UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. RICHARD USHER, ROHAN RAMCHANDANI, AND CHRISTOPHER ASHTON Defendants.	:	Case No. 1:17-Cr-00019

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTIONS IN LIMINE

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DEFENDANTS' MOTION IN LIMINE 1—
TO EXCLUDE ANY REFERENCE TO BANK GUILTY PLEAS

In May 2015, Barclays PLC, Citicorp, J.P. Morgan Chase & Co., The Royal Bank of Scotland plc, and UBS AG (the "Banks") entered into separate plea agreements to resolve multi-year investigations into trading practices in the global FX market. The Banks employed the traders in this case and pleaded guilty to violating the Sherman Antitrust Act for the conduct charged here as well as other conduct not at issue in this case.[1] The Government has indicated it will not affirmatively seek to introduce the Banks' guilty pleas (the "Bank Pleas") at trial, but might try to introduce them if Defendants "open the door" with certain types of evidence. The injection of the Bank Pleas into this trial would be improper and would constitute reversible error.

Accordingly, Defendants ask the Court to prohibit any references to the Bank Pleas at trial. The Bank Pleas are testimonial statements, and thus their introduction would violate Defendants' rights under the Sixth Amendment's Confrontation Clause. Furthermore, the Bank Pleas should be excluded under Federal Rule of Evidence 403 because of the extreme risk the jury would improperly rely on the Bank Pleas instead of the evidence introduced at trial. Because any introduction of the Bank Pleas would violate Defendants' Constitutional rights, the Court should exclude any reference to them at trial.

A. Factual Background

As the Bank Pleas state,[2] four of the five Banks admitted to violating Sherman Antitrust Act Section 1 by engaging with co-conspirators:

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[1] UBS pleaded guilty to manipulating the London Interbank Offer Rate (LIBOR) and other benchmark interest rates. UBS also acknowledged that it had breached a previous non-prosecution agreement resolving the LIBOR investigation by engaging in collusive conduct related to the FX spot market and paid a $203 million penalty. (UBS Plea Agreement ¶¶ 1, 20.)

[2] Defendants excerpt Barclays' plea agreement in the argument on the next page. Kendall Decl.,

> in a conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the EUR/USD currency pair exchanged in the FX Spot Market by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere.

The Bank Pleas also refer to the Defendants' chat room, and state that the Banks and their co-conspirators:

> engaged in communications, including near daily conversations, some of which were in code, in an exclusive electronic chat room, which chat room participants, as well as others in the FX Spot Market, referred to as "The Cartel" or "The Mafia." Participation in this electronic chat room was limited to specific EUR/USD traders, each of whom was employed, at certain times, by a co-conspirator dealer in the FX Spot Market.

The Bank Pleas also purport to describe Defendants' alleged conduct, and they state that the Banks and their co-conspirators:

> carried out the conspiracy to eliminate competition in the purchase and sale of the EUR/USD currency pair by various means and methods including, in certain instances, by: (i) coordinating the trading of the EUR/USD currency pair in connection with European Central Bank and World Markets/Reuters benchmark currency "fixes" which occurred at 2:15 PM (CET) and 4:00 PM (GMT) each trading day; and (ii) refraining from certain trading behavior, by withholding bids and offers, when one conspirator held an open risk position, so that the price of the currency traded would not move in a direction adverse to the conspirator with an open risk position.

As part of the Bank Pleas, four of the Banks agreed to fines totaling $2.5 billion.

The Indictment (¶¶ 18, 23(a), (c), (d)) parrots the Bank Pleas' language to allege facts disputed here: (1) Defendants' alleged agreement, (2) the nature and purpose of Defendants' chat room, and (3) the Government's theories of coordinated trading.

B. Admission of the Bank Pleas Would Violate the Constitution's Confrontation Clause and Result in Reversible Error

The Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const., amend. VI.

Ex. A ¶¶ 4(g), (h), (i) (Barclays PLC Plea Agreement (May 20, 2015) (yellow highlighting added in copy attached to Decl.)). The other Banks' Pleas track Barclays', and the Court can access all Bank Pleas at https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas (last visited July 31, 2018).

The Supreme Court has made clear that where the Government seeks to introduce a testimonial statement against a criminal defendant, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004). The Sixth Amendment, in other words, establishes a "*per se* bar on the admission of out-of-court testimonial statements made by unavailable declarants where there was no prior opportunity for cross-examination." *United States v. McClain*, 377 F.3d 219, 221 (2d Cir. 2004).

Since *Crawford*, the Second Circuit has held that plea allocutions accompanying guilty pleas are testimonial statements under the Confrontation Clause, precluding their admission. The Second Circuit in *United States v. Hardwick* described plea allocutions as "testimonial hearsay . . . inadmissible under the Confrontation Clause unless the co-conspirator testifies at trial, or is unavailable at trial and the defendant had a prior opportunity for cross-examination." 523 F.3d 94, 98 (2d Cir. 2008); *see also United States v. Riggi*, 541 F.3d 94, 102 (2d Cir. 2008) ("It is thus *constitutional error* to admit as substantive evidence a plea allocution by a co-conspirator who does not testify at trial 'unless the co-conspirator is unavailable and there has been prior opportunity for cross-examination'") (emphasis added) (quoting *McClain*, 377 F.3d at 222); *see also United States v. Becker*, 502 F.3d 122, 129-30 (2d Cir. 2007) ("[P]lea allocutions are testimonial, and are therefore subject to the requirements set forth in *Crawford*."); *United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006) ("It is undisputed that under *Crawford,* which was decided one year after this trial, the admission of these guilty pleas . . . was error.").

Under the law of this Circuit, the Bank Pleas fall squarely within the definition of testimonial statements of alleged co-conspirators that will not testify at trial. As a result, any reference to the Bank Pleas at trial would violate Defendants' rights under the Sixth

Amendment's Confrontation Clause, and the Court should preclude such references at trial. *See Riggi*, 541 F.3d at 102; *McClain*, 377 F.3d at 222.

C. The Court Should Exclude the Bank Pleas Under Rule 403 Because They Create a Significant Risk of Unfair Prejudice

Because the unfair prejudice of the Bank Pleas substantially outweighs their probative value, the Court should exclude them under Federal Rule of Evidence 403. Recognizing the extreme prejudice of guilty pleas, courts in this and other Circuits have excluded plea agreements under Rule 403. In *United States v. Massino*, the district court held that the introduction of guilty pleas of Massino's co-defendants violated the Confrontation Clause. 319 F. Supp. 2d 295, 298 (E.D.N.Y. 2004). And, even if introduction of the plea evidence were constitutional, the *Massino* court reasoned Rule 403 would bar its admission, "as [the evidence] is substantially more prejudicial than probative." *Id.* at 300. Describing the prejudicial effect of the guilty pleas, the court explained: "[G]iven the inherently interrelated nature of the charges, there is an enormous risk that the jury . . . would find the fact that co-defendants pleaded guilty to be probative of the defendant's culpability." *Id.*

In *United States v. McLellan*, the court precluded the Government from introducing a deferred prosecution agreement ("DPA") for the limited purpose of proving that State Street had suffered a loss as a result of the defendant's alleged scheme. 1:16-cr-10094-LTS (D. Mass. May 22, 2018). The court granted the motion, stating that the "document is unfairly prejudicial," *McLellan* Order ¶ 14, at 4 (Doc. 405), in response to the defendant's argument that the prejudice of admitting the DPA would be "compounded by the fact that it is impossible to cross examine State Street about its admissions and its self-serving decision to enter into an agreement with the Government." McLellan Mot. in Limine, at 4 (Doc. 373); *see also United States v. Brown*, 913 F. Supp. 1324, 1331-32 (D. Minn. 1996) (granting motion for new trial; finding that, despite pre-

trial order excluding related corporate plea and fine, jurors saw press coverage of same, "trigger[ing] the presumption of prejudice.").

The Court should exclude the Bank Pleas under Rule 403 because their prejudicial effect is obvious. Their language tracks the elements the Government must prove at trial, and they include the Banks' admissions of criminal liability for conduct charged here. If exposed to the Bank Pleas, the jury could not be expected to impartially evaluate the balance of the trial evidence. *See Riggi*, 541 F.3d at 103-104; *Becker*, 502 F.3d at 131 (limiting instruction regarding guilty plea insufficient where "prejudicial spillover was so overwhelming").

In analyzing prejudicial effect, courts also have considered the number of pleas introduced, whether those pleas were repetitive, and whether their content related directly to issues central to the defense—all factors that compel exclusion of the Bank Pleas in this case. *See, e.g.*, *Becker*, 502 F.3d at 131. Five Banks entered into separate plea agreements concerning the exact same conduct charged here, amplifying the prejudice against Defendants. *See id.*; *Riggi*, 541 F.3d at 103-04. Because the Bank Pleas' probative value is minimal, and the risk of unfair prejudice overwhelming, the Court should exclude them from trial under Rule 403.

D. No Evidence Offered by Defendants Should Open the Door to the Admission of the Bank Pleas

Despite representing to Defendants that it will not introduce the Bank Pleas, the Government has suggested it might seek to introduce the Bank Pleas if Defendants "open the door" in two circumstances. Neither justifies admitting the Bank Pleas.

First, the Government has said it would seek to introduce the Bank Pleas if Defendants introduce evidence that the Banks endorsed the use of the multi-party chat rooms such as the one at issue here. That FX industry participants used multi-party chat rooms, that the Banks provided traders access to these chat rooms, and that Defendants' co-workers and supervisors

knew about Defendants' chat room—all will be obvious from the evidence and testimony both the Government and Defendants parties will present at trial. Without such evidence, there is a risk that the jury will inaccurately conclude Defendants' chat room was an exclusive communication channel concealed from the Banks. It would be fundamentally unfair to permit the Government to threaten that Defendants would "open the door" to the prejudicial Bank Pleas merely by presenting this critical defense evidence. And the fact that multi-party chat rooms were common and accepted within the FX industry is central to understanding that there was no illegal agreement among Defendants and that Defendants' lacked the intent to enter into such a criminal agreement. Those facts cannot "open the door" to the Banks' decisions to enter plea agreements years later.

Second, the Government said it would seek admission of the Bank Pleas if Defendants simply refer to the incontrovertible fact that the global spot FX market is not regulated. But the unregulated nature of this market only provides basic context for jurors to understand how the market developed and operated, what the expectations were within the market, and why the jury should not infer from Defendants' actions the existence of any agreement to fix prices, or any intent to enter into such an agreement. Without this background, the jury could reasonably assume that the market is heavily regulated and that the trading rules are clear. Indeed, a juror would be reasonable, but wrong, to assume that such a large market was regulated by the NYSE, CFTC, or SEC.

Finally, the Government cannot explain how the Banks' pleading guilty to a Sherman Antitrust Act violation undermines the fact that the global spot FX market is unregulated. The

Court should therefore reject the Government's purported bases to introduce the Bank Pleas. They have no place in this trial.[3]

DEFENDANTS' MOTION IN LIMINE 2—
TO EXCLUDE EVIDENCE AND ARGUMENT CONCERNING "SPOOFING"

Defendants move under Federal Rules of Evidence 401, 402, 403, and 404(b) to exclude evidence and argument that:

- Defendants engaged in "spoofing";
- spoofing is a crime, regulatory or bank policy violation, market manipulation, or otherwise illegitimate or improper; and
- otherwise characterizes any of Defendants' other alleged individual trading behaviors as market manipulation or otherwise uses terms likely to confuse the jury into thinking this is a securities fraud case rather than an antitrust case.

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") prohibits "spoofing" in the securities and commodities markets, and defines that practice as "bidding or offering with the intent to cancel the bid or offer before execution." 7 U.S.C. § 6c(a)(5). Because Congress specifically exempted FX spot trading from Dodd-Frank, the Act does not apply to Defendants' actions. 7 U.S.C. §§ 1a(40), 2(c)(1). FX spot trading, by contrast, has no governing definition of "spoofing." Traders use the terms "spoof" and "BS bid" loosely to refer to various common behaviors, some differing from Dodd-Frank's definition.

The Indictment does not charge Defendants with spoofing, and spoofing is not an antitrust violation. Nor does the Government contend that spoofing is relevant as "other act" evidence under Rule 404(b). Instead, the Government intends to offer: (1) evidence of spoofing

[3] The Government has not suggested Defendants could open the door to guilty pleas entered by any banks other than those five discussed here. But the relief requested by this motion would apply to any references to any regulatory or law enforcement activity concerning any bank, which the Court should exclude for the reasons stated above. The probative value of the resolution of any regulatory or legal proceeding against other banks is even weaker than that of the Bank Pleas. And evidence of any civil suits related to the FX market or Defendants are inadmissible under Rule 403. *See, e.g.*, *Abu Dhabi Comm. Bank v. Morgan Stanley & Co., Inc.*, 2013 WL 1155420, at *7 (S.D.N.Y. Mar. 20, 2013).

in a few of its trading episodes as purportedly "intrinsic" to the charged conduct,[4] and (2) expert testimony from Dr. David DeRosa on spoofing's "[im]propriety."[5] In a recent meet-and-confer, Defendants asked the Government to withdraw Dr. DeRosa's expected "[im]propriety" testimony given its irrelevance. The Government refused and said it would be impossible for the Government to refer to spoofing without also characterizing it to the jury as an "improper" and "dishonest" trading tactic.

Spoofing is not "intrinsic" to the charged conduct. Even if it were, any evidence and argument about the practice—and expert testimony about its impropriety—would violate Rule 404(b)(1)'s prohibition on the use of other act evidence to prove guilt through bad character, and should be excluded as prejudicial evidence under Rule 403.

A. The Court Should Exclude Evidence and Argument that Defendants Engaged in "Spoofing" Under Rule 403

This is an antitrust case, not a securities fraud case. The Government does not need to tell the jury that Defendants placed "spoof" bids, or to argue or imply that doing so was "improper" to present its case. The spoofing evidence has minimal probative value; would inject prejudicial, confusing fraud concepts into an antitrust case; and would inflame the jury on issues of securities fraud and Wall Street misconduct that are irrelevant to this case.

The Government contends spoofing evidence is admissible in this antitrust case because it is "intrinsic to the charged offense."[6] Spoofing is unilateral conduct that involves only one trader. Spoofing by itself thus cannot violate Sherman Antitrust Act Section 1. Defendants

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[4] The Government identified five, time-stamped periods in Defendants' chat room that it contends are evidence of "spoofing." Kendall Decl., Ex. B (Email from B. Bughman to D. Crump et al. (July 12, 2018; 1634) (subject: "RE: US v. Usher et al. - 404(b) Evidence")).

[5] Kendall Decl., Ex. C (Government's Amended Notice of Expert Testimony [David DeRosa] ¶ 20, at 3 (July 17, 2018)) ("Spoofing in the interbank market, including the purpose of spoofing, possible effects in the market, and the propriety of the practice.") (yellow highlighting added).

[6] Kendall Decl., Ex. B.

expect the Government will claim spoofing is "intrinsic" because it was *part* of the charged conduct. But it is not clear how spoofing could be part of a charge of unreasonably restraining trade. An alleged agreement not to hit another trader's spoof bid would not be an agreement to fix prices in violation of the Sherman Antitrust Act.

Even if the alleged spoofing were part of the charged conduct, intrinsic evidence must satisfy Rule 403's balancing test, which the Government's spoofing evidence fails. As jurors learn about high-stakes prosecutions of bank traders, they may wonder of possible connections to securities fraud and Wall Street misconduct. Some will likely know that spoofing in some securities contexts can be a crime, and may be aware of recent, high-profile prosecutions of traders for spoofing in other markets.[7] The Government's spoofing evidence can only tighten for jurors the incorrect connection between this case and securities fraud, unfairly prejudicing Defendants. *See United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990) (stating that other acts should be excluded if "more sensational" than the charged crime).

The Court should not permit the Government to confuse and inflame the jury with uncharged, inapplicable legal concepts. The unfair prejudice of this evidence far outweighs any minimal additional probative value of a few additional trading episodes that use the word "spoof" or "BS bid." *See* Fed. R. Evid. 403; *Old Chief v. United States*, 519 U.S. 172, 184 (1997) (holding that an item's probative value under Rule 403 should be assessed in light of available "evidentiary alternatives").

[7] *See, e.g.*, Ex-UBS Metals Trader Acquitted in 'Spoofing' Case, Wall St. J., Apr. 25, 2018, https://www.wsj.com/articles/ex-ubs-metals-trader-acquitted-in-spoofing-case-1524691500; Case makes history with 'spoofing' conviction, CNBC, Nov. 4, 2015, https://www.cnbc.com/2015/11/04/case-makes-history-with-spoofing-conviction.html.

B. The Court Should Exclude Evidence and Argument that Spoofing is Improper Under Rules 404(b)(1) and 403

Even if the Government could show that spoofing evidence is not substantially more prejudicial than probative, the propriety or impropriety of alleged spoofing is not probative. The ultimate, disputed issue here is whether Defendants had an unlawful agreement (about "real" bids, "BS bids," or anything else) violating Sherman Antitrust Act Section 1. The Government's (or any witness's) opinion about the propriety of such bids is irrelevant and misleading.

The Government's claim that it is impossible to mention spoofing without pejoratively characterizing the practice is wrong. The Government itself described spoofing in its disclosure as "plac[ing] bids and offers on EBS that [Defendants] did not intend to execute," without any further commentary about impropriety. Thus, commentary about the impropriety of the purported spoofing could serve only one purpose—to suggest Defendants' guilt through bad character contrary to Rule 404(b)(1). Such evidence would also exacerbate the already inflammatory and prejudicial nature of the spoofing evidence itself, violating Rule 403, and would risk extending an already long trial on an irrelevant issue.

Defendants are not on trial for spoofing, which violates no law or regulation applying to FX spot trading. Painting Defendants with the "spoofing-is-improper" brush would thus be inappropriate and unfair.

C. The Court Should Exclude Evidence and Argument that Defendants' Other Alleged Individual Trading Behaviors Were Improper

Similarly, the Court should not permit the Government to introduce evidence or argument to the effect that Defendants' other alleged individual trading behaviors were improper, illegitimate, market manipulation, or any similar negative characterization.[8] The salient dispute

[8] The term "market manipulation" is a securities fraud concept, and is likely to be familiar to the jury in that context. *See* 15 U.S.C. § 78j(b) (making it unlawful to "use or employ, in connection with the purchase or sale or any security . . . any manipulative or deceptive device or

is whether Defendants entered into an agreement to fix prices violating Sherman Antitrust Act Section 1. Any other characterization is not probative; it is derogatory and inflammatory.

DEFENDANTS' MOTION IN LIMINE 3—
TO EXCLUDE EVIDENCE OF ALLEGED NON-COMPLIANCE WITH BANK COMPLIANCE POLICIES

Defendants move under Federal Rules of Evidence 403 and 407 to exclude at least six exhibits on the Government's proposed exhibit list as well as any argument that the Defendants did not comply with Bank compliance policies and, thus, were guilty of the charged offense.[9]

1. Apr. 4, 2012 JP Morgan compliance email (JPMC-0000071746). The Government's proposed exhibit list includes an internal, informal email from a JP Morgan compliance employee to Defendant Richard Usher and two other traders seeking their assistance in "produc[ing] Guidelines for the FX business on Antitrust." The author states, "The Guidelines should cover any situation where the desk may be at risk, either real *or perceived*, of engaging in anticompetitive behavior," and that "[a]n obvious area to cover . . . is to outline do's and don'ts in regard to trading ahead of currency fixes." (Emphasis added.)

2. July 6, 17, and 18, 2012, Barclays Phone Calls (BARC-FX_00364613, BARC-FX_00360534, BARC-FX01095871, FBI011-EDOC-00000005). The Government's proposed exhibit list also contains recordings of four July 2012 calls that the Government identifies as between Mr. Ashton and other Barclays traders.[10] The calls all contain discussions about the

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contrivance"). The Government should not be permitted to confuse the jury into believing that such concepts are probative in this antitrust case.

[9] Defendants are aware of six exhibits that the Government listed on its proposed exhibit list that violate Rules 403 and 407 in this manner, and specifically move to exclude them. But to the extent the Government seeks to offer other evidence or argument that would violate the same principles articulated herein, Defendants expect to raise the same objections.

[10] Defendants do not concede that the Government has correctly identified the participants in the recorded calls on its proposed exhibit list. Yet for the purpose of this Motion, Defendants refer to the call participants the Government has identified.

Bank's internal compliance review of interbank chats. From March 2012 through 2013, Mr. Ashton was an active part of discussions with Barclays Compliance about the Bank's evolving policies concerning information exchange in interbank chats and the development of a new "Market Colour Policy" to provide guidance to traders.

3. May 15, 2013 JP Morgan Phone Call (FBI011-EDOC-00000030). The Government's proposed exhibit list also includes a recording of a phone call dated May 15, 2013—four months *after the end* of the charged conspiracy—which the Government's transcription identifies as between Mr. Usher and his then-supervisor, Claudia Jury. The call concerned JP Morgan's compliance guidelines about chat room fix discussions—guidelines revised *after the end* of the alleged conspiracy period. Ms. Jury said traders should be "judicious about . . . terminology" when discussing fixes because "somebody like you said won't understand it" and could misinterpret the discussion. Mr. Usher later replied that he "think[s] everyone's been very very judicious on the external thing . . . I just wanted to [really reiterate to the] guys [that] actually internally we['ll just] think about things a little bit as well. . . ."

The Government improperly seeks to use this evidence to show Defendants' purported guilt or "consciousness of guilt" of the charged Sherman Antitrust Act violation. These inferences are both incorrect and legally impermissible. The exhibits would confuse the jury on the correct legal standard, mislead the jury about the facts, and inject a wasteful trial-within-a-trial on the contours of the referenced Bank compliance policies. The Government's recorded phone call exhibits also concern inadmissible subsequent remedial measures.

A. The Court Should Exclude the Compliance Exhibits and Evidence About Alleged Compliance Violations Under Rule 403

The Court should not permit the Government to offer the views of UK-based traders and compliance employees as to what might pose a vague, evolving *compliance* risk to suggest the

inference that Defendants violated U.S. antitrust *law*. Such views are especially inapposite when they concern evolving, post-facto compliance guidelines five years into the indicted period (2012 versus 2007). This case turns on whether Defendants violated the Sherman Antitrust Act, not whether they violated their employers' evolving compliance policies, most of which focused on exchanging information and maintaining client confidentiality.

Company compliance policies are designed to avoid regulatory, business, and reputational risk. They are not the law. Yet the distinction between compliance standards and the law can be difficult for a jury to understand because compliance standards "sound" like legal standards and they often encompass similar, overlapping issues. *English v. Dist. of Columbia*, 651 F.3d 1, 10 (D.C. Cir. 2011) ("Although as a matter of law the alleged [police department] policy violation has no bearing on the Fourth Amendment analysis, it would be far less clear to a jury."). For this reason, courts in antitrust cases frequently preclude the Government or claimants from introducing compliance policies and evidence of employees' non-compliance to try to establish guilt.[11]

Here, the Government's exhibits about alleged compliance violations are not even the policies themselves but the muddled musings of traders and other bank employees about the Banks' evolving compliance standards or proposed changes to them, often filtered through several layers of hearsay and involving complex, unexplained context. Moreover, these standards substantially address information exchange, which is not a per se violation of the

[11] *See In re Urethane Antitrust Litigation*, No. 2:08-5169 (WJM-MF), 2016 U.S. Dist. LEXIS 15137, at *6 (D.N.J. Feb. 8, 2016); *United States v. Stora Enso N. Am. Corp.*, No. 3:06 CR 323 (CFD), 2007 U.S. Dist. LEXIS 43382 (D. Conn. June 5, 2007) (excluding portions of defendant's "Antitrust and Trade Regulation Compliance Policy" as "encroach[ing] upon the court's duty to instruct on the law" and unduly prejudicial and misleading); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 1:14-md-02503-DJC (D. Mass Mar. 8, 2018) (Doc. 1089) (excluding defendant's "policies against price fixing, payoffs or not being paid for delayed product entry" as irrelevant and unduly prejudicial).

Sherman Antitrust Act. *See, e.g.*, *United States v. U.S. Gypsum Co*., 438 U.S. 422, 441 n.16 (1978); *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113 (1975).

Allowing the jury to hear uninformed opinions on an inapt standard would be improper, misleading, and highly prejudicial. *See United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991); *Urethane*, at *2, *6 (excluding Dow Chemical's interpretation of antitrust laws and internal advice to employees).

The Government's compliance exhibits also pose an extremely high risk of confusing the jury because third parties—not a Defendant—make many of the most prejudicial comments. What other traders believed about the Banks' evolving compliance policies is irrelevant to the charge in this case. Yet there is a material danger that jurors would confuse musings about such policies (and alleged non-compliance) with statements about the reach of the Sherman Antitrust Act. The Court states the law; the Government should not be injecting lay, uninformed, "legal" opinions into evidence. These assertions are confusing, misleading, and irrelevant, and should be excluded.[12]

Finally, the Government's exhibits would create an unnecessary trial-within-a-trial on compliance issues. To be able to assess the differences between the Banks' compliance policies

[12] With respect to the JP Morgan phone call, the Government may argue that Mr. Usher's "exculpatory" statements in the call were false, attempted to conceal his conduct, and hence showed his "consciousness of guilt." But the parties to the call are clearly discussing the Bank's post-Indictment period *compliance* standards about lawful information-exchange, not the Sherman Antitrust Act or illegal agreements. Nothing in the call suggests any relevance to the disputed issues in this case. Moreover, it is improper to use purportedly "false" exculpatory statements as "consciousness of guilt" evidence because such statements can be interpreted as showing a guilty mind *only if the jury first assumes the defendant is guilty*. *Cf. United States v. Littlefield*, 840 F.2d 143, 149 (1st Cir. 1988) ("[T]he jury could find the exculpatory statement at issue to be false only if it already believed evidence directly establishing the defendant's guilt. . . . In effect, the jurors were told that once they found guilt, they could find consciousness of guilt, which in turn is probative of guilt. This is both circular and confusing.") (rejecting consciousness of guilt instruction).

and the law, the jury would need to hear about each Bank's compliance policies, their operation, and their objectives across a five-year period. The jury would also need to hear about the context for the issues that are discussed in the calls, including a client confidentiality concern relating to a Barclays trader and the Bank of International Settlements, and the LIBOR and EURIBOR banking investigations, among other topics—none of which relates to Defendants. The Government's witnesses are not equipped to provide that context. *See English*, 651 F.3d at 10 (affirming exclusion of policy evidence where admission "would cause big time confusion of the issues, and preventing such confusion would require the admission of the conclusions to be hedged about with jury instructions and necessitate a trial within a trial about the whole District of Columbia disciplinary system") (internal quotation marks omitted).

B. The Court Should Exclude the Compliance Phone Calls Because They Describe Subsequent Remedial Measures Under Rule 407

The five phone calls are also evidence of subsequent remedial measures that cannot be admitted to prove culpable conduct. *See* Fed. R. Evid. 407; *Wash. Alder LLC v. Weyerhaeuser Co.*, No. cv-03-753-PA, 2004 U.S. Dist. LEXIS 15269, at *13 n.4 (D. Or. July 27, 2004) (noting in antitrust case that Rule 407 would bar evidence of defendants' reaction to pending litigation); *Noble v. McClatchy Newspapers*, 533 F.2d 1081, 1090 (9th Cir. 1975) (upholding exclusion of remedial measures concerning allegedly anticompetitive provisions of contract). The calls occurred *after* each Bank started reviewing interbank chats and revising their internal policies concerning information exchange in the chats. Participants on each of the phone calls specifically refer to the banks *changing* their policies concerning the use of chat rooms in the wake of these formal reviews.[13]

[13] Rule 407 applies to the banks' policy changes just as it would to Defendants' own remedial measures. *See* Rule 407 adv. cmte. note ("[The rule] rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added

C. Conclusion

For the reasons stated above, the Court should exclude specific evidence concerning alleged violations of the Banks' evolving compliance policies. However, if the Court denies this motion, Defendants will need to supplement their witness and exhibit lists to respond to the Government's compliance evidence. The Government's limited compliance-related exhibits are cherry-picked from a much more complex compliance narrative. Any trial-within-a-trial on compliance should be balanced, and Defendants would seek to provide the jury with the full context that is necessary to properly assess and weigh this evidence.

DEFENDANTS' MOTION IN LIMINE 4— TO EXCLUDE EXPERT TESTIMONY OF JEREMY N. TILSNER AND EBS-ONLY MARKET SHARES

Defendants move to exclude portions of the purported expert testimony of Government witness Jeremy N. Tilsner under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 589-90 (1993). Mr. Tilsner's proposed testimony—concerning:

A. EBS-only (i.e., Electronic Broking Services) "market shares" and total market size,

B. trade "attributes" and "aggregate metrics," and

C. "market share" analyses of time-limited slices of trading on one of many electronic trading platforms, EBS

—exceeds his "data analytics" expertise; is misleading, irrelevant, and unhelpful to the jury; and seeks to bootstrap lawyer-created analyses and hearsay into purported antitrust "evidence" through the guise of expert testimony. In the alternative to excluding Mr. Tilsner, Defendants ask the Court to conduct a voir dire on his credibility and expertise as part of the scheduled September 4 or 13 conferences or at any date convenient before trial.

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safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them.").

According to the Government's amended expert disclosure, Mr. Tilsner holds a bachelor's degree in electrical engineering, and has 15 years of experience in the "field of data analytics."[14] His CV describes that experience as consisting of data collection, consolidation, and production. Missing from the Tilsner Disclosure is any substantive expertise in accounting, economics, industrial organization, or financial services. Based on Mr. Tilsner's CV and disclosure, his experience with trading data appears to be limited to "valuation," evaluating the "accuracy" of a compliance system for detecting insider trading, and evaluating the performance of investments. Neither his disclosure nor his CV reveals any experience "analyzing data" for Sherman Antitrust Act purposes, much less expertise in defining a relevant market and assigning market shares. He also lacks any industry expertise in the field of FX.

The Tilsner Disclosure[15] describes three topics for Mr. Tilsner's testimony:

- "analyses depicting market share and ranking of the Trader(s) around the time of the Fixes";
- FX trade attributes, including "direction, quantity, price, time, counterparty, and trading channel," as well as "other attributes as evidenced in the data, including the absence of orders or trades"; and
- "aggregate metrics" about FX trading, such as the "total volume and net direction of trading, or lack thereof, by the Traders within a specific interval," as well as at the WMR and ECB fixes.

Mr. Tilsner lacks expertise in defining a relevant "product market" or "market share" in an antitrust case (topics found in industrial organization economics), which are central issues in his Disclosure and this case. Mr. Tilsner's CV lists only two publications (which appear to be Alvarez & Marsal company newsletter pieces); neither addresses defining markets or determining relevant product markets in antitrust cases.

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[14] Kendall Decl., Ex. D (Government's Amended Disclosure [Jeremy N. Tilsner] (July 17, 2018) (yellow highlighting added)).

[15] *Id.* ¶¶ 18-21.

Federal Rule of Evidence 702 permits a witness to offer expert opinion at trial only if: (1) the witness is "qualified as an expert by knowledge, skill, experience, training, or education"; (2) the witness's expertise will "help the trier of fact"; (3) "the testimony is based on sufficient facts or data"; (4) "the testimony is the product of reliable principles and methods"; and (5) "the expert has reliably applied the principles and methods to the facts of the case." The Government bears the burden of proving the admissibility of Mr. Tilsner's testimony, and the Government cannot satisfy that burden. *Bourjaily v. United States*, 483 U.S. 171, 172-73 (1987).

A. The Court Should Exclude Mr. Tilsner's Proposed Testimony Concerning Market Share Analyses

Mr. Tilsner's proposed testimony concerning Defendants' market shares—a term of art in antitrust—exceeds his training or expertise. *See United States v. Roldan-Zapata*, 916 F.2d 795, 805 (2d Cir. 1990) ("A witness may be qualified as an expert on certain matters and not others."). Mr. Tilsner lacks any background, training, education, or experience in the field of economics or industrial organization. His CV reveals no expertise in antitrust, generally, and particularly in defining a relevant product market, nor does it reveal any industry experience or expertise in FX markets. His lack of expertise dooms the Government's attempt to introduce Mr. Tilsner's opinions about Defendants' market shares.

Defining the relevant product market is the necessary predicate in an antitrust case to calculating shares of that market and determining anticompetitive effects (if any) in that market, as *Hartford Fire* requires. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some *substantial effect* in the United States.") (emphasis added); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (factors for product market under the Sherman Antitrust Act); *Hayden Pub. Co. v. Cox Broad. Corp.*, 730 F.2d 64, 70 (2d Cir. 1984) (agreeing that "a

determination as to the boundaries of the relevant product market is essential in order to measure the anti-competitive effect if any, of defendants' activities"). An expert economist—not an expert in "data analytics"—typically defines a market, as this work requires economic analysis. In turn, "[t]he reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it determine the outer boundaries of a product market." *In re Fresh Del Monte Pineapples Antitrust Litig.*, No. 04-md-1628 (RMB) (MHD), 2009 U.S. Dist. LEXIS 97289, at *23 (S.D.N.Y. Sep. 30, 2009) (excluding expert testimony on defining a product market because of its "insufficient factual basis and unrealiability, i.e., his methodology does not consider meaningfully whether [other products] are reasonable substitutes") (internal quotation marks and citation omitted); *CDC Techs., Inc. v. IDEXX Labs., Inc*., 7 F. Supp. 2d 119, 126 (D. Conn. 1998) ("[H]ow to define the product market is answered in antitrust cases by asking expert economists to testify.") (internal quotation marks and citation omitted). Nor is Mr. Tilsner equipped to offer any opinions such as "reasonable interchangeability of use" under *Brown Shoe*, 370 U.S. at 325, because he lacks any industrial organization economics training or experience.

The Government has admitted that EBS-only market shares, i.e., shares of a single electronic trading platform (EBS), do not reflect a relevant antitrust product market.[16] Because Mr. Tilsner lacks the necessary expertise, he is unqualified to testify as an expert witness concerning "analyses depicting market share and ranking of the Trader(s)" in an antitrust case, and the Court should preclude any testimony from him on this issue.[17] *See United States v. Zafar*, 291 F. App'x 425, 427 (2d Cir. 2008) (affirming district court's exclusion of expert

[16] *E.g.*, Indict. ¶ 7; Kendall Decl., Ex. E (Email from Chu to Sahni (July 31, 2018; 1200) (subject: "Usher: Discussion re Daubert of Tilsner")).

[17] Kendall Decl. Ex., D ¶ 20.

testimony, in light of "critical missing link" between the expert's proposed testimony and the facts of the case); *Nimely v. City of N.Y.*, 414 F.3d 381, 399 n.13 (2d Cir. 2005) ("[B]ecause a witness qualifies as an expert with respect to certain matters or areas of knowledge, it by no means follows that he or she is qualified to express expert opinions as to other fields.").

Moreover, given his lack of experience with trade data and market share analyses, Mr. Tilsner must rely on and simply "repeat[]" others' assessments of relevance without testing them against his own, reliable methodology or drawing conclusions thereon. *See United States Dukagjini*, 326 F.3d 45, 59 (2d Cir. 2002). To allow him to testify on those topics would "enable[e] the government to circumvent the rules prohibiting hearsay." *See id*. The Government disclosed that Mr. Tilsner was provided notes and other materials from the Banks and EBS that "explain[ed] . . . the most relevant date or time field, and . . . the most relevant price field" for data at issue in this case.[18] But the testimony of an expert who serves only as a mouthpiece for bank representatives is improper and unreliable. *See Berlyn, Inc. v. Gazette Newspapers, Inc.*, 214 F. Supp. 2d 530, 539 (D. Md. 2002) ("To the extent that Shaffer relied on market research done by defendants or statements by the defendants regarding their perceptions of competition, market, and the like, there is no indication that these assessments were based on proper research methods.").

Such testimony would also run afoul of the Confrontation Clause. *See United States v. Mejia*, 545 F.3d 179, 198 (2d Cir. 2008) (quoting *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir. 2002)) (explaining that expert "testimony violates *Crawford* 'if [the expert] communicated out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of an expert opinion'"). Statements made by bank

[18] Kendall Decl., Ex. D ¶¶ 15-16.

representatives to the FBI, prosecutors, or to Mr. Tilsner himself during the course of structured questioning during the investigation in this case fall within the "core" of testimonial hearsay. Permitting Mr. Tilsner to parrot those statements to the jury, without his independent assessment, would violate the Confrontation Clause. *See United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004) (stating that *Crawford* precludes admission of "a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings").

B. The Court Should Exclude Mr. Tilsner's Proposed Testimony About FX Trade "Attributes" and "Aggregate Metrics" such as Total Volume

The Court should also preclude Mr. Tilsner from offering testimony concerning specific attributes of Defendants' FX trading, including "direction, quantity, price, time, counterparty, and trading channel," as well as "other attributes as evidenced in the data, including the absence of orders or trades."[19] Likewise the Court should preclude Mr. Tilsner from offering testimony concerning "aggregate metrics," such as the "total volume and net direction of trading, or lack thereof, by the Traders within a specific interval," as well as at the WMR and ECB fixes.[20]

Mr. Tilsner is proffered as only a "data analytics" expert whose experience consists of the preservation, consolidation, and production of large-format data. Mr. Tilsner has no relevant industry expertise in FX that would qualify him to testify about the "direction, quantity, price, time, counterparty, [or] trading channel" of any given trade. *See Roldan-Zapata*, 916 F.2d at 805 (former police officer and ex-DEA agent lacked a basis to testify about current record-keeping practices of police force). Without such expertise, Mr. Tilsner's testimony interpreting trading data cannot reflect expert opinion, but instead would merely parrot hearsay from bank

[19] Kendall Decl., Ex. D ¶¶ 17-18, 21-22.

[20] *Id.* ¶¶ 18–21.

representatives who might have been called as fact witnesses. As discussed above, simply parroting to the jury what the banks' representatives told Mr. Tilsner about the meaning of the data with respect to trade attributes is neither reliable nor relevant expert testimony. *Dukagjini*, 326 F.3d at 59.

C. The Court Should Exclude Mr. Tilsner's Anticipated Testimony and Evidence About Irrelevant EBS-Only Slices of the EUR/USD Market, Which Would Likely Mislead the Jury

The Government disclosed that Mr. Tilsner's calculations of "market shares" refer solely to EBS-only trading.[21] The Government also disclosed it will introduce evidence of market shares of EBS-only trading for time-limited windows on specific dates.[22] The Court should preclude the Government from admitting such selective snapshots of EBS-only trading data.

The Government has admitted its EBS-only market is not the relevant product market:

- "[T]he phrase 'the Market' . . . is simply shorthand for all market participants on EBS."[23]
- "The interdealer market is a virtual marketplace in which dealers post prices and trade currencies, most often through *electronic platforms* hosted by third parties, and *also through interdealer brokers*."[24]

As the Government concedes, EBS is one among many legitimate channels FX traders use to transact, including Currenex, Reuters Messenger, and interdealer brokers. The Government concedes Mr. Tilsner's testimony concerning "market shares" testimony would not address the "FX market definition in the economic sense," but instead is simply a "shorthand" for "market

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[21] *See, e.g.*, Kendall Decl., Exs. E & F (excerpting only the "Summary" worksheet of a native Excel file (AM006-EDOC-00000021) on the Government's proposed exhibit list; yellow highlighting added to market share" values for "Total Market" and "% Market" for EBS-only trading).

[22] Kendall Decl., Exs. D ¶ 22 & F.

[23] Kendall Decl., Ex. E.

[24] Indictment ¶ 7 (emphases added).

participants on EBS."[25] Yet Mr. Tilsner will purportedly sponsor a misleading EBS-only "market share" analysis. This only exacerbates the issue presented by Mr. Tilsner's lack of expertise (as explained on pages 18-21 above). Without this necessary expertise, Mr. Tilsner is merely applying selective arithmetic to a subset of EBS-only trading data in a vacuum—not a properly defined antitrust market.

Moreover, describing Defendants' percentage of EBS trading in a given window as a "market share" by its very nature would lead the jury to believe that EBS trading alone constitutes the "market," and that transactions on EBS alone determine the fix price for the EUR/USD "market." Expert testimony in an antitrust case concerning "market share" that the Government concedes does not purport to address the relevant antitrust product market is not relevant, would mislead the jury, and therefore should be excluded. *See* Fed. R. Evid. 402, 403.

* * *

Defendants note that the parties have and will continue to resolve less fundamental evidentiary issues by agreement. These include the exclusion of affirmative evidence of Defendants' terminations and other disciplinary action against them (under Rules 401 and 403); certain types of uncharged conduct (under Rules 401, 403, and 404); and certain portions of Mr. Usher's personnel file (under the same rules). If, contrary to Defendants' understanding, the Government nevertheless intends to introduce any of these categories of evidence at trial, the Defendants may seek relief from the Court by filing supplemental briefs.

[25] Kendall Decl., Ex. E.

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Respectfully submitted

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