IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD DENNIS and PORT 22, LLC, on behalf of themselves and all others similarly situated, Plaintiff v. THE ANDERSONS INC., CARGILL, INC., and JOHN/JANE DOES NOS. 1-50, Defendants.	Case No. 1:20-cv-04090 Hon. Charles R. Norgle

ORDER

Defendants' partial motion to dismiss Counts V and VI of Plaintiffs' Second Amended Complaint [58] is denied.

MEMORANDUM OPINION

Plaintiffs filed this class action lawsuit against The Andersons Inc. ("Andersons"), Cargill, Inc. ("Cargill"), and unnamed individual defendants, alleging that in the fall of 2017 the Defendants manipulated the Chicago Board of Trade ("CBOT") commodities market for soft red winter wheat ("SRW"). The Court previously denied Defendants' motion to transfer the case to the Northern District of Ohio and partially granted Defendants' motion to dismiss, with leave for Plaintiff to amend his complaint with respect to his antitrust claims under the Sherman Act. Plaintiffs filed an amended complaint on those counts and Defendants now move to dismiss them. For the reasons set out below, the Court denies Defendants' motion to dismiss.

I. BACKGROUND[1]

Plaintiffs allege that Andersons and Cargill are large, diversified conglomerates that trade "futures and physical commodities, including wheat and other grains." Dkt. 54, Second Am. Compl. ("SAC") ¶¶ 2-3. "In 2017, The Andersons Grain Group generated $2.1 billion in revenue" and Cargill "generated $109.7 billion in revenue." Id. Unlike many futures commodities traders who never sell or acquire the physical commodities, Cargill and Andersons each "buys, sells, handles, and stores physical wheat and transacts in wheat futures and options." Id. Plaintiffs allege that Defendants entered into a scheme to manipulate the commodities market for soft red winter wheat by flooding the wheat cash market and then registering a large number of wheat shipping certificates, artificially suppressing demand and consequently lowering prices.

"A commodity futures contract is a standardized bilateral executory agreement for the purchase and sale of a particular commodity, like wheat, at a specified time. In the context of futures trading, a commodity is the underlying instrument upon which a futures contract is based." Id. ¶ 40. The futures and options market for a particular commodity is distinct from the "cash market" for that same commodity. Sanner v. Bd. of Trade of City of Chicago, 62 F.3d 918, 926 (7th Cir. 1995). In the cash market, the commodity is paid for and exchanged at the point of sale. The purchaser of wheat in the cash market pays for it and immediately takes possession of it. Budicak, Inc. v. Lansing Trade Grp., LLC, 452 F. Supp. 3d 1029, 1039 (D. Kan. 2020). Futures, however, reflect a purchase or sale of a commodity to be delivered "at a defined point in the future." SAC ¶ 40. For example, a wheat farmer concerned that the price of wheat might fall before the harvest could hedge against that risk by selling futures contracts for wheat so that the farmer

[1] The Court accepts as true all Plaintiffs' allegations and reasonable inferences therefrom for the purpose of resolving a motion to dismiss. All definitions of industry terms, descriptions of industry practices, and explanations of economic relationships in the industry are construed consistently with Plaintiffs' allegations. However, the terms, practices, and relationships discussed herein are subject to potential expert witness testimony in later stages of this litigation.

receives the current market price for wheat while promising its delivery in the future. Conversely, a grain mill or food company concerned that the price of wheat might rise in the future might buy futures contracts, purchasing the wheat at the current market price for delivery in the future.

Although wheat "futures contracts may be settled by delivery of the actual commodity at the conclusion of the contract," "these deliveries do not often happen" because a "wheat futures contract can be offset or 'rolled' forward before the contract goes into its delivery cycle." Id. ¶ 41. "For example, a purchaser of one wheat futures contract may liquidate, cancel, or offset a future obligation to take delivery of wheat by selling one wheat futures contract" and in doing so offsets "the earlier purchase of one contract." Id. ¶ 42. For commodities traders who have no interest in the physical commodity itself, the goal is to realize a profit from the "the difference between the initial purchase price and the sale price." Id. That difference is often referred to as the "spread," although that term may refer to a number of different price differentials in the industry. Id. ¶ 53. By using certain arrangements of futures or options, traders can establish a "bull spread"—from which they will profit if the commodity's price rises—or a "bear spread"—from which they will profit if the commodity's price falls. Id. ¶ 54.

The CBOT is a board of trade designated by the Commodity Futures Trading Commission ("CFTC") and is one of the largest and oldest futures and options exchanges. Numerous commodities are traded through CBOT, including several types of wheat, corn, soybeans, and other crops. "Trading in Chicago SRW CBOT wheat futures and options is subject to the rules and regulations of the CBOT, including Chapter 14 (Wheat Futures) of the CBOT Rulebook." Id. ¶ 45. "CBOT trading and clearing members must follow the rules of the CBOT and [Chicago Mercantile Exchange] CME, including the rules prohibiting manipulation." Id. ¶ 25. "Every aspect of a futures contract traded on the CBOT, like the grade and amount of wheat, is standardized—except the price and delivery month. This standardization of futures contracts is specifically designed to facilitate the ease of trading of fungible contracts in one central marketplace." Id. ¶ 52. "CBOT wheat futures and options are transacted electronically on the CME's Globex electronic trading platform and, in the case of options, also through 'open outcry' on the trading floor of the CBOT." Id. ¶ 46.

These futures contracts are connected to delivery cycles set by CBOT that "occur during five different contract months each calendar year: March, May, July, September, and December." SAC ¶ 41. If futures contracts are not offset or otherwise cancelled by a time specified by the CBOT during the relevant delivery cycle, the seller of the contract must deliver the commodity and the buyer of the contract must make payment and take the commodity (or pay storage fees). Id. At this point, commodities traders unable or uninterested in delivering or taking delivery of the wheat often offset their trades and realize their profit or loss. Conversely, traders interested in buying or selling the wheat may then make or take physical delivery of the wheat.

If the trades are not offset, the seller must register "shipping certificates" with "warehouses approved by the exchange," which are then given to the buyer and represent the right to the specified amount of wheat in a CBOT warehouse available to be picked up. SAC ¶¶ 55, 57. "The owner of a shipping certificate has several options: Shipping certificates can be bought and sold between traders or exchanged for futures positions, so the owner can transfer and sell the certificate to another market participant. The owner could also hold the certificate and pay storage fees. Or the owner could 'cancel' the shipping certificate and order that the physical grain be 'loaded-out' for transport. This is known as 'canceling for load-out.'" Id. ¶ 56. Wheat "loaded out" is often transported to mills or food companies to be processed and made into food products.

Here, "Andersons and Cargill are competitors in the buying and selling of grain, including soft red winter wheat." SAC ¶ 63. "Notwithstanding their relationship as competitors," "Andersons and Cargill were parties to a long-standing, renewable, five-year joint marketing agreement" with respect to grain facilities in Ohio and the marketing of soft red winter wheat. Id. ¶ 64. "As a result of the Agreement, The Andersons and Cargill collaborated and communicated on issues relating to origination, merchandising, and operation of the facilities in Toledo, Ohio and Maumee, Ohio." Id. ¶ 70.

Allegedly, during the term of this agreement, "Andersons and Cargill conspired to manipulate the prices of CBOT wheat futures and options contracts to cause artificial prices and artificial price trends." SAC ¶ 71. In November 2017, "Andersons and Cargill, under the guise of their joint Agreement, agreed to manipulate the price of CBOT wheat futures and options contracts" by having "Andersons uneconomically register large quantities of December 2017 wheat futures in order to artificially widen the spread and artificially decrease prices relative to the March 2018 contract." In other words, Plaintiffs' allegation is that Defendants conspired to create a ruse by which they would falsely signal to the market that wheat was in great supply, hoping to drive down the price.

"Andersons' and Cargill's manipulation had several, interrelated steps." SAC ¶ 75. First, in "November 2017, when most market participants were liquidating their futures positions by entering into offsetting trades, The Andersons maintained its large short position of wheat futures" while Andersons and Cargill began "jointly selling physical wheat in the cash market to wheat buyers in November 2017." Id. "Despite selling the physical wheat its futures were meant to hedge, The Andersons still held more than 60% of the short open interest[2] on the day immediately prior to the First Notice Day."[3] Id. "As [a] result, Toledo-area buyers satisfied their demand for wheat in the cash market and were able to offset their futures positions for the December contract." Id. Second, on "November 29, 2017, The Andersons registered 2,000 shipping certificates." Id. "Each shipping certificate represents 5,000 bushels of wheat, so 2,000 shipping certificates represents 10 million bushels or 600 million pounds of wheat." Id. ¶ 4. By registering the certificates instead of entering into offsetting trades, Andersons signaled "an intention to make delivery on their futures position" for a "massive amount of wheat." Id. Defendants understood that their actions would cause the market to perceive a significant oversupply of wheat, that the prices of the December 2017 wheat futures and options contracts would decline as a result, and that Defendants could then "repurchase the certificates at artificially reduced prices" that they created. Id. Third, "[a]rmed with advance knowledge that The Andersons was going to register 2,000 shipping certificates and that nobody, including Cargill, would need most of these certificates, The Andersons entered into the bear spread position[4] in wheat futures and options mentioned above." Id. In other words, Andersons entered into short positions to profit from the artificially low prices it created. Id. Finally, after "the spread prices widened, The Andersons repurchased wheat from participants who were matched to The Andersons' certificates." Id. Ultimately, "by December 22, 2017, The

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[2] "Open interest is the total number of futures contracts in a delivery month that have been entered into and not yet liquidated by an offsetting transaction or fulfilled by delivery." SAC ¶ 43.

[3] According to the SAC, the First Notice Day is "the second day in the delivery process" when "the short position holder and long position holder receive notification that they have been matched, and the long position holder receives an invoice from CME Clearing." SAC ¶ 58.

[4] "Usually in a 'spread position,' the trader is long or short a futures contract for one delivery month and the opposite for another delivery month. For example, a person could be short the December 2017 wheat futures contract and long the March 2018 wheat futures contract. This is referred to as a 'calendar spread' position. The buying (or selling) of the near month contract expiring fastest, and the selling (or buying) of the next month after that is called a 'front month spread.' Buying the near month and selling the next month is called a 'bull spread,' while selling the near month and buying the next month after that is called a 'bear spread.' 'Spreads' can also refer to the difference between the physical or 'cash' commodity market price and the futures market price." SAC ¶ 5.

Andersons had repurchased 1,330 of the 2,000 certificates." Id. "Because Defendants had manipulated the price lower, The Andersons were able to buy back all of the wheat at a lower price than when the certificates were first registered." Id.

The Chicago Mercantile Exchange ("CME"), the parent of the Chicago Board of Trade, investigated the trades made by Defendants. In July 2020, the CME found that Andersons violated the trading rules by engaging in conduct contrary to the "just and equitable principles of trade," acting "detrimental to the interest or welfare of the Exchange," and engaging in "dishonorable or uncommercial conduct." Dkt. 42-1; CME GROUP, CBOT Rulebook, 4 – Enforcement of Rules, §§32(B)(2), 432(Q), 432(T) (last accessed April 28, 2022) available at https://www.cmegroup.com/content/dam/cmegroup/rulebook/CBOT/I/4.pdf. The CME fined Andersons $2,000,000. Similarly, in September 2020, the CME found that Cargill "was a party to a joint marketing agreement with a Grain Merchant" to "register and deliver a significant amount of December 2017 Soft Red Winter Wheat ('SRW') to benefit the Grain Merchant's futures and options positions related to the grain subject to the joint marketing agreement." Dkt. 42-2. The CME found that on "November 29, 2017, the Grain Merchant registered 2,000 SRW certificates, and, as anticipated, the market widened to trade into its resting bids at prices beneficial to its wheat futures position" and "repurchased 1,330 of the 2,000 certificates." Id. The CME fined Cargill $500,000 for violations the rules of the Chicago Board of Trade. Id.

In support of their antitrust claims, Plaintiffs allege in the Second Amended Complaint that "the relevant product market in this case is CBOT wheat futures and options contracts." SAC ¶ 82. Further, Plaintiffs allege that "Defendants' market power is demonstrated by the high percentage of short open interest in December 2017 CBOT wheat futures contracts." Id. ¶ 83. "Specifically, on November 29, 2017, . . . The Andersons controlled over 60% of the short open interest in

December 2017 CBOT wheat contracts, equivalent to 10 million bushels of wheat." Id. "As detailed above, The Andersons and Cargill willfully acquired their monopoly power through uneconomic and exclusionary conduct, including, inter alia, selling physical wheat in November 2017 in the cash market to wheat purchasers to suppress and limit demand for SRW during the delivery period." Id.

II. DISCUSSION

Defendants move to dismiss Plaintiffs' antitrust claims, Counts V and VI of the Second Amended Complaint. Defendants argue that (1) Plaintiffs' complaint discusses the per se standard of antitrust liability, which is inapplicable here; (2) Plaintiffs fail to plead a proper product market; (3) Plaintiffs fail to plead Defendants' market power in the proper product market; and (4) Plaintiffs fail to plead anti-competitive effects. The motion is fully briefed and ripe for adjudication. For the reasons set out below, the Court denies Defendants' motion to dismiss.

A. Standard

Under Rule 12(b)(6), "'[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, if accepted as true, to state a claim to relief that is plausible on its face.'" Toulon v. Continental Cas. Co., 877 F.3d 725, 734 (7th Cir. 2017) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a "short and plain statement of the claim showing that the plaintiff is entitled to relief." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554-557 (2007). This statement must provide sufficient plausible facts to put a defendant on notice of the claims against him. Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009). In reviewing a plaintiff's claim, the court "must construe all of the plaintiff's factual allegations as true, and must draw all reasonable inferences in the plaintiff's favor." Virnich v. Vorwald, 664 F.3d 206, 212 (7th Cir. 2011). However, the facts pleaded in the complaint must form a legally cognizable claim to survive a motion to dismiss. Fifth Third Bank v. Hirsch, 2011 WL 2470643, at *2 (N.D. Ill. June 20, 2011).

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . ." 15 U.S.C. § 1. "Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' this Court has long recognized that Congress intended to outlaw only unreasonable restraints." State Oil Co. v. Khan, 522 U.S. 3, 10 (1997). In short, "the purpose of the Sherman Act is to protect consumers from injury that results from diminished competition." Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 334–35 (7th Cir. 2012). A "plaintiff must prove three elements to succeed under § 1 of the Sherman Act: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying injury." Id.

With respect to the reasonableness of the restraint, "[c]ourts have established three categories of analysis—per se, quick-look, and Rule of Reason—for determining whether actions have anticompetitive effects, though the methods often blend together." Agnew, 683 F.3d at 335. "Determining whether a restraint is undue for purposes of the Sherman Act presumptively calls for what we have described as a rule of reason analysis." Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2151 (2021) (cleaned up). "That manner of analysis generally requires a court to conduct a fact-specific assessment of market power and market structure to assess a challenged restraint's actual effect on competition," with the goal being "to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." Id. The rule of reason analysis is exacting and factually intensive. The per se and quick look standards are abbreviations of the rule of reason analysis.

Under the per se standard, "[s]ome types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se." Khan, 522 U.S. at 10. A classic example of a per se unreasonable restraint on trade is a price-fixing agreement between horizontal competitors. Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006). "Restraints that would fall under this category are illegal as a matter of law for reasons of efficiency; in essence, it is simply not worth the effort or resources of a Rule of Reason analysis when the Court can predict with confidence that the Rule of Reason will condemn a restraint." Agnew, 683 F.3d at 336 (cleaned up); Khan, 522 U.S. at 10 ("Per se treatment is appropriate once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." (cleaned up)). Courts are reluctant to apply the per se framework "with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." Khan, 522 U.S. at 10. Thus, courts only apply the per se rule when there is a high likelihood that the alleged conduct is anticompetitive because "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 100 (1984) (quoting Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19–20 (1979)). In other words, "the restraint must have manifestly anticompetitive effects and lack any redeeming virtue." Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties, 2020 WL 5642941, at *5 (N.D. Ill. Sept. 22, 2020) (cleaned up) (quoting Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007)). The per se rule is thus applied only in rare circumstances. In re

Processed Egg Prod. Antitrust Litig., 962 F.3d 719, 730 (3d Cir. 2020) ("The District Court recognized that the rule of reason is the default standard and that per se liability is a rare exception, the latter being appropriate only when a court has 'considerable experience' with the type of restraint at issue and can predict that the restraint would be found to be unreasonable under the rule of reason in almost all instances.").

Some circumstances do not meet the heavy burden to invoke a per se rule of illegality but have anticompetitive effects that can nonetheless be fairly evaluated in the "twinkling of an eye," without the exacting scrutiny of a full rule of reason analysis. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2155 (2021). In these situations, courts apply a "quick look" analysis for restraints at the "opposite ends of the competitive spectrum." Id. ("For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation."). "At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny," such as where an alleged monopolist's market share is so small that it is "incapable of impairing competition." Id. at 2155-56. "At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful per se or rejected after only a quick look." Id. at 2156. The Supreme Court has cautioned that, "recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—we take special care not to deploy these condemnatory tools until we have amassed considerable experience with the type of restraint at issue and can predict with confidence that it would be invalidated in all or almost all instances." Id. (cleaned up).

The thrust of Supreme Court precedent here is that absent special circumstances, courts should analyze antitrust claims using the rule of reason. "Under a Rule of Reason analysis, the plaintiff carries the burden of showing that an agreement or contract has an anticompetitive effect on a given market within a given geographic area." Agnew, 683 F.3d at 335–36. "As a threshold matter, a plaintiff must show that the defendant has market power—that is, the ability to raise prices significantly without going out of business—without which the defendant could not cause anticompetitive effects on market pricing." Id. "If the plaintiff meets his burden, the defendant can show that the restraint in question actually has a procompetitive effect on balance, while the plaintiff can dispute this claim or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective." Id. In short, a plaintiff asserting a Section 1 Sherman Act claim must adequately plead (1) a relevant market, (2) in which the defendant has market power, and (3) that the alleged conduct has an anticompetitive effect. DeSlandes v. McDonald's USA, LLC, 2021 WL 3187668, at *11 (N.D. Ill. July 28, 2021); ChoiceParts, LLC v. Gen. Motors Corp., 203 F. Supp. 2d 905, 917 (N.D. Ill. 2002).

B. The Court declines to determine which standard applies, as Plaintiffs have adequately pleaded a Section 1 claim under the rule of reason.

Plaintiffs' claim under Section 1 of the Sherman Act includes a reference to the per se rule. SAC ¶ 130. Defendants' position is that Plaintiffs' "Sherman Act Section 1 claim in Count V fails because the per se standard is inapplicable as a matter of law." Dkt. 59 at 11. Plaintiffs contend that their Section 1 claim survives under either a per se theory, the quick look standard, or the rule of reason. Dkt. 64 at 3-7. Defendants argue that Plaintiffs may not proceed with the quick look standard because it was not pleaded.

First, "Plaintiffs need only plead facts, not legal theories, in their complaints." R3 Composites Corp. v. G&S Sales Corp., 960 F.3d 935, 941 (7th Cir. 2020) (quoting Reeves ex rel. Reeves v. Jewel Food Stores, Inc., 759 F.3d 698, 701 (7th Cir. 2014)). Second, at this stage, the Court need not determine whether the abbreviated analyses under the per se or quick look standards apply to the alleged misconduct because Plaintiffs plausibly allege facts supporting their Section 1 claim that survive scrutiny under the rule of reason. The Court addresses the parties' arguments with respect to the rule of reason analysis below.[5]

C. Plaintiffs adequately allege a Section 1 Claim under the rule of reason.

As noted above, a plaintiff asserting a Section 1 Sherman Act claim must adequately plead (1) a relevant market, (2) in which the defendant has market power, (3) and conduct that has an anticompetitive effect. Agnew, 683 F.3d at 335–36; DeSlandes, 2021 WL 3187668, at *11; ChoiceParts, LLC, 203 F. Supp. 2d at 917. Defendants argue that Plaintiffs' complaint insufficiently pleads facts supporting any of these elements. Dkt. 59 at 6-11. However, Courts are rightfully hesitant to grant motions to dismiss Sherman antitrust claims for failure to adequately plead relevant markets, market power, and anticompetitive effects because those inquiries are deeply fact intensive. Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001). With all allegations presumed true and all inferences construed in Plaintiffs' favor, the Court concludes that Plaintiff has adequately pleaded a relevant market, market power, and anticompetitive effects.

1. Plaintiffs adequately plead a relevant market.

The danger of a monopoly is that if a company possesses significant power in a relevant marketplace, it can exclude competition, exert control over prices, or both. Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., 20 F.4th 466, 484 (9th Cir. 2021). Congress enacted the Sherman Act "to protect consumers from injury that results from diminished competition." Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 334–35 (7th Cir. 2012). Because "the entire point of the

[5] Defendants seek to dismiss Plaintiffs' claim under Section 2 of the Sherman Act as well. However, the arguments Defendants raise in support of their motion to dismiss Plaintiffs' Section 2 claim are duplicative of their arguments in support of dismissing Plaintiffs' Section 1 claims. Dkt. 59 at 11-15. (arguing that Plaintiffs failed to adequately plead a relevant market, market power, and an actionable injury.) The Court denies Defendants' motion to dismiss Plaintiffs' Section 2 claim for the same reasons it denies Defendants' motion with respect to Plaintiffs' Section 1 claims as discussed below.

Sherman Act is to protect competition in the commercial arena, without a commercial market, the goals of the Sherman Act have no place." Id. at 337 (internal citation omitted). "The market power query begins with the determination of the relevant market, that is, a market relevant to the legal issue before the court." Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124, 1130 (10th Cir. 2002) (quoting SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 966 (10th Cir. 1994)).

"[B]ecause the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the relevant market rests on a determination of available substitutes." Id. For example, the Federal Circuit in Delano Farms held that a single variety of table grape was not a relevant market because the plaintiff had not shown unique characteristics about the variety in question such that if its price were to rise, consumers could not simply purchase another variety. Delano Farms Co. v. California Table Grape Comm'n, 655 F.3d 1337, 1351 (Fed. Cir. 2011). Simply put, when a product has reasonable substitute products, there is less concern that a monopolist can exclude competition or control prices. Thus, to succeed on an antitrust claim, a proper product market must include any interchangeable, alternative products in the field. Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 436 (3d Cir. 2016).

The Supreme Court has provided guidance for drawing the appropriate lines with respect to available substitutes in product markets: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC, 950 F.3d 911, 918 (7th Cir. 2020) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)). "The term 'interchangeability' implies that one product is roughly equivalent to another for the use to which it is put. It also means that while there might be some degree of preference for one product over the other, either would work effectively." Mylan Pharms. Inc., 838 F.3d at 436. Cross-elasticity of demand is a "relationship between two products, usu[ally] substitutes for each other, in which a price change for one product affects the price of the other." Cross-Elasticity Of Demand, Black's Law Dictionary (11th ed. 2019); Todd v. Exxon Corp., 275 F.3d 191, 201–02 (2d Cir. 2001). "In economic parlance, substitutable goods are those goods that display a high cross-elasticity of demand. Goods A and B have high cross-elasticity when the demand for Product A increases significantly when the price for Product B increases (and vice versa)." Mednick v. Precor, Inc., 2016 WL 5390955, at *4 (N.D. Ill. Sept. 27, 2016). Ultimately, "the products in a market must have unique attributes that allow them to be substituted for one another, but make them difficult to replace with substitute products from outside the market." In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., 767 F. Supp. 2d 880, 901 (N.D. Ill. 2011).

"To survive a Rule 12(b)(6) motion to dismiss, an alleged product market must bear a 'rational relation to the methodology courts prescribe to define a market for antitrust purposes—analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible." Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001) (cleaned up). Here, Plaintiffs' complaint alleges that the "relevant product market in this case is CBOT wheat futures and options contracts." SAC ¶ 82. Defendants argue that this proposed market is too broad because it is not limited to soft red winter wheat but could also include "Hard Red Winter Wheat futures and options, Black Sea Wheat futures and options, Ukrainian Wheat futures and options, Australian Wheat futures, and intercommodity spread options involving wheat." Dkt. 59 at 7. Defendants also argue that Plaintiffs use internally inconsistent markets because the complaint "refers to purported markets for 'SRW futures contracts including spreads traded on a domestic exchange,' 'CBOT wheat futures,' 'December 2017 and March 2018 CBOT wheat futures contracts,' and 'December 2017

CBOT wheat contracts'" Id. at 8 (cleaned up). Defendants conclude that "[d]ismissal is required where, as here, a 'plaintiff has defined the relevant market in an inconsistent and facially implausible way.'" Id. (quoting Cinema Vill. Cinemart, Inc. v. Regal Ent. Grp., 2016 WL 5719790, at *5-6 (S.D.N.Y. Sept. 29, 2016)).

Plaintiffs' response is that Defendants' product-market arguments do little more than "nitpick" and "quibble" because a fair reading of the complaint in its entirety indicates that this dispute was only about futures for soft red winter wheat between the December 2017 and July 2018 contract periods. Dkt. 64 at 8. To alleviate any confusion, Plaintiffs clarified their proposed market definition to be "December 2017, March 2018, May 2018 and July 2018 CBOT SRW futures and options contracts." Id. at 11. Defendants reply that this new market definition is unpleaded and that Plaintiff's "inconsistent market definitions render all of Plaintiffs' relevant market allegations implausible." Dkt. 13 at 8. The Court disagrees. Plaintiffs' complaint contains enough detail to draw the inference that the allegations concern only futures and options relating to soft red winter wheat in late 2017 and 2018. See, e.g., SAC ¶¶ 4, 6, 7, 11, 21, 22, 26, 37, 38, 45, 83. In addition, with respect to Plaintiffs' clarified product market in their response brief, the Court may consider it because it is consistent with the initial allegations even though it was not expressly pleaded. Sawyer v. Columbia Coll., 2010 WL 3081260, at *2 (N.D. Ill. Aug. 5, 2010) ("However, a Plaintiff need not include all essential facts in his complaint; rather, he may add them in an affidavit or brief in order to overcome a motion to dismiss as long as they are consistent with the initial allegations."); see Hill v. Nicholson, 829 F. App'x 141, 142 (7th Cir. 2020) ("In reviewing Hill's appeal, we take as true his allegations, including those in his appellate brief that are consistent with his amended complaint.").

Defendants also argue that Plaintiffs have not sufficiently alleged interchangeability or cross-elasticity of demand for their proposed product market because "the SAC is devoid of any factual allegations that describe the 'unique attributes' of any one of the various product markets alleged in the SAC that could plausibly show what specific types of contracts are or are not substitutable with other contracts." Dkt. 59 at 9. Plaintiffs respond that their "relevant market—confined to futures and options contracts trading during the period of the illicit conduct—is precisely the type deemed sufficient in other similar cases." Dkt. 64 at 11.

Plaintiff cites other federal cases in which the court held that similar contract periods in the futures market were appropriate markets. In Ploss, the court held "when it comes to futures contracts, a confined period of time indeed can define a relevant market for antitrust purposes," refusing to dismiss a proposed relevant market for "December 2011 soft red winter wheat futures contracts" in part because "the wheat futures market is often used for hedging," which gives it a "unique value." Ploss v. Kraft Foods Grp., Inc., 197 F. Supp. 3d 1037, 1070 (N.D. Ill. 2016). In Dairy Farmers, the court also recognized the unique value to be gained from trading in a particular month for futures commodities (milk in that case) to "hedge against price changes for the underlying commodity during the same period of time." In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., 767 F. Supp. 2d 880, 902 (N.D. Ill. 2011). Further, Plaintiffs' complaint details the complicated and unique operations of the CBOT futures market for particular commodities that all revolve around specific contract periods. It is plausible that contracts for one month may not be interchangeable with contracts for another month, especially for farmers who often use these markets to hedge against sudden drops in wheat prices between harvest and delivery. Defendants have identified no interchangeable products that might undermine Plaintiffs' proposed product market.

Ultimately, because "market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." Todd v. Exxon Corp., 275 F.3d 191, 199–200 (2d Cir. 2001). At this stage, even if Plaintiffs' proposed product market is imperfect, the Court concludes that Plaintiffs are "entitled to discovery and a factual inquiry before their alleged product market may be dismissed as impermissibly narrow." Allen v. Dairy Farmers of Am., Inc., 748 F. Supp. 2d 323, 337 (D. Vt. 2010). The Court thus concludes that Plaintiffs have adequately pleaded a relevant product market in support of their claims under the Sherman Act.

2. Plaintiffs adequately plead market power.

Defendants contend that Plaintiffs fail to adequately plead that Defendants had sufficient power in the relevant market to support an antitrust claim. Plaintiffs allege, among other things, that Defendants (1) were billion-dollar conglomerates trading in wheat (2) that flooded the wheat cash market with wheat such that little wheat was needed in the Toledo area, (3) held 60% of the open short interest in wheat commodities the day before the First Notice Day, (4) registered shipping certificates representing over 600 million pounds of wheat for supposed delivery in a single month, which (5) caused the price of wheat and its corresponding long futures to dramatically decline in value. SAC ¶¶ 2-5, 71-75, 79-89.

Defendants argue that "[a]t most, the SAC alleges that TAI held 60 percent of the short open interest in December 2017 CBOT SRW wheat futures on November 29, 2017. But that says nothing about market power or market share for CBOT wheat futures across all future delivery dates, or anything with respect to options." Dkt. 59 at 15.

"Monopoly power has long been defined in the courts as the power to exclude competition or to control price." GlobalTap LLC v. Smart Tap LLC, 2015 WL 791256, at *5 (N.D. Ill. Feb. 24, 2015) (quoting Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1414 (7th Cir.

1989)); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7th Cir. 1987) ("In both section 1 and section 2 cases, the purpose of establishing market power is to determine whether the defendant can control the market and thus affect competition."). "Plaintiffs may prove market power either (1) through direct evidence of anticompetitive effects, or (2) by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in that case." Thompson's Gas & Elec. Serv., Inc. v. BP Am. Inc., 691 F. Supp. 2d 860, 863 (N.D. Ill. 2010). "The existence of such power ordinarily may be inferred from the predominant share of the market." United States v. Grinnell Corp., 384 U.S. 563, 571 (1966). "[T]he Seventh Circuit has held that questions of whether the defendant possessed the requisite market power frequently are best addressed on a motion for summary judgment or at trial." Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc., 669 F. Supp. 2d 895, 901–02 (N.D. Ill. 2009). Dismissal at this early stage in the litigation is only appropriate where "the antitrust plaintiff fails to identify any facts from which the court can infer that defendants had sufficient market power to have been able to create a monopoly." Id. (cleaned up).

Defendants' argument appears to be that at the pleading stage, market power "cannot be shown unless the plaintiff . . . first proves that [the defendant] has a large market share." Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928, 937 (7th Cir. 2000). "This, however, has things backwards." Id. "[T]he share a firm has in a properly defined relevant market is only a way of estimating market power, which is the ultimate consideration." Id. "The Supreme Court has made it clear that there are two ways of proving market power. One is through direct evidence of anticompetitive effects. The other, more conventional way, is by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in the case." Id. (cleaned up).

Here, Plaintiffs allege that Defendants, large companies in the business of buying and selling wheat, had enough power to flood the wheat cash market in the Toledo area, obtain and hold 60% of the short open interest on the day before the First Notice Day, and register the equivalent of 600 million pounds of wheat for delivery. Plaintiffs allege that this caused the price of wheat and its corresponding futures to drop significantly. SAC ¶¶ 2-5, 71-75, 79-89. These allegations plausibly suggest that Defendants had significant market power in the market for wheat futures. In addition, the plausibility of these allegations is buttressed by the CME's adjudication that Defendants violated the rules of the exchange by engaging in this conduct. Further, at this stage of the litigation, the Court cannot determine whether Defendants' share in the short open interest "exceeds whatever threshold is important for the practice in the case." Toys "R" Us, Inc., 221 F.3d at 937 (7th Cir. 2000). Taking Plaintiffs' allegations in their entirety, Plaintiffs have not failed to "identify any facts from which the court can infer that defendants had sufficient market power to have been able to create a monopoly." Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc., 669 F. Supp. 2d 895, 901–02 (N.D. Ill. 2009). Plaintiffs' allegations are sufficient for now. Considering the complexity of this particular market and the interwoven economic forces at work, the ultimate question of whether Defendants had sufficient market power for antitrust purposes is best reserved for summary judgment or trial.

3. Plaintiffs adequately plead anticompetitive effects.

Defendants contend that Plaintiffs fail to adequately plead that Defendants' alleged conduct had any anticompetitive effects. Specifically, Defendants argue that because Plaintiffs allege that Defendants conspired to lower prices rather than raise them, there can be no actionable antitrust claim. Dkt. 59 at 11. Defendants rely on language from cases that describe the proper injury in antitrust cases as generally flowing "from higher prices or lower output, the principal vices proscribed by the antitrust laws." McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc., 937 F.3d 1056, 1065 (7th Cir. 2019); see Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.").

Those cases, however, relate to antitrust standing in prototypical price-fixing agreements relating to consumer goods, where the consumer always benefits from low prices. They do not relate to commodities trading, in which a low price is good for the buyer and bad for the seller, and vice versa. Numerous courts have held that agreements to suppress commodity prices are actionable under antitrust law. In re London Silver Fixing, Ltd., Antitrust Litig., 213 F. Supp. 3d 530, 563 (S.D.N.Y. 2016) ("Plaintiffs adequately allege that [defendants], horizontal competitors in the relevant markets for physical silver and silver derivatives, conspired artificially to suppress the [price of silver] in order to gain an unfair trading advantage over other market participants, causing Plaintiffs to suffer losses on their silver investments."); In re Commodity Exch., Inc., 213 F. Supp. 3d 631, 652 (S.D.N.Y. 2016) (suppressing gold prices); Ploss v. Kraft Foods Grp., Inc., 197 F. Supp. 3d 1037, 1050 (N.D. Ill. 2016) (suppressing wheat prices); Gelboim v. Bank of Am. Corp., 823 F.3d 759, 771 (2d Cir. 2016) (depressing the LIBOR rate). The core inquiry of all antitrust cases relating to price manipulation of a good is whether that price reflects the supply and demand of the unhindered market, or whether that price is tainted by the anticompetitive machinations of a major market participant. "Generally, when consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions, they suffer injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Gelboim, 823 F.3d at 772 (cleaned up). "[T]o the extent that [defendants] raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces." Id. (emphasis added) (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940)). Thus, a conspiracy to lower prices may be actionable as well as a conspiracy to raise them if a defendant improperly uses market power to interfere with market forces.

Defendants have not provided any case in which a court dismissed a commodities-related antitrust claim on account of the conspiracy lowering, rather than raising, the price of the underlying commodity. Accepting Defendants' argument without considering the underlying purposes of antitrust law would run afoul the Supreme Court's repeated admonition that "legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018) (cleaned up) (quoting Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 466–467 (1992)). The Court thus rejects Defendants' contention that Plaintiffs' antitrust claims must be dismissed out of hand because they allege price suppression rather than price inflation.

III. CONCLUSION

Ultimately, at this stage of the litigation, Defendants' arguments for dismissal are premature. These deeply factual inquiries concerning this complex market and its multifaceted market forces are better resolved at summary judgment or trial than at the dismissal stage. Plaintiffs have provided sufficient, plausible allegations to put Defendants on notice of the antitrust claims levied against them. For these reasons, the Court denies Defendants' motion to dismiss Plaintiffs' antitrust claims.

IT IS SO ORDERED.

ENTER:

CHARLES RONALD NORGLE, Judge
United States District Court

DATE: May 3, 2022