APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 17-1569, 17-1915, 17-1989, 17-2056, 17-2343, 17-2347, 17-2351, 17-2352, 17-2360, 17-2376, 17-2381, 17-2383, 17-2413

SCHWAB SHORT-TERM BOND MARKET FUND, SCHWAB TOTAL BOND MARKET FUND, SCHWAB U.S. DOLLAR LIQUID ASSETS FUND, SCHWAB MONEY MARKET FUND, SCHWAB VALUE ADVANTAGE MONEY FUND, SCHWAB RETIREMENT ADVANTAGE MONEY FUND, SCHWAB INVESTOR MONEY FUND, SCHWAB CASH RESERVES, SCHWAB ADVISOR CASH RESERVES, CHARLES SCHWAB BANK, N.A., CHARLES SCHWAB & CO., INC., SCHWAB YIELDPLUS FUND, SCHWAB YIELDPLUS FUND LIQUIDATION TRUST, THE CHARLES SCHWAB CORPORATION, CITY OF NEW BRITAIN, on behalf of itself and all others similarly situated, MAYOR AND CITY COUNCIL OF BALTIMORE, CITY OF HOUSTON, VISTRA ENERGY CORPORATION, YALE UNIVERSITY, JENNIE STUART MEDICAL CENTER, INC., FTC FUTURES FUND PCC LTD, on behalf of themselves and all others similarly situated, NATIONAL CREDIT UNION ADMINISTRATION BOARD, as liquidating Agent of U.S. Central Federal Credit Union, Western Corporate Federal Credit Union, Members United Corporate Federal Credit Union, Southwest Corporate Federal Credit Union, and Constitution Corporate Federal Credit Union, PENNSYLVANIA INTERGOVERNMENTAL COOPERATION AUTHORITY, CITY OF PHILADELPHIA,

DARBY FINANCIAL PRODUCTS, SALIX CAPITAL US INC., CAPITAL VENTURES INTERNATIONAL, PRUDENTIAL INVESTMENT PORTFOLIOS 2, FKA Dryden Core Investment Fund, on behalf of Prudential Core Short-Term Bond Fund, BAY AREA TOLL AUTHORITY, CALIFORNIA PUBLIC PLAINTIFFS, LINDA ZACHER, ELLEN GELBOIM, on behalf of herself and all others similarly situated, GARY FRANCIS, METZLER INVESTMENT GMBH, on behalf of itself and all others similarly situated, 303030 TRADING LLC, ATLANTIC TRADING USA, LLC, FTC FUTURES FUND SICAV, on behalf of themselves and all others similarly situated, NATHANIEL HAYNES, THE COUNTY OF MENDOCINO, COUNTY OF SONOMA, COUNTY OF SAN MATEO, THE SAN MATEO COUNTY JOINT POWERS FINANCING AUTHORITY, CITY OF RICHMOND, RICHMOND JOINT POWERS FINANCING AUTHORITY, SUCCESSOR AGENCY TO THE RICHMOND COMMUNITY REDEVELOPMENT AGENCY, COUNTY OF SAN DIEGO, RIVERSIDE PUBLIC FINANCING AUTHORITY, DAVID E. SUNDSTROM, in his official capacity as Treasurer of the county of Sonoma for and on behalf of the Sonoma County Treasury Pool Investment, CITY OF RIVERSIDE, EAST BAY MUNICIPAL UTILITY DISTRICT, COUNTY OF SACRAMENTO, SAN DIEGO ASSOCIATION OF GOVERNMENTS, REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Plaintiffs-Appellants,

v.

CARPENTERS PENSION FUND OF WEST VIRGINIA, CITY OF DANIA BEACH POLICE & FIREFIGHTERS' RETIREMENT SYSTEM, individually and on behalf of all others similarly situated, RAVAN INVESTMENTS, LLC, RICHARD HERSHEY, JEFFREY LAYDON, on behalf of himself and all others similarly situated, ROBERTO E. CALLE GRACEY, AVP PROPERTIES, LLC, COMMUNITY BANK & TRUST, BERKSHIRE BANK, individually and on behalf of all others similarly situated, ELIZABETH LIEBERMAN, on behalf of themselves and all other similarly situated, TODD AUGENBAUM, on behalf of themselves and all others similarly situated, 33-35 GREEN POND ROAD ASSOCIATES, LLC, on behalf of itself and all others similarly situated, COURTYARD AT AMWELL II, LLC, ANNIE BELL ADAMS, on behalf of herself and all others similarly situated, JILL COURT ASSOCIATES II, LLC, GREENWICH COMMONS II, LLC, DENNIS PAUL FOBES, on behalf of himself and all others similarly situated, LEIGH E. FOBES, on behalf of herself and all others similarly situated, MAIDENCREEK VENTURES II LP, RARITAN COMMONS, LLC, MARGARET LAMBERT, on behalf of herself and all others similarly situated, LAWRENCE W. GARDNER, on behalf of themselves and all others similarly situated, BETTY L. GUNTER, on behalf of herself and all others similarly situated, TEXAS COMPETITIVE ELECTRIC HOLDINGS COMPANY LLC, GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO, CARL A. PAYNE, individually, and on behalf of other members of the general public similarly situated, GUARANTY BANK AND TRUST COMPANY, individually and on behalf of all others similarly situated, KENNETH W. COKER, individually, and on behalf of other members of the general public similarly situated, JOSEPH AMABILE, LOUIE AMABILE, individually and on behalf of Lue Trading, Inc., NORMAN BYSTER, MICHAEL CAHILL, RICHARD DEOGRACIAS, individually and on behalf of RCD Trading, Inc., HEATHER M. EARLE, on behalf of themselves and all others similarly situated, HENRYK

MALINOWSKI, on behalf of themselves and all others similarly situated, MARC FEDERIGHI, individually and on behalf of MCO Trading, SCOTT FEDERIGHI, individually and on behalf of Katsco, Inc., LINDA CARR, on behalf of themselves and all others similarly situated, ERIC FRIEDMAN, on behalf of themselves and all others similarly situated, ROBERT FURLONG, individually and on behalf of XCOP, Inc., DAVID GOUGH, COUNTY OF RIVERSIDE, JERRY WEGLARZ, BRIAN HAGGERTY, individually and on behalf of BJH Futures, Inc., DAVID KLUSENDORF, NATHAN WEGLARZ, on behalf of plaintiffs and a class, DIRECTORS FINANCIAL GROUP, individually and on behalf of all others similarly situated, RONALD KRUG, CHRISTOPHER LANG, SEIU PENSION PLANS MASTER TRUST, individually and on behalf of all others similarly situated, HIGHLANDER REALTY, LLC, JOHN MONCKTON, PHILIP OLSON, JEFFREY D. BUCKLEY, FEDERAL HOME LOAN MORTGAGE CORPORATION, BRETT PANKAU, DAVID VECCHIONE, individually on behalf of Vecchione & Associates, RANDALL WILLIAMS, JOHN HENDERSON, 303 PROPRIETARY TRADING LLC, MARGERY TELLER, CEMA JOINT VENTURE, NICHOLAS PESA, EDUARDO RESTANI, PRINCIPAL FUNDS, INC., PFI BOND & MORTGAGE SECURITIES FUND, PFI BOND MARKET INDEX FUND, PFI CORE PLUS BOND I FUND, PFI DIVERSIFIED REAL ASSET FUND, PFI EQUITY INCOME FUND, PFI GLOBAL DIVERSIFIED INCOME FUND, PFI GOVERNMENT & HIGH QUALITY BOND FUND, PFI HIGH YIELD FUND, PFI HIGH YIELD FUND I, PFI INCOME FUND, PFI INFLATION PROTECTION FUND, PFI SHORT-TERM INCOME FUND, PFI MONEY MARKET FUND, PFI PREFERRED SECURITIES FUND, PRINCIPAL VARIABLE CONTRACTS FUNDS, INC., PVC ASSET ALLOCATION

ACCOUNT, PVC MONEY MARKET ACCOUNT, PVC BALANCED ACCOUNT, PVC BOND & MORTGAGE SECURITIES ACCOUNT, PVC EQUITY INCOME ACCOUNT, PVC GOVERNMENT & HIGH QUALITY BOND ACCOUNT, PVC INCOME ACCOUNT, PVC SHORT-TERM INCOME ACCOUNT, PRINCIPAL FINANCIAL GROUP, INC., PRINCIPAL FINANCIAL SERVICES, INC., PRINCIPAL LIFE INSURANCE COMPANY, PRINCIPAL CAPITAL INTEREST ONLY I, LLC, PRINCIPAL COMMERCIAL FUNDING, LLC, PRINCIPAL COMMERCIAL FUNDING II, LLC, PRINCIPAL REAL ESTATE INVESTORS, LLC, VITO SPILLONE, BRIAN MCCORMICK, MAXWELL VAN DE VELDE, individually and on behalf of all others similarly situated, INDEPENDENCE TRADING, INC., INSULATORS AND ASBESTOS WORKERS LOCAL #14, individually and on behalf of all others similarly situated, COURMONT & WAPNER ASSOCIATES, L.P., on behalf of itself and all others similarly situated, SALIX CAPITAL LTD., FTC CAPITAL GMBH, on behalf of themselves and all others similarly situated, CITY OF NEW BRITAIN FIREFIGHTERS' AND POLICE BENEFIT FUND, DIRECT ACTION PLAINTIFFS, FEDERAL NATIONAL MORTGAGE ASSOCIATION, TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, LTD., FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver, FRAN P. GOLDSLEGER, NATIONAL ASBESTOS WORKERS PENSION FUND, PENSION TRUST FOR OPERATING ENGINEERS, HAWAII ANNUITY TRUST FUND FOR OPERATING ENGINEERS, CEMENT MASONS' INTERNATIONAL ASSOCIATION EMPLOYEES' TRUST FUND, individually and on behalf of all others similarly situated, AXIOM INVESTMENT ADVISORS, LLC, AXIOM HFT LLC, AXIOM INVESTMENT ADVISORS HOLDINGS L.P., AXIOM INVESTMENT COMPANY, LLC, AXIOM INVESTMENT COMPANY

HOLDINGS L.P., AXIOM FX INVESTMENT FUND, L.P., AXIOM FX INVESTMENT FUND II, L.P., AXIOM FX INVESTMENT 2X FUND, L.P., EPHRAIM F. GILDOR, GILDOR FAMILY ADVISORS L.P., GILDOR FAMILY COMPANY L.P., GILDOR MANAGEMENT, LLC, PRUDENTIAL CORE TAXABLE MONEY MARKET FUND,

Plaintiffs,

LLOYDS BANKING GROUP PLC, BANK OF AMERICA CORPORATION, THE ROYAL BANK OF SCOTLAND GROUP PLC, CREDIT SUISSE GROUP AG, DEUTSCHE BANK AG, JPMORGAN CHASE & CO., THE NORINCHUKIN BANK, HBOS PLC, ROYAL BANK OF CANADA, HSBC BANK PLC, COÖPERATIEVE RABOBANK U.A., FKA Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., JPMORGAN CHASE BANK, N.A., THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., BANK OF AMERICA, N.A., BARCLAYS BANK PLC, WESTDEUTSCHE IMMOBILIENBANK AG, PORTIGON AG, FKA WestLB AG, HSBC HOLDINGS PLC, WESTLB AG, SOCIÉTÉ GÉNÉRALE, COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., CREDIT SUISSE INTERNATIONAL, CREDIT SUISSE (USA), INC., THE ROYAL BANK OF SCOTLAND PLC, CREDIT SUISSE AG, HSBC SECURITIES (USA) INC., HSBC BANK USA, N.A., HSBC FINANCE CORPORATION, BARCLAYS CAPITAL INC., HSBC USA, INC., THE HONG KONG AND SHANGHAI BANKING CORPORATION LTD., RBC CAPITAL MARKETS LLC, BANK OF AMERICA N.A., CITIBANK, N.A., UBS AG, CITIGROUP INC., THE ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., UBS SECURITIES LLC, CITI SWAPCO INC., BBA ENTERPRISES, LTD., BBA LIBOR, LTD., BRITISH BANKERS' ASSOCIATION, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, FKA Banc of

America Securities, LLC, CITIGROUP FINANCIAL PRODUCTS INC., J.P. MORGAN BANK DUBLIN PLC, FKA Bear Stearns Bank PLC, UBS LIMITED, CREDIT SUISSE GROUP INTERNATIONAL,

Defendants-Appellees,

CREDIT AGRICOLE S.A., SUMITOMO MITSUI BANKING CORPORATION, BNP PARIBAS S.A., RBS CITIZENS, N.A., incorrectly sued as the Charter One Bank NA, RBS CITIZENS, N.A., CREDIT SUISSE GROUP, NA, CITIZENS BANK OF MASSACHUSETTS, agent of RBS Citizens Bank, NA, BARCLAYS US FUNDING LLC, DEUTSCHE BANK FINANCIAL LLC, DOES 1 THROUGH 10, SOCIETE GENERALE CORPORATE & INVESTMENT BANKING, NATIONAL ASSOCIATION, STEPHANIE NAGEL, JOHN DOES #1–#5, NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-1, CHASE BANK USA, N.A., J.P. MORGAN CLEARING CORP., BANK OF AMERICA SECURITIES LLC, CENTRALE RAIFFEISEN-BERENLEENBANK B.A., UBS AG, ROYAL BANK OF SCOTLAND GROUP PLC, BANK OF NOVA SCOTIA, CREDIT SUISSE SECURITIES (USA) LLC, RBS GROUP, LLOYDS BANK PLC, FKA LLOYDS BANK PLC, CITIZENS BANK N.A., CREDIT SUISSE SECURITIES (USA) LLC, CITIGROUP GLOBAL MARKETS INC., LLOYDS BANK PLC, CITIGROUP FUNDING, INC., BARCLAYS PLC, J.P. MORGAN SECURITIES LLC, FKA J.P. MORGAN SECURITIES INC., DEUTSCHE BANK SECURITIES INCORPORATED, BANC OF AMERICA SECURITIES, LLC, RBS SECURITIES INC., FKA Greenwich Capital Markets, Inc., LLOYDS TSB BANK PLC, ICAP PLC, J.P. MORGAN MARKETS LTD., BANK OF AMERICA HOME LOANS, MERRILL LYNCH CAPITAL SERVICES, INC., CITIGROUP GLOBAL MARKETS LIMITED, MERRILL LYNCH & CO., INC., MERRILL LYNCH INTERNATIONAL

BANK, LTD., BEAR STEARNS CAPITAL MARKETS, INC., BARCLAYS CAPITAL (CAYMAN) LIMITED, INSTITUTE OF INTERNATIONAL BANKERS, THE CLEARING HOUSE ASSOCIATION, L.L.C.,

Defendants.[*]

Appeal from the United States District Court for the Southern District of New York
No. 11-md-2262, Naomi Reice Buchwald, *Judge*.

August Term 2018

Argued: May 24, 2019

Decided: December 30, 2021

COUNSEL

Eric F. Citron (Thomas C. Goldstein, Charles H. Davis,[†] on the brief), Goldstein & Russell, P.C., Bethesda, Maryland, for Schwab Plaintiffs-Appellants and Plaintiffs-Appellants Ellen Gelboim and Linda Zacher.

Neal Kumar Katyal (Eugene A. Sokoloff, Kirti Datla, Allison K. Turbiville, Marc J. Gottridge, Lisa J. Fried, Benjamin A. Fleming, on the brief), Hogan Lovells US LLP, Washington, D.C., for Defendants-Appellees Lloyds Banking Group plc and HBOS plc (additional

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[*] The Clerk of Court is respectfully directed to amend the caption as set forth above.

[†] Charles H. Davis subsequently withdrew as counsel. (Doc. No. 873).

counsel for the many parties and amici are listed in Appendix A).

Before: Livingston, Chief Judge, Lynch and Sullivan, Circuit Judges.

OPINION

Richard J. Sullivan, Circuit Judge:

Plaintiffs-Appellants in this multidistrict litigation allege an international conspiracy to manipulate the London Interbank Offered Rate ("LIBOR"), a benchmark interest rate for lending money among global financial institutions. Defendants-Appellees are the sixteen panel banks involved in setting LIBOR, about two dozen affiliated banking institutions (together with the panel banks, "Banks"), and the British Bankers' Association ("BBA"), as well as affiliated organizations working with the BBA to set LIBOR (collectively, "Defendants"). On appeal are several orders from the United States District Court for the Southern District of New York (Buchwald, *J.*), granting Defendants' motions to dismiss claims in twenty-three cases for lack of antitrust standing or lack of personal jurisdiction over Defendants.

We agree with the district court that third parties who independently chose to reference LIBOR in their bonds before selling those bonds to Plaintiffs broke the causal chain linking Plaintiffs' harm to Defendants' misconduct. Under well-established antitrust standing principles, this means that those Plaintiffs who purchased such bonds are not the proper parties to enforce the federal antitrust laws against Defendants and thus lack statutory standing. And like the district court, we are persuaded that this statutory standing analysis applies to the antitrust claims brought under California law.

But we disagree with the district court's personal jurisdiction analysis. In our view, jurisdiction is appropriate under a conspiracy-based theory, in which a defendant purposefully avails itself of the laws of a forum when it or its co-conspirator undertakes an overt act in furtherance of the conspiracy in the forum. Here, that requirement – first articulated by this Court in an opinion that post – dated the district court's ruling – is satisfied in light of allegations that executives and managers from several Banks were directing the suppression of LIBOR from the United States. We thus **AFFIRM** in part, **REVERSE** in part, and **REMAND** to the district court for proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Allegations

This marks the fourth time in eight years that this case has come before us. *See Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68 (2d Cir. 2018) ("*Schwab*"); *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759 (2d Cir. 2016); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 13-3565-L, 2013 WL 9557843 (2d Cir. Oct. 30, 2013). Consequently, we have had ample occasion to discuss Plaintiffs' factual allegations, which "[d]espite the legal complexity of this case, ... are rather straightforward." *Gelboim*, 823 F.3d at 765 (quoting *In re: LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 677 (S.D.N.Y. 2013) ("*LIBOR I*")).

LIBOR is a widely used benchmark that approximates the average rate at which a group of designated banks can borrow money. It serves as an index for a variety of financial instruments, including bonds, interest rate swaps, commercial paper, and exchange-traded derivatives. LIBOR is also used indirectly in calculating rates for short-term, fixed-rate bonds, which do not reference LIBOR but are nevertheless assessed in terms of their spread relative to it. LIBOR has also been licensed to third parties, including the Chicago Mercantile Exchange, which directly incorporate LIBOR as a price component for financial products traded in the United States.

The Banks belonged to the British Bankers' Association ("BBA"), a trade organization for the banking and financial-services sector in the United Kingdom that sets the daily LIBOR rate for various currencies. With respect to the daily LIBOR rate for U.S. dollars,[1] the Banks that comprised the LIBOR panel were asked to disclose the rate at which they could borrow dollars on the inter-bank market. Under LIBOR-setting rules, (1) each Bank was to independently exercise good faith judgment in submitting its estimated interest rates for borrowing funds at different maturity rates, which were to be based on the Bank's knowledge of market conditions;

[1] For the sake of simplicity, this Opinion refers to the U.S.-Dollar LIBOR as "LIBOR."

(2) the daily submissions were to remain confidential until after LIBOR was computed and published; and (3) Thomson Reuters, on behalf of the BBA, would then calculate LIBOR based on the average of the middle eight submissions, and publish the final rate, as well as all sixteen individual submissions.

The panel Banks involved in setting LIBOR also bought and sold – in the United States – billions of dollars' worth of financial instruments tied to that benchmark. Even small increases in LIBOR would have allegedly cost the Banks hundreds of millions of dollars. *Gelboim*, 823 F.3d at 766. For instance, JPMorgan Chase stated that it would lose $500 million if LIBOR increased by one percentage point. But if rates instantaneously *decreased* by one percentage point, Citibank, for example, would make $1.935 billion.

During the 2008 financial crisis, several news articles and scholarly pieces reported that LIBOR was suspiciously low as compared to other lending benchmarks. *See LIBOR I*, 935 F. Supp. 2d at 680. These comments were promptly refuted by the Banks and the BBA, who provided alternative explanations for LIBOR's failure to track similar benchmarks. *Id.* In early 2011, however, one of the Banks released a report explaining that the United States Department of Justice, along with several other United States and foreign agencies, had subpoenaed information designed to determine whether the panel Banks had manipulated LIBOR during the 2008 financial crisis. *Id.*

B. Procedure

In light of mounting evidence that LIBOR had been artificially suppressed, litigants began flooding courts throughout the country with federal and state antitrust claims and various other claims based on the alleged manipulation. To manage these cases, the Judicial Panel on Multidistrict Litigation ("JPML") established an MDL in the Southern District of New York. *See In re: Libor-Based Fin. Instruments Antitrust Litig.*, 802 F. Supp. 2d 1380 (J.P.M.L. 2011). The JPML explained that the cases shared the same allegations that the panel Banks "manipulated L[IBOR] by deliberately and intentionally understating their respective borrowing costs to the BBA, and that, by doing so, they paid lower interest rates to customers who bought [the Banks'] products with rates of return tied to L[IBOR.]" *Id.* at 1381. The MDL has expanded to include dozens of class and individual actions.

As relevant here, four groups of Plaintiffs brought complaints related to the alleged conspiracy:

(1) The Over-the-Counter (or "OTC") Plaintiffs filed a putative class action representing those who directly purchased LIBOR-based interest rate swaps directly from the Banks.

(2) The Bondholder Plaintiffs filed a putative class action on behalf of those who held LIBOR-based bonds issued by third parties.

(3) The Exchange-Based Plaintiffs filed a putative class action for purchasers of LIBOR-based futures on the Chicago Mercantile Exchange.

(4) The remaining Plaintiffs comprise a group filing individual (non-class) actions based on their purchases of various financial instruments from the Banks. Among this group are The Charles Schwab Corporation and related entities (collectively, "Schwab"), which filed three complaints alleging harm from purchases of various LIBOR-indexed financial instruments from the Banks, as well as from LIBOR-based bonds and fixed-rate bonds sold by third parties.

Taken together, Plaintiffs' complaints named about forty Defendants allegedly responsible for the LIBOR suppression. They include the panel Banks involved in setting LIBOR: Bank of America Corporation and Bank of America, N.A. (together, "Bank of America"); Bank of Tokyo-Mitsubishi UFJ Ltd. ("BTMU"); Barclays Bank plc ("Barclays"); Citigroup, Inc. and Citibank, N.A. (together, "Citibank"); Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. ("Rabobank"); Credit Suisse Group AG ("Credit Suisse"); Deutsche Bank AG ("Deutsche Bank"); HSBC Holdings plc and HSBC Bank plc (together, "HSBC"); JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (together, "JPMorgan Chase"); Lloyds Banking Group plc ("Lloyds"); HBOS plc ("HBOS"); Société Générale S.A. ("SocGen"); The Norinchukin Bank ("Norinchukin"); Portigon AG and Westdeutsche ImmobilienBank AG (together, "WestLB"); Royal Bank of Canada ("RBC"); Royal Bank of Scotland Group plc ("RBS"); and UBS AG ("UBS"). Three of these Banks – Bank of America, Citibank, and JPMorgan Chase – are incorporated and headquartered in the United States, while the remainder are foreign Banks. In addition to naming these Defendants, the complaints (taken together) name about two dozen affiliated banking institutions, most of which are incorporated and/or headquartered in the United States.[2] They also name the BBA, BBA Enterprises, Ltd., and BBA LIBOR, Ltd., each of which participates in setting LIBOR.

The district court initially dismissed the federal antitrust claims in their entirety on the ground that Plaintiffs failed to plead antitrust injury, reasoning that the LIBOR-setting process was collaborative rather than competitive and that Plaintiffs therefore suffered no anticompetitive harm. *See LIBOR I*, 935 F. Supp. 2d at 686–95. At the same time, however, the district court denied motions to dismiss certain other contract-based claims that were not linked to the

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[2] Those entities are Citigroup Financial Products, Inc.; Citi Swapco Inc.; Citigroup Global Markets, Inc.; Citigroup Funding Inc.; Credit Suisse Securities (USA) LLC; Credit Suisse (USA) Inc.; Deutsche Bank Securities, Inc.; HSBC Bank USA, N.A.; HSBC Finance Corporation; HSBC Securities (USA) Inc.; HSBC USA Inc.; Chase Bank, USA, N.A.; J.P. Morgan Securities LLC; Merrill Lynch, Pierce, Fenner & Smith Inc. (f/k/a Banc of America Securities LLC); Merrill Lynch Capital Services, Inc.; RBC Capital Markets LLC; RBS Securities Inc. (f/k/a Greenwich Capital Markets, Inc.); UBS Securities LLC; Barclays Capital Inc.; Credit Suisse International; The Hongkong and Shanghai Banking Corporation Ltd.; J.P. Morgan Dublin plc; Merrill Lynch International Bank. Although our case caption lists Credit Suisse Group International, the district court dismissed that party since the complaint referenced it only in the case caption, and the entity otherwise appears to be non-existent. *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR IV*"), No. 11-mdl-2262 (NRB), 2015 WL 6243526, at *158 (S.D.N.Y. Oct. 20, 2015). The caption also lists Rabobank International, but that is merely a tradename for Rabobank.

antitrust claims. *Id.* at 738. Several Plaintiffs appealed, and we dismissed the appeal for lack of subject matter jurisdiction for the simple reason that the district court had not yet issued a final order disposing of the entire MDL. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2013 WL 9557843, at *1. The Supreme Court granted certiorari and reversed, holding that Plaintiffs did not have to wait until the completion of all MDL proceedings to appeal and observing that the parties could take advantage of Federal Rule of Civil Procedure 54(b) to obtain partial judgment on subsets of claims. *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 415–16, 135 S.Ct. 897, 190 L.Ed.2d 789 (2015).

With the case once again before our Court, we reversed the district court on the merits. Specifically, we held that Plaintiffs had plausibly alleged a per se antitrust violation involving horizontal price-fixing and had plausibly alleged an inter-bank conspiracy to suppress LIBOR based on parallel conduct, internal communications, and "a common motive" of "increased profits and the projection of financial soundness." *Gelboim*, 823 F.3d at 781–82. We further considered Plaintiffs' statutory "antitrust standing," which turns on whether Plaintiffs "suffered antitrust injury" and whether they are the proper parties to challenge the antitrust violations (so-called "efficient enforcers"). *Id.* at 772. While we determined that Plaintiffs had sufficiently alleged that they suffered an antitrust injury, we concluded that we were "not in a position to resolve" the efficient-enforcer prong, which would "entail further inquiry" best left to the district court in the first instance. *Id.* at 778.

Back in the district court, Defendants moved to dismiss several antitrust claims, including the federal antitrust claims filed by Schwab and the Bondholder Plaintiffs, on efficient enforcer grounds. The Defendants also moved to dismiss various state-law antitrust claims, such as those filed by Schwab pursuant to California's Cartwright Act, arguing that state law imposed analogous efficient enforcer requirements that certain Plaintiffs could not overcome. Separately, citing a lack of personal jurisdiction, Defendants moved to dismiss all or part of each complaint filed by Schwab and the OTC and Exchange-Based Plaintiffs, as well as the remaining eighteen complaints filed by non-class Plaintiffs.

On December 20, 2016, the district court largely granted the motions to dismiss. On the issue of antitrust standing, the district court concluded that the Bondholder Plaintiffs were not efficient enforcers since they purchased their bonds from third parties who independently chose to reference LIBOR. *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR VI*"), No. 11-mdl-2262 (NRB), 2016 WL 7378980, at *16 (S.D.N.Y. Dec. 20, 2016). Such independent action, the court explained, "breaks the chain of causation between [D]efendants' actions and a [P]laintiff's injury." *Id.* The court further held that the efficient enforcer considerations underlying its analysis of the federal antitrust claims applied with equal force to the antitrust claims brought under California's Cartwright Act. *Id.* at *24.

But the district court did not address whether Schwab, whose claims depended in part on purchasing LIBOR-related bonds sold by third parties, was an efficient enforcer. Instead, the district court dismissed Schwab's three complaints (and the claims of several other Plaintiffs) on personal jurisdiction grounds. The district court first defined the scope of the conspiracy, which the court deemed to be limited to the Banks' "projection of financial soundness." *Id.* at *7. With this narrow scope in mind, the court rejected the notion that Plaintiffs could "rely on the sales of LIBOR-based financial products in the United States" because "the goal of the conspiracy would have succeeded regardless of whether any defendants based their products on LIBOR and regardless of whether any [D]efendant [B]ank increased or decreased the margin on their LIBOR-based products." *Id.* at *8. Although the court noted several allegations that Bank executives and managers in the United States had directed the suppression of LIBOR from within the United States, the court nevertheless found that the allegations could be "easily discounted, especially in light of the moving [D]efendants' declarations" denying those allegations. *Id.* at *11. After discounting those allegations, and without holding an evidentiary hearing or permitting jurisdictional discovery, the district court concluded that Plaintiffs had failed to plausibly allege any facts supporting a conspiracy-based theory of jurisdiction. *See id.* at *8, 14.

Plaintiffs timely appealed. We received briefing on the antitrust standing issues, separate briefing on the personal jurisdiction issues, and supplemental briefing in light of our decision in *Schwab.* Following oral argument, we granted requests from a number of parties to sever, stay, and remand their appeals to the district court for purposes of concluding settlement negotiations. The district court ultimately approved those settlements on December 16, 2020, prompting us to dismiss those appeals on January 27, 2021.[3] This appeal is now ready for resolution.

II. DISCUSSION

In broad strokes, Plaintiffs raise two challenges to the district court's opinion. First, Schwab and the Bondholder Plaintiffs challenge the district court's conclusion that those who purchased LIBOR-related bonds from third parties lack antitrust standing under federal law, and (with respect to Schwab only) that California law applies the same statutory standing analysis. Second, each Plaintiff contends that the district court in fact had personal jurisdiction over every Defendant based on multiple theories,

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[3] Specifically, we dismissed the appeals of the following parties pursuant to Federal Rule of Appellate Procedure 42(b): (1) Plaintiffs Ellen Gelboim and Linda Zacher's appeal with respect to Citibank, NA and Citigroup, Inc. (Doc. No. 821); (2) Gelboim and Zacher's appeal with respect to J.P. Morgan Chase & Co., J. P. Morgan Chase Bank, N.A., Bank of America Corporation, and Bank of America N.A. (Doc. Nos. 817, 815); (3) Gelboim and Zacher's appeal with respect to Royal Bank of Scotland (Doc. Nos. 819), and (4) the Exchange-Based Plaintiffs Metzler Asset Management GmbH (f/k/a Metzler Investment GMBH), FTC Futures Fund SICAV, FTC Futures Fund PCC Ltd., Atlantic Trading USA, LLC, 303030 Trading LLC, Gary Francis, and Nathaniel Haynes's appeal with respect to Société Générale S.A. (Doc. Nos. 784). We later dismissed HSBC Holdings plc and HSBC Bank plc from one of the Schwab cases. (Doc. No. 838) Most recently, Gelboim and Zacher moved to sever and stay their appeal as to Credit Suisse, The Bank of Tokyo-Mitsubishi UFJ, Ltd. (now known as MUFG Bank, Ltd.), and Norinchukin Bank, which we granted on October 19, 2021; accordingly, this opinion does not resolve any legal issues between those parties.

including a conspiracy-based theory of jurisdiction. We take each issue in turn.

A. Antitrust Standing

The Bondholder Plaintiffs argue that the district court improperly dismissed their complaint after concluding that they lacked antitrust standing to bring a federal antitrust claim. Schwab purports to join the Bondholder Plaintiffs' appeal on this issue to the extent that its antitrust claims overlap with the Bondholder Plaintiffs', and Schwab further challenges the district court's determination that California's state antitrust law mirrors its federal analog.

On the issue of federal antitrust standing, we agree with the district court's conclusion that those Plaintiffs who purchased LIBOR-based bonds from third parties did not suffer an antitrust injury *that was proximately caused* by Defendants' alleged conspiracy. Like the district court, we therefore hold that the Bondholder Plaintiffs are not the proper parties to sue under federal antitrust law because – in the parlance of our antitrust doctrine – the Bondholder Plaintiffs are not "efficient enforcers" of the federal law. The same conclusion necessarily covers Schwab's federal antitrust claims, to the extent that they are based on Schwab's purchase of LIBOR-related bonds from third parties, and Schwab's California antitrust claims, since we are persuaded that California's antitrust standing analysis tracks its federal analog.[4]

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[4] Even though the district court dismissed Schwab's claims for lack of personal jurisdiction and did not reach Defendants' motion to dismiss Schwab's claims for lack of antitrust standing,

1. Antitrust Standing for Federal Antitrust Claims

Section 4 of the Clayton Act provides for a private right of action and treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). But the Supreme Court has recognized that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated General Contractors of California, Inc. v. California State Council of Carpenters* ("*AGC*"), 459 U.S. 519, 534, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) (internal quotation marks omitted). Accordingly, the private right to seek treble damages for federal antitrust violations has "developed limiting contours," which are "embodied in the concept of 'antitrust standing.' " *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75 (2d Cir. 2013).

To establish antitrust standing, "a plaintiff must show (1) antitrust injury, which is 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful,' and (2) that he is a proper plaintiff in light of four 'efficient enforcer' factors[.]" *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50

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we are free to consider that issue on appeal as an alternate basis to affirm the dismissal of Schwab's claims. *See Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 421 (2d Cir. 2005).

L.Ed.2d 701 (1977)).[5] There can be no doubt after our decision in *Gelboim* that all Plaintiffs here, including Schwab and the Bondholder Plaintiffs, have "plausibly alleged antitrust injury" flowing from the Banks' horizontal price-fixing conspiracy. 823 F.3d at 775. But even where a plaintiff "has cleared the antitrust-injury hurdle," the plaintiff must further "show that it is an 'efficient enforcer' of the antitrust laws." *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 65 (2d Cir. 2019). Though *Gelboim* did not resolve this efficient-enforcer prong of the antitrust-standing analysis, the district court considered the issue on remand and found that the Bondholder Plaintiffs failed to plausibly allege facts establishing that they were efficient enforcers.

At its core, the efficient enforcer analysis requires a court to decide if the "plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement." *Gelboim*, 823 F.3d at 780 (internal quotation marks omitted). In *AGC*, the Supreme Court outlined four factors to guide this analysis:

(1) " 'the directness or indirectness of the asserted injury' ";

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[5] Of course, an antitrust plaintiff must show both constitutional standing and antitrust standing. *See AGC*, 459 U.S. at 535 n.31, 103 S.Ct. 897; *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121 (2d Cir. 2007). But we have already held that constitutional standing is "easily satisfied by [A]ppellants' pleading that they were harmed by receiving lower returns on LIBOR-denominated instruments as a result of [D]efendants' manipulation of LIBOR." *Gelboim*, 823 F.3d at 770.

(2) " 'the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement' ";

(3) "the speculativeness of the alleged injury"; and

(4) "the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries."

Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 66 (2d Cir. 1988) (quoting *AGC*, 459 U.S. at 540–45, 103 S.Ct. 897). We now consider whether the district court properly applied these factors on remand.

a. Directness of the Injury

In our view, the district court correctly "dr[e]w a line between [P]laintiffs who transacted directly with [D]efendants and those who did not," finding that only those who transacted with the Banks suffered a direct antitrust injury. *LIBOR VI*, 2016 WL 7378980, at *16. For the purposes of antitrust standing, proximate cause is determined according to the so-called "first-step rule." "Under th[at] rule, injuries that happen at the first step following the harmful behavior are considered proximately caused by that behavior." *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127, 140 (2d Cir. 2021); *see also Gatt*, 711 F.3d at 78 ("Directness ... means close in the chain of causation.") (internal quotation marks omitted). It is thus not enough that a plaintiff "suffered a loss in some manner that might conceivably be traced to the conduct of the defendants." *In re Aluminum*

Warehousing Antitrust Litig., 833 F.3d 151, 157 (2d Cir. 2016) (internal quotation marks omitted). Rather, " 'the general tendency of [§ 4 of the Clayton Act] is not to go beyond the first step.' " *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 417, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004) (Stevens, J., concurring in the judgment) (internal quotation marks omitted); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (citing *AGC*, 459 U.S. at 532–33, 103 S.Ct. 897) (holding that the Clayton Act covers only plaintiffs "whose injuries were proximately caused by a defendant's antitrust violations.")

The first-step rule and traditional proximate cause considerations require drawing a line between those whose injuries resulted from their direct transactions with the Banks and those whose injuries stemmed from their deals with third parties. *See In re Am. Express*, 19 F.4th at 141 (holding that "if there are 'direct victims,' those victims are the merchants to which Amex's Anti-Steering Rules applied," not the appellants who "were allegedly injured when Amex's competitors, ... raised their own prices"); 2A Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 335c(3) (2014) ("Beyond the actual customers, most other plaintiffs would be classified as 'remote' and denied standing even though they have suffered injury-in-fact."). This is because the decision of a third party to incorporate LIBOR as a term in a financial instrument could be made without any connection to the actions of the Banks. Such independent decisions snap the chain of causation linking Plaintiffs' injury to the Banks' misconduct.

The disconnect between Plaintiffs' injury and the Banks' alleged benefit further demonstrates the attenuated nature of the causal chain. Schwab and the Bondholder Plaintiffs were allegedly harmed because they received lower-interest payments due to the conspirators' suppression of LIBOR, which resulted in Plaintiffs' counterparties receiving a corresponding benefit of lower-interest payments. But the reduced-interest payment in no way enriched the Banks, who had no financial stake in the transactions whatsoever. Rather, for every Plaintiff who was harmed by a reduced-interest payment, there was a third party who benefited from being the counterparty to the transaction. None of that benefit, however, flowed to the Banks. And while Plaintiffs insist that the Banks derived a reputational benefit from falsely touting their ability to get lower rates on borrowing than was actually the case, that benefit too is wholly unrelated to the purported harm. Though the Banks may have increased their profits by selling LIBOR-indexed instruments, those who purchased from third parties were "not the target" of such harm; they were "simply collateral damage." *IQ Dental Supply*, 924 F.3d at 65-66.

To be sure, some courts have occasionally looked past intervening decisions by third parties to find "umbrella standing," which allows a consumer who dealt with a non-cartel member to pursue antitrust claims against cartel members who rigged the market as a whole. *See Gelboim*, 823 F.3d at 778 (collecting cases and noting a circuit split). We have never adopted this theory of antitrust standing, and the unique nature of the LIBOR conspiracy makes umbrella standing particularly inappropriate here.

See, e.g., *In re Am. Express*, 19 F.4th at 143 ("[I]t is not the appellants' status of umbrella plaintiffs or otherwise that resolves the antitrust standing question but 'the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff.' " (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1058 (9th Cir. 1999)). Unlike the archetypal price-fixing conspiracy, which involves a cartel that controls a market for a good and sells that good at an inflated price, *see, e.g.*, *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1166 n.24 (5th Cir. 1979), the LIBOR conspiracy entailed the fixing of a number that was available for unlimited third parties to reference and incorporate into their own products and transactions without any input from, or involvement by, the Banks. There is no allegation that the Banks controlled the market for LIBOR-referencing products, nor any claim that the Banks pressured third parties to adhere to a LIBOR-based index. Instead, third parties independently decided to peg their bonds' terms to LIBOR.

Simply put, umbrella standing of the sort urged by the Bondholder and Schwab Plaintiffs would yield liability that is far too sweeping and would, therefore, "raise the very concern of damages disproportionate to wrongdoing" emphasized in cases that reject umbrella standing. *Gelboim*, 823 F.3d at 779. Because the harm that befell Schwab and the Bondholder Plaintiffs is far removed from Defendants' conduct, it cannot be said that Defendants proximately caused the alleged antitrust injury.

The Supreme Court's decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982), is not to the contrary. There, the plaintiff argued that an insurance provider for her employer-purchased group health plan had conspired with psychiatrists to box out psychologists from the psychotherapy market, and as a result of the conspiracy, had refused to reimburse her for treatment provided by a psychologist. *See id.* at 469-70, 102 S.Ct. 2540. The Supreme Court determined that the plaintiff had successfully pleaded antitrust injury because, even though she did not directly transact with the conspiring defendants, her injury was "inextricably intertwined" with their scheme. *Id.* at 484, 102 S.Ct. 2540. In so holding, the Supreme Court merely carved out an exception to the market participant requirement in cases where a plaintiff was "manipulated or utilized by [a defendant] as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical markets." *Aluminum Warehousing*, 833 F.3d at 161 (internal quotation marks omitted). *McCready* involved a direct relationship between the pocket-book harm to the plaintiff and the market advantage gained by the defendants, which was the very goal of the conspiracy.

Not so here. As noted above, Defendants derived no benefit from Plaintiffs' transactions with third parties. Those transactions, while arguably foreseeable to the Banks, were entirely separate from the purpose of the alleged conspiracy and took place merely because of LIBOR's unlimited public availability as a reference point for innumerable transactions. This case thus has little in common with *McCready.*

Likewise, the Seventh Circuit cases on which Plaintiffs rely, *Sanner v. Board of Trade of Chicago*, 62 F.3d 918 (7th Cir. 1995), and *Loeb Industries, Inc. v. Sumitomo Corp.*, 306 F.3d 469 (7th Cir. 2002), do not support a finding of proximate cause here. In both cases, the Seventh Circuit found antitrust standing for the plaintiffs who bought or sold various physical commodities in the cash market, and who alleged injuries caused by the defendants' manipulation of the futures market for the same commodity. *Sanner*, 62 F.3d at 930; *Loeb Indus.*, 306 F.3d at 489. But while these cases accepted a somewhat attenuated chain of causation, they nonetheless emphasized the "lockstep" link between prices in the two markets and the uniquely interrelated nature of a *cash* market for a specific commodity and the *futures* market for that same commodity. In fact, *Sanner* deemed the markets to be "so closely related that the distinction between them is of no consequence to antitrust standing analysis." 62 F.3d at 929 (internal quotation marks omitted). *Sanner* further emphasized that the defendant "intended to impact both the cash and futures markets to bring down prices in both markets" in order to benefit its clients. *Id.* at 929-30. The same cannot be said here, where the Banks gained no financial benefit from the use of LIBOR as an index number for *third-party* transactions.

We thus reject the attempts of Schwab and the Bondholder Plaintiffs "to impose liability for transactions [that] [D]efendants did not control and of which they were likely not even aware." *Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 560 (S.D.N.Y. 2017); *see also In re Am. Express*, 19 F.4th at 141; *Sullivan v. Barclays PLC*, No. 13-cv-2811 (PKC), 2017 WL 685570, at *17–18; *In re Platinum & Palladium Antitrust Litig.*, No. 14-cv-

9391 (GHW), 2017 WL 1169626, at *22 (S.D.N.Y. Mar. 28, 2017). As aptly summarized by the district court, the Bondholder Plaintiffs "did not purchase directly from [D]efendants," and "made their own decisions to incorporate LIBOR into their transactions, over which [D]efendants had no control, in which [D]efendants had no input, and from which [D]efendants did not profit." *LIBOR VI*, 2016 WL 7378980, at *16. The same is true of Schwab insofar as it purchased LIBOR-related bonds from third parties. [6] Accordingly, since Defendants did not proximately cause the injury flowing from the purchases of these LIBOR-related bonds, neither set of Plaintiffs has statutory standing to raise a federal antitrust claim related to those purchases. *See Lexmark*, 572 U.S. at 126, 134 S.Ct. 1377.

b. Other *AGC* Factors

While the first factor alone furnishes ample justification for affirming the district court, the other *AGC* factors, on the whole, likewise cut against a finding of antitrust standing. The second factor – "the existence of more direct victims of the alleged conspiracy," *AGC*, 459 U.S. at 545, 103 S. Ct. 897 – clearly weighs against antitrust standing since there is no shortage of other parties in this very case who purchased LIBOR-indexed financial instruments

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[6] Indeed, Schwab's argument is even more tenuous in some respects, since Schwab bases its federal antitrust claim not only on LIBOR-indexed bonds purchased from third parties, but also on fixed-rate bonds that do not reference LIBOR at all. Schwab's theory is that LIBOR exerted a kind of gravitational force, influencing fixed-rate bonds. But that is clearly insufficient to establish antitrust standing.

directly from the Banks. Those victims' injuries are directly linked to the Banks' profit from the conspiracy, thus underscoring the attenuated nature of the harms allegedly flowing from third-party bond sales. *See id.*

The third factor, which focuses on whether the alleged damages are "highly speculative," *id.* at 542, 103 S.Ct. 897, also favors Defendants. As we previously stated, "highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement." *Gelboim*, 823 F.3d at 779. Schwab and the Bondholder Plaintiffs contend that their "damage theory is simple," and only requires the district court to compare the "difference between the fixed price and the price that would have obtained in a competitive market but for the price fixing." Appellant's Antitrust Br. at 37–38.

Though simple to articulate, Plaintiffs' damages theory would be difficult to apply because, at least for those who purchased their bonds during the suppression period, Plaintiffs' theory would require the court to speculate about how the third-party sellers would have factored a non-suppressed LIBOR into the transaction. For example, a bondholder may have received lowered coupon payments from a suppressed rate, but the price of the bond itself may have been correspondingly lowered to account for a suppressed LIBOR. The spread relative to LIBOR could have also been adjusted in light of the lower rate. To answer these and other conjectural hypotheticals, Schwab and the Bondholder Plaintiffs "would have to model far more than basic lost sales and lost profits"; they would essentially have to "creat[e] ... an alternative universe" based on "multiple layers of speculation." *IQ Dental Supply*, 924 F.3d at 67 (internal quotation marks omitted). Such "highly speculative" damages claims are disfavored in selecting efficient antitrust enforcers. *See AGC*, 459 U.S. at 542–43, 103 S.Ct. 897.

That said, two considerations persuade us to give this damages-calculation factor only limited weight. First, many of the Bondholder Plaintiffs purchased their bonds prior to the period in which LIBOR was allegedly suppressed. For claims based on these purchases, calculating damages would be more straightforward since it would not turn on how third parties accounted for the suppressed rate when incorporating LIBOR as part of the price term. Second, the Supreme Court has warned that antitrust standing should not provide a "get-out-of-court-free card" to be played "any time that a damages calculation might be complicated." *Apple Inc. v. Pepper*, ––– U.S. ––––, 139 S. Ct. 1514, 1524, 203 L.Ed.2d 802 (2019). Though of diminished weight, this factor nevertheless tips the scale slightly in favor of Defendants.

Finally, the fourth *AGC* factor – "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" – reflects a "strong interest ... in keeping the scope of complex antitrust trials within judicially manageable limits." *AGC*, 459 U.S. at 543–44, 103 S.Ct. 897. This case does not present the problem of upstream and downstream purchasers that is the usual focus of this factor. *See id.* After all, the third parties who sold the bonds – and *benefited* from the suppressed rate – would clearly not be in a position to enforce the antitrust laws. Although the ongoing government enforcement actions might pose some minimal risk of duplicative recoveries, *see Gelboim*, 823 F.3d at 780, we nevertheless view this fourth factor as favoring Schwab and the Bondholder Plaintiffs.

But, on the whole, the last three *AGC* factors ultimately bolster the finding that Schwab and the Bondholder Plaintiffs have failed to establish antitrust standing.[7]

2. Antitrust Standing for California Antitrust Claims

Schwab next challenges the district court's decision to apply the *AGC* antitrust standing factors to antitrust claims brought pursuant to California's Cartwright Act. Though state-law authority is sparse and federal cases interpreting the state's requirements are divided, *compare, e.g.*, *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 433 F. Supp. 3d 395, 413—14 (E.D.N.Y. 2020) (siding with courts applying the *AGC* factors to California's Cartwright Act), *with, e.g.*, *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 258 (S.D.N.Y. 2019) ("I cannot conclude ... that the Supreme Court of California would apply the *AGC* factors in accordance with federal precedents...."), we ultimately agree with the court

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[7] Having resolved the antitrust-standing issue in favor of Defendants, we do not reach their alternative argument that Schwab and the Bondholder Plaintiffs have not pleaded an antitrust injury related to bonds purchased before the suppression period.

below that California law substantially incorporates the *AGC* factors.

In deciding matters of state law, we seek to "predict how the state's highest court would resolve the [issues] that we have identified." *Travelers Ins. Co. v. Carpenter*, 411 F.3d 323, 329 (2d Cir. 2005) (internal quotation marks omitted). Naturally, that means that we "give the fullest weight to pronouncements of the state's highest court," *id.* – but it also means that we look to the rulings of the state's lower courts as providing important data points for understanding state law, *see New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 210 (2d Cir. 2006).

To date, the California Supreme Court has not addressed the question before us; instead, the best data point for assessing California's antitrust standing analysis is a decision from a California intermediate appellate court, *Vinci v. Waste Mgmt., Inc.*, 36 Cal.App.4th 1811, 43 Cal. Rptr. 2d 337, 338–39 (1995), which expressly described the antitrust standing required under state law in terms of the *AGC* factors. *See also Wholesale Elec. Antitrust Cases I & II*, 147 Cal.App.4th 1293, 55 Cal. Rptr. 3d 253, 265 (2007) (quoting federal antitrust standing elements as deciding antitrust standing under California's Cartwright Act). The *Vinci* court looked to federal antitrust elements both because the Cartwright Act contains "similar language" to the federal antitrust statute interpreted in *AGC* and "[b]ecause the Cartwright Act has objectives identical to the federal antitrust acts." *Vinci*, 43 Cal. Rptr. 2d at 338 & n.1.

Schwab nonetheless contends that the California Supreme Court's more recent decision in *Aryeh v.*

Canon Business Solutions, Inc., 55 Cal.4th 1185, 151 Cal.Rptr.3d 827, 292 P.3d 871, 877 (2013), casts doubt on *Vinci*. While it is true that *Aryeh* stated in dicta that "[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act," 151 Cal.Rptr.3d 827, 292 P.3d at 877, *Aryeh* does not compel us to conclude that interpretations of federal and state antitrust standing law always diverge. Indeed, we recently held – on the strength of *Aryeh*'s instructions alone – that "the California legislature, like Congress, was 'familiar with the common-law rule' of proximate cause" and did not intend "to displace it *sub silentio*" when it enacted the Cartwright Act. *In re Am. Express*, 19 F.4th at 144 (quoting *Lexmark*, 572 U.S. at 132, 134 S.Ct. 1377). This conclusion is strengthened by *Vinci*, which remains the California case most directly on point. We therefore hold that Schwab also lacks antitrust standing to bring its state-law claims based on its purchasing of bonds from third parties.

B. Personal Jurisdiction

We next consider the district court's personal jurisdiction analysis. As noted above, the district court dismissed the federal and state antitrust claims filed by the Exchange-Based, OTC, and non-class Plaintiffs (including Schwab), after concluding that these Plaintiffs failed to sufficiently allege minimum contacts with the United States. Reviewing the district court's dismissal de novo, *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir. 2010), we conclude that the district court had specific personal jurisdiction under the conspiracy theory adopted in *Schwab*.

To survive a motion to dismiss, "a plaintiff must make a prima facie showing that [personal] jurisdiction exists." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 167 (2d Cir. 2013) (internal quotation marks omitted). While we read "the pleadings and any supporting materials in the light most favorable to the plaintiffs," *id.*, we also require that the plaintiffs make "legally sufficient allegations of jurisdiction, including an averment of facts that, if credited[,] would suffice to establish jurisdiction over the defendant," *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 35 (2d Cir. 2010) (alteration in original) (internal quotation marks omitted).

Before a court may exercise personal jurisdiction over a defendant, three requirements must be met: (1) "the plaintiff's service of process upon the defendant must have been procedurally proper"; (2) "there must be a statutory basis for personal jurisdiction that renders such service of process effective"; and (3) "the exercise of personal jurisdiction must comport with constitutional due process principles." *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 327–28 (2d Cir. 2016) (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59–60 (2d Cir. 2012)).

Only the third requirement – compliance with due process – is contested here. As the Supreme Court has long held, due process demands that each defendant over whom a court exercises jurisdiction have some "minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90

L.Ed. 95 (1945) (internal quotation marks omitted); *see also Waldman*, 835 F.3d at 330–31 (applying analysis to Fifth Amendment). Our inquiry narrows further, however, since the district court did not address traditional notions of fair play and substantial justice, and Defendants do not rely on that prong as an alternative basis for affirmance. We thus likewise limit our analysis to the assessment of Defendants' minimum contacts. *See Schwab*, 883 F.3d at 82.

The district court determined that the "relevant forum for the assessment of minimum contacts is the United States as a whole." *LIBOR VI*, 2016 WL 7378980, at *8. In reaching this conclusion, the district court cited its analysis in an earlier opinion, *id.*, in which the court had observed that some of Plaintiffs' claims "arise under federal statutes containing provisions authorizing nationwide service of process," *LIBOR IV*, 2015 WL 6243526, at *23; *see* 15 U.S.C. § 22. There, the district court grounded its nation-based approach on the theory that "[w]hen the national sovereign is applying national law, the relevant contacts are the contacts between the defendant and the sovereign[ ] nation." *LIBOR IV*, 2015 WL 6243526, at *23 (quoting *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279, 1294 (7th Cir. 1992)); *see also Chew v. Dietrich*, 143 F.3d 24, 28 n.4 (2d Cir. 1998). No party challenges the district court's conclusion that a nation-wide contacts analysis is appropriate here, and neither do we. *See In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 207 (2d Cir. 2003) (assuming that district court correctly decided that the "minimum contacts analysis looks to a corporation's contacts with the United

States as a whole," "given that the parties do not question it on appeal").

When the claims "arise[ ] out of, or relate[ ] to, [a] defendant's contacts with the forum — i.e., specific jurisdiction is asserted — minimum contacts necessary to support such jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." *Licci*, 732 F.3d at 170 (internal quotation marks omitted and alterations adopted); *see also Bristol-Myers Squibb Co. v. Superior Ct. of California*, ––– U.S. ––––, 137 S. Ct. 1773, 1780, 198 L.Ed.2d 395 (2017). The contacts must be created by the "defendant *[it]self*," *Walden v. Fiore*, 571 U.S. 277, 284, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014) (internal quotation marks omitted), rather than from the "unilateral activity of another party or a third person," *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). That said, "a defendant can 'purposefully avail itself of a forum' " through the action of a third party by "directing its agents or distributors to take action there." *Schwab*, 883 F.3d at 84 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 135 n.13, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014)); *see also Walden*, 571 U.S. at 286, 134 S.Ct. 1115 ("[A] defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties.").

In *Schwab*, we held that a defendant can similarly avail itself of a forum through certain actions taken by a co-conspirator in the forum. *See Schwab*, 883 F.3d at 86–87. Much like an agent who operates on behalf of, and for the benefit of, its principal, a co-conspirator who undertakes action in furtherance of the conspiracy essentially operates on behalf of, and for the benefit of, each member of the conspiracy. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) ("In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit.").

To assert a conspiracy theory of personal jurisdiction, a plaintiff must plausibly allege that "(1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a [forum] to subject that co-conspirator to jurisdiction in that [forum]." *Schwab*, 883 F.3d at 87. Defendants argue that Plaintiffs cannot meet *Schwab*'s third prong, and that, in addition to *Schwab*'s test, conspiracy-based jurisdiction "requires a relationship of direction, control, and supervision before a co-conspirator's forum contacts may be imputed to absent defendants for jurisdictional purposes." Appellees' Jurisdiction Sur-reply at 5. We reject both arguments.

1. The Plaintiffs plausibly alleged overt conspiratorial acts in the forum.

Only *Schwab*'s third prong is at issue here.[8] When viewed in favor of the non-moving party, the pleadings

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[8] Although Defendants state for the first time in their sur-reply that Plaintiffs failed to satisfy the first two *Schwab* factors, we consider this delayed argument to be forfeited. *See McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 96 (2d Cir. 2009) ("[W]e ordinarily will not consider issues raised for the first time in a reply brief."); 16AA Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3974.2 (5th ed.) ("An appellee

and record evidence establish several overt, conspiratorial acts that are sufficient to subject each co-conspirator to personal jurisdiction in the United States. *See Licci*, 732 F.3d at 167; *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 85 (2d Cir. 2013).

Plaintiffs allege that Bank executives and managers in the United States mandated that their subordinates manipulate LIBOR. For starters, they allege that a "senior UBS manager in Stamford, Connecticut issued [a] standing directive to 'submit low LIBOR contributions' for USD LIBOR, and to keep submissions in the 'middle of the pack of other banks' expected LIBOR submissions.' " Confidential App'x at 3–4 (quoting UBS's admissions to the Department of Justice). Similarly, Plaintiffs rely on emails between a senior JPMorgan Chase executive in New York and the Banks' LIBOR submitter discussing the importance of staying in "the pack" and asking the submitter to "err on the low side" when setting LIBOR. *Id.* at 3, 30, 139. They also quote an email in which a U.S.-based employee of Citibank urged the Bank's LIBOR submitter that "we should

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who fails to include and properly argue a contention in the appellee's brief takes the risk that the court will view the contention as forfeited."). Indeed, even after Plaintiffs' opening brief articulated essentially the same conspiracy-based jurisdictional test later adopted in *Schwab* and relied on *Gelboim* as "confirm[ing] that the first and second elements are met," Appellants' Jurisdiction Br. at 59, Defendants' 73-page response brief on personal jurisdiction did not hint at any disagreement on that score. Under these circumstances, no "manifest injustice" would result from following our ordinary course and declining to consider Defendants' belated argument. *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005).

take a leadership [role] in bringing these LIBORS back to more sensible levels," "[e]xactly as we did 3–4 months back"; the Bank's LIBOR submissions then decreased. *Id.* at 34–35. Finally, Plaintiffs assert that a Barclays' executive "who was based in New York ... has admitted that he instructed subordinates to submit artificially low USD LIBOR rates." *Id.* at 343.

If true, these communications would establish overt acts taken by co-conspirator Banks in the United States in furtherance of the suppression conspiracy, vesting the district court with personal jurisdiction over each Defendant. *See Schwab*, 883 F.3d at 87; *cf. United States v. Kirk Tang Yuk*, 885 F.3d 57, 74 (2d Cir. 2018) (holding that a phone call to advance a conspiracy made venue proper in the district where the call originated); *Textor v. Bd. of Regents of N. Illinois Univ.*, 711 F.2d 1387, 1393 (7th Cir. 1983) (finding conspiracy-based personal jurisdiction where a party allegedly discriminated in the forum "[i]n furtherance of, and in accordance with, th[e] conspiracy").[9]

The district court, however, was not convinced because it found each allegation to be "easily discounted, especially in light of the moving [D]efendants' declarations stating that they did not determine or transmit their LIBOR submissions from the United States." *LIBOR VI*, 2016 WL 7378980, at

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[9] In light of this conclusion, we do not address whether other alleged acts, including that the BBA sent a representative to the United States to assure investors that LIBOR was sound and that LIBOR submissions were transmitted to Thomson Reuters in New York, also amount to overt conspiratorial acts in the forum.

*11. But this is not the stage in the litigation to decide competing factual assertions; "in the absence of an evidentiary hearing, it was error for the district court to resolve that factual dispute in [Defendants'] favor." *Dorchester*, 722 F.3d at 86.

Defendants nonetheless argue that Plaintiffs' allegations cannot survive scrutiny. Attacking the allegations concerning the UBS-related LIBOR bids, they contend that the document on which Plaintiffs rely (a non-prosecution agreement with the Department of Justice) actually "contradicts" Plaintiffs' assertion that the UBS manager in Stamford, Connecticut directed subordinates to manipulate the inter-bank rate. Appellee's Jurisdiction Br. at 43. To be sure, the non-prosecution agreement mentions suppression-related emails from a UBS manager "in Zurich," but the agreement further states that the Zurich manager "in turn indicated that the direction came from the Stamford-based Group Treasury senior manager." App'x at 3399, 3408. And while Defendants would discount these statements as "apparently not based on ... personal knowledge," Appellee's Jurisdiction Br. at 43, we are not at liberty to draw that inference against Plaintiffs at this stage of the litigation. *See Dorchester*, 722 F.3d at 85–86.

Defendants similarly challenge the characterizations of other alleged conspiratorial acts. For instance, Defendants would disregard allegations of the U.S.-based requests from upper management at JPMorgan Chase, dismissing those communications as "executives" merely "express[ing] opinions about [LIBOR] submissions." Appellee's Jurisdiction Br. at 44. Once again, this strained reading is clearly incompatible with our obligation to interpret the record in the light most favorable to Plaintiffs. *See Dorchester*, 722 F.3d at 85–86. In the end, Plaintiffs have alleged overt acts taken in the United States to advance the suppression conspiracy; at this stage of the litigation, that is enough to establish personal jurisdiction. *See Schwab*, 883 F.3d at 87.

2. Conspiracy jurisdiction does not require allegations of control.

Defendants next argue that in addition to meeting *Schwab*'s three elements, Plaintiffs must also demonstrate that Defendants directed, controlled, and/or supervised the co-conspirator who carried out the overt acts in the forum. Although Defendants base their argument on our decision in *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), *abrogated on other grounds by Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010), neither that case nor due process principles require more than that a defendant purposefully availed itself of the forum through the overt acts of its co-conspirator.

In adopting "the appropriate test for alleging a conspiracy theory of jurisdiction," *Schwab* noticeably did not endorse Defendant's argument, even though Defendants advanced the same point there. *Compare Schwab*, 883 F.3d at 86–87, *with* Brief for Defendants-Appellees, *Schwab*, 883 F.3d 68, 2017 WL 395989, at *30–35. Our silence was not due to oversight – indeed, elsewhere in *Schwab* we discussed the very portions of *Leasco* on which Defendants now rely. *See Schwab*, 883 F.3d at 85. *Leasco*, however, did not demand a relationship of control before one defendant's minimum contacts are imputed to its co-conspirator. It held instead that "the mere presence of one conspirator" would not be enough to "confer personal jurisdiction over another alleged conspirator," and that actions taken by a lawyer in the forum could not be attributed to a partner at the law firm merely on the basis of the partnership. *Leasco*, 468 F.2d at 1343. True, we went on to state in dicta that the "matter could be viewed differently" if the partner had delegated the in-forum tasks, meaning that delegation and control can be important indicia of purposeful availment through a third party. *Id.* But that observation in no way amounts to a holding that a defendant *must* control a co-conspirator before its purposeful availment is imputed to the defendant; rather, *Schwab* provides "the appropriate test for alleging a conspiracy theory of jurisdiction." 883 F.3d at 87.

Moreover, although we conclude that our caselaw does not require a relationship of control, direction, or supervision, we should also underscore that *Schwab*'s three-prong test *serves* the purposeful availment requirement, rather than supplants it. *See id.* (fashioning the test to avoid "inconsisten[cies] with the 'purposeful availment' requirement"). To that end, the conspiracy theory could not get off the ground if a defendant were altogether blindsided by its co-conspirator's contacts with the forum; the conspiratorial contacts must be of the sort that a defendant "should reasonably anticipate being haled into court" in the forum as a result of them. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *see also Schwab*, 883 F.3d at 82 ("[The] minimum contacts necessary to support such jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there.").

Defendants, of course, do not dispute that the overt acts were foreseeable to them. The alleged conspiracy involved the manipulation of U.S.-Dollar LIBOR with co-conspirators who were based in the United States. With this backdrop, the alleged overt acts taken by co-conspirators in the United States to advance the conspiracy should certainly have been anticipated by Defendants, and that is enough to make out a prima facie case that each Defendant has the requisite minimum contacts with the nation.[10] *See Schwab*, 883 F.3d at 87.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court dismissing the Bondholder Plaintiffs' complaint, as well as dismissing Schwab's federal and state antitrust claims to the extent that they depend on its purchases of LIBOR-related bonds from third parties. But since we hold that Defendants had the relevant minimum contacts with the United States to satisfy due process,

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[10] Having resolved the specific personal jurisdiction issue in favor of the Plaintiffs, we do not reach Plaintiffs' alternative arguments that Defendants established minimum contacts with the United States by (1) selling trillions of dollars of LIBOR-based instruments in the United States, Appellants' Jurisdiction Br. at 40–42; (2) exploiting U.S. markets for USD-LIBOR-based financial products, *id.* at 42–44; and (3) targeting the United States with their price-fixing conspiracy, *id.* at 42–46.

we **REVERSE** the judgment in part, and **REMAND** for further proceedings.

APPENDIX A

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION.

This Document Applies to: Cases Listed in Appendix

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11 MDL 2262 (NRB)

Signed: December 20, 2016

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE

LIBOR VI

I. Introduction

Following an unusual, if not unique, appellate journey, we once again address the antitrust claims in this multi-district litigation ("MDL") arising from the alleged manipulation of the London Interbank Offer Rate ("LIBOR"), which we initially dismissed for lack of antitrust standing in March 2013. In re LIBOR-Based Fin. Instruments Antitrust Litig., 935 F. Supp. 2d 666 (S.D.N.Y. 2013) ("LIBOR I").

On this motion, defendants present two bases for dismissal of the antitrust claims: first, that this Court lacks personal jurisdiction over some defendants; and second, that plaintiffs lack antitrust standing because they are not efficient enforcers of the antitrust laws. Defendants have properly preserved their request to move for dismissal on other bases after the resolution of this motion.

For the reasons stated below, defendants' motion to dismiss is granted in part and denied in part. We grant the moving defendants' motion to dismiss for lack of personal jurisdiction, although such a result means we retain personal jurisdiction over the non-moving defendants.[1] We grant the defendants' motion to dismiss the putative Bondholder class's claims because they are not efficient enforcers of the antitrust laws. While we deny the defendants' motion to dismiss on efficient enforcer grounds as to all other antitrust claims, those claims are circumscribed as set forth in this opinion.

II. Background

The nature of LIBOR, its alleged manipulation, and the parties in this case have been explored in our prior opinions.[2] Thus, we assume familiarity with the facts.

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[1] Whether a defendant is a movant or non-movant is case-dependent in this MDL. Defendants' Notice of Motion lists the relevant cases and movants. Notice of Defs.' Joint Mot. to Dismiss App'x B, ECF No. 1480.

[2] E.g., In re LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MDL 2262 (NRB), 2015 WL 6696407, 2015 U.S. Dist. LEXIS 149629 (S.D.N.Y. Nov. 3, 2015) ("LIBOR V"); In re LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MDL

In LIBOR I, we dismissed the antitrust claims brought by Bondholder plaintiffs, over-the-counter ("OTC") plaintiffs, Exchange-Based plaintiffs, and Schwab plaintiffs for lack of antitrust standing. For a plaintiff to have antitrust standing, it must allege that it (1) has experienced antitrust injury and (2) is an efficient enforcer of the antitrust laws; we concluded that the plaintiffs lacked standing because they failed to allege an antitrust injury. As the Bondholders had only brought antitrust claims, their dismissal effectively dismissed the Bondholders' case.

The Bondholder and Schwab plaintiffs appealed LIBOR I to the Second Circuit, which dismissed the appeal *sua sponte* for lack of appellate jurisdiction on the grounds that we had not issued a final order and LIBOR I did not dispose of all claims in the MDL. In re LIBOR-Based Fin. Instruments Antitrust Litig., No. 13-3565-L, 2013 WL 9557843, at *1 (2d Cir. Oct. 30, 2013).

The Bondholders sought and were granted certiorari. The Supreme Court unanimously reversed, holding that the Bondholders' right to appeal ripened when we dismissed their case, and not at the eventual completion of the MDL proceedings. Gelboim v. Bank of Am. Corp., 135 S. Ct. 897, 900 (2015). The Supreme Court remanded to the Second Circuit for consideration of the merits.

2262 (NRB), 2015 WL 6243526, 2015 U.S. Dist. LEXIS 147561 (S.D.N.Y. Oct. 20, 2015) ("LIBOR IV"); In re LIBOR-Based Fin. Instruments Antitrust Litig., 27 F. Supp. 3d 447 (S.D.N.Y. 2014) ("LIBOR III"); In re LIBOR-Based Fin. Instruments Antitrust Litig., 962 F. Supp. 2d 606 (S.D.N.Y. 2013) ("LIBOR II"); LIBOR I, 935 F. Supp. 2d 666.

The Second Circuit issued its merits decision in May 2016. Gelboim v. Bank of Am. Corp., 823 F.3d 759 (2d Cir. 2016) ("Gelboim"). The Circuit reversed LIBOR I, holding that plaintiffs sufficiently pled an antitrust conspiracy [3] and the first prong of antitrust standing, that is, the existence of antitrust injury.[4] It remanded to us for further consideration of the second prong of antitrust standing, whether plaintiffs are efficient enforcers. The defendants' motion followed on a schedule set by the Court in a letter order dated June 7, 2016.

III. Personal Jurisdiction

The Second Circuit's holding that the plaintiffs adequately pled a conspiracy requires an analysis of that conspiracy and the consequent impact, if any, on whether this Court has personal jurisdiction over the moving defendants. This Court observes the teaching of Gelboim and proceeds on the premise that the conspiracy had an impact on price. Plaintiffs make much of the Second Circuit's statement that their "allegations evince a common motive to conspire—increased profits and the projection of financial soundness," Gelboim, 823 F.3d at 781-82. Plaintiffs focus on "increased profits" as the object of the

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[3] Gelboim did not revive an alternative theory of antitrust violation, as advanced by some plaintiffs, that defendants fixed the market for benchmark rates. We have already rejected the viability of this theory. See LIBOR IV, 2015 WL 6243526, at *89-90. Therefore, the attempt of some plaintiffs to resuscitate this theory in the briefing on the present motions to dismiss was improper.

[4] The defendants filed a petition for a writ of certiorari on October 20, 2016.

conspiracy and thus argue that personal jurisdiction may be obtained over all panel banks because of the banks' economic activity in the United States. Plaintiffs misread and overread Gelboim.

It is far from clear that Gelboim should be read to mean that plaintiffs have sufficiently alleged "increased profits" as a goal independent of a conspiracy to "project[ ] ... financial soundness." Id. at 782. Regardless, the premise that the primary goal of the conspiracy was to increase profits by lowering the interest rate the banks had to pay when they were in the role of borrower is not plausible, as Gelboim itself noted: "[C]ommon sense dictates that the Banks operated not just as borrowers but also as lenders in transactions that referenced LIBOR.... It seems strange that this or that bank (or any bank) would conspire to gain, as a borrower, profits that would be offset by a parity of losses it would suffer as a lender." Id. at 783.[5] The Gelboim court continued this observation as follows: "On the other hand, the record is undeveloped and it is not even established that the Banks used LIBOR in setting rates for lending transactions." Id.

However, the record is developed.[6] Nor is there a need to rely on common knowledge or common sense.

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[5] Contrary to plaintiffs' argument that the profit-motivated goal should be assumed simply because "a person intends the natural and probable consequences of his actions," Oct. 27, 2016 Hr'g Tr. 23:4-5 ("Tr."), a conspiracy requires an agreement to achieve a particular goal, which cannot be assumed.

[6] We have always permitted the plaintiffs to rely on information resulting from government investigations here and abroad in their submissions without requiring formal

There were complaints brought on behalf of student loan holders who asserted that LIBOR manipulation resulted in lowered LIBOR-based borrowing costs. These complaints were dismissed precisely because under such an arrangement the loanholders benefited and the defendant banks lost income. LIBOR V, 2015 WL 6696407, at *2, *6. Contrary to Shakespeare's advice, "Neither a borrower nor a lender be," the defendant banks are both.

If, as plaintiffs suggest, the conspiracy were profit-motivated, it would have required all of the sixteen panel banks to have made a parallel decision to be net borrowers of money over the suppression period in the LIBOR-based lending market. After five years of voluminous discovery in both civil litigation and government investigations, plaintiffs have not offered evidence that the panel banks made such a decision or were in fact net borrowers.

Rather, the object of the conspiracy that the Circuit recognized and which meets the plausibility test is the projection of financial soundness. Without question, if implemented, a conspiracy with such an object would, under Gelboim's analysis of antitrust injury, have an impact on price. However, as we have previously held, such an object is not sufficiently directed to the United

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amendments to complaints. Plaintiffs have had the benefits of the findings from "wide-ranging investigations of LIBOR since at least 2011 by the Securities Exchange Commission, the Commodities Futures Trading Commission, the Department of Justice, the New York State Attorney General, and numerous foreign regulators, and [ ] public settlements and plea agreements involving Barclays, Citi, Deutsche Bank, JPMorgan, Rabobank, RBS, Societe Generale, UBS, and brokers...." LIBOR IV, 2015 WL 6243526, at *43.

States such as would support the exercise of personal jurisdiction over all panel banks.

Plaintiffs argue in the alternative that if this Court has specific personal jurisdiction over at least one panel bank, it follows that this Court has personal jurisdiction over all panel banks under the theory of conspiracy jurisdiction. Because plaintiffs have failed to establish that any defendant committed an act in furtherance of the conspiracy in or directed at the United States, this Court has only general personal jurisdiction over certain panel banks as to the antitrust claims, and therefore the conspiracy jurisdiction argument has no purchase.

Finally, defendants have not forfeited their personal jurisdiction defense. Since the Supreme Court decided Daimler AG v. Bauman, 134 S. Ct. 746 (2014), and the Second Circuit decided Gucci America, Inc. v. Weixing Li, 768 F.3d 122 (2d Cir. 2014), when the antitrust claims were winding their way up to the Supreme Court on an issue of appellate procedure, defendants had no opportunity to address this personal jurisdiction defense until they properly preserved it in their Second Circuit briefing in the spring of 2015.

1. Scope of the Conspiracy

The first step in evaluating personal jurisdiction in a conspiracy case is to define the scope of the conspiracy, because only acts taken pursuant to that conspiracy are jurisdictionally relevant:

> For overt acts ... are meaningful only if they are within the scope of the conspiratorial agreement. If that agreement did not, expressly or impliedly, contemplate that the conspiracy

> would continue in its efforts to [achieve a particular goal], then the scope of the agreement cannot be broadened retroactively by the fact that the conspirators took steps after the conspiracy which incidentally had that effect.

Grunewald v. United States, 353 U.S. 391, 414 (1957). The consequence is that "when questions arise concerning matters such as venue or the statute of limitations, which depend on the formation of the agreement or the occurrence of overt acts, it becomes crucial to determine the scope of the conspiratorial agreement." United States v. Rosenblatt, 554 F.2d 36, 39 (2d Cir. 1977) (internal quotation marks and citations omitted).

This approach applies equally to civil cases and to questions concerning personal jurisdiction. See, e.g., In re Sumitomo Copper Litig., 120 F. Supp. 2d 328, 340, 342 (S.D.N.Y. 2000) (personal jurisdiction attached in New York over foreign defendants because "Plaintiffs allege that [the defendants] engaged in a scheme to defraud the copper market, including copper traded on New York's Comex," and "committed tortious acts in New York in furtherance of that conspiracy"). As an example of the necessary analysis, in the price-fixing case United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), the Supreme Court explained that absent "evidence that the conspiracy was formed within the Western District of Wisconsin, the trial court was without jurisdiction unless some act pursuant to the conspiracy took place there." Id. at 252. The Court then inquired into the "chief end and objective" of the price-fixing conspiracy, finding it to be "the raising and maintenance of Mid-

Western prices at higher levels." Id. at 253. Sales of price-fixed products were therefore jurisdictionally relevant to the conspiracy:

> [T]he objectives of the conspiracy would fail if respondents did not by some formula or method relate their sales in the Mid-Western area to the spot market prices ... [or] if respondents, contrary to the philosophy of all the stabilization efforts, indulged in price cutting and price wars.... In sum, the conspiracy contemplated and embraced, at least by clear implication, sales to jobbers and consumers in the Mid-Western area at the enhanced prices. The making of those sales supplied part of the continuous cooperation necessary to keep the conspiracy alive.

Id. (internal quotation marks omitted). With these facts, the Court found that personal jurisdiction in the Western District of Wisconsin attached. [7]

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[7] Sales of price-fixed products are not a necessary element of a violative price-fixing conspiracy. "[I]t is ... well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. It is the contract, combination or conspiracy, in restraint of trade or commerce which [Section] 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." Socony-Vacuum Oil, 310 U.S. at 224 n.59 (internal quotation marks and citations omitted); see also United States v. Milikowsky, 896 F. Supp. 1285, 1288 (D. Conn. 1994) (in a "conspiracy to fix prices for violation of the Sherman Antitrust Act, the agreement itself constitutes the complete offense"), aff'd, 65 F.3d 4 (2d Cir. 1995). Additional overt acts in furtherance of the conspiracy are not needed.

Despite plaintiffs' protestations at oral argument, it should be uncontroversial that the jurisdictional relevance of an act depends on the goal of the conspiracy. In fact, plaintiffs themselves implicitly recognize this principle, which is why they exert such effort to define the conspiracy as one with a profit motive. See, e.g., Pls.' Joint Mem. of Law in Opp'n 1, ECF No. 1524 (arguing that given the reference to "increased profits" in the Second Circuit's opinion, "Gelboim thus brings into the jurisdictional analysis of Plaintiffs' antitrust claims a wider range of conduct than that which was relevant to the non-conspiratorial 'data fraud' claims").

We reject plaintiffs' attempt to read the Second Circuit's opinion so broadly, and we find that plaintiffs have only sufficiently alleged that the goal of the antitrust conspiracy was the projection of financial soundness. The Circuit's examples of the allegations that "evince a common motive to conspire" pertained only to the banks' reputational concerns, not an independent motive to reap profits on persistently suppressed LIBOR by maintaining one bank-wide position throughout the class period. Id. at 782 n.19. More importantly, the Circuit went on to observe that a profit motive in the persistent suppression conspiracy is logically unsound: "[C]ommon sense dictates that the Banks operated not just as borrowers but also as lenders in transactions that referenced LIBOR. Banks do not stockpile money, any more than bakers stockpile yeast. It seems strange that this or that bank (or any bank) would conspire to gain, as a borrower, profits that would be offset by a parity of losses it would suffer as a lender." Id. at 783. The only conclusion to be drawn is that the Circuit meant "increased profits and the projection of financial soundness" to describe collectively a single, reputation-based motive to conspire, where increased profits followed from a positive reputation.[8]

In fact, taking the Circuit's observation one step further, the defendant banks could not have profited on transactions in the course of a persistent suppression conspiracy unless each bank borrowed more money using a LIBOR-based interest rate than the amount it lent using a LIBOR-based interest rate

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[8] This understanding of the Circuit's observation is consistent with this Court's comments in LIBOR III and LIBOR IV about the motivations of defendants, rejecting as implausible any suggestion that defendants engaged in the persistent suppression of LIBOR to increase transactional profits. E.g., LIBOR III, 27 F. Supp. 3d at 469 ("[I]t is implausible that all defendants would maintain parallel trading positions ... across the Class Period and that those positions, in turn, motivated their daily LIBOR submissions.... The far more likely explanation is that, to the extent all defendants engaged in parallel manipulation of LIBOR, the conduct was motivated by reputational concerns, not by the banks' positions....") (internal alterations omitted). To be clear, what we have found plausible is that defendants engaged in *trader-based manipulation* were motivated by the prospect of increased profits. E.g., LIBOR IV, 2015 WL 6243526, at *6 ("[I]ndividual traders received money, promotions, and adulation based on their personal profit and loss. To gain profits or avoid losses, therefore, a trader would sometimes ask his bank's LIBOR submitter to engage in what we call trader-based manipulation. The submitter would send a false quote in whichever currency and tenor suited the trader's book."). Profit-motivated trader-based manipulation, which was sporadic and would result in both the inflation and deflation of LIBOR submissions, id. at *32, has nothing to do with the persistent suppression conspiracy that is at issue in the antitrust claims, Gelboim, 823 F.3d at 764.

throughout the class period. The corollary is that for a transaction-based profit *motive* to exist, the panel banks would have had to fix LIBOR with the parallel intent to be a net borrower across the suppression period. Both propositions are implausible.

In re Commodity Exchange, Inc., Gold Futures and Options Trading Litigation, No. 14-MD-2548 (VEC), 2016 WL 5794776 (S.D.N.Y. Oct. 3, 2016) ("Gold"), is instructive. Like in this case, the plaintiffs in Gold asserting antitrust claims alleged both persistent suppression and trader-based manipulation of gold prices (although these theories are not so labeled in that case). Id. at *5-6. Like in this case, the Gold court found a profit motive in the trader-based conspiracy to be plausible, because banks could "predictably [ ] cause gold prices to rise or fall at the Gold Fixing" and therefore "strategically buy low and sell high in ways that other non-Fixing market participants could not." Id. at *19. In contrast, the Gold court found implausible a profit motive in the persistent suppression of gold prices, which would have required plaintiffs to show that defendants "held net short gold futures positions on COMEX, which allowed them to profit when the price of gold fell...." Id. at *18. Even after evaluating plaintiffs' data showing that large bullion banks were "as a whole" net short on gold futures and options throughout the class period, the court concluded that "the data does not plausibly support an allegation that any particular bank was net short at any particular time (let alone that all of the Defendants were net short throughout the alleged conspiratorial period)" and that the data fatally excluded defendants' positions in other relevant markets. Id.

Allegations that defendants were net borrowers in the LIBOR persistent suppression conspiracy are even less availing. Unlike in Gold, where the plaintiffs at least presented data showing an aggregate net short position, the plaintiffs here are empty-handed. To the extent the complaints say anything about net borrowing at all,[9] they rely on information regarding interest rates generally, not USD LIBOR specifically;[10] draw conclusions based on information

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[9] The relevant allegations are generally uniform across all of the complaints, so we cite to representative examples in the following footnotes.

[10] E.g., Mayor and City Council of Balt. v. Credit Suisse Grp. AG, Second Consolidated Am. Compl. ¶ 78, No. 11-md-2262 (NRB), ECF No. 406 ("OTC Compl.") ("Illustrating Defendants' motive to artificially suppress LIBOR, in 2009 Citibank reported it would make $936 million in net interest revenue if rates would fall by 25 bps per quarter over the next year and $1.935 billion if they fell 1% instantaneously. JPMorgan Chase likewise reported significant exposure to interest rates in 2009: The bank stated that if interest rates increased by 1%, it would lose over $500 million. HSBC and Lloyds also estimated they would earn hundreds of millions of additional dollars in 2008-2009 in response to lower interest rates and would lose comparable amounts in response to higher rates."); Fed. Home Loan Mortg. Corp. v. Bank of Am. Corp., Am. Compl. ¶ 89, No. 13-cv-3952 (NRB), ECF No. 61 ("Freddie Mac Compl.") ("Bank of America further stated that it held a notional amount of more than $50 billion in receive fixed/pay floating interest-rate swaps that would mature in 2008 or 2009 with no offsetting pay fixed/receive floating interest-rate swaps.").

that has nothing to do with LIBOR suppression;[11] and advance unsupported assertions.[12]

The one allegation that approaches the line between conceivable and plausible, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007), is that of plaintiffs FDIC and Freddie Mac, who quote from Bank of America's 2008 Annual Report that Bank of America is "liability sensitive to LIBOR." Fed. Deposit Ins. Corp. v. Bank of Am. Corp., Am. Compl. ¶ 81, No. 14-cv-1757 (NRB), ECF No. 23 ("FDIC Compl.") (quoting

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[11] E.g., OTC Compl. ¶ 78 ("Deutsche Bank reportedly earned more than $650 million in profit during 2008 from trades tied to LIBOR because LIBOR was low.") (citing Jean Eglesham, *Bank Made Huge Bet, and Profit, on Libor*, Wall St. J., Jan. 10, 2013, at http://online.wsj.com/article/SB10001424127887324442304578231721272636626.html). The cited article describes profits made not on LIBOR suppression but rather on "trades pegged to the interest rates" such as bets regarding "the gap between different rates related to Libor and the euro interbank offered rate" and "each hundredth of a percentage point that the three-month U.S. dollar Libor increased compared with the one-month U.S. dollar Libor."

[12] E.g., OTC Compl. ¶ 78 ("These banks collectively earned billions in net revenues between August 2007 and May 2010 from suppressed USD LIBOR."); Metzler Inv. GmbH v. Credit Suisse Grp. AG, Corrected Second Am. Consolidated Compl. ¶ 268, No. 11-md-2262 (NRB), ECF No. 438 ("Exchange-Based Compl.") ("Because their interest earning assets, as compared to their funding mix, generally included more longer-term and more fixed-rate instruments, suppression of LIBOR would tend to reduce Defendants' funding costs more than it would reduce their interest income. Thus, by suppression of LIBOR, Defendants would contribute to increasing, maintaining, or mitigating deterioration of their net interest margins."); Freddie Mac Compl. ¶ 89 ("During this time, many of the Bank Defendants were net borrowers, meaning that they financially benefited from reductions in short-term interest rates.").

Bank of Am., 2008 Annual Report, at 88 (2008), *available at* http://media.corporate-ir.net/media_files/irol/71/71595/reports/2008_AR.pdf); Freddie Mac Compl. ¶ 89 (same). Taken in context, however, this statement is not sufficient. The full sentence in the Annual Report includes an important modifier: "We are *typically* asset sensitive to Federal Funds and Prime rates, and liability sensitive to LIBOR." Bank of Am., 2008 Annual Report, at 88 (emphasis added). The paragraph goes on to say, "At December 31, 2008, the spread between the three-month LIBOR rate and the Federal Funds target rate had significantly widened since December 31, 2007.... As the Federal Funds and LIBOR dislocation widens, the benefit to net interest income from lower rates is limited. Subsequent to December 31, 2008, the spread between the three-month LIBOR rate and the Federal Funds target rate has narrowed." Id. This paragraph offers no assistance to plaintiffs: as in Gold, it does not plausibly support an allegation that Bank of America was a net borrower on LIBOR-based products at a particular time, much less that Bank of America was a net borrower throughout the class period, and even less that all defendants were net borrowers throughout the class period. Cf. Gold, 2016 WL 5794776, at *18. When pressed at oral argument for evidence that the banks were in fact net borrowers, plaintiffs had none. Tr.10:1-9.[13]

[13] After oral argument, plaintiffs submitted an academic paper that suggested that "banks mostly take pay-floating positions in interest-rate derivatives, which are positions that gain in value from a surprise fall in interest rates." Carmody Letter 2, ECF No. 1638. As plaintiffs acknowledge, the study relates only to U.S. banks, id. at 2 n.3; the study examines interest rates generally,

***7** As to the necessary parallel *intent* to be net borrowers, Plaintiffs have neither allegations nor evidence that this parallel intent existed or would be logical.

What is logical—and what is supported by specific allegations and evidence—is a conspiracy aimed at the projection of financial soundness.[14] The plaintiffs' complaints are replete with admissions from defendant banks that, for example:

> The instructions at UBS to suppress USD LIBOR to stay within the pack and err on the low side "were issued, at least in significant part, because of concerns that if UBS submitted higher LIBOR rates relative to other banks, UBS could attract negative attention in the media." In so acting, UBS "sought to avoid negative media attention and, relatedly, sought to avoid creating an impression that it was having difficulty obtaining funds." To the extent those directions from UBS management

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not LIBOR specifically; and LIBOR suppression does not mean that LIBOR experienced a surprise fall, only that LIBOR was lower than it otherwise would have been. The paper therefore does not save plaintiffs' theory.

[14] Two prominent economists tasked with reforming LIBOR came to the same conclusion about the motivations for LIBOR manipulation. See Darrell Duffie & Jeremy C. Stein, Reforming LIBOR and Other Financial Market Benchmarks, 29 J. Econ. Persp. 191, 191 (2015) ("Banks had incentives to announce biased interest rates, for two reasons. First, in times of economic stress, reporting a lower interest rate would signal that the bank is more creditworthy, all else equal. Second, some of the bank's trading positions would be more profitable if LIBOR could be pushed one way or the other, depending on the position taken.").

> "were motivated by reputational concerns," they "were inconsistent with the definition of LIBOR."

OTC Compl. ¶ 69 (quoting Non-Prosecution Agreement between the United States Department of Justice, Criminal Division, Fraud Section and UBS AG, App'x A, Statement of Facts ¶ 100, Dec. 18, 2012 ("UBS DOJ SOF")); and

> [O]n September 22, 2008, a UBS employee wrote in an electronic chat that "the real cash market isn't trading anywhere near LIBOR," and he suspected the reason was that Banks[ ] "undervalue LIBOR in times like this so as to not show where they really pay in case it creates headlines about that bank being desperate for cash."

Id. ¶ 70 (quoting UBS DOJ SOF ¶ 101) (internal alterations omitted); and

> Because [ ] managers "sought to avoid what they believed would be an inaccurate perception that Barclays was not in good financial shape when compared to its peers," Barclays "engaged in this misconduct in order to reduce the reputational risk associated with proper, higher LIBOR submissions." In other words, the DOJ explained—borrowing from Barclays employees' comments in internal communications—"the purpose of the strategy of underreporting Dollar LIBORs was to keep Barclays's 'head below the parapet' so that it did not get 'shot' off."

Id. ¶ 71(c) (quoting Non-Prosecution Agreement between the United States Department of Justice, Criminal Division, Fraud Section and Barclays Bank PLC, App'x A, Statement of Facts ¶ 40, June 26, 2012) (emphases omitted).

Because the projection of financial soundness is the only sufficiently pled goal of the persistent suppression conspiracy, we adhere to our earlier ruling that the contacts relevant to specific jurisdiction are only those in the "forum containing the office from which a defendant determined, or transmitted, a false LIBOR submission." LIBOR IV, 2015 WL 6243526, at *32.

In this context, plaintiffs entreat us to rely on the sales of LIBOR-based financial products in the United States regardless of the motive of the defendants. Such reliance would be misplaced since "defendants need not engage in any market transactions at all ... to affect the LIBOR fix...." Mem. & Order, 2016 WL 1558504, at *7 (S.D.N.Y. Apr. 15, 2016), ECF No. 1380. This case is different from Socony-Vacuum Oil, in which the Supreme Court reasoned that goal of the conspiracy—the raising and maintenance of high prices—would have been vitiated had the defendants engaged in "price cutting and price wars"; the result was that the conspiracy necessarily involved selling price-manipulated products into the jurisdiction. 310 U.S. at 253. Here, the goal of the conspiracy would have succeeded regardless of whether any defendants based their products on LIBOR and regardless of whether any defendant bank increased or decreased the margin on their LIBOR-based products. The sales of LIBOR-based products are not meaningful in a jurisdictional analysis because they were not "within the scope of the conspiratorial agreement"; and the scope of the agreement "cannot be broadened retroactively by the fact that the conspirators took steps after the conspiracy which incidentally had [a particular] effect." Grunewald, 353 U.S. at 414.

2. Due Process Analysis

On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over each defendant. Metro. Life Ins. Co. v. Robertson–Ceco Corp., 84 F.3d 560, 566 (2d Cir. 1996). Whether the court has jurisdiction over a defendant is "governed by a combination of state law, federal statute, and principles of due process," but the due process analysis must be undertaken in every case. In re Aluminum Warehouse Antitrust Litig., 90 F. Supp. 3d 219, 223 (S.D.N.Y. 2015).

Plaintiffs' prima facie showing of jurisdiction "must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." In re Terrorist Attacks on Sept. 11, 2001, 714 F.3d 659, 673 (2d Cir. 2013). The court has "considerable procedural leeway. It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion." Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A., 722 F.3d 81, 84 (2d Cir. 2013). In the absence of an evidentiary hearing, the court must "construe the pleadings and affidavits in the light most favorable to plaintiffs, resolving all doubts in their favor," Porina v. Marward Shipping Co., 521 F.3d 122, 126 (2d Cir. 2008), although it may not "draw argumentative inferences in the plaintiff's favor," Robinson v. Overseas Military Sales Corp., 21

F.3d 502, 507 (2d Cir. 1994) (internal quotation marks omitted).

The due process analysis of specific personal jurisdiction requires the court to evaluate first, whether the defendant has purposefully established minimum contacts within the forum, and second, whether the exercise of jurisdiction would be so unreasonable as to offend traditional notions of fair play and substantial justice. Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014). "Due process limits on [a court's] adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." Id. at 1122.

Additionally, "specific jurisdiction depends on an affiliation between the forum and the underlying controversy," and therefore "the defendant's suit-related conduct must have created a substantial connection with the forum." LIBOR IV, 2015 WL 6243526, at *27 (internal quotation marks, citations, and alterations omitted). The relevant forum for the assessment of minimum contacts is the United States as a whole. Id. at *23.

We reject any suggestion that Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120 (2d Cir. 2002), relaxed the minimum contacts standard to a mere "relatedness" standard. Bank Brussels itself explained that, in that case, the jurisdictionally relevant activities proximately caused the engagement of the law firm at issue. Id. at 128. We repeat our prior holding that specific jurisdiction requires "no less than a 'but for' connection between the defendant's forum-directed activities and the claim." LIBOR IV, 2015 WL 6243526, at *28.

Therefore, any allegations of forum-related contacts that "relate to" the antitrust conspiracy but that are not causally connected to actual LIBOR submissions are jurisdictionally insufficient.

Plaintiffs have failed to show that overt acts in furtherance of the reputation-driven antitrust conspiracy occurred in or were aimed at the United States. Plaintiffs have inundated this Court with vacuous submissions derived from millions of pages of discovery, including some made at the eleventh hour immediately prior to oral argument and even some made after oral argument. While the volume makes it impossible to address every individual allegation, generally speaking the submissions pertain to trader-based allegations, manipulation of LIBOR pegged to other currencies, color about the state of USD LIBOR, marketing activities—everything but what the plaintiffs are actually required to plead. While for present purposes we accept plaintiffs' many jurisdictional allegations as true, we find them ultimately insufficient. Most of the allegations fail to address whether defendants determined, or transmitted, a false LIBOR submission from the United States; the few allegations that attempt to do so are unavailing.

First, defendants' sales and trades of LIBOR-based products to plaintiffs in the United States are not within the scope of the reputation-motivated antitrust conspiracy. Likewise, trader-based allegations have no relevance here. It bears repeating that defendants' sales of LIBOR-based products to plaintiffs in a forum are sufficient to grant personal jurisdiction under certain contract claims, unjust enrichment claims, and fraud claims, and plaintiffs may seek recovery for damages under those theories. Sunward Elecs., Inc. v. McDonald, 362 F.3d 17, 24 (2d Cir. 2004) (a plaintiff asserting specific personal jurisdiction "must establish the court's jurisdiction with respect to *each* claim asserted") (emphasis in original); e.g., LIBOR IV, 2015 WL 6243526, at *31 ("[S]wap agreements support personal jurisdiction in the plaintiffs' home forums over claims (whether pleaded in contract, unjust enrichment, or tort) concerning the contractual relationships that they embody."); id. at *37 ("[W]e also uphold jurisdiction where [a] bond was issued" in such claims against bond obligors).

Second, plaintiffs allege that defendants aimed their conduct at the United States under the Calder effects test. The Calder effects test requires plaintiffs to show "purposeful direction, where the defendant took intentional, and allegedly tortious, actions expressly aimed at the forum." LIBOR IV, 2015 WL 6243526, at *27 (internal quotation marks and citations omitted).[15] None of plaintiffs' voluminous submissions persuade us to alter our prior holdings that there is "no suggestion, and it does not stand to reason, that foreign defendants aimed their manipulative [persistent suppression] conduct at the United States or any particular forum state." Id. at *32. As plaintiffs acknowledge, it would be necessary to disturb that holding only if plaintiffs sufficiently pled a profit-motivated conspiracy, Pls.' Joint Mem. of Law in

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[15] Plaintiffs' allegation that defendants "intentionally directed their unlawful conspiracy at the United States" is conclusory and thus insufficient to meet their burden. Pls.' Joint Mem. of Law in Opp'n 15.

Opp'n 14-15,[16] which they have not, *supra*. Indeed, the present case is to be contrasted with the antitrust cases on which plaintiffs rely and in which courts have sustained personal jurisdiction in the United States under the effects test. In those cases, the court expressly or impliedly found that the conspiracy's goal was to "inflict[ ] supracompetitive prices on foreign countries such as the United States," In re Vitamin C Antitrust Litig., No. 05-CV-453 BMC JO, 2012 WL 12355046, at *12 (S.D.N.Y. Aug. 8, 2012), thus making sales of price-fixed products relevant—which is not the case here. See also In re Fasteners Antitrust Litig., No. 08-MD-1912, 2011 WL 3563989, at *13 (E.D. Pa. Aug. 12, 2011) (co-conspirators agreed to "future price increases in North America"); In re Cathode Ray Tube (CRT) Antitrust Litig., 27 F. Supp. 3d 1002, 1012 (N.D. Cal. 2014) (co-conspirators "coordinated pricing decisions in relation to United States market conditions"). And contrary to plaintiffs' argument that "suffer[ing] the brunt of the harm" in the United States alone is sufficient for jurisdiction, Pls.' Joint Mem. of Law in Opp'n 19-20, under the due

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[16] Plaintiffs write, "While this Court previously declined to apply Calder to assert personal jurisdiction for data fraud claims, concluding that persistent suppression was not designed to 'benefit Defendants' trading position' and 'it did not stand to reason, that foreign defendants aimed their manipulative conduct at the United States or any particular forum state,' Plaintiffs respectfully submit that this Court's conclusions on data fraud do not apply to the antitrust allegations that Defendants had a 'common motive to conspire' to suppress USD LIBOR for 'increased profits,' Gelboim, 823 F.3d at 781-82. Viewed in that light, Plaintiffs satisfy every element of the Calder analysis for their antitrust claims." Pls.' Joint Mem. of Law in Opp'n 14-15 (internal alterations omitted).

process inquiry "it is the defendant's conduct that must form the necessary connection...." Walden, 134 S. Ct. at 1122; see also Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Houston Metroplex, P.A., 623 F.3d 440, 445 n.1 (7th Cir. 2010) (Calder focuses on "whether the defendant intentionally aimed its conduct at the forum state rather than on the possibly incidental and constitutionally irrelevant effects of that conduct on the plaintiff.").

Third, as we have already held, marketing activities are jurisdictionally irrelevant in the persistent suppression conspiracy. "[T]hat a panel bank defendant engaged in LIBOR 'marketing' activities which reached a given forum state does not mean that the same defendant is subject to personal jurisdiction in that state on the basis of the defendant's manipulation of LIBOR.... It is incontrovertible that the importance of LIBOR was its universal significance, not its projection into any particular state, and plaintiffs do not plead otherwise." LIBOR IV, 2015 WL 6243526, at *30.

Fourth, plaintiffs rely on allegations regarding panel banks' subsidiaries and affiliates in the United States, but "have not pleaded facts or submitted supporting material that suggests that any panel bank's United States-based affiliate played a role in that bank's alleged suppression of LIBOR." Mem. & Order, 2016 WL 1733463, at *3 (S.D.N.Y. Apr. 29, 2016), ECF No. 1396 ("April 29 Order"). For plaintiffs to establish personal jurisdiction through the activity of banks' subsidiaries and affiliates, plaintiffs must first show a "merging [of] parent and subsidiary for jurisdictional purposes[, which] requires an inquiry comparable to the corporate law question of piercing the corporate veil." Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 930 (2011) (internal quotation marks omitted). Plaintiffs must then show that the defendants' affiliates or subsidiaries took jurisdictionally relevant acts consistent with the principles we have set out for the panel bank defendants. Here, plaintiffs have done neither; they merely allege that defendants' affiliates "participated in USD LIBOR suppression" and sold price-fixed LIBOR-based instruments in the United States. Pls.' Mem. of Law in Opp'n 10.[17] To reiterate, "the fact of significant activity, by a defendant or affiliates, in this country, combined with some evidence of LIBOR manipulation in London, provides

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[17] For example, plaintiffs allege, "In a 2007 internal email sent to Barclays' former CEO Robert Diamond, BCI [Barclays Capital Inc., a wholly owned subsidiary of Barclays] Director and Executive Officer Jerry del Missier, who was based in New York, wrote that the USD LIBOR submissions for all of the Panel Banks were 'fantasy rates.' Del Missier has admitted that he instructed subordinates to submit artificially low USD LIBOR rates." Pls.' Supp. Statement of Additional Jurisdictional Facts ¶ 26, ECF No. 1517 (citing Jill Treanor, *Former Barclays executive insists Bob Diamond instructed him to cut Libor*, The Guardian, July 16, 2012, https://www.theguardian.com/business/2012/jul/16/barclays-del-missier-bob-diamond-libor).

First, the "fantasy rates" comment offers nothing more than market color. Second, the article on which plaintiffs rely makes clear that the direction to submit low LIBOR rates came from CEO Bob Diamond, not from Del Missier. Id. ("In evidence to MPs following his resignation as chief operating officer of Barclays, Del Missier was adamant that Diamond instructed him to cut the Libor rate following a conversation with Paul Tucker, deputy governor of the Bank of England.... Asked if he was acting on an instruction from Diamond, Del Missier said: 'Yes it [sic] was.' ").

no indication that the LIBOR determination and submission process occurred any place other than outside the United States." April 29 Order, 2016 WL 1733463, at *3.

Fifth, plaintiffs allege that LIBOR submissions were transmitted to Thomson Reuters in New York, as stated by former Rabobank trader Lee Stewart in his plea allocution in United States v. Stewart, Case No. 1:14-cr-00272-JSR (S.D.N.Y.), Tr. at 15:3-6, Apr. 1, 2015, ECF No. 46 ("Stewart Tr.").[18] As defendants point out, it is unlikely that Lee Stewart, who was not a LIBOR submitter, had personal knowledge of the location from which Thomson Reuters received LIBOR submissions.[19] Furthermore, it is implausible that Thomson Reuters in New York would be in the role of accepting LIBOR submissions at around 11:00 a.m. London time (6:00 or 7:00 a.m. New York time).

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[18] Carmody Letter 1, Oct. 20, 2016, ECF No. 1600. Plaintiffs also rely on the testimony of former Rabobank trader Takayuki Yagami, even though Yagami traded products tied to *Yen* LIBOR. Id. at 2. We do not understand plaintiffs' continued, stubborn refusal to comply with our simple admonition that only allegations pertaining to USD LIBOR are potentially relevant to this case. LIBOR IV, 2015 WL 6243526, at *45 ("We continue to reject the impermissible inference that defendants' reprehensible behavior in one product (or even many products: Yen LIBOR, TIBOR, Swiss Franc LIBOR, EURIBOR, ... and so on) suffices to overcome deficiencies in the pleading of actionable bad behavior in USD LIBOR.").

[19] Stewart's statement itself suggests that he lacked personal knowledge: "I also *understand* that someone at Rabobank, first in London and later in Utrecht, would submit a Rabobank LIBOR rate each day to Thom[ ]son Reuters in New York by means of an electronic wire submission." Stewart Tr. at 15:3-6 (emphasis added).

In any event, an allegation that the submissions were sent to New York, without additional allegations that any person or entity did anything further with the submissions in the United States, is insufficient to support personal jurisdiction. Laydon v. Mizuho Bank, Ltd., No. 12 CIV. 3419 GBD, 2015 WL 1515358, at *3 (S.D.N.Y. Mar. 31, 2015) ("Communications that passed through and/or were stored within the United States are insufficient to assert personal jurisdiction over a defendant.") (internal quotation marks omitted).

The few allegations that do address the forum in which a defendant determined or transmitted a false LIBOR submission are easily discounted, especially in light of the moving defendants' declarations stating that they did not determine or transmit their LIBOR submissions from the United States. Kurtzberg Decl. Ex. 1, ECF No. 1484; Connors Decl., ECF No. 1590.

Taking these allegations *seriatim*, plaintiffs misleadingly suggest that one of Citibank's USD LIBOR submitters requested a submission from New York, Pls.' Joint Mem. of Law in Opp'n 8, but defendants have put forward a sworn document stating that this individual was no longer Citibank's USD LIBOR submitter at the time that plaintiffs allege he was present in New York, Kurtzberg Reply Decl., Ex. 2 at 10, ECF No. 1546.

Plaintiffs also allege that a senior JPMorgan executive in New York directed JPMorgan's LIBOR submissions, OTC Pls.' Supp. Mem. of Law in Opp'n 3, ECF No. 1508, but the substance of the exchange contains nothing more than intrabank communications regarding the executive's thoughts on LIBOR levels, see LIBOR IV, 2015 WL 6243526, at *60 (such individuals do not "purport[ ] to do anything more than to state a sincere opinion based on publicly available information").

Plaintiffs cite UBS's settlement papers with the U.S. Department of Justice to argue that UBS has "admitted that an executive in Connecticut directed that submissions for all currencies stay low and instituted a policy that submissions for all currencies stay within the pack." Pls.' Joint Mem. of Law in Opp'n 9 (citing UBS DOJ SOF ¶ 108). UBS's actual admission reads: "[T]he manager of the Yen trading desk understood that this direction to submit low LIBOR contributions was issued by the senior manager of Group Treasury based in Stamford in order to make the bank appear more creditworthy, and that it applied to all currencies." UBS DOJ SOF ¶ 108. Plaintiffs stretch the admission to the breaking point. The admission regards a Yen LIBOR trader's understanding as to the source of the policy, but the Statement of Facts itself explains that the actual source of the policy was "an ALM senior manager in Zurich." Id. ¶ 102. Thus, the Statement of Facts does not contradict UBS's sworn statement to the Court that "[n]o UBS employee in the United States determined or submitted USD LIBOR to the British Bankers Association ('BBA') during the relevant time, ... 2005 to 2012." Connors Decl. ¶ 3, ECF No. 1590.

Finally, plaintiffs allege that New York-based entity Credit Suisse First Boston made USD LIBOR submissions on behalf of Credit Suisse. OTC Pls.' Supp. Mem. of Law in Opp'n 4. The document on which plaintiffs rely is nothing more than a high-level market commentary e-mail from the Royal Bank of

Scotland, sent to a host of third parties, that makes a stray reference to Credit Suisse First Boston. Joint Decl. of Kovel & Hausfeld, Ex. 60 at 11, ECF No. 1510. This document does not credibly support the allegation.

When the allegations are evaluated soberly, plaintiffs fail to carry their burden of making a prima facie showing of minimum contacts. Plaintiffs protest that "[a]t its core, Defendants' Motion rests on the absurd premise that domestic victims of a price-fixing cartel should be precluded from bringing suit in the U.S. against the members of that cartel, some of whom are domiciled in the U.S., for harm caused by the cartel's conduct in or aimed at the U.S." Pls.' Joint Mem. of Law in Opp'n 3. Plaintiffs' rhetoric is unconvincing. Of course, defendants that are domiciled in the relevant forum are subject to general personal jurisdiction, and neither the Court nor the non-moving defendants[20] contest that principle; it is black-letter law that harm experienced in a forum is not sufficient to establish specific personal jurisdiction; and the plaintiffs have not shown that the *persistent suppression* conspiracy, as distinguished from the trader-based conspiracy, is aimed at the United States.

We hold that plaintiffs have failed to carry their burden under the first prong, purposeful availment, of the due process analysis as to all moving defendants. Therefore, we need not reach the second prong, whether the exercise of personal jurisdiction would comport with traditional notions of fair play and

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[20] See *supra* note 1.

substantial justice. We also need not reach defendants' arguments regarding lack of venue.

3. Pendent Jurisdiction

The non-moving defendants concede that we have general personal jurisdiction over them as to the relevant federal and state antitrust claims, so we need not address pendent jurisdiction as to the state antitrust claims.

In contrast, we decline to exercise pendent jurisdiction over antitrust claims, whether they be federal or state, based on forum selection clauses in particular contracts or based on the location from which a bond was issued. We repeat that not all claims "against a counterparty may be brought in a contractually selected forum. The claim must relate to the particular contractual relationship. Thus, for example, we will not uphold jurisdiction over a counterparty for all fraud claims that a plaintiff might bring against that counterparty on the basis of the forum selection clause." LIBOR IV, 2015 WL 6243526, at *34; see also Mem. & Order, 2016 WL 4773129, at *2 (S.D.N.Y. Sept. 12, 2016), ECF No. 1557. Likewise, we will not uphold jurisdiction over a counterparty for antitrust claims simply on the basis of a forum selection clause or the location from which a bond was issued.

4. Conspiracy Jurisdiction

Plaintiffs assert that, under the theory of conspiracy personal jurisdiction, we have personal jurisdiction over all of the defendants. "[C]ourts that have recognized personal jurisdiction on the basis of conspiracy have required plaintiffs to (1) make a prima facie factual showing of a conspiracy; (2) allege specific facts warranting the inference that the defendant was a member of the conspiracy; and (3) show that the defendant's co-conspirator committed a tortious act pursuant to the conspiracy in the forum." LIBOR IV, 2015 WL 6243526, at *34 (internal quotation marks and alterations omitted).

Given that plaintiffs have not plausibly alleged that any defendant committed an act pursuant to the pled conspiracy in the United States, conspiracy jurisdiction does not apply here. In making this ruling, we do not express an opinion as to whether conspiracy jurisdiction survives as a doctrine after the Supreme Court's ruling in Walden v. Fiore, 134 S. Ct. 1115 (2014), and after recent opinions in the Southern District of New York, such as In re Alumnium Warehousing Antitrust Litigation, 90 F. Supp. 3d 219 (S.D.N.Y. 2015), and Laydon v. Mizuho Bank, Ltd., No. 12 CIV. 3419 GBD, 2015 WL 1515358 (S.D.N.Y. Mar. 31, 2015).

5. Forfeiture

Plaintiffs argue that defendants have forfeited their personal jurisdiction arguments on the antitrust claims through defendants' availment of the United States courts. This argument is meritless.

Although there is "a dearth of caselaw ... defining precisely what types of appearances and filings qualify" to forfeit a personal jurisdiction defense, it is evident that "not all do." Gerber v. Riordan, 649 F.3d 514, 519 (6th Cir. 2011). The touchstone is that to forfeit a personal jurisdiction defense, "a defendant must give a plaintiff a reasonable expectation that it will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking." Corporacion Mexicana De Mantenimiento Integral v. Pemex-Exploracion Y Produccion ("Pemex"), 832 F.3d 92, 102 (2d Cir. 2016). The rationale is that "defendants should raise such preliminary matters before the court's and parties' time is consumed in struggle over the substance of the suit." Dem. Rep. of Congo v. FG Hemisphere Assocs., LLC, 508 F.3d 1062, 1064 (D.C. Cir. 2007). But "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, especially when it does raise the objections as soon as their cognizability is made apparent." Holzsager v. Valley Hosp., 646 F.2d 792, 796 (2d Cir. 1981).

We initially dismissed plaintiffs' antitrust claims in March 2013. LIBOR I, 935 F. Supp. 2d 666. Certain plaintiffs appealed the dismissal; in October 2013, the Second Circuit *sua sponte* dismissed the appeal for lack of appellate jurisdiction. In re LIBOR-Based Fin. Instruments Antitrust Litig., Nos. 13-3565-L & 13-3636(Con), 2013 WL 9557843 (2d Cir. Oct. 30, 2013). In March 2014, the Bondholder plaintiffs appealed that decision to the Supreme Court, presenting the question, "Is the right to appeal secured by [28 U.S.C.] § 1291 affected when a case is consolidated for pretrial proceedings in multidistrict litigation (or MDL) authorized by 28 U.S.C. § 1407?". Gelboim v. Bank of Am. Corp., 135 S. Ct. 897, 901 (2015). That question was fully briefed by November 2014.

Between the time the Second Circuit dismissed the appeal and the completion of briefing in the Supreme

Court, jurisdictional defenses became available to the defendants: the Supreme Court decided Daimler, 134 S. Ct. 746, in January 2014 and the Second Circuit decided Gucci, 768 F.3d 122, in September 2014. Defendants raised Daimler-based jurisdictional defenses in the cases still pending before this Court. Kurtzberg Letter, Aug. 13, 2014, ECF No. 601.

In January 2015, the Supreme Court reversed the Second Circuit and remanded for a decision on the merits. In April 2015 (before merits briefing began in May 2015), defendants noted to the Second Circuit that they "expressly preserve all defenses regarding personal jurisdiction as to all matters on appeal." Defs.-Appellees' Mot. to Consolidate Appeals 5 n.4, Gelboim v. Bank of Am. Corp., 823 F.3d 759 (2d Cir. 2015) (No. 13-3565), ECF No. 221. Additionally, in the merits briefing in May 2015, defendants noted that "[t]wenty of the twenty-five actions on appeal are subject to motions to dismiss for lack of personal jurisdiction pending in the district court, ... and in the remaining actions, certain defendants intend to assert personal jurisdiction defenses before the district court at an appropriate time, if necessary." Joint Br. For Defs.-Appellees 28 n.23, Gelboim v. Bank of Am. Corp., 823 F.3d 759 (2d Cir. 2015) (No. 13-3565), ECF No. 464. These statements were sufficient to put the plaintiffs on notice that, if the antitrust claims were to be reinstated, defendants would move for dismissal on this basis.[21]

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[21] We firmly reject plaintiffs' attempt to spin their own appeal as a "tactical choice" by the *defendants* "to take the merits up on appeal ... by affirmatively asking the Second Circuit ... to affirm

Given this timeline, the only plausible argument that plaintiffs can make is that the defendants should have preserved their newfound personal jurisdictional defense as to the antitrust claims in their opposition to plaintiffs' petition for certiorari on May 27, 2014, or in their opposition brief in the Supreme Court on October 15, 2014, because those briefs are the only substantive submissions that defendants had the opportunity to make in any court in the Bondholder case between March 2013 and April 2015.[22]

We conclude that defendants' failure to mention the personal jurisdiction defense in their Supreme Court briefs in no way created "a reasonable expectation that [they would] defend the suit on the merits" or "cause[d] the court to go to some effort that would be wasted if personal jurisdiction is later found lacking," Pemex, 832 F.3d at 102. There is no reason to think that the Supreme Court's decision on the writ of certiorari would have been affected by an inchoate personal jurisdiction defense that had not been raised in or evaluated by a lower court. Furthermore, the Supreme Court granted certiorari limited to the scope

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on the merits," OTC Pls.' Suppl. Mem. of Law in Opp'n 5. Defendants, of course, were not the appellants.

[22] Plaintiffs argue that the Bondholder case returned to the district court between the Second Circuit's dismissal in October 2013 and the Bondholder plaintiffs' appeal to the Supreme Court in March 2014, and so the defendants should have raised the defense then. Bondholder Pls.' Supp. Mem. in Opp'n 2-3, ECF No. 1499. This argument is beyond comprehension. Until the Supreme Court granted certiorari in June 2014, there simply was no Bondholder case: it had been dismissed in the district court and dismissed in the Second Circuit. Plaintiffs would have us create a rule requiring defendants to raise defenses in cases that do not exist.

of the Second Circuit's power to take an appeal in a multidistrict litigation, and the Court does not countenance briefing on questions on which it has not granted certiorari. See Supreme Court Rule 24.1(a) ("[T]he brief may not raise additional questions or change the substance of the questions" that have been presented in the "petition for a writ of certiorari or the jurisdictional statement."). Plaintiffs somewhat bizarrely suggest that defendants should have (1) asked the Supreme Court to remand so that the defendants could move the district court to consider a personal jurisdiction defense on claims that the district court had already dismissed or (2) asserted the defense despite the Supreme Court's rules. Bondholder Pls.' Supp. Mem. in Opp'n 3, ECF No. 1499. These suggestions only serve to highlight how groundless the plaintiffs' position is.

In this regard, plaintiffs' heavy reliance on Pemex is misplaced. In Pemex, the defendant lost in the district court and appealed to the Second Circuit on several grounds, including for lack of personal jurisdiction. 832 F.3d at 101. After a new development during the course of the appeal, the defendant-appellant asked the Second Circuit to remand to the Southern District so that the district court could consider the merits of the case. Once the Southern District ruled against the defendant-appellant, the defendant-appellant reasserted its challenge of personal jurisdiction. The Second Circuit held that the defendant-appellant waived its personal jurisdiction defense because it had affirmatively asked the Second Circuit to send the case back to the Southern District in hopes of a favorable merits ruling below. Id.

Defendants have done nothing of the sort here. After the Supreme Court's decision, defendants appropriately preserved the personal jurisdiction defense in the Second Circuit and subsequently moved on personal jurisdiction grounds in this Court at the first opportunity they could post-Daimler, and so have not forfeited the defense.[23] Thus, we apply here our prior holding that "[i]n light of the change in the law of personal jurisdiction as applied to foreign banks under Daimler and Gucci, and finding no prejudice to plaintiffs from a successive motion, we do not consider defendants' Rule 12(b)(2) motion improper or inappropriate." LIBOR V, 2015 WL 6696407, at *18.

6. Request for Jurisdictional Discovery

Despite the tomes of submissions, plaintiffs have not made a "threshold showing that there is some basis for the assertion of jurisdiction." Daval Steel Prods. v.

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[23] This ruling applies equally to defendant UBS, which did not waive its personal jurisdiction defense as to the antitrust claims when it consented to personal jurisdiction in New York as to other claims. Sunward Elecs., Inc. v. McDonald, 362 F.3d 17, 24 (2d Cir. 2004) (a plaintiff "must establish the court's jurisdiction with respect to *each* claim asserted") (emphasis in original).

Similarly, defendants without New York branches did not forfeit their personal jurisdictional defense in failing to assert the defense in 2012. As defendants point out, Daimler cast significant doubt on other avenues of establishing personal jurisdiction, such as the Second Circuit's theory of jurisdiction under Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000). See Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 224-26 (2d Cir. 2014).

M.V. Juraj Dalmatinac, 718 F. Supp. 159, 162 (S.D.N.Y. 1989). We therefore exercise our discretion to deny jurisdictional discovery. Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic, 582 F.3d 393, 401 (2d Cir. 2009); see April 29 Order, 2016 WL 1733463, at *3 ("[P]laintiffs' submissions do not identify facts that indicate that discovery could show that [the relevant] defendants determined or submitted LIBOR in forums that would allow this Court to exercise personal jurisdiction.").

IV. Efficient Enforcer

"The four efficient enforcer factors are: (1) the directness or indirectness of the asserted injury, which requires evaluation of the chain of causation linking appellants' asserted injury and the Banks' 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." Gelboim, 823 F.3d at 778 (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC"), 459 U.S. 519, 540–45 (1982)) (internal quotation marks omitted).

These factors are meant to guide a court in exploring the fundamental issue of "whether the putative plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement." Gelboim, 823 F.3d at 780 (internal quotation marks omitted). After all, "[i]t is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." AGC, 459 U.S. at 536. Indeed, "[t]here is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause,' and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages." Id. at 535-36. In both situations, the court must draw a line beyond which a defendant will not be held responsible for harm experienced by a plaintiff. See id. at 534. And in both situations, no black-letter rule exists; a court must "exercise [its] judgment in deciding whether the law affords a remedy in specific circumstances." Id. at 536-37. While all efficient enforcer analyses require the exercise of judgment, the task before us is particularly challenging because, as the Second Circuit recognized in Gelboim, "there are features of this case that make it like no other...." 823 F.3d at 778.

In this regard, it is clear that the Second Circuit believed that not all plaintiffs should survive the efficient enforcer analysis. Of particular concern was the specter that "[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 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." Id. at 779. Though the Circuit's preliminary views were offered in dicta, we are deferential to them.

In their papers on this motion, defendants note the failure of plaintiffs to plead specifics about particular transactions. While we likewise observe the manifest deficiencies in many of the pleadings despite multiple opportunities to amend or supplement them, we do not find that these deficiencies prevent us from evaluating the efficient enforcer factors. However, these deficiencies may affect other antitrust issues or the adequacy of the pleadings more broadly.

We consider each of the efficient enforcer factors in turn.

1. Causation

Under the first factor, courts examine "whether the violation was a direct or remote cause of the injury." Gelboim, 823 F.3d at 772. The concern associated with remote causation—particularly in the present case—is that defendants will face "damages disproportionate to wrongdoing...." Id. at 779.

One consideration in determining causation is whether plaintiffs transacted with defendants directly. See 2A Areeda & Hovenkamp, Antitrust Law ¶ 335c(3) (2014) ("Beyond the actual customers, most other plaintiffs would be classified as 'remote' and denied standing even though they have suffered injury-in-fact."). Plaintiffs who purchased products from non-defendants but allege that defendants' actions raised their prices are called "umbrella purchasers." [24] Some courts reject standing of

[24] There exists a circuit split on whether umbrella purchasers have antitrust standing. Gelboim, 823 F.3d at 778. Among the district courts there seems to be broader agreement: "The overwhelming majority of recent court decisions that have addressed the viability of the 'umbrella' theory after [AGC] have

umbrella purchasers because " 'significant intervening causative factors,' most notably, the 'independent pricing decisions of non-conspiring retailers,' " attenuate the causal connection between the violation and the injury. Gold, 2016 WL 5794776, at *13 (quoting Gross v. New Balance Athletic Shoe, Inc., 955 F. Supp. 242, 245-47 (S.D.N.Y. 1997)). In such circumstances, "the defendants secured no illegal benefit at [the plaintiffs'] expense," and permitting recovery in such a transaction "could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits...." Mid-West Paper Prods. Co. v. Cont'l Grp., Inc., 596 F.2d 573, 583, 586 (3d Cir. 1979).

Although "[t]he antitrust laws do not require a plaintiff to have purchased directly from a defendant in order to have antitrust standing," In re Foreign Exch. Benchmark Rates Antitrust Litig. ("FOREX"), No. 13 CIV. 7789 (LGS), 2016 WL 5108131, at *9 (S.D.N.Y. Sept. 20, 2016), a determination of standing in an individual antitrust case is highly fact-specific, AGC, 459 U.S. at 536-37. In this case, we are persuaded to draw a line between plaintiffs who transacted directly with defendants and those who did not. A plaintiff and a third party could, and did, easily incorporate LIBOR into a financial transaction without any action by defendants whatsoever. Their independent decision to do so breaks the chain of causation between defendants' actions and a plaintiff's injury.

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rejected 'umbrella' claims." In re Vitamins Antitrust Litig., No. 99CIV5134, 2001 WL 855463, at *4 (D.D.C. July 2, 2001).

Counsel for the Bondholder plaintiffs effectively conceded as much at oral argument. Tr. 47:15-48:1 ("[I]magine that I walk into ... Citibank, and say I want to borrow $100,000. And we negotiate over the terms and one of the terms that we put in is LIBOR.... [I]t is not proximately caused because we made the independent decision, the banker and I, to put LIBOR in."); id. 53:19-22 ("If we were just saying anybody who has LIBOR in their price could come in and be a plaintiff in this case, then you would have a real question of proximate causation."). Counsel attempted to distinguish those hypothetical plaintiffs from the Bondholder plaintiffs under the theory that the former concerns the impermissibly broad "worldwide market for money," whereas the latter concerns only "the LIBOR-denominated bond market." Id. 53:6-15. This artificial market delineation is unrelated to the causation question and has no analytical force. Even if we accepted that the relevant market should be "the LIBOR-denominated bond market," plaintiffs who did not purchase directly from defendants continue to face the same hurdle: they 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...." Gelboim, 823 F.3d at 779.

Therefore, where a plaintiff's counterparty is reasonably ascertainable and is not a defendant bank,[25] a plaintiff is not an efficient enforcer. Accordingly, the Bondholder plaintiffs lack antitrust standing, and their antitrust claims are dismissed.

The above framework is not readily transferable to the Eurodollar futures market. Tr. 84:21-24 ("The [Chicago Mercantile Exchange], legally, at its clearing house, takes the role of intermediary[,] removing counter-party risk from the buyer and the seller. So, the CME is the counter-party to both contracts."). Therefore, the approach utilized by Judge Schofield in FOREX is helpful here. In FOREX, Judge Schofield examined the portion of the FX market that the defendants controlled, concluding that the causation factor had been met because of the allegation that the defendants "dominated the FX market with a combined market share of over 90% as significant participants in both OTC and exchange transactions." 2016 WL 5108131, at *9 (internal alterations omitted).[26] This approach essentially may be viewed as a proxy for the question of direct causation: if

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[25] There remains an open question about the treatment of plaintiffs who transacted with a subsidiary or affiliate of a panel bank. We do not resolve that question here, but note that the parties should consider this question at the class certification stage.

[26] We reject plaintiffs' attempt to turn the question of market control into a question of "price control ... over ... the entire Eurodollar futures market by virtue of their authorship of LIBOR," Exchange-Based Pls.' Mem. of Law in Opp'n 7, ECF No. 1504. The thrust of the umbrella purchaser concept is to distinguish between those plaintiffs who dealt with price-fixing defendants directly and other plaintiffs whose prices were affected by price-fixing defendants' actions. Plaintiffs' approach would nullify the causation question in all antitrust cases.

defendants "control[led] only a small percentage of the ultimate identified market," then plaintiffs' claims may generate "damages disproportionate to wrongdoing." Gelboim, 823 F.3d at 779.

Exchange-Based Plaintiffs endeavored to meet the FOREX standard by alleging that from October 2008 through December 2010, all 16 panel bank defendants or their affiliates were "large traders" of Eurodollar futures and options, and large traders comprised 70 to 90 percent of that market. Kovel & Hausfeld Joint Decl. Ex. 1, ECF No. 1510; Lovell & Kovel Letter 3 n.2, ECF No. 1650. They neglected to mention that the number of defendant banks was dwarfed by the total population of over 2,900 large traders in that market during the same time period. Gluckow Letter 5 n.12, ECF No. 1661.[27] Even so, it remains possible that the panel banks, which included some of the world's largest financial institutions, together controlled a large percentage of the market, measured by number of trades or by dollar amount. As of now, there is simply not a sufficient record on the issue of market control. Although we are skeptical that the Exchange-Based plaintiffs can ultimately show that the

[27] The Court was not informed of this fact until defendants' letter of December 2, 2016, which is particularly striking given the Court's question on this very issue at oral argument on October 27, 2016. Tr. 102:22-103:14 ("THE COURT: How many large traders are there all together[?] ... [I]f there were 400 large traders and there are 16 banks, the percentage is low in terms of the analysis that was utilized in FOREX. That's what I am trying to learn. [COUNSEL FOR EXCHANGE-BASED PLAINTIFFS]: We don't know what the percentage is. It may be low [ ], it might not be low.").

defendants controlled the market, we defer that determination to a later stage.

2. Existence of More Direct Victims

Under this factor, courts examine whether there exists a class that suffered an antitrust injury more directly than the present class and therefore would be more suited to bring an antitrust claim. AGC, 459 U.S. at 542.

The Second Circuit expressly recognized that even though "appellants allege status as consumers," in this case "directness may have diminished weight" because "one peculiar feature of this case is that remote victims (who acquired LIBOR-based instruments from any of thousands of non-defendant banks) would be injured to the same extent and in the same way as direct customers of the Banks." Gelboim, 823 F.3d at 779.

We agree that this factor must carry diminished weight. Any other result would vitiate the first prong of causation. See Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 443 (2d Cir. 2005) ("[T]he weight to be given the various [efficient enforcer] factors will necessarily vary with the circumstances of particular cases.").

3. Speculative Damages

While "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 689 (2d Cir. 2009), at the same time "highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement," Gelboim, 823

F.3d at 779. The Second Circuit expressed skepticism that some of the present antitrust claims could survive this factor, opining, "Any damages estimate would require evidence to support a just and reasonable estimate of damages, and it is difficult to see how appellants would arrive at such an estimate, even with the aid of expert testimony." Id.

In evaluating standing in price-fixing cases, damages may be unduly speculative for several reasons.

One reason is that the damages claim is conclusory. E.g., AGC, 459 U.S. at 542-43 (damages were speculative because there was "no allegation that any collective bargaining agreement was terminated as a result of the coercion, no allegation that the aggregate share of the contracting market controlled by union firms has diminished, no allegation that the number of employed union members has declined, and no allegation that the Union's revenues in the form of dues or initiation fees have decreased").

A second reason is that 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. This rationale tends to dovetail with the first factor of direct causation. E.g., Reading Indus., Inc. v. Kennecott Copper Corp., 631 F.2d 10, 13 (2d Cir. 1980).

A third reason is that, due to external market factors, there is no relationship between the fixed price and the price that the plaintiffs ultimately paid. E.g., Gold, 2016 WL 5794776, at *14 ("[T]he Court is concerned that at least some Plaintiffs' alleged injuries are highly speculative.... Plaintiffs cannot deny that other market variables may have affected gold prices before and after the PM fixing.").

In Gelboim, the Second Circuit offered a fourth: damages may be speculative where the non-fixed components of a transaction were heavily negotiated between the parties in relation to the fixed component. 823 F.3d at 780.

To summarize, plaintiffs' damages theory will not be held to be speculative if it is credible. The relevant question is "whether the putative plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement." Id. The question is not one of damages calculation, which forms the essence of the two broad arguments advanced by defendants: first, that the parties would need to reconstruct but-for LIBOR, and second, that damages would need to be netted. As to the first argument, the estimation of but-for LIBOR is the job of the parties' competing experts. While this case might involve more relevant numbers than most—numbers "for each of 16 panel banks across 15 maturities, for a total of 240 quotes per business day," Defs.' Joint Mem. of Law 18, ECF No. 1481—that is not a sufficient reason to deem the damages speculative.

As to the second argument, we agree that plaintiffs may ultimately recover only to the extent of their net injury, given that plaintiffs may well have benefited from LIBOR suppression in the same transaction or in a different transaction. See Minpeco, S.A. v. Conticommodity Servs., Inc., 676 F. Supp. 486, 489

(S.D.N.Y. 1987) ("[A]n award of damages should put a plaintiff forward into the position it would have been [in] 'but for' the defendant's violation of the law.... An antitrust plaintiff may recover only to the 'net' extent of its injury; if benefits accrued to it because of an antitrust violation, those benefits must be deducted from the gross damages caused by the illegal conduct.") (quoting L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1367 (9th Cir. 1986)). Again, however, netting in and of itself does not render the damages unduly speculative.

We now turn to an analysis of whether the different groups of plaintiffs have articulated a non-speculative theory of damages which would support a finding that they could be efficient enforcers. As discussed below, there are issues with each group of plaintiffs. To the extent that any plaintiffs sue under transactions not specifically addressed herein, the principles of each category of transaction should be applied accordingly.

i. Non-Negotiated Transactions Such As Bonds

The first group of plaintiffs is those who entered into non-negotiated transactions such as bonds.[28] These plaintiffs argue that the appropriate calculation of damages is simply the difference between suppressed LIBOR and but-for LIBOR. We disagree, as the effect of a change in LIBOR cannot be isolated in the same way as the overcharge of a typical price-fixed product

[28] Although the Bondholder class—comprised of plaintiffs who did not transact directly from defendants—is dismissed under the first factor of causation, there remain plaintiffs within the OTC class who allege that they purchased bonds directly from defendants, such as plaintiff SEIU. The analysis in this section pertains to such plaintiffs.

such as a book, as explained in the following paragraph.

We have already made two fundamental observations regarding bonds consistent with "common economic experience," Twombly, 550 U.S. at 565. First, the purchase price of a bond is "equal to the present value of its expected future interest and principal payments...." LIBOR IV, 2015 WL 6243526, at *70. Second, if LIBOR was suppressed at the time the bondholder purchased the bond, then both the expected future interest payments and the purchase price of the bond would have reflected that lower LIBOR level. Id. That is, for a bond, the future interest payments equal the interest rate (LIBOR plus perhaps a spread) multiplied by the notional value of the bond. If the notional value is held constant, and if the spread represents issuer risk that is not affected by LIBOR, Tr. 83:1-7, then when LIBOR falls the purchase price must fall correspondingly; any other result would defy basic economic principles. [29]

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[29] The Schwab plaintiffs submitted declarations arguing the following:

> I do not agree that [LIBOR suppression] would have somehow been reflected in a lower price to the Treasury Entities, thereby compensating them. In initial offerings the Treasury Entities simply bought at par. In secondary markets the Treasury Entities sometimes bought at a discount or premium to par—but any discount or premium would have reflected underlying changes in interest rates or creditworthiness of the issuer, not 'compensation' for LIBOR suppression. Whether in the primary or secondary market, Schwab overpaid for the investments; the suppression of LIBOR systematically caused the risk of the investment to be understated

Generally speaking, this interaction would also be reflected in the purchase price of other LIBOR-based, non-negotiated financial instruments such as asset-backed securities.

Therefore, bondholders would be harmed from lowered coupon payments only if the price they paid for the bond was not correspondingly lowered in absolute dollars. An example is a bondholder who purchased a bond prior to the suppression period and then received suppressed returns. A more complicated situation is presented by a bondholder who purchased a bond during LIBOR suppression. If the level of LIBOR suppression remained constant over the life of the bond, then that bondholder did not experience damages flowing from the defendants' actions and the measure of damages would be zero. But if the suppression level increased over the life of the bond, then the bondholder has experienced damages in the amount of the "extra" suppression. As an example, if the LIBOR suppression level was 15 basis points below but-for LIBOR at the time the plaintiff purchased the bond, and then the suppression level

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> compared to the interest rate being offered and reduced the Treasury Entities' income.

Decl. of Dennis Goldman ¶ 10, ECF No. 1512.

Whether a bond is purchased at par value is immaterial to the question of whether the purchase price is equal to the present value of the expected payments. Purchasing a new-issue bond at par simply means that the future payments are set at a level that reflects a present value of par. As to the secondary market, it would seem that the point of the Schwab plaintiffs is the same as our point: a discount or premium on the purchase price "reflect[s] underlying changes in interest rates," such as LIBOR suppression.

increased to 45 basis points below but-for LIBOR at the time of the first coupon payment, the bondholder was damaged to the tune of 30 basis points on that coupon payment. And if on a later coupon payment the suppression level became 5 basis points below but-for LIBOR, then the benefit of 10 basis points on that coupon payment should be netted against the measure of damages. These scenarios present issues of proof, and not ones of standing.

ii. Negotiated Transactions Such As Swaps

The second group of plaintiffs is those who entered into negotiated transactions such as interest rate swaps. An interest rate swap is an instrument in which "two parties agree to exchange interest rate cash flows, based on a specified notional amount from a fixed rate to a floating rate (or vice-versa) or from one floating rate to another. These are highly liquid financial derivatives. Interest rate swaps are commonly used for both hedging and speculating." OTC Compl. ¶ 35(f).[30] The interest rate derivatives market in which these instruments were created and sold was an "informal bilateral market consisting of broker/dealers that traded price information and negotiated transactions over electronic communications networks.... [D]ealers active in this

[30] The named plaintiffs of the proposed OTC class only purchased interest rate swaps, but the OTC complaint lists other types of instruments on which it would sue on behalf of the class. The instruments "include but are not limited to asset swaps, collateralized debt obligations, credit default swaps, forward rate agreements, inflation swaps, interest rate swaps, total return swaps, and options." OTC Compl. ¶ 35.

market custom-tailor agreements to meet the specific needs of their customers." Freddie Mac Compl. ¶ 207.

The Second Circuit expressed skepticism about the measure of damages in such highly negotiated transactions. Gelboim, 823 F.3d at 780. In response, plaintiffs argue that courts do not consider the presence of negotiation to be fatal to the calculation of damages. OTC Pls.' Mem. of Law in Opp'n 10 n.12, ECF No. 1511. Defendants, meanwhile, argue that the presence of negotiation "means greater opportunity for changes in the but-for world—i.e., the introduction of further intervening causal intermediaries." Defs.' Reply Mem. of Law 25, ECF No. 1544. Both of these arguments miss the mark.

When parties enter into bespoke swaps, they do so to effect a financial goal—to exchange risk for safety, to achieve a balance in their holdings, or to make a bet on a belief that LIBOR will move in a certain direction. Gaining or trading away exposure to LIBOR is the point of the swap. Thus, in entering into a swap transaction the parties take into consideration the present level of LIBOR and their view of how LIBOR will change in the future. The parties respond to these considerations when they set the non-LIBOR portions of the swap. As direct action plaintiffs agree, "[T]he fixed rate was designed to be the net present value of what LIBOR was [at the time of the transaction]." Tr. 78:15-16. Thus, in our view, the point of the Second Circuit's observation is that when swaps were entered into during the suppression period, the negotiated components absorbed the effects of LIBOR suppression.

Plaintiffs cite to Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469 (7th Cir. 2002), to support their view that damages should simply be measured from the but-for level even in negotiated contracts. Loeb actually cuts against their argument. In that case, the price of a contract for copper cathode futures was comprised of (1) a number equivalent to the average of Comex copper prices, and (2) a negotiated premium set on a quarterly or monthly basis. Id. at 476, 487. The court held that the negotiated premium did not render the damages speculative, for the reason that "the evidence show[ed] that as the Comex price increased, the premium also increased. Thus, there [wa]s no possibility that the two components 'offset' or that the premium somehow compensated for the defendants' manipulated price inflation." Id. at 487-88. Here, the circumstances are different, as the Second Circuit recognized, and there is every expectation that the negotiated component compensated for manipulated LIBOR. Cf. FOREX, 2016 WL 5108131, at *8 (LIBOR is distinguishable from the FX market, which "does not entail the same level of 'negotiation' between parties in selecting the ultimate rates for their transactions.").[31]

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[31] Plaintiffs also rely heavily on New York v. Hendrickson Brothers, Inc., 840 F.2d 1065 (2d Cir. 1988), which said that "antitrust treble-damage actions should not be complicated by a need to trace the effects of the overcharge with respect to such matters as prices, costs, and the potentially different behavior of all the pertinent variables in the absence of the overcharges." Id. at 1079. Plaintiffs use this quotation out of context. The court in Hendrickson was explaining why indirect purchasers are routinely denied antitrust standing—that is, because allowing recovery by indirect purchasers would require courts to trace all of the effects of an overcharge.

At bottom, swapholders are in a position similar to bondholders. Plaintiffs who entered into swaps before the suppression period may recover for suppressed payments relative to but-for LIBOR. And plaintiffs who entered into swaps during the suppression period may recover for any super-suppressed payments, netted against any less-suppressed payments. See Tr. 78:11-15 (where counsel for the direct action plaintiffs stated, "There may be transactions where damages are zero if they're late in the time period. There are going to be [damages] for sure, if they enter a swap in 2007 before the suppression really starts going down.").

iii. Futures Contracts

The third group of plaintiffs is those who purchased Eurodollar futures contracts on an exchange. Relying on the undisputed fact that the settlement price of a Eurodollar future is 100 minus the three-month USD LIBOR fix on the contract's last trading day,[32] Exchange-Based plaintiffs allege that defendants "affected Eurodollar futures prices directly by manipulating the index that was directly incorporated into the formula for those prices." LIBOR II, 962 F. Supp. 2d at 612.

The mathematical relationship between LIBOR and the settlement price of Eurodollar futures contracts does not address the relationship, if any, between LIBOR and the *trading* price of Eurodollar futures contracts (that is, the price at which Eurodollar

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[32] Metzler Inv. GmbH v. Credit Suisse Grp. AG, Corrected Second Am. Compl. ¶ 433, No. 11-md-2262 (NRB), ECF No. 438 ("Exchange-Based Compl.").

futures contracts were bought and sold prior to settlement). The trading price reflects the market's prediction for what the price will be at settlement, which could be years away—not what LIBOR is at the present moment. See Exchange-Based Compl. ¶ 431 ("[I]n practice, Eurodollar futures are a proxy for the LIBOR-based credit curve.") (internal alterations omitted); Tr. 90:20, 98:19-20 (settlement can occur five or ten years in the future). Therefore, it will only be possible to determine the effect of LIBOR on trading prices if the two are in fact closely related. In FOREX, such a relationship—where the "exchange price ... [and] the FX spot prices ... move virtually in tandem"—was demonstrated by empirical data provided in the complaint as well as acknowledgments in settlements with the U.S. Commodity Futures Trading Commission that "exchange rates in many actively traded CME foreign exchange futures contracts track rates in foreign exchange markets at near parity." 2016 WL 5108131, at *9 (internal alterations omitted). By contrast, in Gold, the court expressed skepticism that such a relationship could be shown because "Plaintiffs cannot deny that other market variables may have affected gold prices before and after the PM Fixing. (Indeed, were it otherwise, pricing across gold markets would essentially be flat, varying only twice a day)." 2016 WL 5794776, at *14.

Here, the Exchange-Based plaintiffs have not sufficiently pled that the LIBOR level on a given day moves in tandem with the trading price of Eurodollar futures contracts. Exchange-Based plaintiffs have merely pled that "[t]raders who exit their positions before settlement are still affected by LIBOR mispricing because the Eurodollar futures contracts trade based on what LIBOR is expected to be in the future. To the extent that LIBOR is mispriced in the present, expectations of what LIBOR will be in the future will also be skewed." Exchange-Based Compl. ¶ 439. The complaint continues, "The current and prospective higher settlement prices of CME Eurodollar futures contracts created higher reference points for the expectations of all market participants." Id. ¶ 447. This hardly pleads a sufficiently close relationship between LIBOR and trading prices.

Exchange-Based plaintiffs offer one example in their attempt to show a relationship between LIBOR and Eurodollar futures prices. Their complaint presents data on LIBOR and Eurodollar futures contracts in the days surrounding "the events on April 17, 2008.... LIBOR jumped on that day following the BBA's announcement that it would investigate the authenticity of LIBOR reporting." Id. at ¶ 444. Figure 21 of the complaint purports to show the "sharp decrease in the Eurodollar futures price on April 17, 2008[,] ... [as well as] the behavior of LIBOR during the same period, which exhibits opposite movements to the Eurodollar futures price." The price shown in the graph is the price of the "nearby Eurodollar futures contract...." Id.

Unless Figure 21 is inadvertently mislabeled, it is extraordinarily misleading.[33] Figure 21 presents two

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[33] There is little reason to believe that the graphs are mislabeled. Although the complaint provides no information as to the source of the data in the graphs, publicly available data suggests that the date labels are correct. See, e.g., Federal Reserve Bank of St. Louis, 3-Month London Interbank Offered Rate (LIBOR), based on U.S. Dollar, FRED Economic Data, https://fred.stlouisfed.org/series/USD3MTD156N; Quandl,

graphs. On each graph, a two-day period in the middle of April 2008 is highlighted to demonstrate the supposed one-to-one, causal relationship between LIBOR and Eurodollar contract prices. One graph shows a sharp increase in LIBOR over the course of two days in the middle of April 2008 (the "LIBOR Increase"), and the other graph shows a sharp decline in Eurodollar contract prices over the course of two days in the middle of April 2008 (the "Eurodollar Decrease"). If LIBOR truly caused a linear movement in Eurodollar contract prices, one would expect to see either that the LIBOR Increase and the Eurodollar Decrease occurred during the same two days or that the LIBOR Increase occurred shortly before the Eurodollar Decrease.

What Figure 21 shows instead is that the LIBOR Increase occurred *after* the Eurodollar Decrease: the Eurodollar Decrease occurred from April 15 to April 17, 2008, but the LIBOR Increase occurred from April 16 to April 18, 2008. The graphs suggest that Eurodollar futures prices moved unconnected to the actual LIBOR level.

Eurodollar Futures, August 2008, EDQ2008, CME, https://www.quandl.com/data/CME/EDQ2008-Eurodollar-Futures-August-2008-EDQ2008-CME (Tab TABLE, which provides, inter alia, a drop in prices from April 15 to April 17, 2008 that approximates the amount of the drop provided in Figure 21 of the complaint). Exchange-Based plaintiffs have also submitted a proposed amended complaint and a post-oral argument letter, both relying on the same graph and providing no other empirical examples. Metzler Inv. GmbH v. Credit Suisse Grp. AG, Proposed Third Amnded Compl. ¶ 622, No. 11-cv-2613 (NRB), ECF No. 292; Lovell & Kovel Letter App'x B, MDL ECF No. 1650.

Even putting aside the movements over these three days, the movements throughout April 2008 belie the Exchange-Based plaintiffs' claim of a causal relationship. The relative flatness of LIBOR levels (1) between April 4, 2008 and April 15, 2008 and (2) between April 18, 2008 and April 28, 2008 appear to have no relationship to (1) falling Eurodollar contract prices between April 4, 2008 and April 15, 2008 and (2) rising Eurodollar contract prices between April 18, 2008 and April 28, 2008. And given that the graph purports to show the prices of the *nearby* Eurodollar futures contract, the relationship in futures contracts that expire further out must be even more attenuated. The graphs do not credibly support the notion that Exchange-Based plaintiffs will be able to show that LIBOR suppression of a particular amount would have caused a corresponding, determinable change in trading prices.

This is not a case where information pertaining to the supposed causal relationship is uniquely in defendants' hands. Notably, despite the apparent availability of the data, Exchange-Based plaintiffs offer no other empirical information showing that Eurodollar futures prices move in tandem with LIBOR—no other graphs, trendlines, or correlations. And unlike in FOREX, Exchange-Based plaintiffs have not cited to any official findings that Eurodollar futures trading prices track LIBOR at near parity. Without demonstrating such a relationship, plaintiffs cannot prove that defendants caused any particular changes in Eurodollar trading prices.

A separate reason to dismiss claims of intermediate traders is that there is good reason to doubt that they suffered damages in any event. After all, these traders made the decision to purchase a futures contract at a particular price and made the decision to sell it back to the market at a particular price. The precise amount of money that they would make or lose on the market was known to them at the time they made the decision to sell, and LIBOR suppression did not change this knowledge. Cf. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 342 (2005) ("Normally, in cases such as this one (i.e., fraud-on-the-market cases), an inflated purchase price [of a stock] will not itself constitute or proximately cause the relevant economic loss. For one thing, as a matter of pure logic, at the moment the transaction takes place, the plaintiff has suffered no loss; the inflated purchase payment is offset by ownership of a share that *at that instant* possesses equivalent value. Moreover, the logical link between the inflated share purchase price and any later economic loss is not invariably strong. Shares are normally purchased with an eye toward a later sale. But if, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss.").

Therefore, a damages theory predicated on a direct link between an act of LIBOR suppression and an impact on Eurodollar futures trading prices in a particular amount is speculative. The only Exchange-Based plaintiffs with a non-speculative theory are those who, before the suppression period started, shorted contracts that were held to settlement during the suppression period. Such plaintiffs would be able to rely on an unmanipulated selling price as well as a settlement price demonstrably impacted by LIBOR suppression, as set forth in the example in Paragraph 440 of the Exchange-Based plaintiffs' complaint.

4. Duplicative Recovery and Complex Apportionment

The last factor reflects a "strong interest ... in keeping the scope of complex antitrust trials within judicially manageable limits." AGC, 459 U.S. at 543.

Under this factor courts are traditionally concerned with the prospect of different groups of plaintiffs attempting to recover for the same exact injury, id., which plaintiffs do not do here. Courts are not traditionally concerned with considerations that defendants have raised, namely, whether governments have conducted investigations concerning the conduct at issue, and whether the plaintiffs assert alternative theories of recovery. See, e.g., Mid-West Paper, 596 F.2d at 594 n.85 (plaintiffs are not "necessarily foreclosed from ... relief by the mere pendency of the government and direct purchaser suits for similar remedies. Generally, they may proceed simultaneously or in disregard of each other....") (internal quotation marks and citation omitted); Alaska Elec. Pension Fund v. Bank of Am. Corp. ("ISDAFix"), No. 14 Civ. 7126, 2016 WL 1241533, at *8 (S.D.N.Y. Mar. 28, 2016) ("[T]he damages at issue are tied to particular transactions and contracts, obviating the danger of duplicative recovery.").

Clearly, the Second Circuit in Gelboim *was* concerned with the scope of government recovery, as "the ramified consequences are beyond conception." 823 F.3d at 780. As of now, there has been no showing that certain plaintiffs have been made whole through the receipt of restitution payments made to governments; if such a showing is made in the future, we will take the steps necessary to avoid duplicative recovery. Moreover, defendants suggest no substitute avenue of recovery for plaintiffs who transacted with a panel-bank defendant that is not under government investigation.

We are also unaware of any authority foreclosing plaintiffs from pursuing antitrust claims simply because they are also pursuing non-antitrust claims. While plaintiffs cannot recover twice for the same injury, they are permitted to assert alternative theories of liability.

5. State Law Claims

Some plaintiffs have asserted state antitrust law claims in addition to their federal law claims. Defendants argue that antitrust standing in the state claims also turns on the AGC factors.

"In addressing unsettled areas of state law, ... our role as a federal court ... is not to adopt innovative theories that may distort established state law. Instead we must carefully predict how the state's highest court would resolve the uncertainties that we have identified. In making this prediction, we give the fullest weight to pronouncements of the state's highest court, ... while giving proper regard to relevant rulings of the state's lower courts. We may also consider decisions in other jurisdictions on the same or analogous issues." Travelers Ins. Co. v. Carpenter, 411 F.3d 323, 329 (2d Cir. 2005) (internal quotation marks and citations omitted). Additionally, "the judgment of an intermediate appellate state court is a 'datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.' " New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 210 (2d Cir. 2006) (quoting Comm'r v. Estate of Bosch, 387 U.S. 456, 465 (1967)).

We only address those state law claims that remain after our personal jurisdiction rulings: California Cartwright Act claims in Bay Area Toll Authority v. Bank of America Corp., No. 14-cv-3094, and New York Donnelly Act claims in Federal Deposit Insurance Corp. v. Bank of America Corp., No. 14-cv-1757; Principal Financial Group, Inc. v. Bank of America Corp., No. 13-cv-6014; and Principal Funds Inc. v. Bank of America Corp., No. 13-cv-6013. As explained below, we conclude that the AGC factors should apply to the California and New York antitrust claims, and therefore the standing analyses set forth above apply equally to the state law claims.

i. California Cartwright Act Claims

California's highest court has not considered the application of the AGC factors, but it has recently stated that "[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act...." Aryeh v. Canon Bus. Sols., Inc., 292 P.3d 871, 877 (Cal. 2013). Prior to the California Supreme Court's decision in Aryeh, a California intermediate appellate court applied the AGC factors to a Cartwright Act claim, Vinci v. Waste Mgmt., Inc., 43 Cal. Rptr. 2d 337, 338-39 (Cal. Ct. App. 1995), as did the Ninth Circuit, Knevelbaard

Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000) [34].

Plaintiffs argue that Aryeh nullified the standing analyses in Vinci and Knevelbaard. We are not so persuaded. Aryeh—a case ultimately about California's unfair competition law—did not analyze antitrust standing, and did not indicate that the California Supreme Court disapproved of the application of the AGC factors. Indeed, a recent case in the Eastern District of New York concluded that "because there is no California law contrary to the state appellate court's application of the AGC factors in Vinci, the Court applies the AGC factors to Plaintiffs' [Cartwright Act] claim. The decision of both an intermediary court and the Ninth Circuit remain the best predictor of the state's highest court's action on the issue, and the Court is not convinced to disregard this data by any other indication that the highest court of the state would decide otherwise." Salveson v. JP Morgan Chase & Co., 166 F. Supp. 3d 242, 258 (E.D.N.Y. 2016) (internal quotation marks omitted). We agree with this analysis and conclude that the AGC factors apply to plaintiffs' Cartwright Act claims.

ii. New York Donnelly Act Claims

New York's highest court has not opined on the applicability of the AGC factors. However, a New York

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[34] The Ninth Circuit noted that antitrust standing is more permissive under Cartwright Act claims than under federal law in that the Cartwright Act permits suits by both direct and indirect purchasers. Knevelbaard Dairies, 232 F.3d at 987, 991. That fact does not impact the analysis in this case.

intermediate appellate court has quoted AGC approvingly in considering a Donnelly Act claim. Cont'l Guest Servs. Corp. v. Int'l Bus Servs., Inc., 939 N.Y.S.2d 30, 30 (N.Y. App. Div. 1st Dep't 2012). Relying on Continental Guest Services Corp., the Second Circuit subsequently held that "[w]e see no reason ... to interpret the Donnelly Act differently than the Sherman Act with regard to antitrust standing." Gatt Comm'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 81 (2d Cir. 2013). We conclude that the AGC factors apply to plaintiffs' Donnelly Act claims.

V. Conclusion

After applying the personal jurisdiction and efficient enforcer holdings in this opinion, the antitrust claims that remain are set out in the accompanying appendix. The Court anticipated before the briefing on this motion that its decision would be informative with regard to any proposed additional motion. Accordingly, any party wishing to pursue a motion previewed in June and derived from Gelboim should submit a pre-motion letter by January 6, 2017. Any letters in opposition to any such proposal should be filed by January 13, 2017.

This Memorandum and Order resolves MDL docket entry 1480.

SO ORDERED.

APPENDIX

Action	**Jurisdiction Filed**	**Antitrust Claims**	**Remaining Defendants**
Gelboim v. Credit Suisse Grp. AG, No. 12-CV-1025 [Bondholders]	S.D.N.Y.	Federal	*Antitrust claims dismissed on efficient enforcer grounds*
Metzler Inv. GmbH v. Credit Suisse Grp. AG, No. 11-cv-2613 [Exchange-Based]	S.D.N.Y. N.D. Ill. D. Minn. D.N.J.	Federal	Bank of America Corp. Bank of America, N.A. Citibank, N.A. Citigroup Inc. JPMorgan Chase & Co. JPMorgan Chase Bank, N.A. John Does 1-5
Mayor and City of Baltimore v.	S.D.N.Y.	Federal	Bank of America Corp.

Credit Suisse Grp. AG, No. 11-cv-5450 [OTC]			Bank of America, N.A. Citibank, N.A. Citigroup Inc. JPMorgan Chase & Co., N.A.
Charles Schwab Bank, N.A. v. Rank of Am. Corp., No. 11-cv-6411	N.D. Cal.	Federal, Califor-nia	*Antitrust claims dismissed on personal jurisdiction grounds*
Schwab Money Mkt. Fund v. Bank of Am. Corp., No. 11-cv-6412	N.D. Cal.	Federal, Californi a	*Antitrust claim dismissed on personal jurisdiction grounds*
Schwab Short- Term Bend Mkt. Fund. v. Bank of Am. Corp., No. 11-cv-6409	N.D. Cal.	Federal, Californi a	*Antitrust claims dismissed on personal jurisdiction grounds*

Amabile v. Bank of Am. Corp., No. 13-cv-17C0	S.D.N.Y.	Federal	Bank of America Corp. Citibank, N.A. JPMorgan Chase & Co.
Bay Area Toll Auth. v. Bank of Am. Corp., No. 14-cv-3094	N.D. Cal.	Federal, Califor-nia	Citibank, N.A.
City of Houston v. Bank of Am. Corp., No. 13-cv-5616	S.D. Tex.	Federal, Texas	*Antitrust claims dismissed on personal jurisdiction grounds*
City of Phila. v. Bank of Am. Corp., No. 13-cv-6020	E.D. Pa.	Federal	Citigroup Inc.
Darby Fin. Prods. v. Barclays Bank PLC, No. 13-cv-8799	N.Y. Sup. Ct.	Federal	JPMorgan Chase & Co. JPMorgan Chase Bank, N.A.
Fed. Deposit Ins. Corp. v. Bank of Am. Corp.,	S.D.N.Y.	Federal, New York	Bank of America Corp.

No. 14-cv-1757			Bank of America, N.A. Bear Stearns Capital Markets, Inc. JPMorgan Chase & Co. JPMorgan Chase Bank, N.A. Citibank, N.A. Citigroup Inc. Citigroup Financial Products, Inc. HSBC Bank USA, N.A. Merrill Lynch & Co. Merrill Lynch Capital Services Inc.
Fed. Home Loan Mortg. Corp. v. Bank of Am. Corp., No. 13-cv-3952	E.D. Va.	Federal	HSBC Bank USA, N.A.

Nat'l Credit Union Admin. Bd. v. Credit Suisse Grp. AG, No. 13-cv-7394	D. Kan.	Federal, Califor-nia, Illinois, Kansas	*Antitrust claims dismissed on personal jurisdiction grounds*
Principal Fin. Grp., Inc, v. Bank of Am. Corp., No. 13-cv-6014	S.D. Iowa	Federal, New York	JPMorgan Securities LLC Merrill Lynch, Pierce, Fenner & Smith Inc. RBS Securities Inc.
Principal Funds, Inc. v. Bank of Am. Corp., No. 13-cv-6013	S.D. Iowa	Federal, New York	JPMorgan Securities LLC Merrill Lynch, Pierce, Fenner & Smith Inc. RBS Securities Inc.
Prudential Inv. Portfolios 2 v. Bank of Am. Corp.,	D.N.J.	Federal	Citigroup Inc.

No. 14-cv-4189			HSBC Finance Corp. HSBC Securities (USA) Inc. HSBC USA Inc. JPMorgan Securities LLC MLPFS Inc. RBS Securities Inc.
Regents of the Univ. of Cal. Bank of Am. Corp., No. 13-cv-5186 (Cal. Consol.)	N.D. Cal. S.D. Cal. C.D. Cal. E.D. Cal.	Federal, Califor-nia	*Antitrust claims dismissed on personal jurisdiction grounds*
Salix Capital US Inc. v. Banc of Am. Sec. LLC, No. 13-cv-4018	N.Y. Sup. Ct.	Federal	Bank of America Corp. Bank of America, N.A. Barclays Capital JPMorgan Chase & Co. JPMorgan Chase Bank, N.A.

			JPMorgan Securities LLC Citibank, N.A. Citigroup Inc. Citigroup Global Markets Inc. Citigroup Global Markets Limited Credit Suisse Securities (USA) LLC Deutsche Bank Securities Inc. MLPFS Inc.