UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION THIS DOCUMENT RELATES TO:	MDL No. 2262 Master File No. 1:11-md-2262-NRB **ORAL ARGUMENT REQUESTED**
ELLEN GELBOIM, et al., Plaintiffs, v. CREDIT SUISSE GROUP AG, et al., Defendants.	No. 12-cv-1025
METZLER INVESTMENT GmbH, et al., Plaintiffs, v. CREDIT SUISSE GROUP AG, et al., Defendants.	No. 11-cv-2613
MAYOR AND CITY OF BALTIMORE, et al., Plaintiffs, v. CREDIT SUISSE GROUP AG, et al., Defendants.	No. 11-cv-5450
JOSEPH AMABILE, et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-1700
BAY AREA TOLL AUTHORITY, Plaintiff, v. BANK OF AMERICA CORP., et al., Defendants.	No. 14-cv-3094

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Plaintiff, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-5186
EAST BAY MUNICIPAL UTILITY DISTRICT, Plaintiff, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-0626
SAN DIEGO ASSOCIATION OF GOVERNMENTS, Plaintiff, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-5221
CITY OF RICHMOND, et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-0627
CITY OF RIVERSIDE, et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-0597
COUNTY OF MENDOCINO, et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-8644

COUNTY OF SACRAMENTO, Plaintiff, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-5569
COUNTY OF SAN DIEGO, et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-0667
COUNTY OF SAN MATEO, et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-0625
COUNTY OF SONOMA, et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-5187
DARBY FINANCIAL PRODUCTS, et al., Plaintiffs, v. BARCLAYS BANK PLC, et al., Defendants.	No. 13-cv-8799
FEDERAL DEPOSIT INSURANCE CORP. as Receiver for AMCORE BANK, N.A., et al., Plaintiff, v. BANK OF AMERICA CORP., et al., Defendants.	No. 14-cv-1757

THE FEDERAL HOME LOAN MORTGAGE CORP., Plaintiff, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-3952
CITY OF HOUSTON, Plaintiff, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-5616
CITY OF PHILADELPHIA, et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-6020
NATIONAL CREDIT UNION ADMINISTRATION BOARD as Liquidating Agent for U.S. Central Federal Credit Union, et al., Plaintiff, v. CREDIT SUISSE GROUP AG, et al., Defendants.	No. 13-cv-7394
PRINCIPAL FINANCIAL GROUP, INC., et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-6014
PRINCIPAL FUNDS, INC., et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 13-cv-6013

PRUDENTIAL INVESTMENT PORTFOLIOS 2, et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 14-cv-4189
SALIX CAPITAL US INC., Plaintiffs, v. BANC OF AMERICA SECURITIES LLC, et al., Defendants.	No. 13-cv-4018
CHARLES SCHWAB BANK, N.A., et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 11-cv-6411
SCHWAB MONEY MARKET FUND, et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 11-cv-6412
SCHWAB SHORT-TERM BOND MARKET FUND, et al., Plaintiffs, v. BANK OF AMERICA CORP., et al., Defendants.	No. 11-cv-6409

JOINT MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS ALL ANTITRUST CLAIMS BASED ON THE EFFICIENT ENFORCER DOCTRINE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

PLAINTIFFS AT ISSUE ON THIS MOTION 5

A. Bondholder Plaintiffs 5

B. Exchange-Based Plaintiffs 6

C. OTC Plaintiffs 9

D. Individual Plaintiffs 10

ARGUMENT 10

I. THE FEDERAL ANTITRUST CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO DEMONSTRATE THEY ARE EFFICIENT ENFORCERS OF THE ANTITRUST LAWS 10

A. Bondholder Plaintiffs 12

B. Exchange-Based Plaintiffs 24

C. OTC Plaintiffs 28

D. Individual Plaintiffs 34

II. THE STATE LAW ANTITRUST CLAIMS SHOULD ALSO BE DISMISSED 39

CONCLUSION 40

TABLE OF AUTHORITIES

Page(s)

CASES

Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429 (3d Cir. 2000) 17

Allen v. Dairy Farmers of Am., Inc., No. 5:09-cv-230, 2014 WL 2610613 (D. Vt. June 11, 2014) 15

Animal Sci. Prods., Inc. v. China Minmetals Corp., 34 F. Supp. 3d 465 (D.N.J. 2014) 35

Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters (*AGC*), 459 U.S. 519 (1983) 11, 13, 27

Blue Shield of Va. v. McCready, 457 U.S. 465 (1982) 11

Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284 (5th Cir. 1988) 23

Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408 (2d Cir. 2005) 11, 32

de Atucha v. Commodity Exch., Inc., 608 F. Supp. 510 (S.D.N.Y. 1985) 13

Elliott Assocs. v. Porsche Automobil Holding SE, 759 F. Supp. 2d 469 (S.D.N.Y. 2010), *aff'd sub nom. Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014) 30

Empls.' Ret. Sys. of Ala. v. Resolution Tr. Corp., 840 F. Supp. 972 (S.D.N.Y. 1993) 6

Garabet v. Autonomous Techs. Corp., 116 F. Supp. 2d 1159 (C.D. Cal. 2000) 14, 17

Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68 (2d Cir. 2013) 40

Gelboim v. Bank of America Corp., No. 13-3565-cv (L), -- F.3d --, 2016 WL 2956968 (2d Cir. May 23, 2016) .... passim

Gross v. New Balance Athletic Shoe, Inc., 955 F. Supp. 242 (S.D.N.Y. 1997) 14, 15, 17

Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977) 35

In re Aftermarket Auto. Lighting Prods. Antitrust Litig., No. 09 MDL 2007-GW, 2009 WL 9502003 (C.D. Cal. July 6, 2009) 30, 39

In re Aluminum Warehousing Antitrust Litig., No. 13-md-2481 (KBF), 2014 WL 4277510 (S.D.N.Y. Aug. 29, 2014).......... 35

In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390 (S.D.N.Y. 2011) 13

In re Folding Carton Antitrust Litig., 88 F.R.D. 211 (N.D. Ill. 1980) 15

In re LIBOR-Based Fin. Instruments Antitrust Litig. (*LIBOR I*), 935 F. Supp. 2d 666 (S.D.N.Y. 2013).......... 7, 21, 24, 27

In re LIBOR-Based Fin. Instruments Antitrust Litig. (*LIBOR II*), 962 F. Supp. 2d 606 (S.D.N.Y. 2013).......... 24, 34

In re LIBOR-Based Fin. Instruments Antitrust Litig. (*LIBOR IV*), No. 11-md-2262 (NRB), 2015 WL 6243526 (S.D.N.Y. Oct. 25, 2015) .... passim

In re LIBOR-Based Fin. Instruments Antitrust Litig. (*LIBOR V*), No. 11-md-2262 (NRB), 2015 WL 6696407 (S.D.N.Y. Nov. 3, 2015) 5, 33, 34

In re LIBOR-Based Fin. Instruments Antitrust Litig., No. 11-md-2262 (NRB), 2016 WL 1301175 (S.D.N.Y. Mar. 31, 2016) 37

In re NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493 (S.D.N.Y. 1996) 35

In re Processed Egg Prods. Antitrust Litig., 312 F.R.D. 124 (E.D. Pa. 2015) 15

In re TFT-LCD (Flat Panel) Antitrust Litig., No. M 07-1827 SI, 2012 WL 6708866 (N.D. Cal. Dec. 26, 2012), *aff'd*, 637 F. App'x 981 (9th Cir. 2016).......... 15

In re UBS Auction Rate Sec. Litig., No. 08-cv-2967(LMM), 2010 WL 2541166 (S.D.N.Y. Jun. 10, 2010) 32

In re Vitamin C Antitrust Litig., 279 F.R.D. 90 (E.D.N.Y. 2012) 33

In re Vitamins Antitrust Litig., Misc. No. 99-197, 2001 WL 855463 (D.D.C. July 2, 2001) 15

JetAway Aviation, LLC v. Bd. of Cnty. Comm'rs, 754 F.3d 824 (10th Cir. 2014) 11

Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979 (9th Cir. 2000) 40

L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356 (9th Cir. 1986) 19

Laydon v. Mizuho Bank, Ltd., No. 12-cv-3419 (GBD), 2014 WL 1280464 (S.D.N.Y. Mar. 28, 2014) .... passim

Marlin v. Robertson, 307 S.W.3d 418 (Tex. Ct. App. 2009) 40

Mid-West Paper Prods. Co. v. Cont'l Grp., Inc., 596 F.2d 573 (3d Cir. 1979) .... passim

Minpeco, S.A. v. Conticommodity Servs., Inc., 676 F. Supp. 486 (S.D.N.Y. 1987) 19, 27

O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060 (7th Cir. 1997) 40

Ocean View Capital, Inc. v. Sumitomo Corp. of Am., No. 98-cv-4067 (LAP), 1999 WL 1201701 (S.D.N.Y. Dec. 15, 1999) 13, 18

Or. Laborers-Emp'rs Health & Welfare Tr. Fund v. Philip Morris Inc., 185 F.3d 957 (9th Cir. 1999) 27, 28

Orr v. BHR, Inc., 4 F. App'x 647 (10th Cir. 2001) 40

Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc., 467 F.3d 283 (2d Cir. 2006) 11

Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117 (2d Cir. 2007) 11

Power & Tel. Supply Co. v. SunTrust Banks, Inc., 447 F.3d 923 (6th Cir. 2006) 10

Prudential Ins. Co. of Am. v. C.I.R., 882 F.2d 832 (3d Cir. 1989) 6

Reading Indus., Inc. v. Kennecott Copper Corp. (*Reading I*), 477 F. Supp. 1150 (S.D.N.Y. 1979), *aff'd*, 631 F.2d 10 (2d Cir. 1980) 13, 17

Reading Indus., Inc. v. Kennecott Copper Corp. (*Reading II*), 631 F.2d 10 (2d Cir. 1980) 13, 21

Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris Inc., 249 F.3d 1068 (D.C. Cir. 2001) 28

Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974) 9

Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07-cv-9423 (LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009) 39

Sw. Bell Tel. Co. v. Superior Payphones, Ltd., No. 13-05-661-CV, 2006 WL 417423 (Tex. Ct. App. 2006) 40

U.S. Football League v. Nat'l Football League, 842 F.2d 1335 (2d Cir. 1988) 18

United States ex rel. Blaum v. Triad Isotopes, Inc., 104 F. Supp. 3d 901 (N.D. Ill. 2015) 40

United States v. Astheimer, No. 91-0041, 1992 WL 20304 (E.D. Pa. Feb. 3, 1992), *aff'd*, 981 F.2d 1249 (3d Cir. 1992) 8

Vinci v. Waste Mgmt., Inc., 43 Cal. Rptr. 2d 337 (Ct. App. 1995) 40

Wrobel v. Avery Dennison Corp., No. 05-cv-1296, 2006 WL 7130617 (D. Kan. Feb. 1, 2006) 40

STATUTES AND RULES

740 ILL. COMP. STAT. 10/11 39

Federal Rule of Civil Procedure 12 1

KAN. STAT. ANN. § 50-163 39

TEX. BUS. & COM. CODE ANN. § 15.04 40

OTHER AUTHORITIES

CME Group, *A Trader's Guide to Futures* (2013), *available at* https://www.cmegroup.com/education/files/a-traders-guide-to-futures.pdf 9

CME Group, *Interest Rate Products: Eurodollar Futures* (2012), *available at* http://www.cmegroup.com/trading/interest-rates/files/IR148_Eurodollar_Futures_Fact_Card.pdf 7

Jeff Bauman, John Coleman & Rob Powell, CME Group, *Interest Rate Products: Creating Inexpensive Swaps* (2009), *available at* http://www.cmegroup.com/trading/interest-rates/files/IR194_CreatingInexpensiveSwaps.pdf 7

John W. Labuszewski, CME Group, *Interest Rates: Understanding Eurodollar Futures* (2013), *available at* https://www.cmegroup.com/trading/interest-rates/files/understanding-eurodollar-futures.pdf 7

RBC, Free-writing Prospectus, $1,000,000,000 Floating Rate Notes Due 9/28/2010, *available at* https://www.sec.gov/Archives/edgar/data/1000275/0001214659 07002146/a92871fwp.htm (last retrieved July 4, 2016) 32

RBC, Pricing Supplement to the Prospectus dated January 5, 2007 and the Prospectus Supplement dated February 28, 2007 (Sept. 26, 2007), *available at* https://www.sec.gov/Archives/edgar/data/1000275/0001214659 -07-002147.txt (last visited July 4, 2016) 32

Roberta Romano, *A Thumbnail Sketch of Derivative Securities and their Regulation*, 55 MD. L. REV. 1 (1996) 30

U.K. Serious Fraud Office, *LIBOR US Dollar (Barclays)*, *available at* https://www.sfo.gov.uk/cases/libor-barclays/ (last visited July 3, 2016) 22

U.S. Commodity Futures Trading Commission, *CFTC Orders Citibank, N.A. and Japanese Affiliates to Pay $175 Million Penalty for Attempted Manipulation of Yen LIBOR and Euroyen TIBOR, and False Reporting of Euroyen TIBOR and U.S. Dollar LIBOR*, May 25, 2016, *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7372-16 (last visited July 3, 2016) 22

U.S. Department of Justice, *Two Former Deutsche Bank Employees Indicted on Fraud Charges in Connection with Long-Running Manipulation of Libor*, June 2, 2016, *available at* https://www.justice.gov/opa/pr/two-former-deutsche-bank-employees-indicted-fraud-charges-connection-long-running (last visited July 3, 2016) 22

Following the Second Circuit's remand in *Gelboim v. Bank of America Corp.*, No. 13-3565-cv (L), -- F.3d --, 2016 WL 2956968 (2d Cir. May 23, 2016), Defendants[1] submit this Memorandum of Law in support of their motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), the antitrust claims asserted in all non-stayed actions in this multidistrict litigation on the ground that Plaintiffs[2] are not efficient enforcers of the antitrust laws.[3]

PRELIMINARY STATEMENT

Gelboim supports complete dismissal of Plaintiffs' federal and state antitrust claims. Applying the "efficient enforcer" analysis set forth by the Second Circuit does not alter — and indeed, reinforces — this Court's conclusion that Plaintiffs have not alleged facts sufficient to show antitrust standing. Observing that "there are features of this case that make it like no other," the Second Circuit advised that the four factors in the efficient enforcer analysis "require close attention" because they "potentially bear upon whether the aims of the antitrust laws are most efficiently advanced by [Plaintiffs] through these suits." *Id.* at *13. Close attention to these factors reveals that no Plaintiff here has alleged facts sufficient to show that it is an efficient enforcer of the antitrust laws. This result holds for both the federal and the state

1 This memorandum is submitted on behalf of the undersigned Defendants in the above-captioned cases in which they are named as parties. Barclays does not join any arguments to the extent they are asserted solely against the OTC Plaintiffs or Exchange-Based Plaintiffs.

2 As used herein, "Plaintiffs" means all plaintiffs in the actions subject to this motion.

3 Consistent with the Court's Orders dated June 17, 2016, MDL ECF No. 1461, and June 21, 2016, MDL ECF No. 1463, Defendants address this motion to the antitrust claims in all the non-stayed actions, and not only the non-stayed actions remanded by the Second Circuit. Furthermore, Defendants have briefed both the state and federal law antitrust claims because, although *Gelboim* considered only federal antitrust claims, the Second Circuit's holdings on antitrust injury may affect this Court's disposition of the state antitrust claims as well. Pursuant to this Court's Order dated July 5, 2016, MDL ECF No. 1478, Defendants have at this time moved to dismiss Plaintiffs' antitrust claims only on efficient enforcer and personal jurisdiction grounds, and have not briefed any arguments for dismissal of Plaintiffs' antitrust claims on statute of limitations, antitrust injury, or other grounds, including those outlined in their pre-motion letter dated June 30, 2016, MDL ECF No. 1473. Defendants do not waive other arguments for dismissal of Plaintiffs' antitrust claims and respectfully preserve them for presentation to the Court at the appropriate time. Among other things, the following Defendants were dismissed from certain Individual Actions in *LIBOR IV*: British Bankers' Association; BBA Enterprises Ltd.; BBA LIBOR Ltd.; Citigroup Financial Products, Inc.; Citigroup Global Markets, Inc.; Credit Suisse Group International; Credit Suisse Securities (USA) LLC; Deutsche Bank Securities, Inc.; HSBC Securities (USA) Inc.; J.P. Morgan Securities, LLC; Merrill Lynch, Pierce, Fenner & Smith, Inc.; RBC Capital Markets, LLC; RBS Securities, Inc.; Société Générale; UBS Securities, Inc.; and UBS Securities LLC. Those Defendants reserve all rights to contend at an appropriate juncture that they were not reinstated by *Gelboim*.

antitrust claims at issue, because the antitrust law of each relevant state incorporates the federal efficient enforcer analysis.

First Factor: Causation. Plaintiffs are not efficient enforcers because the chain of causation linking Defendants' alleged manipulation of U.S. Dollar LIBOR ("LIBOR") to each Plaintiff's alleged injury is highly attenuated and predicated upon nothing more than Plaintiffs' alleged trades in financial instruments that purportedly had some relationship to LIBOR. The Second Circuit highlighted three critical inquiries associated with an "assessment of the chain of causation between the [alleged] violation and the [alleged] injury": (1) the scope of the relevant market or markets impacted by the alleged violation; (2) the impact of the alleged violation within a relevant market or markets; and (3) whether Plaintiffs dealt directly with Defendants. *Id.* at *8, 13 (internal quotation marks omitted).

As to the first inquiry, Plaintiffs' failure to identify any causal relationship between the alleged manipulation of LIBOR and the various financial instruments implicated by their claims highlights the Second Circuit's principal concern: that granting Plaintiffs antitrust standing here would "vastly extend the potential scope of antitrust liability in myriad markets where derivative instruments have proliferated." *Id.* at *14. Indeed, if antitrust standing could be conferred upon claimants who allege nothing more than that they traded in a financial instrument linked in some way to LIBOR, Defendants would face an innumerable set of lawsuits seeking treble damages, with potential antitrust liability untethered to any causal relationship between Defendants' alleged misconduct and the competitive conditions attendant to that particular financial transaction. The Second Circuit warned against granting antitrust standing in such cases because it would require Defendants to "pay treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative." *Id.* Such unlimited exposure could itself *harm* competition by over-enforcing the antitrust laws; and indeed, that harm would be particularly severe here because the setting of LIBOR is a voluntary undertaking by the panel banks and indisputably efficiency-enhancing for the market. To chill such legitimate, pro-competitive behavior would run contrary to the aims of the antitrust laws.

As to the second and third inquiries, Plaintiffs fail to allege how the purported manipulation of LIBOR affected the pricing and terms of the vast range of financial instruments in which they allegedly transacted. To evaluate these causal chains would require this Court to speculatively reconstruct the choices of multiple independent decision-makers, recreate the operation of independent market variables, and eliminate the effects of countless intervening causal factors that influence the price of any of the numerous financial instruments at issue. This speculative undertaking is made even more difficult here because many of Plaintiffs' claims are based upon transactions with non-Defendants. Most courts have soundly rejected standing for claimants who did not transact with Defendants because this theory of "umbrella standing" does not satisfy the causation requirement of the efficient enforcer inquiry. In *Gelboim*, the Second Circuit itself cast doubt on whether "umbrella standing" can ever satisfy the efficient enforcer inquiry, and counseled against "umbrella standing" in this case because, among other things, it would impose "damages disproportionate to wrongdoing." *Id.*

Second Factor: Directness. Although some Plaintiffs claim to be more "direct" than others because they transacted with certain Defendants, no Plaintiff has adequately pleaded "directness" for the purpose of efficiently enforcing the antitrust laws. First, Plaintiffs who did not transact with any Defendant are, as a matter of law, too remote to serve as efficient enforcers. *See Mid-West Paper Prods. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 580–87 (3d Cir. 1979). In *Gelboim*, the Second Circuit noted that Plaintiffs who purchased their instruments "from other sources" were "remote victims" and instructed that "not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced." 2016 WL 2956968, at *14. Second, even those Plaintiffs who allegedly did transact with certain Defendants have not demonstrated antitrust standing here. Indeed, the unfettered ability of parties to financial transactions to incorporate LIBOR into their financial instruments led the Second Circuit to caution that, in this context, any claim of being a "direct" Plaintiff "may have diminished weight." *Id.* If this factor has "diminished weight," then the other factors necessarily assume heightened importance as to alleged direct purchaser Plaintiffs.

Third Factor: Speculative Damages. Plaintiffs are not efficient enforcers because their alleged damages are highly speculative. To determine damages, this Court would first have to reconstruct a "but-for" LIBOR rate for every day of the three-year period in which LIBOR was purportedly suppressed, for each of 16 different panel banks in 15 different tenors. It would then need to hypothesize as to how market participants — Plaintiffs, Defendants, and the numerous third parties who bought and sold myriad financial instruments during the relevant time period — would have reacted to, and potentially altered their transactions based upon, these hypothetical but-for rates. There are nearly infinite permutations for how parties might (or might not) have — addressed these innumerable factors in this hypothetical, but-for world. And for each Plaintiff, the Court would have to consider the impact of this hypothetical but-for rate on every transaction on a wide range of other financial instruments[4] in order to net out any benefit that the particular Plaintiff received from the alleged manipulation of LIBOR on one transaction from the "damage" purportedly suffered in another. Thus, even after acknowledging that "some degree of uncertainty" is allowed under the antitrust laws, the *Gelboim* court highlighted the "unusual challenges" presented by Plaintiffs' claims because the disputed transactions were ultimately undertaken in a worldwide "market for money," where competitors (including non-Defendants) offer "various increments above LIBOR, or rates pegged to other benchmarks, or rates set without reference to any benchmark at all." *Id.* at *14–15. In the face of these problems, the Second Circuit stated that it is "difficult to see how [Plaintiffs] would arrive at [a 'just and reasonable estimate of damages'], even with the aid of expert testimony." *Id.* at *14.

Fourth Factor: Duplicative Recovery and Complex Damages Apportionment. Finally, permitting these Plaintiffs to sue under the antitrust laws could, as the Second Circuit recognized, lead to duplicative or cumulative recoveries with the various domestic and international governmental investigations focusing on the identical alleged conduct. Indeed, the Second

[4] It is not necessary to decide, for purposes of this motion, the precise boundaries of which financial instruments must be included in the net injury calculation. It is sufficient to note that entities that entered into these transactions likely had other LIBOR-related transactions that would need to be included in the net injury calculation, and such other transactions may well have been in the opposite direction.

Circuit recognized that the "transactions that are the subject of investigation and suit are countless" and cautioned that "the ramified consequences are beyond conception." *Id.* at *15. There is no need for "private attorneys general" when multiple governments both here and abroad are actively enforcing (and have enforced) antitrust and other laws and have indeed recovered more than $6 billion, as well as other non-monetary remedies, in connection with their U.S. Dollar LIBOR investigations (in some cases in conjunction with other currencies or benchmarks). There is especially no need for an antitrust remedy where, as here, most Plaintiffs could potentially recover for the same injury under their disputed non-antitrust claims. Moreover, any recovery in antitrust would require the Court to engage in complex apportionment by offsetting (1) any benefits Plaintiffs received from the alleged manipulation of LIBOR on their other transactions, as well as (2) any recovery on Plaintiffs' surviving non-antitrust claims, which may be subject to different damages regimes.

Because the Plaintiffs subject to this motion have not alleged facts showing that they are efficient enforcers of the antitrust laws, their federal and state antitrust claims should be dismissed.

PLAINTIFFS AT ISSUE ON THIS MOTION

Each Plaintiff subject to this motion asserts a cause of action under Section 1 of the Sherman Act. In addition, certain Individual Plaintiffs assert claims under the state antitrust laws of New York, California, Texas, Illinois, and Kansas.[5]

A. Bondholder Plaintiffs

The Bondholder Plaintiffs seek to represent a proposed class of persons that owned debt securities — principally bonds — on which interest linked to LIBOR was payable during the Class Period,[6] excluding debt securities issued by any Defendant as obligor. Bondholder Compl.

---

5 *See* Schedule A to the Notice of Motion filed herewith.

6 The alleged Class Period for all putative non-stayed class actions asserting suppression claims is August 2007 to May 2010. This Court has dismissed claims of suppression predating August 9, 2007. *In re LIBOR-Based Fin. Instruments Antitrust Litig.* (*LIBOR V*), No. 11-md-2262 (NRB), 2015 WL 6696407, at *3 (S.D.N.Y. Nov. 3, 2015).

¶ 1; Bondholder Prop. Compl. ¶ 1.[7] The named Bondholder Plaintiffs allege that they owned debt securities issued by General Electric Capital Corporation ("General Electric") and the State of Israel. Bondholder Compl. ¶¶ 15–16; Bondholder Prop. Compl. ¶¶ 7–8. The named Bondholder Plaintiffs do not allege that they: (1) owned any debt securities issued by any Defendant; (2) purchased from or sold any debt securities to any Defendant; or (3) received (or were owed) any LIBOR-linked interest payments from any Defendant. Thus, the Bondholder Plaintiffs do not allege, and cannot allege, that Defendants directly or indirectly profited in any way from the sale of those bonds.

The purchase price of a bond at any given time[8] depends upon many factors, including but not limited to the default risk of the issuer, the present value of the principal, the maturity of the bond, and the promised coupon or interest rate — which may include both a fixed and a variable component — as well as the interest rates available on alternative investments in the marketplace, expectations about future interest rates, market liquidity, and any additional contractual terms such as prepayment rights and penalties, amortization features, taxability, or embedded optionality. *See generally Prudential Ins. Co. of Am. v. C.I.R.*, 882 F.2d 832, 835 (3d Cir. 1989); *see also In re LIBOR-Based Fin. Instruments Antitrust Litig.* (*LIBOR IV*), No. 11-md-2262 (NRB), 2015 WL 6243526, at *70 (S.D.N.Y. Oct. 25, 2015) ("[A] bond's price is equal to the present value of its expected future interest and principal payments."). The Bondholder Plaintiffs' complaint contains no allegations whatsoever about the role LIBOR played in the price of the bonds they claim to have purchased; indeed, the complaint makes no allegations at all regarding the factors relevant to the pricing of bonds in the primary or secondary markets.

B. Exchange-Based Plaintiffs

The Exchange-Based Plaintiffs seek to represent a proposed class of persons who traded Eurodollar futures and options on exchanges during the Class Period. Exchange Compl. ¶ 505;

[7] All abbreviations to the complaints cited herein are defined in the Notice of Motion filed herewith.

[8] Because bonds can be traded in a secondary market, the price of a bond may fluctuate over time. *See Empls.' Ret. Sys. of Ala. v. Resolution Tr. Corp.*, 840 F. Supp. 972, 992 (S.D.N.Y. 1993).

Exchange Prop. Compl. ¶ 686. "Eurodollar futures contracts do not require the seller actually to deliver cash deposits to the buyer, but rather provide that at the end of the contract . . . the seller pays the buyer a specified price . . . equal to 100 minus . . . the USD three-month LIBOR fix." *In re LIBOR-Based Fin. Instruments Antitrust Litig.* (*LIBOR I*), 935 F. Supp. 2d 666, 683 (S.D.N.Y. 2013) (internal quotation marks omitted). The transaction or trading price of a Eurodollar futures contract "reflect[s] the market's prediction of the three-month USD LIBOR on the contract's last trading day." *Id.* (internal brackets and quotation marks omitted). The market's prediction of three-month USD LIBOR, in turn, will depend upon "conditions prevailing in the money markets and moving outward on the yield curve," with the yield curve shifting based upon investor expectations as to "the future direction of interest rates," the "liquidity premium" required for long-term securities, and "unexplained irregularities or 'kinks.'"[9] An option on a Eurodollar futures contract gives the holder the right, but not the obligation, to buy or sell a particular Eurodollar futures contract. *LIBOR I*, 935 F. Supp. 2d at 683.

Although the Exchange-Based Plaintiffs' complaint[10] is devoid of any factual allegations reflecting the purpose of Eurodollar futures and options, various publications cited in the complaint acknowledge that these derivatives are commonly used to hedge interest rate risk. *See* Exchange Prop. Compl. ¶¶ 606 n.166,[11] 608 n.170;[12] *see also* Amabile Compl. ¶ 10 ("The

---

[9] John W. Labuszewski, CME Group, *Interest Rates: Understanding Eurodollar Futures*, at 2–3 (2013), *available at* https://www.cmegroup.com/trading/interest-rates/files/understanding-eurodollar-futures.pdf.

[10] Defendants address the factual allegations contained in the Exchange-Based Plaintiffs' Proposed Third Amended Consolidated Class Action Complaint. This Court has granted Exchange-Based Plaintiffs leave to add DB Group Services (UK) Ltd. ("DBGS") as a defendant in a future complaint, but DBGS is not a defendant in Exchange-Based Plaintiffs' operative complaint. Accordingly, DBGS does not join this motion, and it reserves all rights to bring a motion to dismiss any future complaint filed by Exchange-Based Plaintiffs at an appropriate time.

[11] CME Group, *Interest Rate Products: Eurodollar Futures*, at 1 (2012), *available at* http://www.cmegroup.com/trading/interest-rates/files/IR148_Eurodollar_Futures_Fact_Card.pdf ("A benchmark for investors globally, Eurodollar futures provide a valuable, cost-effective tool for hedging fluctuations in short-term U.S. dollar interest rates.")

[12] *See* Jeff Bauman, John Coleman & Rob Powell, CME Group, *Interest Rate Products: Creating Inexpensive Swaps*, at 3 (2009), *available at* http://www.cmegroup.com/trading/interest-rates/files/IR194_CreatingInexpensiveSwaps.pdf ("Packs and bundles are used by portfolio managers to adjust duration and by entities . . . seeking to hedge a LIBOR-related risk.").

Eurodollar futures contract is used as a pricing and hedging instrument."); *United States v. Astheimer*, No. 91-0041, 1992 WL 20304, at *4 (E.D. Pa. Feb. 3, 1992), ("[I]t should be noted that there are generally two reasons for buying or selling futures contracts; the first is to speculate on price movement, and the other is to hedge."), *aff'd*, 981 F.2d 1249 (3d Cir. 1992). Many Exchange-Based Plaintiffs entered into futures and options to counterbalance or offset interest rate exposure they faced on other financial instruments. "In particular, Eurodollar futures are often used to price and to hedge interest rate swaps"[13] — the same instrument allegedly transacted by many of the named OTC Plaintiffs. Thus, an Exchange-Based Plaintiff who was purportedly harmed by alleged LIBOR suppression on Eurodollar futures may also have benefited from the very same alleged suppression on another investment, such as OTC interest rate swaps.[14] No Exchange-Based Plaintiff alleges that it suffered net injury on transactions affected by LIBOR; nor does any Exchange-Based Plaintiff say whether it traded futures to hedge or to speculate.

The Exchange-Based Plaintiffs claim the purported "suppression of LIBOR caused Eurodollar contracts to trade and settle at artificially high prices, reducing gains made in trades." *Gelboim*, 2016 WL 2956968, at *4 (internal quotation marks omitted).[15] However, no Exchange-Based Plaintiff alleges that it traded with any Defendant or that any Defendant ever benefited from "artificially high prices" on the Exchange-Based Plaintiffs' trades. Instead, the named Exchange-Based Plaintiffs allege only that they "traded on-exchange based products tied to LIBOR such as Eurodollar futures . . . [and] were harmed as a consequence of Defendants' unlawful conduct." Exchange Compl. ¶ 27; Exchange Prop. Compl. ¶ 32. The Exchange-Based Plaintiffs do not allege Eurodollar futures transactions with any Defendant — nor could they,

---

13 *Understanding Eurodollar Futures*, at 1.

14 The opposite is also true: Many OTC Plaintiffs supposedly harmed by alleged LIBOR suppression would have benefited in the Eurodollar futures market.

15 In addition, the Exchange-Based and Amabile Plaintiffs allege antitrust claims based on day-to-day trader manipulation.

given the impersonal, anonymous nature of futures markets. *Cf. Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 236 (2d Cir. 1974) ("[T]hese transactions occurred on an anonymous national securities exchange where as a practical matter it would be impossible to identify a particular defendant's sale with a particular plaintiff's purchase."). In fact, the Exchange-Based Plaintiffs acknowledge that their counterparty on every transaction was a third party, *viz.*, the exchange's centralized clearinghouse. Exchange Compl. ¶ 438 (purchasers and sellers of Eurodollar futures contracts have a "future obligation to the contract market/exchange clearing house"); *see also* CME Group, *A Trader's Guide to Futures*, at 12 (2013), *available at* https://www.cmegroup.com/education/files/a-traders-guide-to-futures.pdf (CME Clearing "serv[es] as the counterparty to every transaction" on the CME).

C. OTC Plaintiffs

The OTC Plaintiffs seek to represent a proposed class of persons who purchased from Defendants "financial instrument[s] that paid interest indexed to LIBOR" and owned such instruments during the Class Period. OTC Compl. ¶ 37; OTC Prop. Compl. ¶ 45. An apparently inestimable variety of financial instruments are covered by this class definition, including (but not limited to) asset swaps, collateralized debt obligations, credit default swaps, forward rate agreements, inflation swaps, interest rate swaps, total return swaps, options, and floating rate notes. OTC Compl. ¶¶ 35–36; OTC Prop. Compl. ¶¶ 43–44. The OTC Plaintiffs do not include any allegations reflecting the role LIBOR may have played in the pricing of these instruments, or reflecting how these instruments are priced generally. Indeed, the OTC Plaintiffs do not allege that they transacted in most of these instruments at all (let alone with Defendants). The OTC Plaintiffs instead allege simply that the purported LIBOR suppression caused "prices of LIBOR-Based Instruments to be supracompetitive." OTC Compl. ¶ 368; OTC Prop. Compl. ¶ 376.

One named OTC Plaintiff, SEIU Pension Plans Master Trust ("SEIU"),[16] alleges it purchased LIBOR-linked bonds issued by two Defendants and that it purchased the bonds from

[16] Defendants address the factual allegations contained in the OTC Plaintiffs' Proposed Third Consolidated Amended Complaint, which adds SEIU as a plaintiff. For the reasons stated herein, any attempt by SEIU to assert

affiliates of those respective Defendants. OTC Prop. Compl. ¶ 18. The other named OTC Plaintiffs allege that they purchased from certain Defendants LIBOR-based interest rate swaps. *Id.* ¶¶ 12–17. An "'interest-rate swap' is a derivative contract between two parties who agree to exchange or 'swap' the interest payments that would arise on hypothetical loans of the 'notational amount.'" *Power & Tel. Supply Co. v. SunTrust Banks, Inc.*, 447 F.3d 923, 927 n.1 (6th Cir. 2006). The terms of a swap may depend upon many factors, including the default risk of each counterparty, the notional amount, the purchase date of the swap, the duration of the swap, and the interest rates to be exchanged — each of which may include both a fixed and a variable component — as well as the interest rates available on alternative investments in the marketplace, expectations about future interest rates, and any additional contractual terms, such as termination fees or embedded options. *See* OTC Prop. Compl. ¶ 350. Like futures, swaps are often used to hedge interest rate risk, including risk on floating rate liabilities. *See LIBOR IV*, 2015 WL 6243526, at *12 n.21. Losses on swaps may therefore be offset by gains on other financial instruments.

D. Individual Plaintiffs

At issue on this motion are antitrust claims in 25 Individual Actions that do not seek to certify a class: *Amabile*, *BATA*, the ten *California Consolidated Cases*, *Darby*, *FDIC*, *Freddie Mac*, *Houston*, *Philadelphia*, *NCUA*, the two *Principal* cases, *Prudential*, *Salix*, and the three original *Schwab* actions. To avoid repetition, a brief description of these plaintiffs and their alleged instruments is provided in conjunction with their analysis. *See infra* Section I.D.

ARGUMENT

I. THE FEDERAL ANTITRUST CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO DEMONSTRATE THEY ARE EFFICIENT ENFORCERS OF THE ANTITRUST LAWS

Because "Congress did not intend the antitrust laws to provide a remedy in damages for

---

antitrust claims based on those allegations would be futile. Defendants reserve all rights to bring a motion to dismiss any future complaint filed by the OTC Plaintiffs at an appropriate time.

all injuries that might conceivably be traced to an antitrust violation," all private plaintiffs "must demonstrate antitrust standing." *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.*, 467 F.3d 283, 290 (2d Cir. 2006) (quoting *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* (*AGC*), 459 U.S. 519, 534 (1983)). "The burden to demonstrate antitrust standing" — *i.e.*, that the plaintiff has suffered antitrust injury, and is an efficient enforcer — "is on the plaintiff." *JetAway Aviation, LLC v. Bd. of Cnty. Comm'rs*, 754 F.3d 824, 832 n.7 (10th Cir. 2014); *see also Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121 (2d Cir. 2007). The efficient enforcer inquiry asks whether a private antitrust plaintiff is a "proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement." *Gelboim*, 2016 WL 2956968, at *15 (internal quotation marks omitted). Although "[a]n antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy," *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476–77 (1982), permitting every potential plaintiff to pursue treble damages can lead to "'overkill' recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition," *Mid-West Paper*, 596 F.2d at 587. Thus, the efficient enforcer doctrine recognizes that "not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced." *Gelboim*, 2016 WL 2956968, at *14; *see also Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 438 (2d Cir. 2005) ("The fact that private plaintiffs have been injured by acts that violate the antitrust laws is not enough to confer standing to sue.").

As applied by the Second Circuit to this case, the four efficient enforcer factors are:

> (1) the "directness or indirectness of the asserted injury," which requires evaluation of the "chain of causation" linking [Plaintiffs'] asserted injury and the Banks' alleged price-fixing; (2) the "existence of more direct victims of the alleged conspiracy"; (3) the extent to which [Plaintiffs'] 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, 2016 WL 2956968, at *13 (quoting *AGC*, 459 U.S. at 540–45). "These factors require close attention here given that there are features of this case that make it like no other." *Id.* For the reasons that follow, no Plaintiff has alleged facts sufficient to show that it is an efficient enforcer.

A. Bondholder Plaintiffs

The Bondholder Plaintiffs are not efficient enforcers under any of the four *AGC* factors. They do not allege that they transacted with Defendants, that they received interest payments from Defendants, or that Defendants benefitted in any way from the harm the Bondholder Plaintiffs supposedly suffered. The Bondholder Plaintiffs' only link to the alleged antitrust violation is the fact that the third-party issuers of the Bondholder Plaintiffs' bonds referenced LIBOR when structuring their bonds. Moreover, any calculation of the Bondholder Plaintiffs' damages would require speculation not only about what LIBOR might have been, but also about how that but-for LIBOR would have affected the pricing decisions of the third-party issuers who set the terms (including the interest rates) of the bonds, as well as the pricing decisions of the third-party sellers who sold the Bondholder Plaintiffs their bonds. Further, there is a real risk of cumulative recovery with the $6 billion already recovered by regulators around the world in connection with the alleged conduct at issue. Because none of the efficient enforcer factors favors the Bondholder Plaintiffs, their antitrust claims should be dismissed.

1. Causation

Granting the Bondholder Plaintiffs standing would expand the scope of antitrust liability to encompass any claimant, anywhere, simply because that claimant's counterparty unilaterally determined to reference LIBOR in its financial instruments. The possibility of such a result goes to the central concern in the causation inquiry: "damages disproportionate to wrongdoing." *See id.* at *14 ("Requiring the Banks to pay treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative swap would, if appellants' allegations were proved at trial, 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."). To ensure that the antitrust laws do not impose disproportionate liability, the efficient enforcer inquiry requires claimants to plead facts sufficient to show the causal relationship between their claims and Defendants' alleged misconduct. This, in turn, requires assessment of (1) the causal chain "linking [the Bondholder Plaintiffs'] asserted injury and the Banks' alleged price-fixing" with particular attention to (2) "the antitrust standing of those plaintiffs who did not deal directly with the Banks." *Id.* at *13. The pleadings of the Bondholder Plaintiffs are inadequate on both counts.

"[V]aguely defined links" in the chain of causation are insufficient to establish a direct injury. *AGC*, 459 U.S. at 540. For this reason, courts in the Second Circuit regularly dismiss antitrust claims that depend upon reconstructing the choices of multiple independent decision-makers and the operation of independent market variables. *See Reading Indus., Inc. v. Kennecott Copper Corp.* (*Reading II*), 631 F.2d 10, 13 (2d Cir. 1980) (declining to "mire the courts in intricate efforts to recreate the possible permutations in the causes and effects of a price change"), *aff'g Reading I*, 477 F. Supp. 1150 (S.D.N.Y. 1979); *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 403 (S.D.N.Y. 2011) (denying antitrust standing because alleged injury in the compact disc market was too attenuated from alleged misconduct in the internet music market); *de Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510, 516 (S.D.N.Y. 1985) (dismissing antitrust claims where plaintiff's claims were too indirect and where other market variables could have intervened to affect pricing decisions); *Ocean View Capital, Inc. v. Sumitomo Corp. of Am.*, No. 98-cv-4067 (LAP), 1999 WL 1201701, at *3–4 (S.D.N.Y. Dec. 15, 1999) (recognizing that the plaintiff's "complaint alleges a causal connection between defendant's behavior and plaintiff's injury," but holding that plaintiff's "theory of liability is based on a tenuous causal chain of events").

The causal chain connecting Defendants' alleged manipulation of LIBOR and the Bondholder Plaintiffs' purported injury in the form of higher bond prices (or lower yields) contains at least six discrete links: (1) Defendants entered into an agreement to suppress LIBOR; (2) pursuant to the agreement, at least some panel banks made LIBOR submissions below what they otherwise would have been; (3) the altered submissions made pursuant to the agreement reduced the LIBOR rate, even though the LIBOR calculation is based on the trimmed mean of submissions made by member banks; (4) the suppression of LIBOR did <u>not</u> affect the price or terms of the bond;[17] (5) the suppression of LIBOR rates pursuant to the agreement continued through the dates of interest payment on the bond, thereby reducing such payments; and (6) all this happened at a time and tenor relevant to each bond purchase. The fourth step, in particular, is a "significant intervening causative factor[]," *Gross v. New Balance Athletic Shoe, Inc.*, 955 F. Supp. 242, 247 (S.D.N.Y. 1997), because it depends upon how issuers, sellers, and buyers would react to suppressed LIBOR. For example, rather than leave the terms of the bond unchanged, the issuer might decide to offset a lower anticipated LIBOR rate with a lower price or a higher fixed component to interest.[18] A similarly complex and attenuated chain of causation led Judge Daniels to deny antitrust standing on efficient enforcer grounds for a claim based on Yen LIBOR and Euroyen TIBOR. *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD), 2014 WL 1280464, at *9–10 (S.D.N.Y. Mar. 28, 2014) ("This attenuated causation between the alleged conspiracy and the asserted injury is too indirect to support antitrust standing."). Indeed, courts frequently deny antitrust standing in cases involving *much simpler* causal chains. *See, e.g.*, *Gross*, 955 F. Supp. at 247 (shoe pricing); *Garabet v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1169 (C.D. Cal. 2000) (laser eye surgery pricing).

*   *   *   *   *

The Bondholder Plaintiffs have failed to sufficiently allege a "causal link" between their alleged harm and Defendants' alleged misconduct for a separate, independent reason: they have

---

17 If there was an impact on the price or terms of the bond, then the Bondholder Plaintiffs would need to further show both that (a) the change in price or terms did not offset the effect of the alleged LIBOR suppression on the anticipated interest payments, and (b) the value of the bond did not improve over time based upon subsequent reductions (or complete cessation) in the amount of LIBOR suppression, thereby potentially *benefiting* the Plaintiff.

18 *See LIBOR IV*, 2015 WL 6243526, at *70 ("If LIBOR was . . . persistently suppressed when Schwab bought LIBOR-based bonds, then the bond's expected future interest payments would also have been suppressed (or, at the very least, not inflated). Because a bond's price is equal to the present value of its expected future interest and principal payments, the bond's purchase price would also necessarily have been suppressed.").

not alleged they transacted directly with Defendants. *See Gelboim*, 2016 WL 2956968, at *13–14. Instead, the Bondholder Plaintiffs purport to have standing to sue Defendants on the basis of "umbrella standing." Concerned about the prospect of this vastly expanded and disproportionate liability, the Second Circuit cited with approval those cases rejecting umbrella standing. Specifically, although the Second Circuit noted a possible circuit split on the viability of umbrella standing, it expressed particular discomfort that "this case may raise the very concern of damages disproportionate to wrongdoing" raised by the Third Circuit in *Mid-West Paper*. *Id.* (citing *In re Processed Egg Prods. Antitrust Litig.*, 312 F.R.D. 124, 144–145 (E.D. Pa. 2015) (dismissing umbrella claims)).[19] Indeed, "most federal courts in recent years have rejected [umbrella] claims." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2012 WL 6708866, at *6 (N.D. Cal. Dec. 26, 2012), *aff'd*, 637 F. App'x 981 (9th Cir. 2016).[20] This District is no exception. *See Gross*, 955 F. Supp. at 246 ("[T]he factors outlined by the Supreme Court in *AGC* weigh against finding that consumers who purchased from non-conspiring retailers have standing to assert an antitrust claim."). Accordingly, this Court should reject the Bondholder Plaintiffs' attempt to establish standing by means of "umbrella standing."

The Third Circuit's opinion in *Mid-West Paper*, upon which the Second Circuit relied in both *Gelboim* and *Reading II*, is instructive. In that case, the Third Circuit rejected the proffered umbrella theory for four principal reasons — each of which is fully applicable here.[21] *First*, the

---

19 *See also In re Folding Carton Antitrust Litig.*, 88 F.R.D. 211, 220 (N.D. Ill. 1980) ("[W]e are reluctant to impose liability on the defendants when they gained no illegal benefit at the expense of the plaintiffs, since the plaintiffs did not purchase from them.").

20 *Accord Allen v. Dairy Farmers of Am., Inc.*, No. 5:09-cv-230, 2014 WL 2610613, at *27 (D. Vt. June 11, 2014) (plaintiffs seeking umbrella damages "cite no court in the Second Circuit which has recognized this theory of recovery or explained how it advances the implementation of the antitrust laws"); *In re Vitamins Antitrust Litig.*, Misc. No. 99-197, 2001 WL 855463, at *4 (D.D.C. July 2, 2001) ("The overwhelming majority of recent court decisions that have addressed the viability of the 'umbrella' theory after *Associated General* have rejected 'umbrella' claims.").

21 Indeed, the Bondholder Plaintiffs have even weaker grounds for standing than a plaintiff asserting a traditional umbrella claim. In the classic umbrella situation, purchasers from a non-conspirator contend that "the alleged conspiracy raised the general price level in the market, and that non-conspirators sold their product under this umbrella at higher prices than would have prevailed absent the illegal activity." *Mid-West Paper*, 596 F.2d at 581 (internal quotation marks omitted). Customers of the non-conspiring firm then seek to assert a claim for umbrella damages against the conspirators. Had the non-conspiring firm failed to raise its prices, the conspiracy could have been undercut. Here, Bondholder Plaintiffs do not allege, nor could they, that the success of the alleged

Third Circuit pointed out that the defendants in *Mid-West Paper* "secured no illegal benefit at [the plaintiff's] expense." 596 F.2d at 583. Here, the Bondholder Plaintiffs do not allege that their debt instruments were issued by Defendants or that they purchased these instruments from Defendants. Therefore, Defendants did not benefit from any alleged overcharge to the Bondholder Plaintiffs. *Second*, the Third Circuit warned that liability "for higher prices that arguably ensued in the entire industry" would lead to "'overkill' recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition." *Id.* at 586–87. Here, antitrust liability to "every plaintiff who ended up on the wrong side" of a LIBOR-based transaction could "bankrupt 16 of the world's most important financial institutions [and] vastly extend the potential scope of antitrust liability in myriad markets where derivative instruments have proliferated." *Gelboim*, 2016 WL 2956968, at *14; *see also id.* at *2 (emphasizing the "many uses and advantages" of LIBOR). *Third*, the Third Circuit noted that "[t]he outcome of any attempt to ascertain what price the defendants' competitors would have charged had there not been a conspiracy would at the very least be highly conjectural." *Mid-West Paper*, 596 F.2d at 584. Here, the effect that a higher LIBOR rate might have had on the price or interest rates of the bonds purchased by the Bondholder Plaintiffs is also speculative; indeed, the Bondholder Plaintiffs do not even allege what effect, if any, LIBOR had on the price of their bonds. *Fourth*, the Third Circuit advised that "concentrating the entire award in the hands of" those who purchased directly from the defendants would sufficiently fulfill "the objectives of the treble damage action" without need for a "complex economic proceeding." *Id.* at 585. Here, any need for private antitrust enforcement is mitigated by the extensive governmental enforcement actions related to LIBOR, which amply fulfill the purposes of the antitrust laws.

conspiracy somehow depended upon getting General Electric and Israel to offer a lower LIBOR-based interest rate on their bonds.

In short, because the Bondholder Plaintiffs rely upon an impermissible umbrella theory of standing, they have not demonstrated they are efficient enforcers of the antitrust laws.[22]

2. More Direct Victims

The Bondholder Plaintiffs did not trade with Defendants, and therefore, by definition, are not "direct victims." Indeed, in *Gelboim*, the Second Circuit discerned that Plaintiffs in this litigation comprise both "direct customers of [] the Banks" as well as "remote victims," and expressly identified the Bondholder Plaintiffs as "remote victims" because they "purchased their bonds from other sources." 2016 WL 2956968, at *14. The Second Circuit added that "not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced." *Id.* Following *Gelboim*, one of the OTC Plaintiffs has candidly questioned the antitrust standing of the Bondholder Plaintiffs in a letter to this Court. *See* Letter from Patrick J. Coughlin ("SEIU Letter"), MDL ECF No. 1436, at 1–2 (S.D.N.Y. June 3, 2016) ("[T]he Second Circuit expressed doubt as to the claims of . . . the *Gelboim* plaintiffs, as their injuries appear to be too remote" (internal quotation marks omitted)).

Indeed, courts have routinely affirmed that a lack of direct dealings between claimants and defendants makes the claimants "too remotely connected to the causal chain from wrongdoing" to be efficient enforcers. *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 441 (3d Cir. 2000); *see also Gross*, 955 F. Supp. at 246–47. For example, in *Garabet*, the court dismissed claims brought by plaintiffs that did not transact directly with defendants precisely because "Plaintiffs have sued sellers from whom they have never made purchases" and thus "any injury they have suffered is only indirect, due to the necessary intervening actions [of others]." 116 F. Supp. 2d at 1169. Similarly, in *Sumitomo*, the court emphasized that "[h]arm from general price increases" in situations where plaintiff did not transact with any defendant "is

[22] *See Gross*, 955 F. Supp. at 246–47 ("Plaintiffs' alleged injury was suffered, if at all, only indirectly as a result of a general price increase which in turn resulted from the direct effects of the conspiracy; the causal connection between the alleged injury and the conspiracy is attenuated by significant intervening causative factors (*i.e.*, independent pricing decisions of non-conspiring retailers)."); *Reading I*, 477 F. Supp. at 1161 ("[I]f Reading has standing to sue, every other individual or firm who purchased copper during the period 1964–1970 at prices artificially elevated as a consequence of the alleged price-fixing conspiracy must have standing as well.").

not actionable." 1999 WL 1201701, at *7. Because the Bondholder Plaintiffs are at most "remote victims" who "purchased their bonds from other sources," *Gelboim*, 2016 WL 2956968, at *14, they are not efficient enforcers.

3. Speculative Damages

The Bondholder Plaintiffs cannot meet their burden of showing they are efficient enforcers because their alleged damages are speculative and would not be susceptible to "'a just and reasonable estimate' . . . even with the aid of expert testimony." *Id.* at *14 (quoting *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1378 (2d Cir. 1988)). As the Second Circuit recognized in *Gelboim*, "this case presents some unusual challenges" in determining damages because, among other reasons, "[t]he disputed transactions were done at rates that were negotiated, notwithstanding that the negotiated component was the increment above LIBOR," and because "the market for money is worldwide, with competitors offering various increments above LIBOR, or rates pegged to other benchmarks, or rates set without reference to any benchmark at all." *Id.* at *15. "[H]ighly speculative damages," the Court added, are "a sign that a given plaintiff is an *inefficient* engine of enforcement." *Id.* at *14 (emphasis added).

The Second Circuit's concerns are well founded. As Judge Daniels explained in the analogous context of Yen LIBOR and Euroyen TIBOR, any analysis of damages would require the Court to first "reconstruct[] hypothetical 'but-for' . . . [LIBOR] benchmark rates during the period Plaintiff held his positions" and then "hypothesize the impact of these 'but-for' benchmark rates on the perceptions of the market participants whose activities would have influenced the prices of [the relevant instruments]." *Laydon*, 2014 WL 1280464, at *10. Each leg is highly speculative. *First*, reconstructing but-for LIBOR, particularly during and in the wake of the unprecedented financial crisis, is necessarily guesswork — which would have to be repeated for each of 16 panel banks across 15 maturities, for a total of 240 quotes per business day. *See LIBOR IV*, 2015 WL 6243526, at *46 ("Each submission by a panel bank is the sum of several factors, including the risk-free rate, the creditworthiness of banks in general, the creditworthiness of the panel bank relative to other banks, some error based on sincere uncertainty about the panel bank's own borrowing costs, and, presumably, manipulation."). *Second*, determining the impact of but-for LIBOR on the economics of a bond would require speculation concerning the but-for terms of the bond. The terms of the bond — including its price and/or fixed spread — would likely change based upon but-for LIBOR because the transacting parties would consider, among other things, the anticipated return on the bond and the relative advantages of myriad alternative investments, some of which might feature rates "pegged to other benchmarks, or rates set without reference to any benchmark at all." *Gelboim*, 2016 WL 2956968, at *15; *cf. id.* ("The transactions that are the subject of investigation and suit are countless and the ramified consequences are beyond conception."). And as this Court has noted, in the actual world, bond issuers may have decided to offset the lower expected LIBOR rate with either a lower price or a higher fixed component to interest. *Cf. LIBOR IV*, 2015 WL 6243526, at *70 ("If LIBOR was . . . persistently suppressed when Schwab bought LIBOR-based bonds, then . . . the bond's purchase price would also necessarily have been suppressed.").

Furthermore, even if the Court could reconstruct but-for LIBOR on every relevant day and hypothesize its impact on the instruments held by the Bondholder Plaintiffs, the Court would still need to determine whether (and to what degree) each Bondholder Plaintiff suffered a net injury across all its LIBOR-related transactions — regardless of whether the underlying financial instrument was a bond, an interest rate swap, a Eurodollar futures contract, or something else. "[C]onsumers were free to take various positions in the market, including long and short," *Laydon*, 2014 WL 1280464, at *9, and the Bondholder Plaintiffs may not receive damages on bond purchases that suffered from suppressed LIBOR while also retaining a windfall from transactions (on any financial instrument) that profited from suppressed LIBOR. *See Minpeco, S.A. v. Conticommodity Servs., Inc.*, 676 F. Supp. 486, 489 (S.D.N.Y. 1987) ("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))). Determining net loss would require the Court to speculate how but-for LIBOR impacted each of the Bondholder Plaintiffs' LIBOR-related transactions across the nearly three-year Class Period.

To illustrate the speculative nature of the damages analysis, consider one of the countless bonds potentially at issue — the bond allegedly purchased by Linda Zacher, one of the named Bondholder Plaintiffs. Zacher's bond was allegedly issued by the State of Israel on June 15, 2008, with a five-year maturity, paying interest semi-annually based upon 6-month LIBOR minus a fixed spread of 30 basis points. Bondholder Prop. Compl. ¶ 8. Zacher does not say when she purchased her bond or from whom she purchased it, but one can assume, for purposes of this exercise, that she purchased directly from the issuer (and certainly not from one of the Defendants) on June 15, 2008.

As noted above, reconstructing but-for LIBOR would be speculative at best. But suppose that first hurdle were cleared, and it was somehow determined that 6-month LIBOR should have been 5 basis points higher on every day throughout the Class Period of August 2007 to May 2010. There are almost infinite permutations on how the Zacher bond transaction might change in that but-for world. Because at the time of the bond's issuance in June 2008, the LIBOR rate would have been 5 basis points higher for nearly a year, market participants would likely expect higher LIBOR to continue in the future. With that expectation in mind, Israel might have simply adjusted the fixed spread on its bond from minus 30 basis points to minus 35 basis points; in this scenario, Zacher would have paid the same price for the bond and received the same returns during the period of alleged suppression. Or Israel might have left the spread unchanged, but expected that purchasers pay more for the expected higher return on the bond; in this scenario, Zacher would have paid more for the bond but also received greater returns during the period of alleged suppression.[23] It would be pure guesswork to try to state which scenario (or perhaps some different scenario) would actually occur.

[23] How long Zacher held the bond — which is not stated in the complaint — would introduce yet more uncertainty into the assessment of damages. If Zacher held her bond past May 2010, the end of the alleged suppression period, or if the alleged suppression on her bond decreased over time during the alleged suppression period (which is what occurred based on Plaintiffs' allegations, *see* Bondholder Compl. ¶ 107), then the "normalization" of LIBOR would cause the payments on her bond (and hence its overall value) to rise thereafter;

Here, as in *Reading II*, "to find antitrust damages . . . would engage the court in hopeless speculation concerning the relative effect of an alleged conspiracy in [the setting of LIBOR] on the price of [financial instruments], where countless other market variables could have intervened to affect those pricing decisions." 631 F.2d at 13–14. Claims requiring such "intricate efforts to recreate the possible permutations in the causes and effects of a price change," *id.* at 14, are not contemplated by the antitrust laws, and the Bondholder Plaintiffs have not demonstrated standing to assert them.

4. Duplicative Recoveries / Complex Apportionment

The Bondholder Plaintiffs are not efficient enforcers because their claims, if permitted to proceed, would necessarily be cumulative to the claims of other similarly situated, remote claimants. Moreover, the Bondholder Plaintiffs' claims are cumulative to the work conducted by government and regulatory agencies worldwide. This is precisely the type of "duplicative" recovery that the Second Circuit cautioned against in *Gelboim*, where it noted that allowing private LIBOR antitrust suits to proceed could lead to duplicative recoveries and complex damage apportionment with the domestic and international governmental investigations focusing on the same conduct. 2016 WL 2956968, at *15. The Court noted that these regulatory and governmental initiatives may implicate a variety of remedies, including "fines, injunctions, disgorgement, and other remedies known to United States courts and foreign jurisdictions," including "damages on behalf of victims [and] apportionment among them." *Id.* The Second Circuit emphasized that "[t]here are many other enforcement mechanisms at work here," *id.* at *13, and explained that scrutiny "by government organs, bank regulators and financial regulators

---

this increase would be a *windfall* to the extent the actual pricing of the bond, which was allegedly purchased during the period of suppression, assumed LIBOR would remain suppressed. *See LIBOR IV*, 2015 WL 6243526, at *70. The Court would have to somehow determine both the extent of the windfall and its net effect on Zacher's investment in the bond. Or, to take another example, if Zacher sold her bond on the secondary market before May 2010, the end of the alleged suppression period, then the Court would have to again determine (speculatively) the but-for LIBOR, the but-for sale price, and finally Zacher's manipulation-related loss on the sale — which, assuming persistent suppression, may well be a wash. *Cf. LIBOR I*, 935 F. Supp. 2d at 717 (In the CEA context, "[a] plaintiff who purchased at an inflated price might have sold his instrument before the false information had been corrected, thus not suffering a loss at all, or might have sold it at a loss but where the loss was caused by something other than the defendant's misrepresentation."). Moreover, this all presumes Zacher did not hold any other instruments from which she would have benefitted from a suppressed LIBOR, thus offsetting her losses on the bond.

in a considerable number of countries" casts doubt upon "the need for appellants as instruments for vindicating the Sherman Act." *Id.*

That doubt is well warranted here, where Defendants have faced intense scrutiny[24] by numerous federal and state regulators — including the Antitrust and Fraud Divisions of the Department of Justice ("DOJ"), the Securities and Exchange Commission, the Commodity Futures Trading Commission, the New York State Department of Financial Services, and the attorneys general of numerous states. Some of these regulators still have open investigations into the alleged manipulation of USD LIBOR, and prosecutors in both the United States and the United Kingdom have brought criminal proceedings against numerous individuals, further deterring any anticompetitive conduct.[25] The Appendix to this Memorandum lists the publicly resolved government investigations into the alleged manipulation of USD LIBOR that have resulted in settlements to date.[26] As reflected in that chart, U.S.-based regulators have recovered over $5.1 billion in criminal and civil penalties related to USD LIBOR (in some cases in

[24] Just two months ago, the CFTC's Director of Enforcement announced a settlement order related to (among other things) USD LIBOR and reiterated that "[t]he CFTC remains steadfast in its commitment to ensure the integrity of global benchmarks that are critical to the U.S. and international financial markets." U.S. Commodity Futures Trading Commission, *CFTC Orders Citibank, N.A. and Japanese Affiliates to Pay $175 Million Penalty for Attempted Manipulation of Yen LIBOR and Euroyen TIBOR, and False Reporting of Euroyen TIBOR and U.S. Dollar LIBOR*, May 25, 2016, *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7372-16 (last visited July 3, 2016).

[25] In June 2016, the DOJ announced the indictment of two former traders "for their alleged roles in a scheme to manipulate [USD LIBOR]." U.S. Department of Justice, *Two Former Deutsche Bank Employees Indicted on Fraud Charges in Connection with Long-Running Manipulation of Libor*, June 2, 2016, *available at* https://www.justice.gov/opa/pr/two-former-deutsche-bank-employees-indicted-fraud-charges-connection-long-running (last visited July 3, 2016). In the same press release, the DOJ noted that it had "charged 13 individuals as a result of [the] investigation" into manipulation of various benchmark interest rates, including USD LIBOR. *Id.*; *see also* U.K. Serious Fraud Office, *LIBOR US Dollar (Barclays)*, *available at* https://www.sfo.gov.uk/cases/libor-barclays/ (last visited July 3, 2016) (noting with regard to Barclays employees that "[s]ix individuals have been charged by the Serious Fraud Office with conspiracy to defraud in connection with an investigation into the manipulation of US Dollar LIBOR").

[26] Because the Appendix lists only investigations that have resulted in settlements or fines, it is not intended to be exhaustive as to either the regulators conducting investigations or the Defendants under investigation. The OTC Plaintiffs, for example, have trumpeted the scale of the global regulatory scrutiny, alleging that "[i]nvestigations regarding LIBOR are ongoing in the United States, Switzerland, Japan, United Kingdom, Canada, the European Union, and Singapore by ten different governmental agencies, including the DOJ, the SEC, the FSA, and the CFTC." OTC Prop. Compl. ¶ 7.

conjunction with other currencies or benchmarks),[27] and secured extensive remedial undertakings and corporate compliance programs to ensure the integrity of USD LIBOR submissions, among other non-monetary penalties. Foreign regulators, including the U.K. Financial Conduct Authority and the Dutch Public Prosecutor, have also investigated conduct relating to USD LIBOR and recovered civil and criminal penalties totaling about £744 million and €70 million, respectively.[28] In the aggregate, domestic and foreign regulators have recovered more than $6 billion at today's exchange rates in those proceedings.

"Congress intended only that [private antitrust suits] be used as a weapon to *enforce the antitrust laws*," *Mid-West Paper*, 596 F.2d at 587 (emphasis added), but the need for such "private attorneys general" is substantially diminished where multiple governments have *already* enforced the antitrust laws and taken steps to penalize the alleged wrongdoing, enact remedies, and collect fines. Allowing the Bondholder Plaintiffs' indirect and speculative private antitrust claims to proceed in parallel with the many domestic and foreign government initiatives — not to mention the non-antitrust state and federal claims that this Court has permitted to proceed in other cases — would create the danger of "damages disproportionate to wrongdoing," *Gelboim*, 2016 WL 2956968, at *14, and "'overkill' recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition," *Mid-West Paper*, 596 F.2d at 587. This is particularly so because the "fear of treble damages and judicial second-guessing would discourage the establishment of useful industry standards," *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 297 (5th Cir. 1988), such as LIBOR, the setting of which is voluntary by the panel banks and indisputably efficiency-enhancing for the market. *Cf. Gelboim*, 2016 WL 2956968, at *2 (emphasizing the "many uses and advantages" of

---

[27] Every investigation in the Appendix includes USD LIBOR. Some regulators investigated or settled charges relating to USD LIBOR in conjunction with other currencies or benchmarks; these entries are identified with appropriate annotations.

[28] As this Court has recognized, none of the regulatory investigations, domestic or foreign, has identified evidence of "*any* conspiracy to persistently suppress LIBOR during the financial crisis." *LIBOR IV*, 2015 WL 6243526, at *43.

LIBOR); *LIBOR I*, 935 F. Supp. 2d at 739 (suits brought by "'private attorneys general' . . . must be examined closely to ensure that the plaintiffs who are suing are the ones properly entitled to recover and that the suit is, in fact, serving the public purposes of the laws being invoked"). Because the Bondholder Plaintiffs' claims are cumulative, they have not demonstrated they are efficient enforcers of the antitrust laws.

B. Exchange-Based Plaintiffs

The Exchange-Based Plaintiffs have similarly failed to plead they are efficient enforcers for at least four reasons.[29] *First*, the Exchange-Based Plaintiffs have not alleged that they transacted with any Defendants. Therefore, as with the Bondholder Plaintiffs, the Exchange-Based Plaintiffs do not allege that any Defendants "secured [an] illegal benefit at [Plaintiffs'] expense." *Mid-West Paper*, 596 F.2d at 583. *Second*, the Exchange-Based Plaintiffs' theory of damages risks imposing vast and disproportionate liability. As the Exchange-Based Plaintiffs note, the market for Eurodollar futures is "enormous," with hundreds of millions of contracts being exchanged in a single year, involving notional values in the hundreds of trillions of dollars. Exchange Compl. ¶ 342 (total trading volume on the CME in 2012 was 425 million contracts, involving a notional value of $425 trillion). Defendants certainly do not control the proliferation of such products, and are not alleged to have been on the "other side" of the named Exchange-Based Plaintiffs' transactions. Therefore, granting the Exchange-Based Plaintiffs antitrust standing subjects Defendants to potentially vast exposure to liability for transactions from which

[29] To the extent that Exchange-Based Plaintiffs seek to assert an antitrust claim premised on *trader-based manipulation* (as opposed to *persistent suppression*), that antitrust claim should be dismissed for all the reasons set forth below in connection with their antitrust claim premised on persistent suppression. If anything, the Exchange-Based Plaintiffs' claim to standing is even weaker in the context of trader-based manipulation, which as this Court has noted, was "episodic and varying in direction." *See In re LIBOR-Based Fin. Instruments Antitrust Litig.* (*LIBOR II*), 962 F. Supp. 2d 606, 620 (S.D.N.Y. 2013); *see also LIBOR IV*, 2015 WL 6243526, at *40 n.72 (noting that trader-based manipulation, which "tended to shade LIBOR by fractions of basis points," "cut in [plaintiffs'] favor as often as it cut against them," and "caus[ed] less injury [and] is more difficult to plead"). In addition, because of the opportunistic, up-and-down nature of alleged trader-based manipulation, any damages suffered by Exchange-Based Plaintiffs would be highly speculative, requiring, among other things, the Court to reconstruct but-for LIBOR and its impact on the trading price of each Exchange-Based Plaintiff's futures contracts on a day-by-day basis. As this Court has noted, "claims based on contracts purchased prior to August 2007 will face even greater challenges with regard to loss causation than plaintiffs' other claims face." *See LIBOR I*, 935 F. Supp. 2d at 709. Of course, nothing in *Gelboim* changes this analysis.

Defendants received nothing. Such over-deterrence and over-punishment could undermine the efficiency of financial markets, as no rational financial institution would participate in creating or maintaining a (socially useful) financial benchmark at the risk of ruinous exposure on transactions over which it has no control and receives no benefit. *Third*, futures transactions are essentially a zero-sum game among the participants. Moving LIBOR up or down will create winners and losers among the participants. But granting antitrust standing — and potentially treble damages — to the party that lost due to alleged LIBOR suppression inherently ignores its counterparty that equally benefitted from LIBOR suppression. Indeed, given the nature of the Eurodollar futures market, the very same person that lost money due to alleged LIBOR suppression on one day may have benefited from alleged LIBOR suppression the next. *Fourth*, precluding the Exchange-Based Plaintiffs' claims would neither weaken antitrust enforcement, given the extensive government enforcement actions, nor leave the Exchange-Based Plaintiffs without a remedy, given the possibility of recovery under their disputed Commodity Exchange Act ("CEA") claims.

1. Causation

Because the Exchange-Based Plaintiffs do not allege any transactions with Defendants, they — like the Bondholder Plaintiffs — necessarily rely upon an umbrella theory of standing and seek the same "disproportionate" damages that have the potential to "vastly extend the . . . scope of antitrust liability." *Gelboim*, 2016 WL 2956968, at *14. Specifically, the Exchange-Based Plaintiffs claim that alleged suppression of LIBOR increased the prices of the Eurodollar futures and options traded on impersonal exchanges by this proposed class. *See id.* at *4. As discussed *supra* Section I.A.1, the *Gelboim* Court refused to endorse umbrella standing, and the theory is overwhelmingly disfavored by other courts. Even if umbrella standing were legally viable, application of the doctrine here would create immense risks of over-deterrence, vastly disproportionate liability, and undue speculation and complexity. *See Sumitomo*, 1999 WL 1201701, at *7 ("Harm from general price increases" in situations where plaintiff did not transact with any defendant "is not actionable.").

Furthermore, the causal chain "linking [the Exchange-Based Plaintiffs'] asserted injury and the Banks' alleged price-fixing," *Gelboim*, 2016 WL 2956968, at *13, is at least as attenuated as the causal chain alleged by the Bondholder Plaintiffs. *See supra* Section I.A.1. Like the price and terms of a LIBOR-indexed bond, the transaction price of a Eurodollar futures contract is based on expectations of LIBOR at the time of the (future) settlement, not LIBOR at the time of the purchase. Accordingly, as Judge Daniels explained in dismissing antitrust claims based upon Euroyen TIBOR futures, any injury is "dependent upon perception of what the [LIBOR] rate would be in the future." *Laydon*, 2014 WL 1280464, at *9; *see also* Exchange Prop. Compl. ¶ 616. For these reasons, the "attenuated causation between the alleged conspiracy and the asserted injury is too indirect to support antitrust standing." *Laydon*, 2014 WL 1280464, at *9.

2. More Direct Victims

The Exchange-Based Plaintiffs do not allege that they transacted with Defendants and therefore, like the Bondholders Plaintiffs, the Exchange-Based Plaintiffs are too "remote" to have standing. *See supra* Section I.A.2. Accordingly, the directness factor weighs against the Exchange-Based Plaintiffs being efficient enforcers of the antitrust laws.

3. Speculative Damages

As with the Bondholder Plaintiffs, the damages claimed by the Exchange-Based Plaintiffs are uncertain and complex. In order to assess the claimed damages, this Court would need to (1) reconstruct but-for LIBOR on each day of the nearly three-year Class Period, (2) determine the impact of but-for LIBOR on the trading price of each Exchange-Based Plaintiff's futures contracts, (3) determine whether changes in alleged LIBOR suppression changed the value of each futures contract (potentially to the Exchange-Based Plaintiff's benefit), and (4) determine whether each Exchange-Based Plaintiff suffered a net injury across all its LIBOR-related transactions — whether Exchange-Based or not — during the Class Period. *See supra* Section I.A.3. Critically, step (2) requires an assessment of how but-for LIBOR would have changed the perception of market participants regarding LIBOR *in the future*, which would require the Court to predict both the immediate reaction of the financial markets generally and the change to investor expectations regarding the future direction of interest rates and liquidity premiums. As the court noted in *Laydon*, such an analysis involves a vastly complicated series of market interactions. 2014 WL 1280464, at *9. In addition, as is often the case, Exchange-Based Plaintiffs likely used Eurodollar futures as part of a hedging or other LIBOR-offset strategy. Therefore, step (3) requires that any damages allegedly suffered in the futures market be offset by gains individual plaintiffs realized elsewhere. *See Minpeco*, 676 F. Supp. at 490 (plaintiff's "claimed damages on its silver futures positions must be offset by the measure of the increase in value which accrued to its own physical silver holdings"). Such an analysis would necessitate excessively "complicated proceedings involving massive evidence and complicated theories." *AGC*, 459 U.S. at 544. Given these complexities, "it is difficult to see how appellants would arrive at [a just and reasonable estimate of damages], even with the aid of expert testimony." *Gelboim*, 2016 WL 2956968, at *14; *see also Laydon*, 2014 WL 1280464, at *10 ("Where the 'theory of antitrust injury depends upon a complicated series of market interactions,' the damages are speculative." (citing *Reading II*, 631 F.2d at 13)).

4. Duplicative Recoveries / Complex Apportionment

As with the Bondholder Plaintiffs, *see supra* Section I.A.4, the antitrust claims of the Exchange-Based Plaintiffs are duplicative of the work of regulators worldwide and raise the specter of "damages disproportionate to wrongdoing," *Gelboim*, 2016 WL 2956968, at *14.

Furthermore, the antitrust claims of the Exchange-Based Plaintiffs would be cumulative to, and require complex apportionment with, the CEA claims that this Court has permitted to proceed. *See LIBOR I*, 935 F. Supp. 2d at 695–724. Courts have not hesitated to deny antitrust standing where, as here, plaintiffs may recover for the same injury under other state or federal theories. *See, e.g.*, *Or. Laborers-Emp'rs Health & Welfare Tr. Fund v. Philip Morris Inc.*, 185 F.3d 957, 966 (9th Cir. 1999) ("Although the smokers cannot recover under either RICO or the antitrust laws, they can seek recovery under other state law theories for personal injury and the associated medical costs — the same damages that plaintiffs seek to recover."); *Serv. Emps. Int'l*

Union Health & Welfare Fund v. Philip Morris Inc., 249 F.3d 1068, 1075 (D.C. Cir. 2001) ("[B]ecause individual smokers may seek recoveries for the same alleged conduct under state law theories and because employers, other health insurers, and other similar potential plaintiffs might also pursue similar antitrust and RICO claims against the tobacco industry, double recovery could occur."). Even if the law provided certain protections against double recovery,[30] that would not "cure the ultimate problem — that the court[] would be forced to adopt complicated rules apportioning damages among plaintiffs at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Or. Laborers*, 185 F.3d at 966 (internal quotation marks omitted). Because the Exchange-Based Plaintiffs have pending CEA claims against the same Defendants for the same alleged conduct and the same purported injuries, they are particularly inefficient enforcers of the antitrust laws.

C. OTC Plaintiffs

The allegations of the OTC Plaintiffs are similarly deficient, failing to show how their asserted claims are anything but attenuated and speculative. The OTC Plaintiffs claim they were injured on myriad financial instruments, but do not explain how LIBOR affects the pricing of each of those instruments, much less how the purported suppression of LIBOR caused them injury. The financial instruments actually held by the named OTC Plaintiffs — swaps and bonds — incorporate many contractual terms. The OTC Plaintiffs' complaint does not allege how any particular term might have changed based upon a change in LIBOR, and such an exercise would require both conjecture and speculation. In addition to these insurmountable hurdles on causation and damages, the OTC Plaintiffs present an especially high risk of duplicative recovery and complex apportionment because they have pending state law claims, which present different theories of damages and afford the OTC Plaintiffs a full opportunity to present their case and

[30] Any such protection is potentially limited, as the D.C. Circuit has noted. *Serv. Emps. Int'l*, 249 F.3d at 1075 ("The district court's contrary view [on duplicative recovery] fails to take into account the collateral source rule, and the limits of the single satisfaction rule, which would not prevent multiple plaintiffs from obtaining duplicative recoveries from a single defendant for a single tort." (citations omitted)).

recover their losses, if any. For all these reasons, the OTC Plaintiffs have not satisfied their burden of showing they are efficient enforcers of the antitrust laws.

1. Causation

As an initial matter, the OTC Plaintiffs' allegations provide little information about the wide variety of derivative instruments — *e.g.*, asset swaps, collateralized debt obligations, credit default swaps, and more — they purport to include within their class definition. The OTC Plaintiffs do not specify which instruments incorporated LIBOR, what role LIBOR played in the pricing of these instruments, or explain how they are priced generally. This failure to plead even the most basic elements of causation confirms that it would be nearly impossible to determine whether, let alone how, the alleged suppression of LIBOR resulted in higher prices for these instruments. As the Second Circuit noted in *Gelboim*, the claims advanced by Plaintiffs here largely concern the worldwide market for money, where a variety of competitors "offer[] various increments above LIBOR, or rates pegged to other benchmarks, or rates set without reference to any benchmark at all." 2016 WL 2956968, at *15. Thus, even though these Plaintiffs purportedly transacted with certain Defendants,[31] they do not allege how the conduct of Defendants who controlled "only a small percentage of the ultimate identified market," *id.* at *14, impacted the worldwide market for money.

Moreover, the named OTC Plaintiffs do not allege that the specific OTC transactions they identify constitute their sole LIBOR-related transactions (OTC or otherwise) during the Class Period. This failure is stark because OTC transactions are often undertaken pursuant to both simple and complex hedging and offsetting activities — meaning that for the bulk of the OTC Plaintiffs' transactions, it is impossible to identify, let alone fully trace, the causation (and

[31] No OTC Plaintiff alleges that The Bank of Tokyo-Mitsubishi UFJ, Ltd., Coöperatieve Rabobank U.A. (f/k/a Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.), HSBC Holdings plc, HSBC Bank plc, Norinchukin Bank, Portigon AG (f/k/a WestLB AG), Société Générale, The Royal Bank of Scotland Group plc, or Westdeutsche ImmobilienBank AG was a counterparty to any LIBOR-related agreement, or that it otherwise had direct dealings with those entities. As to the British Bankers' Association, BBA Enterprises Ltd., BBA LIBOR Ltd., HBOS plc, Lloyds Banking Group plc, Lloyds Bank plc (f/k/a Lloyds TSB Bank plc), and Société Générale, the same is true of all Plaintiffs.

extent) of their alleged injuries or, importantly, any offsetting gains. *See In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, No. 09 MDL 2007-GW, 2009 WL 9502003, at *5 (C.D. Cal. July 6, 2009) (dismissing federal and state antitrust claims because "it is impossible to tell from the allegations of the Complaint" whether the *AGC* factors were met).

Even setting aside these deficiencies, it is clear from the instruments alleged by the named OTC Plaintiffs — swaps and bonds — that the causal chain linking alleged misconduct by Defendants to asserted injury to the OTC Plaintiffs is too attenuated to support liability. The lengthy causal chain for bonds is discussed *supra* Section I.A.1, and the causal chain for swaps is potentially even more attenuated because swap agreements are bespoke "privately negotiated" bilateral contracts."[32] *Elliott Assocs. v. Porsche Automobil Holding SE*, 759 F. Supp. 2d 469, 471 (S.D.N.Y. 2010) (internal quotation marks omitted), *aff'd sub nom. Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014).[33] Whereas the terms of a typical bond reflect the creditworthiness of the issuer, the pricing and terms of a swap are negotiated in order to reflect the credit risk of both counterparties, introducing even more variation in terms than a typical bond.[34] Accordingly, any injury to a swapholder plaintiff depends not only upon how the defendant counterparty would react to a changed market perception of LIBOR, but also upon how the plaintiff would have reacted — and how the parties would have reconciled their positions in negotiation. *Cf. Gelboim*, 2016 WL 2956968, at *15 (expressing concern because "the disputed transactions were done at rates that were negotiated, notwithstanding that the negotiated component was the increment above LIBOR"). Moreover, if the plaintiff used the interest rate swap in order to hedge another LIBOR-based obligation, *see*

---

32 SEIU and the named Bondholder Plaintiffs do not allege that they negotiated the terms of their bonds.

33 *Accord, e.g.*, Freddie Mac Compl. ¶ 207 ("The OTC market was an informal bilateral market . . . . Although a great deal of standardization exists in the OTC market, dealers active in this market custom-tailor agreements to meet the specific needs of their customers."); FDIC Compl. ¶ 422 (same).

34 *See, e.g.*, Roberta Romano, *A Thumbnail Sketch of Derivative Securities and their Regulation*, 55 MD. L. REV. 1, 51–53 (1996); OTC Compl. ¶ 342 ("A party transacting with a less creditworthy counterparty or at a time of systemwide financial stress that could affect its counterparty would demand better terms — for example, the ability to pay a lower fixed rate in an interest rate swap — to compensate for exposure to increased credit risk.); Freddie Mac Compl. ¶ 207 ("counterparties to OTC derivative agreements must bear some default or credit risk").

LIBOR IV, 2015 WL 6243526, at *12 n.21 ("It appears that BATA, like many municipal plaintiffs, traded LIBOR-based swaps as a hedge."), the causal chain would be stretched even thinner and any assessment would require additional information concerning the hedge.

2. More Direct Victims

In *Gelboim*, the Second Circuit counseled that in this case the directness factor — *i.e.*, whether the plaintiff is a "direct customer[]" of Defendants — "may have diminished weight." 2016 WL 2956968, at *14. If the weight attributed to this factor is diminished, then the other three efficient enforcer factors of causation, speculative damages, and duplicative recoveries and complex apportionment necessarily assume greater weight in the analysis. Because each of these factors counts against the OTC Plaintiffs, they have not demonstrated antitrust standing no matter how "direct" their alleged transactions may be.

As SEIU points out, the "Second Circuit was . . . particularly skeptical of the standing of plaintiffs with claims based upon 'rates that were negotiated' — *i.e.*, the OTC swap plaintiffs." SEIU Letter at 2 (quoting *Gelboim*, 2016 WL 2956968, at *15). The spread between the two legs of a swap reflects the parties' differing expectations regarding expected future movements in LIBOR. Thus, determining any damages resulting from a swap would require evaluation of the impact of but-for LIBOR on market perception of LIBOR in the future, speculation into each counterparty's negotiating ability, and prediction of the terms upon which the counterparties would agree to settle. Simply put, with a swap, the Court must determine, for each swap transaction, how two different counterparties would have acted in a but-for world and speculate upon the terms at which they would have transacted, if at all.

SEIU itself fares no better. In its June 3, 2016 letter to the Court, SEIU attempted to distinguish itself as a bondholder because *Gelboim* voiced concern about "[r]equiring the Banks to pay damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative *swap*." SEIU Letter at 2 (quoting *Gelboim*, 2016 WL 2956968, at *14) (emphasis added). Contrary to SEIU's intimation, however, the Second Circuit's reference to swaps was not a limiting principle but rather merely an example of how easily a plaintiff could "end up on the wrong side" of a LIBOR-based transaction. SEIU does not allege — and, given its "total assets of over $1.3 billion," OTC Prop. Compl. ¶ 18, could not plausibly allege — that throughout the Class Period it *never* engaged in any financial transaction in which it would have benefited from suppressed LIBOR. Moreover, SEIU faces the same problems of causation, speculative damages, and duplicative recovery as the Bondholder Plaintiffs, *see supra* Section I.A, as well as the problem of complex apportionment with pending non-antitrust OTC claims, discussed *infra* Section I.C.4. SEIU therefore lacks antitrust standing in equal measure to the OTC swapholders it appropriately criticizes.[35]

Finally, at least one of SEIU's bonds was purchased in the secondary market, which will require an even more attenuated causation analysis and increase the risk of speculative damages, complex apportionment, and duplicative recoveries. Publicly available offering documents reflect that the bond that SEIU alleges that it purchased from RBC Dain Rauscher LLC ("Dain Rauscher") on June 4, 2009 was issued on September 28, 2007, and that RBC sold the entire offering to an underwriter that was not Dain Rauscher.[36] Regardless of when and from whom

---

[35] Dismissing the claims of the OTC Plaintiffs would not leave the antitrust laws unenforced. *See Gelboim*, 2016 WL 2956968, at *14 ("[T]here are features of this case that make it like no other, and potentially bear upon whether the aims of the antitrust laws are most efficiently advanced by appellants through these suits. There are many other enforcement mechanisms at work here. In addition to the plaintiffs in the numerous lawsuits consolidated here, the Banks' conduct is under scrutiny by government organs, bank regulators and financial regulators in a considerable number of countries. This background context bears upon the need for appellants as instruments for vindicating the Sherman Act."). As discussed above, government entities around the world have vigorously investigated allegations of LIBOR misconduct, including under the antitrust laws. The overriding difficulty in this litigation is the proliferation of financial instruments influenced by LIBOR and the attendant ability of any investor to take any position at any time: Holdings may offset (*e.g.*, Eurodollar futures and interest rate swaps), net exposure may shift, and in the end, the winners and losers on a change in LIBOR at a given moment may be often a matter of chance. *See id.* Certainly no OTC Plaintiff has claimed a "direct and undivided economic interest," *Daniel*, 428 F.3d at 444, in having LIBOR be up, down, or at some artificiality-free level throughout the relevant period. By contrast, governments across the world *do* have a direct and undivided interest in the integrity of LIBOR — including the Financial Conduct Authority in the United Kingdom, which now regulates LIBOR — reinforcing the conclusion that "no public interest is sacrificed by dismissing this action." *Id.*

[36] *See* RBC, Pricing Supplement to the Prospectus dated January 5, 2007 and the Prospectus Supplement dated February 28, 2007 (Sept. 26, 2007), *available at* https://www.sec.gov/Archives/edgar/data/1000275/0001214659-07-002147.txt (last visited July 4, 2016); RBC, Free-writing Prospectus, $1,000,000,000 Floating Rate Notes Due 9/28/2010, *available at* https://www.sec.gov/Archives/edgar/data/1000275/000121465907002146/a92871fwp.htm (last retrieved July 4, 2016). The Court can consider these documents on a 12(b)(6) motion. *See, e.g.*, *In re UBS Auction Rate Sec. Litig.*, No. 08-cv-2967(LMM), 2010 WL 2541166 (S.D.N.Y. Jun. 10, 2010) (taking judicial notice of prospectus).

Dain Rauscher purchased the bonds, it would be complex to ascertain how the price that SEIU paid in June 2009 was affected by the alleged LIBOR suppression. *See* cases cited *supra* at p. 13 (*AGC* and progeny). In addition, because SEIU purchased bonds in the secondary market and has alleged nothing more than a parent-subsidiary relationship between RBC and Dain Rauscher, SEIU sits in the same position as any other indirect purchaser that courts routinely find are not efficient enforcers of the antitrust laws. *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 101 (E.D.N.Y. 2012) (to invoke ownership or control exception to indirect purchaser rule, plaintiff must show that defendant had "such control over the subsidiary that the defendant can be said to have 'set prices along the chain of distribution.'" (citations omitted)); *cf. LIBOR V*, 2015 WL 6696407, at *21 ("general allegations of corporate ownership" and control not sufficient to plausibly allege that subsidiary acted as agent of panel bank when entering into swaps).

3. Speculative Damages

The OTC Plaintiffs' failure to explain how any of their instruments were priced renders any damages analysis inherently speculative. SEIU's bonds share all the difficulties of the bonds alleged by the Bondholder Plaintiffs, *see supra* Section I.A.3, and as the Second Circuit suggested in *Gelboim*, transactions performed "at rates that were negotiated" — most prominently swaps — are even more challenging. 2016 WL 2956968, at *15. In order to calculate damages on an interest rate swap, this Court would need to (1) reconstruct but-for LIBOR, (2) determine the impact of but-for LIBOR on *both* legs of the swap — potentially across three time periods: before the alleged suppression, during the alleged suppression, and after the alleged suppression — which would require evaluation of the impact of but-for LIBOR on the market perception of LIBOR in the future, speculation into each counterparty's risk tolerance and negotiating ability, and prediction of the terms upon which the counterparties would agree to settle, and (3) determine whether each swapholder suffered a net injury across all its LIBOR-related transactions in the nearly three-year Class Period. Step (3) is especially important in the case of swaps because they are often used to hedge risk on other instruments, such as variable rate bonds issued by municipal plaintiffs and corporations. *See LIBOR IV*, 2015

WL 6243526, at *12 n.21. Such speculative damages strongly suggest that the OTC Plaintiffs are "an inefficient engine of enforcement." *Gelboim*, 2016 WL 2956968, at *14.[37]

4. Duplicative Recoveries / Complex Apportionment

Like the Exchange-Based Plaintiffs, the OTC Plaintiffs have pending non-antitrust claims against Defendants for the same alleged conduct and the same purported injuries as their antitrust claims. *See LIBOR II*, 962 F. Supp. 2d at 628–35. Accordingly, the OTC Plaintiffs' antitrust claims are cumulative to not only the enforcement efforts of regulators worldwide, but also of their own claims in this litigation. *See supra* Sections I.A.4 and I.B.4.

D. Individual Plaintiffs

1. Amabile

The Amabile Plaintiffs, who allege they traded in Eurodollar futures on a public exchange, are similarly situated to the Exchange-Based Plaintiffs. *See LIBOR IV*, 2015 WL 6243526, at *19; Amabile Compl. ¶ 35 and Ex. A. The Amabile Plaintiffs' allegations fail to satisfy the efficient enforcer factors for the reasons set forth in Section I.B, *supra*.

2. BATA, California Consolidated, Houston, Philadelphia, Darby, NCUA, and Salix

The BATA, California Consolidated, Houston, Philadelphia, Darby, NCUA, and Salix Plaintiffs allege that they purchased from the bank Defendants and third parties interest rate swaps, swaptions, and/or bonds indexed to LIBOR.[38] *See LIBOR IV*, 2015 WL 6243526, at *12–19 (identifying alleged transactions).[39] To the extent they allegedly purchased their instruments

---

[37] Indeed, this Court has already dismissed the claims of one OTC Plaintiff, Highlander Realty LLC ("Highlander"), because the complaint precluded any claim that alleged LIBOR manipulation affected Highlander's interest payments on a "synthetic fixed-rate loan." *See LIBOR V*, 2015 WL 6696407, at *23–24.

[38] The BATA, FDIC, Freddie Mac, and Principal Plaintiffs purport to bring antitrust claims against the British Bankers' Association, BBA Enterprises Ltd., or BBA LIBOR Ltd. (collectively, the "BBA Defendants"). No Plaintiff alleges, or could allege, that the BBA Defendants transacted in financial instruments tied to LIBOR or that any Plaintiff purchased any financial instruments linked to LIBOR from the BBA or its affiliates. Thus, Plaintiffs are particularly inefficient enforcers of the antitrust laws against the BBA Defendants.

[39] *See also* BATA Compl. ¶¶ 252–53; Cal. Consol. Compl. ¶¶ 402–506; Houston Compl. ¶¶ 386–94; Philadelphia Compl. ¶ 284 & Ex. A; Darby Compl. ¶ 268 & Ex. A; Salix Compl. ¶ 7 & Exs. A–B.

from Defendants, these plaintiffs are similarly situated to the OTC Plaintiffs.[40] *See supra* Section I.C. To the extent they allegedly purchased these instruments from third parties, these plaintiffs are similarly situated to the Bondholder Plaintiffs. *See supra* Section I.A. These plaintiffs are not efficient enforcers for at least the reasons provided in those respective sections.

Plaintiffs' complaints also suffer from fundamental pleading deficiencies that independently necessitate dismissal. For example, the California Consolidated Plaintiffs allege they purchased LIBOR-based notes, certificates of deposit, and securities "issued" by certain Defendants, *see, e.g.*, Cal. Consol. Compl. ¶¶ 402–03, 406–11, 414–21, 463–73, 503–04, but fail to (i) identify from whom they purchased, (ii) specify the relationship between these instruments and LIBOR, or (iii) explain how the instruments were priced. These pleading failures are fatal: "without additional, specific allegations" concerning the nature of the transactions, the court simply cannot "perform an *AGC* analysis." *In re Aluminum Warehousing Antitrust Litig.*, No. 13-md-2481 (KBF), 2014 WL 4277510, at *23–24 (S.D.N.Y. Aug. 29, 2014).

Moreover, certain plaintiffs allege purchases made through broker intermediaries, *see, e.g.*, Cal. Consol. Compl. ¶¶ 402–03, 406–11, but fail to "allege the factual particulars of [their] purchases," *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 34 F. Supp. 3d 465, 512 (D.N.J. 2014), or describe the degree of discretion the brokers exercised. In light of these deficiencies, the broker-based claims should be dismissed under the indirect purchaser rule of *Illinois Brick*.[41]

Lastly, several Plaintiffs allege speculative injuries that bear no connection to the alleged price-fixing conspiracy and thus that cannot give rise to antitrust standing. For example:

---

40 For example, several of these plaintiffs allege that they purchased LIBOR-based swaps and other instruments as part of a larger hedging strategy, *see, e.g.*, Salix Compl. ¶¶ 8–10, 275; Houston Compl. ¶ 31; *LIBOR IV*, 2015 WL 6243526, at *12 n.21 ("It appears that BATA, like many municipal plaintiffs, traded LIBOR-based swaps as a hedge."), thereby injecting the same complex issues of causation and netting of damages discussed *supra* Sections I.C.1 and I.C.3, which preclude antitrust standing here.

41 *See In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 506 (S.D.N.Y. 1996) (suggesting that "Plaintiffs who purchased or sold securities through a non-Defendant owned broker lack standing under *Illinois Brick*" where broker has "discretion concerning the price and terms of the purchase"); *see generally Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

- The California Consolidated and Houston Plaintiffs allege that, in making investment decisions, they conducted "comparative analyses between LIBOR-based" instruments and "fixed rate instruments" and that LIBOR suppression "compromised this analysis" by "making the LIBOR-based instruments appear more attractive." Cal. Consol. Compl. ¶ 108; Houston Compl. ¶ 93. But — even setting aside the indirect and attenuated nature of this theory of liability — neither group of Plaintiffs identifies a single transaction where any compromised comparative analysis caused them any losses.

- Houston vaguely alleges that it suffered losses on auction rate securities based on isolated manipulation that purportedly resulted in "inflated LIBOR." Houston Compl. ¶ 395. Not only is this alleged injury wholly disconnected from the suppression-based conspiracy upheld in *Gelboim*, but this Court has already found Houston's pleading inadequate. *See LIBOR IV*, 2015 WL 6243526, at *68.

- NCUA brings claims as liquidating agent for five failed credit unions, one of which — Constitution Corporate ("Constitution") — alleges only that it held "investments and other assets that paid interest streams pegged to LIBOR." NCUA Compl. ¶¶ 4, 226. This "vague pleading" fails to plead even Article III injury, and accordingly all claims on behalf of Constitution should be dismissed. *LIBOR IV*, 2015 WL 6243526, at *15 & n.26 (questioning whether NCUA's "vague pleading is sufficient to allege an injury on the part of Constitution").

- Salix seeks to recover for patently remote injuries, such as lost management fees, *see* Salix Compl. ¶¶ 290–94, which this Court has already held are "too far removed from LIBOR manipulation to support recovery."[42]

3. FDIC, Freddie Mac, Principal, and Prudential

The FDIC, Freddie Mac, Principal, and Prudential Plaintiffs[43] allege that they purchased from certain Defendants and third parties LIBOR-based asset-backed securities, including mortgage-backed securities, as well as loans, interest rate swaps, and bonds. *See LIBOR IV*,

[42] *LIBOR IV*, 2015 WL 6243526, at *64. Salix also alleges other indirect injuries, such as losses arising out of the need to post cash collateral under certain collateral support annexes triggered by losses on swaps, which in turn diverted liquidity and "led to forced sales" on other investments. *See* Salix Compl. ¶ 279. These injuries, too, are far too attenuated and speculative to support antitrust standing.

[43] The FDIC, Freddie Mac and Principal Plaintiffs purport to allege a "different" antitrust theory predicated on an "upstream market for interest-rate benchmarks." *See* Joint Mem. of Certain Direct Action Plaintiffs in Opposition to Defendants' Motion to Dismiss Direct Action Antitrust Claims Based on Prior Rulings, MDL ECF No. 883, at 1–3. The harm which those plaintiffs seek to remedy under the antitrust laws, however, is the same as *Gelboim*: They lost money on financial instruments tied to LIBOR. Accordingly, the efficient enforcer factors enumerated by the Second Circuit — causation, directness, speculative damages, and duplicative recovery/complex apportionment — apply with equal, if not greater, force to this supposed alternative theory.

2015 WL 6243526, at *13–16.[44] These defective allegations fare no better than those of other Individual Plaintiffs: Their complaints suffer from the same pleading deficiencies, including failure to adequately plead the relevant transactions and failure to specify how the various instruments were priced or the role USD LIBOR played in determining those prices.[45]

The FDIC, for example, alleges that certain closed banks were harmed by the alleged conspiracy because they made retail loans at depressed rates. *See* FDIC Compl. ¶¶ 429, 431–33. But the FDIC complaint provides no factual details regarding these supposed loan transactions and alleges no specific harm resulting from any of these loans, which were transactions with third parties — not Defendants. Moreover, the Principal Plaintiffs allege that they "purchased variable-rate bonds and asset backed securities" that were "underwritten and/or issued" by Defendants, *see, e.g.*, Principal Fin. Compl. ¶ 216 & Ex. A; Principal Fund Compl. ¶ 214 & Ex. A, but fail to allege from whom they purchased such instruments. Such basic facts concerning the transactions giving rise to Plaintiffs' purported claims are not only integral to the *AGC* analysis, but are clearly within Plaintiffs' possession.

Furthermore, with respect to asset-backed securities,[46] the FDIC, Freddie Mac, Principal, and Prudential Plaintiffs have not even plausibly alleged that they (rather than the underlying trust) are the proper parties to sue. *See LIBOR IV*, 2015 WL 6243526, at *84–85 ("[T]he *trust*

---

[44] *See also* FDIC Compl. ¶¶ 155–271, 400; Freddie Mac Compl. ¶¶ 185, 223–79; Principal Fin. Compl. ¶¶ 202–03, 216–17 & Ex. A; Principal Funds Compl. ¶¶ 200–01, 214–15 & Ex. A; Prudential Compl. ¶ 250 & Exs. A–B.

[45] *See, e.g.*, FDIC Compl. ¶¶ 2, 117 (making sporadic references to mortgage-backed securities, floating rate loans and other products, but wholly failing to explain how they were priced in relation to USD LIBOR); Principal Fin. Compl. ¶ 169 (alleging without elaboration that "Plaintiffs negotiated financial instruments . . . that incorporated USD LIBOR as a price term"); Prudential Compl. ¶¶ 53, 263-87 (vaguely describing instruments for which "Libor was used as a benchmark . . . to calculate floating interest rates," but failing to allege specifics on how they were priced). Freddie Mac attempts to explain in conclusory terms how swaps might be priced, *see* Freddie Mac Compl. ¶¶ 177, 210, but fails entirely to provide any factual particulars about the instruments Freddie Mac actually purchased or how those instruments were actually priced. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262 (NRB), 2016 WL 1301175, at *4 (S.D.N.Y. Mar. 31, 2016) (noting that Freddie Mac's deficient complaint contains "no description of any MBS transactions *whatsoever*" (emphasis in original)).

[46] "When an investor holds an asset-backed security, the investor . . . is entitled to certain disbursements as beneficiary of a trust" backed by "a collection of assets . . . such as a collection of homeowners' notes and mortgages." *LIBOR IV*, 2015 WL 6243526, at *84.

(rather than plaintiffs as beneficiaries) may be the proper party to maintain claims against the trust's counterparties."). All claims based upon asset-backed securities should be dismissed on that basis alone. But even assuming *arguendo* that these Plaintiffs may sue on asset-backed securities, their antitrust claims still fail because they are not efficient enforcers. Although they do not allege how their asset-backed securities were priced, it is clear that any chain of causation linking LIBOR suppression to injury on asset-backed securities would be broken by the intervening factors of numerous third parties, including "borrowers," "servicer[s]," "payment agent[s]," "issuer[s]," and potentially also "guarantor[s]," "underwriters," and "dealers," *LIBOR IV*, 2015 WL 6243526, at *84. Because the Court would have to examine the but-for decision-making of all of these actors, damages on asset-backed securities would be extraordinarily speculative. Accordingly, these Plaintiffs are especially inefficient enforcers to assert antitrust claims based upon transactions in asset-backed securities.[47]

In other relevant respects, the FDIC, Freddie Mac, Principal, and Prudential Plaintiffs are similarly situated to the OTC Plaintiffs to the extent they allegedly purchased their instruments from the bank Defendants.[48] *See supra* Section I.C. To the extent they allegedly purchased their instruments from third parties, these Plaintiffs are similarly situated to the Bondholder Plaintiffs. *See supra* Section I.C.

4. Schwab

The Schwab Plaintiffs allege that they purchased from certain Defendants and third parties various LIBOR-based floating or fixed-rate instruments, including certificates of deposit,

---

47 Allegations with respect to other instruments pose similar problems. Prudential, for example, alleges it purchased certain bonds during the alleged suppression period, and then held them past May 2010. *See* Prudential Compl. Ex. A. For the reasons explained *supra* note 23, because Prudential allegedly purchased those bonds at depressed prices and held them until after the period of suppression ended, it likely received a windfall with respect to those transactions. Moreover, with respect to swap transactions, certain Plaintiffs allege injuries that are so patently remote that they cannot possibly support antitrust standing. For example, Prudential (like Salix) alleges that "Libor suppression caused the collateral calls [pursuant to Credit Support Annexes] to be much, much higher than they would have been absent Defendants' wrongful conduct." Prudential Compl. ¶ 261 n.83. Such attenuated injuries cannot give rise to an antitrust claim for the same reasons discussed *supra* note 4247.

48 Notably, Freddie Mac concedes that it used derivative financial instruments to hedge. Freddie Mac Compl. ¶ 9; *see also supra* note 40.

corporate debt, mortgage-related instruments, fixed rate notes, and variable notes. *See LIBOR IV*, 2015 WL 6243526, at *7 n.12, *18.[49] These allegations are similarly deficient. Among other things, the Schwab complaints fail to provide sufficient details concerning the dates, circumstances and counterparties of their alleged transactions. *See, e.g.*, Schwab Bank Compl. ¶¶ 195–200; Schwab Bond Compl. ¶¶ 195–201. Further, the Schwab Plaintiffs vaguely allege that the "suppression of LIBOR allowed [Defendants] to pay unduly low interest rates to investors, including the Schwab funds," *see, e.g.*, Schwab Money Compl. ¶ 10, but do not specify the relationship between their instruments and LIBOR, or explain how their instruments were priced.[50] Accordingly, it is not possible to identify (let alone fully trace) the causation of Schwab Plaintiffs' alleged injuries or to measure their damages. *See In re Aftermarket Auto. Lighting*, 2009 WL 9502003, at *5.

Nevertheless, to the extent they allegedly purchased their instruments from Defendants, the Schwab Plaintiffs may be similarly situated to the OTC Plaintiffs. *See supra* Section I.C. To the extent they allegedly purchased their instruments from third parties, the Schwab Plaintiffs may be similar to the Bondholder Plaintiffs. *See supra* Section I.A.

II. THE STATE LAW ANTITRUST CLAIMS SHOULD ALSO BE DISMISSED

The state law antitrust claims asserted by certain Plaintiffs fail for the same reason as their federal antitrust claims. The antitrust laws of the five relevant states are guided by federal precedents.[51] Consistent with that principle, these states generally apply *AGC* to determine

---

[49] *See* Schwab Bank Compl. ¶¶ 10–12; Schwab Bond Compl. ¶¶ 10–12; Schwab Money Compl. ¶¶ 10–12.

[50] The Schwab Plaintiffs also allege injuries arising out of *fixed*-rate instruments they supposedly decided to purchase by comparing the fixed rate of return with LIBOR. *See* Schwab Bank Compl. ¶ 193; Schwab Bond Compl. ¶ 193; Schwab Money Compl. ¶ 197. But the Schwab Plaintiffs appear to concede (as they must) that LIBOR is not a price component of any fixed-rate instruments they purchased. Thus, any losses the Schwab Plaintiffs may have incurred by purchasing a fixed-rate instrument in reliance on LIBOR are far too attenuated to support antitrust standing. *See Laydon*, 2014 WL 1280464, at *9.

[51] **California**: *Knevelbaard Dairies*, 232 F.3d at 999 (cases interpreting the Sherman Act are an "aid in interpreting our own Cartwright Act"); **Illinois**: 740 ILL. COMP. STAT. 10/11 (when the Illinois Antitrust Act's wording "is identical or similar to that of a federal antitrust law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act"); **Kansas**: KAN. STAT. ANN. § 50-163(b) (Kansas restraint of trade act is "construed in harmony with ruling judicial interpretations of federal antitrust law by the United States supreme court"); **New York**: *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07-cv-9423 (LTS), 2009 WL 1457177, at *5 (S.D.N.Y. May 26, 2009) (Donnelly Act claims "should generally be

antitrust standing. **California**: *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000) (applying *AGC* factors); *Vinci v. Waste Mgmt., Inc.*, 43 Cal. Rptr. 2d 337, 338–39 (Ct. App. 1995) (same); **Illinois**: *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1066 (7th Cir. 1997) ("Federal antitrust standing rules apply under the Illinois Antitrust Act."); *United States ex rel. Blaum v. Triad Isotopes, Inc.*, 104 F. Supp. 3d 901, 930 (N.D. Ill. 2015) ("the Illinois Appellate Court has cited *AGC* approvingly, and the Seventh Circuit has stated affirmatively that federal antitrust standing rules apply" (internal citation omitted)); **Kansas**: *Orr v. BHR, Inc.*, 4 F. App'x 647, 651 (10th Cir. 2001) (Sherman Act standing cases "are persuasive in this undeveloped area of state law"); *Wrobel v. Avery Dennison Corp.*, No. 05-cv-1296, 2006 WL 7130617, at *3 (D. Kan. Feb. 1, 2006) (applying the "*AGC* standing test"); **New York**: *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 81 (2d Cir. 2013) ("We see no reason . . . to interpret the Donnelly Act differently than the Sherman Act with regard to antitrust standing."). Although **Texas** cases do not explicitly apply *AGC*, they track the *AGC* factors in describing the relevant standard. *See, e.g.*, *Sw. Bell Tel. Co. v. Superior Payphones, Ltd.*, No. 13-05-661-CV, 2006 WL 417423, at *7 n.4 (Tex. Ct. App. 2006) (standing requires both antitrust injury and "efficient enforcer"); *Marlin v. Robertson*, 307 S.W.3d 418, 424–25 (Tex. Ct. App. 2009) (applying factors comparable to *AGC*).

CONCLUSION

For the foregoing reasons, Plaintiffs' antitrust claims should be dismissed with prejudice.

---

construed in light of Sherman Act precedents"); **Texas**: TEX. BUS. & COM. CODE ANN. § 15.04 (Texas Free Enterprise and Antitrust Act is "construed in harmony with federal judicial interpretations of comparable federal antitrust statutes").

Dated: New York, New York
July 6, 2016

Respectfully submitted,

/s/_Arthur J. Burke
Arthur J. Burke
Paul S. Mishkin
Adam G. Mehes
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Fax: (212) 450-4800
arthur.burke@davispolk.com
paul.mishkin@davispolk.com
adam.mehes@davispolk.com

Attorneys for Defendants Banc of America Securities LLC (n/k/a Merrill Lynch, Pierce, Fenner & Smith, Inc.), Bank of America Corporation, Bank of America, N.A., Merrill Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Merrill Lynch Capital Services, Inc., and Merrill Lynch International Bank Ltd.

/s/_Daryl A. Libow
Daryl A. Libow
Christopher M. Viapiano
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W., Suite 700
Washington, D.C. 20006
Telephone: (202) 956-7500
Fax: (202) 956-6973
libowd@sullcrom.com
viapianoc@sullcrom.com

Attorneys for Defendant The Bank of Tokyo-Mitsubishi UFJ, Ltd.

/s/_David H. Braff
David H. Braff
Yvonne S. Quinn
Jeffrey T. Scott
Matthew J. Porpora
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
braffd@sullcrom.com
quinny@sullcrom.com
scottj@sullcrom.com
porporam@sullcrom.com

/s/_Jonathan D. Schiller
Jonathan D. Schiller
Leigh M. Nathanson
Amos Friedland
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-2300
jschiller@bsfllp.com
lnathanson@bsfllp.com
afriedland@bsfllp.com

Michael Brille
5301 Wisconsin Avenue NW
Washington, D.C. 20015
Telephone: (202) 237-2727
mbrille@bsfllp.com

Attorneys for Defendants Barclays PLC, Barclays Bank PLC, and Barclays Capital Inc.

/s/_Andrew A. Ruffino
Andrew A. Ruffino
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018
Telephone: (212) 841-1000
aruffino@cov.com

Alan M. Wiseman
Thomas A. Isaacson
Andrew D. Lazerow
Jonathan Gimblett
850 Tenth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 662-6000
awiseman@cov.com
tisaacson@cov.com
alazerow@cov.com
jgimblett@cov.com

/s/_Lev Dassin
Lev Dassin
Jonathan S. Kolodner
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2000
ldassin@cgsh.com
jkolodner@cgsh.com

Attorneys for Defendants Citibank, N.A., Citigroup Inc., Citigroup Financial Products, Inc., Citigroup Funding, Inc., Citigroup Global Markets Inc., Citigroup Global Markets Ltd., and Citi Swapco Inc.

/s/_David R. Gelfand
David R. Gelfand
Sean M. Murphy
Mark D. Villaverde
MILBANK TWEED HADLEY & McCLOY LLP
28 Liberty Street
New York, New York 10005
Telephone: (212) 530-5000
dgelfand@milbank.com
smurphy@milbank.com
mvillaverde@milbank.com

Attorneys for Defendant Coöperatieve Rabobank U.A. (f/k/a Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.)

/s/_Herbert S. Washer
Herbert S. Washer
Elai Katz
Joel Kurtzberg
Jason Hall
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
Telephone: (212) 701-3000
hwasher@cahill.com
ekatz@cahill.com
jkurtzberg@cahill.com
jhall@cahill.com

Attorneys for Defendant Credit Suisse Group AG, Credit Suisse International, Credit Suisse AG, Credit Suisse Securities (USA) LLC, and Credit Suisse (USA) Inc.

/s/_Moses Silverman
Moses Silverman
Andrew C. Finch
Hallie S. Goldblatt
Noam Lerer
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
Telephone: (212) 373-3000
Fax: (212) 757-3990
msilverman@paulweiss.com
afinch@paulweiss.com
hgoldblatt@paulweiss.com
nlerer@paulweiss.com

Attorneys for Defendants Deutsche Bank AG and Deutsche Bank Securities Inc.

/s/_Donald R. Littlefield
Donald R. Littlefield (*pro hac vice*)
Jack D. Ballard *(pro hac vice*)
Michael A. Rodriguez (*pro hac vice*)
BALLARD & LITTLEFIELD, LLP
3700 Buffalo Speedway, Suite 250
Houston, Texas 77098
Telephone: (713)403-6400
Fax: (713)-403-6410
dlittlefield@ballardlittlefield.com
jballard@ballardlittlefield.com
mrodriguez@ballardlittlefield.com

Attorneys for Defendants HSBC Holdings plc and HSBC Bank plc in City of Houston v. Bank of America Corp., et al., S.D.N.Y. Case No. 1:13-cv-05616

/s/_Ed DeYoung
Ed DeYoung
Gregory T. Casamento
LOCKE LORD LLP
3 World Financial Center
New York, New York 10281
Telephone: (212) 812-8325
Fax: (212) 812-8385
edeyoung@lockelord.com
gcasamento@lockelord.com

Roger B. Cowie
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
Telephone: (214) 740-8614
Fax: (214) 740-8800
rcowie@lockelord.com

J. Matthew Goodin
Julia C. Webb
111 South Wacker Drive, Suite 4100
Chicago, Illinois 60606
Telephone: (312) 443-0700
jmgoodin@lockelord.com
jwebb@lockelord.com

Attorneys for Defendants HSBC Holdings plc, HSBC Bank plc, The Hongkong and Shanghai Banking Corporation Ltd., HSBC USA, Inc., HSBC Finance Corporation, HSBC Securities (USA,) Inc., and HSBC Bank USA, N.A. (except in City of Houston v. Bank of America Corp., et al., S.D.N.Y. Case No. 1:13-cv-05616)

/s/_Thomas C. Rice
Thomas C. Rice
Paul C. Gluckow
Omari L. Mason
Alexander N. Li
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
Telephone: (212) 455-2000
Fax: (212) 455-2502
trice@stblaw.com
pgluckow@stblaw.com
omason@stblaw.com
zanderli@stblaw.com

Abram J. Ellis
900 G Street NW
Washington, D.C. 20001
Telephone: (202) 636-5500
Fax: (202) 636-5502
aellis@stblaw.com

Attorneys for Defendants JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC f/k/a J.P. Morgan Securities Inc., J.P. Morgan Markets Limited f/k/a Bear, Stearns International Limited, J.P. Morgan Dublin plc f/k/a JPMorgan Bank Dublin plc f/k/a Bear Stearns Bank plc, Chase Bank USA, N.A., and Bear Stearns Capital Markets, Inc.

/s/_Marc J. Gottridge
Marc J. Gottridge
Lisa J. Fried
Kevin T. Baumann
Benjamin A. Fleming
HOGAN LOVELLS US LLP
875 Third Avenue
New York, New York 10022
Telephone: (212) 918-3000
Fax: (212) 918-3100
marc.gottridge@hoganlovells.com
lisa.fried@hoganlovells.com
kevin.baumann@hoganlovells.com
benjamin.fleming@hoganlovells.com

Attorneys for Defendants Lloyds Banking Group plc, Lloyds Bank plc (f/k/a Lloyds TSB Bank plc) and HBOS plc

/s/_Alan M. Unger
Alan M. Unger
Andrew W. Stern
Nicholas P. Crowell
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
Telephone: (212) 839-5300
Fax: (212) 839-5599
aunger@sidley.com
astern@sidley.com
ncrowell@sidley.com

Attorneys for Defendant The Norinchukin Bank

/s/_Christopher M. Paparella
Christopher M. Paparella
Ethan E. Litwin
Marc A. Weinstein
Morgan J. Feder
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 837-6000
Fax: (212) 422-4726
Chris.Paparella@hugheshubbard.com
Ethan.Litwin@hugheshubbard.com
Marc.Weinstein@hugheshubbard.com
Morgan.Feder@hugheshubbard.com

Attorneys for Defendants Portigon AG (f/k/a WestLB AG) and Westdeutsche ImmobilienBank AG

/s/_Richard D. Owens
Richard D. Owens
Jeff G. Hammel
LATHAM & WATKINS LLP
885 Third Avenue
New York, New York 10022
Telephone: (212) 906-1200
richard.owens@lw.com
jeff.hammel@lw.com

Attorneys for Defendants British Bankers' Association, BBA Enterprises Ltd., and BBA LIBOR Ltd.

/s/_Arthur W. Hahn
Arthur W. Hahn
Christian T. Kemnitz
Brian J. Poronsky
KATTEN MUCHIN ROSENMAN LLP
525 West Monroe Street
Chicago, Illinois 60661
Telephone: (312) 902-5200
arthur.hahn@kattenlaw.com
christian.kemnitz@kattenlaw.com
brian.poronsky@kattenlaw.com

Attorneys for Defendant Royal Bank of Canada and RBC Capital Markets LLC

/s/_Fraser L. Hunter, Jr.
Fraser L. Hunter, Jr.
David S. Lesser
Jamie S. Dycus
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
New York, New York 10007
Telephone: (212) 230-8800
Fax: (212) 230-8888
fraser.hunter@wilmerhale.com
david.lesser@wilmerhale.com
jamie.dycus@wilmerhale.com

/s/_Steven Wolowitz
Steven Wolowitz
Henninger S. Bullock
Andrew J. Calica
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 506-2500
Fax: (212) 262-1910
swolowitz@mayerbrown.com
hbullock@mayerbrown.com
acalica@mayerbrown.com

Attorneys for Defendant Société Générale

/s/_Robert G. Houck
Robert G. Houck
CLIFFORD CHANCE US LLP
31 West 52nd Street
New York, New York 10019
Telephone: (212) 878-8000
Fax: (212) 878-8375
robert.houck@cliffordchance.com

Attorneys for Defendants The Royal Bank of Scotland Group plc, The Royal Bank of Scotland plc, and RBS Securities Inc. f/k/a Greenwich Capital Markets, Inc.[52]

[52] Wilmer Cutler Pickering Hale and Dorr LLP is counsel for these defendants except as to plaintiffs Prudential Investment Portfolios 2; Triaxx Prime CDO 2006-2 LTD; Triaxx Prime CDO 2007-1 LTD; Principal Funds, Inc.; Principal Capital Interest Only I, LLC; Principal Commercial Funding, LLC; Principal Commercial Funding II, LLC; Principal Financial Group, Inc.; Principal Financial Services, Inc.; Principal Life Insurance Company; Principal Real Estate Investors, LLC; Principal Variable Contracts Funds, Inc.; and Fannie Mae. Clifford Chance US LLP is counsel for these defendants except as to Plaintiff the Federal Home Loan Mortgage Corporation.

/s/_Peter Sullivan
Peter Sullivan
Lawrence J. Zweifach
Jefferson E. Bell
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166-0193
Telephone: (212) 351-4000
psullivan@gibsondunn.com
lzweifach@gibsondunn.com
jbell@gibsondunn.com

Joel S. Sanders (admitted pro hac vice)
555 Mission Street, Suite 3000
San Francisco, California 94105
jsanders@gibsondunn.com

Attorneys for Defendants UBS AG, UBS Securities LLC, and *UBS Limited.*