No. 19-___

IN THE

Supreme Court of the United States

7 WEST 57TH STREET REALTY COMPANY, LLC,
Petitioner,

v.

CITIGROUP, INC.; CITIBANK, N.A.; BANK OF AMERICA CORPORATION; BANK OF AMERICA N.A.; BARCLAYS BANKS PLC; UBS AG; JPMORGAN CHASE & CO.; CREDIT SUISSE GROUP AG; BANK OF TOYKO-MITSUBISHI UFJ, LTD.; COOPERATIEVE CENTRALE RAIFFEISEN – BOERENLEENBANK B.A.; HSBC HOLDINGS PLC; HSBC BANK PLC; HBOS PLC; LLOYDS BANKING GROUP PLC; ROYAL BANK OF CANADA; THE NORINCHUKIN BANK; THE ROYAL BANK OF SCOTLAND GROUP PLC; WESTLB AG; WESTDEUTSCHE IMMOBILIENBANK AG; DEUTSCHE BANK AG; JPMORGAN CHASE BANK, N.A.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents conspired to fix the price of the London Interbank Offered Rate (LIBOR) in order to manipulate the market for LIBOR-denominated financial instruments. Because LIBOR was an enormously influential benchmark interest rate, the manipulation of LIBOR had serious and predictable effects in the market for LIBOR-denominated financial instruments and in related financial markets that predictably reacted to changes in LIBOR.

The question presented is:

Whether an antitrust plaintiff with a direct privity relationship to a price-fixer has antitrust standing under Section 4 of the Clayton Act, 15 U.S.C. § 15, when it was injured by its participation in a market that was foreseeably affected by defendants' anticompetitive manipulation of a directly related market.

RULE 29.6 DISCLOSURE STATEMENT

7 West 57th Street Realty Company, LLC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

United States Court of Appeals (2d Cir.):

7 West 57th Street Realty Co. v. Citigroup, Inc., No. 18-1102 (Apr. 30, 2019)

United States District Court (S.D.N.Y.):

7 West 57th Street Realty Co. v. Citigroup, Inc., No. 13-cv-981 (Mar. 20, 2018) (order on motion for leave to amend complaint)

7 West 57th Street Realty Co. v. Citigroup, Inc., No. 13-cv-981 (Mar. 31, 2015) (order on motion to dismiss)

New York State Courts:

Citibank, N.A. v. Solow, Index No. 603697/2008 (Sup. Ct. Mar. 24, 2011)

Citibank, N.A. v. Solow, Nos. M-955 and M-1203 (App. Div. Feb. 23, 2012)

Citibank, N.A. v. Solow, No. 2012-464 (Ct. App. June 27, 2012)

TABLE OF CONTENTS

QUESTION PRESENTED i
RULE 29.6 DISCLOSURE STATEMENT ii
RELATED PROCEEDINGS ii
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
INTRODUCTION 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 11
I. The Courts Of Appeals Are Deeply Divided On The Question Presented 11
II. The Second Circuit's Erroneous Holding On The Question Presented Merits This Court's Review 19
III. This Case Is An Excellent Vehicle To Decide The Question Presented 22
CONCLUSION 24

TABLE OF APPENDICES

Appendix A, Court of Appeals Decision
(2d Cir. Apr. 30, 2019) 1a

Appendix B, District Court Decision Denying
Motion for Leave to Amend Complaint
(S.D.N.Y. Mar. 20, 2018) 11a

Appendix C, District Court Decision Granting
Motion to Dismiss (S.D.N.Y. Mar. 31, 2015) 50a

TABLE OF AUTHORITIES

Cases

Apple Inc. v. Pepper,
139 S. Ct. 1514 (2019) 21

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,
459 U.S. 519 (1983) 13, 15

Blue Shield of Va. v. McCready,
457 U.S. 465 (1982) 12, 13, 19, 20

Charles Schwab Corp. v. Bank of Am. Corp.,
883 F.3d 68 (2d Cir. 2018) 4, 6

Gelboim v. Bank of Am. Corp.,
135 S. Ct. 897 (2015) 4

Gelboim v. Bank of Am. Corp.,
823 F.3d 759 (2d Cir. 2016) .... *passim*

Knevelbaard Dairies v. Kraft Foods, Inc.,
232 F.3d 979 (9th Cir. 2000) 16, 17

Loeb Indus., Inc. v. Sumitomo Corp.,
306 F.3d 469 (7th Cir. 2002) 16

Norris v. Hearst Tr.,
500 F.3d 454 (5th Cir. 2007) 14

Novell, Inc. v. Microsoft Corp.,
505 F.3d 302 (4th Cir. 2007) 17, 18

Sanner v. Bd. of Trade of Chi.,
62 F.3d 918 (7th Cir. 1995) 15, 16

S.D. Collectibles, Inc. v. Plough, Inc.,
952 F.2d 211 (8th Cir. 1991) 15

Serpa Corp. v. McWane, Inc.,
199 F.3d 6 (1st Cir. 1999) 14, 15

Statutes

Clayton Act, 15 U.S.C. § 12 *et seq*. 2, 9, 12, 21

15 U.S.C. § 15 (Section 4).......................... 2, 12, 21

Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 *et seq.* 9

Sherman Act, 15 U.S.C. § 1 *et seq*. 1, 9

15 U.S.C. § 1 (Section 1) 1

Donnelly Act, N.Y. Gen. Bus. Law §§ 340-347 9

28 U.S.C. § 1254(1) 1

Other Authorities

P. Areeda & H. Hovenkamp et al., *Antitrust Law* (4th ed. 2014) 21

Herbert Hovenkamp, *Fixing Antitrust's Indirect Purchaser Rule*, Reg. Rev. (July 17, 2019), https://www.theregreview.org/2019/07/17/hovenkamp-fixing-antitrust-indirect-purchaser-rule/ 21, 22

PETITION FOR A WRIT OF CERTIORARI

Petitioner 7 West 57th Street Realty Company, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unpublished but available at 2019 WL 1914278. The most recent opinion of the district court (Pet. App. 11a-49a) is reported at 314 F. Supp. 3d 497. An earlier decision of the district court (Pet. App. 50a-118a) is unpublished but available at 2015 WL 1514539.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2019 (Pet. App. 2a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1 of the Sherman Act (15 U.S.C. § 1) states:

> Every 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, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act (15 U.S.C. § 15) states in relevant part:

> (a) Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

INTRODUCTION

Respondents engaged in a massive conspiracy to manipulate what was then the world's most important benchmark interest rate in order to increase their own profits. Petitioner had a direct privity relationship with a conspirator and, as a result of respondents' price-fixing conspiracy, petitioner suffered hundreds of millions of dollars in financial losses—losses from which respondents directly profited. Petitioner should therefore present as a textbook definition of a plaintiff with antitrust standing. But the Second Circuit held that, although petitioner suffered an antitrust injury, it could not establish antitrust standing because it did not participate in the market that respondents manipulated but instead participated in a directly related market. That holding is wrong.

Respondents conspired to fix the prices of financial instruments indexed to the London Interbank Offered Rate (LIBOR) by colluding to set an artificially inflated or depressed LIBOR value, depending on

respondents' needs of the moment. As a direct and predictable effect of respondents' price-fixing scheme, the value of petitioner's bond portfolio (which collateralized a loan from respondent Citibank) declined—and respondents promptly took advantage of the drop in value that they caused by seizing the bonds. Petitioner's antitrust injuries are precisely the type of injuries respondents would have expected to result from their market manipulation—and when respondents leveraged the predictable effect their scheme had on petitioner's bond collateral as a means of profiting from petitioner, respondents fulfilled the goal of their scheme. Nothing more should be required to establish antitrust standing—and in three circuits, nothing more is required. But in four circuits (including the Second Circuit below) antitrust violators get a free pass when their scheme is so large that it predictably (and often intentionally) affects separate but related markets. This Court's intervention is warranted to ensure that a uniform standard applies nationwide, and this case is an ideal vehicle to establish such a standard.

STATEMENT OF THE CASE

1. a. Respondents—some of the world's largest banks—engaged in a secret horizontal price-fixing conspiracy to increase their own profits by manipulating LIBOR. Respondent Citibank used its direct relationship with petitioner 7 West 57th Street Realty Company, LLC, to transfer nearly $450 million from petitioner to itself and other co-conspirator respondents by taking advantage of a natural and foreseeable consequence of the price-fixing scheme.

LIBOR is an interest-rate benchmark that is used as a key price component in an array of financial

instruments, including loans, bonds, and derivative instruments like swaps. *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 765 (2d Cir. 2016); *see also Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 903 (2015). LIBOR often is directly incorporated as a component of interest rates, with interest rates represented as a fixed spread above LIBOR. 823 F.3d at 765-766. LIBOR is also used by financial-services companies in pricing interest-bearing debt securities (*i.e.*, bonds) that are not denominated in terms of LIBOR because of LIBOR's overwhelming importance to the financial-services industry. *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 78-79 (2d Cir. 2018). Thus, LIBOR "has been called the world's most important number." *Gelboim*, 823 F.3d at 765 (internal quotation marks omitted).

Respondents were all members of the British Bankers' Association (BBA), the leading trade association for the U.K. banking financial services sector. *Gelboim*, 823 F.3d at 765. The BBA set a different daily LIBOR value for ten separate currencies—at issue here is U.S. Dollar LIBOR.[1] *Ibid.*; Pet. App. 14a. During the relevant time, each member bank responded to the following question every business day: "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 a.m.?" 823 F.3d at 765. Thomson Reuters later compiled each bank's submission and calculated the final daily LIBOR by first discarding the four highest and four lowest

[1] For ease of use, we will continue to refer to U.S. Dollar LIBOR as simply "LIBOR."

submissions and then calculating the mean of the eight remaining submissions. *Id.* at 766.

Under the governing BBA rules, each bank was to respond on the basis of its own research, as well as its own credit and liquidity risk profile. Each bank was required to independently exercise good-faith judgment and to submit an interest rate based on its own expert knowledge of market conditions, without reference to rates contributed by other panel-member banks. Each bank's submission was required to remain confidential until after the final daily LIBOR was published. And the daily submissions of each of the 16 panel members were to be published along with the final rate in order to promote "transparen[cy] on an *ex post* basis." *Gelboim*, 823 F.3d at 766 (citation omitted).

In addition to being BBA LIBOR panel members, respondents were also horizontal competitors in the issuance of a variety of financial services and products, including LIBOR-denominated loans and derivatives. *Gelboim*, 823 F.3d at 766.

b. On the basis of information disclosed after extensive government investigations, petitioner has alleged that respondents engaged in a collusive scheme to fix LIBOR in order to financially benefit themselves. Pet. App. 16a-17a. As revealed in government investigations, respondents effectuated their conspiracy through coordinated daily submissions of their individual LIBOR values, for the purpose, *inter alia*, of increasing the banks' profitability. *See Gelboim*, 823 F.3d at 781-782. As just one of *many* examples of respondents' activities, respondent Barclays admitted to government investigators that its traders coordinated with the bank's LIBOR submitters to submit inaccu-

rate daily LIBOR responses that benefitted the traders' positions on various instruments. C.A. J.A. 56-57. Barclays' LIBOR submitters agreed to accommodate the traders' requests to submit "a rate higher, lower, or unchanged" compared to what an accurate submission would have been in order to benefit the traders. *Ibid.* Barclays' traders also coordinated with submitters at other member banks to convince them to also submit inaccurate rates. C.A. J.A. 56-58. Respondents UBS and RBS admitted that its traders and submitters also worked together to provide inaccurate LIBOR submissions. C.A. J.A. 59-81.

As a result of respondents' collusive behavior, the published LIBOR value was inaccurate for months. *See Gelboim*, 823 F.3d at 765. Respondents' manipulation of LIBOR was evident in the fact that published LIBOR was no longer tracking other economic indicators—including credit-default-swap spreads, the One-Month Treasury Bill rate, and the actual costs of borrowing—as it historically had done. *Schwab*, 883 F.3d at 96-98; C.A. J.A. 81-88; *see Gelboim*, 823 F.3d at 767. Throughout 2008, as evidence from those investigations began to come to light, the BBA and the individual respondents repeatedly reassured the public and government regulators that LIBOR was not being manipulated. C.A. J.A. 98-100. Those statements were dishonest as respondents continued their price-fixing scheme and, together with the BBA, continued to cover it up.

c. For a period of about a month from mid-September to mid-October 2008, evidence shows that respondents' LIBOR submissions—and the resulting LIBOR values—were artificially inflated. C.A. J.A. 91-96. During that time, respondent Citibank was on

the verge of collapse, desperately in need of cash, and rapidly approaching illiquidity in spite of receiving two government bailouts that injected a total of $45 billion of capital into the company. Pet. C.A. Br. 14. Just as Citibank's financial woes were coming to a head and threatening to shutter the bank for good, the events giving rise to petitioner's injuries took place.

In 2003, Sheldon H. Solow—the assignor of the current cause of action to petitioner—had pledged $450 million in pre-refunded high-grade municipal bonds with virtually no credit risk as collateral for LIBOR-denominated loans from Citibank.[2] Pet. App. 17a; C.A. J.A. 41-42, 89. The loans were due in March 2009. C.A. J.A. 89. At all times, Solow was current on his loan payments. *Ibid.*

In late September 2008—in the middle of respondents' artificial inflation of LIBOR—respondent Citibank notified Solow that on five consecutive days between September 17 and September 23, 2008, the value of his bond-portfolio collateral had dropped below the value required as collateral for his loans. C.A. J.A. 90-91. As alleged in petitioner's complaint, respondents' temporary inflation of LIBOR depressed the value of fixed-rate bonds, such as those indexed by the Standard & Poor's New York AMT-Free Municipal Bond Index and the municipal bonds pledged by Solow as collateral, because there was a direct, inverse, and well-known relationship between LIBOR and the value

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[2] This petition sometimes refers to petitioner and Solow interchangeably.

of fixed-rate instruments. C.A. J.A. 94-95.[3] During the one-month period of respondents' collusive inflation of LIBOR, Solow's bond-portfolio collateral predictably decreased in value, even though the bonds themselves were not denominated in LIBOR. C.A. J.A. 91-96. Seizing on this temporary decrease in value, Citibank claimed a technical default on the loans and seized the bonds. C.A. J.A. 41-42, 90-91.

After seizing Solow's bonds, the cash-desperate Citibank sold them in a fire-sale for approximately $415 million, with many of the bonds purchased by respondents, including by Citibank itself. C.A. J.A. 90-96. Citibank also seized more than $4.2 million from Solow's accounts to pay interest on the defaulted loan.[4] C.A. J.A. 96. By January 23, 2009—after respondents' upward manipulation of LIBOR had ceased and before Solow's loans would have been due had Citibank not seized his bonds and sold them—all of Solow's bonds had fully regained their value. C.A. J.A. 90.

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[3] The direct and inverse relationship between LIBOR and bond values is easily understood. Bond investors are yield investors who trade their bond instruments in order to ensure that they receive a yield equal to the market rate. The yield on a bond is a function of the purchase price, the interest rate it pays, and the par value. The way to increase the yield on a lower-interest bond that is already in the market is to buy it for a lower price. Thus, as benchmark interest rates such as LIBOR go up, the value of fixed-price bonds directly and predictably goes down.

[4] Citibank sued Solow in New York state court to recover an additional $67 million deficiency Citibank alleged remained after the bond sale. C.A. J.A. 96-97. Citibank obtained a final judgment for more than $100 million in March 2011, which was affirmed on appeal. C.A. J.A. 97. Solow paid the judgment in full in May 2012 because he lacked knowledge of respondents' LIBOR manipulation at that time. *Ibid.*

2. In February 2013, after Solow assigned his claims to petitioner, petitioner filed this action in the U.S. District Court for the Southern District of New York alleging that respondents colluded to manipulate LIBOR in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 *et seq.*; Section 15 of the Clayton Act, 15 U.S.C. § 12 *et seq.*; the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1961 *et seq.*; and New York's Donnelly Act, N.Y. Gen. Bus. Law §§ 340-347. Pet. App. 50a-51a. Respondents moved to dismiss, and in March 2015, the court granted the motion to dismiss petitioner's first amended complaint. *Id.* at 118a. The court concluded, *inter alia*, that petitioner failed to establish that it had suffered an antitrust injury and that its RICO claim was barred both by the statute of limitations and by res judicata. *Id.* at 80a-116a.

Petitioner moved for leave to file a second amended complaint to cure the alleged defects identified by the district court. Respondents opposed the motion on the ground that amendment would be futile. Pet. App. 11a-13a. The court denied petitioner's motion to file a second amended complaint. *Id.* at 49a. On petitioner's federal antitrust claim, the court reversed its initial finding that petitioner failed to adequately allege antitrust injury, relying on the Second Circuit's intervening decision in *Gelboim*, *supra*. Pet. App. 32a-33a. The district court nonetheless held that petitioner could not establish antitrust standing because it did not demonstrate that it is an "efficient enforcer" of its antitrust claim. *Id.* at 33a-40a. The court also reversed its earlier holding that petitioner's RICO claim was time-barred, but affirmed its conclusion

that the RICO claim was barred by res judicata. *Id.* at 41a-48a.

3. On appeal, the Second Circuit affirmed, holding that petitioner is not an efficient enforcer of the antitrust laws in spite of its direct privity relationship with one of the price-fixers, and holding that petitioner's RICO claim must fail because its injury was too remote from respondents' illegal conspiracy. Pet. App. 4a-9a.

With respect to petitioner's antitrust claim, the court of appeals first held that petitioner's injury was not directly caused by respondents' artificial inflation of LIBOR because petitioner's bonds were not denominated in LIBOR, and therefore the diminution in value of the bonds was "necessarily directly caused by the independent judgments of participants in the secondary municipal bond market." Pet. App. 6a. The court went on to hold that more direct victims of respondents' price-fixing scheme exist—eliding the facts that the victims the court identified were injured by respondents' suppression, rather than inflation, of LIBOR and that petitioner had a direct privity relationship with respondent Citibank. *Id.* at 6a-7a. Finally, although the extent of the harm to Solow had already been clearly established through the state-court proceedings, *see* note 4, *supra*, the court of appeals found that "damages flowing from Appellant's alleged injuries would be highly speculative." Pet. App. 7a.

With respect to petitioner's RICO claim, the court of appeals "decline[d] to address" the district court's holding that petitioner's RICO claims were barred by res judicata because Solow was put on inquiry notice of his federal claims only nine days before the state-court judgement was final. Pet. App. 9a; Pet. C.A. Br.

22. The court of appeals instead affirmed dismissal of petitioner's RICO claim because, the panel concluded, it "would fail on the merits." Pet. App. 9a. That conclusion merely piggy-backed the panel's determination that petitioner's injury was not tied closely enough to respondents' conspiratorial acts to satisfy principles of proximate cause. *Id.* at 9a-10a.

REASONS FOR GRANTING THE WRIT

Petitioner has plausibly alleged that respondents' price-fixing in the market for LIBOR-denominated financial instruments directly and foreseeably affected the value of petitioner's bond portfolio, which predictably reacts to changes in LIBOR—and that as a result of respondents' market manipulation, money was taken from petitioner by respondents. In at least three courts of appeals, petitioner would have antitrust standing at least sufficient to survive a motion to dismiss. But in the Second Circuit—and three others—petitioner is out of luck because its injuries stem not from participation in the manipulated market, but from participation in a related market that predictably reacted to that market. This Court should intervene to settle the circuit conflict on this important and recurring question of antitrust standing—and this case is an ideal vehicle in which to do so.

I. The Courts Of Appeals Are Deeply Divided On The Question Presented.

The courts of appeals are intractably divided about whether a price-fixer may be liable in antitrust for injuries to an individual who participates in a market that is different from, but directly and predictably affected by, the market manipulated by the price-fixer. Here, the Second Circuit held that petitioner lacked

antitrust standing because it did not participate in the market directly manipulated by respondents—the market for LIBOR-denominated financial instruments—even though petitioner was injured by its participation in a market that was directly and foreseeably affected by respondents' price-fixing scheme—the market for its bond portfolio. If petitioner had filed the same complaint in the Fourth, Seventh, or Ninth Circuits, it would have established antitrust standing and survived respondents' motion to dismiss. This Court's intervention is warranted to settle the circuit conflict.

1. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," has a private cause of action for treble damages. As this Court has recognized, Congress had an "expansive remedial purpose in enacting § 4," and nothing in the statute limits potential plaintiffs to individuals who are customers or competitors of the market manipulators. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472, 484-485 (1982) (citation omitted). Although this Court "refused to engraft artificial limitations on the § 4 remedy," *id.* at 472, it has also recognized that "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property," *id.* at 477. Thus, despite the broad scope of the statutory language, the Court has limited the types of injured parties who may sue to enforce the antitrust laws, *ibid.*, by requiring a showing of what lower courts call "antitrust standing."

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, the Court enumerated a set of factors to consider when determining whether a particular antitrust plaintiff may maintain its suit. 459 U.S. 519, 535-545 (1983) (*AGC*). Taken together, the relevant factors require a court to determine whether a plaintiff's asserted injury is the type of injury Congress sought to redress through antitrust laws (*i.e.*, whether a plaintiff has established a so-called "antitrust injury") and whether the plaintiff's injury is sufficiently direct and ascertainable to render the plaintiff a so-called "efficient enforcer" of the antitrust laws. Pet. App. 4a-5a; *see AGC*, 459 U.S. at 535-545; *McCready*, 457 U.S. at 472-478. As relevant to this case, in determining whether a plaintiff is an efficient enforcer of the antitrust laws, courts examine how direct the connection is between the alleged antitrust violation and the plaintiff's asserted injuries. Pet. App. 5a-6a. Although injured consumers and competitors in the restrained market are generally accepted as appropriate antitrust plaintiffs, *see*, *e.g.*, *AGC*, 459 U.S. at 539, courts of appeals are deeply divided about whether an injured participant in a related market also has antitrust standing. This Court's intervention is sorely needed to settle that recurring question.

2. In the decision below, the Second Circuit held that petitioner lacks antitrust standing because it is not a direct participant in the market that respondents conspired to manipulate, *i.e.*, the market for LIBOR-denominated financial instruments. Pet. App. 6a. Petitioner alleged in its complaint and proposed second amended complaint both that bond prices and benchmark interest rates such as LIBOR move in

opposite directions and that respondents' price-fixing scheme directly contributed to the drop in value of Solow's bond portfolio. C.A. J.A. 41, 89-91, 489, 553-555. But because the bonds were not LIBOR-denominated (although the interest rates on the loans were), the court of appeals held that the connection between respondents' anticompetitive behavior and petitioner's injuries was by definition not sufficiently direct. Pet. App. 6a. The Second Circuit's approach to the efficient-enforcer prong of antitrust standing comports with that of the First, Fifth, and Eighth Circuits. Those courts have held that a consumer or competitor in the manipulated market can establish antitrust standing—but that participants in a separate but related market cannot.

In *Norris v. Hearst Trust*, for example, the plaintiffs were distributors of the *Houston Chronicle* who alleged that the defendant used its monopoly power in the Houston newspaper market to demand that its distributors provide false certifications involving advertising rates—and then fired any distributor that refused to provide the false certifications. 500 F.3d 454, 457-459 (5th Cir. 2007). The Fifth Circuit held that the plaintiffs lacked antitrust standing because such standing is limited to "consumers []or competitors in the market attempted to be restrained." *Id.* at 467. The First Circuit applied a similar rule in *Serpa Corp. v. McWane, Inc.*, holding that a plumbing-supplies distributor lacked antitrust standing to challenge anticompetitive actions of the manufacturer because it was not a competitor or consumer of manufacturer—and "[c]ompetitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury."

199 F.3d 6, 10 (1st Cir. 1999); *see id.* at 9, 13. The Eighth Circuit has also held that antitrust "standing is generally limited to actual market participants, that is, competitors or consumers." *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991) (citing *AGC*, 459 U.S. at 539).

3. In contrast, the Fourth, Seventh, and Ninth Circuits have recognized a plaintiff's antitrust standing based on injuries flowing from participation in a market that was not directly manipulated by antitrust defendants but was affected by defendants' manipulation of a related market.

In *Sanner v. Board of Trade of Chicago*, for example, the Seventh Circuit considered the claims of, *inter alia*, soybean farmers who claimed injury from their participation in the soybean cash market as a result of defendants' manipulation of prices in the soybean futures market. 62 F.3d 918, 921-922 (7th Cir. 1995). The district court had dismissed the plaintiff farmers' claims for lack of antitrust standing because "the cash market for soybeans was distinct from the futures market for the same commodity"—and the defendants' alleged market manipulation "was directed toward the futures market" in which "the plaintiffs did not themselves participate." *Id.* at 926. The Seventh Circuit reversed, holding that, although the cash and futures markets for soybeans are distinct markets, the plaintiffs had established antitrust standing at the pleading stage because they had plausibly alleged that the defendants' manipulation of the futures market "predictably would have impacted the cash market as well"—and, indeed, the plaintiffs had alleged that the effect on the cash market was part of the conspirators' anticompetitive aim. *Id.* at 929. The fact that partic-

ipants in the directly manipulated futures market were also affected by the defendants' alleged market manipulation, the court explained, did not make the injuries of cash-market participants any less direct or any less deserving of protection under the antitrust laws. *Id.* at 930. And the court rejected the market-manipulators' argument that the farmers' damages from participation in the related cash market were speculative, explaining that a "damages calculation for a market manipulation scheme . . . is hardly beyond the ken of the federal courts." *Ibid.*

The Seventh Circuit similarly recognized the antitrust standing of some participants in the physical copper market in their suit against defendants that manipulated the copper futures market in *Loeb Industries, Inc. v. Sumitomo Corp.*, explaining that, because "different injuries in distinct markets may be inflicted by a single antitrust conspiracy," "differently situated plaintiffs might be able to raise claims." 306 F.3d 469, 481 (7th Cir. 2002); *see id.* at 475-478, 481-483. The court also rejected the defendants' argument that the plaintiffs' damages were too speculative, characterizing "[t]he defendants' entire case theory" as "troubling": "because their scheme was *so* evil, went undetected for *so* long, and caused *so* much economic loss throughout the cash market, that we should simply give them a pass from the antitrust laws." *Id.* at 493. As the court explained, "[t]his is not now and never has been the law." *Ibid.*

The Ninth Circuit used a similar approach to determining whether a plaintiff had antitrust standing based on injuries from participation in a market that was related to—but distinct from—a manipulated market in *Knevelbaard Dairies v. Kraft Foods, Inc.*,

232 F.3d 979 (9th Cir. 2000). The plaintiffs in *Knevelbaard* were milk producers who alleged that defendant cheese makers colluded to rig the price of bulk cheese on the cash auction market on the Wisconsin-based National Cheese Exchange—and that, as an intended result, the price of milk on the California-based fluid milk market was depressed. *Id.* at 984-985. The Ninth Circuit rejected the defendants' argument that "the chain of causation" between their alleged fixing of the cheese market in Wisconsin and plaintiffs' injuries from effects of the price-fixing felt in the milk market in California was "too tenuous to support recovery." *Id.* at 989. The court held that the milk sellers had established antitrust standing because the defendants' manipulation of the cheese market had the direct and intended consequence of affecting prices in the milk market. *Id.* at 990-991. The court explained that, "where a plaintiff is injured by one facet of a multi-faceted conspiracy, he is entitled to damages regardless of whether the other facets of the defendants' collusion had any economic impact on him." *Id.* at 991.

Finally, the Fourth Circuit applied a similar approach in *Novell, Inc. v. Microsoft Corp.*, when it expressly declined "to adopt a bright-line rule that only consumers or competitors in the relevant market have antitrust standing." 505 F.3d 302, 311 (4th Cir. 2007). The plaintiff in that case was a software developer that participated in the market for office-productivity software and claimed injuries from defendant Microsoft's anticompetitive activities in the market for PC operating systems. *Id.* at 306-308. The court held that the plaintiff was an efficient enforcer of the antitrust laws with respect to Microsoft's manipulation of the operating-system market even though the plaintiff

was harmed by anticompetitive effects felt in the distinct market for office-productivity software. *Id.* at 317-319.

4. This Court's intervention is needed now to resolve the circuit courts' conflicting approach to determining whether a plaintiff has antitrust standing to seek compensation for a defendant's anticompetitive manipulation of one market when the plaintiff's injuries stem from its participation in a distinct but directly affected market. The Second Circuit held that petitioner lacked antitrust standing because it did not participate in the market that was directly manipulated by respondents—*i.e.*, the market for LIBOR-denominated financial instruments. Pet. App. 6a. In the First, Fifth, and Eighth Circuits, the result would likely have been the same. But in the Fourth, Seventh, and Ninth Circuits, petitioner would likely have survived respondents' motions to dismiss—because petitioner plausibly alleged that respondents' manipulation of the market for LIBOR-denominated financial instruments had a direct and foreseeable effect on the market for its bonds. The circuit conflict stands in particularly stark relief in this case, moreover, because as a result of respondents' price-fixing scheme, money from petitioner's pocket went directly into the pocket of one or more price-fixers. When a price-fixer intentionally leverages a known effect of its market manipulation to line its own pockets, the victim of that scheme should have antitrust standing. But in the Second Circuit (and in three other circuits), it does not have standing when the foreseeable effect leveraged by the price-fixer occurs in a market that is distinct from the directly manipulated market.

II. The Second Circuit's Erroneous Holding On The Question Presented Merits This Court's Review.

As illustrated by the widespread circuit conflict, the question presented is important and recurring. At least four circuits have cut off antitrust standing to an entire class of market-manipulation victims, in contravention of this Court's precedents.

This Court has already rejected the Second Circuit's view that antitrust standing does not extend to individuals who do not directly participate in the manipulated market. In *McCready*, the Court considered the claims of an individual who subscribed to Blue Shield's healthcare plan through her employer and who alleged that Blue Shield reimbursed subscribers for psychotherapy provided by psychiatrists, but not for the same services provided by psychologists. 457 U.S. at 468-470. After being denied reimbursement for treatment provided by a psychologist, McCready alleged that Blue Shield and a professional organization of psychiatrists had illegally conspired to manipulate the market for transactions between healthcare plans on one side and psychiatrists and psychologists on the other. *Ibid.* Although McCready, as a healthcare-plan subscriber, was harmed by the conspiracy, she was not a direct participant in that market.

In recognizing McCready's antitrust standing, this Court rejected a bright line rule that only the specific target of the conspiracy—there, psychologists—have standing to sue, focusing instead on whether McCready had "sustained injuries too remote" to supply antitrust standing. 457 U.S. at 476 (emphasis and citation omitted). The Court explained that McCready's injuries were *not* too remote because the harm she suffered

"was clearly foreseeable" and was "precisely the type of loss that the claimed violations would be likely to cause" because her injury was "so integral to an aspect of the conspiracy." *Id.* at 479 (internal quotation marks and alterations omitted). Even more to the point, the Court expressly rejected the defendants' proposed rule that antitrust standing should be limited to "economic actor[s] in the market that had been restrained." *Ibid.*

The rules this Court rejected in *McCready* are precisely the rules the Second Circuit applied below. Like McCready's injuries, petitioner's injuries were clearly foreseeable and were "within that area of the economy" that was "endangered by [the] breakdown of competitive conditions" that resulted (by design) from the respondents' manipulation of LIBOR. 457 U.S. at 480 (citation omitted). Indeed, as alleged in the operative complaint (and in the proposed second amended complaint), C.A. J.A. 40, 56-72, 96, 488-489—and as the Second Circuit held in *Gelboim v. Bank of America Corp.*, 823 F.3d 759, 782 (2d Cir. 2016)—one purpose of respondents' price-fixing conspiracy was to increase their profits in individual financial transactions. It must be taken as true at this stage of the litigation that when respondent Citibank, while on the brink of illiquidity and collapse, took advantage of a foreseeable consequence of its market manipulation by treating the drop in value of petitioner's bond portfolio as an excuse to foreclose on petitioner's otherwise current loans, it increased its own profits at petitioner's expense. Petitioner's losses were therefore "integral to an aspect of [respondents'] conspiracy" and were made possible by respondents' leveraging a foreseeable effect of its conspiracy to fix prices in the market for

LIBOR-denominated financial instruments. Like McCready, petitioner participated in a related market that was affected by respondents' market manipulation—and like McCready, petitioner should have had antitrust standing.

This Court recently reaffirmed that the "broad text" of Section 4 of the Clayton Act "broadly affords injured parties a right to sue under the antitrust laws" and "readily covers" a variety of consumers. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520, 1522 (2019). Although the two-sided market at issue in *Pepper* was different from the horizontal LIBOR-fixing conspiracy at issue here, the Court's discussion generally supports finding antitrust standing at the pleading stage, even when a market manipulator's scheme affects large swaths of people. The Second Circuit refused to recognize petitioner's standing in part out of fear of subjecting the price-fixing respondent banks to too much liability. Pet. App. 6a. But this Court's decision in *Pepper* makes clear that that type of concern has no place in determining whether a purported plaintiff is a proper antitrust plaintiff when (as here) the plaintiff's injuries were proximately caused by the anticompetitive scheme. *See Pepper*, 139 S. Ct. at 1525 ("Basic antitrust law tells us that the 'mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative of one another.'") (quoting 2A P. Areeda & H. Hovenkamp et al., *Antitrust Law* ¶ 339d, at 136 (4th ed. 2014)); *see also* Herbert Hovenkamp, *Fixing Antitrust's Indirect Purchaser*

Rule, Reg. Rev. (July 17, 2019)[5] (arguing that the "nineteenth century tort law concept" that "only a single entity could be said to have an injury that was proximately caused by the defendant's conduct" makes little "sense in antitrust cases" and "should be laid to rest").

III. This Case Is An Excellent Vehicle To Decide The Question Presented.

There is a well-developed circuit conflict on whether an antitrust violator is subject to suit for damages inflicted as a result of its market manipulation when those damages occur in a market that is related to, but distinct from, the directly manipulated market. This case is an ideal vehicle for resolving the conflict on that important question.

This case cleanly poses the question presented because petitioner has plainly alleged that respondents' price-fixing scheme, which was directed at the market for LIBOR-denominated financial instruments, had a direct and foreseeable effect on the sector of the bond market in which petitioner participated. Petitioner also plainly alleged that, as a result of respondents' anticompetitive conspiracy and its direct effect on the value of petitioner's bonds, petitioner was injured and respondents directly profited from petitioner's injuries. In other words, the allegations in the complaint—which must be taken as true at this point—cleanly tee up the question whether a plaintiff lacks antitrust standing merely because its injuries stem from participation in a market that is related to, but

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[5] https://www.theregreview.org/2019/07/17/hovenkamp-fixing-antitrust-indirect-purchaser-rule/.

distinct from, the market that was directly manipulated by the antitrust defendants. The Second Circuit held that petitioner lacks standing on that basis; this Court should intervene to correct that mistake.

This case is an ideal vehicle to consider the question presented because it does not implicate thornier issues of antitrust standing that can muddy the analysis. Thus, for example, this case does not require the Court to determine whether an umbrella purchaser[6] would have antitrust standing. *See Gelboim*, 823 F.3d at 778. It also does not involve a plaintiff with no direct privity relationship to an antitrust conspirator: petitioner had a direct relationship with respondent Citibank and, as a result of respondents' anticompetitive behavior, Citibank and other respondents took money directly from petitioner.

Importantly, the non-precedential status of the decision below presents no obstacle to granting this petition. The decision below makes clear that it involves a straightforward application of the principles of antitrust standing that govern antitrust cases arising in the Second Circuit. In particular, the decision below purports to apply *Gelboim*—a published decision—without alteration or elaboration. Pet. App. 4a-8a (citing or quoting *Gelboim* eleven times in four pages of

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[6] An "umbrella purchaser" is a customer who buys a price-fixed good from a non-conspirator and claims that the price was inflated because the non-conspirator could charge higher prices as a result of inflation caused by the price-fixing conspiracy. *Gelboim*, 823 F.3d at 778.

the opinion). In the absence of this Court's intervention, the entrenched circuit conflict will linger on.[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 29, 2019

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[7] The court of appeals' conclusion that the connection between petitioner's injuries and respondent's market manipulation was not sufficiently direct employed principles of proximate causation. Pet. App. 6a. The court separately affirmed the dismissal of petitioner's RICO claim on the ground that petitioner's injuries were not proximately caused by respondents' scheme. *Id.* at 9a-10a. That conclusion on proximate cause is no obstacle to this Court's review because it was premised entirely on the court of appeals' holding (in affirming dismissal of petitioner's antitrust claims) that the link between petitioner's injuries and respondents' anticompetitive behavior was not direct enough. *Ibid.* If this Court were to grant this petition and reverse that holding, the court of appeals would have to reconsider its proximate-cause conclusion as well.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 18-1102-cv

7 WEST 57TH STREET REALTY COMPANY, LLC,
A Delaware Limited Liability Company,
Plaintiff-Appellant,

v.

CITIGROUP, INC., CITIBANK, N.A., BANK OF AMERICA CORPORATION, BANK OF AMERICA N.A., BARCLAYS BANKS PLC, UBS AG, JPMORGAN CHASE & CO., CREDIT SUISSE GROUP AG, BANK OF TOKYO-MITSUBISHI UFJ, LTD., COOPERATIEVE CENTRALE RAIFFEISEN - BOERENLEENBANK B.A., HSBC HOLDINGS PLC, HSBC BANK PLC, HBOS PLC, LLOYDS BANKING GROUP PLC, ROYAL BANK OF CANADA, THE NORINCHUKIN BANK, THE ROYAL BANK OF SCOTLAND GROUP PLC, WESTLB AG, WESTDEUTSCHE IMMOBILIENBANK AG, DEUTSCHE BANK AG, JPMORGAN CHASE BANK, N.A.,
Defendants-Appellees.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A

SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 30th day of April, two thousand nineteen.

Present: ROSEMARY S. POOLER,
DENNY CHIN,
Circuit Judges.
ERIC N. VITALIANO,[1]
District Judge.

Appeal from the United States District Court for the Southern District of New York (Gardephe, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Appellant 7 West 57th Street Realty Company, LLC appeals from the March 20, 2018, judgment of the United States District Court for the Southern District

[1] Judge Eric N. Vitaliano, United States District Court for the Eastern District of New York, sitting by designation.

of New York (Gardephe, *J.*), dismissing its claims under the Sherman Act, 15 U.S.C. § 1 et seq., the Clayton Act, 15 U.S.C. § 15, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., and New York's Donnelly Act, N.Y. Gen. Bus. Law §§ 340-347, against Citigroup, Inc., Citibank, N.A., Bank of America Corporation, Bank of America N.A., Barclays Banks PLC, UBS AG, JPMorgan Chase & Co., Credit Suisse Group AG, Bank of Tokyo-Mitsubishi UFJ, Ltd., Cooperatieve Centrale Raiffeisen - Boerenleenbank B.A., HSBC Holdings PLC, HSBC Bank PLC, HBOS plc, Lloyds Banking Group plc, Royal Bank of Canada, The Norinchukin Bank, The Royal Bank of Scotland Group PLC, WestLB AG, WestDeutsche ImmobilienBank AG, Deutsche Bank AG, JPMorgan Chase Bank, N.A. (collectively, "Defendants"), arising from Defendants' alleged manipulation of the London Inter-bank Offered Rate ("LIBOR"). On March 31, 2015, the district court dismissed Appellant's federal claims and declined to exercise supplemental jurisdiction over its state law claims. *See generally 7 W. 57th St. Realty Co. v. Citigroup, Inc. (Citigroup I)*, No. 13 Civ. 981 (PGG), 2015 WL 1514539 (S.D.N.Y. Mar. 31, 2015). On March 20, 2018, the district court denied Appellant's motion for leave to amend its complaint, holding that, because Appellant's proposed second amended complaint was still deficient, amendment would be futile. *See generally 7 W. 57th St. Realty Co. v. Citigroup, Inc. (Citigroup II)*, 314 F. Supp. 3d 497 (S.D.N.Y. 2018). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

I. Legal Standards

We review de novo a district court's grant of a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Biro v. Conde Nast*, 807 F.3d 541, 544 (2d Cir. 2015). "The denial of leave to amend is similarly reviewed *de novo* because the denial was based on an interpretation of law, such as futility." *Gelboim v. Bank of America Corp.*, 823 F.3d 759, 769 (2d Cir. 2016) (internal quotation marks omitted).

We accept "as true the factual allegations in the complaint and draw[] all inferences in the plaintiff's favor." *Biro*, 807 F.3d at 544. To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint must contain "enough factual matter (taken as true)" that is suggestive of, "not merely consistent with," the alleged wrongdoing. *Id.* at 556-57. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where, as here, a RICO claim rests on alleged violations of the mail fraud, wire fraud, and bank fraud statutes, a complaint must satisfy the heightened pleading standards of Federal Rule of Civil Procedure 9(b). *See Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 119 (2d Cir. 2013).

II. Antitrust Claims

Appellant argues that the district court erred by concluding that it lacked antitrust standing. To establish antitrust standing, a plaintiff must have suffered an antitrust injury and be an efficient enforcer of the

antitrust laws. *See Gelboim*, 823 F.3d at 772. The efficient enforcer inquiry turns on weighing four factors: "(1) the directness or indirectness of the asserted injury, which requires evaluation of the chain of causation linking [Appellant's] asserted injury and the Banks' alleged price-fixing; (2) the existence of more direct victims of the alleged conspiracy; (3) the extent to which [Appellant's] damages claim is highly speculative; and (4) the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Id.* at 778 (internal quotation marks omitted); *see also id.* at 772. "[T]he weight to be given the various factors will necessarily vary with the circumstances of particular cases." *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 443 (2d Cir. 2005).

A. Directness of Appellant's Injuries

"Directness in the antitrust context means close in the chain of causation." *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 78 (2d Cir. 2013) (internal quotation marks omitted). That is because "[a]n antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad wording of § 4 [of the Clayton Act] there is a point beyond which the wrongdoer should not be held liable." *Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519, 534 (1983) (internal quotation marks omitted); *see also Blue Shield of Va. v. McCready*, 457 U.S. 465, 477 (1982) ("It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property."). Our directness inquiry employs

"familiar principles of proximate causation." *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 412 (2d Cir. 2014).

Here, Appellant's complaint alleges that LIBOR affects the value of bonds, like those that belonged to Sheldon Solow—Appellant's predecessor in interest—that are not pegged to LIBOR. However, because Solow's municipal bonds were not actually LIBOR denominated, any diminution in value was necessarily directly caused by the independent judgments of participants in the secondary municipal bond market. Moreover, we recognized in *Gelboim* the danger of opening up antitrust liability to LIBOR contributor panel banks for injuries "to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative swap:" doing so would "not only bankrupt 16 of the world's most important financial institutions, but also vastly extend the potential scope of antitrust liability in myriad markets where derivative instruments have proliferated." 823 F.3d at 779. That concern is exponentially more present in this case, where the bonds were not actually tied to LIBOR.

B. More Direct Victims

"[N]ot every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced." *Id*. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party. . . to perform the office of a private attorney general." *Associated Gen. Contractors*, 459 U.S. at 542.

Here, there are indisputably more direct victims. As Appellant alleges in its complaint, "[h]undreds of trillions of dollars of bank loans are subject to LIBOR." App'x at 41 ¶ 7. A person or entity that was on one side or the other of those transactions would have a more direct injury flowing from Defendants' alleged LIBOR manipulation than someone, like Appellant, whose injury flowed from the ripple effect LIBOR has on financial instruments that are not actually tied to LIBOR.

C. Speculative Damages

"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946); *see also Gelboim*, 823 F.3d at 779. Indeed, "[i]mpediments to reaching a reliable damages estimate often flow from the nature and complexity of the alleged antitrust violation." *Gelboim*, 823 F.3d at 780. "Still, highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement." *Id.* at 779.

Here, the damages flowing from Appellant's alleged injuries would be highly speculative. In *Gelboim*, we recognized that "[a]ny damages estimate would require evidence to support a just and reasonable estimate of damages," and estimating the damages for LIBOR-pegged instruments would present "some unusual challenges," in part because the "market for money is worldwide" and there are several ways to set interest rates. *Id*. at 779-80 (internal quotation marks omitted). We therefore found it "difficult to see how appellants would arrive at such an estimate, even with

the aid of expert testimony." *Id.* at 779. This case presents an even more unusual challenge because Solow's bonds were not LIBOR-denominated. To quantify Appellant's injury, a jury would need to know what LIBOR hypothetically would have been had Defendants not manipulated it, and how this would have affected the value of Solow's bonds. Much of this calculation would require speculation about how each of the 16 LIBOR panel banks would have answered the LIBOR question over the five days when Solow's bond portfolio declined in value. Moreover, without knowing what buyers would pay or sellers would accept for bonds during that period, a jury would have to speculate how the hypothetical LIBOR would have affected the "illiquid and opaque" market in which Solow's bonds traded. *See* App'x at 551 ¶ 160.

D. Duplicative Recovery and Complex Damage Apportionment

Defendants do not offer any serious argument why allowing Appellant to assert antitrust standing would require any sort of complex apportionment of damages or would run the risk of duplicative recovery—aside from pointing to the existence of "government and regulatory investigations and suits," with no further explanation how possible recoveries by the entities, agencies, and plaintiffs in those matters would be duplicative of Appellant's possible recovery in the present matter. Appellees' Br. at 42 (quoting *Gelboim*, 823 F.3d at 780). Indeed, as was the case in *Gelboim*, "[i]t is wholly unclear on this record how issues of duplicate recovery and damage apportionment can be assessed." 823 F.3d at 780.

In sum, balancing the above considerations, we agree with the district court that Appellant is not an efficient enforcer of the antitrust laws.

III. RICO Claim

Below, the district court held that Appellant's RICO claim was barred by res judicata. *Citigroup II*, 314 F. Supp. 3d at 518-19. It reasoned that, because public revelations about potential "LIBOR manipulation occurred on March 15, 2011"—before the state court issued the March 24, 2011, judgment against Solow in Citibank's favor—Solow could have brought the RICO claim in the prior state court proceeding. *Id.* We decline to address that issue because, even if res judicata did not bar Appellant's RICO claim, it would fail on the merits.

"[T]o state a claim under civil RICO, the plaintiff is required to show that a RICO predicate offense not only was a 'but for' cause of his injury, but was the proximate cause as well." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (internal quotation marks omitted). "Proximate cause for RICO purposes . . . should be evaluated in light of its common-law foundations; proximate cause thus requires some direct relation between the injury asserted and the injurious conduct alleged. A link that is too remote, purely contingent, or indirec[t] is insufficient." *Id.* (second alteration in original) (citation and internal quotation marks omitted).

Here, the alleged RICO-predicate fraud only indirectly caused Solow's bond portfolio to decline in value, to the extent there was any causation at all. As explained above, the injury was directly caused by buy/sell decisions that independent market actors

made, which LIBOR may have influenced. Although the existence of independent buyers and sellers in a capital market does not act as a per se bar to a finding of proximate causation, it does act as a bar here, because the opacity and illiquidity of the market for Solow's bonds would prevent a court from using the economic tools ordinarily used for inferring reliance and causation—for example, the fraud on the market theory, event studies, or the efficient capital markets hypothesis—in evaluating Appellant's claim. Because Defendants' alleged RICO-predicate fraud did not proximately cause Solow's injury, the district court was correct to dismiss Appellant's RICO claim.

We have considered the remainder of Appellant's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 13 Civ. 981 (PGG)

7 WEST 57TH STREET REALTY COMPANY, LLC,
Plaintiff,
v.

CITIGROUP, INC.; CITIBANK, N.A.; BANK OF AMERICA CORP.; BANK OF AMERICA N.A.; BARCLAYS BANK PLC; UBS AG; JPMORGAN CHASE & CO.; JPMORGAN CHASE BANK, NATIONAL ASSOCIATION; CREDIT SUISSE GROUP AG; BANK OF TOKYO-MITSUBISHI UFJ LTD.; COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A.; HSBC HOLDINGS PLC; HSBC BANK PLC; HBOS PLC; LLOYDS BANKING GROUP PLC; ROYAL BANK OF CANADA; THE NORINCHUKIN BANK; ROYAL BANK OF SCOTLAND GROUP, PLC; WESTLB AG; WESTDEUTSCHE IMMOBILIENBANK AG; DEUTSCHE BANK AG,
Defendants.

MEMORANDUM OPINION & ORDER

PAUL G. GARDEPHE, U.S.D.J.:

On February 13, 2013, Plaintiff 7 West 57th Street Realty Company, LLC—the assignee of Sheldon

H. Solow—filed this action against Defendants Citigroup, Inc.; Citibank, N.A.; Bank of America Corp.; Bank of America N.A.; Barclays Bank Plc; UBS AG; JPMorgan Chase & Co.; JPMorgan Chase Bank, National Association.; Credit Suisse Group AG; Bank of Tokyo-Mitsubishi UFJ Ltd.; Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A.; HSBC Holdings Plc; HSBC Bank Plc; HBOS Plc; Lloyds Banking Group Plc; Royal Bank of Canada; The Norinchukin Bank; Royal Bank of Scotland Group, Plc; WestLB AG; Westdeutsche Immobilienbank AG; and Deutsche Bank AG, alleging that Defendants colluded to manipulate the London InterBank Offered Rate for the U.S. dollar ("USD-LIBOR") in 2008. (Am. Cmplt. (Dkt. No. 95)) Plaintiff claims that Defendants—who are members of the British Bankers Association, and who were responsible for submitting interest rates that the BBA used to calculate USD-LIBOR in 2008—violated Section 1 of the Sherman Act, 15 U.S.C. § 1; the Clayton Act, 15 U.S.C. § 12 *et seq.*: the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*: and New York's Donnelly Act, N.Y. Gen. Bus. Law § 340. (SAC (Dkt. No. 174-1) ¶ 1)

On March 31, 2015, this Court granted Defendants' Rule 12(b)(2) and Rule 12(b)(6) motions to dismiss the Amended Complaint. (*See* Order (Dkt. No. 172))[1] This Court's dismissal order granted Plaintiff leave to move to amend (*see id.* at 54), and on June 1, 2015, Plaintiff filed a motion for leave to file a Second Amended Complaint ("SAC"). (Mot. (Dkt. No. 174))

Defendants contend that Plaintiffs motion to amend should be denied on grounds of futility.

[1] Familiarity with the March 31, 2015 order is presumed.

Defendants contend that the proposed SAC does not (1) demonstrate that this Court has personal jurisdiction over the Foreign Bank Defendants; (2) cure the deficiencies in Plaintiffs antitrust claims; and (3) cure the flaws in Plaintiffs RICO claim. (*See* Defs. Br. (Dkt. No. 181))

For the reasons stated below, Plaintiffs motion for leave to file a Second Amended Complaint will be denied.

BACKGROUND[2]

I. FACTUAL BACKGROUND

A. THE ALLEGED LIBOR-FIXING SCHEME

The London InterBank Offered Rate ("LIBOR") is set daily by the British Bankers' Association ("BBA"),

[2] The following facts are drawn from the proposed SAC and are presumed true for purposes of resolving whether Plaintiffs motion to amend would be futile. *See Gary Friedrich Enterprises, LLC v. Marvel Enterprises, Inc.*, No. 08 Civ. 1533 (BSJ) (JCF), 2011 WL 1142916, at *4 (S.D.N.Y. Mar. 22,2011); *see also Kassner v. 2nd Ave. Delicatessen. Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). "Because determinations of futility on a motion for leave to amend are subject to the same standards as motions under Rule 12(b)(6), '[f]utility is generally adjudicated without resort to any . . . evidence [outside the face of the complaint].'" *Gary Friedrich Enterprises, LLC*, 2011 WL 1142916, at *4 (quoting *Wingate v. Gives*, No. 05 Civ. 1872 (LAK) (DP), 2009 WL 424359, at *5 (S.D.N.Y. Feb. 13, 2009)). The Court may properly consider documents attached to the complaint as exhibits, incorporated by reference, or integral to the Complaint, however. *See, e.g.*, *Max Impact, LLC v. Sherwood Grp., Inc.*, No. 09 CIV. 902 (LMM) (HBP), 2012 WL 3831535, at *4 (S.D.N.Y. Aug. 16, 2012) ("[I]n making futility determinations, the court must limit itself to the allegations in the complaint, as well as to any documents attached to the complaint as exhibits or incorporated by reference." (citations

a non-regulatory body governed by a board composed of members of various banks. (SAC (Dkt. No. 174-1) ¶¶ 6, 43, 45) LIBOR functions as a pricing mechanism and benchmark for determining, *inter alia*, interest rates for trillions of dollars in financial instruments worldwide. (*Id.* ¶¶ 5, 55-60)

The BBA calculates and publishes LIBOR for ten currencies, including the U.S. dollar. (*Id.* ¶ 46) Each of these currencies is overseen by a separate BBA "Contributor Panel." (*Id.*) A Contributor Panel consists of various banks that—as described below—provide submissions to the BBA that are used to calculate the daily LIBOR for that panel's particular currency. (*See id.* ¶¶ 46, 49-50)

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omitted)); *see also Bldg. Indus. Elec. Contractors Ass'n v. City of N.Y.*, 678 F.3d 184, 187 (2d Cir. 2012). Accordingly, in resolving Plaintiffs motion, the Court has also considered documents that are incorporated into the proposed SAC by reference, including non-prosecution and deferred prosecution agreements that certain Defendants entered into with the United States Department of Justice, as well as certain press releases and news articles concerning the manipulation of LIBOR. (*See* SAC (Dkt. No. 174-1)). The Court has also taken judicial notice of public filings in New York state court proceedings brought by Defendant Citibank, N.A. against Solow. *See Global Network Commc'ns. Inc. v. City of N.Y.*, 458 F.3d 150, 157 (2d Cir. 2006) ("'[In deciding a motion to dismiss,] [a] court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" (quoting *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998)); *Jermaine Dunham v. City of New York, et al.*, No. 11 Civ. 1223 (ALC) (HBP), 2018 WL 1305460, at *5 (S.D.N.Y. Mar. 13, 2018) (noting that, as with a motion to dismiss, a court can "consider matters of which judicial notice may be taken" in ruling on whether a proposed amendment would be futile).

Defendants are, or were, members of the Contributor Panel for the U.S. dollar. (*Id.* ¶ 43) Defendants are also horizontal competitors across a range of financing activities, including transactions that expressly incorporate LIBOR as a benchmark. (*Id.* ¶¶ 36, 43)

USD-LIBOR is set daily through a process orchestrated by the BBA. (*See id.* ¶ 48) Each day, the BBA asks the sixteen banks on the Contributor Panel for USD-LIBOR (the "contributing banks") "[a]t what rate [of interest] [they] could . . . borrow funds, were [they] to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 a.m." (*Id.*) Under BBA rules, each bank's submission is meant to reflect the interest rate at which members of the bank's staff—who are primarily responsible for management of the bank's cash—believe that the bank could borrow unsecured interbank funds in the London market. (*Id.* ¶ 49) Under BBA rules, each contributing bank's submission must be based on its own independent good faith judgment, taking into account market conditions and the bank's posture as a borrower in the market for interbank loan funds. (*Id.* ¶ 50) The contributing banks' daily submissions to the BBA reflect their costs of borrowing funds at three maturity dates—one-month, three-months, and six-months. (*Id.* ¶ 48)

Thomson Reuters—an independent entity—collects the contributing banks' submissions on the BBA's behalf. (*Id.* ¶¶ 52, 54) Using the contributing banks' submissions, Thomson Reuters calculates USD-LIBOR through an "inter-quartile" methodology, in which it discards the four highest and the four lowest submissions, and then averages the remaining eight

submissions to arrive at the USD-LIBOR for a given day. (*Id.* ¶¶ 48, 54)

The BBA requires each contributing bank to arrive at its own daily submission without referring to the submissions of other banks on the Contributor Panel. (*Id.* ¶¶ 49, 51) In order to prevent collusion and ensure that each submission is independent, each bank is further required to keep its submission confidential until after Thomson Reuters publishes the daily LIBOR rates. (*Id.* ¶¶ 51, 54) When LIBOR is published, the rates submitted by each individual contributor bank are published as well, so that it is clear how the LIBOR rates were calculated. (*Id.* ¶ 52)

The BBA also prohibits banks from submitting contributions that are based on the pricing of any derivative financial instruments tied to LIBOR. (*Id.* ¶ 49) This prohibition is intended to prevent contributing banks from making submissions based on a motive to maximize profits or minimize losses in connection with such derivative transactions. (*Id.*)

According to the proposed SAC, however, by 2008 Defendants were not complying with the BBA's rules governing their submissions. (*See id.* ¶¶ 5-6) Instead, "Defendants conspired to . . . manipulate USD-LIBOR by falsely reporting to the BBA the . . . interest rates at which the Defendant banks expected they could borrow funds . . . on a daily basis." (*Id.* ¶¶ 6, 73, 80)

Traders at the contributing banks asked colleagues who were responsible for submitting rates to the BBA (the "LIBOR submitters") to submit rates that would benefit the bank's own trading positions, as opposed to rates that reflected the bank's good faith judgment of its true cost of borrowing that day. (*See*

id.) Traders also requested that their counterparts at other contributing banks do the same. (*See id.*) The traders made these requests through electronic messages, telephone calls, and in-person conversations. (*See id.* ¶ 61). The LIBOR submitters frequently agreed to accommodate these requests. (*Id.*)

Through their traders' requests—and the LIBOR submitters' acquiescence—Defendants caused rates to be submitted to the BBA that served Defendants' own financial interests, rather than complying with BBA standards. (*See id.* ¶¶ 5, 6, 61) As a result, USD-LIBOR calculated on the basis of these rates was "artificial" and did not reflect the contributing banks' true costs of borrowing under actual market conditions. (*See id.* ¶¶ 5-6) Because LIBOR is used as the "pricing mechanism and the primary benchmark for interest rates," Defendants' collusion and manipulation of LIBOR "affected the pricing of trillions of dollars' worth of financial transactions in the United States, including bank loans and municipal bonds." (*Id.* ¶¶ 6-7, 56)

B. SOLOW'S LOANS AND 2008 DEFAULT

Solow—who assigned his claims related to this action to Plaintiff—pledged a portfolio of more than $450 million in high-grade municipal bonds as collateral for LIBOR-denominated loans in or about 2003. (*See id.* ¶¶ 1, 9-10) Several of these loans were issued by Defendant Citibank, N.A. (*Id.* ¶ 9) The interest rate for these loans was determined by reference to USD-LIBOR. (*See id.*) Between 2003 and 2008, the interest rate on Solow's loans was LIBOR + 0.75%. (*See id.* ¶ 166) In March 2008, however, Citibank increased the interest rate on Solow's loans to LIBOR + 1.25%. (*Id.*)

According to the proposed SAC, statistical analysis indicates that—at certain times between August 31, 2007 and October 22, 2008—there was a negative correlation coefficient relationship between one-month USD-LIBOR rates and Standard & Poor's ("S&P") New York AMT-Free Municipal Bond Index (the "S&P bond index"), which is an index that measures the performance of bonds similar to those in Solow's portfolio. (*Id.* ¶ 176) This analysis suggests that an increase in one-month USD-LIBOR during those periods was, on average, associated with a decline in the value of the bonds listed in the S&P bond index. (*Id.*) In other words, a manipulation of LIBOR that caused interest rates to increase would cause the value of the bonds in the Solow portfolio to decline. (*Id.* ¶ 168)

Although Defendants' alleged manipulation of LIBOR "tended toward overall suppression of LIBOR for much of the conspiracy period," Defendants "increased, decreased, or maintained the submitted LIBOR rates in order to support their trading positions or other needs of the moment." (*Id.* ¶¶ 9, 177) In the months leading up to the liquidation of Solow's bond portfolio in November 2008, LIBOR was "artificially inflated as a result of Defendants' conduct." (*Id.* ¶¶ 176-180) For example, between September 12, 2008 and October 10, 2008, Defendants' submissions to the BBA for the calculation of USD-LIBOR were higher than their true costs of borrowing, which resulted in the artificial inflation of USD-LIBOR during that period. (*Id.* ¶¶ 169, 171-72, 177-78)

On September 24, 2008, Citibank notified Solow that on five consecutive days between September 17 and September 23, 2008, the value of his bond portfolio had dropped below the value required as collateral for

his loans. (*Id.* ¶¶ 167, 170) Solow was then current on his loans, but Citibank nonetheless declared a technical default and seized Solow's bond portfolio. (*Id.* ¶¶ 9, 167, 178)

On November 3, 2008, Solow's portfolio—which had been worth $450 million when pledged as collateral—sold for approximately $415 million, net of commissions. (*Id.* ¶ 179) Defendants Citibank, JPMorgan, Bank of America, Barclays, and Deutsche Bank were "direct and indirect" participants in the liquidation of the portfolio, with Citibank purchasing a substantial portion of the portfolio in the first instance. (*Id.* ¶ 178) Because the sale of Solow's bond portfolio did not fully satisfy his debt, Citibank seized the bond portfolio's earned interest of more than $15,000. (*Id.* ¶ 179)

Between October 6 and November 13, 2008, Citibank also seized more than $4.2 million in cash from Solow's accounts. (*Id.*) Citibank claimed that at least $2.1 million of the cash seized was for interest that Solow owed on the loans after default. (*Id.*) In calculating interest, Citibank applied a "default" interest rate, which was LIBOR-denominated and higher than the interest rate that had applied prior to Citibank's declaration of default. (*See id.*)

After these transactions, Citibank still claimed a $67 million deficiency, and demanded immediate payment of the deficiency and an additional $18.5 million in cash collateral. (*Id.* ¶¶ 179-80) On December 16, 2008, Citibank filed suit against Solow in New York Supreme Court seeking the $67 million deficiency, interest at the default interest rate, $18.5 million in cash collateral and fees, management fees, expenses, costs, and attorneys' fees. (*Id.* ¶ 181)

On March 24, 2011, Citibank obtained a judgment against Solow in New York Supreme Court for more than $100 million. (*Id.* ¶ 183; Ruffino Decl., Ex. G (May 24, 2011 Judgment) (Dkt. No. 118-4) at 11) On February 23, 2012, the lower court's judgment was affirmed by the First Department. *See Citibank, N.A. v. Solow*, 92 A.D.3d 569, 570 (1st Dept.), *leave to appeal denied*, 19 N.Y.3d 807 (2012). Solow paid the judgment in full on May 23, 2012. (SAC (Dkt. No. 174-1) ¶ 182)

II. PROCEDURAL HISTORY

After satisfying the state court judgment, Solow assigned his claims arising out of the events described above to Plaintiff 7 West 57th Street Realty Company. (*See id.* ¶¶ 1, 10) Plaintiff commenced this action on February 13, 2013. (Cmplt. (Dkt. No. 1)) The Amended Complaint was filed on June 11, 2013. (Am. Cmplt. (Dkt. No. 95))

On December 13, 2013, all Defendants moved to dismiss the Amended Complaint, arguing that (1) Plaintiff's claims are barred by the applicable statutes of limitations; (2) Plaintiff failed to state an antitrust claim; (3) Plaintiff failed to state a RICO claim; (4) Plaintiff's claims are barred by *res judicata* in light of the state court proceedings; and (5) Plaintiff lacks standing to assert Solow's claims. (*See* Dkt. Nos. 114, 115, 117)

On December 10, 2014, the Bank of Tokyo-Mitsubishi UFJ, Ltd., Barclays Bank PLC, Credit Suisse Group AG, Deutsche Bank AG, HSBC Holdings pic, HSBC Bank plc, Lloyds Banking Group plc, Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A., HBOS plc, the Norinchukin Bank, the Royal Bank of Canada, the Royal Bank of Scotland plc,

Portigon AG, and Westdeutsche ImmobilienBank AG (collectively, the "Foreign Bank Defendants") moved to dismiss for lack of personal jurisdiction. (Mot. (Dkt. No. 139))

A. The March 31, 2015 Order Dismissing the Amended Complaint

On March 31, 2015, this Court granted Defendants' motion to dismiss the Amended Complaint, holding that (1) the Court lacked personal jurisdiction over the Foreign Bank Defendants; (2) Plaintiff had not plausibly alleged an antitrust injury, and, accordingly, was not entitled to bring suit under the Sherman Act; and (3) Plaintiff's RICO claims "are barred by the statute of limitations and by *res judicata*." (*See* Order (Dkt. No. 172) at 25-26, 36-37, 52) Having dismissed all of Plaintiff's federal claims, this Court declined to exercise supplemental jurisdiction over Plaintiff's remaining state law claim under N.Y. Gen. Bus. § 340. (*See id.* at 53)

1. Personal Jurisdiction Over the Foreign Bank Defendants

As to personal jurisdiction, this Court first noted that Plaintiff did "not contend that there is any basis for the exercise of general jurisdiction." (*Id.* at 14) This Court then addressed Plaintiff's arguments concerning specific jurisdiction, consent to personal jurisdiction, personal jurisdiction premised on co-conspirators' acts, and personal jurisdiction under Fed. R. Civ. P. 4(k)(2). (*See id.* at 14-25)

With respect to specific jurisdiction, this Court noted that in order "'to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum

state.'" (*Id.* at 16-17 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)). This Court found "precious little in the Amended Complaint demonstrating a connection between the Foreign Banks' alleged suit-related conduct and New York, and . . . no allegations demonstrating that any such relationship arose out of contacts that the Foreign Banks created with New York." (*Id.* at 19 (citing *Walden v. Fiore*, 134 S.Ct. 1115, 1122-23 (2014)).

While the Amended Complaint cited Barclays' discharge of two Barclays employees, "Plaintiff ha[d] not pled facts suggesting that the conduct of the two Barclays employees has any connection with the injury suffered by Solow, or that the misconduct alluded to . . . took place within the relevant time period—September 12, 2008 to October 10, 2008." (*Id.* at 19-20)

The Amended Complaint also did not satisfy the *Calder* "effects test." (*Id.* at 20-21) Assuming *arguendo* that Plaintiff's allegations regarding the effect of Defendants' manipulation of LIBOR rates on Solow's bond portfolio were sufficient to demonstrate an effect in New York, "Plaintiff ha[d] not alleged facts demonstrating that the Foreign Banks 'expressly aimed' their conduct at New York or its municipal bond markets." (*Id.* at 21 (quoting *Tarsavage v. Citic Trust Co., Ltd.*, 3 F. Supp. 3d 137, 145 (S.D.N.Y. 2014)) The Court concluded that it did not have specific personal jurisdiction over the Foreign Bank Defendants. (*Id.*)

As to consent, this Court rejected Plaintiff's argument that the Foreign Bank Defendants consented to general personal jurisdiction in New York by virtue of their registration with the New York Department of Financial Services. (*Id.* at 21) In reaching this conclusion, this Court noted that New York Banking Law

§ 200(3) limited "any consent to personal jurisdiction by registered banks to specific personal jurisdiction." (*Id.* at 22 (emphasis in original) (citations omitted)) Accordingly, registration under this provision did not constitute consent to personal jurisdiction. (*Id.*)

As to Plaintiff's claim that personal jurisdiction could be premised on co-conspirators' acts, this Court found that the Amended Complaint did not plead sufficient facts to plausibly allege a conspiracy. (*Id.* at 22-23) Plaintiff's "attempts to support its conclusory allegations by citing guilty pleas, settlements, and accompanying admissions, along with "econometric evidence" of Defendants' LIBOR manipulation," were insufficient because Plaintiff had not shown "how the banks' guilty pleas, settlements, or admissions demonstrate a conspiracy to cause injury to Solow." (*Id.* at 23) Moreover, Plaintiff's "econometric evidence" was insufficient because "[a]nalysis that 'flags the possibility' of a conspiracy is not sufficient to meet the plausibility test under *Iqbal*." (*Id.* at 23-24 (citations omitted)) This Court also noted that Plaintiff had not explained how its allegations were sufficient "to satisfy the necessary elements for co-conspirator personal jurisdiction." (*Id.* (citations omitted))

As to personal jurisdiction under Fed. R. Civ. P. 4(k)(2), this Court found that the second required element was not met, because "'Plaintiff's ha[d] not certified that Defendants are not subject to jurisdiction in any other state.'" (*Id.* (quoting *Tamam v. Fransabank Sal*, 677 F. Supp. 2d 720, 731 (S.D.N.Y. 2010)) Accordingly, this Court declined to apply Fed. R. Civ. P. 4(k)(2). (*See id.* at 24-25)

Because this Court found that there was no basis to exercise personal jurisdiction over the Foreign Bank

Defendants, this Court dismissed Plaintiff's claims against them. (*Id.* at 25)

2. <u>Antitrust Claim</u>

In dismissing Plaintiff's antitrust claim under the Sherman Act, this Court held that Plaintiff had "not plausibly alleged an antitrust injury," and therefore lacked standing. (*Id.* at 36) Relying on Judge Buchwald's analysis in *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR I*"), 935 F. Supp. 2d 666, 686 (S.D.N.Y. 2013), this Court found that "Plaintiff's allegations that the LIBOR-setting process is 'competitive' are not plausible on their face," because the "LIBOR-setting process is a cooperative and not a competitive exercise." (*See* Order (Dkt. No. 172) at 28-31, 33-34)

In particular, this Court found that Plaintiff's allegations that "'a Contributor Panel bank's LIBOR submissions [were] not [to] be influenced by its motive to maximize profit or minimize losses in derivatives transactions tied to LIBOR'" supported the notion that, in setting LIBOR, the banks were not competing with one another, but instead were participating in a collective exercise aimed at generating an objective, "good faith" benchmark." (*Id.* at 34 (citing Am. Cmplt. (Dkt. No. 95) ¶ 44)). And "[t]he fact that the benchmark set as a result of the LIBOR-setting process would be a basis for competition does not mean that the cooperative process of collecting submissions used to set LIBOR was a competitive exercise." (*Id.*)

This Court also found that many of the Amended Complaint's allegations were inconsistent with the notion that the LIBOR-setting process is a competitive exercise. In this regard, this Court cited the following

allegations: that "(1) Thomson Reuters—an agency independent of the BBA—collects, calculates, and publishes the daily LIBOR; (2) any bank that trades in the London market can apply to be on a Contributor Panel; and (3) the interquartile averaging method prevents individual or small groups of banks from influencing LIBOR with false submissions." (*Id.*) The Court emphasized that "[n]one of these allegations have anything to do with the issue of whether the submission process is competitive." (*Id.* at 34)

This Court likewise held that the Amended Complaint's allegations that (1) Defendants are "horizontal competitors across a wide range of financing activities" ([Am. Cmplt. (Dkt. No. 95)] ¶ 36); (2) "LIBOR-denominated interest rates [are used] as a threshold or beginning point for competition among [Defendants] in the market for loans to their customers and others" (*id.* ¶ 52); (3) "LIBOR is also instrumental in establishing market prices for many types of interest-bearing debt securities, including financial instruments that are not specifically LIBOR-denominated" (*id.* ¶ 53);" and (4) the LIBOR-setting process is competitive because it is "designed to ensure that LIBOR would be based on competition in the interbank funding markets" (*id.* ¶ 48), were insufficient to demonstrate that manipulation of LIBOR had any effect on competition. (Order (Dkt. No. 172) at 35-36)

Accordingly, this Court found that Plaintiff had not plausibly alleged antitrust injury, and granted Defendants' motion to dismiss Plaintiff's antitrust claim. (*Id.* at 36)

3. RICO Claims

This Court dismissed Plaintiff's RICO claims on the grounds that they were (1) time-barred; and (2) barred by *res judicata*. (*Id.* at 53)

With respect to the statute of limitations issue, this Court noted that "a May 29, 2008 *Wall Street Journal* article 'detailed' the 'divergence between [credit-default spreads ('CDS')] and LIBOR.'" (*Id.* at 38) Accordingly, "Plaintiff was on inquiry notice of the fact that LIBOR rates may have been manipulated" by at least May 29, 2008. (*Id.* at 39) This Court rejected Plaintiff's argument that the statute of limitations should be tolled because "(1) the LIBOR manipulation scheme had been made public, and (2) Defendants' 're-assurances' that no manipulation had occurred would have been entirely self-serving[,]" such that Plaintiff could not have reasonably relied on them. (*Id.*)

Because Solow was on inquiry notice as of May 29, 2008, and no inquiry was pursued, Plaintiff's RICO claims became time-barred after May 29, 2012. (*Id.*) Plaintiff's RICO claims were not filed until February 13, 2013, however. (*Id.* (citing Cmplt. (Dkt. No. 1)) Accordingly, this Court concluded that Plaintiff's RICO claims are time-barred.

With respect to *res judicata*, this Court found that "[e]ven if Plaintiff's RICO claims were not barred by the statute of limitations, they would be barred by *res judicata*, given the judgment" obtained by Citibank against Solow in New York Supreme Court on March 24, 2011. (*Id.* at 41-43) This Court concluded that (1) "there has been a final judgment on the merits"; (2) that the "prior proceeding also arose out of the same transactions and occurrences alleged here";

(3) Defendant Citibank, N.A., was a party to the state court action, and the other Defendants not named in the prior state court action "may properly be considered in privity with Citibank for *res judicata* purposes"; and (4) Plaintiff's RICO claims could have been asserted in the prior action. (*Id.* at 41-46)

In concluding that Plaintiff's RICO claims could have been asserted in the prior state court action, this Court rejected Plaintiff's arguments that Solow could not have raised his RICO claims because he had no knowledge of them. (*Id.* at 50) This Court explained that the May 29, 2008 *Wall Street Journal* article reported the fraud several years before the state trial court entered judgment against Solow. (*Id.* at 50) This Court also noted that the Amended Complaint alleges that a "'public revelation regarding government investigations into possible LIBOR manipulation occurred on March 15, 2011,'" and that on March 16, 2011, March 17, 2011 and March 23, 2011, The Financial Times and Bloomberg reported that U.S. authorities were investigating whether several banks had manipulated the setting of LIBOR. (*Id.* at 51 (citing Am. Cmplt (Dkt. No. 95-1) ¶¶ 81-84)) "Even accepting Plaintiff's allegation that Solow did not know that the media reports concerning Defendants' LIBOR manipulation were true," this Court found that "these [multiple] news reports put Solow on inquiry notice." (*Id.* at 52) "Because Solow 'had sufficient information to create a duty of further investigation,' Plaintiff may not avoid the effects of *res judicata*." (*Id.* (citations omitted))

4. **Leave to Amend**

In dismissing the Amended Complaint, this Court granted Plaintiff leave to amend its antitrust claim. (*See id.* at 54) Because Plaintiff's RICO claims are barred by the statute of limitations and *res judicata*, however, this Court found that any amendment would be futile, and denied leave to amend "as to those claims." (*Id.*)

B. **Plaintiff's Motion for Leave to File a Second Amended Complaint**

Plaintiff argues that (1) the "newly-added allegations in the [proposed] SAC demonstrate that each [of the Foreign Bank Defendants] has sufficient contacts with the United States and this forum" to establish personal jurisdiction; (2) it has standing to assert its antitrust claim in light of the Second Circuit's decision in *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016) vacating Judge Buchwald's decision, upon which this Court relied in dismissing Plaintiff's antitrust claim; and (3) it should be granted leave to "replead its RICO claim" in light of the Second Circuit's summary order in *BPP Ill., LLC v. Royal Bank of Scotland Grp. PLC*, 603 F. App'x 57 (2d Cir. 2015). (*See* Pltf. Br. (Dkt. No. 174-1) at 2, 7; Pltf. Ltr. (Dkt. No. 203) at 1-3)

Defendants oppose Plaintiff's motion on the grounds that the "proposed amendment would be futile." (Def. Br. (Dkt. No. 181) at 6)

DISCUSSION

I. LEAVE TO AMEND

District courts "ha[ve] broad discretion in determining whether to grant leave to amend," *Gurary v.*

Winehouse, 235 F.3d 792, 801 (2d Cir. 2000), and "leave to amend should be freely granted when 'justice so requires[.]'" *Pangburn v. Culbertson*, 200 F.3d 65, 70 (2d Cir. 1999) (quoting Fed. R. Civ. P. 15(a)); *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234 (2d Cir. 1995) ("The Supreme Court has emphasized that amendment should normally be permitted, and has stated that refusal to grant leave without justification is 'inconsistent with the spirit of the Federal Rules.'" (quoting *Foman v. Davis*, 371 U.S. 178, 182, (1962))).

A court may properly deny leave to amend, however, in cases of "'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc.'" *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also Murdaugh v. City of New York*, No. 10 Civ. 7218 (HB), 2011 WL 1991450, at *2 (S.D.N.Y. May 19, 2011) ("Although under Rule 15(a) of the Federal Rules of Civil Procedure leave to amend complaints should be 'freely given,' leave to amend need not be granted where the proposed amendment is futile."). "An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)." *Lucente v. IBM Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) (citation omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "In considering a motion to dismiss . . . the court is to accept as true all facts alleged in the complaint," *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007) (citing *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 87 (2d Cir. 2002)), and must "draw all reasonable inferences in favor of the plaintiff." *Id.* (citing *Fernandez v. Chertoff*, 471 F.3d 45, 51 (2d Cir. 2006)).

Allegations that "are no more than conclusions, are not entitled to the assumption of truth," however. *Iqbal*, 556 U.S. at 679. A pleading is conclusory "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement,'" *id.* at 678, offers "'a formulaic recitation of the elements of a cause of action,'" *id.*, or does not provide factual allegations sufficient "to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 121 (2d Cir. 2007). In considering a motion to dismiss under Rule 12(b)(6), a district court "may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco*, 622 F.3d at 111 (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)).

"[Parties] opposing a motion to amend . . . bear[] the burden of establishing that an amendment would be futile." *Bonsey v. Kates*, No. 13 Civ. 2708 (RWS), 2013 WL 4494678, at *8 (S.D.N.Y. Aug. 21, 2013) (citing *Blaskiewicz v. Cty. of Suffolk*, 29 F. Supp. 2d 134, 137-38 (E.D.N.Y. 1998)).

II. ANTITRUST CLAIM

Plaintiff requests leave to amend its antitrust claim on the basis of the Second Circuit's decision in *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759 (2d Cir. 2016). (*See* Pltf. Ltr. (Dkt. No. 203) at 1) Plaintiff points out that—in dismissing Plaintiff's antitrust claim—this Court relied, in large part, on the district court's "reasoning that the LIBOR-setting process is cooperative rather than competitive and therefore cannot constitute antitrust injury." (*Id.*) Because *Gelboim* rejects that analysis, Plaintiff contends that leave to amend should be granted. (*Id.* at 1-3)

Defendants counter that even if Plaintiff's allegations now suffice to demonstrate antitrust injury, any amendment would still be futile because Plaintiff cannot demonstrate that it is an "efficient enforcer" of the antitrust laws. (*See* Def. Ltrs. (Dkt. Nos. 204, 220))

A. Antitrust Standing

Section 1 of the Sherman Act provides that "[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, is declared to be illegal." 15 U.S.C. § 1. The private right of action to enforce this provision is set forth in Section 4 of the Clayton Act. *See* 15 U.S.C. § 15.

In order to bring a cause of action under the Sherman Act, a plaintiff must demonstrate antitrust standing, *i.e.*, that "'the plaintiff is a proper party to bring a private antitrust action.'" *Gelboim*, 823 F.3d at 770 (quoting *Associated Gen. Contractors of Calif., Inc., v. Calif. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983)). "Like constitutional standing, antitrust standing is a threshold inquiry resolved at

the pleading stage." *Id.* (citing *Gatt Commc'ns v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75 (2d Cir. 2013)). To demonstrate antitrust standing, a plaintiff must demonstrate both (1) antitrust injury; and (2) that it is an efficient enforcer of the antitrust laws. *Id.* at 772.

1. Antitrust Injury

In order for "[a] private plaintiff . . . [to] recover damages under § 4 of the Clayton Act, . . . [the] plaintiff must prove the existence of '*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (emphasis in original) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). "An antitrust injury 'should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.'" *Gelboim*, 823 F.3d at 772 (quoting *Brunswick*, 429 U.S. at 489).

"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.'" *Id.* (quoting *Brunswick*, 429 U.S. at 489). "Even though the members of [a] price-fixing group [a]re in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces." *Id.* at 773. The "anticompetitive effect of the . . . alleged conspiracy would be that consumers got less for their money." *Id.* at 774. Moreover, because "horizontal price-fixing conspiracies among competitors are

unlawful *per se*," allegations "pleading harm to competition are not required to withstand a motion to dismiss." *Id.* at 771, 775-76 ("Appellants have alleged an anticompetitive tendency: the warping of market factors affecting the prices for LIBOR-based financial instruments. No further showing of actual adverse effect in the marketplace is necessary.").

Here, Plaintiff alleges that the Defendants violated Section 1 of the Sherman Act by engaging in a horizontal price-fixing scheme to "fix[], maintain[] or ma[ke] artificial prices for LIBOR-based financial instruments, including [Solow's] loans and bond portfolio." Defendants' manipulation of USD-LIBOR allegedly contributed to the devaluation of Solow's bonds, resulting in Citibank's seizure and sale of Solow's bond portfolio at "artificially low prices." (SAC (Dkt. No. 174-1) ¶¶ 36, 163, 169, 199) Because Plaintiff has "identified an 'illegal anticompetitive practice' (horizontal price-fixing), ha[s] claimed an actual injury placing [Solow] in a ' 'worse position' as a consequence' of the Banks' conduct, and ha[s] demonstrated that [Solow's] injury is one the antitrust laws were designed to prevent," Plaintiff has plausibly alleged antitrust injury. *See Gelboim*, 823 F.3d at 775.

2. <u>Efficient Enforcer</u>

"The second question that bears on antitrust standing is whether plaintiff satisfy[ies] the efficient enforcer factors." *Id.* at 777. The efficient enforcer inquiry turns on four factors: "(1) the 'directness or indirectness of the asserted injury,' which requires evaluation of the 'chain of causation' linking [plaintiff's] asserted injury and [defendants'] alleged price-fixing; (2) the 'existence of more direct victims of the alleged

conspiracy'; (3) the extent to which appellants' damages claim is 'highly speculative'; and (4) the importance of avoiding 'either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.'" *Id.* at 778 (quoting *Associated Gen. Contractors*, 459 U.S. at 540-45). Given the unusual nature of the cases arising out of the alleged LIBOR price-fixing conspiracy, the Second Circuit has urged lower courts to pay "close attention" to the efficient enforcer factors, and to carefully consider "whether the aims of the antitrust laws are most efficiently advanced by [plaintiffs] through these suits." *See id.*

As discussed below, Plaintiff's chain of causation is attenuated and its damages claim is likely to be "highly speculative." Accordingly, the Court concludes that Plaintiff lacks antitrust standing.

a. <u>Causation</u>

Under the first efficient enforcer factor, courts evaluate the "chain of causation linking [plaintiff's] asserted injury and [defendants'] alleged price-fixing" by asking "whether the violation was a direct or remote cause of the injury." *Id.* at 772, 777. "The concern associated with remote causation—particularly in the present case—is that defendants will face 'damages disproportionate to [their] wrongdoing. . . .'" *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 (NRB), 2016 WL 7378980, at *15 (S.D.N.Y. Dec. 20, 2016) (quoting *Gelboim*, 823 F.3d at 779). Accordingly, "[w]here the chain of causation between the asserted injury and the alleged restraint in the market 'contains several somewhat vaguely defined links,'" or "the causal relationship between the Defendants'

actions and the Plaintiff's injury is too attenuated, the claim is too indirect" to support antitrust standing. *Laydon v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419 (GBD), 2014 WL 1280464, at *9 (S.D.N.Y. Mar. 28, 2014) (quoting *Associated Gen. Contractors*, 459 U.S. at 540).

In the context of cases alleging a LIBOR price-fixing conspiracy, the "antitrust standing of those plaintiffs who did not deal directly with the Banks"—commonly referred to as "umbrella purchasers"—presents a complex issue. *See Gelboim*, 823 F.3d at 778; *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2016 WL 7378980, at *15. "Umbrella standing concerns are most often evident when a cartel controls only part of a market, but a consumer who dealt with a non-cartel member alleges that he sustained injury by virtue of the cartel's raising of prices in the market as a whole." *Gelboim*, 823 F.3d at 778. "In such circumstances, 'the defendants secured no illegal benefit at [plaintiff's] expense,' and permitting recovery in such a transaction 'could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits.'" *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2016 WL 7378980, at *15 (quoting *Mid-West Paper Prods. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 583, 586 (3d Cir. 1979)). Indeed, "[r]equiring the Banks to pay treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative swap would . . . not only bankrupt . . . the world's most important financial institutions, but also vastly extend the potential scope of antitrust liability in myriad markets where derivative instruments have proliferated." *Gelboim*, 823 F.3d at 779.

Ultimately, the standing inquiry in each antitrust case is a highly fact-specific determination. *In re*

LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MDL 2262 (NRB), 2016 WL 7378980, at *16 (S.D.N.Y. Dec. 20, 2016). After carefully considering the reasoning in *Gelboim*, this Court concludes that there is good reason "to draw a line between plaintiffs who transacted directly with defendants . . . and those who did not." *See id.* As Judge Buchwald explained,

> [a] plaintiff and a third party could, and did, easily incorporate LIBOR into a financial transaction without any action by defendants whatsoever . . . . [P]laintiffs who did not purchase directly from defendants . . . made their own decisions to incorporate LIBOR into their transactions, over which defendants had no control, in which defendants had no input, and from which defendants did not profit. To hold defendants trebly responsible for these decisions would result in "damages disproportionate to wrongdoing . . . ."

In re LIBOR-Based Fin. Instruments Antitrust Litig., 2016 WL 7378980, at *16 (quoting *Gelboim*, 823 F.3d at 779).

Here, Plaintiff's claim is even more attenuated than those of the bondholders in *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2016 WL 7378980, at *16. Plaintiff alleges that Solow pledged his bond portfolio as collateral for a loan, and that he suffered injury when Defendants' manipulation of LIBOR caused interest rates to increase, which in turn caused the value of Solow's bond portfolio to decline below the amount required as collateral for his loans. (SAC (Dkt. No. 174-1) ¶¶ 9, 167-68, 170) According to Plaintiff, Citibank then seized Solow's bond portfolio and sold it

at a reduced value, resulting in a deficiency and further injury to Solow. (*See id.*)

Although Plaintiff contends that Solow transacted directly with Defendant Citibank—because Citibank issued him several loans—the root cause of Solow's injury is the devaluation and subsequent liquidation of his bond portfolio. (*See id.*; Pltf. Ltr. (Dkt. No. 221) at 2) Solow did not purchase his bonds directly from any Defendant, however. (*See* Am. Cmplt. (Dkt. No. 174-1) ¶ 9; Pltf. Ltr. (Dkt. No. 221) at 2) Moreover, Solow's municipal bonds were "not specifically LIBOR-indexed," and they "trade[d] in a decentralized dealer market that is illiquid and opaque and dominated by intermediaries that account for the majority of . . . customer transactions." (SAC (Dkt. No. 174-1) ¶ 8, 160-162)

Accordingly, the chain of causation between Plaintiff's alleged injury and Defendants' manipulation of LIBOR involves at least several "vaguely defined links," *see Associated Gen. Contractors*, 459 U.S. at 540, which require a complicated series of market interactions and assumptions, including that: (1) the Defendants conspired to inflate their USD-LIBOR submissions during the period leading up to the liquidation of Solow's bond portfolio—namely, September 12, 2008 to October 10, 2008; (2) Thomson Reuters compiled those submissions, and—after applying the interquartile averaging method—calculated LIBOR benchmark rates that were artificial; (3) increased LIBOR rates caused interest rates to rise, notwithstanding the Second Circuit's point that "the worldwide market for financial instruments . . . is vast, and influenced by multiple benchmarks," *see Gelboim*, 823 F.3d at 782; (4) the general increase in interest rates

caused Solow's municipal bonds to decline in value—even though they were not LIBOR-indexed and traded in a decentralized dealer market—because interest rates and bond prices generally move in opposite directions; and (5) the reduced valuation of Solow's collateral caused Citibank to declare a default and sell Solow's bond portfolio at a loss, causing injury to Solow. (*See* SAC (Dkt. No. 174-1) ¶¶ 48-54, 160, 167-71, 179) This attenuated chain of causation "between the alleged conspiracy and the asserted injury is too indirect to support antitrust standing." *See Laydon*, 2014 WL 1280464, at *9 (citations omitted); *In re LIBOR*, 2016 WL 7378980, at *16.

b. <u>Speculative Damages</u>

Although "public policy require[s] that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created, . . . highly speculative damages [are] a sign that a given plaintiff is an inefficient engine of enforcement." *Gelboim*, 823 F.3d at 779.

Where, as here, "the 'theory of antitrust injury depends upon a complicated series of market interactions,' the damages are speculative . . . because 'countless other market variables' could affect pricing decisions." *Laydon*, 2014 WL 1280464, at *10 (quoting *Reading Indus., Inc., v. Kennecott Copper Corp., et al.*, 631 F.2d 10, 12-13 (2d Cir. 1980)); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2016 WL 7378980, at *17 (Damages may be unduly speculative where "the injury is so far down the chain of causation from defendants' actions that it would be impossible to untangle the impact of the fixed price from the impact of intervening market decisions."). Indeed, the Second Circuit expressed skepticism that antitrust claims

premised on an alleged LIBOR-based price fixing conspiracy could satisfy this factor, noting that "[a]ny damages estimate would require evidence to 'support a just and reasonable estimate' of damages,' and it is difficult to see how [plaintiffs] would arrive at such an estimate, even with the aid of expert testimony." *Gelboim*, 823 F.3d at 779. In this context, "'the vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation.'" *Id*. (quoting *J. Truett Payne Co., Inc., v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981)).

Here, the factors motivating the Second Circuit's concerns are particularly pronounced. Analysis of Plaintiff's injury would require a complex multi-step analysis to quantify the indirect effect of Defendants' alleged manipulation of USD-LIBOR on the value of Solow's bonds. First, Plaintiff would have to reconstruct the "hypothetical 'but-for' . . . [USD] LIBOR benchmark rates" during the period leading up to and following the liquidation of Solow's bond portfolio, and show how Defendants' manipulation of LIBOR rates affected the overall USD-LIBOR rate each day. *See Laydon*, 2014 WL 1280464, at *10. Then, Plaintiff would have to show how manipulation of USD-LIBOR rates affected general interest rates. Next, Plaintiff would have to demonstrate the extent to which general interest rates were inversely related to the value of his specific municipal bonds. Plaintiff would also have to quantify the extent to which the value of his bonds was affected by USD-LIBOR manipulation, as opposed to other market causes—such as, most critically, the

2008 financial crisis.[3] Given Plaintiff's concession that Solow's municipal bonds were not LIBOR-indexed, and that they "trade[d] in a decentralized dealer market that is illiquid and opaque and dominated by intermediaries that account for the majority of . . . customer transactions," there are many independent market factors that could have affected the value of his bonds. (*See* SAC (Dkt. No. 174-1) ¶¶ 160-62) Accordingly, this Court concludes that Plaintiff's damages would be highly speculative.

Because Plaintiff has not satisfied at least two of the efficient enforcer factors, Plaintiff lacks antitrust standing. *See Laydon*, 2014 WL 1280464, at *10. Accordingly, any proposed amendment would be futile, and Plaintiff's request for leave to amend its antitrust claim will be denied.[4]

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[3] The period in which Plaintiff alleges that interest rates rapidly increased as a result of Defendants' LIBOR manipulation—September 12, 2008 to October 10, 2008—coincides with the height of the 2008 financial crisis. Indeed, the period cited by Plaintiff ends less than a week before nine banks announced their decision to participate in the Troubled Asset Relief Program ("TARP"). *See* Mark Landler & Eric Dash, *Drama Behind a $250 Billion Banking Deal*, N.Y. Times (Oct. 14, 2008), http://www.nytimes.com/2008/10/15/business/economy/15bailout.html. This Court may take judicial "notice of the events constituting the financial crisis that occurred in fall 2008, . . . because the Court 'may take judicial notice of indisputable historical events.'" *See Starr Int'l Co. v. Fed. Reserve Bank of New York*, 906 F. Supp. 2d 202, 205 (S.D.N.Y. 2012), *aff'd*, 742 F.3d 37 (2d Cir. 2014) (citations omitted).

[4] Having concluded that Plaintiff lacks antitrust standing because its chain of causation is attenuated and its damages claim is highly speculative, the Court does not reach the remaining efficient enforcer factors.

III. <u>RICO CLAIMS</u>

In its March 31, 2015 order, this Court found that Plaintiff's RICO claims are time-barred and barred by *res judicata*. Accordingly, the Court denied Plaintiff leave to amend its RICO claims on the grounds that any amendment would be futile. (*See* Order (Dkt. No. 172) at 54) Plaintiff nonetheless contends that it should be allowed to re-plead its RICO claims in light of the Second Circuit's summary order in *BPP Illinois, LLC v. Royal Bank of Scotland Grp. PLC*, 603 F. App'x 57 (2d Cir. 2015). (Pltf. Br. (Dkt. No. 174-1) at 2, 10)

Defendants counter that *BPP Illinois* is not on point, because the Second Circuit's summary order addresses the Pennsylvania's statute of limitations, rather than the federal inquiry notice standard that applies to Plaintiff's RICO claims. (Def. Br. (Dkt. No. 181) at 20). Defendants further argue that—even if Plaintiff's RICO claims were not time-barred—amendment would still be futile, because Plaintiff's RICO claims are barred by *res judicata*. (*Id.* at 21)

As an initial matter, it must be acknowledged that Plaintiff's argument regarding leave to amend its RICO claims is barred by the law of the case doctrine. In its March 31, 2015 decision, this Court held that granting leave to amend would be futile, because Plaintiff's RICO claims are both time-barred and barred by *res judicata*. That decision is law of the case and bars Plaintiff's present argument. *See DiLaura v. Power Auth. of State of New York.*, 982 F.2d 73, 76 (2d Cir. 1992) ("The law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" (citations omitted)); *Semple v. Eyeblaster, Inc.*, No. 08 Civ. 9004 (HB), 2009

WL 1748062, at *2 (S.D.N.Y. June 19, 2009) ("Plaintiff's motion appears to be, in substance, a request to overturn the Court's order that her complaint could not be further amended, which is the law of the case . . . . Under the law-of-the-case doctrine, once a court has ruled on an issue, that decision generally should be adhered to in subsequent stages of the same action, unless cogent or compelling reasons militate otherwise." (citations omitted)).

Moreover, in urging this Court to grant leave to amend, Plaintiff relies on a Second Circuit summary order. Summary orders have no precedential effect. *See* 2d Cir. Local R. 32.1.1(a) ("Rulings by summary order do not have precedential effect."); *Weiss v. Macy's Retail Holdings Inc.*, 265 F. Supp. 3d 358, 365 (S.D.N.Y. 2017) (Because a summary order "has no precedential effect," a "district court has no obligation to follow a summary order where the reasoning was cursory or unsound."); *Intesa Sanpaolo, S.p.A. v. Credit Agricole Corp. & Inv. Bank*, 924 F. Supp. 2d 528, 537 (S.D.N.Y. 2013) (rejecting argument that Section 10(b) claims were not time-barred where case cited by plaintiff was a "summary order" that "does not constitute binding precedent").

In any event, as explained below, even if (1) this Court exercised its discretion to reconsider its prior ruling, and (2) *BPP Illinois* had precedential effect, Plaintiff's motion for leave to amend its RICO claims would be properly denied. *See DiLaura*, 982 F.2d at 76 (The law of the case "'doctrine is admittedly discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment.'" (citations omitted)).

A. **The Second Circuit's Decision in *BPP Illinois***

In *BPP Illinois, LLC v. Royal Bank of Scotland Grp., PLC*, No. 13 Civ. 0638 (JMF), 2013 WL 6003701, at *4, 8 (S.D.N.Y. Nov. 13, 2013), *aff'd in part, vacated in part*, 603 F. App'x 57 (2d Cir. 2015), the district court dismissed plaintiffs' state law fraud claims as untimely on the ground that—under Pennsylvania law—plaintiffs were on inquiry notice of their potential claims by May 29, 2008, when several news articles were published stating that reported LIBOR rates were artificial. In so ruling, the district court rejected plaintiffs' contention that the inquiry notice issue had to be resolved by a jury. *See id.* at *6-7.

The Second Circuit "vacate[d] the district court's dismissal of the BPP Plaintiff's' claims as barred by Pennsylvania's two-year statute of limitations." *BPP Illinois*, 603 F. App'x at 58. The court reasoned that,

> "[p]ursuant to application of the [Pennsylvania] discovery rule, the point at which the complaining party should reasonably be aware that he has suffered an injury is a factual issue best determined by the collective judgment, wisdom, and experience of jurors." *Crouse v. Cyclops Indus.*, 560 Pa. 394, 404, 745 A.2d 606 (2000) . . . . "Only where the facts are so clear that reasonable minds could not differ may a court determine as a matter of law *at the summary judgment stage*, the point at which a party should have been reasonably aware of his or her injury and its cause and thereby fix the commencement date of the limitations period." *Gleason v.*

> *Borough of Moosic*, 609 Pa. 353, 363, 15 A.3d 479 (2011) (emphasis added).

BPP Illinois, 603 F. App'x at 58-59. The court further explained that under Pennsylvania law "the statute of limitations is an affirmative defense, and 'a plaintiff is not required to plead, in a complaint, facts sufficient to overcome an affirmative defense.'" *Id.* at 59 (quoting *Schmidt v. Skolas*, 770 F.3d 241, 251 (3d Cir. 2014)). Accordingly, the *BPP Illinois* court found that "in concluding at the Rule 12(b)(6) stage that the BPP Plaintiff's failed to exhibit reasonable diligence in not discovering their injury by May 29, 2008, the district court acted too hastily." *Id.* Although "further proceedings might show that the BPP Plaintiff's' claims are . . . untimely under the [Pennsylvania] discovery rule, the present record is insufficient to decide this question as a matter of law." *Id.*

B. Whether Plaintiff's RICO Claim is Time-Barred

Plaintiff argues that *BPP Illinois* instructs that RICO claims cannot "be deemed time-barred at the pleading stage." (Pltf. Br. (Dkt. No. 174-1) at 10) *BPP Illinois* does not address the inquiry notice standard for federal claims such as RICO, however. Instead, *BPP Illinois* addresses whether and when—under Pennsylvania law—an issue of inquiry notice can be resolved on a motion to dismiss. *See BPP Illinois*, 603 F. App'x at 59. Accordingly, *BPP Illinois* does not undermine well-established Second Circuit law holding that statute of limitations questions concerning federal claims may properly be resolved on a motion to dismiss. *See, e.g.*, *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 153 (2d Cir. 2012) (affirming Rule 12(b)(6)

dismissal of plaintiff's RICO claims on inquiry notice grounds); *LC Capital Partners, LP v. Frontier Ins. Grp., Inc.*, 318 F.3d 148, 157 (2d Cir. 2003) (affirming Rule 12(b)(6) dismissal of plaintiff's federal securities claim where it was clear from the "face of the complaint and related documents" that plaintiff was on inquiry notice).

In the alternative, Plaintiff argues that *BPP Illinois* establishes that the May 29, 2008 *Wall Street Journal* article—which this Court relied on in finding Plaintiff's RICO claims time-barred—was insufficient to put Plaintiff on inquiry notice. (Pltf. Reply (Dkt. No. 184) at 6) In responding, Defendants repeat that *BPP Illinois* is inapposite because it involves the "dismissal of state law claims as time-barred under the applicable Pennsylvania law." (Def. Br. (Dkt. No. 181) at 20)

The Second Circuit's decision last month in *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68 (2d Cir. 2018) also addresses the significance of the May 29, 2008 *Wall Street Journal* article, however. In that case, the Second Circuit—applying California law—reversed a district court's determination that the plaintiff was on inquiry notice based on news articles published by May 29, 2008. *See Charles Schwab Corp.*, 883 F.3d at 96-97. The Second Circuit's decision rested, in part, on California law, and under California law press reports are not sufficient to put a plaintiff on inquiry notice unless there is "evidence that the plaintiff was actually aware of the reporting in question." *Id.* at 97.

The Second Circuit went on to state that

> even if Schwab were aware of news articles that raised the possibility that "LIBOR had

> been at artificial levels since August 2007," . . . it is not certain that any of Schwab's claims would be time-barred. The BBA responded to the negative press reporting by assuring investors and journalists that its own investigation had confirmed the accuracy of LIBOR. It is plausible that Schwab reasonably relied on those assurances, thus delaying the start of the limitations period. *See BPP Ill., LLC v. Royal Bank of Scot. Grp., PLC*, 603 Fed. Appx. 57, 59 (2d Cir. 2015) (considering the same press reports at issue here, and reversing district court for "act[ing] too hastily" in dismissing LIBOR-manipulation claims as time-barred).

Id. at *19. The Second Circuit's analysis strongly suggests that, even if the news articles published on or about May 29, 2008 are sufficient to place a plaintiff on inquiry notice, the statute of limitations would be tolled under the doctrine of fraudulent concealment where a plaintiff plausibly alleges that it relied on the BBA's assurances that LIBOR was accurate.

Here, Plaintiff alleges that, "throughout 2008, the BBA engaged in affirmative acts that lulled any speculation that LIBOR had been or was being manipulated." (SAC (Dkt. No. 184-1) ¶ 188) Plaintiff further alleges that between April 2008 and May 29, 2008, the BBA and many of the Defendant banks made repeated public statements reassuring investors that "LIBOR had not been manipulated," and denying any wrongdoing. (*See id.* ¶¶ 189-194)

Given the Second Circuit's recent endorsement of the fraudulent concealment theory, this Court con-

cludes that Plaintiff's RICO claims are not subject to dismissal as time-barred.

C. **Whether Plaintiff's RICO Claims Are Barred by *Res Judicata***

Plaintiff contends that "the logic of the Second Circuit's holding" in *BPP Illinois* requires reconsideration of this Court's *res judicata* decision, "because, like the statute of limitations," *res judicata* "is an affirmative defense subject to a stringent standard of review unmet by Defendants and inappropriate in the absence of discovery." (Pltf. (Dkt. No. 174-1) at 11) This Court is not persuaded.

As discussed above, *BPP Illinois* addresses the proper application of a Pennsylvania statute of limitations under Pennsylvania law. *BPP Illinois* does not involve any application of *res judicata*, and nothing in that decision suggests that a court is precluded from evaluating *res judicata* arguments on a motion to dismiss. Indeed, controlling Second Circuit precedent establishes that "[a] court may consider a *res judicata* defense on a Rule 12(b)(6) motion to dismiss when the court's inquiry is limited to the plaintiff's complaint, documents attached or incorporated therein, and materials appropriate for judicial notice." *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 498 (2d Cir. 2014).

Plaintiff also contends, however, that *BPP Illinois* requires reconsideration of this Court's holding that Solow could have asserted his RICO claims in the prior state court action. (*See* Pltf. Reply (Dkt. No. 184) at 9-10; Order (Dkt. No. 172) at 49-52) Plaintiff argues that *BPP Illinois* establishes that the news articles published by May 29, 2008 were insufficient to place Plaintiff on inquiry notice, and that therefore Plaintiff

could not have brought his RICO claims in the prior state action. (Pltf. Reply (Dkt. No. 184) at 9-10)

Plaintiff's argument is unavailing, however, because this Court's determination that Solow could have asserted his federal RICO claims in the prior state action did not depend on whether the May 29, 2008 news reports put him on inquiry notice. While this Court acknowledged the publication of multiple relevant news articles by May 29, 2008, this Court's analysis turned on Plaintiff's concessions in the Amended Complaint that (1) a "'public revelation regarding government investigations into possible LIBOR manipulation occurred on March 15, 2011,'" disclosing that there were "'improper attempts by UBS, either acting on its own or together with others, to manipulate LIBOR rates at certain times'"; and (2) numerous news articles—published in March 2011—reporting that U.S. authorities had subpoenaed many of the Defendant banks, and initiated investigations into whether these banks had manipulated LIBOR. (*See* Order (Dkt. No. 174) at 50-52 (quoting Am. Cmplt. (Dkt. No. 95-1) ¶¶ 81-84)) Given that all of these revelations occurred "prior to the state trial court's entry of judgment against Solow" on March 24, 2011 (*see* Ruffino Decl., Ex. G (May 24, 2011 Judgment) (Dkt. No. 118-4) at 11), this Court found that Solow was "on notice of the LIBOR-manipulation scheme" and that he could have asserted his RICO claims in the state court action. (*See* Order (Dkt. No. 174) at 52)

In sum, *BPP Illinois* does not undermine this Court's prior determination that Plaintiff's RICO claims are barred by *res judicata*. Because Plaintiff's

RICO claims are barred by *res judicata*, leave to amend these claims will be denied.[5]

CONCLUSION

For the reasons stated above, Plaintiff's motion for leave to file a Second Amended Complaint is denied. The Clerk of the Court is directed to terminate the motion (Dkt. No. 174), and to close this case.

Dated: New York, New York
March 19, 2018

SO ORDERED.

s/______________________
Paul G. Gardephe
United States District Judge

[5] Having concluded that Plaintiff's proposed SAC does not remedy the defects in its federal claims, leave to amend is denied on that basis, and this Court does not reach Defendants' personal jurisdiction arguments.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 13 Civ. 981 (PGG)

7 WEST 57TH STREET REALTY COMPANY, LLC,
Plaintiff,

v.

CITIGROUP, INC.; CITIBANK, N.A.; BANK OF AMERICA CORP.; BANK OF AMERICA N.A.; BARCLAYS BANK PLC; UBS AG; JPMORGAN CHASE & CO.; JPMORGAN CHASE BANK, NATIONAL ASSOCIATION; CREDIT SUISSE GROUP AG; BANK OF TOKYO-MITSUBISHI UFJ LTD.; COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A.; HSBC HOLDINGS PLC; HSBC BANK PLC; HBOS PLC; LLOYDS BANKING GROUP PLC; ROYAL BANK OF CANADA; THE NORINCHUKIN BANK; ROYAL BANK OF SCOTLAND GROUP, PLC; WESTLB AG; WESTDEUTSCHE IMMOBILIENBANK AG; DEUTSCHE BANK AG,
Defendants.

MEMORANDUM OPINION & ORDER

PAUL G. GARDEPHE, U.S.D.J.:

On February 13, 2013, Plaintiff 7 West 57th Street Realty Company, LLC—the assignee of Sheldon H.

Solow—filed this action against Defendants Citigroup, Inc.; Citibank, N.A.; Bank of America Corp.; Bank of America N.A.; Barclays Bank Plc; UBS AG; JPMorgan Chase & Co.; JPMorgan Chase Bank, National Association; Credit Suisse Group AG; Bank of Tokyo-Mitsubishi UFJ Ltd.; Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.; HSBC Holdings Plc; HSBC Bank Plc; HBOS Plc; Lloyds Banking Group Plc; Royal Bank of Canada; The Norinchukin Bank; Royal Bank of Scotland Group, Plc; WestLB AG; Westdeutsche Immobilienbank AG; and Deutsche Bank AG, alleging that Defendants colluded to manipulate the London Inter-Bank Offered Rate for the U.S. dollar ("USD-LIBOR") in 2008. (Am. Cmplt. (Dkt. No. 95)) Plaintiff claims that Defendants-who are members of the British Bankers Association (the "BBA"), and who were responsible for submitting interest rates that the BBA used to calculate USD-LIBOR in 2008—violated Section 1 of the Sherman Act, 15 U.S.C. § 1; the Clayton Act, 15 U.S.C. § 12 *et seq.*; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; and New York's Donnelly Act, N.Y. Gen. Bus. Law § 340. (Am. Cmplt. (Dkt. No. 95) ¶ 1)

Defendants have moved to dismiss the Amended Complaint. (Dkt. Nos. 114, 139) For the reasons stated below, Defendants' motions to dismiss will be granted.

BACKGROUND[1]

I. FACTUAL BACKGROUND

A. THE LIBOR-FIXING SCHEME

The London InterBank Offered Rate ("LIBOR") is set daily by the BBA, a non-regulatory body governed by a board composed of members of various banks. (Am. Cmplt. (Dkt. No. 95) ¶¶ 39, 40) LIBOR functions as a pricing mechanism and benchmark for deter-

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[1] The following facts are drawn from the Amended Complaint and are presumed true for purposes of resolving Defendants' motions to dismiss. *See Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). In resolving Defendants' motions, the Court has also considered documents that are incorporated into the Amended Complaint by reference, including non-prosecution and deferred prosecution agreements that certain Defendants entered into with the United States Department of Justice, as well as certain press releases and news articles concerning the manipulation of LIBOR. *See* Am. Cmplt. (Dkt. No. 95) ¶¶ 59-126. "In assessing the legal sufficiency of [a plaintiff's] claim[s] [on a motion to dismiss,]" the court may "consider . . . the complaint and any documents attached thereto or incorporated by reference and 'documents upon which the complaint "relies heavily."'" *Bldg. Indus. Elec. Contractors Ass'n v. City of N.Y.*, 678 F.3d 184, 187 (2d Cir. 2012) (quoting *In re Citigroup ERISA Litig.*, 662 F.3d 128, 135 (2d Cir. 2011) (quoting *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010))). The Court has also taken judicial notice of public filings in New York state court proceedings brought by Defendant Citibank, N.A. against Solow. *See Global Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 157 (2d Cir. 2006) ("'[In deciding a motion to dismiss,] [a] court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" (quoting *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998)).

mining, *inter alia*, interest rates for trillions of dollars in financial instruments worldwide. (*Id.* ¶¶ 5, 50-55)

Each day, the BBA calculates and publishes LIBOR for ten currencies, including the U.S. dollar. (*Id.* ¶ 41) Each of these currencies is overseen by a separate BBA "Contributor Panel." (*Id.*) A Contributor Panel consists of various banks that—as described below—provide submissions to the BBA that are used to calculate the daily LIBOR for that panel's particular currency. *See id.*

Defendants are or were members of the Contributor Panel for the U .S. dollar. (*Id.* ¶ 39) Defendants are also horizontal competitors across a range of financing activities, including transactions that expressly incorporate LIBOR as a benchmark. (*Id.* ¶ 36)

USD-LIBOR is set daily through a process orchestrated by the BBA. (*Id.* ¶ 43) Each day, the BBA asks the sixteen banks on the Contributor Panel for USD-LIBOR (the "contributing banks") "[a]t what rate [of interest] [they] could . . . borrow funds, were [they] to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am[.]" (*Id.*) Under BBA rules, each bank's answer—referred to as its "contribution" or "submission"—is meant to reflect the interest rate at which members of the bank's staff who are primarily responsible for management of the bank's cash believe that the bank could borrow unsecured interbank funds in the London money market. (*Id.* ¶ 44) Under BBA rules, each contributing bank's submission must be based on its own independent good faith judgment, taking into account market conditions and the bank's posture as a borrower in the market for interbank loan funds. (*Id.* ¶ 45) The contributing banks' daily submissions to the

BBA reflect their costs of borrowing funds at three maturity dates—one-month, three-months, and six-months. (*Id.* ¶ 43)

Thomson Reuters—an independent entity—collects the contributing banks' submissions on the BBA's behalf. (*Id.* ¶¶ 47, 49) Using the contributing banks' submissions, Thomson Reuters calculates USD-LIBOR through an "inter-quartile" methodology, in which it discards the four highest and the four lowest submissions, and then averages the remaining eight submissions to arrive at the USD-LIBOR for a given day. (*Id.* ¶ 43)

The BBA requires each contributing bank to arrive at its own daily submission without referring to the submissions of other banks on the Contributor Panel. (*Id.* ¶¶ 44, 46) Each bank is further required to keep its submission confidential until after Thomson Reuters publishes the daily USD-LIBOR. (*Id.* ¶¶ 46, 49) When USD-LIBOR is published, the rates submitted by each individual contributor bank are published as well, so that it is clear how USD-LIBOR was calculated. (*Id.* ¶¶ 46, 47)

The BBA also prohibits banks from submitting contributions based on the pricing of any derivative financial instruments tied to LIBOR. (*Id.* ¶ 44) This prohibition is intended to prevent contributing banks from making submissions based on a motive to maximize profits or minimize losses in connection with such derivative transactions. (*Id.*)

By 2008, however, Defendants were not complying with the BBA's rules governing their submissions. *See id.* ¶ 5. Instead, "Defendants . . . manipulate[d] USD-LIBOR by falsely reporting to the BBA the . . . interest

rates at which the Defendant banks expected they could borrow funds . . . on a daily basis." (*Id.* ¶¶ 6, 68, 73) Traders at the contributing banks asked their colleagues who were responsible for submitting rates to the BBA (the "LIBOR submitters") to submit rates that would benefit the bank's own trading positions, as opposed to rates that reflected the bank's good faith judgment of its true cost of borrowing that day. *See, e.g.*, *id.* Traders also requested that their counterparts at other contributing banks do the same. *See, e.g.*, *id.* The traders made these requests through electronic messages, telephone calls, and in-person conversations. *See, e.g.*, *id.* ¶ 61. The LIBOR submitters frequently agreed to accommodate these requests. *See id.* Through their traders' requests—and the LIBOR submitters' acquiescence—Defendants caused rates to be submitted to the BBA that served Defendants' own financial interests, rather than complying with BBA standards. (*Id.* ¶¶ 5, 6) As a result, USD-LIBOR calculated on the basis of these rates was "artificial" and did not reflect the contributing banks' true costs of borrowing under actual market conditions. (*Id.*)

B. SOLOW'S LOANS AND 2008 DEFAULT

Solow—who assigned his claims related to this action to Plaintiff—pledged a portfolio of more than $450 million in high-grade municipal bonds as collateral for LIBOR-denominated loans in or about 2003. *See id.* ¶¶ 9, 148. Several of these loans were issued by Defendant Citibank, N.A. (*Id.* ¶¶ 9, 15) The interest rate for these loans was determined by reference to USD-LIBOR. *See id.* ¶ 9. For approximately five years, the interest rate on Solow's loans was LIBOR + 0.75%. (*Id.* ¶ 148) In March 2008, however, Citibank increased the interest rate on the loans to LIBOR + 1.25%. (*Id.* ¶ 148)

Statistical analysis indicates that—at certain times between August 31, 2007 and October 22, 2008—there was a negative correlation coefficient relationship between one-month USD-LIBOR rates and Standard & Poor's ("S&P") New York AMT-Free Municipal Bond Index (the "S&P bond index"), which is an index that measures the performance of bonds similar to those in Solow's portfolio. (*Id.* ¶ 156) This analysis suggests that an increase in one-month USD-LIBOR during those periods was, on average, associated with a decline in the value of the bonds listed in the S&P bond index. (*Id.*)

Between September 12, 2008 and October 10, 2008, Defendants' submissions to the BBA for the calculation of USD-LIBOR were higher than their true costs of borrowing, which resulted in the artificial inflation of USD-LIBOR throughout that period. (*Id.* ¶¶ 151, 153-54, 157)

On September 24, 2008, Citibank notified Solow that on five consecutive days between September 17 and September 23, 2008, the value of his bond portfolio had dropped below the value required as collateral for his loans. (*Id.* ¶ 152) Solow was then current on his loans, but Citibank nonetheless declared a technical default and seized Solow's bond portfolio. (*Id.* ¶¶ 9, 149, 152, 158)

On November 3, 2008, Solow's portfolio—which had been worth $450 million when pledged as collateral—sold for approximately $415 million, net of commissions. (*Id.* ¶ 159) Defendants Citibank, JPMorgan, Bank of America, Barclays, and Deutsche Bank were "direct and indirect" participants in the liquidation of the portfolio, with Citibank purchasing a substantial portion of the portfolio in the first instance. (*Id.* ¶ 158)

Because there was still a deficiency in the amount Solow owed following this sale, Citibank seized the portfolio's earned interest of more than $15,000 as well. (*Id.* ¶ 159)

Between October 6 and November 13, 2008, Citibank seized more than $4.2 million in cash from accounts held by Solow. (*Id.*) Citibank claimed that at least $2.1 million of the cash seized was for interest that Solow owed on the loans after default. (*Id.*) In calculating interest, Citibank applied a "default" interest rate, which was LIBOR-denominated and higher than the interest rate that had applied prior to Citibank's declaration of default. (*Id.*)

After these transactions, Citibank still claimed a $67 million deficiency, and demanded immediate payment of the deficiency and an additional $18.5 million in cash collateral. (*Id.* ¶¶ 159, 160) On December 16, 2008, Citibank filed suit against Solow in New York Supreme Court seeking the $67 million deficiency, interest at the default interest rate, $18.5 million in cash collateral and fees, unspecified management fees, expenses, costs, and attorneys' fees. (*Id.* ¶ 161)

On March 24, 2011, Citibank obtained a judgment against Solow in New York Supreme Court for more than $100 million. (*Id.* ¶ 162; Ruffino Decl. (Dkt. No. 118) Ex. D) On February 23, 2012, the lower court's judgment was affirmed by the First Department. *See Citibank, N.A. v. Solow*, 92 A.D.3d 569, 570 (1st Dep't), *leave to appeal denied*, 19 N.Y.3d 807 (N.Y. 2012). Solow paid the judgment in full on May 23, 2012. (Am. Cmplt. (Dkt. No. 95) ¶ 162)

II. PROCEDURAL HISTORY

After satisfying the state court judgment, Solow assigned claims arising out of the events described above to Plaintiff 7 West 57th Street Realty Company. *See id.* ¶ 1. Plaintiff commenced this action on February 13, 2013. (Cmplt. (Dkt. No. 1)) The Amended Complaint was filed on June 11, 2013. (Am. Cmplt. (Dkt. No. 95)) Plaintiff claims that—but for Defendants' conduct—USD-LIBOR would not have been artificially inflated in September 2008, the value of Solow's bond portfolio would not have dropped beneath the value necessary to collateralize Solow's loans with Citibank, and no default on the loans would have been declared. *See id.* Plaintiff further claims that the seizure of Solow's portfolio and cash, the low prices realized from the sale of the portfolio, the high default interest rates Solow was forced to pay, and the judgment in the state court action all resulted from Defendants' manipulation of USD-LIBOR. *See id.* ¶ 163.

On December 13, 2013, all Defendants moved to dismiss the Amended Complaint. (Dkt. No. 114) Defendants argue that (1) Plaintiff's claims are barred by the applicable statutes of limitations; (2) Plaintiff has failed to state an antitrust claim; (3) Plaintiff has failed to state a RICO claim; (4) Plaintiff's claims are barred by *res judicata* in light of the state court proceedings; and (5) Plaintiff lacks standing to assert Solow's claims. *See* Dkt. Nos. 115, 117.

On October 23, 2014, the foreign bank Defendants requested leave to file a second motion to dismiss—for lack of personal jurisdiction—based on developments in the law of personal jurisdiction since the original motion to dismiss was filed. (Dkt. No. 133) This Court granted Defendants' application, and on December 10,

2014, the foreign bank Defendants filed a motion to dismiss for lack of personal jurisdiction. (Dkt. No. 139)

DISCUSSION

I. LEGAL STANDARD FOR MOTION TO DISMISS

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In considering a motion to dismiss . . . the court is to accept as true all facts alleged in the complaint," *Kassner*, 496 F.3d at 237 (citing *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 87 (2d Cir. 2002)), and must "draw all reasonable inferences in favor of the plaintiff." *Id.* (citing *Fernandez v. Chertoff*, 471 F.3d 45, 51 (2d Cir. 2006)).

A complaint is inadequately pled "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement,'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557), and does not provide factual allegations sufficient "to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) (citing *Twombly*, 550 U.S. at 555). "In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco*, 622 F.3d at 111 (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002); *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 54 (2d Cir. 1999)).

II. PERSONAL JURISDICTION

The Bank of Tokyo-Mitsubishi UFJ, Ltd., Barclays Pank PLC, Credit Suisse Group AG, Deutsche Bank AG, HSBC Holdings plc, HSBC Bank plc, Lloyds Banking Group plc, Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A., HBOS plc, the Norinchukin Bank, the Royal Bank of Canada, the Royal Bank of Scotland plc, Portigon AG (f/k/a WestLB AG), and Westdeutsche ImmobilienBank AG (together, the "Foreign Banks") claim that this Court lacks personal jurisdiction over them. (Def. Br. on Motion to Dismiss for Lack of Personal Jurisdiction (Dkt. No. 140) at 1) "Jurisdiction to resolve cases on the merits requires . . . authority . . . over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). Accordingly, this Court will address the Foreign Banks' objection to this Court's exercise of personal jurisdiction over them before addressing the arguments brought by all Defendants that Plaintiff has failed to state a claim.

A. The Foreign Banks Have Not Waived Their Personal Jurisdiction Objection

Plaintiff argues that the Foreign Banks have waived their objections as to personal jurisdiction by not raising them in their original motion to dismiss under Rule 12(b). (Pltf. Opp. to Motion to Dismiss for Lack of Personal Jurisdiction (Dkt. No. 157) at 17) Generally, a party waives any objection to personal jurisdiction by not raising it on a motion to dismiss under Rule 12(b). *See* Fed. R. Civ. P. 12(h)(1)(A) ("A party waives any defense listed in Rule 12(b)(2)-(5) by . . . omitting it from a motion described in Rule 12(g)(2)

[providing that a party who makes a motion under Rule 12(b) must not make another motion under Rule 12(b) raising a new defense or objection that was available but omitted from its earlier motion]"). However, Rule 12(g)(2) provides that only where "a defense or objection . . . was available to the party" does its omission from an earlier Rule 12(b) motion constitute waiver. Fed. R. Civ. P. 12(g)(2); *see Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009) ("'[A] party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made.'" (quoting *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981))).

Plaintiff argues that an objection as to personal jurisdiction was available to the Foreign Banks when they filed their original motion to dismiss in December 2013. (Pltf. Opp. to Motion to Dismiss for Lack of Personal Jurisdiction (Dkt. No. 157) at 18-19) In *Gucci America, Inc. v. Weixling Li*, 768 F.3d 122 (2d Cir. 2014), however, the Second Circuit ruled that a foreign bank similarly situated to the Foreign Banks in this case had not waived its objection to personal jurisdiction, even though the bank had not raised a personal jurisdiction objection in the district court:

> In *Daimler[AG v. Bauman*, 134 S.Ct. 746 (2014)], the Supreme Court for the first time addressed the question whether, consistent with due process, "a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary." 134 S.Ct. at 759. Assuming without deciding that such contacts may in some circumstances be imputed to the foreign parent, the

Court held that a corporation may nonetheless be subject to general jurisdiction in a state only where its contacts are so "continuous and systematic," judged against the corporation's national and global activities, that it is "essentially at home" in that state. *Id.* at 761-62. Aside from "an exceptional case," the Court explained, a corporation is at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company's formal place of incorporation or its principal place of business. *Id.* at 761 & n.19. In so holding, the Court expressly cast doubt on previous Supreme Court and New York Court of Appeals cases that permitted general jurisdiction on the basis that a foreign corporation was doing business through a local branch office in the forum. *See id.* at 735 n.18 (citing *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898)[;] *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259 (1917)) . . . .

We conclude that applying the Court's recent decision in *Daimler*, the district court may not properly exercise general personal jurisdiction over the Bank. Just like the defendant in Daimler, the nonparty Bank here has branch offices in the forum, but is incorporated and headquartered elsewhere. Further, this is clearly not "an exceptional case" where the Bank's contacts are "so continuous and systematic as to render [it] essentially at home in the forum." *Daimler*, 134 S.Ct. at 761 & n.19 (alteration in original) (quoting

Goodyear [Dunlop Tires Operations, S.A. v. Brown], 131 S.Ct. [2846,] 2851 [(2011)]). . . .

Although the Bank appeared in the district court and did not argue there that the court lacked personal jurisdiction, we also conclude that its objection to the exercise of general jurisdiction has not been waived. While arguments not made in the district court are generally waived, *see Datskow v. Teledyne, Inc., Cont'l Prods. Div.*, 899 F.2d 1298, 1303 (2d Cir. 1990), "a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made," *Hawknet*, 590 F.3d [at] 92 (citation omitted). Accordingly, we have held that a defendant does not waive a personal jurisdiction argument—even if he does not make it in the district court—if the "argument that the court lacked jurisdiction over [the] defendant would have been directly contrary to controlling precedent in this Circuit." *Id.* Prior to *Daimler*, controlling precedent in this Circuit made it clear that a foreign bank with a branch in New York *was* properly subject to general personal jurisdiction here . . . . Under prior controlling precedent of this Circuit, the Bank was subject to general jurisdiction because through the activity of its New York branch, it engaged in a "continuous and systematic course of doing business in New York." *Hoffritz [for Cutlery, Inc. v. Amajac, Ltd.*], 763 F.2d [55,] 58 [(2d Cir. 1985)]. Therefore, we conclude that the Bank did not waive its personal jurisdiction objection.

Gucci Am., 768 F.3d at 134-36.

Plaintiff argues that the test applied in *Daimler* was, in fact, established three years earlier in *Goodyear*, 131 S.Ct. at 2851 (2011). *See Daimler*, 134 S.Ct. at 751 ("In *Goodyear* . . . we addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction. As to the former, we held that a court may assert jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.' . . . Instructed by *Goodyear*, we conclude that Daimler is not 'at home' in California[.]" (quoting *Goodyear*, 131 S.Ct. at 2851)). Moreover, that same test was applied by the Second Circuit itself prior to *Daimler*. *See In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 674 (2d Cir. 2013) ("The Supreme Court recently noted that '[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.'" (alteration in original) (quoting *Goodyear*, 131 S.Ct. at 2853-54)).

Gucci America unequivocally holds, however, that *Daimler* effected a change in the law, providing defendants such as the Foreign Banks with a personal jurisdiction defense that was previously unavailable to them. *Gucci Am.*, 768 F.3d at 135-36. This Court is, of course, bound by *Gucci America*. Accordingly, the Foreign Banks have not waived their personal jurisdiction objection.

B. Specific Personal Jurisdiction

"In litigation arising under federal statutes that do not contain their own jurisdictional provisions, . . . federal courts are to apply the personal jurisdiction rules of the forum state, provided that those rules are consistent with the requirements of Due Process."[2] *Penguin Grp.*, 609 F.3d at 35 (internal citation omitted).

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[2] Before analyzing the forum state's rules regarding the exercise of personal jurisdiction, it is necessary to address the applicability of the nationwide personal jurisdiction provisions in the RICO statute and the Clayton Act. These federal laws provide the bases for two of Plaintiff's causes of action.

The Second Circuit has noted that the RICO statute "does not provide for nationwide personal jurisdiction over every defendant in every civil RICO case, no matter where the defendant is found. . . . [A] civil RICO action can only be brought in a district court where personal jurisdiction based on minimum contacts is established as to at least one defendant." *PT United Can Co. Ltd. v. Crown Cork & Seal Co.*, 138 F.3d 65, 71 (2d Cir. 1998). Additional defendants may be subject to nationwide personal jurisdiction, but "[t]his jurisdiction is not automatic[;] [it] requires a showing that the 'ends of justice' so require." *Id.* The "ends of justice" requirement is satisfied where "there is no district with personal jurisdiction over all defendants." *Id.* at 71 n.5; *see also Daly v. Castro Llanes*, 30 F. Supp. 2d 407, 413 (S.D.N.Y. 1998) ("The phrase 'ends of justice require' has been interpreted to mean that § 1965(b) authorizes an assertion of personal jurisdiction if, otherwise, the entire RICO claim could not be tried in one civil action.").

Only "if the allegations in the Complaint state[] a viable RICO claim, . . . would [it] be proper to exercise 'ends of justice' RICO jurisdiction," however. *Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 315 (S.D.N.Y. 2010); *see BWP Media USA Inc. v. Hollywood Fan Sites, LLC*, No. 14 Civ. 121(JPO), 2014 WL 6077247, at *4 (S.D.N.Y. Nov. 14, 2014) ("Plaintiffs 'cannot rely upon [the nationwide personal jurisdiction provisions of the RICO statute] to establish jurisdiction over each of the defendants' if

"[C]ontacts with [a] forum may confer two types of jurisdiction-specific and general." *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 449, 453 (S.D.N.Y. 2005) (footnote omitted). Plaintiff does not contend that there is any basis for the exercise of general jurisdiction here. *See* Pltf. Opp. to Motion to Dismiss for Lack of Personal Jurisdiction (Dkt. No. 157) at 10-14 (arguing only that "[e]xercising [s]pecific [j]urisdiction [o]ver Defendants is [p]roper"); Oct. 24, 2014 Pltf. Ltr. (Dkt. No. 134) at 1 ("General personal jurisdiction is irrelevant here . . . ."). "Specific jurisdiction exists when a forum 'exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum.'" *Id.* (quoting *Metro. Life Ins. Co.*, 84 F.3d at 567-68 (internal quotation marks and citation omitted)).

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the RICO claim is dismissed." (quoting *Cont'l Petroleum Corp. v. Corp. Funding Partners, LLC*, No. 11 Civ. 7801(PAE), 2012 WL 1231775, at *8 (S.D.N.Y. Apr. 12, 2012))). Here—as discussed below—Plaintiff's RICO claim is barred by the statute of limitations and by *res judicata*. Accordingly, this Court cannot apply the RICO statute's nationwide personal jurisdiction provisions.

Application of the nationwide personal jurisdiction provisions of the Clayton Act would be improper for the same reason: as discussed below, Plaintiff has failed to state an antitrust claim. Where there is no valid antitrust claim, it necessarily follows that Plaintiff cannot rely on an antitrust statute's personal jurisdiction provisions. *Cf. id.*; *Elsevier Inc*, 692 F. Supp. 2d at 315.

Because the provisions in the Clayton Act and the RICO statute authorizing nationwide personal jurisdiction are not applicable here, this Court will "apply the personal jurisdiction rules of the forum state, provided that those rules are consistent with the requirements of Due Process." *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 35 (2d Cir. 2010) (internal citations omitted).

1. **Specific Personal Jurisdiction Under New York Law**

New York's long-arm statute provides, in relevant part, that a court may exercise specific personal jurisdiction over a non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state," where plaintiff's claim arises out of that transaction of business or contract. N.Y. C.P.L.R. § 302(a)(1). To establish personal jurisdiction under this section, plaintiff must show that "(1) defendant purposefully availed himself of the privilege of doing business in the forum state such that the defendant could foresee being brought into court there; and (2) plaintiff's claim arises out of or is related to the defendant's contacts with the forum state." *Aqua Prods., Inc. v. Smartpool, Inc.*, No. 04 Civ. 5492 (GBD), 2005 WL 1994013, at *5 (S.D.N.Y. Aug. 18, 2005) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 508, 414 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Chew v. Dietrich*, 143 F.3d 24, 28 (2d Cir. 1998)).

"A court will have personal jurisdiction over a defendant, pursuant to § 302(a)(2), if the defendant 'commits a tortious act within the state.'" *Virgin Enters. Ltd. v. Virgin Eyes LAC*, No. 08 Civ. 8564 (LAP), 2009 WL 3241529, at *4 (S.D.N.Y. Sept. 30, 2009) (quoting N.Y. C.P.L.R. § 302(a)(2)). "[T]he New York Court of Appeals has interpreted [this] subsection to reach only tortious acts performed by a defendant who was physically present in New York when he committed the act." *Id.* (citing *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 460 (1965) ("Any possible doubt on this score is dispelled by the fact that the draftsmen of section 302 pointedly

announced that their purpose was to confer on the court 'personal jurisdiction' over a non-domiciliary whose act in the state gives rise to a cause of action or, stated somewhat differently, 'to subject non-residents to personal jurisdiction when they commit acts within the state.'") (citations omitted)). "[I]n *Bensusan Restaurant Corp. v. King*, the [Second Circuit] declined to deviate from the New York Court of Appeals' decision in *Longines-Wittnauer* . . . ." *Id.* (citing *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 29 (2d Cir. 1997)).

Section 302(a)(3) allows for "a nondomiciliary who 'commits a tortious act without the state causing injury . . . within the state' [to] be brought before a New York court to answer for his conduct if he has had sufficient economic contact with the State or an active interest in interstate or international commerce coupled with a reasonable expectation that the tortious conduct in question could have consequences within the State." *McGowan v. Smith*, 52 N.Y.2d 268, 273 (1981) (quoting N.Y. CPLR § 302(a)(3)). Under Section 302(a)(3), any non-domiciliary who in person or through an agent "'commits a tortious act without the state causing injury to person or property within the state'" may be subject to personal jurisdiction if he

> "(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . ."

Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 790-91 (2d Cir. 1999) (quoting N.Y. CPLR § 302(a)(3)).

2. Due Process Limits on the Exercise of Specific Personal Jurisdiction

To satisfy the Due Process Clause, "the nonresident generally must have 'certain minimum contacts . . . such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Walden v. Fiore*, 134 S.Ct. 1115, 1121 (2014) (quoting *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. and Placement*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))). "The inquiry [with respect to specific, personal jurisdiction] . . . 'focuses on "the relationship among the defendant, the forum, and the litigation."'" *Id.* (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977))). Accordingly, for this Court "to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum state." *Id.*

Moreover, "the relationship [between the defendant's suit-related conduct and the forum] must arise out of contacts that the 'defendant *himself*' creates with the forum . . . ." *Id.* at 1122 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)) (emphasis in original). And the " 'minimum contacts' analysis looks to the defendant's contacts with the forum . . . itself, not the defendant's contacts with persons who reside there." *Id.* While "a defendant's contacts with the forum . . . may be intertwined with his transactions or interactions with the plaintiff or other

parties," these relationships, "standing alone, [are] an insufficient basis for jurisdiction." *Id.* at 1123. "Due process requires that a defendant be haled into court in a forum . . . based on his own affiliation with the [forum], not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the [forum]." *Id.* (quoting *Burger King*, 471 U.S. at 475). In this regard, "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 1125.

A defendant need not have committed a physical act within the forum state, however, for his contacts with the forum to be sufficient; the test may also be satisfied where "an act performed elsewhere[] causes an effect in the [forum]." *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F. Supp. 81, 87 (S.D.N.Y. 1995) (citing *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990)) (applying minimum contacts analysis in context of Fed. R. Civ. P. Rule 4(k)(2)). Indeed, in *Walden*, the Supreme Court discussed at length how the effects of a defendant's conduct can tie the defendant sufficiently to a forum to permit the exercise of personal jurisdiction. Justice Thomas explained that

> [t]he crux of *Calder* [—a case finding specific personal jurisdiction in California where a Florida-based paper published a defamatory article about a California actress—] was that the reputation-based "effects" of the alleged libel connected the defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort. However scandalous a

> newspaper article might be, it can lead to a loss of reputation only if communicated to (and read and understood by) third persons . . . . Accordingly, the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens. Indeed, because publication to third persons is a necessary element of libel, . . . the defendants' intentional tort actually occurred *in* California. . . . In this way, the "effects" caused by the defendants' article—*i.e.*, the injury to the plaintiff's reputation in the estimation of the California public—connected the defendants' conduct to *California*, not just to a plaintiff who lived there. That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction.

Walden, 134 S.Ct. at 1123-24 (emphasis in original) (footnote omitted).

In this Circuit, "where 'the conduct that forms the basis for the controversy occurs entirely out-of-forum, and the only relevant jurisdictional contacts with the forum are therefore in-forum effects harmful to the plaintiff,'" a court is to employ "an 'effects test,' by which 'the exercise of personal jurisdiction may be constitutionally permissible if the defendant expressly aimed its conduct at the forum.'" *Tarsavage v. Citic Trust Co., Ltd.*, 3 F. Supp. 3d 137, 145 (S.D.N.Y. 2014) (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 173 (2d Cir. 2013) (citing *Calder*,

465 U.S. at 789)). It is not sufficient that conduct incidentally had an effect in the forum, or even that effects in the forum were foreseeable. *See id.* (citing *In re Terrorist Attacks*, 714 F.3d at 674) Instead, the defendant must have intentionally caused—*i.e.*, expressly aimed to cause—an effect in the forum through his conduct elsewhere. *See id.* (citing *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 95 (2d Cir. 2008), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010)).

3. Analysis

Plaintiff alleges that "[t]his Court has personal jurisdiction over each of the Defendants by virtue of their business activities in this District." (Am. Cmplt. (Dkt. No. 95) ¶ 12) Plaintiff must demonstrate that the Foreign Banks' *suit-related* conduct creates minimum contacts with New York, however, not simply that the Foreign Banks have a presence here or conduct business activities here in general. *Walden*, 134 S.Ct. at 1121. General contacts with New York are not sufficient to establish specific personal jurisdiction. There is precious little in the Amended Complaint demonstrating a connection between the Foreign Banks' alleged suit-related conduct and New York, and there are no allegations demonstrating that any such relationship arose out of contacts that the Foreign Banks created with New York. *See id.* at 1122-23.

Only two paragraphs in the 72-page Amended Complaint (*see* Am. Cmplt. (Dkt. No. 95) ¶¶ 64-65) even hint at a connection between New York and the Foreign Banks' suit-related conduct. In those paragraphs, Plaintiff quotes from a June 6, 2013 *Wall Street Journal* article reporting that "'several former

Barclays derivatives traders and other employees who worked in the bank's New York office'" are under investigation by the U.S. Department of Justice, and that "'Barclays has fired several employees . . . for their alleged roles in attempted Libor manipulation.'" (*Id.* ¶ 64) The Journal article goes on to state that the two Barclays employees who were fired "'engaged in communications involving inappropriate requests relating to Libor.'" *See id.* ¶ 65. As to the Foreign Banks other than Barclays, nothing of this sort is pled. As to Barclays, these allegations are not sufficient to demonstrate the necessary connection between its alleged suit-related conduct and New York, much less that any relationship between this conduct and New York arose out of contacts that Barclays created with New York. *See Walden*, 134 S.Ct. at 1121-23. Indeed, Plaintiff has not pled facts suggesting that the conduct of the two Barclays employees has any connection with the injury suffered by Solow, or that the misconduct alluded to in the article took place within the relevant time period—September 12, 2008 to October 10, 2008, according to Paragraphs 151, 153-54, 157 of the Amended Complaint.

Accepting the Amended Complaint's allegations that Solow resided in New York and was injured here, due process requires more for the exercise of personal jurisdiction. The Foreign Banks' suit-related conduct must tie them to New York *itself*, not just to a plaintiff who happens to reside in New York. *Walden*, 134 S.Ct. at 1121-22.

The Amended Complaint likewise does not satisfy the "effects test," which requires factual allegations demonstrating that the Foreign Banks' suit-related conduct was "'expressly aimed'" at New York, in

addition to having an effect here. *Tarsavage*, 3 F. Supp. 3d at 145 (quoting *Licci*, 732 F.3d at 173). Plaintiff alleges that "[t]he municipal bonds in the Solow portfolio were issued by New York governmental entities," and conducts a statistical analysis of LIBOR's relationship to a New York bond index that is "an index of bonds similar to those in the Solow portfolio." (Am. Cmplt. (Dkt. No. 95) ¶ 156) Plaintiff further alleges that the Foreign Banks' LIBOR manipulations caused the value of Solow's bond portfolio-which contained New York municipal bonds—to fall below the minimum required threshold for his loans' collateral. (*Id.* ¶ 163 ("The purported impairment of Plaintiff's bond portfolio, seizure of the portfolio and cash, the low prices realized in the collateral sale and inflated LIBOR-denominated contract and 'default' interest rates and imposition of fees and expenses *were the result of Defendants' collective manipulations of LIBOR*.") (emphasis added))

Assuming *arguendo* that these allegations are sufficient to demonstrate an effect in New York, Plaintiff has not alleged facts demonstrating that the Foreign Banks "'expressly aimed'" their conduct at New York or its municipal bond markets. *See Tarsavage*, 3 F. Supp. 3d at 145 (quoting *Licci*, 732 F.3d at 173). Accepting that (1) the artificial inflation of LIBOR caused interest rates to increase; (2) the increase in interest rates caused the value of Solow's bond portfolio to fall below the required threshold; and (3) the negative effect on Solow's portfolio was a foreseeable result of the Foreign Banks' alleged LIBOR manipulation, "the fact that harm in the forum is foreseeable . . . is insufficient for the purpose of establishing specific personal jurisdiction over a defendant." *In re Terrorist*

Attacks, 714 F.3d at 674. Because the Amended Complaint does not plead facts demonstrating that the LIBOR manipulation was done with the express aim of causing an effect in New York, the "effects test" is not satisfied. *See Tarsavage*, 3 F. Supp. 3d at 145.

This Court does not have specific personal jurisdiction over the Foreign Banks.

C. Consent to Personal Jurisdiction

Plaintiff argues that some of the Foreign Banks have consented to general personal jurisdiction in New York by virtue of their registration with the New York Department of Financial Services and designation of an agent for service of process in New York. (Pltf. Opp. to Motion to Dismiss for Lack of Personal Jurisdiction (Dkt. No. 157) at 4-10) Plaintiff cites a number of cases for the proposition that such registration and designation amounts to consent to general personal jurisdiction in New York. *See id.* None of these cases are on point, however, because they address registration under provisions of New York law different from those under which the Foreign Banks are registered.

The Foreign Banks are registered under New York Banking Law § 200, which provides that foreign banks operating in New York must "appoint[] the superintendent and his or her successors as its true and lawful attorney, upon whom all process in any action or proceeding against it on a cause of action *arising out of a transaction with its New York agency or agencies or branch or branches*, may be served . . . ." N.Y. Banking Law § 200(3) (emphasis added). The plain language of this provision limits any consent to personal jurisdiction by registered banks to *specific* personal jurisdiction. *See Gliklad v. Bank Hapoalim B.M.*,

No. 115/95/2014 2014 N.Y. Slip Op 32117(U), at *5 (Sup. Ct. N.Y. Cnty. Aug. 4, 2014) (Section 200 "provid[es] for the exercise of specific jurisdiction, not general.").

The cases cited by Plaintiff address different registration and licensing provisions, which do not contain the same language limiting consent to claims arising out of the activities of a New York branch or agency. *See, e.g.*, *The Rockefeller Univ. v. Ligand Pharms.*, 581 F. Supp. 2d 461, 464-66 (S.D.N.Y. 2008) (registration under N.Y. Business Corporation Law § 1304(6) constitutes consent to general jurisdiction). Under the plain language of New York Banking Law § 200 and the holding in *Gliklad*—the only case cited that addresses Section 200—this Court concludes that the Foreign Banks have not consented to general personal jurisdiction in New York.

D. Jurisdiction Premised on Co-Conspirators' Acts

Plaintiff also argues that "[t]he Court may . . . exercise personal jurisdiction over the [Foreign Banks] based on the acts committed by their co-conspirators." (Pltf. Opp. to Motion to Dismiss for Lack of Personal Jurisdiction (Dkt. No. 157) at 16) To establish that personal jurisdiction based on the acts of a co-conspirator is appropriate, a plaintiff must demonstrate that "'(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control or at the request of or on the behalf of the out-of-state defendant.'" *Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d

424, 442-43 (S.D.N.Y. 2008) (quoting *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 805 (S.D.N.Y. 2005) (citations and internal quotation marks omitted)).

The Amended Complaint does not plead sufficient facts to satisfy these requirements. Although Plaintiff repeatedly asserts that the Defendants conspired to injure Solow (*see, e.g.*, Am. Cmplt. (Dkt. No. 95) ¶¶ 33-35, 175-177, 192, 202-204), these allegations are conclusory, and the Court cannot "credit 'mere conclusory statements' or '[t]hreadbare recitals of the elements of a cause of action.'" *Tarsavage*, 3 F. Supp. 3d at 144 (quoting *Iqbal*, 556 U.S. at 678).

Plaintiff attempts to support its conclusory allegations by citing guilty pleas, settlements, and accompanying admissions, along with "econometric evidence" of Defendants' LIBOR manipulation. *See* Pltf. Opp. to Motion to Dismiss (Dkt. No. 119) at 35; Am. Cmplt. (Dkt. No. 95) ¶¶ 56-157. Plaintiff has not shown, however, how the banks' guilty pleas, settlements, or admissions demonstrate a conspiracy to cause injury to Solow.

As to Plaintiff's "econometric evidence," Plaintiff's theory appears to be that the LIBOR rates reported during the relevant time period were higher than they would have been absent a conspiracy among the banks to inflate their LIBOR submissions. However, Plaintiff concedes that the studies on which it relies concluded that (1) "'[i]f banks were truthfully quoting their costs, . . . we would expect [their] distributions to be similar'" (*id.* ¶ 143 (quoting Connan Snider and Thomas Youle, *Does the LIBOR Reflect Banks' Borrowing Costs?* (April 2, 2010)), and (2) the unexpected pattern of divergence between LIBOR quotes and certain other

economic indicators "'cannot establish the presence of a conspiracy or a manipulation of the LIBOR rate, [although] certain patterns do "flag" such a possibility.'" (*Id.* ¶ 144 (quoting Rosa M. Abrantes-Metz, Michael Kraten, Albert D. Metz, and Gim S. Seow, *LIBOR Manipulation?*, 36 Journal of Banking & Finance 136, 149 (2012)) Analysis that "flags the possibility" of a conspiracy is not sufficient to meet the plausibility test under *Iqbal*. *See Iqbal*, 556 U.S. at 678 (claim for relief must be "plausible on its face").

In any event, Plaintiff has not explained how its allegations are sufficient to satisfy the necessary elements for co-conspirator personal jurisdiction set forth above. *See* Pltf. Opp. to Motion to Dismiss for Lack of Personal Jurisdiction (Dkt. No. 157) at 16. This Court concludes that personal jurisdiction over the Foreign Banks cannot be predicated on this theory.

E. Personal Jurisdiction Under Fed. R. Civ. P. 4(k)(2)

Fed. R. Civ. P. 4(k)(2) provides a basis for "the exercise of personal jurisdiction by a federal district court when three requirements are met: (1) the claim must arise under federal law; (2) the defendant must not be 'subject to jurisdiction in any state's courts of general jurisdiction'; and (3) the exercise of jurisdiction must be 'consistent with the United States Constitution and laws.'" *Porina v. Marward Shipping Co.*, 521 F.3d 122, 127 (2d. Cir. 2008) (quoting Fed. R. Civ. P. 4(k)(2)). Rule 4(k)(2) "fill[s] a gap in the enforcement of federal law for courts to exercise personal jurisdiction over defendants with sufficient contacts with the United States generally, but insufficient contacts with any one state in particular." *In re Terrorist Attacks*,

349 F. Supp. 2d at 807 (citations and internal quotation marks omitted).

Here, Plaintiff has alleged claims under three federal statutes: the Sherman Act, the Clayton Act, and the RICO Act. (Am. Cmplt. (Dkt. No. 95) ¶ 1).

"As to the second element, although the Court has already found that Defendants are not subject to personal jurisdiction in New York, Plaintiffs have not certified that Defendants are not subject to jurisdiction in any other state." *Tamam v. Fransabank Sal*, 677 F. Supp. 2d 720, 731 (S.D.N.Y. 2010). Accordingly, the second prerequisite for application of Rule 4(k)(2) has not been met. *See id.* A contrary holding would encourage similarly-situated plaintiffs—those suing foreign corporations under federal law—to omit any allegations tying defendants to a specific state, in hopes of engaging the broader minimum contacts analysis of Rule 4(k)(2), which only requires contacts with the United States as a whole. *See Porina*, 521 F.3d at 127. Because Plaintiff has not alleged all of the elements required for the exercise of personal jurisdiction under Rule 4(k)(2), this Court declines to apply that provision here.

* * * *

Because this Court does not have personal jurisdiction over the Foreign Banks, Plaintiffs' claims against them will be dismissed.[3]

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[3] On February 20, 2015, Plaintiff requested leave to submit a supplemental declaration in opposition to the Foreign Banks' motion to dismiss for lack of personal jurisdiction. (Dkt. No. 169) Certain of the Foreign Banks object to Plaintiff's proposed

III. ANTITRUST CLAIM

Plaintiff alleges that the Defendants violated Section 1 of the Sherman Act by conspiring to "fix[], maintain[] or ma[ke] artificial prices for LIBOR-based financial instruments, including [Solow's] loans and bond portfolio." (Am. Cmplt. (Dkt. No. 95) ¶ 176) All Defendants have moved to dismiss this claim, arguing, *inter alia*, that Plaintiff has failed to allege an antitrust injury. (Def. Br. (Dkt. No. 115) at 24-29)

A. Antitrust Injury

Section 1 of the Sherman Act provides that "[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, is declared to be illegal." 15 U.S.C. § 1. The private right of action to enforce this provision is set forth in Section 4 of the Clayton Act. *See* 15 U.S.C. § 15.

In order for "[a] private plaintiff . . . [to] recover damages under § 4 of the Clayton Act[,] . . . [the] plaintiff must prove the existence of '*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)) (emphasis in original). "[I]njury,

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supplemental submission. (Dkt. No. 171) Leave is granted to file the supplemental declaration, but it does not alter the Court's analysis. While the supplemental declaration provides more information concerning certain Foreign Banks' general contacts with New York, it does not assist Plaintiff in demonstrating that the Foreign Banks' *suit-related* conduct ties them to this forum.

although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny . . . ." *Id.* "The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *Id.* at 344 (emphasis omitted). Accordingly, a plaintiff must demonstrate not only an injury resulting from the defendant's conduct, but also that the injury "'is the type of injury contemplated by the [antitrust] statute.'" *Nichols v. Mahoney*, 608 F. Supp. 2d 526, 544 (S.D.N.Y. 2009) (quoting *Arista Records LLC v. Lime Grp. LLC*, 532 F. Supp. 2d 556, 568 (S.D.N.Y. 2007)).

"[P]roof of a *per se* violation [of the Sherman Act] and of antitrust injury are distinct matters that must be shown independently." *Atl. Richfield*, 495 U.S. at 344 (quotation omitted). Accordingly, "even in cases involving *per se* violations [of the Sherman Act], the right of action under § 4 of the Clayton Act is available only to those private plaintiffs who have suffered antitrust injury." *Id.*

The Second Circuit "employ[s] a three-step process for determining whether a plaintiff has sufficiently alleged antitrust injury." *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 76 (2d Cir. 2013).

> First, the party asserting that it has been injured by an illegal anticompetitive practice must "identify[] the practice complained of and the reasons such a practice is or might be anticompetitive." [*Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 122 (2d Cir. 2007).] Next, [courts] identify the "actual injury the plaintiff alleges." *Id.* This requires

> [courts] to look to the ways in which the plaintiff claims it is in a "worse position" as a consequence of the defendant's conduct. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977). Finally, [courts] "compar[e]" the "anticompetitive effect of the specific practice at issue" to "the actual injury the plaintiff alleges." *Port Dock*, 507 F.3d at 122. It is not enough for the actual injury to be "causally linked" to the asserted violation. *Brunswick*, 429 U.S. at 489. Rather, in order to establish antitrust injury, the plaintiff must demonstrate that its injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes [or might make] defendants' acts unlawful." [*Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 438 (2d Cir. 2005)] (internal quotation marks omitted).

Gatt Commc'ns, Inc., 711 F.3d at 76.

B. In re LIBOR-Based Financial Instruments Antitrust Litigation

In *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 686, *reconsideration denied*, 962 F. Supp. 2d 606 (S.D.N.Y. 2013), *appeal dismissed*, Nos. 13-3565 (L); 13-3636 (Con), 2013 WL 9557843 (2d Cir. Oct. 30, 2013), *rev'd and remanded sub nom. Gelboim v. Bank of Am. Corp.*, 135 S.Ct. 897 (2015) (the "MDL"), a court in this District addressed the question of whether plaintiffs sufficiently pled an "antitrust injury" resulting from Contributor Panel

banks' manipulation of USD-LIBOR.[4] The MDL consists of "private lawsuits by persons who allegedly suffered harm as a result of the suppression of LIBOR." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d at 676. Plaintiffs in the MDL fall into four categories: (1) plaintiffs who "purchased in the United States, directly from a [d]efendant, a financial instrument that paid interest indexed to LIBOR . . . [and allegedly] received lower payments from defendants [due to the suppression of LIBOR]"; (2) "[plaintiffs] who owned . . . U.S. dollar-denominated debt securit[ies] . . . on which interest was payable . . . at a rate expressly linked to the U.S. Dollar Libor rate . . . [and allegedly] 'receiv[ed] manipulated and artificially

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[4] As discussed at length below, the district court in *In re LIBOR-Based Fin. Instruments Antitrust Litig.* dismissed plaintiffs' antitrust claim on the ground that they had not pled an antitrust injury. On reconsideration, the district court denied plaintiffs leave to amend, finding that any amendment would be futile. 962 F. Supp. 2d 606. Plaintiffs appealed, but the Second Circuit "determined sua sponte that it lack[ed] jurisdiction over [plaintiffs'] appeal because a final order ha[d] not been issued by the district court . . . and the orders appealed from did not dispose of all the claims in the consolidated action." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2013 WL 9557843, at *1. The Supreme Court granted certiorari on the jurisdiction question and reversed in *Gelboim v. Bank of Am. Corp. See Gelboim*, 135 S.Ct. at 906. The Supreme Court held that the plaintiffs whose antitrust claims were dismissed without leave to amend are entitled to an immediate appeal of the district court's decision, despite the continued pendency of certain other claims in the MDL. *See id.* at 905-06 ("The District Court's order dismissing the . . . complaint for lack of antitrust injury, without leave to amend, had the hallmarks of a final decision."). Accordingly, the Court "reverse[d] the judgment of the . . . Second Circuit deeming the District Court's dismissal of the . . . complaint unripe for appellate review, and . . . remand[ed] the case for further proceedings[.]" *Id.* at 906.

depressed amounts of interest' [due to the suppression of LIBOR]"; (3) plaintiffs who purchased Eurodollar contracts at "supracompetitive prices" because "defendants' suppression of LIBOR caused Eurodollar contracts to trade and settle at artificially high prices"; and (4) plaintiffs who held or purchased LIBOR-based financial instruments that paid a rate of return "directly based on LIBOR," or who purchased fixed-rate based instruments that they "decided to purchase by comparing the instruments' fixed rate of return with LIBOR. . . ." *See id.* at 681-84.

In the MDL, "plaintiffs . . . alleged that defendants violated the Sherman Act through a horizontal price-fixing conspiracy . . . . which [was] . . . unlawful . . . [in] its effect of restraining competition." *Id.* at 686 n.7. In particular, plaintiffs claimed that "defendants violated the antitrust laws by conspiring to set LIBOR at an artificial level." *Id.* at 688.

As to antitrust injury, plaintiffs alleged that

> Defendants' anticompetitive conduct had severe adverse consequences on competition in that [plaintiffs] who traded in LIBOR-Based [financial instruments] during the Class Period were trading at artificially determined prices that were made artificial as a result of Defendants' unlawful conduct. As a consequence thereof, [plaintiffs] suffered financial losses and were, therefore, injured in their business or property.

Id. at 688 (alterations in original) (citation and quotation marks omitted).

After conducting an exhaustive analysis of the facts concerning LIBOR-setting and the case law

surrounding antitrust injury, Judge Buchwald concluded in a March 29, 2013 opinion that "plaintiffs' allegations d[id] not make out a plausible argument that they suffered an antitrust injury . . . ." *Id.* at 695. "Plaintiffs, therefore, d[id] not have standing to bring claims pursuant to the Clayton Act." *Id.* "Accordingly, plaintiffs' antitrust claims [were] dismissed." *Id.*

In reaching this conclusion, Judge Buchwald found that

> [a]lthough [plaintiffs'] allegations might suggest that defendants fixed prices and thereby harmed plaintiffs, they do not suggest that the harm plaintiffs suffered resulted from any anticompetitive aspect of defendants' conduct. As plaintiffs rightly acknowledged at oral argument, the process of setting LIBOR was never intended to be competitive. Rather, it was a cooperative endeavor wherein otherwise-competing banks agreed to submit estimates of their borrowing costs to the BBA each day to facilitate the BBA's calculation of an interest rate index. Thus, even if we were to credit plaintiffs' allegations that defendants subverted this cooperative process by conspiring to submit artificial estimates instead of estimates made in good faith, it would not follow that plaintiffs have suffered *antitrust injury*. Plaintiffs' injury would have resulted from defendants' misrepresentation, not from harm to competition.

Id. at 688 (emphasis added) (internal citations omitted).

In addition to finding that the LIBOR-setting process was a cooperative and not a competitive exercise, Judge Buchwald concluded that the LIBOR manipulation that Defendants allegedly engaged in was not anti-competitive in its effects:

> [W]ith regard to the market for LIBOR-based financial instruments, plaintiffs have not alleged that defendants' alleged fixing of LIBOR caused any harm to competition between sellers of those instruments or between buyers of those instruments. Plaintiffs' allegation that the prices of LIBOR-based financial instruments "were affected by Defendants' unlawful behavior," such that "Plaintiffs paid more or received less than they would have in a market free from Defendants' collusion," might support an allegation of price fixing but does not indicate that plaintiffs' injury resulted from an anticompetitive aspect of defendants' conduct. In other words, it is not sufficient that plaintiffs paid higher prices because of defendants' collusion; that collusion must have been anticompetitive, involving a failure of defendants to compete where they otherwise would have. Yet here, undoubtedly as distinguished from most antitrust scenarios, the alleged collusion occurred in an arena in which defendants never did and never were intended to compete.
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> . . .
>
> [T]here was similarly no harm to competition in the interbank loan market. As discussed above, LIBOR is an index intended to convey information about the interest rates pre-

> vailing in the London interbank loan market, but it does not necessarily correspond to the interest rate charged for any actual interbank loan. Plaintiffs have not alleged that defendants fixed prices or otherwise restrained competition in the interbank loan market, and likewise have not alleged that any such restraint on competition caused them injury. Plaintiff's theory is that defendants competed normally in the interbank loan market and then agreed to lie about the interest rates they were paying in that market when they were called upon to truthfully report their expected borrowing costs to the BBA. This theory is one of misrepresentation, and possibly of fraud, but not of failure to compete.

Id. at 688-89 (footnote and citation omitted).[5]

In the absence of a "loss stem[ming] from a competition-reducing aspect or effect of the defendant[s'] behavior," *Atl. Richfield*, 495 U.S. at 344 (emphasis omitted), Judge Buchwald concluded that plaintiffs "d[id] not make out a plausible argument that they suffered an antitrust injury." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d at 695. Accordingly, she dismissed Plaintiffs' antitrust claims. *Id.*

At least one other court in this District has likewise concluded in a LIBOR-fixing case that plaintiff had failed to plausibly allege antitrust injury. In

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[5] Contrary to Plaintiff's contention, Judge Buchwald did not "rel[y] exclusively on Defendants' conduct and not on the effects thereof . . . ." (Pltf. Br. (Dkt. No. 119) at 33 n.19) Judge Buchwald considered the effects of Defendants' conduct on the relevant markets.

Laydon v. Mizuho Bank, Ltd., No. 12 Civ. 3419 (GBD), 2014 WL 1280464, at *8 (S.D.N.Y. Mar. 28, 2014), the plaintiff alleged "that he initiated short positions in CME Euroyen TIBOR futures contracts during the Class Period and suffered net losses on such contracts due to the presence of artificial Euroyen TIBOR futures prices proximately caused by Defendants' unlawful manipulation and restraint of trade." *Id.* (internal citations and quotation marks omitted). Judge Daniels ruled that "[p]laintiff fail[ed] to plead an antitrust injury," because he "fail[ed] to plead facts sufficient to establish that this [conduct] 'is or might be anticompetitive.'" *Id.* (quoting *Gatt Commc'ns, Inc.*, 711 F.3d at 76). "At most, Plaintiff allege[d] that prices were distorted." *Id.* Judge Daniels found, however, that "the setting of the USD LIBOR benchmark rate is not competitive; rather it is a cooperative effort wherein otherwise competing banks agreed to submit estimates of their borrowing costs to facilitate calculation of an interest rate index." *Id.* Accordingly, the plaintiff's antitrust claim was dismissed. *Id.* at *10.

C. <u>Analysis</u>

Although Plaintiff claims that "the decision in the *LIBOR* MDL has no bearing on the instant case" (Pltf. Br. (Dkt. No. 119) at 32), the theory of antitrust injury in the MDL and in the instant case is essentially the same. In both actions, plaintiffs claim that defendants manipulated USD-LIBOR in such a way as to cause plaintiffs to suffer financial losses. The allegations regarding the manner in which defendants allegedly manipulated LIBOR—through the submission of artificial rates from Contributor Panel banks to the BBA—are the same in both actions. *Compare In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp.

2d at 678-81, *with* (Am. Cmplt. (Dkt. No. 95) ¶¶ 5-9, 39, 50-137).

Plaintiff attempts to dodge the effect of Judge Buchwald's reasoning and determinations by alleging in the Amended Complaint that the LIBOR-setting process is competitive. *See, e.g.*, Am. Cmplt. (Dkt. No. 95) ¶¶ 39, 44, 38, 39. Plaintiff asserts that the "[MDL] plaintiffs neglected to allege that the LIBOR setting process was competitive, and in fact conceded that it was not during oral argument." (Pltf. Br. (Dkt. No. 119) at 24) Plaintiff argues that—by contrast—it has "specifically allege[d] that LIBOR is a competitively-set rate, [and] that Defendants participate in a daily contest in the marketplace, and [Plaintiff] devotes entire sections of the [Amended Complaint] to explaining the competitive nature of the industry." (*Id.*)

In the Amended Complaint, Plaintiff alleges that Defendants "set LIBOR in a process that produces competitively determined daily USD-LIBOR rates and establishes a daily contest between the Defendants to, among other things, signal their relative strength in terms of prestige, credit risk, access to funding, and liquidity." (Am. Cmplt. (Dkt. No. 95) ¶ 39) In support of its claim, Plaintiff alleges that (1) contributor banks are required under BBA rules to independently exercise their own good faith judgment in determining their individual submissions, which reflect their daily competitive postures; (2) banks are further required under BBA rules to keep their submissions confidential before the BBA publishes the daily rate; and (3) the BBA—through Thomson Reuters—publishes the individual banks' daily submissions in announcing USD-LIBOR. (*Id.* ¶¶ 45-48) Plaintiff claims that "[t]he[s]e three key [aspects of the LIBOR-setting

process] were designed to ensure that LIBOR would be based on day-to-day competition in the interbank funding markets and elsewhere. . . . LIBOR could not reflect and move day-to-day based on actual competitive conditions if it was not based upon independent, good faith submissions of the individual panel banks." (*Id.* ¶ 48)

Judge Buchwald correctly rejected this theory of antitrust injury and portrait of the LIBOR-setting process as entirely implausible, however, when plaintiffs in the MDL action moved for leave to amend their antitrust claims after dismissal. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 962 F. Supp. 2d at 627. In denying leave to amend, Judge Buchwald noted that "Plaintiffs' allegations [in their proposed second amended complaints] include new ways of packaging previously known facts, such as arguing that the LIBOR-setting rules themselves give rise to competition, and new theories for how defendants compete, such as that they compete over their creditworthiness, that they compete to offer customers the best interest rate benchmark on financial instruments, or that they compete by 'keeping other banks honest' and reporting any improper conduct by them." *Id.* Judge Buchwald concluded, however, that plaintiffs' new allegations were not plausible and therefore did not sufficiently allege antitrust injury:

> [R]egardless of the creativity they display, none of plaintiffs' allegations make plausible that there was an arena in which competition occurred, that defendants' conduct harmed such competition, and that plaintiffs suffered injury as a result. Even where plaintiffs have identified a market in which defendants are,

> in fact, competitors, they have not plausibly alleged that each defendant failed to act in its independent individual self-interest. In other words, even if we grant that plaintiffs have alleged a vertical effect—that they suffered harm as a result of defendants' conduct—they have not plausibly alleged a horizontal effect—that the process of competition was harmed because defendants failed to compete with each other or otherwise interacted in a manner outside the bounds of legitimate competition.

Id. at 627-28.

Similarly here, Plaintiffs allegations that the LIBOR-setting process is "competitive" are not plausible on their face. Indeed, it is obvious that the LIBOR-setting process is a cooperative and not a competitive exercise. *See Laydon*, 2014 WL 1280464, at *8 ("the setting of the USD LIBOR benchmark rate is not competitive; rather it is a cooperative effort wherein otherwise competing banks agreed to submit estimates of their borrowing costs to facilitate calculation of an interest rate index"). Under the BBA rules, each bank was required to use its own "good faith judgment about the interest rate that [the bank] would be required to pay"—not to submit rates that were competitive with those submitted by other banks. (Am. Cmplt. (Dkt. No. 95) ¶ 45) Moreover, as the Amended Complaint acknowledges, "a Contributor Panel bank's LIBOR submissions [were] not [to] be influenced by its motive to maximize profit or minimize losses in derivatives transactions tied to LIBOR." (*Id.* ¶ 44 (citation and quotation marks omitted)) This allegation supports the notion that, in setting LIBOR, the banks were not

competing with one another, but instead were participating in a collective exercise aimed at generating an objective, "good faith" benchmark, based on which there would be competition. The fact that the benchmark set as a result of the LIBOR-setting process would be a basis for competition does not mean that the cooperative process of collecting submissions used to set LIBOR was a competitive exercise. It was not.

Plaintiff argues, however, that "several other aspects of the LIBOR setting process . . . demonstrate that LIBOR setting is a competitive process," including that (1) Thomson Reuters—an agency independent of the BBA—collects, calculates, and publishes the daily LIBOR; (2) any bank that trades in the London market can apply to be on a Contributor Panel; and (3) the interquartile averaging method prevents individual or small groups of banks from influencing LIBOR with false submissions. (*Id.* ¶ 49)

None of these allegations have anything to do with the issue of whether the submission process is competitive. The fact that an outside agency performs the ministerial tasks of collecting, calculating, and publishing the rates says nothing about whether the process is competitive. Likewise, the fact that other banks can apply to join a Contributor Panel does not demonstrate that rates were being competitively submitted. Similarly, the use of the interquartile averaging method suggests a collaborative process, rather than a competitive one. To the extent banks submitted particularly "competitive" rates, those rates would be eliminated as outliers under the interquartile methodology. The process of averaging the eight rates that were closest in value suggests an effort to arrive at an

appropriate rate through collaboration and consensus, and not through competition.

The Amended Complaint's allegations that (1) Defendants are "horizontal competitors across a wide range of financing activities" (*id.* ¶ 36); (2) "LIBOR-denominated interest rates [are used] as a threshold or beginning point for competition among themselves in the market for loans to their customers and others" (*id.* ¶ 52); and (3) "LIBOR is also instrumental in establishing market prices for many types of interest-bearing debt securities, including financial instruments that are not specifically LIBOR-denominated" (*id.* ¶ 53), add nothing to the analysis. The fact that Defendants compete in the financial markets, and that LIBOR may be the starting point for much of that competition, does not demonstrate that the process of setting LIBOR is a competitive exercise. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d at 688 ("It is of no avail to plaintiffs that defendants were competitors outside the BBA."). Moreover, nothing in the Amended Complaint suggests that—as a result of the manipulation of LIBOR—Defendants ceased to compete with one another in the financial markets.

To the extent that Plaintiff argues that the LIBOR-setting process is competitive because it is "designed to ensure that LIBOR would be based on competition in the interbank funding markets" (Am. Cmplt. (Dkt. No. 95) ¶ 48), that argument is also without merit. Plaintiff's allegations do not demonstrate that manipulation of LIBOR had any effect on competition in those markets. As Judge Buchwald stated, "[i]f LIBOR no longer painted an accurate picture of the interbank lending market, the injury plaintiffs

suffered derived from misrepresentation, not from harm to competition." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d at 692.[6]

Because Plaintiff has not plausibly alleged an antitrust injury, Defendants' motion to dismiss Plaintiff's antitrust claim will be granted.[7]

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[6] Plaintiff argues that this case "is similar to many others attacking index or benchmark price manipulation." (Pltf. Br. (Dkt. No. 119) at 29) Many of the cases that Plaintiff cites (*see id.* at 29 n.17) are addressed in Judge Buchwald's decision. In a thorough analysis, she distinguishes the harm in those cases from the type of injury resulting from the manipulation of LIBOR. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d at 688, 694 & n.9, 694-95. The Court finds Judge Buchwald's analysis persuasive and adopts her conclusions here.

[7] In a February 20, 2015 letter (Dkt. No. 168), Plaintiff directs this Court's attention to two recent cases: *Gelboim*, 135 S.Ct. 897, and *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, Nos. 13 Civ. 7789 (LGS), 13 Civ. 7953 (LGS), 14 Civ. 1364 (LGS), 2015 WL 363894 (S.D.N.Y. Jan. 28, 2015) ("*FOREX*"). As noted above, in *Gelboim* the Supreme Court held that the plaintiffs whose antitrust claims were dismissed in the *LIBOR* MDL are entitled to immediately appeal Judge Buchwald's decision. *See Gelboim*, 135 S. Ct. at 905-06. Nothing in *Gelboim* casts doubt on Judge Buchwald's reasoning and conclusions. In *FOREX*, which involves allegations of collusion in fixing a foreign exchange benchmark, the court distinguished Judge Buchwald's determination that the LIBOR-setting process is cooperative and not competitive:

> *LIBOR* [MDL]'s conclusion that the plaintiffs in that case had not demonstrated antitrust injury was explicitly based on that court's understanding that the LIBOR-setting process was a "cooperative endeavor wherein otherwise-competing banks agreed to submit estimates of their borrowing costs . . . to facilitate the . . . calculation of an interest rate index." The Fix[—the process of setting the foreign exchange benchmark at issue in *FOREX*—] by contrast, is set by

IV. RICO CLAIMS

Plaintiff also asserts RICO claims, under 18 U.S.C. §§ 1962(c) and (d). (Am. Cmplt. (Dkt. No. 95) ¶¶ 181-82) Plaintiff alleges that "Defendants' collective association, including through their participation together as members of the BBA's USD-LIBOR panel, constitutes a RICO enterprise-in-fact," and that "[e]very member of the enterprise participated in the process of misrepresenting its costs of borrowing to the BBA." (*Id.* ¶ 192)

Defendants have moved to dismiss Plaintiff's RICO claims, arguing that (1) the claims are time-barred; (2) Plaintiff seek an improper extraterritorial application of RICO; (3) Plaintiff has not alleged a sufficiently direct relationship between the claim and Solow's injury; (4) Plaintiff has not adequately plead predicate acts of racketeering; (5) the Amended Complaint fails to state a RICO conspiracy claim; (6) Plaintiff's claims are barred by *res judicata*; and (7) Plaintiff lacks standing to assert claims on Solow's behalf. *See* Def. Br. (Dkt. No. 115) at 13-58; Def. Br. (Dkt. No. 117). As discussed below, this Court concludes that

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> actual transactions in a market where Defendants are supposed to be perpetually competing by offering independently determined bid-ask spreads.

FOREX, 2015 WL 363894, at *11 (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d at 688). The *FOREX* court found that because the process for setting the foreign exchange "Fix" involved actual market transactions, it differed from the cooperative LIBOR-setting process in a crucial way. This conclusion, if anything, supports Judge Buchwald's reasoning.

Plaintiff's RICO claims are barred by the statute of limitations and by *res judicata*, and does not reach Defendants' remaining arguments.

A. Plaintiff's RICO Claims are Time-Barred[8]

"RICO claims are subject to a four-year statute of limitations." *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 148 (2d Cir. 2012) (citations omitted). "'Federal courts . . . generally apply a discovery accrual rule when a statute is silent on the issue, as civil RICO is . . . .'" *Id.* (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). Accordingly, "a RICO claim accrues upon the discovery of the injury alone." *Id.* at 150.

"Under Second Circuit precedent, courts apply an 'inquiry notice' analysis to determine when a plaintiff has discovered his injury[.]" *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d at 698.

> "Inquiry notice—often called 'storm warnings' in the securities context—gives rise to a duty of inquiry 'when the circumstances would suggest to an investor of ordinary intelligence

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[8] In deciding a motion to dismiss on statute of limitations grounds, "[a] [d]istrict [c]ourt [may] t[ake] judicial notice of . . . media reports, state court complaints, and regulatory filings" as long as "[t]he court d[oes] 'not take judicial notice of the documents for the truth of the matters asserted in them, but rather to establish that the matters [had] been publicly asserted.'" *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 424 (2d Cir. 2008) (quoting *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 460 F. Supp. 2d 329, 335 (D. Conn. 2006) *vacated and remanded*, 547 F.3d 406 (2d Cir. 2008)); *see id.* at 425 ("[I]t is proper to take judicial notice of the *fact* that press coverage, prior lawsuits, or regulatory filings contained certain information, without regard to the truth of their contents, in deciding whether so-called 'storm warnings' were adequate to trigger inquiry notice . . . .").

> the probability that she has been defrauded.' In such circumstances, the imputation of knowledge will be timed in one of two ways: (i) '[i]f the investor makes no inquiry once the duty arises, knowledge will be imputed as of the date the duty arose'; and (ii) if some inquiry is made, 'we will impute knowledge of what an investor in the exercise of reasonable diligence[] should have discovered concerning the fraud, and in such cases the limitations period begins to run from the date such inquiry should have revealed the fraud.'"

Id. (quoting *Koch*, 699 F.3d at 151 (quoting *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 168 (2d Cir. 2005))).

Here, Plaintiff alleges that it was Defendants' manipulations of LIBOR that caused Solow's injury. (Am. Cmplt. (Dkt. No. 95) ¶ 163 ("The purported impairment of [Solow's] bond portfolio, seizure of the portfolio and cash, the low prices realized in the collateral sale and inflated LIBOR-denominated contract and 'default' interest rates and imposition of fees and expenses were the result of Defendants' collective manipulations of LIBOR. . . .") As Plaintiff recognizes, however, a May 29, 2008 *Wall Street Journal* article "detailed" the "divergence between [credit-default spreads ('CDS')] and LIBOR." (*Id.* ¶ 131; *see id.* ¶¶ 135-36; Shioleno Decl. (Dkt. No. 116) Ex. A) The article-Carrick Mollenkamp & Mark Whitehouse, *Study Casts Doubt on Key Rate—WSJ Analysis Suggests Banks May Have Reported Flawed Interest Data for Libor*, Wall. St. J., May 29, 2008, at A1—states that

> Major banks are contributing to the erratic behavior of a crucial global lending benchmark, a Wall Street Journal analysis shows.
>
> The Journal analysis indicates that Citigroup Inc., WestLB, HBOS PLC, J.P. Morgan Chase & Co. and UBS AG are among the banks that have been reporting significantly lower borrowing costs for the London interbank offered rate, or Libor, than what another market measure suggests they should be. Those five banks are members of a 16-bank panel that reports rates used to calculate Libor in dollars.
>
> That has led Libor, which is supposed to reflect the average rate at which banks lend to each other, to act as if the banking system was doing better than it was at critical junctures in the financial crisis. The reliability of Libor is crucial to consumers and businesses around the world, because the benchmark is used by lenders to set interest rates on everything from home mortgages to corporate loans.

(Shioleno Decl. (Dkt. No. 116), Ex. A)

Given this article, by at least May 29, 2008, Plaintiff was on inquiry notice of the fact that LIBOR rates may have been manipulated. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d at 708, 710 ("Here, not only were LIBOR and each bank's LIBOR submission publicly available on a daily basis, but benchmarks of general interest rates and each bank's financial health were also publicly available . . . . [T]he *Wall Street Journal* analysis [by

Mollenkamp and Whitehouse] compared the LIBOR fixes and quotes to these benchmarks to conclude that LIBOR was likely artificial. In other words, by May 29, 2008, plaintiffs' investigative work had already been done for them and had been published in the pages of the *Wall Street Journal*. . . . [P]laintiff's were on inquiry notice of their injury by May 29, 2008 . . . ."); *see also BPP Ill, LLC v. Royal Bank of Scot. Grp., PLC*, No. 13 Civ. 0638 (JMF), 2013 WL 6003701, at *8 (S.D.N.Y. Nov. 13, 2013) ("By May 29, 2008, . . . there were at least seven articles in major publications [including the May 29, 2008 *Wall Street Journal* article] reporting that there was substantial evidence to support the conclusion that LIBOR was artificially low and had been so for some time. Those articles were sufficient 'storm warnings' to 'awaken inquiry' into the possibility that U.S. Dollar LIBOR was not, as Defendants allegedly represented to the BPP Plaintiffs to induce them into the swap agreement, 'a legitimate and reliable market-based interest rate.'").

Plaintiff alleges no facts suggesting that Solow undertook an inquiry into the cause of his injury—the Defendants' alleged LIBOR manipulation—over the next four years. Accordingly, Solow "[is] deemed to have knowledge of [his] injury at the point at which the duty to inquire arose, and the period of limitations starts to run on that date." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d at 698.

Plaintiff argues, however, that the statute of limitations should be tolled, because Defendants subsequently provided reassurances that LIBOR was not being manipulated, and because they fraudulently concealed their manipulation of LIBOR. (Pltf. Br. (Dkt. No. 119) at 20-28) Because (1) the LIBOR

manipulation scheme had been made public, and (2) Defendants' "reassurances" that no manipulation had occurred would have been entirely self-serving, Plaintiff's tolling argument fails. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d at 710-11 ("Here, plaintiffs have not adequately alleged fraudulent concealment. For one, they did not 'remain[] unaware of [defendants'] violation during the limitations period,' as they were on notice no later than May 29, 2008, that they had likely been injured. Moreover, because of this, they could not have reasonably relied on defendants' and the BBA's reassurances that LIBOR was accurate. For the same reason, defendants' alleged manipulation [of LIBOR] was not self-concealing. . . . Here, . . . Thomson Reuters published daily both the final LIBOR fix and the quotes from each of the panel banks. A person of ordinary intelligence could have reviewed the submitted quotes along with numerous articles analyzing these quotes and explaining why they were likely artificial. Under these circumstances, plaintiffs have not adequately alleged fraudulent concealment."); *see also BPP Ill., LLC*, 2013 WL 6003701, at *8-9 ("Plaintiffs' arguments [regarding the statute of limitations] . . . are unpersuasive. First, Plaintiffs point to the fact that the BBA itself defended the integrity of LIBOR in some of the very articles highlighting LIBOR's potential unreliability. Affirmative public denials of wrongdoing can, in some circumstances, weigh against a finding of inquiry notice. But a plaintiff may rely on such reassuring representations only if it is reasonable to do so. Here, given the BBA's 'strong incentive to maintain market confidence in LIBOR's integrity,' and the fact that its public denials flew in the face of the data marshaled by the newspaper articles discussed above, a

reasonable person would have at least inquired further before accepting the BBA's representations. . . . Plaintiffs' fraudulent concealment argument . . . fails for the same reason that they cannot rely on the discovery rule: However reasonable it may have been to rely on Defendants' statements about the reliability of LIBOR in early 2008, it was no longer reasonable to do so by late May 2008 in the face of substantial reports to the contrary.") (internal citations omitted).

Because Solow was on inquiry notice as of May 29, 2008, and no inquiry was pursued, RICO claims had to be brought by May 29, 2012. Plaintiff's RICO claims were not filed until February 13, 2013, however. (Cmplt. (Dkt. No. 1)) Accordingly, those claims are time-barred.

B. Plaintiff's RICO Claims Are Also Barred By Res Judicata

Even if Plaintiff's RICO claims were not barred by the statute of limitations, they would be barred by *res judicata*, given the judgment in the state court action brought by Citibank against Solow.[9] (Def. Br. (Dkt. No. 117) at 8-18)

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[9] Defendants argue that "*[r]es judicata* applies to all of [Plaintiff's] claims, including [its] Sherman Act claim . . . ." *See* Def. Reply Br. (Dkt. No. 121) at 2. Defendants assert that *res judicata* bars Plaintiff's antitrust claim because Plaintiff was required to raise LIBOR manipulation as a defense in the state court action. (*Id.* at 2-4) Plaintiff argues, however, that federal courts have exclusive jurisdiction over Sherman Act claims, and that accordingly *res judicata* does not bar Plaintiff's antitrust claim. (Pltf. Br. (Dkt. No. 120) at 5) Having concluded that Plaintiff's antitrust claim must be dismissed for failure to allege an antitrust injury, this Court does not reach the question of whether Plaintiff's antitrust claim is barred by *res judicata*.

The doctrine of *res judicata* provides that

> "a valid, final judgment, rendered on the merits, constitutes an absolute bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand. It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which might have been, but were not, actually raised and decided in that action. The first judgment, when final and on the merits, thus puts an end to the whole cause of action."

Epperson v. Entm't Express, Inc., 242 F.3d 100, 108-09 (2d Cir. 2001) (quoting *Saylor v. Lindsley*, 391 F.2d 965, 968 (2d Cir. 1968) (citations omitted)).[10] "The policies underlying *res judicata* reflect the sensible goal that where possible all related claims be resolved in one proceeding . . . ." (*Id.* at 109).

"Whether a claim is precluded depends on '"whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first."'" *Blue Ridge Invs., LLC v. Republic of Arg.*, 902 F. Supp. 2d 367, 382 (S.D.N.Y. 2012) (quoting *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 (2d Cir. 1992) (quoting *N.L.R.B. v. United Techs. Corp.*, 706 F.2d 1254, 1260

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[10] "A court may consider a *res judicata* defense on a Rule 12(b)(6) motion to dismiss when the court's inquiry is limited to the plaintiff's complaint, documents attached or incorporated therein, and materials appropriate for judicial notice." *Techno-Marine SA v. Giftports, Inc.*, 758 F.3d 493, 498 (2d Cir. 2014).

(2d Cir. 1983))); *see TechnoMarine SA*, 758 F .3d at 499 ("Whether a claim that was not raised in the previous action could have been raised therein depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." (internal quotation marks omitted)). "[W]hatever legal theory is advanced, when the factual predicate upon which claims are based are substantially identical, the claims are deemed to be duplicative for purposes of *res judicata*." *Berlitz Schs. of Languages of Am., Inc. v. Everest House*, 619 F.2d 211, 215 (2d Cir. 1980).

1. Final Judgment on the Merits

Here, there is no question that there has been a final judgment on the merits. On March 24, 2011, Citibank obtained a judgment against Solow in New York Supreme Court requiring him to pay more than $100 million in damages to Citibank. (Am. Cmplt. (Dkt. No. 95) ¶ 162; Ruffino Decl. (Dkt. No. 118), Ex. D) The judgment was affirmed by the First Department on February 23, 2012. *See Citibank, N.A. v. Solow*, 92 A.D.3d 569, 570 (1st Dep't), *leave to appeal denied*, 19 N.Y.3d 807 (2012). Solow paid the judgment in full on May 23, 2012. (Am. Cmplt. (Dkt. No. 95) ¶¶ 162-63)

2. Same Transaction or Occurrence

The prior proceeding also arose out of the same transactions and occurrences alleged here. In that proceeding, Citibank claimed that

> [t]h[e] case [arose] out of Solow's failure to repay in full loans from Citibank and to provide cash collateral for letters of credit issued by Citibank. The loans were made and the

letters of credit were issued or continued in existence under two lines of credit (one for $490,000,000 and one for $13,000,000) and were secured by securities in custodial accounts held by Citibank. Citibank has liquidated its collateral and has set off against cash on deposit in Solow's accounts at Citibank, all as allowed under the governing documents and applicable law. The $13,000,000 line of credit has now been repaid, but more than $67,000,000 in loans and over $18,500,000 in letters of credit remain outstanding under the $490,000,000 line of credit.

…

Citibank determined that, as of September 23, 2008, the market value of the Pledged Collateral had fallen below $463,000,000 for five consecutive business days.

[] By letter dated September 24, 2008, Citibank provided notice of a Margin Call to Solow demanding that Solow deposit within two business days collateral acceptable to Citibank with a market value of not less than $11,319,494. . . .

[] By letter dated September 26, 2008, Citibank informed Solow that the market value of additional Pledged Collateral required to satisfy the Margin Call had increased to $13,561,794 and stated that if Solow did not furnish by the close of business on September 26, 2008 additional Pledged Collateral in an amount sufficient to cause the market value

of all Pledged Collateral in Citibank's possession to equal or exceed $463,000,000, Citibank might begin to sell any or all of the Pledged Collateral.

[] By letter dated September 30, 2008, Citibank demanded the immediate payment of all amounts outstanding under the $13,000,000 Note and stated that Solow's obligations thereunder that were not paid by October 2, 2008 would bear interest at the overdue rate set forth in the $13,000,000 Note. Citibank informed Solow that it might begin to sell any or all of the Pledged Collateral at any time to satisfy Solow's obligations under the $13,000,000 Note.

[] By a second letter dated September 30, 2008, Citibank demanded the immediate payment of all amounts outstanding under the $490,000,000 Note and indicated that Solow's obligations thereunder that were not paid by September 30, 2008 would bear interest at the overdue rate set forth in the $490,000,000 Note. Citibank informed Solow that it might begin to sell any or all of the Pledged Collateral at any time to satisfy Solow's obligations under the $490,000,000 Note.

[] Between October 7 and November 3, 2008, Citibank sold all saleable assets from the Pledged Accounts on the open market for a total, net of any commissions and fees, of $415,120,803.10, and applied this amount to Solow's loan obligations.

[] On October 9 and October 13, 2008, interest in the aggregate amount of $15,261.46 was earned on account of the Pledged Collateral, and Citibank applied this amount to Solow's loan obligations.

[] On October 6, November 3, and November 13, 2008, Citibank set off a total of $4,247,786.23 against cash on deposit in accounts maintained by Solow at Citibank. Of this amount, Citibank applied $2,099,802.93 to Solow's outstanding principal loan obligations and $2,147,983.30 to Solow's accrued interest obligations.

[] Following these applications, the $13,000,000 Note was paid in full and the outstanding principal balance due under the $490,000,000 Note was reduced to $67,094,168.56 (the "Loan Shortfall").

[] By letter to Solow dated November 18, 2008, Citibank demanded immediate payment of the Loan Shortfall and all other obligations due under the 2008 Loan Documents. With respect to the Letters of Credit, Citibank demanded, without limitation, that Solow deposit cash collateral in the amount of $18,582,168.49 to secure his reimbursement obligations under the Letters of Credit, replace the Letters of Credit with letters of credit from another financial institution, or cause the Letters of Credit to be cancelled with the consent of the beneficiaries.

[] To date, Solow has failed to pay the Loan Shortfall and his other obligations and has

> failed to collateralize, replace, or cause to be cancelled the outstanding Letters of Credit.

(Ruffino Decl. (Dkt. No. 118) Ex. L ("Cmplt.") ¶¶ 6, 48-58)

This same series of "transactions and occurrences" gives rise to Plaintiff's claims here. *See* Am. Cmplt. (Dkt. No. 95) ¶¶ 9, 147-49, 159-60. Moreover, in the state court action, Solow litigated Citibank's declaration of default, sale of collateral, and imposition of default interest rates, arguing—*inter alia*—that the value of the collateral had been determined in bad faith. *See Citibank, N.A.*, 92 A.D.3d at 569-70; Aug. 28, 2013 Rufino Decl. (Dkt. No. 118) Ex. A ("Mar. 26, 2010 State Court Decision") at 6-13; *id.* Ex. B ("Solow Answer") ¶¶ 79-87. The state court rejected Solow's arguments on the merits. (Mar. 26, 2010 State Court Decision (Dkt. No. 118) at 13) Although Plaintiff now asserts a new legal theory—that the declaration of default, low sale price of the collateral, and default interest rates are all related to Citibank's and the other Defendants' manipulation of LIBOR—alternate legal theories are not sufficient to avoid the *res judicata* effect of a prior judgment. *See Berlitz Schs.*, 619 F.2d at 215.

3. <u>Same Parties or Their Privies</u>

The next issue is whether this action involves the same parties or their privies. "[C]ourts of [New York] have found that the concept of privity 'requires a flexible analysis of the facts and circumstances of the actual relationship between the party and nonparty in the prior litigation [.]'" *Syncora Guar. Inc. v. J.P. Morgan Sec. LLC*, 110 A.D.3d 87, 93 (1st Dep't 2013) (quoting *Evergreen Bank v. Dashnaw*, 246 A.D.2d 814, 816

(3d Dep't 1998)); *see also Amalgamated Sugar Co. v. NL Indus., Inc*., 825 F.2d 634, 640 (2d Cir. 1987) ("The doctrine of privity, which extends the *res judicata* effect of a prior judgment to nonparties who are in privity with the parties to the first action, is to be applied with flexibility.") (citation omitted).

There is no question that Defendant Citibank, N.A., was a party to the state court action. *See Citibank, N.A.*, 92 A.D.3d at 570. As to Solow, Plaintiff claims that it is the assignee of Solow's claims for injuries arising out of Citibank's declaration of default on his loans in September 2008. *See* Am. Cmplt. (Dkt. No. 95) ¶ 1. Plaintiff is therefore in privity with Solow for *res judicata* purposes. *See Savini v. Sheriff of Nassau Cnty*., 209 F. Supp. 946, 952 (E.D.N.Y. 1962) ("[I]t is abundantly clear that the defense of *res judicata* applies against an assignee as it does against his assignor.") (citations omitted); *In re Slocum ex rel. Nathan A. v. Joseph B*., 183 A.D.2d 102, 103 (3d Dep't 1992) ("Under current New York law, privity of a nonparty to a prior litigation with a party to that litigation [for *res judicata* purposes] refers to 'a relationship with [the] party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation.'") (alteration in *In re Slocum*) (quoting *D'Arata v. New York Cent. Mut. Fire Ins. Co*., 76 N.Y.2d 659, 664 (1990)). Accordingly, Plaintiff's RICO claims against Citibank are barred by *res judicata*.

The other Defendants were not named in the prior state court action, but may properly be considered in privity with Citibank for *res judicata* purposes. Plaintiff's theory is that Citibank and its co-defendants

conspired to manipulate LIBOR and, in doing so, caused Plaintiff's injuries. With respect to its RICO claims, Plaintiff alleges that "Defendants, in concert and with the assistance of brokers and co-conspirators, made false statements to the BBA for the purpose and with the effect of manipulating LIBOR to suit their needs of the moment." (Am. Cmplt. (Dkt. No. 95) ¶ 193; *see also id.* ¶ 5 ("This case arises from the collusion to manipulate and manipulation of LIBOR for the U.S. dollar . . . ."); *id.* ¶ 6 ("Defendants conspired to, and did, manipulate USD-LIBOR by falsely reporting to the BBA the actual interest rates at which the Defendant banks expected they could borrow funds—*i.e.*, their true costs of borrowing—on a daily basis. . . . By acting together and in concert to knowingly falsely report borrowing costs, Defendants colluded to manipulate and manipulated USD-LIBOR . . . ."); *id.* ¶ 9 ("Notwithstanding the fact that Solow was at all times current on [his] loans, at a time when Defendants' collusion and manipulations caused LIBOR to be artificially inflated, Citibank declared Solow's bond portfolio collateral to be inadequate for having dropped below the required minimum value, declared a technical default, seized the bond portfolio and sold it off including to itself and on information and belief to other defendants, at prices that were artificially low as a result of their collusion and manipulation of USD-LIBOR, and further imposed a LIBOR-denominated 'default' interest rate rather than the LIBOR-denominated contract rate."); *id.* ¶ 33 ("Various other persons, firms and corporations, unknown and not named as Defendants, have participated as co-conspirators with Defendants and have performed acts and made statements in furtherance of the conspiracy.")) Plaintiff further alleges that "[e]ach of the Defendants named

herein acted as the agent or joint-venturer of or for the other Defendants with respect to the acts, violations and common course of conduct alleged herein." (*Id.* ¶ 34)

Accordingly, "[a]lthough [Citibank's co-defendants] w[ere] not named . . . in [the prior] suit . . ., the pleadings are sufficient to support a finding of privity—*i.e.*, the legal conclusion that the relationship between the parties is sufficiently close to warrant claim preclusion. Courts have held that alleged co-conspirators are 'in privity' with one another for *res judicata* purposes." *Discon Inc. v. NYNEX Corp.*, 86 F. Supp. 2d 154, 166 (W.D.N.Y. 2000) (internal citation omitted); *see also In re Teltronics Servs., Inc.*, 762 F.2d 185, 192 (2d Cir. 1985) ("LM Ericsson TeleComm, Inc., was alleged to be a co-conspirator in the second Southern District action filed by Teltronics against the Ericsson defendants, and is entitled to the *res judicata* effect of that decision."); *Fonseca v. Columbia Gas Sys., Inc.*, 37 F. Supp. 2d 214, 228 (W.D.N.Y. 1998) ("I find that a sufficiently close relationship existed between the alleged coconspirators to preclude plaintiff from proceeding against any of them in this subsequent, separate action."); *Somerville House Mgmt., Ltd. v. Arts & Entm't Television Network*, 92 Civ. 4705 (LJF), 1993 WL 138736, at *2 (S.D.N.Y. Apr. 28, 1993) ("[N]ewly-added defendants may assert a *res judicata* defense as long as the 'newly-added defendants have a sufficiently close relationship to the original defendant.'. . . [A] number of courts have found that alleged coconspirators can be considered 'in privity' with one another for *res judicata* purposes . . . .") (quoting *Official Publ'ns, Inc. v. Kable News Co.*, 811 F. Supp. 143, 147 (S.D.N.Y. 1993)) (citations omitted); *McLaughlin v.*

Bradlee, 599 F. Supp. 839, 847 (D.D.C. 1984) ("The defendants here may defensively assert claim preclusion against McLaughlin even though none of the prior suits named all six of them as defendants. . . . [T]he defendants in the present suit are closely related to those named in the 1981 complaints[] . . . [and] there is only one alleged conspiracy."), *aff'd*, 803 F.2d 1197 (D.C. Cir. 1986).

"*Res judicata* operates to preclude claims, rather than particular configurations of parties; Plaintiff's addition of new defendants, in the context of allegations of their involvement in the series of alleged deprivations, does not entitle [it] to revive the previously-[decided] claims," *Cameron v. Church*, 253 F. Supp. 2d 611, 623 (S.D.N.Y. 2003), or to litigate claims "which might have been, but were not, actually raised and decided in [the earlier] action." *Epperson*, 242 F.3d at 108 (citation and quotation marks omitted); *cf. Official Publ'ns, Inc*., 811 F. Supp. at 147 ("The doctrine of *res judicata* also bars litigation of the same causes of action against defendants who were known to plaintiff at the time the first action was filed but were not named where the newly-added defendants have a sufficiently close relationship to the original defendant. . . . Where the 'new' defendants are sufficiently related to one or more of the defendants in the previous action which arises from the same transaction all defendants may invoke *res judicata*") (citations omitted).

4. Plaintiff's RICO Claims Could Have Been Asserted in the Prior Action

Plaintiff argues, however, that its RICO claims are not barred by *res judicata*, because they could not have been asserted as counterclaims in the state court

action. *See* Pltf. Br. (Dkt. No. 120) at 8. Plaintiff is mistaken. Solow could have asserted—as counterclaims in the state court action—the same RICO claims that Plaintiff asserts here. *See Tafflin v. Levitt*, 493 U.S. 455, 458, 467 (1990) ("[S]tate courts have concurrent jurisdiction over civil RICO claims."). In bringing RICO counterclaims, Solow could also have joined Citibank's co-defendants as parties. *See* N.Y. C.P.L.R. § 3019(a) ("A counterclaim may be any cause of action in favor of . . . [a] defendant [] . . . against . . . a plaintiff and other persons alleged to be liable."). "While New York does not have a compulsory counterclaim rule, a party is not free to remain silent in an action in which he is the defendant and then bring a second action seeking relief inconsistent with the judgment in the first action by asserting what is simply a new legal theory." *Henry Modell & Co. v. Minister, Elders & Deacons of Reformed Protestant Dutch Church of City of N.Y.*, 68 N.Y.2d 456, 461 (N.Y. 1986) (internal citation omitted); *Santiago v. Lalani*, 256 A.D.2d 397, 399 (2d Dep't 1998) (same); *Se Dae Yang v. Korea First Bank*, 247 A.D.2d 237, 237-38 (1st Dep't 1998) (same). Because Plaintiff's RICO claims arise out of the same transactions and occurrences as those at issue in the state court action, those claims could have and should have been pursued in that action. *Cf. Bin Saud v. Bank of N.Y.*, 734 F. Supp. 628, 633 (S.D.N.Y. 1990), *aff'd sub nom. Saud v. Bank of N.Y.*, 929 F.2d 916 (2d Cir. 1991) ("[W]hen a party fails to raise the defense of fraud in an initial action, a subsequent collateral challenge to an adverse judgment rendered in that initial action under the guise of a fraud based RICO claim may be barred by *res judicata*.").

Plaintiff also argues that Solow could not have raised claims related to LIBOR manipulation in the earlier state court action because he "had no knowledge of any of the instant claims prior to or even while the earlier lawsuit was pending." (Pltf. Br. (Dkt. No. 120) at 8) "As a general rule, newly discovered evidence does not preclude the application of *res judicata*," however. *Saud*, 929 F.2d at 920 (citing *Guerrero v. Katzen*, 774 F.2d 506, 508 (D.C. Cir. 1985)). "Exceptions to this rule exist when the evidence was either fraudulently concealed or when it could not have been discovered with due diligence." *Id.*

Here—as the Amended Complaint acknowledges, and as this Court recounted in finding Plaintiff's RICO claims time-barred—the *Wall Street Journal* reported on May 29, 2008—several years before the state trial court entered judgment against Solow—that Defendants had been "reporting significantly lower borrowing costs for the London interbank offered rate, or Libor, than what another market measure suggests they should be," and that as a result, LIBOR was artificially low. (Shioleno Decl. (Dkt. No. 116), Ex. A; *see also BPP Ill., LLC*, 2013 WL 6003701, at *8 ("By May 29, 2008, . . . there were at least seven articles in major publications [including the May 29, 2008 *Wall Street Journal* article] reporting that there was substantial evidence to support the conclusion that LIBOR was artificially low and had been so for some time.").

According to the Amended Complaint, press reports concerning Defendants' possible manipulation of the LIBOR rate continued in subsequent years. Another flurry of media reports concerning this issue appeared in mid-March 2011—also before the state trial court had entered judgment against Solow. According

to Plaintiff, a "public revelation regarding government investigations into possible LIBOR manipulation occurred on March 15, 2011," when Defendant UBS disclosed in an SEC filing that it had received subpoenas from the SEC, the CFTC, and the U.S. Department of Justice "in connection with investigations regarding submissions to the BBA." (*Id.* ¶ 81 (citation, quotations marks, and brackets omitted)) UBS disclosed that "the investigations focus on whether there were improper attempts by UBS, either acting on its own or together with others, to manipulate LIBOR rates at certain times." (*Id.* (citation, quotations marks, and brackets omitted))

On March 16, 2011, the Financial Times reported that

> UBS, Bank of America, Citigroup, and Barclays had received subpoenas from U.S. law enforcement agencies "probing the setting of" LIBOR "between 2006 and 2008." The Financial Times further noted that investigators had "demanded information from" WestLB, and that the previous fall, "all 16 members of the committee that helped the [BBA] set the dollar LIBOR rate during 2006-08 received informal requests for information."

(*Id.* ¶ 82) Plaintiff asserts that on March 17, 2011, Bloomberg reported that "Barclays, Citigroup and Bank of America had received subpoenas from U.S. authorities investigating whether some firms manipulated the setting of LIBOR and Defendants WestLB and Lloyds had been contacted by the authorities." (*Id.* ¶ 83 (citation, quotations marks, and brackets omitted)) According to Plaintiff, on March 23, 2011, Bloomberg reported that Defendants Citigroup, Deutsche

Bank, Bank of America, and JPMorgan had been asked by U.S. authorities "to make employees available to testify as witnesses in a probe of potential interest-rate manipulation in connection with the ongoing LIBOR investigation." (*Id.* ¶ 84 (citation and quotation marks omitted)) All of these articles were published prior to the state trial court's entry of judgment against Solow, and put Solow on notice of the LIBOR-manipulation scheme that Plaintiff alleges here.

Even accepting Plaintiff's allegation that Solow did not know that the media reports concerning Defendants' LIBOR manipulation were true, these news reports put Solow on inquiry notice. With the exercise of due diligence, he could have learned the details of the LIBOR manipulation and asserted his claims accordingly. Because Solow "had sufficient information to create a duty of further investigation," Plaintiff may not avoid the effects of *res judicata*. *See Saud*, 929 F.2d at 921 (holding that RICO claims were barred by *res judicata*; "[E]ven if Saud did not know the full extent of the Bank's alleged fraud at the time the Guaranty Action was commenced, his pleadings in that suit demonstrated that he had sufficient information to create a duty of further investigation. . . . Indeed, given the substantial amount of money at stake in the Guaranty Action, Saud had a strong incentive to actively litigate his defense and further uncover evidence of fraud. Having failed to undertake that inquiry, Saud is chargeable with full knowledge of the fraud.") (citing *Armstrong v. McAlpin*, 699 F.2d 79, 88 (2d Cir. 1983) ("The test as to when fraud should with reasonable diligence have been discovered is an objective one. . . . '[W]here the circumstances are such as to suggest to a person of ordinary intelligence the

probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.'" (citing *Higgins v. Crouse*, 147 N.Y. 411, 416 (1895))).

* * * *

Plaintiff's RICO claims will be dismissed because they are barred by the applicable statute of limitations and by *res judicata*.

V. STATE LAW CLAIM

"[U]nder 28 U.S.C. § 1367(c), a district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction." *Schaefer v. Town of Victor*, 457 F.3d 188, 210 (2d Cir. 2006) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). "[W]hen all federal claims are eliminated in the early stages of litigation, the balance of factors generally favors declining to exercise pendent jurisdiction over remaining state law claims and dismissing them without prejudice." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 103 (2d Cir. 1998) (emphasis omitted) (citing *Carnegie-Mellon Univ.*, 484 U.S. at 350). There is no reason to deviate from this rule here. Accordingly, the Court declines to exercise supplementary jurisdiction and will dismiss Plaintiff's remaining state law claim under N.Y. Gen. Bus. Law § 340.

VI. LEAVE TO AMEND

Plaintiff requests leave to amend in the event that this Court grants Defendants' dismissal motion. (Pltf. Br. (Dkt. No. 119) at 55) Leave to amend should be

"freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). District courts "ha[ve] broad discretion in determining whether to grant leave to amend . . . ." *Gurary v. Winehouse*, 235 F.3d 793, 801 (2d Cir. 2000). Leave to amend may properly be denied in cases of " 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'" *Ruotolo v. City of N.Y.*, 514 F.3d 184, 191 (2d Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also Murdaugh v. City of N.Y.*, No. 10 Civ. 7218 (HB), 2011 WL 1991450, at *2 (S.D.N.Y. May 19, 2011) ("Although under Rule 15(a) of the Federal Rules of Civil Procedure leave to amend complaints should be 'freely given,' leave to amend need not be granted where the proposed amendment is futile.") (citations omitted).

Given that Plaintiff's RICO claims are barred by the statute of limitations and *res judicata*, it is clear that any amendment would be futile. Accordingly, leave to amend is denied as to those claims.

As to Plaintiff's antitrust claim, it appears unlikely that Plaintiff can plead facts sufficient to cure the defects noted in this opinion. Moreover, in *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 962 F. Supp. 2d at 627-28, Judge Buchwald found that the attempt to amend the antitrust claim was futile. Nevertheless, this Court will permit Plaintiff to move to amend the Amended Complaint within thirty days of this decision.

CONCLUSION

For the reasons stated above, Defendants' motions to dismiss the Amended Complaint are granted. Any motion for leave to file a second amended complaint is to be filed by April 30, 2015. The Clerk of the Court is directed to terminate the motions (Dkt. Nos. 114, 139).

Dated: New York, New York
March 31, 2015

SO ORDERED.

s/______________________

Paul G. Gardephe
United States District Judge