the busted trade, it seemed much less likely that DRW would ever transact in the contract with MF Global); P. Ex. 13a.

- DRW's bids were higher than the OTC rates that would have otherwise determined the daily settlement rates. P. Ex. 93 ¶ 1779; P. Ex. 104 at Ex. 4; Trial Tr. 165:7-15, 172:21-173:20, 229:1-4; P. Ex. 36; P. Ex. 37; P. Ex. 17 at No. 23. DRW's electronic bids did not result in the consummation of a single trade. Trial Tr. 95:8-16, 165:3-6; P. Ex. 110, Att. A ¶ 53; P. Ex. 93 ¶ 1782.

- DRW's bids were the only bids being incorporated into the IDEX Curve. Trial Tr. 93:12-24, 323:4-17 (Wilson: IDCH was only considering DRW's bids to arrive at the settlement price).

- DRW's head of quantitative analysis described the IDEX Curve as "DRW defined" just ten days after DRW started placing electronic bids. P. Ex. 25; Trial Tr. 249:16-250:06. Four days later, she confirmed that DRW can "move the IDCG curve[.]" P. Ex. 28.

b. The evidence proves artificial prices existed on at least 1,024 occasions

In addition to satisfying the test in *Wilson I* and *II*, the Commission proved prices were artificial on at least 1,024 occasions. Specifically, the Commission proved that

- DRW systematically placed 1,024 electronic bids over OTC rates that remained active during the PM Settlement Period. P. Ex. 110, Att. A ¶¶ 7, 8, 55, 56, 59, 60, 68, & Exs. 5A-5C. Over the course of 94 trading days, DRW placed 496 bids on over the OTC rates (a) solely during the PM Settlement Period and (b) cancelled them after the close of the PM Settlement Period. P. Ex. 93 ¶¶ 1778-1783. On at least nine days, 100% of DRW's bids were placed only during the PM Settlement Period and subsequently cancelled. P. Ex. 93 ¶¶ 4(a)-(e), 1781. On eleven days, 100% of DRW's bids were placed only during the PM Settlement Period. P. Ex. 17 at No. 15. Over a period of seven months, DRW traders placed nearly 3,000 electronic bids knowing at the time they placed each bid that none of their previous bids resulted in a consummated transaction. D. Ex. 167 ¶ 49 and Table 2; P. Ex. 17 at Nos. 25, 29.

- DRW placed these electronic bids with the admitted purpose of moving the IDEX Curve and affecting the Three-Month Contract's settlement prices. P. Ex. 36; P. Ex. 17 at Nos. 18, 19. DRW placed these electronic bids knowing that the bids would in fact affect daily settlement prices, the IDEX Curve, and would make DRW money. Trial Tr. 52:11-21, 154:25-155:8, 306:02-15, 226:23-227:01, 325:10-12 (Wilson testified that DRW "got the benefit of the variation margin by the settlements settling at the higher rate").

- DRW was *unilaterally* setting prices. P. Ex. 13a (Ferber accuses Wilson); Trial Tr. 323:4-17 (Wilson: IDCH was only considering DRW's bids to arrive at the settlement price); 93:9-24 (Shay testified that DRW's bids were the only bids being incorporated into the IDEX Curve).

c. The sizeable spreads between the OTC Rates and DRW's bid prices, which IDCH used to establish the settlement rates, further support a finding of artificiality

The fact that the contract would be valued and settled at the OTC rates was central to DRW's initial strategy. P. Ex. 30 ("Confirm the contract has full convexity bias (despite the fact they will force it to settle at non-convexity biased prices)."). Consistent with this strategy, DRW made sure to establish its long positions at rates very near the OTC rates. D. Ex. 165 ¶50; P. Ex. 110, Att. A ¶ 66. These prices, which are the *only* reflection of *actual* supply and demand and the *only* prices established by "free competition alone," support the inference that market participants believed the OTC rates reflected fair value. *See Wilson I*, 27 F. Supp. 3d at 533.

Moreover, the evidence showed that DRW's assumption that prices would rise above OTC rates never materialized, even after DRW began submitting voice bids during the close, which "surprised and frustrated" defendants. D. Ex. 165 ¶ 63; P. Ex. 110, Att. A ¶ 64. Wilson explained that a "problem" with the contract settling at the OTC rates "was that the *proper*

amount of variation margin was not flowing to [DRW] on the positions [DRW] already had on." D. Ex. 165 ¶ 64 (emphasis added). So, defendants took matters into their own hands and executed their plan to drive up settlement prices to artificial levels by placing electronic bids during the settlement period at rates considerably higher than the OTC rates. Trial Tr. 229:01-04; P. Ex. 17 at No. 20; P. Ex. 110, Att. A ¶ 59; P. Ex. 93 ¶¶ 1778-83.

The further DRW's bids drove prices above the OTC rates—established by actual transactions based on supply and demand—the more artificial and distorted those prices became. In fact, even defendants' own expert, Harris, testified that the NPV and convexity effects did not materialize and thus, were not incorporated into the price of the Three-Month Contract until DRW placed electronic bids above the OTC rates. Trial Tr. 641:6-642:12.

Whether the contract was "flawed" or "mispriced" is irrelevant. The market price for the contract was based on the terms of the contract, which all market participants knew, and those terms did not include any adjustment for convexity bias. Trial Tr. 90:25-91:14 (Shay testified that DRW's prices "were reflective of a market that wasn't the market that we at the time were clearing"). Moreover, the evidence proved that the contract was actually traded at one price (near OTC rates) and then, as a result of DRW injecting electronic bids, the contract was actually priced at an entirely different level ("DRW defined" and above OTC Rates). By unilaterally adding a convexity effect and setting their own prices, defendants created artificial prices.

III. CONCLUSION

For the foregoing reasons, the Commission requests that the Court enter an order finding that defendants are liable for violating Sections 6(c) and 9(a)(2) of the Act, and impose the relief requested in the Commission's Proposed Findings of Fact and Conclusions of Law, ECF No. 169, at 90-97.

Dated: December 21, 2016

Respectfully submitted,

/s/A. Daniel Ullman II
A. Daniel Ullman II (*pro hac vice)*
Paul G. Hayeck (*pro hac vice*)
Jason Mahoney (*pro hac vice*)
Jonah McCarthy
Traci L. Rodriguez (*pro hac vice*)
Lucy C. Hynes (*pro hac vice*)
Danielle Karst (*pro hac vice*)
Division of Enforcement
1155 21st Street, N.W.
Washington, D.C. 20581
(202) 418-5334 (telephone)
(202) 418-5523 (facsimile)

Michael R. Berlowitz
140 Broadway, 19th Floor
New York, NY 10005
(646) 746-9759 (telephone)
(646) 746-9940 (facsimile)

ATTORNEYS FOR PLAINTIFF
U.S. COMMODITY FUTURES TRADING COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, service of the foregoing document was made on the following parties via ECF:

Michael S. Kim, Esq.
Jonathan Cogan, Esq.
Jason Manning, Esq.
Benjamin Sauter, Esq.
Kobre & Kim LLP
800 Third Avenue
New York, New York 10022

Matthew Menchel, Esq.
2 South Biscayne Boulevard
35th Floor
Miami, Florida 33131

Andrew C. Lourie, Esq.
Kobre & Kim LLP
1919 M Street, N.W.
Washington, DC 20036

Attorneys for Defendants

/s/ A. Daniel Ullman II