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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

AOT HOLDING AG, individually and on behalf of all other similarly situated,	)	
Plaintiff	)	Case No. 19-CV-2240-CSB-EIL
v.	)	Hon. Colin S. Bruce
ARCHER DANIELS MIDLAND COMPANY,	)	ORAL ARGUMENT REQUESTED
Defendant.	)	

DEFENDANT'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

This is a case about a sophisticated, global trading company looking for someone else to blame for unspecified, alleged losses that resulted from its ethanol trading strategy. The Complaint admits that at the time of the events of this case, there was a "supply glut" of ethanol available for sale. Naturally, this oversupply caused the price of ethanol to fall. Companies such as Plaintiff, which speculate on the price of ethanol by buying and selling ethanol futures in the financial markets, had a choice: take "short" positions to bet the price would keep falling, or "long" positions to bet the market would suddenly change direction and the price would rise. Plaintiff gambled wrong, going long against the market, and the price did not rise. Plaintiff now seeks to recover for its own bad bets from Archer Daniels Midland Company ("ADM"). Yet Plaintiff fails to plead allegations from which this Court can plausibly infer any illegal conduct by ADM, and its Complaint should be dismissed.

ADM produces and sells ethanol and also participates in the ethanol futures markets. Plaintiff's foundational allegation is that ADM somehow artificially depressed the price by selling ethanol on the open market at the lower prices at which buyers were actually bidding to buy it. Plaintiff contends that ADM should have forced prices up—in a declining market—and, by failing to convince buyers to pay more, violated the Commodity Exchange Act.

The Complaint fails for several reasons to state a claim. First, Plaintiff's allegations describe nothing other than ordinary competition. Sellers of commodities like ethanol are *supposed* to compete on price to win sales. The Complaint itself alleges why ADM was motivated and able to do so. During the supply glut and falling prices, ADM—one of the largest producers, capable of making 10 percent of the country's ethanol—had a lot of ethanol to sell, and the Complaint admits that ADM's large production capacity, unusually close proximity to a key ethanol terminal, and a variety of transportation options enabled it to beat its competitors

with "lower prices." (Compl. ¶ 48) So that is what ADM did, consistent with rational business conduct.

Plaintiff goes to considerable lengths to distract from its failure to allege plausibly that ADM manipulated the benchmark price of ethanol downward. Notwithstanding its volume, the Complaint is strikingly thin on allegations against ADM. Most tellingly, the Complaint makes allegations about ADM's conduct at the relevant ethanol terminal, in Argo, Illinois, on just *two days* out of the *22 months* at issue in this case. When the events of those two days are brought into sharp focus, Plaintiff's own allegations show that ADM acted normally, not illegally.

On the first day, the Complaint faults ADM for accepting a buyer's bids to buy ethanol—but the buyer making the bids was Plaintiff itself. In other words, ADM agreed to sell ethanol at the price which Plaintiff wanted to pay. On the second day, the Complaint alleges another seller was offering ethanol at a slightly lower price than ADM, but ADM was able to win sales by proposing a better price, $.0005 per gallon less than the competitor. At that point, ADM's offer matched the highest bids from buyers that day. ADM sold at that highest price—a price, the Complaint admits, which was higher than the average monthly benchmark price for the next nine months in a row. Taking these allegations apart or together, Plaintiff does not allege any conduct from which this Court can plausibly infer that ADM manipulated the price of ethanol downward to create an "artificial" price.

The Complaint also fails to state a claim because it fails to allege plausibly that ADM caused Plaintiff any injury. The Complaint's sole cause of action, under the Commodity Exchange Act, requires "actual damages" resulting from buying or selling futures contracts when the price of ethanol was harmfully manipulated. But Plaintiff does not allege that it purchased or sold any futures contracts on either of the two days on which Plaintiff tries (but fails) to allege

manipulative conduct, and the Complaint offers nothing more than speculation that Plaintiff "may have suffered actual damages." ADM respectfully urges this Court to dismiss the entire Complaint.

BACKGROUND

If the 50-page Complaint looks daunting, that is probably because it was intended to be. It begins with a glossary, immersing the reader into the wealth of jargon that fills the rest of its pages. It then proceeds to 135 paragraphs of elaborate, sometimes unnecessary, and often repetitive statements, supplemented by a diagram, a map, three graphs, five tables, and a pasted excerpt from a report. It closes with an appendix that provides a tutorial into the inner workings of financial derivatives including options. Despite its size, what is telling is what it does not say: In 50 pages, the Plaintiff never alleges it bought or sold any options (as opposed to actual ethanol). In a similar vein, despite defining the "Relevant Period" to encompass two years during which ADM allegedly "illegally manipulated Chicago Ethanol Derivatives," the Complaint relies exclusively on data from *two days* of this nearly two-year period as purported support for its allegations against ADM.

Trimming away the Complaint's many tangled branches reveals its root allegation: ADM produced ethanol and sold it on the open market by accepting other companies' bids to buy it. A complaint based on that core allegation does not state a claim under the Commodity Exchange Act.

A. Ethanol, ADM, Plaintiff, and the ethanol market

Ethanol is a renewable fuel made from corn. (Compl. ¶ 14) Most of the country's ethanol is made in the Midwest. (¶ 20) The United States has 200 ethanol plants, 88 percent of which are located in the Midwest, where they produce 91 percent of the country's ethanol. (¶¶ 20-21)

ADM has its headquarters in Decatur and eight ethanol plants in the Midwest. (¶¶ 8, 22)

It is "one of the largest ethanol producers in the United States." (¶¶ 2, 22) ADM alone can produce 10 percent of the country's ethanol. (¶ 22)

Plaintiff is AOT Holding AG, a Swiss corporation that describes itself as "one of the most active participants in the ethanol derivatives market *during the Relevant Period* [that] routinely traded in ethanol derivatives tied to" the benchmark price. (¶ 7 (emphasis added)) During the Relevant Period, Plaintiff sometimes used derivatives to bet that the price of ethanol would rise and other times to bet that it would fall, as can be seen in the below chart copied from the Complaint. (¶¶ 110)

Spot Month Contract	AOT's Position in Chicago Ethanol (Platts) Futures (CU) Entering That Spot Month[6]
November 2017	-420
December 2017	3,123
January 2018	0
February 2018	-116
March 2018	-315
April 2018	224
May 2018	-286
June 2018	-138
July 2018	35
August 2018	75
September 2018	35
October 2018	30
November 2018	30
December 2018	30
January 2019	0
February 2019	0
March 2019	0
April 2019	-20
May 2019	-5
TOTAL	2,282

In 2016, the price of ethanol was falling. (¶ 71) That year and in 2017, the falling price "was squeezing or eliminating the profit margins of ethanol producers, causing them to idle plants or consider exiting the business altogether." (¶ 71) By late 2017, when the events of this case begin, the Complaint alleges there was a "supply glut" of ethanol, forcing the price even lower. (¶ 2) ADM's outlook on the industry, due to the imbalance between supply and demand, was so pessimistic that ADM tried, but was unable to sell three of its ethanol plants. (¶¶ 2, 71)

ADM ended up keeping them and decided not to close or idle them. (¶ 2) Despite the falling price of ethanol, Plaintiff had a net long position of 3,123 contracts going into December 2017, highlighted in the above table from the Complaint—which far exceeds Plaintiff's net positions (long or short) for any other month in its Complaint. (¶ 110) In other words, Plaintiff bet heavily that the price of ethanol would increase during the month of December 2017.

B. The Argo Terminal and ethanol prices

Federal law requires a certain amount of renewable fuels such as ethanol to be blended into gasoline, and the main buyers of ethanol are refineries, blenders, gasoline resellers, and the like. (¶¶ 15–16) They can buy ethanol directly from a producer, or they can buy it at one of the 1,200 ethanol "terminals" located around the country, where ethanol is stored. (¶¶ 17, 24)

The ethanol terminal in Argo, Illinois—near Chicago's Midway Airport—is one of the nation's largest and most important. (¶ 24) (Pictures of it can be found at kindermorgan.com/content/docs/terminalbrochures/mw_Argo.pdf.) Within 250 miles of the Argo Terminal, ADM has five ethanol production facilities that are capable of producing over 1.2 billion gallons of ethanol each year. (¶ 48) They can ship ethanol to the Argo Terminal by railcar, barge, and tanker truck. (¶ 48) The Complaint itself pleads that these factors give ADM a greater natural ability than its competitors to get more ethanol to the Argo Terminal at lower cost, and to sell it there at "lower prices." (¶ 48)

Ethanol prices established at the Argo Terminal influence prices at other terminals and for other sales. (¶ 23) From 1:00 to 1:30 pm on each trading day at the Argo Terminal is a period known as the "Market-on-Close." (¶ 26) Before 1 pm, buyers post the prices at which they are bidding to buy ethanol, and sellers post the prices at which they are offering to sell it. (¶ 27) They may negotiate, and when bid and offer prices match, there is a sale. (¶ 28) Sales that take place during the Market-on-Close are a factor used to calculate a benchmark price for ethanol for

that day. (¶ 26) The prices of ethanol futures contracts and options, which are financial derivatives bought and sold on exchanges such as the Chicago Board of Trade, are tied to that benchmark price. (¶ 30)

C. Plaintiff's price manipulation allegations

Plaintiff alleges that, beginning in November 2017, ADM (a) used financial derivatives that would increase in value if the price of ethanol fell, and (b) sold ethanol at the Argo Terminal in order to depress the benchmark price. (¶ 61) As explained in detail below, however, Plaintiff concedes that the second half of this strategy, the supposed price manipulation, was accomplished by ADM selling ethanol on the open market in response to the posted bids of buyers—including bids posted by Plaintiff itself.

D. The Complaint and cause of action

The Complaint has a single count. It asserts that ADM violated the Commodity Exchange Act by manipulating downward the ethanol benchmark price set during the Market-on-Close at the Argo Terminal. (¶¶ 129, 131)

The count cites six sections of the Act and one section of regulations—7 U.S.C. §§ 6b(a), 6c(a), 9(1), 9(3), 13(a)(2), and 25(a), and 17 C.F.R. § 180.2—without specifying the purpose and contents of each provision. They contain different prohibitions. Generally speaking, the relevant portions of sections 9(1), 9(3), 13(a)(2), and 180.2 prohibit manipulating commodity prices; section 6b(a) prohibits fraud in commodities contracts; and section 6c(a) prohibits commodity transactions that are fictitious sales or are used to cause something other than a "true and bona fide price" to be reported. Finally, section 25(a) provides a private right of action to certain persons who as a result of a violation suffered "actual damages."

ARGUMENT

I. AOT's entire Complaint should be dismissed.

A. Stating a claim requires alleging facts to show plausibly that ADM did not act "in line with a wide swath of rational and competitive business strategy."

The quote in the heading is from the Supreme Court's decision in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). Motions to dismiss usually just cite its key holding that in order to state a claim, a complaint must allege facts showing that it is "plausible" the defendant acted illegally. *Id*. at 570. The similarities between the present case and *Twombly*, however, will reward a closer look. Though they assert different causes of action, the plaintiffs in both cases rely on non-actionable allegations that ordinary business conduct affected market prices.

The plaintiffs in *Twombly* were subscribers of the "Baby Bells," the local telephone companies that emerged from the breakup of AT&T. *Id*. at 549. The plaintiffs accused the Bells of inflating their prices by agreeing to obstruct competition. *Id*. at 550–551. The complaint alleged that an agreement between them could be inferred because (a) they engaged in parallel conduct and had the same "compelling common motivation" to obstruct competition, and (b) they failed "meaningfully to pursue attractive business opportunities in contiguous markets where they possessed substantial competitive advantages." *Id*. (internal quotes omitted).

The Supreme Court held that the plaintiffs failed to state a claim. The Court explained that parallel conduct alone is ambiguous: it is consistent with an agreement, but it is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id*. at 554. Allegations of parallel conduct showed only that it was "possible" or "conceivable" the Bells had an agreement, but stating a claim required providing "plausible grounds to infer" they did. *Id*. at 556, 570.

In short, it is not enough to allege "a statement of facts that merely creates a suspicion

[of] a legally cognizable right of action." *Id*. at 555 (quoting Wright & Miller). "[W]ithout some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief." *Id*. at 557 (internal quotes omitted). Courts must use "common economic experience" to determine whether plaintiffs have alleged facts showing something other than "routine market conduct." *Id*. at 565–66.

B. Plaintiff failed to plead facts plausibly showing that ADM illegally manipulated the ethanol benchmark price.

The Complaint's only count is premised entirely on the assertion that ADM's sales of ethanol during the Argo Terminal's Market-on-Close manipulated and artificially depressed the ethanol benchmark price. (¶¶ 129–34) The count's allegations are organized around the four elements of a commodity price manipulation claim: (1) the defendant had the ability to influence the price and (2) specifically intended to manipulate it, and the defendant's manipulative conduct (3) caused there to be (4) an artificial price. (¶¶ 129–34) *See, e.g.*, *U.S. Commodity Futures Trading Comm'n v. Kraft Foods Grp.*, 153 F. Supp. 3d 996, 1018 (N.D. Ill. 2015).

The Complaint's few on-point factual allegations, however, do not plausibly show that ADM manipulated the ethanol benchmark price into an artificial price. Instead, the conduct alleged is at least equally, if not more, consistent with "routine market conduct" that is "in line with a wide swath of rational and competitive business strategy." *Twombly*, 544 U.S. at 566, 554.

Twombly's admonition against assuming ordinary business activity to be unlawful has special force in the area of commodity prices. A price is artificial only when it "does not reflect the market or economic forces of supply and demand." *Kraft*, 153 F. Supp. 3d at 1022. Actually determining that a price is artificial is "difficult," *U.S. Commodity Futures Trading Comm'n v. Wilson*, No. 13 Civ. 7884, 2018 WL 6322024, at *15 (S.D.N.Y. Nov. 30, 2018), because "[t]he laws that forbid market manipulation should not encroach on legitimate economic decisions lest

they discourage the very activity that underlies the integrity of the markets they seek to protect." *Id*. (citing *In re Amaranth Nat. Gas Commodities Litig.*, 587 F. Supp. 2d 513, 534-35 (S.D.N.Y. 2008)). For that reason, "[t]he allegation of unusual market prices, without more, is insufficient to establish artificial prices, as a matter of law." *In re Rough Rice Commodity Litig.*, CFTC No. 11 C 618, 2012 WL 473091, at *6 (N.D. Ill. 2012) (citing *In re DiPlacido*, CFTC No. 1-23, 2008 WL 4831204, at *87 (CFTC Nov. 5, 2008)). Even a factual allegation of misconduct directed at prices does not suffice to establish that a price was artificial. *Id*.

Here, the Complaint fails to plead that any particular price was artificial. It also fails to plead facts plausibly showing that ADM made anything other than legitimate business decisions at the Argo Terminal in a market with a "supply glut." In its 50 pages—reporting on the "substantial evidence" that an "extensive investigation has uncovered" (¶ 5) after reviewing almost *two years* of data (November 2017 to the present)—it identifies only *two days* on which ADM supposedly took any action in order to depress the benchmark price. Yet its factual allegations do not plausibly show that ADM engaged in market manipulation on those days. To the contrary, the Complaint alleges, if anything, that the prices at which ADM transacted at the Argo Terminal were *not* artificial, because they were the product of competitive, opening bidding and offering, including bidding by the Plaintiff itself—and without an artificial price, there is no market manipulation.

1. December 1, 2017 at the Argo Terminal

On this day, Plaintiff *itself* was posting bids to buy ethanol at the Argo Terminal. (¶ 63) Before 1:00 pm, Plaintiff posted a bid to buy ethanol at a certain price (which the Complaint does not disclose). When the Market-on-Close began, ADM accepted that bid, and the sale occurred. Plaintiff then posted another bid, and ADM accepted it.

It is not surprising that it was AOT itself that posted the only bids it specifically alleges

that ADM accepted on this date. The Complaint states that "AOT bought (and thus took a long position) a net 836 Chicago Ethanol (Platts) Futures contracts between December 1-December 13, 2017." (¶ 114) AOT's net position entering the spot month of December 2017 was 3,123 contract long. (¶ 110) AOT took these long positions, betting that prices would rise, in the context of a market that it says elsewhere in the Complaint was "falling" in 2016 and 2017. (¶71) In other words, AOT admits that it tried to swim against the current of a falling market, betting that it would reverse. From the data AOT provided in the Complaint, AOT took no net position, or a short position, in five of the next six months after December 2017, and in the remaining "Relevant Period" did not take another long position even a small fraction of the size of the position it took in December. (*Id.*) If anything, this data shows that AOT's actions this month, not ADM's, were the clear outlier.

Plaintiff nonetheless alleges that ADM could have no rational reason for accepting any bids on December 1, 2017 "other than manipulating downward the price of ethanol at the Argo Terminal." (¶ 64) The Complaint faults ADM for not haggling to force up the price. (¶¶ 63–65) But that is not how a competitive market works. It is as if someone offered to buy your car for $10,000, bought it at that price, and then sued you for not demanding $12,000. Plaintiff cannot establish that ADM manipulated the price of ethanol downward by alleging that, in one instance, ADM agreed to sell at the very price Plaintiff itself proposed to pay. ADM was not a manipulative *maker* of the price in this instance; ADM was a *taker* of Plaintiff's own bid.

As *Twombly* held, allegations fail to state a plausible claim if there is an "obvious alternative explanation" for the defendant's conduct. *Twombly*, 550 U.S. at 567. It is easy to understand a business rationale for ADM to accept Plaintiff's offers, apparent from the Complaint's own allegations. The Complaint alleges the market was in a state of "supply glut,"

lowering prices, and the Complaint admits that ADM's enormous size, close proximity to the Argo Terminal, and varied transportation options allowed it to sell ethanol there "at lower prices" than competitors. (¶ 48) Given that ADM was still running its plants, including the ones ADM had been unable to sell, it was incentivized to sell ethanol, as other producers would be. In such market conditions, ADM was more apt to accept bids, to ensure its product was sold, than haggle for a higher price—particularly if by doing so it risked another seller accepting the current bid or the price falling even lower. If ADM had ethanol to sell, and wanted to make sure it got sold, accepting bids was a way to do it. Nothing illegal can plausibly be inferred from the alleged conduct by ADM at the Argo Terminal on December 1, 2017.

2. August 3, 2018 at the Argo Terminal

Plaintiff alleges that on this day there were five sales at the Argo Terminal during the Market-on-Close, and ADM was the seller. (¶ 66) As can be seen in a report excerpted in the Complaint, earlier in the day two competitors posted offers to sell at $1.45 per gallon; ADM posted an offer to sell at a lower price, $1.4475 per gallon; and yet another competitor posted the lowest offer, $1.4455 per gallon. (¶ 66, with highlighting added)

> MOC offers: Ethanol: Chicago Argo: Vitol offers $1.4455/gal, Aug 8- Aug 18, 5Kb; ADM offers $1.4475/gal, Aug 8- Aug 18, 5Kb; Center offers $1.45/gal, Aug 8- Aug 18, 5Kb; CHS offers $1.45/gal, Aug 8- Aug 18, 5Kb; Ethanol: FOB NYH: Hartree offers $1.5650/gal, any-August, 25Kb; BP offers $1.5650/gal, any-August, 25Kb.

During the Market-on-Close, ADM beat the lowest competitor's offer, making sales at $1.4450 per gallon, which was the *highest* price at which any buyers were bidding. (¶ 67)

Amazingly, Plaintiff faults ADM for not "incentivizing" the buyers to pay the even higher price that ADM had originally posted. (¶ 67) But ADM had no ability to do so. When one

able seller offers a commodity at one price, and another offers it at a lower price, as happened here, no able buyer will pay the first seller's higher price. Indeed, *no* seller reached a deal on August 3 during the Market-on-Close with *any* buyer at a price higher than ADM received (¶ 66), which shows that buyers simply were not willing to pay more. As the Complaint alleges, the supply glut was depressing ethanol prices.

It bears noting, for context, that the $1.4450 per gallon that ADM received was a *great* price when judged by prices that ADM would have received if it had waited to sell the ethanol that it sold on August 3. The Complaint admits that the average benchmark price that month (August 2018) was only $1.3561, and the average benchmark price stayed below $1.4450 for the next *nine* months. (¶¶ 75–76) Accepting the allegations in the Complaint as true, the price ADM received was either the high water mark for much of a year, or very close to it. This cannot be the basis for a plausible allegation of downward price manipulation on August 3.

Once again, Plaintiff fails to come to terms with its own allegation that there was already a supply glut and falling prices in the ethanol market. That is called a buyer's market. In a buyer's market, sellers compete for sales. What the Complaint describes is an ordinary market process in which ADM acted normally to beat a competitor's price and win sales by the tiniest of margins—just 5 hundredths of a penny per gallon, which means ADM received a total of $5 less than the competitor would have received for every 10,000 gallons sold. There are no allegations to show, plausibly, that winning these sales fell outside "a wide swath of rational and competitive business strategy." *Twombly*, 550 U.S. at 554.

Nor is it remarkable, as the Complaint alleges, that during this time ADM was one of the largest sellers at the Argo Terminal: by 2018, 70 percent of all sales and 90 percent of Market-on-Close sales. (¶ 73) The Complaint itself alleges that ADM's large production capacity, close

proximity to the Argo Terminal, and varied transportation options gave it the natural ability to sell there at "lower prices" than any competitors. (¶ 48) And despite its attempt to sell three of them, ADM's ethanol plants were still running (¶ 74), so ADM had a lot of ethanol to sell. Under those circumstances, being the biggest seller at the Argo Terminal cannot support a plausible inference of price manipulation.

In fact, the Complaint's own allegations show just how *im*plausible is Plaintiff's allegation of price manipulation. First, among the potential sellers, ADM may not even have posted the lowest initial offer on August 3. That contradicts Plaintiff's assertion that ADM was doing everything it could to depress the price artificially.

Second, the Complaint admits that on some occasions when ADM offered a lower price, a competitor would respond by offering the lowest price, winning the sale. (¶ 69) To try to characterize this as price manipulation *by ADM*, Plaintiff alleges that ADM's offer "force[d] a competitor to make an even more aggressive offer in order to offload their ethanol inventory at Argo." (¶ 69) As discussed above, this is how a competitive market works. A motivated seller prices goods to move. If ADM was actually doing everything it could to depress the price artificially, it would always have bested a competitor's lowest price, driving the price ever lower. Yet the Complaint alleges other sellers, not ADM, often drove the price down for reasons of their own related to the oversupply of ethanol. (¶ 69)

Third, the report also shows that, although several buyers on August 3, 2018 had outstanding bids of $1.4450 per gallon (the price ADM eventually met), others were bidding less—$1.4425 per gallon. (¶ 66)

> MOC bids: Ethanol: Chicago Argo: Shell bids $1.4450/gal, Aug 8- Aug 18, 5Kb; Eco bids $1.4450/gal, Aug 8- Aug 18, 5Kb; Gunvor bids $1.4450/gal, Aug 8- Aug 18, 5Kb; Valero bids $1.4450/gal, Aug 8- Aug 18, 5Kb; Shell bids $1.4425/gal, Aug 8- Aug 18, 5Kb; BP bids $1.4425/gal, Aug 8- Aug 18, 5Kb; Louis Dreyfus bids $1.4425/gal, Aug 8- Aug 18, 5Kb; Ethanol: FOB NYH: Shell bids $1.55/gal, any-August, 25Kb; Hartree bids $1.54/gal, any-August, 25Kb.

There was no incentive for the buyers that bid the highest price of $1.4450 per gallon to bid more, because their competitors were bidding less. And ADM did *not* take an action that would have artificially depressed the price: accepting lower bids instead of the highest ones. *In re DiPlacido*, 2008 WL 4831204, at *31 (manipulation is "intentionally sell[ing] cheaper than necessary for the purpose of causing the quoted price to be less than it would otherwise have been," for example by offering commodities for sale at prices lower than a buyer's bid). ADM got the best deal that was available that day, consistent with rational business strategy.

3. Other terminals

Plaintiff also alleges that on August 3 prices were higher at distant terminals, such as terminals in New York and on the West Coast, so ADM would have sold its ethanol at those terminals if not for its supposed desire to manipulate prices at the Argo Terminal. (¶ 88) But an argument based on higher prices elsewhere is an argument that *no one* should have been selling at the Argo Terminal. Yet there were four potential sellers on August 3 offering very similar prices. It thus is not plausible to infer, as Plaintiff does, that ADM's decision to sell ethanol at the Argo Terminal—near its production facilities—was irrational. As the Supreme Court explained in *Twombly* when rejecting the argument that the defendants' alleged wrongdoing was shown because they supposedly "passed up 'especially attractive business opportunities'": no

company "'enters every market that an outside observer might regard as profitable, or even a small portion of such markets.'" *Twombly*, 550 U.S. at 569 (quoting Areeda & H. Hovenkamp, Antitrust Law ¶ 307d (Supp. 2006)).

As if to underscore the implausibility of its allegation that ADM's price manipulation was responsible for the spread between prices at the Argo Terminal and other terminals (¶ 85), the Complaint reports on an investigation that CME Group (which operates the New York Mercantile Exchange and Chicago Board of Trade, where ethanol financial derivatives such as futures are sold (¶ 1)) conducted regarding that very allegation. (¶ 90) But Plaintiff also states that CME determined that the complained-of sales by ADM at the Argo Terminal were a response to "unrelated" railroad logistics for transporting ethanol, and does not allege (because it cannot) that CME found any scheme to manipulate prices. (¶ 90)

4. Ethanol derivatives markets

Finally, the Complaint relies on the allegation that not only was ADM an ethanol producer and seller, ADM also participated in the markets for ethanol financial derivatives and held large positions that increased in value as ethanol's price fell. Plaintiff assumes that if ADM's position in derivatives would benefit from low prices, that shows ADM must be causing them.

To the contrary, large market positions "do not necessarily imply manipulation." *In re Amaranth Nat. Gas Commodities Litig.*, 730 F.3d 170, 184 (2d Cir. 2013). That principle "remains true even if a trader's positions violate applicable position limits and accountability levels." *Id.* And the Complaint cannot go even that far—it admits ADM's positions remained within CME's guidelines. (¶ 58); *In re Rough Rice*, 2012 WL 473091, at *6 (finding a price was not artificial even though plaintiffs alleged 83 violations of an exchange's position limits).

Nor is there anything suspicious about ADM holding positions in ethanol financial derivatives that increased in value as the price of ethanol fell. ADM is a producer and seller of ethanol, and it can sell on both the physical market and the futures market. If ADM sells on the futures market to lock in a price that hedges the future sales of its production of physical ethanol, and the market price then falls before the delivery date, there are gains from the short ethanol futures contracts that merely ensure that ADM receives, for its future physical sales, the price at which it sold on the futures market. This is how commercial hedging works: lost revenue from falling prices can be offset by gains from ethanol financial derivatives that increase in value when the price of ethanol falls. If ADM had structured its affairs the other way around, as Plaintiff apparently believes was required, it would have held ethanol financial derivatives that decreased in value as the price of ethanol fell. Then the falling price would have caused a double loss: lower sales revenue and also losses in the financial markets. ADM was not required to act so foolishly.

In short, Plaintiff failed to plead facts—taken separately or together—plausibly showing that ADM acted illegally and outside the ordinary course of business, or that it took any manipulative action intended to cause an artificial price for ethanol. The entire case should be dismissed.

C. Plaintiff failed to plead facts plausibly showing that ADM injured Plaintiff.

1. The entire case should be dismissed for lack of injury.

The entire case should also be dismissed because Plaintiff fails to allege facts plausibly showing that it suffered "actual damages" from a violation of the Act, which one must have in order to sue. 7 U.S.C. § 25(a)(1); *see also id.* 25(a)(2) (requiring that a plaintiff "sustain[a] loss"). That means alleging an "actual injury caused by the violation," which requires the assertion of facts showing that a plaintiff transacted on days when there was a harmful artificial

price. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 962 F. Supp. 2d 606, 620 (S.D.N.Y. 2013). The Complaint, however, does not allege that Plaintiff bought or sold any ethanol futures contracts on the only two days—December 1, 2017 and August 3, 2018—on which it tries (but fails) to allege that ADM manipulated the price of ethanol. For that reason alone, the Complaint fails to allege any injury.

Instead, to attempt to allege injury, the Complaint includes a table showing Plaintiff's net position in ethanol futures contracts when trading closed on the day before each month began, from November 2017 through May 2019. (¶ 110 & n.6) (The months of June through August 2019 are mysteriously missing.) In other words, the table shows a snapshot of Plaintiff's net entry position at the start of each month, which shows what Plaintiff's exposure would be to pricing changes in that month if the position remained unchanged. A long (positive) net entry position would benefit from ethanol prices rising in that month, while a short (negative) net entry position would benefit from prices falling in that month. But, critically, the chart does not show when, or if, Plaintiff bought or sold *any* futures contracts for those months.

The data in the Complaint shows that in four of the 19 months, Plaintiff held an "even" net entry position of futures contracts, and thus the value of its entry position would not have changed if the price of ethanol fell for that month. For another seven of the 19 periods, Plaintiff's net entry position in futures contracts was short, meaning Plaintiff would *benefit* from a fall in ethanol's price. If the price were artificially depressed for those spot months, the value of Plaintiff's position would have *increased*. Thus, Plaintiff has alleged no injury for these 11 months.

For the remaining eight of the 19 months, Plaintiff's position in futures contracts was long, meaning Plaintiff would benefit from a rise in ethanol's price. If the price was artificially

depressed for those spot months, the value of Plaintiff's position would fall. But even for these spot months, the Complaint alleges only that "[u]sing these estimates … AOT's long positions … *may have* suffered actual damages." (¶ 112) That is not sufficient.

The eight spot months for which Plaintiff held a net long entry position are the sole basis for the Complaint's allegation that Plaintiff's "positions … would have been damaged by ADM's manipulative scheme." (¶ 110) But that is not the sense in which the Act uses the term "damages." Under the Act, a downward fluctuation in the value of a *position* is not an actionable injury, because the price and value might go back up the very next day. *Nguyen v. FXCM*, 364 F. Supp. 3d 227, 240 (S.D.N.Y. 2019) (finding losses insufficiently alleged because "there might have been days where Plaintiffs were actually helped by … the lower [prices]").

Instead, the Act states that an actionable injury must be "actual damages resulting from one or more … transactions," such as *purchases or sales* of futures contracts, at a time when there was "a manipulation of … the price of the commodity underlying such contract." 7 U.S.C. §§ 25(a)(1), (a)(1)(D)(ii). Plaintiff provides details of trades made by ADM that it claims are evidence of price manipulation on only two days. Yet notably absent from the Complaint are any allegations that *Plaintiff* made any purchases or sales of futures contracts on those two days. Plaintiff has therefore failed to allege that any injury it sustained from falling prices in these months could have been caused by ADM.

Thus it is clear that the Complaint alleges no facts that plausibly show Plaintiff was injured by a transaction made at a time when it alleges ADM was acting to manipulate ethanol prices. If anything, the Complaint suggests that any supposed manipulation could only have benefited Plaintiff. For that reason, the entire Complaint should be dismissed. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 27 F. Supp. 3d 447, 461 (S.D.N.Y. 2014) (holding that

damages are "merely 'conceivable,'" and thus inadequately pleaded, if plaintiffs may have been helped rather than harmed by alleged manipulation).

2. Plaintiff never bought or sold two of the three financial derivatives.

The Complaint alleges that the ethanol benchmark price is used in establishing the value of two ethanol financial derivatives (Chicago Ethanol (Platts) Futures contract and Chicago Ethanol (Platts) Average Price Option) (¶¶ 37, 40) and that the market price of CME's Ethanol Futures Contracts is correlated to the ethanol benchmark price (¶ 44). But Plaintiff states it only bought and sold the first of those—Chicago Ethanol (Platts) Futures. (¶¶ 108–18) Plaintiff thus has no basis to assert it was injured by buying or selling the second or third—Chicago Ethanol (Platts) Average Price Options and CME's Ethanol Futures Contracts. If this entire case is not dismissed, it should in any event be limited to only the futures contract that Plaintiff bought and sold. Any claim based on the other two derivatives should be dismissed. *See, e.g.*, *Dennis v. JPMorgan Chase*, 343 F. Supp. 3d 122, 160 (S.D.N.Y. 2018), *reconsideration denied*, 2018 WL 6985207 (S.D.N.Y.) (dismissing putative class claims about one type of futures because "[n]one of the named plaintiffs allege[d] that it traded [those] futures").

3. Plaintiff may not seek punitive damages.

Plaintiff requests punitive and exemplary damages. (¶ 135(B)) Yet the Act does not permit those damages, because its private right of action only allows a plaintiff to recover "actual damages." *Khalid Bin Talal v. E. F. Hutton*, 720 F. Supp. 671, 682 (N.D. Ill. 1989). Thus, even if the Court determines Plaintiff has adequately pleaded an injury, it should dismiss the request for punitive and exemplary damages.

II. Plaintiff failed to plead facts that plausibly show ADM violated several sections of the Act.

Finally, even if the entire case is not dismissed due to Plaintiff's failure to allege facts

that plausibly show ADM intended to and did manipulate the ethanol benchmark price in a way that caused Plaintiff to suffer actual loss, the Complaint's sole count should be dismissed to the extent it is based on asserted violations of 7 U.S.C. §§ 6b(a) or 6c(a).

A. Plaintiff does not allege a violation of section 6b(a).

The Complaint (¶ 131) cites 7 U.S.C. § 6b(a), which as relevant here generally prohibits fraud in commodity futures contracts. Federal Rule of Civil Procedure 9(b) requires section 6b(a) claims—(1) the making of a misrepresentation; (2) scienter; and (3) materiality, *U.S. Commodities Futures Trading Comm'n v. Am. Bullion Exch. Abex, Corp.*, 2014 WL 12603558, at *4 (C.D. Cal. Sept. 16, 2014)—to be pleaded with particularity. *De David v. Alaron Trading Corp.*, 814 F. Supp. 2d 822, 827 (N.D. Ill. 2011). But Plaintiff does not allege any misrepresentation "*in connection with* any order to make or the making of any contract of sale of any commodity," as it must. *Hodgson v. Gilmartin*, 2006 WL 2869532, at *7 (E.D. Pa. Oct. 5, 2006) (citation omitted). In fact, it alleges no misrepresentation at all. To the extent the Complaint's sole count is based on section 6b(a), it should be dismissed.

B. Plaintiff does not allege a violation of section 6c(a).

The Complaint (¶ 131) also cites 7 U.S.C. § 6c(a), but that section cannot support a private cause of action. 7 U.S.C. §§ 25(a)(1) and (a)(2) only authorize plaintiffs to sue for violations of specific sections of the Act, and section 6c is not among those violations. *Ploss v. Kraft Foods*, 197 F. Supp. 3d 1037, 1067 (N.D. Ill. 2016) (dismissing a claim under section 6c because the plaintiff admitted it cannot support a private cause of action).

Even if Plaintiff could state a cause of action for violation of section 6c(a), the relevant subsection of that provision, subsection (2)(B), prohibits a transaction that is a fictitious sale or that is used to cause a commodity price to be reported which is not a "true and bona fide price." An example might be a fake sale, well above the market price, agreed by a conspiring buyer and

seller in order to try to inflate the market price. Nothing like that is alleged here. ADM is only alleged to have sold ethanol to buyers across the table at one of the country's largest and most important markets. One of those buyers was Plaintiff itself. Thus, the Complaint contains no allegations that anything other than a "true and bona fide" price—an actual, arms-length market price—was reported. To the extent the Complaint's sole count is based on section 6c(a), it should be dismissed.

CONCLUSION

Defendant respectfully urges this Court to dismiss the entire Complaint.

Dated: November 4, 2019

Respectfully Submitted,

ARCHER DANIELS MIDLAND COMPANY

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

I hereby certify that the foregoing Defendant's Memorandum in Support of Its Motion to Dismiss contains 6,466 words and therefore complies with this Court's type volume limitation pursuant to Rule 7.1(B)(4) of the Local Rules for the United States District Court for the Central District of Illinois.

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<u>**CERTIFICATE OF SERVICE**</u>

I hereby certify that on November 4, 2019, I caused the foregoing to be served on the following by filing it with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to all counsel of record, including the following:

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