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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

-against-

DONALD R. WILSON and DRW INVESTMENTS, LLC,

Defendants.

13 Civ. 7884 (AT)

MEMORANDUM AND ORDER

ANALISA TORRES, District Judge:

Plaintiff, the United States Commodity Futures Trading Commission (the "CFTC"), brings this action against Donald R. Wilson ("Wilson") and his company DRW Investments, LLC ("DRW" and collectively, "Defendants"), alleging violations of Sections 6(c) and 9(a)(2) of the Commodity Exchange Act (the "CEA"), 7 U.S.C. §§ 9, 13(a)(2) (2012). Defendants move to exclude the testimony of Plaintiff's expert pursuant to Federal Rule of Evidence 702 and for summary judgment pursuant to Federal Rule of Civil Procedure 56. ECF Nos. 116, 111. Plaintiff similarly moves to exclude the testimony of Defendants' experts and for partial summary judgment. ECF Nos. 106, 108. For the reasons stated below, Defendants' motion for summary judgment is DENIED, Plaintiff's motion for partial summary judgment is DENIED, and both parties' motions to exclude are GRANTED in part and DENIED in part.

BACKGROUND[1]

I. The Parties

The CFTC is a federal regulatory agency charged with administering and enforcing the CEA, 7 U.S.C. § 1 *et seq*. (2012), and the regulations promulgated thereunder, 17 C.F.R. § 1.1 *et*

[1] In deciding a summary judgment motion, the Court views the record in the light most favorable to the non-moving party. *See Hunter v. Bryant*, 502 U.S. 224, 233 (1991). Except where noted, the below facts are undisputed.

seq. (2016).

DRW is an Illinois limited liability corporation that speculates in the financial derivatives markets. Donald R. Wilson served at all times relevant to this action as CEO and Manager of DRW. Combined Rule 56.1 Statement ("Combined 56.1") ¶¶ P1-P7, ECF No. 105.

II. The Three-Month Contract

A. Interest Rate Futures Contracts

As a general matter, an interest rate futures contract is an agreement executed between two parties who agree to make cash payments based on an interest rate. The party who is "long" in the futures contract will pay a fixed rate for the duration of the contract, whereas the party who is "short" will pay a floating rate. The contract lasts for a set period of time (the 'tenor') until a predetermined date (the "maturity date"). The length of time that the contract lasts is the "maturity date" or "tenor." The cash payments represent interest on a predetermined sum of money; the value of that predetermined sum is the "notional amount." The price of an interest rate futures contract is typically expressed is terms of interest rates. *See* Decl. Harris Ex. A ("Harris Report") ¶¶ 17-20, ECF No. 113; Decl. MacLaverty Attach. 1 ("MacLaverty Opening") ¶¶ 15, 24, ECF No. 110-18.

Some futures contracts are structured to make use of a CFTC-registered intermediary known as a Derivatives Clearing Organization ("DCO"). A DCO is a clearinghouse that enables the parties to mitigate credit risk: the DCO becomes a "middle man," substituting its credit for the parties' own, and thereby guaranteeing that each party's financial obligations under the contract will be satisfied. *See* Harris Report ¶¶ 20-23; MacLaverty Opening ¶¶ 12, 22-23.

As a result of clearing a contract through a DCO, the parties become accountable to the DCO's daily process of assessing gains and losses. Specifically, at the close of every trading

day, the DCO determines an official settlement price on the exchange that lists the contract. On a daily basis, each party's open futures contract positions are "marked to market," such that the daily settlement price is applied to determine the value of the party's position. After a party's position has been marked to market, the party with a position with a negative value makes a payment to the counterparty with a positive value. These daily payments of profits and losses are referred to as "variation margin" or "maintenance margin" payments. These payments are made to and by the DCO rather than directly between the parties. Variation margin payments are a transfer of ownership of the funds paid, and the recipient may reinvest the payment. *See* Harris Report ¶¶ 20-24; MacLaverty Opening ¶¶ 16-21.

B. Convexity Effect

One key concept in this case is that payment timing creates an opportunity to produce additional profit. Specifically, in a cleared contract a party can profit by investing the daily exchange of variation margin. *See* Harris Report ¶ 31; MacLaverty Opening ¶ 25. The ability to invest a margin payment is predictably worth more to a long party than a short party because the long party receives payments when the prevailing interest rates are higher than they are when the short party receives payments. *See* Harris Report ¶¶ 37-39; MacLaverty Opening ¶ 39. The difference in value to the parties gained from this investment of margin payments is termed the "convexity effect" or "convexity bias." *See* Harris Report ¶ 42; MacLaverty Opening ¶ 25.

Because of the predictable advantage of the long party investing the cash flows of a futures contract, some futures contracts apply a rule or an adjustment known as a "Price Alignment Interest" ("PAI") that can be applied by the exchange on which the futures contract is listed. *See* Harris Report ¶ 46; MacLaverty Opening ¶ 37. In the absence of a PAI, short parties may demand a higher fixed rate in compensation at the time they negotiate the contract. Insofar

as short parties do not demand a higher rate, then the convexity effect would not be priced into the daily contract settlement price. MacLaverty Opening ¶ 39.

Both parties agree that the convexity effect would not occur in an uncleared interest rate swap—*i.e.*, an over-the-counter interest rate swap ("OTC swap") that was not cleared through a DCO[2]—with the same payment terms, notional amount, and interest rate because there is no daily exchange of variation margin. Combined 56.1 ¶ P43. Thus, the long party to an OTC swap "would pay a higher fixed rate in a cleared futures contract than in an OTC interest rate swap with the same terms." Harris Report ¶ 39.

C. The IDEX USD Three-Month Interest Rate Swap Futures Contract

This case involves an exchange-traded interest rate futures contract called the IDEX USD Three-Month Interest Rate Swap Futures Contract (the "Three-Month Contract") and listed by the International Derivatives Clearinghouse ("IDCH"). Combined 56.1 ¶ P15. The Three-Month Contract requires the long party to pay fixed rate payments and the short party to pay floating interest rate payments based on the three-month LIBOR rate. *See* Harris Report ¶ 25. The IDCH, which was registered with the CFTC as a DCO in 2008, is a wholly owned subsidiary of the International Derivatives Clearing Group ("IDCG"), which is a subsidiary of the NASDAQ OMX Group, Inc. ("NASDAQ"). Combined 56.1 ¶¶ P9, P13, D1. The Three-Month Contract was offered on the NASDAQ OMX Futures Exchange ("NFX"). *Id.* ¶ P10.

The Three-Month Contract was listed each trading day in sixteen different tenors ranging from one to thirty years. *Id.* ¶ P7. Market participants could obtain a position in the Three-Month Contract by either (1) executing a bilateral agreement and clearing the contract through

[2] An OTC swap is one of the most common derivative instrument products. They are similar to the contract at issue in this case, but are uncleared instruments. *See* Harris Report ¶¶ 17-20.

the IDCH;[3] or (2) placing an bid (if the party desires to place a long position) or an offer (if the party decides to place a short position) through the IDCH electronic platform and having that position accepted by a counterparty. *Id.* ¶¶ P19, D3.

D. IDCH Rules Governing the Three-Month Contract's Settlement Price

The IDCH uses a two-step process to determine a party's daily margin payments. *See* MacLaverty Opening, Ex. 1. First, the IDCH generates the IDEX Curve—a line graph plotting interest rates versus Three-Month Contract tenors ranging from one year to thirty years. Second, the IDCH uses the IDEX Curve to value a party's open position and thereby determine the daily margin a party will receive or pay. *Id.* ¶¶ P26, P27; *see also* MacLaverty Opening ¶ 25.

To generate the IDEX Curve, the IDCH uses the method outlined in its "Rulebook." *See* Rules of International Derivatives Clearinghouse ("Rulebook"), at IDCG00010744, ECF No. 104-14. According to the Rulebook, the IDCH constructs the IDEX Curve by compiling the daily settlement rates for the various contract tenors. *See* MacLaverty Opening ¶ 25. To determine a tenor's daily settlement rate, the IDCH extrapolates pricing information from a hierarchy of sources, which in order of priority are: (1) the midpoint of relatively tight electronically submitted bids and offers that were placed during 2:45 and 3:00 p.m. EST ("PM Settlement Period");[4] (2) the settlement price of a consummated trade made during the PM Settlement Period that occurred between non-tight bids and offers; and (3) the prevailing rates in the OTC swap markets ("Corresponding Rates"), with the best bids and offers submitted on the electronic platform during the PM Settlement Period limiting the curve—*i.e.*, the settlement price

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[3] That original bilateral agreement would be an OTC swap until it is cleared through the IDCH. *See* Combined 56.1 ¶ D3.

[4] The record does not provide a standard for classifying bids and offers as "tight" or "non-tight."

could not be higher than the best electronic offer or lower than the best electronic bid. *See* Filtering, Prioritizing, & Modification of IDCG Data Feeds, at IDCG00009826-27, ECF No. 104-15; *see also* Harris Report ¶ 39; MacLaverty Opening ¶¶ 29-30; Combined 56.1 ¶¶ P24, P29, D49.

Notwithstanding this methodology, the IDCH maintained the authority to revise the IDEX Curve to be a fair and appropriate reflection of the market.[5] *See* Combined 56.1 ¶ D110; MacLaverty Opening ¶ 26. The parties dispute whether the IDCH did in fact use its authority to set settlement prices at levels different from the Corresponding Rates in the absence of electronic activity. Defendants argue that during the Relevant Period, the IDCH established settlement prices above the Corresponding Rate on days without electronic activity in the Settlement Period. *See* Combined 56.1 ¶¶ P24; D97. The CFTC disputes this and argues that in the absence of electronic activity, the IDCH always sets a tenor's settlement price to the Corresponding Rate. *See, e.g.*, *id.* ¶ P24. In support of these positions, both parties cite to, among other documents, Exhibit 3 of the Malas Declaration, ECF No. 103-15, which is a 308-page spreadsheet summarizing settlement prices submitted by the CFTC. Because there is a dispute as to how to interpret this spreadsheet, the Court will draw the inference against the moving party.[6]

Once the IDEX Curve was created, the IDCH would calculate the net present value of

[5] Three separate provisions each individually permit the IDCH to do this. First, Rule 1002(i) provides that the IDCH "may, in its sole discretion, establish a Daily Settlement Price that is a fair and appropriate reflection of the market." Rulebook at IDCG00010744. Second, Rule 602(c) provides that "when deemed necessary by the [IDCH] to protect the respective interests of the [IDCH] and Clearing Members, the [IDCH] may establish the Settlement Price for any Contract at a price deemed appropriate by the [IDCH] under the circumstances." Rulebook at IDCG00010696. Third, Rule 205 provides that the IDCH may "take actions necessary or appropriate to respond to an Emergency," Rulebook at IDCG00010656, where the definition of "Emergency," is "any actual, attempted or threatened . . . manipulative activity," Rulebook at IDCG00010657.

[6] For Defendants' motion, the Court infers that the IDCH always sets the settlement prices to the Corresponding Rates in the absence of electronic bids in the PM Settlement Period. And for the CFTC's motion, the Court infers that the IDCH did in fact establish settlement prices above the Corresponding Rate on days without electronic activity in the PM Settlement Period.

each open position by valuing the contract positions (fixed and floating) according to the IDEX Curve. *See* Harris Report ¶ 27. In practice, a higher IDEX Curve increased the amount of variation margin the short party would pay to the long party. Combined 56.1 ¶ P30. As a result, a higher IDEX Curve positively impacted the profits of a trader holding an open long position in the Three-Month Contract and negatively impacted the value of an open short position. *Id.* ¶¶ P30, P31, P44.

III. DRW's Alleged Price Manipulations

A. DRW's Open Long Position in the Three-Month Contract

In August 2010, DRW began to trade the Three-Month Contract, and by September 30, 2010, DRW had acquired a net long position of approximately 3,500 contracts with a total net notional value of $350 million. *Id.* ¶¶ D19, P44. Between August and October 2010, DRW acquired its long position through a voice broker, Newedge USA, LLC ("Newedge"), which consummated bilateral trades and then cleared those contracts through the IDCH. *Id.* ¶¶ D18-D19.

During this time, Defendants examined the IDEX Curve in detail, and Wilson made clear that he wanted to "really understand" the IDEX Curve. *Id.* ¶¶ P38, P39. In a July 23, 2010 e-mail, Wilson instructed his employees to "[c]onfirm the contract has full convexity bias (despite the fact they will force it to settle at non-convexity based prices)." *Id.* ¶ P39. And on August 30, 2010, a DRW trader stated that the Three-Month Contract is "flawed and we are working on taking advantage of the PAI/Convexity flaw." *Id.* ¶ P41.

B. DRW's Electronic Bids

In December 2010, the IDCH provided DRW with the names of different vendors that DRW could use to electronically submit bids. By January 24, 2011, DRW, which had previously

lacked the ability to place electronic bids, began electronically to "inject[] bids higher than the prevailing Corresponding Rates during the PM Settlement Period." Combined 56.1 ¶ P88. DRW continued to place bids electronically until August 12, 2011.

Between January 24, 2011, and August 12, 2011 (the "Relevant Period"), DRW submitted 2,894 electronic bids, none of which were hit by a corresponding electronic offer. *Id.* ¶ P87. Approximately 90% of DRW's bids were for a notional amount between $25 and $30 million. *See* Evans Report ¶ 42. Over the course of 94 days during the Relevant Period, 496 of DRW's bids were both higher than the Corresponding Rates and open during the PM Settlement Period. *Id.* ¶¶ P90-92. The CFTC points out that (1) on eleven days during the Relevant Period, all of DRW's bids for that day were placed during the PM Settlement Period, *id.* ¶ P94; and (2) on nine of those days, all of DRW's bids placed during the PM Settlement Period were subsequently cancelled between 3:00 and 3:50 PM EST, *id.* ¶ P93.

C. The February 2, 2011 Trade

Defendants submit evidence that DRW attempted to consummate a trade during the Relevant Period with MF Global on February 2, 2011. Specifically, one of DRW's electronic bids attracted MF Global—a company that did not have the ability to transact electronically—which contacted both the IDCH and the broker, Newedge, in an attempt to transact with DRW. *See* Combined 56.1 ¶ D56. Upon learning of MF Global's desire to transact, DRW bid at a notional volume of $1 billion, and at a value above the Corresponding Rates. *Id.* ¶ D57; *see also* Decl. Wilson ¶ 3, ECF No. 104-7. MF Global countered with an offer of $250 million notional, DRW accepted, and the trade was submitted to the IDCH for clearing. *See* Wilson Decl. ¶¶ 4-5; *see also* February 4 Call Tr., ECF No. 104-73. However, the IDCH did not clear the trade because the required paperwork was not submitted to it in time. Wilson Decl. ¶¶ 4-5. Upon

learning that the trade had not cleared, Wilson contacted MF Global and attempted to initiate a new transaction with similar terms, but MF Global refused. *See* Combined 56.1 ¶ D60; *see also* Wilson Decl. ¶ 5.

Although it is not clear what paperwork was missing, the record does indicate that MF Global refused to form a new trade because MF Global had concerns that DRW was involved in market manipulation. *See* Combined 56.1 ¶ D59; *see also* February 4 Call Tr. DRW argues that even though the initial trade did not clear, MF Global was in fact liable to DRW for that trade; ultimately, MF Global and DRW entered into a general litigation release in which MF Global agreed to pay DRW "approximately $850,000." Combined 56.1 ¶ D61.

D. DRW's Bids and the IDEX Curve

Whenever DRW submitted electronic bids that were open during the Settlement Period, the IDCH incorporated "DRW's bids . . . into the calculation of its daily settlement rates" and thereby set "the Three Month Contract settlement prices higher than they would have been had IDCH decided to set its daily settlement rates to the Corresponding Rates." *Id.* ¶ P69; *see also id.* ¶ D98 ("IDCH established settlement prices above the Corresponding Rates that were at, or near, the prices bid by DRW.").

Internal DRW e-mails show that DRW was aware of the influence its bids had over the IDEX Curve. *Id.* ¶ P82. For example, Yuhua Yu, DRW's head of quantitative research, sent Wilson an e-mail on February 3, 2011, stating: "Old regime: [IDEX Curve] is a LIBOR swap curve. New regime: [IDEX Curve] is DRW defined, which imply a deviation between the LIBOR swap curve and the [IDEX Curve]." *Id.* ¶ P82.

Other parties were also aware of the effect that DRW's bids had on the IDEX Curve. Michael Dundon, IDCG's Chief Risk Officer, noticed that once DRW began submitting

electronic bids, the IDEX Curve changed. *Id.* ¶ P76. Similarly, on February 4, 2011, Laurie Ferber, General Counsel and Executive Vice-President of MF Global, accused DRW of bidding in order to affect the IDEX Curve. *Id.* ¶ P81. During that conversation, she stated: "But when, you know, the fact is those prices don't get traded on. We all know how much volume goes through IDCG, and [DRW's bids] go up at 2:45 every day, so making sure the[—]make sure that the mark[] screws other people, 'cause, you know, it screws them, and that is what happens . . . [y]ou get to set the mark[]." *Id.*

Various market supervisors also investigated DRW's practices. On February 4, 2011, following DRW and MF Global's failed trade, the IDCH requested that DRW provide an explanation of its bidding activity in the Three-Month Contract. *Id.* ¶ D63. On February 18, 2011, DRW explained in a letter to the IDCH that DRW believed that the Three-Month Contract was not "economically equivalent" to OTC swaps because the Three-Month Contract did not adjust for the impact of the convexity effect. DRW February 18 Letter at D0000107, ECF No. 104-35. This resulted, in DRW's view, "in a significant pricing differential" between the Three-Month Contract and the Corresponding Rates, and "[a]ccordingly, DRW [was] posting bids at prices that it believe[d] [were] closer to the true market for [the Three-Month Contract]." *Id.* DRW also explained that it had placed bids during the Settlement Period to "provide additional data points to enable IDCH to fill out the swap curve" and thus "better represent[] fair values" *Id.* at D0000108-9. After this letter, the IDCH did not advise DRW that it should stop submitting electronic bids for the Three-Month Contract. Wilson Decl. ¶ 8.

Similarly, in March 2011, the CFTC's Division of Clearing and Intermediary Oversight commenced an investigation into the IDCH's settlement procedures. That investigation ended with a CFTC employee concluding that "there was a justification for valuing the Three-Month

Contract differently than the Corresponding Rates." *Id.* ¶ D79 Response. And, in August 2011, NFX, the exchange on which the IDCH listed the Three-Month Contract, requested that an independent third party, the National Futures Association ("NFA"),[7] "review the timing of bids submitted by DRW." *Id.* ¶ D123. Based on the information that the NFA reviewed, which included DRW's bid timing, frequency, and size, the NFA concluded "that it did not see any manipulation based on the information it reviewed." *Id.* ¶ D130; *see also id.* ¶¶ D123-D131.

DISCUSSION

I. Expert Testimony

"[O]nly admissible evidence need be considered by the trial court in ruling on a motion for summary judgment." *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997). Both parties have made motions to exclude expert testimony. The Court turns to these motions first.

A. Admission of Expert Testimony

Rule 702 of the Federal Rules of Evidence, which governs the admissibility of expert testimony, provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. In order for an expert opinion to be admissible, the witness "must be qualified as an expert, the testimony must be reliable, and the testimony must assist the trier of

[7] For a description of the NFA's regulatory role, see Combined 56.1 ¶ D23 ("The Market Regulation Group of the National Futures Association is an independent third party that 'works for the exchanges to the benefit of the exchanges to meet their regulatory responsibilities.' With respect to exchanges that work with the NFA Market Regulation Group and that have rules prohibiting manipulation, the NFA Market Regulation Group's responsibilities include assisting the exchanges in identifying potential manipulation."). The CFTC also notes that the NFA does not have the authority to determine liability for market manipulation. *Id.*

fact." *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 172 (S.D.N.Y. 2009). "Courts within the Second Circuit have liberally construed expert qualification requirements." *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, No. 00 Civ. 1898, 2008 WL 1971538, at *5 (S.D.N.Y. May 7, 2008) (internal quotation marks omitted). The Rule 702 commentary explains that it was amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Fed. R. Evid. 702 advisory committee's note to 2000 amendment.

In *Daubert*, the Supreme Court interpreted Rule 702 to require district courts to act as gatekeepers by ensuring that expert scientific testimony "both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. at 597. This requires "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. To be scientifically valid, the subject of expert testimony must rest on "good grounds, based on what is known." *Id.* at 590 (internal quotation marks omitted). In *Daubert*, the Court set forth a non-exclusive list of factors that district courts might consider in gauging the reliability of scientific testimony. *Id.* at 593-95. These factors include: (1) whether the theory has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error and whether standards and controls exist and have been maintained with respect to the technique; and (4) the general acceptance of the methodology in the scientific community. *Id.* "Whether some or all of these factors apply in a particular case depends on the facts, the expert's particular expertise, and the subject of his testimony." *In re Fosamax*, 645 F. Supp. 2d at 173 (citing *Kumho Tire*, 526 U.S. at 138). A district court has broad discretion both in determining the relevant factors to be employed in assessing reliability and in determining

whether that testimony is in fact reliable. *Zuchowicz v. United States*, 140 F.3d 381, 386 (2d Cir. 1998).

"In deciding whether a step in an expert's analysis is unreliable, the district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002). However, in accordance with the liberal admissibility standards of the Federal Rules of Evidence, only serious flaws in reasoning or methodology will warrant exclusion. *Id.* "As long as an expert's scientific testimony rests upon 'good grounds, based on what is known,' it should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies." *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998) (quoting *Daubert*, 509 U.S. at 596). If an expert's testimony lies within "the range where experts might reasonably differ," the jury, and not the trial court, should "decide among the conflicting views of different experts." *Kumho Tire*, 526 U.S. at 153. The ultimate object of the court's gatekeeping role under Rule 702 is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152. "The flexible *Daubert* inquiry gives the district court the discretion needed to ensure that the courtroom door remains closed to junk science while admitting reliable expert testimony that will assist the trier of fact." *Amorgianos*, 303 F.3d at 267.

B. Application

1. Jeffrey Harris

Defendants offer Jeffrey Harris as an expert witness. He is the Finance and Real Estate Department Chair at American University and was previously the Chief Economist of the CFTC. Harris opines, in part, that (1) the Hull-White model values the Three-Month Contract higher than the Corresponding Rates because of the convexity effect; (2) DRW's bids contributed to price discovery because they reflected DRW's understanding that the Three-Month Contract was being undervalued; and (3) DRW would have made "nearly the same profits" in the absence of its electronic bids. *See* Harris Report ¶ 4(a)-(i).

The CFTC moves to exclude Harris' report on a variety of grounds. The CFTC objects to Harris' valuation opinion, arguing that it is unreliable because the Hull-White model is theoretical and unattached to DRW's actual valuation model. Pl. Mem. Exclude 18-21, ECF No. 107. The Court finds that Harris' opinion is permissible because his model is widely accepted in the industry, *see* Harris Report ¶¶ 48-52, and thus may aid the jury in deciding whether to adopt DRW's argument that the Three-Month Contract was undervalued and that DRW's bids did not create an artificial price, *see United States v. Litvak*, 808 F.3d 160, 183 (2d Cir. 2015) (holding that the district court erred in excluding expert testimony regarding securities valuation methods that would educate a jury on how to credit testimony).

The CFTC moves to exclude Harris' testimony on price discovery, arguing that his testimony is not based on reliable sources and that he failed "to investigate the basic market structure of the exchange NFX, the clearinghouse IDCH, and the Three-Month Contract itself, including its lack of liquidity." Pl. Mem. Exclude 19. The Court finds that Harris has based his testimony on reliable academic, government, and trade authorities, *see, e.g.*, Harris Report ¶¶ 73,

78, 87-88, and that he has investigated aspects of the Three-Month Contract market structure, *see, e.g.*, *id.* ¶¶ 25-28 (explaining market structure). Harris' testimony is, therefore, admissible.

The CFTC contends that Harris' conclusion that DRW "would have made nearly the same profits" "regardless of whether IDCH continued to establish settlement prices based on the" Corresponding Rates or IDCH "moved its settlement curve toward [DRW's bids] (as it did during the Relevant Period)" is unsupported and should be excluded. Harris Report ¶ 11. Defendants argue that the fact that a counterparty unwound its position provides an adequate basis for Harris' conclusion. Defs. Opp. Exclude 17, ECF No. 121. The Court disagrees. The fact that a counterparty unwound its position is equally consistent with DRW's profits being significantly impacted by DRW's electronic bids—*i.e.*, because DRW's bids altered the IDCH Curve, the counterparty paid to unwind an otherwise profitable position. Moreover, at his deposition, Harris testified that he had not examined any other profit and loss data. *See* Harris Dep. 185:17-21 ("[T]he only data I had was that one transaction was reversed."), ECF No. 107-18; *see also id.* 186:10-16. Accordingly, the Court excludes paragraphs 111-115, to the extent that Harris opines that the level of profit made by DRW under these two pricing regimes would have been "nearly the same." *See Laumann v. Nat'l Hockey League,* 117 F. Supp. 3d 299, 319 (S.D.N.Y. 2015) (excluding testimony when the expert's opinion was based on "insufficient facts and data" that left "too great an analytical gap between the data and the opinion proffered"); *see also S.E.C. v. Badian,* 822 F. Supp. 2d 352, 360 (S.D.N.Y. 2011) (excluding expert testimony when the expert did not "compare the costs and benefits" of "holding [the asset] until [an event] or selling [the asset] prior to" an event).

The CFTC argues that Harris' "thought experiment" should be stricken because "anyone could do" it. Pl. Mem. Exclude 21; *see also* Harris Report ¶ 121. This objection is meritless: the

term "thought experiment" was used to simplify a finance concept into terms that a juror could understand. Harris' clarification of his testimony does not render it impermissible.

The CFTC contends that Harris offers impermissible legal conclusions in paragraphs 78-85, 92, 93-95, 101, and 103. *See* Pl. Mem. Exclude 22. "[E]very circuit has explicitly held that experts may not invade the court's province by testifying on issues of law." *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001). In response, Defendants have withdrawn the statement offered at Harris Report paragraph 103 ("I conclude that DRW did not manipulate market prices or create artificial prices by bidding above OTC interest rate swap rates during the Three Month Contract's Settlement Period."). Defs. Mem. Opp. Exclude 11, ECF No. 106. As for the other paragraphs, the Court finds Harris' testimony admissible because he testifies not to issues of law, but rather on how industry actors, including the CFTC, understand economic concepts such as price discovery. *See Cary Oil Co. v. MG Ref. & Mktg., Inc.*, No. 99 Civ. 1725, 2003 WL 1878246, at *4 (S.D.N.Y. Apr. 11, 2003) (permitting a former CFTC economist to testify to the CFTC's regulatory scheme); *see also United States v. Litvak*, 808 F.3d 160, 185-187 (2d Cir. 2015) (holding that the district court erred in excluding expert testimony regarding the financial industry's understanding of legal principles).

The CFTC argues that Harris impermissibly testifies to an actor's state of mind at paragraphs 44-45, 93-95, 106-07, and 112-113. Pl. Mem. Exclude 23. Experts are not permitted to testify to an actor's state of mind, but an expert can testify to whether a given practice is consistent with a given state of mind. *Compare Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank*, No. 09 Civ. 3020, 2011 WL 6288415, at *8 (S.D.N.Y. Dec. 15, 2011) ("There is no dispute that opinions concerning state of mind are an inappropriate topic for expert opinion."), *with Media Sport & Arts S.R.L. v. Kinney Shoe Corp.*, No. 95 Civ. 3901, 1999 WL

946354, at *4 (S.D.N.Y. Oct. 19, 1999) (permitting expert testimony on "whether the parties' behavior conformed with industry customs and practices and whether this evidences the intent of the parties to be bound by [the] contract"). An expert can also "reference" an actor's state of mind when that state of mind is in "the record" and is "the basis for [the expert's] ultimate opinion." *Bd. of Trustees of AFTRA Ret. Fund*, 2011 WL 6288415, at *8. In paragraphs 44-45, 93-95, 106-07, and 112, Harris does not directly opine on an actor's state of mind, rather he describes (1) what an action may indicate about a party's state of mind or (2) on a fact that provides the basis for his ultimate opinion.[8] However, that portion of Harris' opinion in which he states "[t]his is because Jefferies, by that time, *realized* that DRW's valuation of the impact of the convexity and NPV effects on the Three Month Contract was accurate and, thereby, *acknowledged* that the Three Month Contract should not have been priced based on the Corresponding Rates" does speak to an actor's state of mind. Harris Report ¶ 113 (emphases added). Therefore, the Court excludes this sentence.

The CFTC contends that Harris' testimony is prejudicial because it is cumulative of Evans' testimony. *See* Pl. Mem. Exclude 23. The CFTC does not cite to any specific duplicative testimony. Given that Evans and Harris opine on substantively different concepts—*i.e.*, financial modeling (Harris) versus bidding practices (Evans)—the Court concludes that Harris' testimony is not cumulative.

2. Matthew Evans

Defendants offer Matthew Evans as an expert witness. He is a Senior Vice President at NERA Economic Consulting and the former Head of U.S. Commodities Valuation and New Business at Barclays Capital. *See* Decl. Matthew Evans Ex. A ("Evans Report") ¶¶ 1-6, ECF

[8] *See, e.g.*, Harris Report ¶ 95 ("[T]he fact that IDCH apparently did not . . . indicates that it reviewed . . . .").

No. 114-1. Evans opines that DRW's bids and associated communications were consistent with an actor engaging in price discovery and attempting to transact. *See* Evans Report ¶ 10.

The CFTC moves to exclude Evans' testimony. As an initial matter, the CFTC argues that Evans cannot be qualified as an expert because he has no relevant certifications or licenses, no post-graduate schooling, and no experience trading interest rate futures. Pl. Mem. Exclude 8. The Court finds that Evans' work experience serving as head of U.S. Commodities Valuation and New Business at Barclays Capital qualifies him as an expert. *See* Evans Report ¶ 2; *see also McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995) ("[The] suggestion that [the expert] had to be a specialist in environmental medicine to provide expert testimony in this case is an unwarranted expansion of the gatekeeper role announced in *Daubert*."); *E.E.O.C. v. Beauty Enterprises, Inc.*, 361 F. Supp. 2d 11, 19 (D. Conn. 2005) ("[N]othing under the Federal Rules of Evidence or *Daubert* suggests that experience alone cannot provide a sufficient foundation for expert testimony.").

The CFTC argues that the Court should reject as unreliable Evans' "empirical hypothesis test." Pl. Mem. Exclude 9-12. *See also* Evans Report ¶¶ 33-44. The Court agrees and finds that this test is unreliable. Evans' report and testimony provide no foundation for the three criteria he has chosen and no rationale for bundling them together in a test with a binary outcome. He supports the test only with his own ipse dixit that his chosen criteria "are commonly used," *id.* ¶ 13, and that "[t]raders have long since been [sic] trading with a good grasp of the above concepts," *id.* ¶ 11. Moreover, Evans fails to suggest what values would satisfy each of the test's factors or how, once determined, those factors should be weighed. *See, e.g.*, *id.* ¶ 33 (failing to define which bids would be (1) of "enough volume to transfer risk"; and (2) open for the "period of time" that makes the bid "executable"); *see also Luitpold Pharm., Inc. v. Ed. Geistlich Sohne*

A.G. Fur Chemische Industrie, No. 11 Civ. 681, 2015 WL 5459662, at *8 (S.D.N.Y. Sept. 16, 2015) (excluding testimony that was "based on [the expert's] own experience, because it was" "merely ipse dixit, not drawn from any verifiable data, even if that data is qualitative"); *id.* ("All experts testify to some extent based on experience. There must be some verifiable way of demonstrating the validity of each of the items on his list.").

The CFTC objects to Evans' opinion that DRW was engaged in "bargain hunting," *see* Evans Report ¶¶ 68-69, and price discovery, *see id.* ¶¶ 14-23, 24-31, arguing that this opinion is unsupported and based only on some of DRW's bidding data. *See* Pl. Mem. Exclude 10-12. The Court finds that Evans' testimony is adequately supported by his review of industry practices and DRW's bidding practices and that the completeness of Evans' analysis goes to weight, not admissibility. *See Campbell v. Metro. Prop. Cas. Ins. Co.*, 239 F.3d 179, 186 (2d Cir. 2001) (noting "gaps or inconsistencies . . . go the weight of the evidence not its admissibility").

The CFTC argues that Evans' opinion should be excluded as irrelevant insofar as Evans is testifying on industry standards, rather than DRW's actual bidding practices. *See* Pl. Mem. Exclude 15-16; *see also id.* 10-11. The Court rejects this argument because if the jury credits Evans' testimony on industry practices, the jury is more likely to find that DRW's bids evinced an intent to trade at large notional volumes, and thus that DRW did not intend its bids to be manipulative. *See Media Sport & Arts s.r.l. v. Kinney Shoe Corp.*, No. 95 Civ. 3901, 1999 WL 946354, at *1 (S.D.N.Y. Oct. 19, 1999) (admitting testimony on the "ordinary practices" of professionals in order '"to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry."' (quoting *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509 (2d Cir. 1977)).

The CFTC argues that Evans' testimony that DRW's actions had no economic analog to bang-the-close cases is an inadmissible legal conclusion. *See* Pl. Mem. Exclude 12-13. The term "banging the close" is neither a legal term nor an element of the CEA. Accordingly, Evans is permitted to testify on this term as it relates to a certain kind of trading practice. *See Litvak*, 808 F.3d at 190; *see also Cary Oil Co.*, 2003 WL 1878246, at *3-4 (permitting expert testimony on general corporate governance principles and the concept of veil-piercing to the jury). The CFTC also argues that Evans' testimony on banging the close is inadmissible because Evans does not examine all banging-the-close cases. *See* Pl. Mem. Exclude 12-13. The Court finds that the completeness of Evans' analysis goes to weight, not admissibility, and the CFTC may probe any gaps on cross-examination.

The CFTC challenges paragraphs 45-47, 50, 51, and 53-61 of Evans' Report, arguing that it is impermissible intent testimony. *See* Pl. Mem. Exclude 13-15. As discussed above with respect to Harris' testimony, an ultimate opinion on an actor's state of mind is inadmissible. The Court finds that Evans testifies, in part, to an actor's state of mind in paragraphs 53[9] and 55.[10] Therefore, the portions of these paragraphs containing inadmissible testimony are excluded.

3. Robert MacLaverty

The CFTC offers Robert MacLaverty as an expert witness. He is a Managing Director with Berkeley Research Group, LLC, and has nineteen years of experience advising on and trading in securities and derivatives. *See* MacLaverty Opening ¶¶ 1-4. MacLaverty offers an expert report dated June 19, 2015, opining that DRW's bids were artificial because they were

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[9] The inadmissible statement is: "DRW was eager to execute." Evans Report ¶ 53.

[10] The inadmissible statement is: "This confirms that the orders open for the settlement were true interests to purchase." Evans Report ¶ 55. Compare this with the permissible testimony from Evans Report ¶ 55 ("Again, this is consistent with true interest to purchase.").

"based on DRW's self serving actions," which were, in sum (1) DRW's bid timing; (2) DRW's bid levels; (3) the fact that DRW's bids were consistently unmatched; and (4) the effect of DRW's bid on the profit derived from DRW's open positions. MacLaverty Opening ¶ 7. MacLaverty also offers a rebuttal expert report dated August 18, 2015, Decl. MacLaverty Attach. 2 ("MacLaverty Rebutal"), ECF No. 110-18, stating, in part, that (1) Harris' testimony is flawed because his model is not calibrated properly, *see* MacLaverty Rebuttal ¶¶ 65-82; and (2) Evans' testimony is flawed because he misunderstands that a party bidding in an illiquid market does not contribute to price discovery, *see* MacLaverty Rebuttal ¶¶ 19, 40-44.

Defendants move to exclude all of MacLaverty's opening report, arguing that MacLaverty adopted a substantively different opinion at his deposition and that in doing so he "abandoned" his opening report and it should be excluded as unreliable under Rule 702. *See* Defs. Mot. Exclude 25-28, ECF No. 117. To support their abandonment theory, Defendants cite a number of purported conflicts between MacLaverty's written opinion and deposition testimony.[11] The Court rejects Defendants' argument that MacLaverty's testimony should be excluded as "abandoned." MacLaverty's opening report was not so narrowly written that the Court is compelled to conclude that MacLaverty's deposition testimony is inconsistent.[12] Quite simply, Defendants' questions were focused on MacLaverty's rebuttal opinion; the fact that he

[11] For example, Defendants contrast MacLaverty's testimony that DRW's bids created artificial prices because DRW based its bid levels on an "uncalibrated model," MacLaverty Dep. 23:25-24:9, ECF No. 104-30, with his written opinion stating that artificial prices existed because DRW's bids were based not on "supply and demand" but instead on DRW's "self-serving actions," MacLaverty Opening ¶ 7. Defendants similarly contrast MacLaverty's deposition testimony that an uncalibrated model alone is sufficient to determine price artificiality, regardless of other factors such as open positions, *see id.* 48:10-49:3, with his written testimony inferring artificiality from, in part, the fact that DRW's bids were unmatched, *see, e.g.*, MacLaverty Opening ¶ 7 (reasoning that "DRW's regular and systematic placement of bids that went unmatched by any other market participant" was a self-serving action).

[12] For example, in his opening, MacLaverty stated that DRW's bid level over the Corresponding Rates was a "self-serving" action. MacLaverty Opening ¶ 7. This testimony is arguably consistent with the notion of an "uncalibrated model" because they both result in bid levels higher than the Corresponding Rates.

answered without reference to his opening is not tantamount to a rejection of his opening report. Accordingly, the Court does not find that the so-called "gaps" and "inconsistencies" between MacLaverty's deposition and opening report render his testimony unreliable under Rule 702.[13] *Campbell*, 239 F.3d at 186 (noting "gaps or inconsistencies . . . go the weight of the evidence not its admissibility").

Defendants argue that MacLaverty should be precluded from offering testimony that financial models must always be calibrated to the last consummated trade because he fails to provide any basis for this opinion. *See* Defs. Mot. Exclude 8-21; *see also, e.g.*, MacLaverty Dep. 136:2-17 ("The only nonartificial calibration of a trading model is to where trades actually occurred."). The Court finds that MacLaverty has failed to provide, in his report or at his deposition, any authority supporting this modeling proposition. *See* MacLaverty Dep. 163:20-164:12; *see also id.* 66:18-67:3. This is problematic because the record suggests that his calibration principle is not within the range of where experts might reasonably differ. Specifically, his opinion is undermined by (1) the IDCH's pricing methodology, which could have adopted this principle but did not do so, *see* MacLaverty Dep. 127:6-129:6; and (2) MacLaverty's testimony that prices in the Three-Month Contract changed quickly and that pricing information cannot be inferred from one day to the next, *see id.* 64:20-65:3. Because MacLaverty provides no support for his testimony on model calibration, and all evidence in the record suggests that it is not a generally accepted method, the Court finds that his testimony on model calibration is unreliable. *See Kumho Tire*, 526 U.S. at 153 (holding that an expert's

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[13] Defendants note in their reply brief that under Federal Rule of Civil Procedure 26 an expert is required to provide a full statement of his opinion, and the failure to do so may be grounds for preclusion under Federal Rule of Civil Procedure 37. *See* Defs. Reply Exclude 16, ECF No. 127. The Court declines to address this argument, first raised in Defendants' reply brief, but notes that this potential ground for relief remains available to Defendants at the *in limine* stage.

testimony must lie within "the range" of "where experts might reasonably differ"); *see also Luitpold Pharm., Inc.*, 2015 WL 5459662, at *8 ("All experts testify to some extent based on experience. There must be some verifiable way of demonstrating the validity of each of the items on his list."). Accordingly, the Court excludes MacLaverty's testimony that financial models must always be calibrated to the last consummated trade.

Defendants challenge MacLaverty's testimony that DRW did not engage in price discovery because "[w]hen there is only one party to any bid or offer in a marketplace, there is no price discovery as there are no consummated trades." MacLaverty Rebuttal ¶ 19; *see also id.* ¶¶ 40-44; Defs. Mot. Exclude 36-38. The Court finds that MacLaverty has failed to provide any reliable authority supporting his theory on price discovery. *See* MacLaverty Dep. 128:14-129:6. This is problematic because the record undermines his theory on price discovery–specifically, the facts that (1) the IDCH established rules incorporating unmatched bids in determining settlement prices, *see* Combined 56.1 ¶¶ D111-D115; (2) the CFTC approved those rules, *id.* ¶ D9; and (3) other contract markets also incorporate unmatched bids and offers into their pricing decisions, *see* Evans Report, Exhibits 7-8. In short, the CFTC has not shown that this testimony is within the range of where experts might reasonably differ. Accordingly, the Court excludes MacLaverty's testimony on price discovery. *See Cary Oil Co.*, 2003 WL 1878246, at *8 (excluding testimony that was "unsupported by any factual basis," and noting that the fact the proposed testimony was "counterintuitive" meant it was "particularly unreliable").

II. Summary Judgment

A. Standard of Review

Summary judgment may be granted only if the court concludes that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of

law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Feingold v. New York*, 366 F.3d 138, 148 (2d Cir. 2004). A dispute is genuine when there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Material facts are those which may affect the outcome of a case. *Id.*

The moving party initially bears the burden of informing the court of the absence of a genuine dispute of material fact by citing to particulars in the record. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. 317 at 322-25; *Koch v. Town of Brattleboro*, 287 F.3d 162, 165 (2d Cir. 2002). The movant may satisfy his burden by "showing that the materials cited do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c)(1)(B). If the nonmoving party has the burden of proof on specific issues, the movant may also satisfy his own initial burden by demonstrating that the adverse party cannot produce admissible evidence to support an issue of fact. *Celotex*, 477 U.S. at 322-23; *PepsiCo Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002). In deciding the motion, the court views the record in the light most favorable to the nonmoving party. *Hunter v. Bryant*, 502 U.S. 224, 233 (1991); *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 61 (2d Cir. 2002).

If the moving party meets his initial burden, the burden then shifts to the opposing party to establish a genuine issue of fact. *Beard v. Banks*, 548 U.S. 521, 529 (2006); *Santos v. Murdock*, 243 F.3d 681, 683 (2d Cir. 2001). The opposing party may not avoid summary judgment by relying solely on conclusory allegations or denials that are unsupported by factual data. Fed. R. Civ. P. 56(c); *Amaker v. Foley*, 274 F.3d 677, 680-81 (2d Cir. 2001). Instead, the opposing party must set forth "specific facts showing there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (internal quotation marks omitted). A nonmoving party demonstrates a "genuine

issue for trial" by presenting evidence about a material fact, such that a reasonable jury could return a verdict in the nonmoving party's favor. *Anderson*, 477 U.S. at 248.

B. Application to the Manipulation and Attempted Manipulation Claims

The CFTC alleges market manipulation and attempted market manipulation in violation of Sections 6(c) and 9(a)(2) of the CEA. Section 6(c) provides that

> It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance . . . .

7 U.S.C. § 9. Section 9(a)(2) prohibits "[a]ny person [from] manipulat[ing] or attempt[ing] to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity." 7 U.S.C. § 13(a)(2).

Given the absence of a statutory definition of "manipulation" in the CEA, caselaw has established a four-prong test. *See In re Amaranth Natural Gas Commodities Litig.*, 730 F.3d 170, 173 (2d Cir. 2013); *see also DiPlacido v. CFTC*, 364 F. App'x 657, 661 (2d Cir. 2009) (summary order). Pursuant to this test, to state a claim for market manipulation the CFTC must allege "(1) that the accused had the ability to influence market prices; (2) that [the accused] specifically intended to do so; (3) that artificial prices existed; and (4) that the accused caused the artificial prices." *DiPlacido,* 364 F. App'x at 661 (citing *In re Cox*, CFTC No. 75-16, 1987 WL 106879, at *4 (July 15, 1987)). To state a claim for attempted manipulation, the CFTC must allege (1) an intent to affect market prices and (2) an overt act in furtherance thereof. *See CFTC v. McGraw–Hill Cos.*, 507 F. Supp. 2d 45, 51 (D.D.C. 2007).

1. Specific Intent to Influence Market Prices

In its June 26, 2014 Memorandum and Order, ECF No. 43, the Court held that in order to

prove market manipulation or attempted market manipulation the CFTC must prove "'an intent to affect market prices.'" *CFTC v. Wilson*, 27 F. Supp. 3d 517, 531-32 (citing *CFTC v. McGraw-Hill Cos.*, 507 F. Supp. 2d 45, 51 (D.D.C. 2007)). The Court also held:

> To meet the specific intent element of a claim for manipulation or attempted manipulation of a futures contract, the Commission must plead that Defendants "acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand." *Parnon*, 875 F. Supp. 2d at 249 (S.D.N.Y. 2012) (quoting *In re Energy Transfer Partners Natural Gas Litig.*, 07 Civ. 3349, 2009 WL 2633781, at *5 (S.D. Tex. Aug. 26, 2009)). A generalized intent to obtain trading profits "which could be imputed to any corporation with a large market presence in any commodity market, is insufficient to show intent." *In re Crude Oil Commodity Litig.*, 06 Civ. 6677, 2007 WL 1946553, at *8 (S.D.N.Y. June 28, 2007).

Id. at 532. The CFTC interprets this language as holding that the intent standard is merely the "intent to affect market price." Pl. Summ. J. 8, ECF No. 112. The CFTC's interpretation is incorrect. The CFTC must prove that Defendants had the specific intent to affect market prices that "did not reflect the legitimate forces of supply and demand." This means, that there is "no manipulation without intent to cause artificial prices." *In re Amaranth Nat. Gas Commodities Litig.*, 730 F.3d 170, 183 (2d Cir. 2013); *see also In re Commodity Exch., Inc. Silver Futures & Options Trading Litig.*, 560 F. App'x 84, 86 (2d Cir. 2014) (defining the intent element as requiring proof that "Defendants specifically intended to cause the artificial price" (internal quotation marks and citation omitted)).[14]

Defendants move for summary judgment on the intent element of the manipulation claims. Defendants argue that although they intended to affect the Three-Month Contract

[14] The CFTC bases its position on shorthand language suggesting that the intent standard is merely the intent to affect prices. But it is well settled that the intent to create an *artificial* price is the correct standard. *See, e.g.*, *Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 247 (5th Cir. 2010) ("[T]he CEA requires [p]laintiffs to [prove] . . . [that defendants] specifically intended to cause the artificial price"); *CFTC v. Parnon Energy Inc.*, 875 F. Supp. 2d 233, 244 (S.D.N.Y. 2012) ("(3) the defendant caused the artificial price; and (4) the defendant intended to do so"); *In re Ind. Farm Bureau*, CFTC No. 75-14, 1982 WL 30249, at *6 (C.F.T.C. Dec. 17, 1982) ("[S]pecific intent to create an 'artificial' or 'distorted' price is a sine qua non of manipulation.").

settlement prices, they did not intend to create artificial prices. However, a reasonable jury could find that DRW had the specific intent to create artificial prices. The jury could base this conclusion on the evidence indicating that (1) DRW first developed a large long position, and then placed electronic bids during the Settlement Period, without finalizing any corresponding transaction; (2) DRW had the intent of affecting the IDEX Curve; and (3) DRW traders made statements suggesting that they did not believe that their bids would be accepted, *see e.g.*, Silberberg Dep. 97:12-14 ("[This was the] ultimate of illiquid products . . . I had no other market participants around me . . . ."), ECF No. 101-20. Together, these facts could lead a reasonable jury to conclude that DRW developed a long position in the Three-Month Contract and then undertook a bidding strategy to create artificial prices. Accordingly, Defendants' motion for summary judgment on this element is DENIED.

The CFTC moves for summary judgment on its attempted manipulation claim. However, a reasonable jury could conclude that Defendants did not intend to create an artificial price based upon evidence indicating that (1) because of the convexity effect, there is an economic rationale for pricing the Three-Month Contract higher than the Corresponding Rates; and (2) when a counterparty to DRW's electronic bids appeared, DRW attempted to trade at rates above the Corresponding Rates for a notional volume approximately three times larger than its open long position. *See* Combined 56.1 ¶ D57; Wilson Decl. ¶ 3. Together, this evidence could lead a reasonable jury to conclude that Defendants believed that the Three-Month Contract had been undervalued and that DRW's bids were a legitimate source of supply and demand. Accordingly, the CFTC's motion for partial summary judgment is DENIED.

2. The Existence of Artificial Prices

Defendants move for summary judgment on the artificial-price element of the

manipulation claim. An artificial price is a price that "does not reflect basic forces of supply and demand." *CFTC v. Parnon Energy Inc.*, 875 F. Supp. 2d 233, 246 (S.D.N.Y. 2012) (citations and internal quotation marks omitted). "'[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.'" *Id.* (quoting *In re Kosuga*, 19 Agric. Dec. 603, 618 n.4 (U.S.D.A. 1960).

The CFTC has presented sufficient evidence for a reasonable jury to conclude that artificial prices existed. A jury could reach this conclusion 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, *see, e.g.*, MacLaverty Opening ¶ 7; and (2) the IDCH would have set the IDEX Curve to the Corresponding Rates in the absence of DRW's bids. Accordingly, Defendants' motion for summary judgment on this element is DENIED.

3. Causation of Artificial Prices

The fourth element of a CEA market manipulation claim requires a plaintiff to allege that the defendant caused the artificial prices. Defendants argue that the CFTC has failed to submit evidence from which a reasonable jury could find causation because the IDCH exercised pricing discretion and could have ignored Defendants' bids when determining the settlement prices of the Three-Month Contract. *See* Defs. Summ. J. 41-44, ECF No. 112. In other words, Defendants argue that unless their orders automatically moved the settlement prices, they cannot be said to have caused artificial prices. This is not what is required. As recognized in *Parnon*, "'it is enough, for purposes of a finding of manipulation in violation of sections 6[c] and 9(a)(2) of the CEA that respondents' action contributed to the price [movement.]'" 875 F. Supp. 2d at

248 (alteration in original) (quoting *In re Kosuga*, 19 Agric. Dec. at 618 n.4); *see also In re Cox*, 1987 WL 106879, at *12 (holding that a charge of manipulation can be sustained where respondents' acts are "one of the proximate causes" of the artificial price).

Given this standard, a reasonable jury that had first concluded that artificial prices existed, could then also conclude that DRW was a proximate cause of those artificial prices because the IDCH incorporated DRW's bids into the IDEX Curve. Indeed, this incorporation was so predictable that a DRW employee concluded in an internal e-mail that the IDEX Curve was "DRW defined." Combined 56.1 ¶ P82. Accordingly, Defendants' motion for summary judgment on this element is DENIED.

C. Due Process and Adequacy of Notice

Defendants argue that granting the CFTC the relief it requests would violate Defendants' due process rights because Defendants did not have adequate notice that their alleged conduct was unlawful. "Due process requires that 'laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Upton v. S.E.C.*, 75 F.3d 92, 98 (2d Cir. 1996) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

Insofar as Defendants argue that they lacked adequate notice regarding the illegality of market manipulation, the Court rejects this argument because it is applying well-settled legal principles.

D. Statutory Exemption

Defendants also argue that the CEA's former section 2(d)(2) excludes the transactions from the CFTC's jurisdiction.[15] Defs. Summ. J. 50. Former Section 2(d)(2) of the CEA states that:

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[15] Although now repealed, the parties agree that this statute regulates DRW's conduct because it was in effect at that time. *See* Defs. Summ. J. 49-50; Pl. Opp. Summ. J. 65, ECF No. 119.

> Nothing in this Act . . . [applies] to an agreement, contract or transaction in an excluded commodity if –
>
> (A) the agreement, contract or transaction is entered into on a principal-to-principal basis between parties trading for their own accounts or as described in section 1(a)(12)(B)(ii);
>
> (B) the agreement, contract or transaction is entered into only between persons that are eligible contract participants described in subparagraph (A), (B)(ii), or (C) of section 1a(12) at the time at which the persons enter into the agreement, contract, or transaction; and
>
> (C) the agreement, contract, or transaction is executed or traded on an electronic trading facility.

7 U.S.C. § 2(d)(2) (2006) (*repealed by* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)).

Defendants argue that DRW's bids are exempted by this statute because there is no "evidence in the record that the Three Month Contract's market participants were not trading for their own account on a principal-to-principal basis." Defs. Summ. J. 50. By DRW's interpretation of this exclusion, the CFTC's jurisdiction over its bids are contingent on whether there were "market participants" who were "not trading for their own account on a principal-to-principal basis." *Id.* But this is not what the plain text of the statute required. *Estate of Pew v. Cardarelli*, 527 F.3d 25, 30 (2d Cir. 2008) (The Court must "first look to the statute's plain meaning; if the language is unambiguous, [the Court] will not look farther."). The text of the statute exempts transactions "entered into on a principal-to-principal basis between parties." Thus the statute requires two parties to be exempted, and a transaction that occurs with only one party is not exempted. The Court holds this because the preposition "between" and the prepositional adjective "principal-to-principal" are both grammatical constructions that require more than just one party.[16]

[16] The Court notes that the presumption that "in determining the meaning of any Act of Congress, unless the context

The Three-Month Contract was traded and delisted as a futures contract under the CFTC's jurisdiction. Combined 56.1 ¶¶ P10, P15. DRW's transactions on this CFTC regulated exchange are not exempted because DRW's bids are a "unilateral action by a single party" and not, as the exemption requires, a transaction between two parties. *Id.* ¶ P20. Accordingly, Defendants' motion for summary judgment on this ground is DENIED.

CONCLUSION

The parties' motions to exclude expert testimony are GRANTED in part and DENIED in part. Defendants' motion for summary judgment is DENIED. Plaintiff's motion for partial summary judgment is DENIED.

The Clerk of Court is directed to terminate the motion at ECF Nos. 106, 108, 111, and 116.

SO ORDERED.

Dated: September 30, 2016
New York, New York

ANALISA TORRES
United States District Judge

indicates otherwise . . . words importing the plural include the singular," 1 U.S.C. § 1 (2012), does not change this interpretation because "the text . . . surrounding the word at issue . . . throws light upon its meaning." *Rowland v. California Men's Colony*, 506 U.S. 194, 199 (1993). That is, the context provided by "entered into on a principal-to-principal basis between" clarifies that Congress intended the noun "parties" to be plural.