APPENDIX

TABLE OF APPENDICES

Appendix A

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 20-1987-cv

Filed February 25, 2022
Document 297-1

District Court Nos. 11 MDL 2262,
1:14-cv-04189-NRB

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of February, two thousand twenty-two.

PRESENT:

GERARD E. LYNCH,
JOSEPH F. BIANCO,
STEVEN J. MENASHI,
Circuit Judges.

THE BERKSHIRE BANK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO,

Plaintiffs-Appellants,

FTC CAPITAL GMBH, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, FTC FUTURES FUND PCC LTD, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, FTC FUTURES FUND SICAV, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, 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, MAYOR AND CITY COUNCIL OF BALTIMORE, RICHARD HERSHEY, JEFFREY LAYDON, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, 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 YIELDPLUS FUND, SCHWAB YIELDPLUS FUND LIQUIDATION TRUST, CHARLES SCHWAB BANK, N.A., CHARLES SCHWAB & CO., INC., THE CHARLES SCHWAB CORPORATION, METZLER

INVESTMENT GMBH, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ROBERTO E. CALLE GRACEY, CITY OF NEW BRITAIN FIREFIGHTERS' AND POLICE BENEFIT FUND, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, AVP PROPERTIES, LLC, 303030 TRADING LLC, ELLEN *GELBOIM*, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, ATLANTIC TRADING USA, LLC, COMMUNITY BANK & TRUST, 33-35 GREEN POND ROAD ASSOCIATES, LLC, ON BEHALF OF ITSELF AND 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, GARY FRANCIS, NATHANIEL HAYNES, COURTYARD AT AMWELL II, LLC, GREENWICH COMMONS II, LLC, JILL COURT ASSOCIATES II, LLC, MAIDENCREEK VENTURES II LP, RARITAN COMMONS, LLC, LAWRENCE W. GARDNER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, ANNIE BELL ADAMS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, DENNIS PAUL FOBES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, LEIGH E. FOBES, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, MARGARET LAMBERT, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, BETTY L. GUNTER, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, CARL A. PAYNE, INDIVIDUALLY, AND ON BEHALF OF OTHER MEMBERS OF THE GENERAL PUBLIC SIMILARLY SITUATED, KENNETH W. COKER, INDIVIDUALLY, AND ON BEHALF OF OTHER MEMBERS OF THE GENERAL PUBLIC SIMILARLY SITUATED, CITY OF RIVERSIDE, THE RIVERSIDE PUBLIC FINANCING AUTHORITY, EAST BAY MUNICIPAL UTILITY DISTRICT,

COUNTY OF SAN MATEO, THE SAN MATEO COUNTY JOINT POWERS FINANCING AUTHORITY, CITY OF RICHMOND, THE RICHMOND JOINT POWERS FINANCING AUTHORITY, SUCCESSOR AGENCY TO THE RICHMOND COMMUNITY REDEVELOPMENT AGENCY, COUNTY OF SAN DIEGO, GUARANTY BANK AND TRUST COMPANY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, HEATHER M. EARLE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, HENRYK MALINOWSKI, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, LINDA CARR, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, ERIC FRIEDMAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, COUNTY OF RIVERSIDE, JERRY WEGLARZ, NATHAN WEGLARZ, ON BEHALF OF PLAINTIFFS AND A CLASS, DIRECTORS FINANCIAL GROUP, INDIVIDUALLY, SEIU PENSION PLANS MASTER TRUST, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, HIGHLANDER REALTY, LLC, JEFFREY D. BUCKLEY, THE FEDERAL HOME LOAN MORTGAGE CORPORATION, COUNTY OF SONOMA, 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, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO ASSOCIATION OF GOVERNMENTS, CEMA JOINT VENTURE, COUNTY OF SACRAMENTO, THE CITY OF PHILADELPHIA, THE PENNSYLVANIA INTERGOVERNMENTAL COOPERATION AUTHORITY, 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, TEXAS COMPETITIVE ELECTRIC HOLDINGS COMPANY LLC, THE CHARLES SCHWAB CORPORATION, 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, FEDERAL NATIONAL MORTGAGE ASSOCIATION, DARBY FINANCIAL PRODUCTS, CAPITAL VENTURES INTERNATIONAL, BAY AREA TOLL AUTHORITY, PRUDENTIAL INVESTMENT PORTFOLIOS 2, FORMERLY KNOWN AS DRYDEN CORE INVESTMENT FUND ON BEHALF OF PRUDENTIAL CORE SHORT-TERM BOND FUND, PRUDENTIAL CORE TAXABLE MONEY MARKET FUND, DIRECTORS FINANCIAL GROUP, ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, TRIAXX PRIME CDO 2006-

1, LTD., TRIAXX PRIME CDO 2006-2 LTD., TRIAXX PRIME CDO 2007-1, LTD., THE FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER, DIRECT ACTION PLAINTIFF, DIRECT ACTION PLAINTIFFS, SALIX CAPITAL US INC., FRAN P. GOLDSLEGER, JOSEPH AMABILE, LOUIE AMABILE, NORMAN BYSTER, MICHAEL CAHILL, RICHARD DEOGRACIAS, MARC FEDERIGHI, SCOTT FEDERIGHI, ROBERT FURLONG, DAVID GOUGH, BRIAN HAGGERTY, DAVID KLUSENDORF, RONALD KRUG, CHRISTOPHER LANG, JOHN MONCKTON, PHILIP OLSON, BRETT PANKAU, DAVID VECCHIONE, RANDALL WILLIAMS, EDUARDO RESTANI, NICHOLAS PESA, JOHN HENDERSON, 303 PROPRIETARY TRADING LLC, CALIFORNIA PUBLIC PLAINTIFFS, 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, JENNIE STUART MEDICAL CENTER, INC., VISTRA ENERGY CORPORATION, YALE UNIVERSITY, BUCKS COUNTY WATER AND SEWER AUTHORITY, FEDERAL DEPOSIT INSURANCE, AS RECEIVER FOR DORAL BANK, THE CHARLES SCHWAB FAMILY OF FUNDS, ON BEHALF OF ITS CURRENT OR FORMER SERIES SCHWAB MONEY MARKET FUND, SCHWAB VALUE ADVANTAGE MONEY

FUND, SCHWAB RETIREMENT ADVANTAGE MONEY FUND, SCHWAB INVESTOR MONEY FUND, SCHWAB CASH RESERVES, AND SCHWAB ADVISOR CASH RESERVES, SCHWAB INVESTMENTS, ON BEHALF OF ITS FORMER SERIES SCHWAB SHORT-TERM BOND MARKET FUND, SCHWAB TOTAL BOND MARKET FUND, AND SCHWAB YIELDPLUS FUND, CHARLES SCHWAB WORLDWIDE FUNDS PLC, ON BEHALF OF ITS SERIES SCHWAB U.S. DOLLAR LIQUID ASSETS FUND, STEPHANIE NAGEL, LINDA ZACHER,

Plaintiffs,

v.

LLOYDS BANKING GROUP PLC, ROYAL BANK OF SCOTLAND GROUP PLC, THE NORINCHUKIN BANK, WESTLB AG, ROYAL BANK OF CANADA, WESTDEUTSCHE IMMOBILIENBANK AG, BRITISH BANKERS' ASSOCIATION, BBA ENTERPRISES, LTD., BBA LIBOR, LTD., LLOYDS BANK PLC, FKA LLOYDS TSB BANK PLC, RBC CAPITAL MARKETS, COÖPERATIEVE RABOBANK U.A., HBOS PLC,

Defendants-Appellees,

BANK OF AMERICA CORPORATION, BANK OF AMERICA HOME LOANS, BARCLAYS BANK PLC, UBS AG, CITIBANK N.A., DEUTSCHE BANK FINANCIAL LLC., DEUTSCHE BANK SECURITIES INC., RABOBANK GROUP, COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A, HSBC HOLDINGS PLC, BARCLAYS CAPITAL INC., BARCLAYS U.S. FUNDING LLC, PORTIGON AG, LLOYDS TSB BANK PLC, CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE INTERNATIONAL, CREDIT SUISSE GROUP, NA, BANK OF AMERICA SECURITIES LLC, DOES 1-10, INCLUSIVE, J.P. MORGAN CLEARING CORP., J.P. MORGAN CHASE & CO.,

NATIONAL ASSOCIATION, CITIZENS BANK OF MASSACHUSETTS, AGENT OF RBS, CITIZENS BANK, NA, INCORRECTLY SUED AS THE OTHER CHARTER ONE BANK NA, FKA CITIZENS BANK OF MASSACHUSETTS, RBS SECURITIES, INC., RBS CITIZENS, N.A., THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED, JOHN DOES 1-5, PORTIGON/WESTLB AG, ICAP PLC, BANK OF SCOTLAND PLC, BARCLAYS CAPITAL (CAYMAN) LIMITED, DB GROUP SERVICES (UK) LIMITED, UBS GROUP AG, LLC, ROBOBANK INTERNATIONAL, SOCIETE GENERALE S.A., SOCIÉTÉ GÉNÉRALE, MERRILL LYNCH CAPITAL SERVICES, INC., MERRILL LYNCH PIERCE FENNER & SMITH, INC., MERRILL LYNCH INTERNATIONAL, HSBC BANK USA, N.A., HSBC BANK PLC, HSBC SECURITIES (USA) INC., UBS LIMITED, CITIGROUP INC, CITIGROUP GLOBAL MARKETS INC., BANK OF AMERICA, N.A., JPMORGAN CHASE BANK NATIONAL ASSOCIATION, J.P. MORGAN SECURITIES, LLC, JPMORGAN & CO., JPMORGAN CHASE BANK, UBS SECURITIES LLC, CITIGROUP GLOBAL MARKETS LIMITED, CITIGROUP FUNDING INC., HSBC FINANCE CORP., HSBC USA INC., CITI SWAPCO INC., J.P. MORGAN MARKETS LTD., MERRILL LYNCH & CO., MERRILL LYNCH INTERNATIONAL BANK, LTD., BANK OF AMERICA, NATIONAL ASSOCIATION, J.P. MORGAN BANK DUBLIN PLC, FORMERLY KNOWN AS BEAR STEARNS BANK PLC, CITIGROUP FINANCIAL PRODUCTS, INC.,

*Defendants.**

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

FOR PLAINTIFFS-APPELLANTS:

JEREMY A. LIEBERMAN (Michael J. Wernke, *on the brief*), Pomerantz LLP, New York, NY.

FOR DEFENDANTS-APPELLEES:

PAUL ALESSIO MEZZINA (David S. Lesser, *on the brief*), King & Spalding LLP, Washington, DC (additional counsel for the many parties are listed in Appendix A).

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

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with this Order.

This case marks the latest appeal to arise from the multidistrict litigation ("MDL") involving the alleged conspiracy to manipulate the London Interbank Offered Rate ("LIBOR"), an interest rate benchmark used in trillions of dollars' worth of financial instruments throughout the world. Plaintiffs-Appellants, Berkshire Bank and Government Development Bank for Puerto Rico ("GDB"), are banks located in New York and Puerto Rico, respectively, that originated and owned loans with interest rates tied to LIBOR. They allege that Defendants-Appellees—a group of foreign entities that includes banks, those banks' subsidiaries and affiliates, and a United Kingdom-based trade association and its subsidiaries—formed a conspiracy to suppress

LIBOR, which caused Plaintiffs-Appellants to receive lower interest rate payments on loans they offered to their customers.

After significant motion practice before the district court, prior appeals to this Court, and additional motion practice following remands to the district court in accordance with this Court's directions, Plaintiffs-Appellants now challenge the judgment of the district court (Buchwald, *J.*) dismissing the fraud and conspiracy-based claims under New York law for lack of personal jurisdiction and the fraud claims under Puerto Rico law as barred by the applicable statute of limitations.

We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

I. Standard of Review

"We review a district court's dismissal of an action for want of personal jurisdiction *de novo,* construing all pleadings and affidavits in the light most favorable to the plaintiff and resolving all doubts in the plaintiff's favor." *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010). "A district court's legal conclusions, including its interpretation and application of a statute of limitations, are likewise reviewed *de novo*." *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011).

II. Personal Jurisdiction

On appeal, Plaintiffs-Appellants challenge a series of district court decisions which held that it lacked personal jurisdiction over any of Defendants-

Appellees because, *inter alia*, Plaintiffs-Appellants failed to show the requisite minimum contacts with the United States, let alone New York, and because Plaintiffs-Appellants' conspiracy theory of personal jurisdiction was inapplicable to their allegations. *See, e.g.*, *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR IV*"), No. 11 MDL 2262 (NRB), 2015 WL 6243526, at *19–*20 (S.D.N.Y. Oct. 20, 2015); *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR V*"), No. 11 MDL 2262 (NRB), 2015 WL 6696407, at *8–*9 (S.D.N.Y. Nov. 3, 2015); *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR VI*"), No. 11 MDL 2262 (NRB), 2016 WL 7378980, at *9 (S.D.N.Y. Dec. 20, 2016), *aff'd in part, rev'd in part sub nom. Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC* ("*Schwab II*"), 22 F.4th 103 (2d Cir. 2021); *In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 (NRB), 2017 WL 532465, at *3 (S.D.N.Y. Feb. 2, 2017). However, subsequent to the district court's issuance of the decisions at issue in this appeal, this Court decided another appeal arising out of the LIBOR MDL that specifically considered the application of conspiracy-based personal jurisdiction. *See Schwab II*, 22 F.4th at 121. *Schwab II* is instructive for analyzing Plaintiffs-Appellants' specific allegations regarding personal jurisdiction.

For personal jurisdiction to exist: (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 (2d Cir. 2016) (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59-60 (2d Cir. 2012)). As in *Schwab II*, the parties' dispute here centers on the third element and whether Plaintiffs-Appellants' theory of personal jurisdiction based on conspiracy comports with due process. *Schwab II*, 22 F.4th at 121.[1] To satisfy constitutional principles of due process, the district court needed to "determine whether [Defendants-Appellees] ha[d] sufficient minimum contacts with the forum [*i.e.*, New York] to justify the court's exercise of personal jurisdiction." *Waldman*, 835 F.3d at 331. Minimum contacts "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 ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 170

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[1] As part of the due process analysis regarding personal jurisdiction, in addition to assessing minimum contacts with the relevant forum, a court must also determine whether "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 (1945) (internal quotation marks and citation omitted). Because the district court found personal jurisdiction lacking under the first prong, it did not address this second prong of the due process analysis. On appeal, Defendants-Appellees reference the second prong only in a cursory footnote with no analysis of the multi-factor reasonableness test applicable to this requirement. *See Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996). Accordingly, we conclude that Defendants-Appellees have waived any argument on appeal that the second prong is not satisfied. *See, e.g., Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) ("A contention is not sufficiently presented for appeal if it is conclusorily asserted only in a footnote."); *accord United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993).

(2d Cir. 2013) (quoting *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 305 F.3d 120, 127 (2d Cir. 2002)). A defendant can purposefully avail itself of the forum by creating the requisite minimum contacts through actions of a third party such as a co-conspirator because "[m]uch 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." *Schwab II*, 22 F.4th at 122.

When asserting that personal jurisdiction exists based on a conspiracy, a "plaintiff must 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 state to subject that co-conspirator to jurisdiction in that state." *Charles Schwab Corp. v. Bank of Am. Corp.* ("*Schwab I*"), 883 F.3d 68, 87 (2d Cir. 2018). Notably, pursuant to principles of due process, there is no requirement that a plaintiff demonstrate that a defendant "directed, controlled, and/or supervised the co-conspirator who carried out the overt acts in the forum." *Schwab II*, 22 F.4th at 124.

In prior appeals arising from the LIBOR MDL, this Court recognized that there were plausible allegations that a conspiracy existed and that defendants participated in it. *See, e.g.*, *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759 (2d Cir. 2016). As in *Schwab II*, the parties here contest the third element of the due process analysis for conspiracy-based personal jurisdiction: whether overt acts in furtherance of the conspiracy had sufficient contacts with the relevant forum. In *Schwab II*, this Court looked to whether certain communications among the alleged LIBOR coconspirators constituted overt acts sufficient to confer personal jurisdiction in the United States as a whole. 22 F.4th at 123. After considering several communications proffered by the plaintiffs, we held in *Schwab II* that "[i]f true, these communications would establish overt acts taken by coconspirator Banks in the United States in furtherance of the suppression conspiracy, vesting the district court with personal jurisdiction over each Defendant." *Id.*

Although the relevant forum in the instant case is New York, rather than the entire United States, *Schwab II* informs our analysis here because several of the critical communications and actions we found sufficient to establish personal jurisdiction in *Schwab II* took place in New York. These include "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" as well as an alleged admission by "a Barclays' executive who was based in New York . . . that he instructed subordinates to submit artificially low USD LIBOR rates." *Id.* (internal quotation marks omitted). In the instant appeal, Plaintiffs-Appellants cite these same allegations in support of their conspiracy-based theory that personal jurisdiction exists over Defendants-Appellees in New York. *See* Appellants' Br. at 22–24. In addition, Plaintiffs-Appellants' pleadings and other supporting evidence are replete with similar alleged communications and actions that appear to involve purported conspiracy participants located in New York who took steps there to advance the conspiracy. *See, e.g.*, Appellants' Br. at 22–27; Sealed App'x at 37, 39, 50, 52, 57, 64, 66, 69, 76, 77, 79, 84, 85, 87, 93, 94, 649–54, 658.[2] As in *Schwab II*, when considering these allegations in the light most favorable to Plaintiffs-Appellants and assuming that they are true—which we must do at this stage of the litigation—these materials establish plausible allegations of overt acts taken by co-conspirators in New York in furtherance of the conspiracy. Thus, these allegations were sufficient to vest the district court with personal jurisdiction over each Defendant-Appellee.

In supplemental briefing submitted after *Schwab II*, Defendants-Appellees argue that, although *Schwab II* held that constitutional standards of due process do not require Plaintiffs-Appellants to demonstrate that Defendants-Appellees directed, controlled, or supervised their coconspirators in New York to confer conspiracy-based personal jurisdiction there, New York's long-arm statute, N.Y. C.P.L.R. § 302(a)(2), does impose such a requirement.[3]

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[2] We need not analyze whether every purported act or communication proffered by Plaintiffs-Appellants "amount[s] to overt conspiratorial acts in the forum" because the ones detailed above sufficiently allege overt acts in New York. *Schwab II*, 22 F.4th at 123 n.9.

[3] Plaintiffs-Appellants argue that Defendants-Appellees failed to raise this argument properly before the district court and have therefore waived it on appeal. Appellants' Reply Br. at 3. Although the district court never reached this precise argument regarding the application of New York's long-arm statute to a conspiracy-based theory of personal jurisdiction, Defendants-

As we explained in *Schwab I*, the due process and long-arm analyses regarding personal jurisdiction are related because "[a]lthough the long-arm statute and the Due Process Clause are not technically coextensive, the New York requirements (benefit, knowledge, some control) are consonant with the due process principle that a defendant must have 'purposefully availed itself of the privilege of doing business in the forum.'" *Schwab I*, 883 F.3d at 85 (quoting *Bank Brussels*, 305 F.3d at 127).

New York's long-arm statute provides that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . commits a tortious act within the state." N.Y. C.P.L.R. § 302(a)(2). As New York courts have long recognized, allegations of a conspiracy can satisfy the statute and a co-conspirator can be considered an agent so that "[t]he acts of a co-conspirator may, in an appropriate case, be attributed to a defendant for the purpose of obtaining personal jurisdiction over that defendant." *Reeves v. Phillips*, 388 N.Y.S.2d 294, 296 (1st Dep't 1976); *see also Travelers Indem. Co. v. Inoue*, 490 N.Y.S.2d 506, 507 (1st Dep't 1985) (same).

Appellees did raise it in their July 6, 2016 brief in support of their motion to dismiss. J. App'x at 1869–70 ("In New York and Minnesota, Plaintiffs must allege that a defendant exercised direction or control over the co-conspirator to impute the co-conspirator's contacts—a standard that, for the reasons outlined above, is necessary to satisfy due process. . . . Because Plaintiffs have made no such allegations, . . . Plaintiffs' conspiracy allegations are deficient under those states' long-arm statutes."). Accordingly, we will address Defendants-Appellees' long-arm argument on the merits.

To establish conspiracy-based personal jurisdiction pursuant to New York's long arm statute, a plaintiff must—after making a *prima facie* showing of a conspiracy—plausibly allege that: "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control, *or* at the request of or on behalf of the out-of-state defendant." *Lawati v. Montague Morgan Slade Ltd.*, 961 N.Y.S.2d 5, 7 (1st Dep't 2013) (emphasis added) (quoting *Best Cellars Inc. v. Grape Finds at Dupont, Inc.*, 90 F. Supp. 2d 431, 446 (S.D.N.Y. 2000)). This third element can be established by, for example, a co-conspirator being "aware of the torts being committed by . . . defendants in New York" while not necessarily "directing [a defendant] to commit tortious acts in New York." *Id.* at 8. In other words, New York courts do not mandate a showing of control or direction to establish conspiracy-based personal jurisdiction. *See, e.g.*, *Am. Broad. Cos. v. Hernreich*, 338 N.Y.S.2d 146, 148 (1st Dep't 1972).

As described earlier as part of our analysis regarding due process, Plaintiffs-Appellants have sufficiently alleged that certain co-conspirators acted as agents of their co-conspirators in New York and took steps in furtherance of the alleged conspiracy at the request of or on behalf of their co-conspirators. Accordingly, "[b]y joining the conspiracy with the knowledge that overt acts in furtherance of the conspiracy had taken place in New York," Defendants-Appellees purposely availed themselves "of the privilege of conducting activities within [New York]."

Lawati, 961 N.Y.S.2d at 8 (citation omitted) (quoting *Cleft of the Rock Found. v. Wilson*, 992 F. Supp. 574, 585 (E.D.N.Y. 1998)).

Thus, Plaintiffs-Appellants' allegations satisfy the requirements of personal jurisdiction both under principles of due process and under New York's long-arm statute.

III. Statute of Limitations

With respect to GDB's fraud claims, we conclude that the district court erred in dismissing such claims as time-barred under Rule 12(b)(6). Under New York's borrowing statute, when a nonresident plaintiff sues upon a cause of action that arose outside of New York, the claim must be timely under both the New York statute of limitations and the statute of limitations of the jurisdiction where the cause of action accrued.[4] *See* N.Y. C.P.L.R. § 202; *Antone v. Gen. Motors Corp., Buick Motor Div.*, 64 N.Y.2d 20, 27–28 (1984). The parties agree that the fraud claims accrued where GDB is domiciled—that is, Puerto Rico—and that the applicable statute of limitations under Puerto Rico law is one year "from the time the aggrieved person had knowledge thereof." P.R. LAWS ANN. Tit. 31, § 5298(2) (1930). This statutory period begins to run only when "the plaintiff possesses, or with due diligence would possess, information sufficient to permit suit." *Alejandro-Ortiz v. P.R. Elec. Power Auth.* ("*PREPA*"), 756 F.3d 23, 27 (1st Cir. 2014) (quoting *Villarini-García v. Hosp. Del Maestro, Inc.*, 8 F.3d 81, 84 (1st Cir. 1993)). A plaintiff is not required to undertake an

[4] Here, Defendants-Appellees do not argue that the claims are untimely under New York law.

investigation if he is unaware of the injury and the person who caused such injury. *See Arturet-Vélez v. R.J. Reynolds Tobacco Co.*, 429 F.3d 10, 14 (1st Cir. 2005) (the one-year period begins to run once "the claimant is on notice of her claim—that is, notice of the injury, plus notice of the person who caused it." (internal quotation marks omitted)).

In the instant case, we cannot determine, at the motion to dismiss stage, whether GDB was aware of any potential injury that should have prompted it to investigate the claims prior to November 21, 2011—one year before initiating the instant lawsuit. Just as the defendants did in *Schwab I*, Defendants-Appellees here point to certain public information related to the LIBOR conspiracy that they contend would have given GDB sufficient knowledge to bring suit.

Specifically, they identify allegations in the complaint regarding press reports, as early as May 2008, about an apparent discrepancy in the panel banks' USD LIBOR submissions, as well as disclosures by UBS in its March 2011 Annual Report that it had received subpoenas from the United States Commodity Futures Trading Commission and the Department of Justice in connection with an investigation into LIBOR.[5] *See* Appellees' Supp. Br. at 10; *see also* J. App'x at 1175, 1199, 1218–19.

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[5] On a motion to dismiss under Rule 12(b)(6), a court may consider "facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings[,] and matters of which judicial notice may be taken." *Samuels v. Air Transp. Loc. 504*, 992 F.2d 12, 15 (2d Cir. 1993). Thus, these

Though not based on the law of Puerto Rico, *Schwab I* analyzed this same information and found it insufficient in April 2011 to have led a "reasonable investor to investigate the possibility of fraud" because there was still a material dispute over whether such an investor "had all the information necessary to set forth its claims in sufficient detail." *Schwab I*, 883 F.3d at 95 (internal quotation marks omitted). Although the relevant date here is six months later than in *Schwab I*, it is still unclear from the complaint (including the media reports and other documents incorporated by reference) that, by November 2011, GDB "possesse[d], or with due diligence would possess, information sufficient to permit suit." *PREPA*, 756 F.3d at 27. Taking the facts as alleged and drawing all inferences in GDB's favor, we conclude, as we did in *Schwab I*, that "[i]t is too soon to identify . . . the precise moment at which the [one]-year limitations period began to run." 883 F.3d at 95. Accordingly, GDB's fraud claims cannot be dismissed as time-barred under Rule 12(b)(6).

* * *

We have reviewed Defendants-Appellees' remaining arguments and find them to be without merit. Accordingly, we REVERSE the judgment of the district court, and REMAND for proceedings consistent with this order.

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documents, incorporated by reference in the complaint, are properly considered here.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

[****Counsel Appendix omitted****]

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Nos. 11 MDL 2262 (NRB),
1:14-cv-04189-NRB

IN RE: LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION.

Filed February 2, 2017
Document 156
This Document Applies to:
Cases Listed in Appendix

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

After the publication of *LIBOR VI*, 11 MD 2262 (NRB), 2016 WL 7378980 (S.D.N.Y. Dec. 20, 2016), the Court received a number of letters and motions. Of those submissions, we address the following in this Order: (1) the request of Direct Action Plaintiffs ("DAPs") for clarification of the Court's jurisdictional holdings in *LIBOR VI* (ECF No. 1688), defendants' response (ECF No. 1730), and DAPs' reply (ECF

No. 1731); (2) in part,[1] defendants' request for leave to move to dismiss the antitrust claims on three additional grounds (ECF No. 1702), the response of DAPs (ECF No. 1721), Over-the-Counter ("OTC") plaintiffs (ECF No. 1722), and Exchange-Based plaintiffs ("EBPs") (ECF No. 1725), and the defendants' reply (ECF No. 1742)[2]; (3) a request, from the Lender plaintiffs (ECF No. 1696) and DAPs (ECF No. 1697), for reconsideration of *LIBOR IV*'s dismissal of state law civil conspiracy claims and of its related personal jurisdiction rulings, defendants' response (ECF No. 1724), and Lender plaintiffs' reply (ECF No. 1751); and (4) the request of the Federal National Mortgage Association ("Fannie Mae") for leave to file an amended complaint (ECF No. 1700), and defendants' response (ECF No. 1724). The remaining letters and motions will be addressed in subsequent orders. We will dispense with a discussion of the limited circumstances under which a motion for

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[1] In their letter, defendants further seek clarification as to whether there exist any live trader-based antitrust claims. The Court will address that request in a subsequent order.

[2] The DAPs requested that we not consider defendants' reply, but if we did, that we "not rule on the substance of Defendants' new arguments unless and until the Court allows Defendants to file their motion and DAPs have had a fair opportunity in their opposition to fully respond to all of Defendants' arguments." Martin Letter (ECF No. 1747). While we note that the defendants' reply did not ultimately affect the conclusion that the Court had reached prior to its receipt, it is this Court's prerogative, and not that of the parties, to decide whether it will consider submissions. At bottom, the DAPs had more than a "fair opportunity" to respond, which they utilized in submitting (with no imposed page limits) a 10-page, single-spaced opposition letter (ECF No. 1721).

reconsideration may be entertained, as it is well-established.

1. Direct Action Plaintiffs' Request for Clarification (ECF Nos. 1688, 1730, 1731)

DAPs request leave to clarify whether the Court in *LIBOR VI* intended to assert general jurisdiction over all United States domiciled defendants for Sherman Act claims regardless of the state in which the individual action was filed. There is nothing to clarify. General jurisdiction and specific jurisdiction require different legal analyses, as this Court has consistently recognized (and counsel presumably understands), and the question of minimum contacts only applies in a specific jurisdiction analysis. The obvious reason that some defendants did not move for dismissal of antitrust claims in certain cases addressed in *LIBOR VI* is because they conceded the existence of general jurisdiction in the forum in which the case was filed. Thus, the requested leave is without basis and is denied.

2. Defendants' Request for Leave to Move to Dismiss (ECF Nos. 1702, 1721, 1722, 1725, 1742)

Defendants request leave to move to dismiss on three grounds: that (1) antitrust claims based on financial products purchased before the start of the alleged conspiracy fail for lack of antitrust injury; (2) antitrust claims against panel banks' affiliates fail; and (3) certain antitrust claims are fully or partially time-barred as to certain defendants.

Defendants also request that we correct the list of remaining defendants against whom antitrust claims are asserted in the Federal Deposit Insurance

Corporation ("FDIC") action. Rather than providing leave to file these motions, we will decide these requests on the comprehensive pre-motion letters submitted. The Court also observes that none of these questions were before the Second Circuit (where, again, the defendants were the appellees), so arguments were not waived or decided there.

The defendants' first request is denied. While we acknowledge the general force of defendants' position that instruments purchased prior to August 9, 2007 could not have been affected by the alleged conspiracy upon purchase, the argument has no viability in the post-*Gelboim* era. Under the Second Circuit's explanation of antitrust injury, and as noted in *LIBOR VI* in the efficient enforcer analysis, the alleged conspiracy could have caused antitrust injury with respect to instruments purchased prior to but held into the suppression period.

The defendants' second request is granted. For antitrust claims arising from the persistent suppression conspiracy, the proper defendant is the panel bank, a position that this Court has applied throughout both explicitly and implicitly.[3] We assume that the parties can resolve the factual issue of the

[3] The OTC plaintiffs' citation to *Copperweld Corporation v. Independent Tube Corporation*, 467 U.S. 752 (1984), provides no assistance. The case stands for the proposition that a Sherman Act Section 1 claim cannot be maintained if the alleged conspiracy is between a parent company and its wholly owned subsidiary. The case does not stand for the proposition that a parent company becomes a separate member of an alleged conspiracy by virtue of the membership of its wholly owned subsidiary. In fact, the case's logic would suggest the opposite.

membership of the panel among themselves. If the inclusion of an affiliate is meant to foreshadow issues of judgment collection, those issues can be resolved when and if they become ripe.

The defendants' third request is addressed in two parts. First, as to the request that certain antitrust claims against certain defendants be deemed time-barred, the request is denied as moot following the Court's ruling on the second request, supra. *Compare* Burke Letter App'x A (ECF No. 1702), *with id.* App'x B. Second, we grant the defendants' request that the FDIC's Sherman Act claims on behalf of Silverton Bank accruing before August 7, 2009 be deemed time-barred. The only disagreement between the FDIC and the defendants is whether *American Pipe* tolling should apply to Silverton's antitrust claims from the filing date of the OTC plaintiffs' first amended complaint or from the filing date of the OTC plaintiffs' second amended complaint. As explained in *LIBOR IV*, the OTC plaintiffs' first amended complaint tolled persistent suppression claims relating to direct purchases from a defendant during the class period. 2015 WL 6243526, at *152. It was not until the OTC plaintiffs' *second* amended complaint that persistent suppression claims relating to direct purchases from "a defendant's affiliate" were added, thus providing a predicate for *American Pipe* tolling. *Id.* Because the FDIC alleges that Silverton transacted in LIBOR-based financial instruments only with a defendant's affiliate,[4] the tolling

[4] *Fed. Deposit Ins. Corp. v. Bank of Am. Corp.*, Am. Compl. ¶¶ 209-216, No. 14-cv-1757, ECF No. 23.

calculation in defendants' letter[5] applies and Silverton's Sherman Act claims accruing before August 7, 2009 are time-barred.

Finally, as the FDIC appears to agree both that its operative complaint only asserted antitrust claims against panel bank members and that the defendants' list[6] of non-panel banks is correct,[7] under Federal Rule of Civil Procedure 60(a) we amend the relevant part of the *LIBOR VI* appendix to read as follows:

Action	**Jurisdiction Filed**	**Antitrust Claims**	**Remaining Defendants**
Fed. Deposit Ins. Corp. v. Bank of Am. Corp., No. 14-cv-1757	S.D.N.Y.	Federal, New York	Bank of America, N.A. JPMorgan Chase Bank, N.A. Citibank, N.A.

[5] Burke Letter 6 (ECF No. 1702).

[6] *Id.* App'x A.

[7] Martin Letter 4 n.7 (ECF No. 1721).

3. Lender Plaintiffs' and Direct Action Plaintiffs' Request for Reconsideration of *LIBOR IV*'s Dismissal of State Law Civil Conspiracy Claims and of Related Personal Jurisdiction Rulings (ECF Nos. 1696, 1697, 1724, 1751)

The Lenders' and DAPs' state law civil conspiracy claims, originally dismissed in *LIBOR IV*, are hereby reinstated with the following limitations.

First, following *Gelboim* and *LIBOR VI* the plaintiffs may only proceed under a reputation-based persistent suppression theory. *See* Martin Letter 2 (ECF No. 1697).[8]

Second, the antitrust personal jurisdiction holdings set forth in *LIBOR VI* apply equally to the state law civil conspiracy claims. The Lender plaintiffs' additional jurisdictional allegations and the reiteration of earlier ones provide no basis to modify our holdings on personal jurisdiction for the reasons stated in the defendants' response. Likewise, there is no basis to alter *LIBOR VI*'s holding on conspiracy jurisdiction, and thus no basis to reconsider the corresponding holding in *LIBOR IV*.

Third, citing to their earlier briefing, defendants argue that state law civil conspiracy claims are subject

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[8] The Federal Home Loan Mortgage Corporation ("Freddie Mac"), the FDIC, Principal Financial Group, and Principal Funds, Inc. (the "FFP Plaintiffs") filed a separate letter requesting reinstatement of their state law civil conspiracy claims under an alternative theory of antitrust liability. (ECF No. 1698.) That request will be addressed in conjunction with the FFP Plaintiffs' motion for reconsideration of *LIBOR VI* (ECF No. 1685) once the latter is fully briefed.

to the statutes of limitations governing the related fraud claims. Kurtzberg Letter 2 (ECF No. 1724-1). While it appears that in the earlier briefing plaintiffs and defendants broadly agreed on this proposition of law,[9] the use of qualifying language by both sides suggests that in some states the statutes of limitations may not be entirely coterminous. *See* Defs.' Mot. to Dismiss the Fraud and Related Claims in the Direct Actions 18 (ECF No. 756) ("[I]n most jurisdictions, the statute of limitations for civil conspiracy is the same as that of the underlying fraud."); Direct Action Pls.' Joint Mem. of Law in Opp'n 2 n.3 (ECF No. 875) ("Conspiracy and aiding/abetting claims generally run with the underlying wrongs and so are not addressed separately for each plaintiff and claim herein."). Therefore, in the event that plaintiffs believe in good faith that a relevant jurisdiction provides a statute of limitations for civil conspiracy that differs from that of the underlying fraud claim, the parties should meet and confer to resolve the issue. Either way, we state the obvious: the state law civil conspiracy claims are subject to the relevant statute of limitations.

Since plaintiffs have argued that the antitrust claims should be tolled under the doctrine of fraudulent concealment, we assume that they would endeavor to apply the same argument to the civil

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[9] *See* Defs.' Mot. to Dismiss the Fraud and Related Claims in the Direct Actions 18 (ECF No. 756); Direct Action Pls.' Joint Mem. of Law in Opp'n 2 n.3 (ECF No. 875); Defs.' Mot. to Dismiss Lender Class Action Compl. 19 (ECF No. 970); Pls.' Opp'n to Defs.' Mot. to Dismiss the Lender Class Action Compl. (ECF No. 1085) (not contesting defendants' assertion in the opening motion).

conspiracy claims. *See* Martin Letter 5-7 (ECF No. 1721). Specifically, the plaintiffs' argument is that under the logic of *LIBOR IV*, they could not have been on notice of conspiracy claims until settlements with government agencies in 2012. To step back from plaintiffs' legalese for a moment, their argument first relieves them of responsibility for discovering wrongdoing (*i.e.*, plaintiffs may simply wait for the government to uncover the conduct), and second suggests that a court's differing view of the evidence in a subsequent decision is sufficient to eliminate the significance of historical events. Neither of these two propositions can stand. Moreover, plaintiffs' effort to isolate the conspiracy claims for statute of limitations purposes is artificial at best and it is antithetical to plaintiffs' approach to this case to postulate each bank operating independently. Finally, plaintiffs' argument is belied by their own vigorous contention before the Second Circuit that in addition to evidence from government investigations, the existence of motive, opportunity, and statistical evidence of manipulation all provided "overwhelming . . . indicia of a naked price-fixing conspiracy . . . ." Joint Br. for Pls.-Appellants 13, *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759 (2d Cir. 2015) (No. 13-3565), Doc. No. 342; *see also Gelboim v. Bank of Am. Corp.*, 823 F.3d at 781-82. It is wholly inconsistent for the plaintiffs now to argue that such indicia should be considered insufficient.[10]

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[10] Here, DAPs appear to be distancing themselves from the statistical evidence of manipulation. *See* Martin Letter 6 n.13 (ECF No. 1721). Not only did DAPs join the presentation of such evidence before the Second Circuit, but also we will not allow plaintiffs to rely on more robust complaints to establish the

Therefore, we hereby apply to the conspiracy claims our prior holdings that plaintiffs were on inquiry notice as of May 29, 2008 and the fraudulent concealment doctrine does not apply. *See LIBOR I*, 935 F. Supp. 2d 666, 710-11 (S.D.N.Y. 2013); *LIBOR IV*, 2015 WL 4634541, at *137-38.

Finally, as set forth above, these claims may be asserted only against the panel bank defendants.

4. Fannie Mae's Request for Leave to File Amended Complaint (ECF Nos. 1700, 1724)

Fannie Mae's request for leave to file an amended complaint is granted. The allegations therein must be consistent with the Court's prior rulings, including the statement in *LIBOR VI* that "where a plaintiff's counterparty is reasonably ascertainable and is not a defendant bank, a plaintiff is not an efficient enforcer, 2016 WL 7378980, at *16 (along with the embedded caveat in footnote 25), and our rulings in this Order.

SO ORDERED.

Dated: New York, New York
February 2, 2017

[Handwritten signature]
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

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sufficiency of pleadings and then rely on sparser complaints to escape statutes of limitations.

APPENDIX

This Order applies to the following cases:

Case Name	**Case No.**
Metzler Inv. GmbH v. Credit Suisse Grp. AG	11-cv-2613
Mayor and City of Baltimore v. Credit Suisse Grp. AG	11-cv-5450
Charles Schwab Bank, N.A. v. Bank of Am. Corp.	11-cv-6411
Schwab Money Mkt. Fund v. Bank of Am. Corp.	11-cv-6412
Schwab Short-Term Bond Mkt. Fund. v. Bank of Am. Corp.	11-cv-6409
Amabile v. Bank of Am. Corp.	13-cv-1700
Bay Area Toll Auth. V. Bank of Am. Corp.	14-cv-3094
City of Houston v. Bank of Am. Corp.	13-cv-5616
City of Phila. v. Bank of Am. Corp.	13-cv-6020
Darby Fin. Prods. v. Barclays Bank PLC	13-cv-8799
Fed. Deposit Ins. Corp. v. Bank of Am. Corp.	14-cv-1757
Fed. Home Loan Mortg. Corp. v. Bank of Am. Corp.	13-cv-3952
Nat’l Credit Union Admin. Bd. v. Credit Suisse Grp. AG	13-cv-7394

Case Name	**Case No.**
Principal Fin. Grp., Inc, v. Bank of Am. Corp.	13-cv-6014
Principal Funds, Inc. v. Bank of Am. Corp.	13-cv 6013
Prudential Inv. Portfolios 2 v. Bank of Am. Corp.	14-cv-4189
Regents of the Univ. of Cal. Bank of Am. Corp.	13-cv-5186
Salix Capital us Inc. v. Banc of Am. Sec. LLC	13-cv-4018

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Nos. 11 MDL 2262 (NRB),
1:14-cv-04189-NRB

IN RE: LIBOR-BASED FINANCIAL
INSTRUMENTS ANTITRUST LITIGATION.

Filed December 20, 2016
Document 150
This Document Applies to:
Cases Listed in Appendix

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-*

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

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Based Fin. Instruments Antitrust Litig., No. 11 MDL 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.

Court remanded to the Second Circuit for consideration of the merits.

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 —

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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.

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 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.*

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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.

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

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

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 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

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

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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.

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]

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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

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 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 . . . ."

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suppression conspiracy that is at issue in the antitrust claims, *Gelboim*, 823 F.3d at 764.

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 emptyhanded. 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.*

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.*

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.").

[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.").

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 Bank of Am., 2008 Annual Report, at 88 (2008), *available at* http://media.corporateir.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]

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

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[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, 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.").

> 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 "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 under-reporting 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 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

[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.

[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).

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 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,

[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

"the fact of significant activity, by a defendant or affiliates, in this country, combined with some evidence of LIBOR manipulation in London, provides 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

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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.'").

[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

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). 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.

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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).

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 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

[20] *See supra* note 1.

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]

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]

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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 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

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 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

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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.

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

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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).

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.

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).

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. 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 (1983)) (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 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.*

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

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.

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

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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.

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 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.

[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.

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 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

[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.").

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 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

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[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.

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] Generally speaking, this interaction would also be reflected in the purchase price of other LIBOR-based,

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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 credit-worthiness 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 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.

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 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 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.

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[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.

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]

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.").

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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.

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 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

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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.").

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, *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.

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.

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

[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.

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 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

Dated: New York, New York
December 20, 2016

[Handwritten signature]
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

APPENDIX

Action	**Juris-diction Filed**	**Anti-trust 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. Credit Suisse Grp. AG, No. 11-cv-5450 (OTC)	S.D.N.Y.	Federal	Bank of America Corp. Bank of America, N.A. Citibank, N.A.

Action	**Juris-diction Filed**	**Anti-trust Claims**	**Remaining Defendants**
			Citigroup Inc. JPMorgan Chase & Co. JPMorgan Chase Bank, N.A.
Charles Schwab Bank, N.A. v. Bank of Am. Corp., No. 11-cv-6411	N.D. Cal.	Federal, California	*Antitrust claims dismissed on personal jurisdiction grounds*
Schwab Money Mkt. Fund v. Bank of Am. Corp., No. 11-cv-6412	N.D. Cal.	Federal, California	*Antitrust claims dismissed on personal jurisdiction grounds*
Schwab Short-Term Bond Mkt. Fund. v. Bank of Am. Corp., No. 11-cv-6409	N.D. Cal.	Federal, California	*Antitrust claims dismissed on personal jurisdiction grounds*
Amabile v. Bank of Am. Corp., No. 13-cv-1700	S.D.N.Y.	Federal	Bank of America Corp. Citibank, N.A.

Action	**Juris-diction Filed**	**Anti-trust Claims**	**Remaining Defendants**
			JPMorgan Chase & Co.
Bay Area Toll Auth. v. Bank of Am. Corp., No. 14-cv-3094	N.D. Cal.	Federal, Cal-ifornia	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., No. 14-cv-1757	S.D.N.Y.	Federal, New York	Bank of America Corp. Bank of America, N.A. Bear Stearns Capital

Action	**Juris-diction Filed**	**Anti-trust Claims**	**Remaining Defendants**
			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.	D. Kan.	Federal, Cal-ifornia,	*Antitrust claims dismissed on personal*

Action	**Juris-diction Filed**	**Anti-trust Claims**	**Remaining Defendants**
AG, No. 13-cv-7394		Illinois, Kansas	*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., No. 14-cv-4189	D.N.J.	Federal	Citigroup Inc. HSBC Finance Corp. HSBC Securities (USA) Inc. HSBC USA Inc. JPMorgan

Action	**Juris-diction Filed**	**Anti-trust Claims**	**Remaining Defendants**
			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, Cal-ifornia	*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

Action	**Juris-diction Filed**	**Anti-trust Claims**	**Remaining Defendants**
			Global Markets Inc. Citigroup Global Markets Limited Credit Suisse Securities (USA) LLC Deutsche Bank Securities Inc. MLPFS Inc.

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Nos. 11 MDL 2262 (NRB),
1:14-cv-04189-NRB

IN RE: LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION.

Filed November 3, 2015
Document 94
This Document Applies to:
Individual Cases Listed in Appendix

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

LIBOR V

[***Table of Contents omitted***]

I. GENERAL INTRODUCTION

This consolidated multi-district litigation (MDL) arises from allegations that over a dozen major banks manipulated the London Interbank Offer Rate (LIBOR), a set of interest-rate benchmarks that underlie trillions of dollars of financial instruments, in order to profit in their own trading and to maintain their reputations for creditworthiness.[1] This MDL involves U.S. Dollar LIBOR only. *Cf. Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD) (S.D.N.Y.) (Yen LIBOR and the Tokyo Interbank Offer Rate); *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG*, No. 15-cv-871 (SHS) (S.D.N.Y.) (Swiss Franc LIBOR).

In four earlier opinions,[2] we tested the legal sufficiency of complaints filed by three putative classes and several individual plaintiffs. Our key holdings sustained some fraud, contract, unjust

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[1] We emphasize that the allegations against defendants are nothing more than allegations. Even where we omit to use a word such as "alleged" in reference to claims against defendants, nothing in this opinion should be taken as a finding that any defendant manipulated LIBOR, that any defendant committed any other form of wrongdoing, or that any plaintiff suffered injury.

[2] *In re LIBOR-Based Fin. Instrs. Antitrust Litig.* (*LIBOR IV*), ___ F. Supp. 3d ___, 2015 WL 6243526, 2015 U.S. Dist. LEXIS 147561 (S.D.N.Y. Oct. 20, 2015), ECF No. 1222; *In re LIBOR-Based Fin. Instrs. Antitrust Litig.*, (*LIBOR III*), 27 F. Supp. 3d 447 (S.D.N.Y. 2014), ECF No. 568; *In re LIBOR-Based Fin. Instrs. Antitrust Litig.* (*LIBOR II*), 962 F. Supp. 2d 606 (S.D.N.Y. 2013), ECF No. 389; *In re LIBOR-Based Fin. Instrs. Antitrust Litig.* (*LIBOR I*), 935 F. Supp. 2d 666 (S.D.N.Y. 2013), ECF No. 286, *appeals dismissed*, Nos. 13-3565 (L), 13-3636 (Con), 2013 WL 9557843 (2d Cir. Oct. 30, 2013), *rev'd as to plaintiff Gelboim sub nom. Gelboim v. Bank of Am. Corp.*, 574 U.S. ___, 135 S. Ct. 897 (2015), *and motion to recall mandate denied sub nom. Schwab Money Mkt. Fund v. Bank of Am. Corp.*, 2015 WL 756248 (2d Cir. Feb. 10, 2015), *cert. denied*, 83 U.S.L.W. 3857, 2015 WL 2234318 (U.S. Oct. 5, 2015) (No. 14-1350), *and successive appeal from District Court docketed*, No. 15-432 (Con) (2d Cir. Feb. 10, 2015).

enrichment, and Commodities Exchange Act[3] claims, while rejecting antitrust and RICO[4] claims.

In this, our fifth extensive opinion, we focus on the legal sufficiency of complaints filed on behalf of three putative classes.[5] We also address the OTC Plaintiffs motions to add new plaintiffs to their consolidated complaint and defendants' motion to dismiss the complaints of the New Classes, the new OTC Plaintiffs, and the Exchange-Based Plaintiffs for lack of personal jurisdiction.[6]

II. BACKGROUND

1. Facts

The facts underlying this case have been thoroughly discussed in *LIBOR I*, 935 F. Supp. 2d at 677–85, and elaborated upon in *LIBOR II*, III, and IV.

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[3] 7 U.S.C. §§ 1-25 (2012).

[4] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68.

[5] We refer to these classes collectively as the "New Classes," and separately as the "Student Plaintiffs" (*Nagel v. Bank of Am.*, N.A., No. 13-cv-260 (W.D. Wis.), *transferred to* No. 13-cv-3010 (NRB) (S.D.N.Y.), and *Weglarz v. JP Morgan Chase Bank, N.A.*, No. 13-cv-684 (N.D. Ill.), *transferred to* No. 13-cv-1198 (NRB) (S.D.N.Y.)), the "Mortgage Plaintiffs" (*Payne v. Bank of Am. Corp.*, No. 12-cv-6571 (N.D. Cal.), *transferred to* No. 13-cv-598 (NRB) (S.D.N.Y.)), and the "Lender Plaintiffs" (*Berkshire Bank v. Bank of Am. Corp.*, No. 12-cv-5723 (NRB) (S.D.N.Y.)).

[6] The consolidated complaints of the "Exchange-Based Plaintiffs" (*Metzler Inv. GmbH v. Credit Suisse Grp. AG*, No. 11-cv-2613 (NRB) (S.D.N.Y.)) and the "OTC Plaintiffs" (*Mayor & City Council of Balt. v. Bank of Am. Corp.* (*Baltimore*), No. 11-cv-5450 (NRB) (S.D.N.Y.)) were the subjects of *LIBOR I*, *II*, and *III*.

Here, we assume familiarity with LIBOR and with allegations of LIBOR manipulation, and we present only the new allegations set forth by the New Classes.

1.1. Student Plaintiffs

1.1.1. Nathan Weglarz and Jerry Weglarz

Nathan Weglarz took out, and Jerry Weglarz co-signed, a student loan in 2007 at an interest rate tied to LIBOR. First Consol. Compl. ("Student Loan Complaint") ¶¶ 64–65, ECF No. 835. The loan was issued by JPMorgan Chase Bank, N.A., and is currently held by the National Collegiate Student Loan Trust 2007-1 (the "NCSLT"). Student Loan Compl. ¶¶ 12, 64, 69.

Attached to the Student Loan Complaint is a "Note Disclosure Statement" from 2007 that appears to match the Student Loan Complaint's description of the loan, *see* Student Loan Compl., Ex. E., but plaintiffs have advised us that this loan document is not in fact the one upon which they are suing.[7] Oral Arg. Tr. ("Tr.") 89:15-19, ECF No. 1199. Accordingly, we rely only on the text of the Student Complaint.

Both Weglarzes are now Illinois residents, and we presume that they were Illinois residents when they signed Nathan Weglarz's loan.

[7] The correct loan documentation is not in the pleadings. Plaintiffs blame a collection agent for their failure to attach their loan to their original complaint in February 2013 or their amended complaint in November 2014, but it is plaintiffs' own duty to set out the facts that they believe entitle them to relief, including their own loan documents.

1.1.2. Stephanie Nagel

Stephanie Nagel took out a student loan from Bank of America, N.A., in either 2004 or 2008 at an interest rate tied to LIBOR. *See* Student Loan Compl. ¶¶ 75–76 (stating that Nagel borrowed from Bank of America in 2004); Loan Request/Credit Agreement ("2008 Nagel Loan Agreement"), Student Loan Compl., Ex. F (loan with Bank of America, N.A., disbursed Jan. 9, 2008); Non-Negotiable Credit Agreement ("2004 Nagel Loan Agreement"), Student Loan Compl., Ex. F (loan with Bank One, N.A., signed Aug. 3, 2004).[8] The agreement may call for the application of federal and California law, *see* 2008 Nagel Loan Agr. ¶ L.1., even though Nagel appears to have been a Wisconsin resident at the time. *See* 2008 Nagel Loan Agr. at Signature Page (listing Nagel's employer as Wisconsin Public Service); Student Loan Compl. ¶ 8 (alleging that Nagel is currently a Wisconsin resident); Student Loan Compl. ¶¶ 120–22 (alleging that Bank of America engaged in trade and commerce within Wisconsin); *but cf.* Student Loan

[8] The Student Loan Complaint states that a loan agreement from 2004 with Bank of America is attached as Exhibit F, but no such document exists. That exhibit contains a 2008 agreement with Bank of America, N.A., and a 2004 agreement with Bank One, N.A. There is no allegation that Bank One, N.A., is affiliated with Bank of America, N.A., and so we ignore Nagel's Bank One loan documents. We assume at this stage that either (1) Nagel is suing under the 2008 agreement with Bank of America, N.A., or (2) Nagel is suing under a 2004 agreement with Bank of America, N.A., which closely resembles the exhibited 2008 agreement. *Cf* Student Loan Compl. ¶ 77 ("The loan was prepared on standard form documents.").

Compl. ¶ 79 (stating, apparently in error, that Nagel's loan calls for application of Rhode Island law).

1.1.3. Theory of Damages

The Student Loan Plaintiffs are borrowers and, as such, were not harmed by the persistent suppression of LIBOR.[9] Nor have they attempted to plead injury from sporadic trader-based manipulation, although their complaint is replete with allegations of trader-based *Yen LIBOR* manipulation. Instead, the Student Loan Plaintiffs argue that their LIBOR-based loans are unconscionable or invalid under state laws that forbid a lender from controlling a loan's floating interest rate. Student Loan Compl. ¶¶ 112, 119. Because they view the floating-rate portions of their interest payments as unlawful, they seek to reform their loan agreements so that only the fixed portion of their interest rate accrues. *See* Tr. 93:14–21. The Student Loan Plaintiffs also bring common law fraud claims on the theory that issuers "specif[ied] a rate indexed to LIBOR at a time when [they were] manipulating such rate," and "represent[ed] that such rate was objective and outside the control of the lender." Student Loan Compl. ¶¶ 127–28.

Separately, the Student Loan Complaint states that the National Collegiate Student Loan Trust 2007-1 (the "Trust"), which currently holds the Weglarzes' loan, "took the loans tainted by the fraud of JP Morgan Chase Bank, N.A." Student Loan Compl. ¶ 131.

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[9] The Student Loan Plaintiffs have not advanced a theory of damages akin to the Mortgagor Plaintiffs (*see infra* at 8-9), and could not have done so, because at least some of their borrowing occurred before August 2007.

1.2. Lender Plaintiffs

The Lender Plaintiffs are three institutions, The Berkshire Bank ("Berkshire"), the Government Development Bank for Puerto Rico ("GDB"), and Directors Financial Group ("Directors"). Consol. Second Am. Class Action Compl. ("Lender Complaint") ¶¶ 12–14, ECF No. 836. Berkshire is a bank chartered in New York. Lender Compl. ¶ 12. GDB is a Puerto Rican bank that loans money to private and public entities and serves as the "fiscal agent and financial advisor for the Puerto Rican Government." Lender Compl. ¶ 13. Directors is a "finance lender." Lender Compl. ¶ 14. Each lent money at interest rates tied to LIBOR, and each alleges receiving artificially low interest payments.

The Lender Complaint does not reveal when the plaintiffs extended loans, to whom, or for what purposes. Counsel represented at oral argument that the plaintiffs "issu[ed] and purchas[ed] mortgage loans" "[o]r other loans," and that "I think . . . the Puerto Rico Government Development Bank does loans beyond mortgages." Tr. 71:7-8, 71:10–12.

1.3. Mortgagor Plaintiffs

The Mortgagor Plaintiffs are four individuals, Carl Payne, Kenneth Coker, Carlito Rivera, and Philip Maresca, who each obtained adjustable-rate mortgages tied to LIBOR. The Mortgagor Plaintiffs allege that banks set adjustable-rate margins in inverse relation to the benchmark rate that exists at the time a loan is offered, so that the bank may expect to achieve a certain targeted cash flow independent of the choice of benchmark. All else equal, a loan that uses a higher reference rate will have a lower margin, while a loan that uses a lower reference rate will have a higher margin. Thus, when the Mortgagor Plaintiffs received loans referencing a suppressed benchmark during the persistent suppression period, their margins were set artificially high. These margins remained artificially high even after persistent suppression ended, leaving the Mortgagor Plaintiffs to pay artificially high payments based on their inflated margins.

Coker and Payne obtained their loans on May 31, 2007, and August 8, 2007, respectively, and Maresca received an "Approval Notice" stating his mortgage terms on August 7, 2007. First Am. Compl. ("Mortgagor Complaint") ¶¶ 226, 230, ECF No. 844; Letter from Daniel Alberstone at 1–2, ECF No. 1186. Thus, the mortgage terms for these three plaintiffs were fixed before August 9, 2007, the date when LIBOR suppression plausibly began. *See LIBOR IV*, ___ F. Supp. 3d at ___ n.143, 2015 WL 6243526, at *115 n.143, 2015 U.S. Dist. LEXIS 147561, at *389–90 n.143. This fact is fatal to these three plaintiffs, as their theory of damages depends on the existence of temporary LIBOR suppression at the time when their interest rates were determined. Accordingly, plaintiffs Coker, Payne, and Maresca are dismissed.

The remaining plaintiff, Rivera, obtained his loan on November 29, 2007, from Bank of America, N.A. Mortgagor Compl. ¶¶ 234, 281–82. The interest rate was 6.50% until December 2012, and LIBOR plus 2.25% thereafter. Mortgagor Compl. ¶¶ 235–36.

1.4. OTC Plaintiffs

1.4.1. TCEH

Texas Competitive Electric Holdings (TCEH) entered into master swap agreements with several banks in 2007. As relevant here, these included one with Credit Suisse International (CSI), an affiliate of Credit Suisse Group AG (CSGAG). *See* Proposed Third Am. Compl. ("Third OTC Complaint") ¶ 389, ECF Nos. 627-1 to 627-3.

1.4.2. SEIU

In late 2006, the SEIU Pension Plans Master Trust (SEIU) purchased corporate bonds issued by Credit Suisse (USA), Inc. (CSUSA), an affiliate of CSGAG. *See* Third OTC Compl. ¶ 398. SEIU purchased these bonds directly from a non-party affiliate of Credit Suisse. *See id.* At oral argument, we questioned whether SEIU, as a bondholder, properly belongs in the same putative class as other plaintiffs, who traded swaps with defendants. Tr. 38:8-10. Plaintiffs' counsel argued that SEIU's claims are similar to swap claims in that SEIU dealt directly with Credit Suisse and is suing Credit Suisse in its capacity as a counterparty. Tr. 38:14-39:4. As class certification is not before us, we express no view as to whether SEIU belongs in the same putative class as swap traders.

1.4.3. Highlander Realty

Highlander Realty, LLC ("Highlander Realty" or "Highlander") presents itself as an OTC Plaintiff that was exposed to LIBOR suppression by trading an interest rate swap with Citizens Bank of

Massachusetts ("Citizens Bank"), an affiliate of the Royal Bank of Scotland. The reality is more complex. In 2006, Highlander entered into what is known as a "synthetic fixed-rate loan," meaning that it simultaneously took out a floating-rate loan from Citizens Bank and used an interest rate swap to exchange its floating-rate obligations for fixed-rate obligations.[10] *See* Third OTC Compl. ¶ 399; Commercial Loan Promissory Note, ECF No. 968-1 (floating-rate note dated October 25, 2006); Interest Rate Swap Confirmation CED14314, ECF No. 968-2 (swap confirmation dated October 26, 2006)). We discuss the terms of Highlander Realty's agreements in greater detail below, in connection with our conclusion that Highlander did not suffer injury from manipulation of LIBOR.

1.4.4. Jennie Stuart

Jennie Stuart Medical Center Inc. ("Jennie Stuart") seeks to join the OTC case. Jennie Stuart entered into two swap contracts with Bank of America, N.A, Third OTC Compl. ¶¶ 394-95, but has conceded that one of these transactions does not reference LIBOR. Letter from William Christopher Carmody at 4, ECF No. 1202.

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[10] This device apparently provides some utility for the borrower in comparison with an ordinary fixed-rate loan, although neither party could explain at oral argument precisely wherein the advantage lies.

2. Procedural History

2.1. Prior Rulings

2.1.1. Consolidation

Shortly after receiving this MDL, we set out to organize the putative class actions.[11] These early orders have been the subject of some recent confusion, so we explain them in detail here. In our Memorandum and Order of November 29, 2011, we appointed interim class counsel for all OTC and Exchange-Based class actions. Mem. & Order at 8, 9, ECF No. 66. We also consolidated all pending and future class actions pursuant to Federal Rule of Civil Procedure 42(a). Mem. & Order at 10. In light of the November 29 Order, the newly-appointed lead counsel for the OTC and Exchange-Based classes proposed a Pretrial Order No. 1, which we signed on December 22, 2011. *See* ECF No. 90. This Pretrial Order No. 1 listed the cases that were consolidated into *Baltimore* (No. 11-cv-5450) and *FTC Capital* (No. 11-cv-2613, now captioned *Metzler*), and directed the Clerk to close the remaining OTC and Exchange-Based class actions.

We later recognized that both the November 29 Order and Pretrial Order No. 1 were in error to the extent that they consolidated class actions for all purposes pursuant to Rule 42(a), because an MDL court may not assign itself out-of-district cases without the consent of all parties. *LIBOR IV*, ___

[11] We note that we have not yet certified any classes and nothing in this opinion should be understood as indicating that any classes will or will not be certified.

F. Supp. 3d at ___ & n.38, 2015 WL 6243526, at *22 & n.38, 2015 U.S. Dist. LEXIS 147561, at *143–44 & n.38 (citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998)). Accordingly, on July 18, 2012, we ordered that the OTC and Exchange-Based class actions were consolidated for pre-trial purposes only. *See* Mem. & Order, ECF No. 187. Although the July 18 Order only explicitly displaced the November 29 Order, its effect was to overrule Pretrial Order No. 1 as well, to the extent that Pretrial Order No. 1 purported to consolidate cases for all purposes.

Thus, the present posture is this. The cases listed in Pretrial Order No. 1 are consolidated for all *pretrial* purposes and are, for the time being, closed on this Court's docket. However, at the conclusion of pretrial proceedings, both *Baltimore* and *Metzler* will, absent further procedural realignment, dissociate into their constituent cases, and each case will return to its district of origin.[12]

2.1.2. Merits Holdings

We reviewed our prior rulings exhaustively in *LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *7-11, 2015 U.S. Dist. LEXIS 147561, at *103–12, and will not repeat that exercise here. Of particular

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[12] The parties may wish to consider whether to transfer and consolidate the pending Exchange-Based class actions for all purposes, although such consolidation would require a "*Lexecon* waiver" from all parties. The parties may also wish to consider a motion to consolidate the OTC class actions that were listed in Pretrial Order No. 1, each of which was filed in this district. However, a consolidation order could not apply to future cases transferred from outside this district.

note is that *LIBOR I*, *II*, and *III* each addressed the merits of the OTC and Exchange-Based class actions but did not consider personal jurisdiction.

While we considered the merits of the OTC and Exchange-Based class complaints, the remaining actions—both non-class actions and class actions that had not been consolidated—were subject to a stay. *See* Memorandum & Order, ECF No. 205; Memorandum, ECF No. 309; *LIBOR II*, 962 F. Supp. 2d at 635. This stay included the *Highlander Realty*[13] and *SEIU*[14] cases that are the subject of pending motions.

2.2. Pending Motions

The outstanding motions are (1) defendants' motions to dismiss the New Classes' complaints (ECF Nos. 966, 969),[15] (2) defendants' motion to dismiss the complaints of the New Classes, the OTC Plaintiffs, and the Exchange-Based Plaintiffs on jurisdictional grounds (also ECF No. 966), (3) certain defendants' objections to elements of the OTC Plaintiffs' most recent proposed amended complaint (ECF Nos. 958, 964, 971), (4) the Exchange-Based Plaintiffs' request to amend their complaint in order to name several new defendants (ECF No. 1159), (5) a motion to reargue portions of *LIBOR IV* (ECF No. 1178), and (6) the

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[13] *Highlander Realty v. Citizens Bank of Mass.*, No. 13-cv-10668 (D. Mass.), *transferred to* No. 13-cv-2343 (NRB) (S.D.N.Y.).

[14] *SEIU Pension Plans Master Trust v. Bank of Am. Corp.*, 13-cv-1456 (NRB) (S.D.N.Y.).

[15] A separate motion by Société Générale to dismiss *Payne* (ECF No. 950) is moot because the Mortgagor Plaintiffs have voluntarily dismissed Société Générale. *See* Notice of Voluntary Dismissal, ECF No. 1096.

Lender Plaintiffs' request to amend in order to state their claim more precisely (ECF No. 1191). This opinion resolves all but the Exchange-Based Plaintiffs' request and the motion to reargue.

III. PLEADING STANDARDS

When deciding a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all factual allegations in the complaint and draw all reasonable inferences in plaintiff's favor. *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009); *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). Nevertheless, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The well-pleaded factual allegations must demonstrate "more than a sheer possibility that a defendant has acted unlawfully" in order to pass muster. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570.

In the context of these Rule 12(b)(6) motions, we consider only the pleadings, exhibits to the pleadings, documents referred to within the pleadings, and documents subject to judicial notice. *See, e.g., Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006); *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1088, 1092 (2d Cir. 1995). As we have implicitly done before, we take judicial notice of LIBOR-related news articles discussed in *LIBOR I*, not for the truth of the articles, but for the existence of the articles and their content.[16] *See Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 424–26 (2d Cir. 2008); *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 581-82 (S.D.N.Y. 2011). As to the *Highlander Realty* action, we consider both the swap agreement and its associated loan agreement, which are both integral to the allegations.

IV. STUDENT LOAN PLAINTIFFS

1. Personal Jurisdiction

The Student Loan Plaintiffs rely on the existence of loans from two defendant banks. The Weglarzes, Illinois residents who sued in the Northern District of

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[16] The Student Loan Plaintiffs ask us to take judicial notice of the facts alleged in the complaints in *Federal Deposit Insurance Corp. v. Bank of America Corp.* (*FDIC*), No. 14-cv-1757 (NRB) (S.D.N.Y.) and *National Credit Union Administration Board v. Credit Suisse Group AG* (*NCUA*), No. 13-cv-2497 (D. Kan.), *transferred to* No. 13-cv-7394 (NRB) (S.D.N.Y.). We may, of course, take judicial notice of the fact that these complaints exist and contain certain allegations. *Cf. LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *152-55, 2015 U.S. Dist. LEXIS 147561, at *472–84 (describing contents of class action complaints in the context of evaluating tolling arguments based on those complaints). However, we have no basis to assume the truth of one plaintiff's allegations in the course of evaluating another plaintiff's complaint. The Student Loan Plaintiffs had an opportunity to file an amended complaint of their own *after* the FDIC and NCUA filed their operative complaints. *Compare* Student Loan Compl., Nov. 13, 2014, ECF No. 835, *with* Am. Compl., *FDIC*, Oct. 7, 2014, Individual Case ECF No. 23, *and* Am. Compl., *NCUA*, Oct. 6, 2014, ECF No. 662. If the Student Loan Plaintiffs wished to include the FDIC's and NCUA's allegations within their own complaint, then they could have done so, subject to the obligations of Federal Rule of Civil Procedure 11(b).

Illinois, allege that they borrowed from JPMorgan Chase Bank, N.A. Nagel, a Wisconsin resident who sued in the Western District of Wisconsin, alleges that she borrowed from Bank of America, N.A. Defendants argue that there is no specific personal jurisdiction as to these banks because the loans "have nothing to do with the 'suit-related conduct,' which is the alleged manipulation of LIBOR." Joint Mem. of Law in Supp. of Defs.' Mot. to Dismiss the Putative Class Actions for Lack of Pers. Jurisd. ("Defs.' PJ Mem.") at 13 (citation omitted), ECF No. 978. Although the Student Loan Plaintiffs did not specifically oppose this argument in their brief, counsel argued at oral argument that, where a defendant entered into a loan in the state of a plaintiff's residence, the defendant is subject to personal jurisdiction in that state. *See* Tr. 102:17-103:3. We agree, and conclude that a *prima facie* case of personal jurisdiction in Illinois and Wisconsin exists for the Student Loan Plaintiffs' statutory and common-law claims relating to the student loans they received from defendants in their home state. Accordingly, the motion to dismiss on jurisdictional grounds is denied as to the Student Loan Plaintiffs' complaint.

2. Fraud

Turning to the merits, we begin with the fraud claim. The Student Loan Plaintiffs' complaint fails to allege with particularity any representation by the issuers regarding the nature of LIBOR. Likewise, the loan documents submitted by plaintiffs do not make any representation regarding LIBOR. Under Rule 9(b), this is enough to warrant dismissal of the fraud claim.

Furthermore, the complaint fails to allege that any manipulation increased plaintiffs' loan payments. Persistent suppression (which the complaint actually fails to allege) would not have increased plaintiffs' payments, and no incident of trader-based inflation is offered as a source of damages. As actual damages are an element of fraud in both Illinois and Wisconsin, this failure too warrants dismissal of the fraud claim. *See Collins-Hardin v. WM Specialty Mortg., LLC*, No. 12 C 50099, 2015 WL 3505188, at *6, 2015 U.S. Dist. LEXIS 71394, at *16–17 (N.D. Ill. June 3, 2015); *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496, 675 N.E.2d 584, 591 (1996); *Iverson v. Schnack*, 263 Wis. 266, 268–69, 57 N.W.2d 400, 401 (1953).

For much the same reasons, the Student Loan Plaintiffs cannot maintain statutory "consumer fraud" claims, which merely recharacterize the same facts as "unfair and deceptive" rather than "fraudulent." *See, e.g., Duran v. Leslie Oldsmobile, Inc.*, 229 Ill. App. 3d 1032, 1039, 594 N.E.2d 1355, 1361 (2d Dist. 1992) (holding that damages are necessary element of claim under Illinois's Consumer Fraud Act). As to Nagel's claims, Wisconsin law does not even apply, as Nagel fails to allege that Bank of America either sent a solicitation into Wisconsin or received a writing from Nagel in Wisconsin. Wis. Stat. § 421.201(1)–(2).

The complaint also states conclusorily that the National Collegiate Student Loan Trust 2007-1 (the "Trust"), which currently holds the Weglarzes' loan, "took the loans tainted by the fraud of JP Morgan Chase Bank, N.A." Student Loan Compl. ¶ 131. Even if the loan were, in fact, "tainted by . . . fraud," no allegation even hints that the Trust was aware of any defect when the Trust purchased the loan. This omission distinguishes cases cited by the Student Loan Plaintiffs in which a successor to a loan agreement was at least aware of the loan originator's fraud. *Cf. Callner v. Greenberg*, 376 Ill. 212, 218, 33 N.E.2d 437, 440 (1941) ("At law, it has been held that a knowing beneficiary of a fraud may be held liable with the perpetrator."); *Moore v. Pinkert*, 28 Ill. App. 2d 320, 334–35, 171 N.E.2d 73, 79 (1st Dist. 1960) ("There is sufficient in the record to raise a strong imputation of Dvorak's knowledge of Kotas' conduct . . . . [I]f it is proved that Dvorak had knowledge thereof he is liable for the money paid to him on account of the mortgage."). Because plaintiffs concede that no statutory action lies against the Trust, *see* Student Loans Pls.' Response to Mots. to Dismiss at 13 n.2, ECF No. 1109, the action is dismissed against the Trust.

3. LIBOR As a Valid Interest Rate

Illinois law provides as follows:

> With respect to interest-bearing loans: . . . (3) Loans must be fully amortizing and be repayable in substantially equal and consecutive weekly, biweekly, semimonthly, or monthly installments. Notwithstanding this requirement, rates may vary according to an index that is independently verifiable and *beyond the control* of the licensee.

205 Ill. Comp. Stat. Ann. 670/15(e) (emphasis added); *cf.* 12 C.F.R. § 34.22(a) (providing that the interest rate for a national bank's adjustable loan must be "beyond the control of the bank"). According to the

Weglarzes, the floating-rate component of their LIBOR-based loan was unlawful because LIBOR was within the "control" of their lender, JPMorgan Chase Bank, N.A.

This claim fails at the threshold because Illinois's Consumer Installment Loan Act, of which section 670/15 is part, "does not apply to any [entity] doing business under and as permitted by any law . . . of the United States relating to banks." 205 Ill. Cons. Stat. Ann. 670/21. JPMorgan Chase Bank, N.A., is indisputably a national bank chartered by the (federal) Office of the Comptroller of the Currency, and so section 670/15 simply does not apply. The Weglarzes advance a back-up argument that the common law of contracts in Illinois incorporates section 670/15 as indicative of public policy. *See* Tr. 98:14–19. We disagree. The Illinois General Assembly placed clear bounds around its consumer loan regulations. The most straightforward interpretation of this choice is that the General Assembly, for whatever reason, intended to regulate lenders *other* than banks and to leave banks free to offer loans subject to their own set of regulations. It is not our role to second-guess whether banks were worthy of this trust, and so we will not apply section 670/15 beyond the bounds set by the General Assembly.[17]

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[17] Before 1998, the same provision *would* have applied to JPMorgan Chase. The statute formerly stated that chartered banks "shall comply with other provisions of this Act [i.e., provisions other than licensure provisions] when contracting for or receiving charges on loans regulated by this Act." 1997 Ill. Legis. Serv. 90-437 (West) (quoting deleted language enacted in 1963 Ill. Laws 3526). That the Illinois General Assembly

Even if section 670/15 applied directly to the Weglarzes' transaction, it is far from clear that LIBOR was within the "control" of JP Morgan Chase. The language of section 670/15 (and similar statutes in other states) has typically been applied to a situation in which an interest rate was entirely subject to a lender's whim or where a loan disclosure completely failed to identify the index. *See Hubbard v. Fidelity Fed. Bank*, 824 F. Supp. 909, 917 (C.D. Cal. 1993), *rev'd in part*, 91 F.3d 75 (9th Cir. 1996); *Preston v. First Bank of Marietta*, 16 Ohio App. 3d 4, 6-7, 473 N.E.2d 1210, 1214–15 (1983). Here, the index was well-known and easily verified. Furthermore, JPMorgan Chase exerted limited influence over the LIBOR index because it was only one of sixteen panel banks, of whose quotes only eight were counted on any given day.

We also do not think that the Illinois General Assembly (or the Comptroller of the Currency in adopting similar regulations) intended to bar the use of so common a benchmark as LIBOR, yet this is the conclusion that logically follows from the Student Loan Plaintiffs' argument. Plaintiffs attempt to avoid this extraordinary conclusion by reading into the statute a rule that a bank may "control" an interest rate so long as the "control" is not exercised in an illicit or unreasonable manner. *See* Tr. 95:21–96:5. This does not follow from the statute. Regardless of whether a lender *exerts* control over an interest rate, the interest

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affirmatively deleted this "shall comply" proviso is powerful evidence that the Legislature no longer wishes to apply the substance of section 670/15 to banks.

rate either is or is not “beyond the control” of the lender.

Finally, we reject the notion that the use of LIBOR as a benchmark for student loans is inherently unconscionable. There is no suggestion that any defendant imposed a LIBOR-based interest rate on the Student Loan Plaintiffs, and such a pleading would be implausible given the widespread availability of fixed-rate student loans. Furthermore, it is not substantively unreasonable to incorporate LIBOR into a floating-rate loan. Whatever LIBOR’s deficiencies may have been, LIBOR was, at the time of Plaintiffs’ transactions, considered to be a sufficiently reliable benchmark that even highly sophisticated borrowers willingly incorporated it into their loans.

4. Conclusion

The Student Loan Plaintiffs’ claims are dismissed. Having dismissed these claims, we have no need to address other issues raised by the parties.

V. LENDER PLAINTIFFS

1. Personal Jurisdiction

The Lender Plaintiffs, who each filed suit in New York against panel banks, assert a fraud theory not associated with any particular relationship between themselves and the defendants. In *LIBOR IV*, we held that, where plaintiffs state a substantively viable claim against panel banks for fraud, personal jurisdiction exists “only where the LIBOR submission was determined or transmitted,” or, in the context of trader-based manipulation, “in the location of the person who requested the submitter to engage in manipulation." *LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *38, 2015 U.S. Dist. LEXIS 147561, at *189–90. We adhere to this conclusion. Accordingly, as with the cases considered in *LIBOR IV*, the parties to this action are "direct[ed] . . . to confer and provide us with a spreadsheet containing a list of claims [against banks and affiliated defendants] that, in accordance with [our general rulings], are dismissed on jurisdictional grounds." *Id.*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *37, 2015 U.S. Dist. LEXIS 147561, at *186.[18]

Alone among the *LIBOR V* plaintiffs, the Lender Plaintiffs assert claims against the BBA and related entities. In *LIBOR IV*, we concluded that "[t]o the extent that . . . the BBA purposefully directed communications about LIBOR to plaintiffs in a given state, those contacts can in principle support personal jurisdiction over claims that those communications were fraudulent," but that such fraud claims fail on the merits. ___ F. Supp. 3d at ___, 2015 WL 6243526, at *30, 2015 U.S. Dist. LEXIS 147561, at *164. Moreover, we rejected personal jurisdiction over the BBA on other bases, concluding that "[p]laintiffs have not alleged that the BBA evaluated the accuracy of panel banks' submission in the United States, that

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[18] As in *LIBOR IV*, "[i]f the parties disagree as to how any ruling applies to a particular defendant in a particular case, each side may provide a brief summary of its position . . . ." ___ F. Supp. 3d at ___, 2015 WL 6243526, at *37, 2015 U.S. Dist. LEXIS 147561, at *186. "To the extent that plaintiffs are unable to complete such a spreadsheet in accordance with our rulings, they should describe with particularity the information that they require and that is not in their possession." *Id.* at n.63.

BBA employees in the United States made the decision to publish false data, that the BBA calculated LIBOR in the United States, or that the BBA's distribution of LIBOR in the United States was a but-for cause of plaintiffs' injuries." ___ F. Supp. 3d at ___, 2015 WL 6243526, at *38, 2015 U.S. Dist. LEXIS 147561, at *190 (footnote omitted). We reaffirm this conclusion that the claims against the BBA defendants fail because of a combination of lack of personal jurisdiction and failure to state a claim.

2. Damages

Of all the New Classes, the Lender Plaintiffs have the most straightforward theory of damages. They held loans whose interest rates were tied to LIBOR. Thus, if LIBOR was persistently suppressed, the interest payments on the loans were lower than the payments would have been if the payments had been calculated from "true LIBOR."

At oral argument, defendants compared the Lender Plaintiffs' claims to the federal securities claims of Schwab that we dismissed in *LIBOR IV*. See Tr. 81:18–82:9; *LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *70, 2015 U.S. Dist. LEXIS 147561, at *277–80. The comparison is inapt because the Lender Plaintiffs propound a different factual theory than did Schwab. It is nonsensical to claim, as Schwab did, that LIBOR suppression artificially inflated the price of LIBOR-based bonds. But Lender Plaintiffs maintain, much more plausibly, that their *interest payments* were artificially depressed. This factual theory was unavailable to Schwab under federal law, which only addresses fraud in the "purchase and sale" of securities, Securities Exchange Act § 10(b), 15 U.S.C. § 78j(b), but is available at common law.

Defendants also argue that Berkshire Bank has pleaded no cognizable damages under New York law because Berkshire Bank's "lost profits" do not represent an out-of-pocket loss on any transaction. Both parties rely on *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 422, 668 N.E.2d 1370, 1374 (1996). In *Lama Holding*, the plaintiff had engaged in a stock transaction in reliance on faulty tax advice. Nevertheless, the plaintiff sold its shares at a clear profit. On these facts, the Court of Appeals held that the plaintiff could not maintain a fraud claim. Plaintiffs read *Lama Holding* narrowly as holding that lost-profit damages are unavailable when the lost profits are "undeterminable and speculative." *Id.* While it is true that the Court of Appeals characterized the plaintiff's ostensible damages in this manner, the Court's reasoning was considerably broader. The fairest reading of *Lama Holding* is that New York's law of fraud recognizes only "out of pocket" losses.

Typically, the measure of damages is the difference between the amount that the plaintiff paid for some property and the true value of the property. *See Continental Cas. Co. v. PricewaterhouseCoopers, LLP*, 15 N.Y.3d 264, 271, 933 N.E.2d 738, 742 (2010). However, this measure does not readily apply here, where there is no fraud in the inception of Berkshire Bank's mortgages and other loans. As the Court of Appeals has observed, "[v]arying circumstances must logically require variation in the application of [the] measure of damages." *Hotaling v. Leach & Co.*, 247

N.Y. 84, 88, 159 N.E. 870, 871 (1928). We therefore consider other New York cases involving bonds and similar securities.

In *Continental Insurance Co. v. Mercadante*, 222 A.D. 181, 225 N.Y.S. 488 (1st Dep't 1927), the court found that a holder of bonds had suffered damages when the holder, relying on defendant's misrepresentations, retained the bonds instead of selling the bonds as the holder had earlier planned. By contrast, in *Starr Foundation v. American International Group*, 76 A.D.3d 25, 901 N.Y.S.2d 246 (1st Dep't 2010), the court found, over a dissent, that a holder of AIG stock had not suffered damages when the holder, in similar circumstances, retained its stock. The majority in *Starr Foundation* distinguished *Continental Insurance* by observing that the bondholder in *Continental Insurance* lost much of its original investment, while the shares at stake in *Starr Foundation* retained value at least equal to what the plaintiff originally spent. *Id.*, 76 A.D.3d at 33, 901 N.Y.S.2d at 252-53. This explanation is in some tension with *Continental Insurance*'s own reasoning that "[t]he gravamen of the action is for fraud in inducing, not the purchase of the bonds, but their retention after purchase." 222 A.D. at 183, 225 N.Y.S. at 490. If the theory of *Continental Insurance* is to be taken seriously, then the proper measure of damages, like the fraud itself, has nothing to do with the investor's fortuitous purchase price, and a "holder claim" can exist even when the plaintiff recouped his initial investment. The better explanation for the outcome in *Starr Foundation* is that plaintiff's ability to sell its stock at a high price was just as artificial as the public information that the plaintiff allegedly received. The lost opportunity was entirely illusory because, if the defendant corporation had properly revealed the truth about its finances, then its stock price would never have been inflated at all. *See Starr Found.*, 76 A.D.3d at 29, 901 N.Y.S.2d at 250. By contrast, it is not clear that the bonds at stake in *Continental Insurance* traded in an efficient market, or that the plaintiff relied upon public information in retaining its bonds. Thus, the *Continental Insurance* plaintiff plausibly gave up a genuine opportunity to sell bonds at a high price in reliance on the defendant's false representations. Together, these cases demonstrate that the measure of damages in a fraud case depends critically upon comparing a plaintiff's investment with the alternatives that would have existed were it not for the defendant's fraud.

The employment opportunity cases cited by *Berkshire Bank* are consistent with this approach. In each one, the court compares the specific opportunity that the plaintiff gave up with the one that the plaintiff received. *See, e.g., Stewart v. Jackson & Nash*, 976 F.2d 86, 88 (2d Cir. 1992); *Doehla v. Wathne Ltd.*, No. 98-cv-6087 (CSH), 1999 WL 566311, at *1, 1999 U.S. Dist. LEXIS 11787, at *1–2 (S.D.N.Y. Aug. 3, 1999); *but cf. Pasternak v. Dow Kim*, 961 F. Supp. 2d 593, 597-98 (S.D.N.Y. 2013) (damages based on potential bonus payments unavailable where plaintiff had not given up an alternative employment opportunity).

In cases involving bonds or loans, it is often proper to compare the cash flows received with those that would have been received if the plaintiff had invested in a hypothetical interest-bearing deposit. For example, in *Hotaling*, 247 N.Y. at 84, 159 N.E. at 870, the Court of Appeals approved the lower court's assessment of damages as (1) the amount paid for the bond, adjusted for interest, minus (2) interest payments received on the bond, and minus (3) principal paid on the bond. This is the approach that we would apply to Berkshire Bank's investments.[19] However, Berkshire Bank has not pleaded information about any specific investment, so we cannot assess whether Berkshire Bank suffered any net loss on any mortgage or other loan. Accordingly, we dismiss Berkshire Bank for failure to plead damages.

3. Scope of Expected Reliance

In *LIBOR IV*, we held that a broad range of LIBOR-based investors were within the class of persons who were intended to rely on LIBOR. *See* ___ F. Supp. 3d at ___, 2015 WL 6243526, at *62-65, 2015 U.S. Dist. LEXIS 147561, at *255–65. We observed further that the panel banks may be liable in fraud regardless of whether they had specific intent to defraud a particular investor or class of investors. *See id.*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *64, 2015 U.S. Dist. LEXIS 147561, at *262-63; *cf. id.*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *80-82, 2015

[19] Arguably, one might pick a different comparator for LIBOR-based mortgages, such as fixed-rate mortgages or floating-rate mortgages based on some other index. However, in the absence of any pleading that Berkshire Bank forwent some such specific investment opportunity in favor of issuing or purchasing a LIBOR-based mortgage, the risk-free interest rate is the most appropriate neutral comparator.

U.S. Dist. LEXIS 147561, at *302–06 (discussing scienter requirement for tortious interference).

In this context, it is plausible that mortgages were within the scope of transactions for which LIBOR was intended to be used, and consequently that mortgage investors may have claims. On the basis of counsel's representation that each of the Lender Plaintiffs held mortgages, we conclude that each of the Lender Plaintiffs are plausibly so situated.[20]

4. Justifiable Reliance

Our doubts about the reasonableness of reliance are even stronger as to the Lender Plaintiffs than in other contexts, especially for mortgages that the Lender Plaintiffs themselves issued. The pleadings do not tell why a mortgage lender, who normally dictates terms to a mortgagor, could not have simply chosen a different interest rate.

Nevertheless, the Lender Plaintiffs' claims survive as to loans that the plaintiffs issued or purchased before warning signs of manipulation emerged. *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *68, 2015 U.S. Dist. LEXIS 147561, at *272-73 ("[J]ustifiability is measured at the time that plaintiff committed to rely on LIBOR. . . . [P]laintiffs may have relied on LIBOR to calculate particular payments years after committing to do so.

[20] We do not know from the pleadings what other kinds of loans plaintiffs issued, and therefore cannot decide at this time the extent to which LIBOR may have been intended for use in other transactions. We also do not decide whether other kinds of loans are sufficiently similar to mortgages so as to warrant certification of a single class.

If the commitment at the time of executing a [transaction] was reasonable, then the reliance that necessarily followed, even years later, is actionable.”). Furthermore, at least for loans that the Lender Plaintiffs *purchased*, it is plausible that the secondary mortgage market was so dominated by LIBOR-based loans that it would have been difficult in practice for the plaintiffs to restrict their investments to non-LIBOR-based loans, even after signs of manipulation began to emerge.

5. Statute of Limitations

We apply New York’s limitations law to all three plaintiffs, including New York’s “borrowing rule,” N.Y. C.P.L.R. 202 (Consol. 2008), which provides that the out-of-state claim of an out-of-state plaintiff must be timely under both New York’s limitations law and the limitations law of the place where the action accrued. In this MDL, we have applied the usual rule that a financial tort accrues where the plaintiff is domiciled. *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *118–19, 2015 U.S. Dist. LEXIS 147561, at *398–401.

Berkshire Bank is domiciled in New York, so its claims must be timely only under New York law. GDB is domiciled in Puerto Rico and Directors in California, and so their claims must, in addition, be timely under Puerto Rico and California law respectively.

Defendants do not argue that any claims are untimely under New York law. Thus, we consider only whether GDB’s claims are timely under Puerto Rico law and whether Directors’ claims are timely under California law.

5.1. Government Development Bank of Puerto Rico

GDB alleges persistent suppression during a period ending May 31, 2010. As GDB first stated its claims on November 21, 2012, its claims are time-barred under Puerto Rico's one-year statute of limitations absent some discovery rule or tolling doctrine. *See* P.R. Laws Ann. tit. 31, §§ 5141, 5298(2).

Puerto Rico's discovery rule provides that the limitations period runs "from the time the aggrieved person had knowledge" of a fraud claim. P.R. Laws Ann. tit. 31, § 5298(2). "Knowledge" is fairly understood to encompass constructive knowledge, *see, e.g., Arturet-Velez v. R.J. Reynolds Tobacco Co.*, 429 F.3d 10, 14 (1st Cir. 2005), from which we discern that Puerto Rico applies some form of an inquiry notice rule. We assume without deciding that Puerto Rico would apply a "weak inquiry notice" rule that the limitations period does not commence until a reasonable inquiry would have discovered the fraud. *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *126, 2015 U.S. Dist. LEXIS 147561, at *417–18 (categorizing discovery rules).

In order to apply such a rule, we must first determine whether GDB was on inquiry notice. We have previously imputed knowledge of news articles about LIBOR to exchange traders but not to long-term investors in LIBOR-based securities. We reasoned that any competent exchange-based trader would have sought out news concerning the subject of his day-to-day trading, while an investor who held a passive swap or bond position might reasonably have ignored news that pertained to a technical detail of his investment. A frequent lender such as GDB (or the other Lender Plaintiffs) is much closer to the exchange-based trader on this spectrum. A lender decides each day how to price adjustable mortgages in relation to LIBOR, and therefore has every reason to follow news about LIBOR. Therefore, we consider GDB to have been on inquiry notice by May 29, 2008 (or the date of its investment, whichever is later).

As GDB was on inquiry notice of all its claims by the end of May 2010, a diligent inquiry would have enabled GDB to plead fraud by May 2011. *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *135, 2015 U.S. Dist. LEXIS 147561, at *434-35. GDB failed to file within one year of May 2011, and so its fraud claim is time-barred.[21]

5.2. Directors Financial Group

Directors filed its complaint on February 13, 2013, which we measure against California's three-year limitations period for fraud. *See* Cal. Civ. Proc. Code § 338(d). At least some of DFG's claims—those asserting fraud on or after February 13, 2010—are timely. Furthermore, as we discussed in *LIBOR IV*, California does not recognize "constructive" inquiry notice through widely disseminated news articles. ___ F. Supp. 3d at ___, 2015 WL 6243526, at *127,

[21] GDB cannot benefit from the doctrine of fraudulent concealment, *see LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *137–38, 2015 U.S. Dist. LEXIS 147561, at *440-41; *LIBOR I*, 935 F. Supp. 2d at 710–11, and cannot benefit from class-action tolling because GDB was not within the original *Berkshire Bank* class. *See* Compl. ¶ 76, *Berkshire Bank*, Individual Case ECF No. 1.

2015 U.S. Dist. LEXIS 147561, at *421. It follows that, at this stage, none of Directors' claims can be dismissed as untimely. Nevertheless, we are skeptical that a "finance lender" such as Directors would be unaware of *Wall Street Journal* articles dealing with a major part of its business. *Cf. LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *165, 2015 U.S. Dist. LEXIS 147561, *510 ("It is difficult to believe that an institutional entity tasked with purchasing . . . residential mortgages did not inform itself of readily available information regarding a critical ingredient of many of the adjustable-rate mortgages in its portfolio.").

6. Conclusion

GDB's claims are untimely, and Berkshire Bank has failed to plead damages under New York law. Furthermore, various claims fail for the reasons stated in *LIBOR IV*: fraud based on panelists' statements about LIBOR, fraud based on the BBA's statements about LIBOR, fraud by omission for failing to reveal manipulation publicly, and conspiracy to commit persistent suppression. Nevertheless, Directors' pleading of "false data" fraud survives against the panel banks, despite our strong doubts about the timeliness of most of Directors' claims.

Because the claims of plaintiff Directors will go forward, we grant leave for Directors to amend in order to state more specifically the nature of its holdings and its injury. Plaintiff Berkshire Bank made no attempt to amplify its pleading in response to defendants' arguments regarding damages, and so we have no basis upon which to assess whether an amended pleading would be futile. Accordingly, Berkshire Bank may not amend without first moving for leave to do so.

We remind the parties that *Berkshire Bank* and Directors Financial Group have been consolidated for *all* purposes (Mem. & Order at 8, ECF No. 692), so that there is a "strong presumption," *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988), that this order is not a final judgment as to any Lender Plaintiff.

VI. MORTGAGOR PLAINTIFFS

1. Personal Jurisdiction

Each of the Mortgagor Plaintiffs is a California resident who alleges the existence of a LIBOR-based adjustable rate mortgage loan in connection with his purchase of real estate in California. *See* Mortgagor Compl. ¶¶ 17-20, 226, 230, 234, 238. To the extent that a defendant knowingly entered into a mortgage in California with a California plaintiff, such a "counterparty" arrangement is sufficient to state a *prima facie* case of personal jurisdiction over that defendant for claims related to that mortgage. In particular, a California court has jurisdiction over plaintiff Rivera's loan from Bank of America, N.A.[22] *See id.* ¶¶ 280-281.

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[22] Because the other Mortgagor Plaintiffs' claims fail on the merits, *see supra* at 9-10, we do not decide whether plaintiff Payne's contract with Washington Mutual supplies a basis for jurisdiction over defendant JPMorgan Chase & Co. or what to make of plaintiff Maresca's allegation, stated for the first time in his briefing, of a contract with "HSBC."

However, the Mortgagor Plaintiffs do not provide a *prima facie* case for personal jurisdiction against defendants with whom they did not transact. With respect to claims against these other defendants, the Mortgagor Plaintiffs rely on the "tortious effects" doctrine and concede that "the claim-specific contacts with California are limited to the effects felt within the state." Pls.' Opp. To Defs.' Mot. To Dismiss Pls.' First Am. Compl. Pursuant to Fed. R. Civ. 12(b)(2) ("Payne Mem.") at 11, ECF No. 1066. Citing *Calder v. Jones*, 465 U.S. 783 (1984), the Mortgagor Plaintiffs argue that defendants' alleged LIBOR manipulation was "expressly aimed" at California "because they knew California had the bulk of mortgaged units, thus home loans, and they knew th[at] rigging U.S. Dollar LIBOR index would have a potentially devastating impact in California." Payne Mem. at 10.

However, as we held in *LIBOR IV*, "personal jurisdiction exists where a defendant took 'intentional, and allegedly tortious actions . . . expressly aimed at the forum.'" ___ F. Supp. 3d at ___, 2015 WL 6243526, at *32, 2015 U.S. Dist. LEXIS 147561, at *173 (quoting *In re Terrorist Attacks on Sept. 11, 2001* (*Terrorist Attacks*), 714 F.3d 659, 674 (2d Cir. 2013)). Plaintiffs' assertion that panel banks expressly aimed their allegedly manipulative conduct at California because of their supposed awareness that harm would be felt disproportionately in California fails as a matter of law, because it improperly equates the foreseeability of harm in a forum with the defendants' intent to aim their conduct at a forum. *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *32, 2015 U.S. Dist. LEXIS 147561, at *173 ("It is bedrock law that merely foreseeable effects of defendants' conduct do not support personal jurisdiction." (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980), and *Terrorist Attacks*, 714 F.3d at 674). Moreover, that the plaintiffs foreseeably suffered injury in California as a result of defendants' actions elsewhere does not by itself support personal jurisdiction in California. *See Adv. Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir. 2014) ("[T]here can be no doubt that 'the plaintiff cannot be the only link between the defendant and the forum.'" (quoting *Walden v. Fiore*, 571 U.S. ___, ___, 134 S. Ct. 1115, 1122 (2014))).[23]

Accordingly, the moving defendants' Rule 12(b)(2) motion is granted except with respect to the Rivera claims against Bank of America, N.A.[24]

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[23] The Mortgagor Plaintiffs do not suggest, and it has never been suggested in this litigation, that any misconduct related to LIBOR manipulation took place in California.

[24] Defendants' halfhearted Rule 12(b)(4) and 12(b)(5) motions against the Mortgagor Plaintiffs' complaint are denied. Those rules countenance dismissal of a complaint for "insufficient process" and "insufficient service of process," but not for failure to file proof of service. Although a plaintiff bears the ultimate burden of proving adequate service of process upon a defendant, *see Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298 (2d Cir. 2005), "[f]ailure to prove service does not affect the validity of service," Fed. R. Civ. P. 4(l)(3); *see King v. Best Western Country Inn*, 138 F.R.D. 39, 43 (S.D.N.Y. 1991). "[A]n objection to service of process 'must be specific and must point out in what manner the plaintiff has failed to satisfy the requirements of the service provision utilized.'" *Koulkina v. City of New York*, 559 F. Supp. 2d 300, 312 (S.D.N.Y. 2008) (quoting *Photolab Corp. v. Simplex Specialty Co.*, 806 F.2d 807, 810 (8th Cir. 1986)). Accordingly, although defendants observe that the Mortgagor Plaintiffs have failed to file proofs of service as required by Fed. R. Civ. P. 4(l)(1), such

2. Fraud Claims Against Bank of America

2.1. Pleading

The Mortgagor Complaint provides no particularized allegations of affirmative falsity, and does not attach plaintiff Rivera's mortgage documents. As a result, we treat Rivera's fraud claim as essentially one for fraud by omission. We also view Rivera's UCL claim[25] as essentially duplicative of his fraud claim. To the extent that the use of LIBOR was not deceitful, the use of LIBOR was not unfair.

2.2. Preemption

Bank of America argues that Rivera's fraud and UCL claims are preempted by the National Bank Act, which regulates lending by national banks such as Bank of America, N.A. The Office of the Comptroller of the Currency has published regulations pursuant to the National Bank Act, which carry the same preemptive force as the statute itself. *See Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 555 (9th Cir. 2010) (citing *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)).

These regulations state:

> A national bank may make real estate loans . . . without regard to state law limitations concerning . . . (9) Disclosure and advertising,

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failure is not by itself cause for dismissal. Plaintiffs state in their memorandum of law that defendants were properly served, and it is conspicuous that defendants do not contend otherwise.

[25] Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 (West 2008).

> including laws requiring specific statements, information, or other content to be included in . . . credit-related documents.

12 C.F.R. § 34.4(a).

> State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996): . . . (2) Torts[.]

12 C.F.R. § 34.4(b).

The National Bank Act does not preempt the entire field of banking or of real estate lending. Instead, it preempts only those regulations that "significantly interfere with [a] national bank's exercise of its powers." *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996). Courts have usually held that regulations addressed to specific banking activities are preempted while laws of general applicability, such as tort law and consumer protection law, are not, although this line is sometimes difficult to draw with precision. *See SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 191–92 (2d Cir. 2007) (concluding that Connecticut's policy against expiration dates on gift cards may have interfered with national banks' powers, but that Connecticut's policy against inactivity fees did not); *Martinez*, 598 F.3d at 555 (citing *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11, 13 (2007)). For example, in *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712 (9th

Cir. 2012), the Ninth Circuit rejected the plaintiffs' contention that California law could require a national bank to disclose the order in which it would post transactions to a customer's checking account. Because the National Bank Act permitted a national bank to "exercise its deposit-taking powers without regard to state law limitations concerning . . . disclosure requirements," 704 F.3d at 726 (citation and quotation marks omitted), the contrary California rule was preempted. However, California's general prohibition on misleading statements was *not* preempted, even to the extent that California's prohibition affected the national bank's deposit-taking practices. *See id.* at 726–27.

This principle is consistent with more general presumptions regarding preemption. The National Bank Act ordinarily preempts banking regulations because of the federal government's long history of regulating national banks. *See Barnett Bank*, 517 U.S. at 32 (Courts historically interpret "grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."). But federal law, including the National Bank Act, is presumed *not* to preempt general tort law, which is the traditional domain of state authority. *See Baldanzi v. WFC Holdings Corp.*, No. 07-cv-9551, 2008 WL 4924987, at *2 (S.D.N.Y. Nov. 14, 2008) ("In contrast to findings of federal preemption in cases involving specific state regulations that conflict with the NBA, causes of action sounding in . . . consumer protection statutes and tort have repeatedly been found . . . not to be preempted."); *cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[W]e 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))). Moreover, this principle is consistent with the Comptroller of the Currency's own explicit pronouncements regarding preemption. *See* 12 C.F.R. § 34.4(b)(2). The Comptroller has even cited California's UCL as an example of a general law that is not preempted in most of its applications. *See* OCC Advisory Letter, Guidance on Unfair or Deceptive Acts or Practices, 2002 WL 521380, at *2 n.2 (Mar. 22, 2002).

We must then classify Rivera's remaining claim. This surviving claim (whether characterized as a tort or as a violation of the UCL) is essentially one of fraud by omission. Bank of America allegedly offered a loan that appeared to be a standard adjustable-rate mortgage with a reliable benchmark, but privately knew through its superior access to information about LIBOR and inter-bank credit markets that the benchmark was, at the time, suppressed.

Stated thus, Rivera's claim falls squarely on the "generally applicable" side of the divide. Rivera does not insist upon a California-specific disclosure rule that a bank must explain the nature of a benchmark that it selects; such a rule would certainly be preempted. Rather, Rivera seeks to apply a general principle of tort law, applicable equally to a bank's mortgage terms as to a cockroach-infested house or a diseased herd of cattle. Thus cabined, there is no risk that Rivera's claim would subject Bank of America to fifty incompatible disclosure requirements, because the common law is similar everywhere: special knowledge imports a duty of disclosure, particularly as to information that is as fundamental to a transaction as the interest rate is to a mortgage.

Bank of America presses a distinction between fraud of commission and fraud of omission. *Compare Murr v. Capital One Bank (USA), N.A.*, 28 F. Supp. 3d 575, 583 (E.D. Va. 2014) ("[T]he parties are in agreement that omission claims are preempted but misrepresentation claims are not."), *with Ellis v. J.P. Morgan Chase & Co.*, 950 F. Supp. 2d 1062, 1082–85, 1091–92 (N.D. Cal. 2013) (holding that fraud-related UCL claims are not preempted, and characterizing some fraud claims as relying upon a "duty to disclose"). This distinction is often illusory, and the law does not generally treat the two kinds of fraud differently. *See Morse v. Fusto*, No. 13-4074, ___ F.3d ___, ___, 2015 WL 5294862, at *8, 2015 U.S. App. LEXIS 16154, at *24–25 (2d Cir. Sept. 11, 2015) (declining to distinguish between affirmative misstatements and omissions alone, and concurring with the district court that the law "make[s] no legal distinction between misleading statements or omissions and affirmative falsehoods") (citation and quotation marks omitted). Furthermore, this distinction does not reach the heart of the preemption analysis—whether a state law significantly interferes with national banking. The rule against fraud by omission, if properly circumscribed by traditional common law principles, does not interfere with national banking any more than does the rule against fraud by commission, and there is no reason to believe that Congress or the Comptroller of the Currency intended to provide national banks with a defense against traditional common law claims.

Martinez, 598 F.3d at 549, relied upon by defendants, held that a so-called "fraud by omission" claim was preempted. Specifically, the plaintiffs in *Martinez* claimed that a bank was required to disclose its own costs for certain services in addition to the fees that the bank charged. Although presented as a "fraud by omission" claim, this claim was nothing of the sort, because tort law has never required a business to reveal its own costs to consumers. In reality, the *Martinez* plaintiffs proposed an unusual bank-specific rule that would have required novel disclosures on all real estate loans in California. Thus, the claim in *Martinez* was properly held to be preempted.

Here, Rivera seeks to hold Bank of America to account for alleged misconduct that is proscribed by traditional common law. The National Bank Act does not preempt such a suit.

3. Fraud Claims Against Other Panel Banks

Rivera also seeks to hold non-counterparty panel banks liable on the theory that their persistent suppression of LIBOR distorted the interest rate that Rivera relied upon. This theory of reliance is fundamentally no different from the theories that we characterized as "fraud on the market" in *LIBOR IV*. *See* ___ F. Supp. 3d at ___, 2015 WL 6243526, at *65, 2015 U.S. Dist. LEXIS 147561, at *264–65. We dismiss Rivera's claims against defendants other than Bank of America, as California has rejected the "fraud on the market" theory of reliance. *See Mirkin v.*

Wasserman, 5 Cal. 4th 1082, 1100–08, 858 P.2d 568, 579–84 (1993).

4. Statute of Limitations

In *LIBOR IV*, we declined to hold that sophisticated OTC swap traders were on inquiry notice of fraud in early 2008, because we considered it unclear whether investors with static holdings would have been attuned to news regarding LIBOR. *See* ___ F. Supp. 3d at ___, 2015 WL 6243526, at *134, 2015 U.S. Dist. LEXIS 147561, at *432. We have even less reason to think that Rivera, apparently an unsophisticated homeowner, was on inquiry notice. Therefore, we do not dismiss his claim on limitations grounds at this stage.

5. Conclusion

We conclude that plaintiff Rivera's claim of fraud by omission (and his associated UCL claim) survive against his counterparty, Bank of America, N.A. All other claims are dismissed.

VII. OTC AND EXCHANGE-BASED PLAINTIFFS

1. Personal Jurisdiction

1.1. Waiver of Personal Jurisdiction Arguments

The OTC and Exchange-Based Plaintiffs argue that, because this Court previously considered Rule 12(b)(6) motions to dismiss brought by moving defendants, those defendants have waived their right to move to dismiss. *See* Fed. R. Civ. P. 12(h). We are unpersuaded.

"[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). Under this principle, a party does not waive an argument by failing to make it at a time when it "would have been directly contrary to controlling precedent in this Circuit." *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009). Recently, in *Gucci America, Inc. v. Li*, 768 F.3d 122 (2d Cir. 2014), the Second Circuit concluded that because *Daimler*, the Supreme Court's most recent expression of the law of general personal jurisdiction, overruled previously "controlling precedent . . . that a foreign bank with a branch in New York was properly subject to general personal jurisdiction here," such a foreign bank had not waived its personal jurisdictional argument by failing to argue to the district court, before *Daimler* was decided, that it was not subject to personal jurisdiction in New York. *See Gucci*, 768 F.3d at 135–36.

In *LIBOR IV*, we rejected the argument of the Schwab Plaintiffs, who had filed a second complaint in California state court after our *LIBOR I* decision dismissing their federal claims and declining to exercise supplemental jurisdiction over most of their state-law claims, that the defendants in that case had forfeited their objection to personal jurisdiction by not joining it with their prior Rule 12(b)(6) motions. Following *Gucci*, we reasoned in part that "[t]he change in the law of general personal jurisdiction" created by *Daimler* "mean[t] that it is not unfair to afford the Schwab defendants an opportunity to oppose jurisdiction." *LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *36, 2015 U.S. Dist. LEXIS 147561, at *185.

Although this analysis is instructive, the posture of the OTC and Exchange-Based Cases is somewhat different from the Schwab case because the defendants are moving to dismiss the same claims in the same actions. Instead, the posture is more akin to that in *7 West 57th Street Realty Company, LLC v. Citigroup, Inc.*, No. 13-cv-981 (PGG), 2015 WL 1514539, 2015 U.S. Dist. LEXIS 44031 (S.D.N.Y. Mar. 31, 2015). There, defendants moved in December 2013 to dismiss the complaint for failure to state a claim, and then in October 2014 the foreign defendants sought leave to make a second motion to dismiss for lack of personal jurisdiction based on the January 2014 *Daimler* decision and the September 2014 *Gucci* decision. The court granted leave to make a second motion to dismiss, reasoning that a defendant does not waive its objection to personal jurisdiction by failing to make it in its first Rule 12(b) motion when the objection was not available at the time of the motion. *See 7 W. 57th St.*, 2015 WL 1514539, at *5–7, 2015 U.S. Dist. LEXIS 44031, at *18–24. The court also observed that Rule 12's partial prohibition on successive motions to dismiss only applies by its terms to "a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2); *see 7 W. 57th St.*, 2015 WL 1514539, at *5, 2015 U.S. Dist. LEXIS 44031, at *18–19.

We agree with the *7 West 57th Street* approach. Here, as there, the defendants who previously moved against the OTC and Exchange-Based Plaintiffs' complaints did so before *Daimler* and *Gucci* made new personal jurisdictional defenses available to foreign banking enterprises with United States branches. In 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.

1.2. OTC Plaintiffs

Only two defendants move on personal jurisdiction grounds in the OTC cases: Credit Suisse Group AG and the Royal Bank of Scotland Group PLC.[26] Plaintiffs' purported basis for jurisdiction over both of these defendants is a theory of agency: when CSI and CSUSA entered into LIBOR-related transactions with TCEH and SEIU, CSI and CSUSA acted as CSGAG's agents, and when Citizens Bank entered into a LIBOR-related transaction with Highlander, Citizens Bank acted as RBS's agent. We reject TCEH's argument for personal jurisdiction over CSGAG because TCEH has not plausibly pleaded that CSI acted as CSGAG's agent when CSI executed swaps with TCEH. *See infra* at 56-58. However, to the extent that CSUSA acted as CSGAG's agent in issuing Credit Suisse bonds to SEIU, *see infra* at 60-61, we may assert personal jurisdiction over CSGAG as well as CSUSA. We need not reach Highlander's argument

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[26] Schedule A to defendants' motion identified three other defendants who moved in part on personal jurisdiction grounds. However, in their reply brief, defendants withdraw the motion to the extent that it is brought on behalf of those three defendants. *See* Joint Reply Mem. of Law in Further Support of Defs.' Mot. to Dismiss the Putative Class Actions for Lack of Pers. Jurisd. at 6 n.6, ECF No. 1124.

as to RBS because, for the reasons discussed below, *see infra* at 61-63, Highlander has failed to allege injury. *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *20, 2015 U.S. Dist. LEXIS 147561, at *138 (holding that the court may "dismiss claims on the merits in cases 'with multiple defendants—over some of whom the court indisputably has personal jurisdiction—in which all defendants collectively challenge the legal sufficiency of the plaintiff's [claims]'" (quoting *Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 n.17 (2d Cir. 2012))).

1.3. Exchange-Based Plaintiffs

Only foreign defendants move against the Exchange-Based Plaintiffs' complaint on personal jurisdictional grounds. All of the moving defendants contest the sufficiency of their contacts with the United States[27] to support personal jurisdiction.[28]

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[27] The Exchange-Based Plaintiffs assert claims under the Commodity Exchange Act. We reiterate our prior holding that, because the CEA contains a nationwide service provision, the jurisdictionally relevant contacts are the contacts that defendants made with the United States as a whole, rather than any particular forum state. *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *23, 2015 U.S. Dist. LEXIS 147561, at *147–48.

[28] Although defendants do not formally move to dismiss pursuant to Rule 12(b)(3) for improper venue, three of the moving defendants (Credit Suisse Group AG, Lloyds Bank Group plc, and HBOS plc) argue that plaintiffs may only rely on the CEA's nationwide service provision in a judicial district where venue is proper. In defendants' sole authority for this proposition, the court noted that the parties before it had not cited authority directly on point and simply "adopt[ed] the parties' [shared] assumption" that the CEA's nationwide service provision was

In *LIBOR IV*, we rejected the contention of the plaintiffs in *Amabile*, who asserted claims under the Commodity Exchange Act, that personal jurisdiction existed in the United States because the defendants' manipulative actions had a foreseeable effect on the Eurodollar futures contract prices. We explained that LIBOR manipulation is distinguished "from the typical commodities or securities manipulation case, in which defendant's conduct is intended to affect the prices of commodities or securities listed in, for example, New York or Chicago." *LIBOR IV*, ___ F. Supp. 3d at ___ n.55, 2015 WL 6243526, at *32 n.55, 2015 U.S. Dist. LEXIS 147561, at *174 n.55.

We reaffirm that conclusion. As we explained in *LIBOR III*, scienter is a requirement of a claim under

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contingent upon venue. *Premium Plus Partners, L.P. v. Davis*, No. 04 C 1851, 2005 WL 711591, at *8 (N.D. Ill. Mar. 28, 2005). Defendants also rely by analogy on *Daniel v. American Board of Emergency Medicine*, 428 F.3d 408 (2d Cir. 2005), which addressed the relationship between venue and personal jurisdiction under the Clayton Act. We are unpersuaded that the syntax of the CEA's provision for venue and process, 7 U.S.C. § 25(c), is akin to that of the Clayton Act's venue provision, 15 U.S.C. § 22. Instead, we stand by our statement in *LIBOR IV* that the "the service provision of the CEA substantially tracks that of the Securities Exchange Act, which the Second Circuit has interpreted to express Congress's intent to extend personal jurisdiction to the outer limit of the Due Process Clause of the Fifth Amendment." *LIBOR IV*, ___ F. Supp. 3d at ___ n.41, 2015 WL 6243526, at *24 n.41, 2015 U.S. Dist. LEXIS 147561, at *147 n.41 (citing *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 526 & n.70 (S.D.N.Y. 2008) ("*Amaranth I*"), *aff'd*, 730 F.3d 170 (2d Cir. 2013) ("*Amaranth II*")). Accordingly, we reject defendants' contention that the CEA's nationwide service provision is contingent on proper venue.

the Commodity Exchange Act. *See LIBOR III*, 27 F. Supp. 3d at 466 (citing *DiPlacido v. CFTC*, 364 F. App'x 657, 661 (2d Cir. 2009)). Although we agreed with defendants that the Exchange-Based Plaintiffs had failed to plead intent to manipulate the market in Eurodollar futures contract, we concluded that, because there was "no legitimate purpose" for defendants' manipulative LIBOR submissions, the plaintiffs had pleaded scienter under the lesser pleading standard of "conscious misbehavior or recklessness."[29] *See LIBOR III*, 27 F. Supp. 3d at 470. While such conscious misbehavior or recklessness may suffice to state a CEA claim, it does not logically imply that a defendant has purposefully directed its allegedly wrongful activities toward the United States. Accordingly, we stand by our conclusion in *LIBOR IV* that, in this highly atypical commodity manipulation case, the scienter necessary, as a matter of substantive law, to plead a violation of the CEA does not rise to the level of purposeful direction by the defendants of their allegedly wrongful conduct to the United States.

The cases on which the Exchange-Based Plaintiffs principally rely do not require a different result. In *Amaranth I*, the court upheld personal jurisdiction over a Canadian trader whose alleged actions were "unmistakably" made with the knowledge that the

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[29] The specific allegations supporting this conclusion are that: "(1) defendants knew that they were submitting inaccurate LIBOR quotes, (2) defendants understood the impact on Eurodollar futures contract prices from doing so, and (3) there is no conceivably legitimate purpose for submitting inaccurate LIBOR quotes." *LIBOR III*, 27 F. Supp. 3d at 470.

"trades would affect the price of natural gas futures within the United States," thus "constitut[ing] purposeful availment of the United States," but denied as to a corporation which had "never allegedly directed any activity toward the United States" and thus had not "purposefully availed itself of this forum." 587 F. Supp. at 536-37. In the *Cotton Futures* case, the court upheld personal jurisdiction over a foreign corporation that had aided and abetted an individual co-defendant in a scheme to "manipulate the cotton futures market." *In re Term Commodities Cotton Futures Litig.*, No. 12-cv-5126 (ALC), 2013 WL 9815198, at *20, *28–31, 2013 U.S. Dist. LEXIS 184374, at *66-68, *90–99 (S.D.N.Y. Dec. 20, 2013), *reconsideration granted on other grounds*, 2014 WL 5014235, 2014 U.S. Dist. LEXIS 145955 (S.D.N.Y. Sept. 30, 2014). These cases are consistent with the general rule that a defendant is only subject to specific personal jurisdiction in a given forum on the basis of the in-forum effects of allegedly wrongful out-of-forum conduct where the defendant purposefully directed its conduct into that forum.[30] *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *32, 2015 U.S. Dist.

[30] Moreover, a defendant's unrelated contacts with the forum "may bolster an argument for specific personal jurisdiction on the basis of a claim arising out of a defendant's forum-related contacts, but cannot create specific personal jurisdiction over a claim that is wholly unrelated to the forum." *LIBOR IV*, ___ F. Supp. 3d at ___ n.50, 2015 WL 6243526, at *30 n.50, 2015 U.S. Dist. LEXIS 147561, at *166 n.50. Thus, the Exchange-Based Plaintiffs' reliance on the moving defendants' various other United States-directed contacts and activities is misplaced, as they have failed to show that the CEA claim arises out of those defendants' United States contacts.

LEXIS 147561, at *173-74 (citing *World-Wide Volkswagen*, 444 U.S. at 295, and *Terrorist Attacks*, 714 F.3d at 674). We have also received unredacted copies of the letters filed by the parties, Letter from Joel Kurtzberg, ECF No. 1207; Letter from Christopher Lovell and David E. Kovel, ECF No. 1209, as well as plaintiffs' supplemental declaration, Suppl. Decl. of David E. Kovel in Supp. of the Exchange-Based Pls.' Mem. of Law in Opp. to Defs.' Mot. to Dismiss the Putative Class Actions for Lack of Pers. Jurisd., ECF No. 1210, and they do not cause us to alter our opinion in any way.

Accordingly, as with the *LIBOR IV* parties and the Lender Plaintiffs, we direct the Exchange-Based Plaintiffs to confer with the moving defendants and to "provide us with a spreadsheet containing a list of claims that, in accordance with [our general rulings], are dismissed on jurisdictional grounds." ___ F. Supp. 3d at ___, 2015 WL 6243526, at *37, 2015 U.S. Dist. LEXIS 147561, at *186; *supra* at 24.

2. New OTC Plaintiffs

2.1. TCEH

Plaintiff TCEH alleges that it traded a swap with Credit Suisse International (CSI), and that persistent suppression lasted through May 2010. Second Consolidated Amended Compl. ¶¶ 1, 386, ECF No. 406. TCEH's claims against CSI were added to the OTC Plaintiffs' Second Amended Complaint on September 10, 2013.

Both CSI and Credit Suisse Group AG (CSGAG) now oppose TCEH's claims. CSI argues that TCEH's unjust enrichment claim is time-barred under Texas and New York law. CSGAG argues that only TCEH's counterparty, CSI, can be liable for breach of contract or unjust enrichment.

2.1.1. Statute of Limitations

TCEH's claim against CSI does not relate back to the complaint against CSGAG because nothing in the original complaint indicates that TCEH sued CSGAG instead of CSI by "mistake." Fed. R. Civ. P. 15(c)(1)(C)(ii).

As TCEH is based in Texas and filed in New York, New York's borrowing rule requires that TCEH's claims be timely under both New York and Texas law. Texas applies a two-year limitations period to unjust enrichment claims, with a rule that an action does not accrue until the action is ascertainable. *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *133, 2015 U.S. Dist. LEXIS 147561, at *429. However, as with the other OTC Plaintiffs, *see infra* at 60, we do not yet have cause to find that TCEH was on inquiry notice prior to filing the complaint and thus cannot conclude that its claim is untimely under Texas law.

As to New York law, we have previously declined to recognize claims for the imposition of a constructive trust and have applied a three-year limitations period to unjust enrichment claims seeking money damages. *See LIBOR IV*, ___ F. Supp. 3d at ___ n.186, ___ n.201, 2015 WL 6243526, at *163 n.186, *175 n.201, 2015 U.S. Dist. LEXIS 147561, at *506 n.186, *535-36 n.201. Further, New York does not apply a discovery rule to unjust enrichment. *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *132, 2015 U.S. Dist. LEXIS 147561, at *428 ("Plaintiffs do not argue that a discovery rule applies to any of their non-fraud claims in New York."). While New York recognizes cross-jurisdictional class-action tolling, *id.*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *145-46, 2015 U.S. Dist. LEXIS 147561, at *457-59, no earlier complaint placed CSI on notice of TCEH's claim, and thus TCEH's claim against CSI is untimely under New York law.

2.1.2. Counterparty Requirement and Agency Pleading

We have previously held that only a counterparty may be liable for breach of contract or unjust enrichment. *LIBOR III*, 27 F. Supp. 3d at 482. To avoid this holding, TCEH proposes that CSI acted as an agent of whichever parent entity was a member of the LIBOR panel.[31]

General allegations of corporate ownership, combined marketing, shared board membership, and so forth are insufficient to establish a principal-agent relationship between corporate entities. *See Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1459-62 (2d Cir. 1995). However, a subsidiary may be an agent of its parent when

> [a]t a minimum, . . . the parent has manifested its desire for the subsidiary to act upon the parent's behalf, the subsidiary has

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[31] TCEH names Credit Suisse Group AG (CSGAG) as the panel bank, while Credit Suisse asserts that Credit Suisse AG (CSAG) was the panel bank. If the misidentification of the panel bank were the only defect in TCEH's pleading, we would freely give leave for TCEH to replace CSGAG with CSAG. *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *157, 2015 U.S. Dist. LEXIS 147561, at *490-91.

> consented to so act, the parent has the right to exercise control over the subsidiary with respect to matters entrusted to the subsidiary, and the parent exercises its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors.

Transamerica Leasing, Inc. v. República de Venezuela, 200 F.3d 843, 849 (D.C. Cir. 2000) (citing Restatement (Second) of Agency § 1).

Here, TCEH alleges that CSI is "controlled" by CSGAG, that the two entities use the same brand and logo, that Credit Suisse presents itself as an "integrated global bank," that Credit Suisse "takes a unified approach to risk management," that CSI personnel report to CSGAG personnel, that CSI is generally managed as part of CSGAG, that CSI shares revenue with CSGAG, that CSGAG lends money to CSI, that CSGAG and CSI have overlapping Boards of Directors, and that CSI adheres to CSGAG's employment policies. Third OTC Compl. ¶¶ 26–27. Clearly, these pleaded facts suggest that CSGAG controlled CSI to a considerable degree and that CSI could conceivably have acted as CSGAG's agent for some purposes. None of these facts, however, indicates that CSI acted as CSGAG's agent on swap transactions or that CSGAG supervised CSI's swap-trading operations. This absence distinguishes the Proposed Third Amended Complaint from *Elbit Systems, Ltd. v. Credit Suisse Group*, 917 F. Supp. 2d 217, 225–26 (S.D.N.Y. 2013), in which the complaint alleged that the corporate parent closely managed the operations of the particular investment group whose employees allegedly violated federal securities laws. Likewise, the Proposed Third Amended Complaint is distinguishable from the Ntsebeza Complaint in *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 274–75 (S.D.N.Y. 2009). That complaint alleged that the corporate parents of two South African car companies directed the specific activities that allegedly violated federal and international law.[32]

2.2. SEIU

2.2.1. Statute of Limitations

SEIU purchased bonds issued by Credit Suisse (USA), Inc. (CSUSA) directly from a broker-dealer affiliate of Credit Suisse. SEIU filed its original complaint against CSGAG on March 5, 2013, and proposed to sue CSUSA as well on August 20, 2014. SEIU's claims against CSUSA do not relate back to the complaint against CSGAG because nothing in the original complaint indicates that SEIU sued CSGAG instead of CSUSA by "mistake." Fed. R. Civ. P. 15(c)(1)(C)(ii). Instead, the original complaint appears

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[32] Credit Suisse's reliance on the text of the ISDA agreement is misplaced. *See* ISDA Agreement, ECF No. 959-1, Ex. C, § 5(b)(i) ("Each party will be deemed to represent to the other party . . . that: (4) . . . [i]t is entering into this Agreement . . . as principal and not as agent of any person or entity."). This passage constitutes a representation *by CSI* that CSI is not the agent of another entity, not a concession by TCEH that CSI is not an agent. The purpose and the effect of this passage is simply to prevent CSI from excusing itself from liability on the pretense that CSI acted as some other entity's agent; the section in no way estops TCEH from holding some other entity to account if, in fact, CSI acted as the other entity's agent.

to reflect a strategic decision to sue only panel banks.[33] *Cf. LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *157, 2015 U.S. Dist. LEXIS 147561, at *490 ("[T]his is not a case in which plaintiffs made a factual mistake as to who their counterparties were or were ignorant of their identity. Rather, any error was a strategic decision to sue panel banks in their capacity as panel banks, rather than counterparties in their capacity as affiliates of panel banks.").

As SEIU is based in the District of Columbia and sued in New York, New York's borrowing rule requires that SEIU's claims be timely under both New York and DC law.

With respect to New York law, we apply a three-year limitations period without a discovery rule. *See supra* at 55-56. However, it appears that the complaint in *Ravan Investments* (No. 11-cv-3249 (NRB), ECF No. 1, operative between May 13, 2011, and April 30, 2012), and the amended complaints in *Baltimore* (No. 11-cv-5450, ECF Nos. 130, 406, operative from April 30, 2012, onwards) suffice to toll SEIU's claims against CSGAG. This implies that SEIU's unjust enrichment claim is timely (at least under New York law) as to claims arising on or after May 13, 2008. However, none of these complaints placed CSUSA on notice of SEIU's claims, and so

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[33] On the other hand, if SEIU finds it necessary to name CSAG as a panel bank entity in place of CSGAG, then the substitution would be a "mistake" subject to Rule 15. *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *157, 2015 U.S. Dist. LEXIS 147561, at *490-91.

SEIU's claims against CSUSA are untimely under New York law.

Turning to DC law, it might be thought that SEIU was not on inquiry notice of wrongdoing by the non-panel entity CSUSA, so that the statute of limitations did not commence in May 2008. *LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *134, 2015 U.S. Dist. LEXIS, at *433-34. However, SEIU was on notice that *some* Credit Suisse entity (namely a panel bank) had possibly suppressed LIBOR and that SEIU held bonds issued by CSUSA. This was enough to establish the possibility that CSUSA would be liable for unjust enrichment on the basis of its affiliate's misconduct. Thus, publicity in 2008 regarding LIBOR would be sufficient to place SEIU on inquiry notice as to its unjust enrichment claim.

Even so, as with other OTC Plaintiffs, we do not yet have cause to find that SEIU was aware of news reports regarding LIBOR in spring 2008 or at any particular time before SEIU filed its complaint. Therefore, we cannot conclude that SEIU's claims against either CSGAG or CSUSA are untimely under DC law.

2.2.2. Counterparty Requirement and Agency Pleading

SEIU alleges that CSUSA acted as an agent of CSGAG, for essentially the same reasons that TCEH argues that CSI acted as an agent of CSGAG. *See supra* at 56-58.

In contrast to TCEH's agency pleading, we accept SEIU's pleading that CSUSA acted as an agent of

CSGAG when it issued bonds.[34] Unlike a discrete swap transaction, a bond issuance is a major corporate event that officers and directors of the corporate parent would typically oversee. Complex financial entities coordinate their financing with extraordinary care and are unlikely to allow entities to issue securities without top-level approval. At the very least, it is plausible that CSUSA did not strike out on its own to issue a bond, but instead acted at the direction of its corporate parents. Accordingly, SEIU's claims against CSGAG survive on an agency theory.

2.3. Highlander Realty

Highlander Realty presents itself as an OTC Plaintiff that was exposed to LIBOR suppression by trading an interest rate swap with Citizens Bank of Massachusetts, an affiliate of the Royal Bank of Scotland. In reality, however, Highlander's swap and bond agreements[35] definitely show that Highlander was never exposed to fluctuations in LIBOR at all. We

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[34] Credit Suisse has asserted that CSAG, rather than CSGAG, was a member of the LIBOR panel. We grant SEIU leave to allege its agency allegations against CSAG instead of against CSGAG in the Third Amended Complaint, provided of course that counsel can do so consistent with Rule 11.

[35] As defendants pointed out at oral argument, there is no question that Highlander Realty's swap agreement and its associated loan agreement are integral to the allegations in Highlander Realty's complaint and may therefore be considered on this motion to dismiss. Tr. 33:25-34:1.

therefore dismiss Highlander Realty's complaint for lack of standing.[36]

In 2006, Highlander entered into what is known as a "synthetic fixed-rate loan," meaning that it simultaneously took out a floating-rate loan from Citizens Bank and used an interest rate swap to exchange its floating-rate obligations for fixed-rate obligations. The effect of the combined agreements was to insulate Highlander completely from changes in LIBOR. Both agreements used the same tenor of LIBOR to define the offsetting floating-rate cash flows, and any minor discrepancy in the agreements' definitions of LIBOR is resolved by the text of the swap confirmation, which provides: "In the event there is a conflict between the [swap's] definition [of LIBOR] and the definition of such term in the [loan agreement], the foregoing definition shall govern and prevail for all purposes, including without limitation the calculation of [Highlander's] payment obligations under the [loan]." Interest Rate Swap Confirmation CED14314, at 2, ECF No. 968-2.

Highlander points to various provisions in the agreement that could have exposed Highlander to LIBOR. But these provisions deal with special events—pre-payment, early termination, a discrepancy in day-count conventions, or a determination by Citizens Bank that a LIBOR loan was no longer lawful—that, so far as the pleadings inform us, never came to pass. For example, since there was no early termination, the "LIBOR Reserve

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[36] This resolution obviates the question of precisely what procedural action Highlander Realty sought to take.

Percentage" calculation that Highlander points to is irrelevant. And since Citizens Bank never determined that a LIBOR loan was unlawful, the "LIBOR-Reference Banks Lending Rate" provision is irrelevant as well.

Highlander's counsel stated at oral argument that the bond and swap payments do not offset. Tr. 17:24–18:15. This appears to miss the point of the transaction. Highlander borrowed money from Citizens Bank, so Highlander ought to pay some amount of money, on net, each month. Highlander's bond payment offsets only the floating leg of the swap payment, and there is no plausible pleading (or information provided in response to defendants' motion) that the bond payment fails to do so. Furthermore, if it were the case that the bond payments failed to offset the floating leg of the swap payment, then the proper action would be for breach of the above-quoted contractual language, a matter that would not relate to the manipulation of LIBOR.

Finally, Highlander argues that it was damaged by bearing extra credit risk. According to Highlander, RBS's LIBOR quotes portrayed RBS, a guarantor of Citizens Bank's swap agreement, as healthier than RBS truly was. Highlander cites no precedent, and we have found none, to support a cause of action for credit risk on its own. If a mortgagor, for instance, fills out a fraudulent mortgage application and then pays his mortgage in full, we do not think that the lender could sue for the damage that might have been. The traditional cause of action for actual damage sustained is sufficient to compensate a defrauded lender. Furthermore, even if "credit risk in the air" were a form of damages, Highlander bore no credit risk in this case because Highlander was always to be a net borrower under the combined swap and loan agreements.

For these reasons, *Highlander Realty* is dismissed.

2.4. Jennie Stuart

Jennie Stuart traded swaps with Bank of America, N.A., and now proposes to include contract and unjust enrichment claims against Bank of America, N.A., and Bank of America Corporation in the consolidated OTC complaint. The proposed claims against Bank of America Corporation do not run against a counterparty, and so leave to amend with respect to that entity is denied. *See LIBOR III*, 27 F. Supp. 3d at 477–82.

At least some of Jennie Stuart's claims against its swap counterparty (Bank of America, N.A.) survive our prior holdings, as the alleged suppression period ended within three years of when the OTC Plaintiffs alleged unjust enrichment and contract claims against Bank of America, N.A. *See LIBOR IV*, ___ F. Supp. 3d at ___, 2015 WL 6243526, at *145-46, 2015 U.S. Dist. LEXIS 147561, at *457–59 (applying class-action tolling to New York statute of limitations); *see also* Ky. Rev. Stat. Ann. § 413.090(2) (15-year limitations period for actions upon a written contract); Ky. Rev. Stat. Ann. § 413.120(1) (5-year limitations period for actions upon an implied contract). Because at least some claims are timely, we need not yet resolve precisely which of Jennie Stuart's claims are timely. The parties should proceed with the expectation that our prior rulings regarding the statute of limitations will ultimately apply to Jennie Stuart's claims.

Bank of America offers one novel argument in opposition to the proposed Jennie Stuart amendment. According to Bank of America, Jennie Stuart may not predicate a claim upon its swap agreement dated October 2, 2008, because Jennie Stuart was on "inquiry notice" of LIBOR manipulation by that point, so that Bank of America's alleged misconduct was within the "intent and reasonable expectations" or the "reasonable contemplation" of the parties. Letter from Robert F. Wise, Jr. at 2-3, ECF No. 971. To support this argument, Bank of America cites three cases: *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497 (2d Cir. 1989), in which a lender's foreclosure action in response to a borrower's default was held to be within the contemplation of the parties; *Dorset Industries, Inc. v. Unified Grocers, Inc.*, 893 F. Supp. 2d 395, 406 (E.D.N.Y. 2012), in which one party's alleged competition with another was sufficient to state a claim for breach of the implied covenant; and *U.S. Bank N.A. v. Ables & Hall Builders*, 696 F. Supp. 2d 428 (S.D.N.Y. 2010) (Chin, J.), in which the application of a contractual early termination procedure was held to be within the contemplation of the parties. None of these holdings supports the view that Jennie Stuart implicitly consented to manipulation of swap payments simply because suspicions of manipulation had been made public several months earlier. Even a known fraudster owes his counterparties a duty of good faith and fair dealing.

We grant the OTC Plaintiffs leave to add Jennie Stuart as a plaintiff in *Baltimore* subject to the caveat that we may ultimately hold some claims to be time-barred in accordance with the general principles we have previously announced.

2.5. Miami Children's Hospital

The OTC Plaintiffs' application for leave to add the Miami Children's Hospital as a plaintiff in *Baltimore* is granted as unopposed. *See* Tr. 50:21–25.

XIII. CONCLUSION

The Clerk is directed to terminate the motions listed in the appendix. *Weglarz* and *Nagel* are dismissed in their entirety. The Clerk is directed to enter judgment and to report the judgment to the Judicial Panel on Multidistrict Litigation and the United States District Courts for the Northern District of Illinois (*Weglarz*) and the Western District of Wisconsin (*Nagel*). *Berkshire Bank* is dismissed except as to the claims of Directors Financial Group, and is dismissed as to the BBA entities. The Clerk is directed to terminate the Berkshire Bank, the Government Development Bank for Puerto Rico, the British Bankers' Association, BBA Enterprises Ltd., and BBA Libor Ltd. as parties. *Payne* is dismissed *except* as to plaintiff Rivera's claims against defendant Bank of America, N.A. The Clerk is directed to terminate all other parties. The OTC Plaintiffs are granted leave to amend their consolidated complaint to include claims of SEIU (only against CSGAG or CSAG, and only for claims arising on or after May 13, 2008), Jennie Stuart Medical Center (only against Bank of America, N.A.), and Miami Children's

Hospital, but not claims of TCEH or Highlander Realty. *Highlander Realty* is dismissed in its entirety. The Clerk is directed to enter judgment and to report the judgment to the Judicial Panel on Multidistrict Litigation and the United States District Court for the District of Massachusetts.

IT IS SO ORDERED.

Dated: November 3, 2015
New York, New York

[Handwritten signature]
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

APPENDIX

This Memorandum and Order resolves the following docket entries in the following cases:

CASE NAME	CASE NO.	ECF NO.
In re Libor-Based Financial Instruments Antitrust Litigation	11-md-2262	950 958 964 966 969 1191
FTC Capital Gmbh et al. v. Credit Suisse Group AG et al.	11-cv-2613	242
Mayor and City Council of Baltimore v. Credit Suisse Group AG et al.	11-cv-5450	103 107 110
The Berkshire Bank et al. v. Bank of America Corp. et al.	12-cv-5723	114 139
Payne et al. v. Bank of America Corp. et al.	13-cv-0598	108 111
Directors Financial Group v. Bank of America Corp.	13-cv-1016	95 118
Weglarz et al. v. JP Morgan Chase Bank, N.A. et al.	13-cv-1198	91
Highlander Realty, LLC et al. v. Citizens Bank of Mass. et al.	13-cv-2343	84
Nagel v. Bank of America, N.A.	13-cv-3010	75