United States Court of Appeals
For the Second Circuit

August Term 2018

Argued: May 24, 2019
Decided: December 30, 2021

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

SCHWAB SHORT-TERM BOND MARKET FUND, SCHWAB TOTAL BOND MARKET FUND, SCHWAB U.S. DOLLAR LIQUID ASSETS FUND, SCHWAB MONEY MARKET FUND, SCHWAB VALUE ADVANTAGE MONEY FUND, SCHWAB RETIREMENT ADVANTAGE MONEY FUND, SCHWAB INVESTOR MONEY FUND, SCHWAB CASH RESERVES, SCHWAB ADVISOR CASH RESERVES, CHARLES SCHWAB BANK, N.A., CHARLES SCHWAB & CO., INC., SCHWAB YIELDPLUS FUND, SCHWAB YIELDPLUS FUND LIQUIDATION TRUST, THE CHARLES SCHWAB CORPORATION, CITY OF NEW BRITAIN, on behalf of itself and all others similarly situated, MAYOR AND CITY COUNCIL OF BALTIMORE, CITY OF HOUSTON, VISTRA ENERGY CORPORATION, YALE UNIVERSITY, JENNIE STUART MEDICAL CENTER, INC., FTC FUTURES FUND PCC LTD, on behalf of themselves and all others similarly situated, NATIONAL CREDIT UNION ADMINISTRATION BOARD, as Liquidating Agent of U.S. Central Federal Credit Union, Western Corporate Federal Credit Union, Members United Corporate Federal Credit Union, Southwest Corporate Federal Credit Union, and Constitution Corporate Federal Credit Union, PENNSYLVANIA INTERGOVERNMENTAL COOPERATION AUTHORITY, CITY OF PHILADELPHIA, DARBY FINANCIAL PRODUCTS, SALIX CAPITAL US INC., CAPITAL VENTURES INTERNATIONAL, PRUDENTIAL INVESTMENT PORTFOLIOS 2, FKA Dryden Core Investment Fund, on behalf of Prudential Core Short-Term Bond Fund, BAY AREA TOLL AUTHORITY, CALIFORNIA PUBLIC PLAINTIFFS, LINDA

ZACHER, ELLEN GELBOIM, on behalf of herself and all others similarly situated, GARY FRANCIS, METZLER INVESTMENT GMBH, on behalf of itself and all others similarly situated, 303030 TRADING LLC, ATLANTIC TRADING USA, LLC, FTC FUTURES FUND SICAV, on behalf of themselves and all others similarly situated, NATHANIEL HAYNES, THE COUNTY OF MENDOCINO, COUNTY OF SONOMA, COUNTY OF SAN MATEO, THE SAN MATEO COUNTY JOINT POWERS FINANCING AUTHORITY, CITY OF RICHMOND, RICHMOND JOINT POWERS FINANCING AUTHORITY, SUCCESSOR AGENCY TO THE RICHMOND COMMUNITY REDEVELOPMENT AGENCY, COUNTY OF SAN DIEGO, RIVERSIDE PUBLIC FINANCING AUTHORITY, DAVID E. SUNDSTROM, in his official capacity as Treasurer of the county of Sonoma for and on behalf of the Sonoma County Treasury Pool Investment, CITY OF RIVERSIDE, EAST BAY MUNICIPAL UTILITY DISTRICT, COUNTY OF SACRAMENTO, SAN DIEGO ASSOCIATION OF GOVERNMENTS, REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Plaintiffs-Appellants,

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

behalf of all others similarly situated, KENNETH W. COKER, individually, and on behalf of other members of the general public similarly situated, JOSEPH AMABILE, LOUIE AMABILE, individually and on behalf of Lue Trading, Inc., NORMAN BYSTER, MICHAEL CAHILL, RICHARD DEOGRACIAS, individually and on behalf of RCD Trading, Inc., HEATHER M. EARLE, on behalf of themselves and all others similarly situated, HENRYK MALINOWSKI, on behalf of themselves and all others similarly situated, MARC FEDERIGHI, individually and on behalf of MCO Trading, SCOTT FEDERIGHI, individually and on behalf of Katsco, Inc., LINDA CARR, on behalf of themselves and all others similarly situated, ERIC FRIEDMAN, on behalf of themselves and all others similarly situated, ROBERT FURLONG, individually and on behalf of XCOP, Inc., DAVID GOUGH, COUNTY OF RIVERSIDE, JERRY WEGLARZ, BRIAN HAGGERTY, individually and on behalf of BJH Futures, Inc., DAVID KLUSENDORF, NATHAN WEGLARZ, on behalf of plaintiffs and a class, DIRECTORS FINANCIAL GROUP, individually and on behalf of all others similarly situated, RONALD KRUG, CHRISTOPHER LANG, SEIU PENSION PLANS MASTER TRUST, individually and on behalf of all others similarly situated, HIGHLANDER REALTY, LLC, JOHN MONCKTON, PHILIP OLSON, JEFFREY D. BUCKLEY, FEDERAL HOME LOAN MORTGAGE CORPORATION, BRETT PANKAU, DAVID VECCHIONE, individually on behalf of Vecchione & Associates, RANDALL WILLIAMS, JOHN HENDERSON, 303 PROPRIETARY TRADING LLC, MARGERY TELLER, CEMA JOINT VENTURE, NICHOLAS PESA, EDUARDO RESTANI, PRINCIPAL FUNDS, INC., PFI BOND & MORTGAGE SECURITIES FUND, PFI BOND MARKET INDEX FUND, PFI CORE PLUS BOND I FUND, PFI DIVERSIFIED REAL ASSET FUND, PFI EQUITY INCOME FUND, PFI GLOBAL DIVERSIFIED INCOME FUND, PFI GOVERNMENT & HIGH QUALITY BOND FUND, PFI HIGH YIELD FUND, PFI HIGH YIELD FUND I, PFI INCOME FUND, PFI INFLATION PROTECTION FUND, PFI SHORT-TERM INCOME FUND, PFI MONEY MARKET FUND, PFI PREFERRED SECURITIES FUND, PRINCIPAL VARIABLE CONTRACTS FUNDS, INC., PVC ASSET ALLOCATION ACCOUNT, PVC MONEY MARKET ACCOUNT, PVC BALANCED ACCOUNT, PVC BOND & MORTGAGE SECURITIES ACCOUNT, PVC EQUITY INCOME ACCOUNT, PVC GOVERNMENT & HIGH QUALITY BOND ACCOUNT, PVC INCOME ACCOUNT, PVC SHORT-TERM INCOME ACCOUNT, PRINCIPAL FINANCIAL GROUP, INC., PRINCIPAL FINANCIAL SERVICES, INC., PRINCIPAL LIFE INSURANCE COMPANY, PRINCIPAL CAPITAL INTEREST ONLY I, LLC, PRINCIPAL COMMERCIAL FUNDING, LLC, PRINCIPAL COMMERCIAL FUNDING II, LLC, PRINCIPAL REAL ESTATE INVESTORS, LLC, VITO SPILLONE, BRIAN MCCORMICK, MAXWELL VAN DE VELDE, individually and on behalf of all others similarly

situated, INDEPENDENCE TRADING, INC., INSULATORS AND ASBESTOS WORKERS LOCAL #14, individually and on behalf of all others similarly situated, COURMONT & WAPNER ASSOCIATES, L.P., on behalf of itself and all others similarly situated, SALIX CAPITAL LTD., FTC CAPITAL GMBH, on behalf of themselves and all others similarly situated, CITY OF NEW BRITAIN FIREFIGHTERS' AND POLICE BENEFIT FUND, DIRECT ACTION PLAINTIFFS, FEDERAL NATIONAL MORTGAGE ASSOCIATION, TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, LTD., FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver, FRAN P. GOLDSLEGER, NATIONAL ASBESTOS WORKERS PENSION FUND, PENSION TRUST FOR OPERATING ENGINEERS, HAWAII ANNUITY TRUST FUND FOR OPERATING ENGINEERS, CEMENT MASONS' INTERNATIONAL ASSOCIATION EMPLOYEES' TRUST FUND, individually and on behalf of all others similarly situated, AXIOM INVESTMENT ADVISORS, LLC, AXIOM HFT LLC, AXIOM INVESTMENT ADVISORS HOLDINGS L.P., AXIOM INVESTMENT COMPANY, LLC, AXIOM INVESTMENT COMPANY HOLDINGS L.P., AXIOM FX INVESTMENT FUND, L.P., AXIOM FX INVESTMENT FUND II, L.P., AXIOM FX INVESTMENT 2X FUND, L.P., EPHRAIM F. GILDOR, GILDOR FAMILY ADVISORS L.P., GILDOR FAMILY COMPANY L.P., GILDOR MANAGEMENT, LLC, PRUDENTIAL CORE TAXABLE MONEY MARKET FUND,

Plaintiffs,

v.

LLOYDS BANKING GROUP PLC, BANK OF AMERICA CORPORATION, THE ROYAL BANK OF SCOTLAND GROUP PLC, CREDIT SUISSE GROUP AG, DEUTSCHE BANK AG, JPMORGAN CHASE & CO., THE NORINCHUKIN BANK, HBOS PLC, ROYAL BANK OF CANADA, HSBC BANK PLC, COOPERATIEVE RABOBANK U.A., FKA Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., JPMORGAN CHASE BANK, N.A., THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., BANK OF AMERICA, N.A., BARCLAYS BANK PLC, WESTDEUTSCHE IMMOBILIENBANK AG, PORTIGON AG, FKA WestLB AG, HSBC HOLDINGS PLC, WESTLB AG, SOCIETE GENERALE, COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., CREDIT SUISSE INTERNATIONAL, CREDIT SUISSE (USA), INC., THE ROYAL BANK OF SCOTLAND PLC, CREDIT SUISSE AG, HSBC SECURITIES (USA) INC., HSBC BANK USA, N.A., HSBC FINANCE CORPORATION, BARCLAYS CAPITAL INC., HSBC USA, INC., THE HONG KONG AND SHANGHAI BANKING CORPORATION LTD., RBC CAPITAL MARKETS LLC, BANK OF AMERICA

N.A., CITIBANK, N.A., UBS AG, CITIGROUP INC., THE ROYAL BANK OF SCOTLAND PLC, SOCIETE GENERALE S.A., UBS SECURITIES LLC, CITI SWAPCO INC., BBA ENTERPRISES, LTD., BBA LIBOR, LTD., BRITISH BANKERS' ASSOCIATION, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, FKA Banc of America Securities, LLC, CITIGROUP FINANCIAL PRODUCTS INC., J.P. MORGAN BANK DUBLIN PLC, FKA Bear Stearns Bank PLC, UBS LIMITED, CREDIT SUISSE GROUP INTERNATIONAL,

Defendants-Appellees,

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

Defendants.[*]

Appeal from the United States District Court

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

for the Southern District of New York
No. 11-md-2262, Naomi Reice Buchwald, *Judge*.

Before: LIVINGSTON, *Chief Judge*, LYNCH and SULLIVAN, *Circuit Judges*.

This appeal arises from a multidistrict litigation alleging that Defendants-Appellees, some of the world's largest banks and affiliated entities, conspired to suppress the London Interbank Offered Rate ("LIBOR"), a benchmark rate used in countless financial instruments around the globe. On appeal are several orders from the United States District Court for the Southern District of New York (Buchwald, *J.*), granting Defendants-Appellees' motions to dismiss antitrust claims in twenty-three cases based on Plaintiffs-Appellants' lack of antitrust standing and/or the court's lack of personal jurisdiction over Defendants-Appellees.

We agree with the district court that Plaintiffs-Appellants who purchased LIBOR-indexed bonds from third parties lack antitrust standing. To have antitrust standing, a plaintiff must be an "efficient enforcer" of the antitrust laws whose alleged injury was proximately caused by a defendant. Here, the third parties' independent decisions to reference that benchmark severed the causal chain linking Plaintiffs-Appellants' injuries to Defendants-Appellees' misconduct, thereby rendering Plaintiffs-Appellants unsuitable as efficient enforcers. But we disagree with the district court's personal jurisdiction analysis, and hold instead that jurisdiction is appropriate under the conspiracy-based theory first articulated by this Court in *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68 (2d Cir. 2018), which post-dated the district court's ruling. According to that precedent, a defendant purposefully avails itself of the laws of a forum when that defendant or its co-conspirator undertakes an overt act in furtherance of the conspiracy in the forum. Here, the facts alleged by Plaintiffs-Appellants – specifically, that executives and managers for several banks were directing the suppression of LIBOR from within the United States – were sufficient to establish personal jurisdiction over the banks under a conspiracy-based theory of jurisdiction. We thus **AFFIRM** in part, **REVERSE** in part, and **REMAND** to the district court for proceedings consistent with this opinion.

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

NEAL KUMAR KATYAL (Eugene A. Sokoloff, Kirti Datla, Allison K. Turbiville, Marc J. Gottridge, Lisa J. Fried, Benjamin A. Fleming, *on the brief*), Hogan Lovells US LLP, Washington, D.C., *for Defendants-Appellees Lloyds Banking Group plc and HBOS plc* (additional counsel for the many parties and amici are listed in Appendix A).

RICHARD J. SULLIVAN, *Circuit Judge*:

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

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

claims in twenty-three cases for lack of antitrust standing or lack of personal jurisdiction over Defendants.

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

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

the United States. We thus **AFFIRM** in part, **REVERSE** in part, and **REMAND** to the district court for proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Allegations

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

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

been licensed to third parties, including the Chicago Mercantile Exchange, which directly incorporate LIBOR as a price component for financial products traded in the United States.

The Banks belonged to the British Bankers' Association ("BBA"), a trade organization for the banking and financial-services sector in the United Kingdom that sets the daily LIBOR rate for various currencies. With respect to the daily LIBOR rate for U.S. dollars,[1] the Banks that comprised the LIBOR panel were asked to disclose the rate at which they could borrow dollars on the inter-bank market. Under LIBOR-setting rules, (1) each Bank was to independently exercise good faith judgment in submitting its estimated interest rates for borrowing funds at different maturity rates, which were to be based on the Bank's knowledge of market conditions; (2) the daily submissions were to remain confidential until after LIBOR was computed and published; and (3) Thomson Reuters, on behalf of the BBA, would then calculate LIBOR based on the average of the middle eight submissions, and publish the final rate, as well as all sixteen individual submissions.

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

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

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

B. Procedure

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

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

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

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

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

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

Taken together, Plaintiffs' complaints named about forty Defendants allegedly responsible for the LIBOR suppression. They include the panel Banks involved in setting LIBOR: Bank of America Corporation and Bank of America, N.A. (together, "Bank of America"); Bank of Tokyo-Mitsubishi UFJ Ltd. ("BTMU"); Barclays Bank plc ("Barclays"); Citigroup, Inc. and Citibank, N.A. (together, "Citibank"); Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. ("Rabobank"); Credit Suisse Group AG ("Credit Suisse"); Deutsche Bank AG ("Deutsche Bank"); HSBC Holdings plc and HSBC Bank plc (together, "HSBC"); JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (together, "JPMorgan Chase"); Lloyds Banking Group plc ("Lloyds"); HBOS plc ("HBOS"); Société Générale S.A. ("SocGen"); The Norinchukin Bank ("Norinchukin"); Portigon AG and Westdeutsche ImmobilienBank AG (together, "WestLB"); Royal Bank of Canada ("RBC"); Royal Bank of Scotland Group plc ("RBS"); and UBS AG

("UBS"). Three of these Banks – Bank of America, Citibank, and JPMorgan Chase – are incorporated and headquartered in the United States, while the remainder are foreign Banks. In addition to naming these Defendants, the complaints (taken together) name about two dozen affiliated banking institutions, most of which are incorporated and/or headquartered in the United States.[2] They also name the BBA, BBA Enterprises, Ltd., and BBA LIBOR, Ltd., each of which participates in setting LIBOR.

The district court initially dismissed the federal antitrust claims in their entirety on the ground that Plaintiffs failed to plead antitrust injury, reasoning that the LIBOR-setting process was collaborative rather than competitive and that Plaintiffs therefore suffered no anticompetitive harm. *See LIBOR I*, 935 F. Supp. 2d at 686–95. At the same time, however, the district court denied motions to dismiss

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

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

With the case once again before our Court, we reversed the district court on the merits. Specifically, we held that Plaintiffs had plausibly alleged a per se antitrust violation involving horizontal price-fixing and had plausibly alleged an inter-bank conspiracy to suppress LIBOR based on parallel conduct, internal communications, and "a common motive" of "increased profits and the projection of financial soundness." *Gelboim*, 823 F.3d at 781–82. We further considered Plaintiffs' statutory "antitrust standing," which turns on whether Plaintiffs "suffered antitrust injury" and whether they are the proper parties to challenge the antitrust violations (so-called "efficient enforcers"). *Id.* at 772. While we

determined that Plaintiffs had sufficiently alleged that they suffered an antitrust injury, we concluded that we were "not in a position to resolve" the efficient-enforcer prong, which would "entail further inquiry" best left to the district court in the first instance. *Id.* at 778.

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

On December 20, 2016, the district court largely granted the motions to dismiss. On the issue of antitrust standing, the district court concluded that the Bondholder Plaintiffs were not efficient enforcers since they purchased their bonds from third parties who independently chose to reference LIBOR. *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR VI*"), No. 11-mdl-2262 (NRB), 2016

WL 7378980, at *16 (S.D.N.Y. Dec. 20, 2016). Such independent action, the court explained, "breaks the chain of causation between [D]efendants' actions and a [P]laintiff's injury." *Id.* The court further held that the efficient enforcer considerations underlying its analysis of the federal antitrust claims applied with equal force to the antitrust claims brought under California's Cartwright Act. *Id.* at 24.

But the district court did not address whether Schwab, whose claims depended in part on purchasing LIBOR-related bonds sold by third parties, was an efficient enforcer. Instead, the district court dismissed Schwab's three complaints (and the claims of several other Plaintiffs) on personal jurisdiction grounds. The district court first defined the scope of the conspiracy, which the court deemed to be limited to the Banks' "projection of financial soundness." *Id.* at 7. With this narrow scope in mind, the court rejected the notion that Plaintiffs could "rely on the sales of LIBOR-based financial products in the United States" because "the goal of the conspiracy would have succeeded regardless of whether any defendants based their products on LIBOR and regardless of whether any [D]efendant [B]ank increased or decreased the margin on their LIBOR-based products." *Id.* at 8. Although the court noted several allegations that Bank

executives and managers in the United States had directed the suppression of LIBOR from within the United States, the court nevertheless found that the allegations could be "easily discounted, especially in light of the moving [D]efendants' declarations" denying those allegations. *Id.* at 11. After discounting those allegations, and without holding an evidentiary hearing or permitting jurisdictional discovery, the district court concluded that Plaintiffs had failed to plausibly allege any facts supporting a conspiracy-based theory of jurisdiction. *See id.* at 8, 14.

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

to dismiss those appeals on January 27, 2021.[3] This appeal is now ready for resolution.

II. DISCUSSION

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

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

A. Antitrust Standing

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

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

since we are persuaded that California's antitrust standing analysis tracks its federal analog.[4]

1. Antitrust Standing for Federal Antitrust Claims

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

To establish antitrust standing, "a plaintiff must show (1) antitrust injury, which is 'injury of the type the antitrust laws were intended to prevent and that

[4] Even though the district court dismissed Schwab's claims for lack of personal jurisdiction and did not reach Defendants' motion to dismiss Schwab's claims for lack of antitrust standing, we are free to consider that issue on appeal as an alternate basis to affirm the dismissal of Schwab's claims. *See Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 421 (2d Cir. 2005).

flows from that which makes defendants' acts unlawful,' and (2) that he is a proper plaintiff in light of four 'efficient enforcer' factors[.]" *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).[5] There can be no doubt after our decision in *Gelboim* that all Plaintiffs here, including Schwab and the Bondholder Plaintiffs, have "plausibly alleged antitrust injury" flowing from the Banks' horizontal price-fixing conspiracy. 823 F.3d at 775. But even where a plaintiff "has cleared the antitrust-injury hurdle," the plaintiff must further "show that it is an 'efficient enforcer' of the antitrust laws." *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 65 (2d Cir. 2019). Though *Gelboim* did not resolve this efficient-enforcer prong of the antitrust-standing analysis, the district court considered the issue on remand and found that the Bondholder Plaintiffs failed to plausibly allege facts establishing that they were efficient enforcers.

At its core, the efficient enforcer analysis requires a court to decide if the "plaintiff is a proper party to perform the office of a private attorney general and

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

thereby vindicate the public interest in antitrust enforcement." *Gelboim*, 823 F.3d at 780 (internal quotation marks omitted). In *AGC*, the Supreme Court outlined four factors to guide this analysis:

> (1) "'the directness or indirectness of the asserted injury'";
>
> (2) "'the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement'";
>
> (3) "the speculativeness of the alleged injury"; and
>
> (4) "the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries."

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

a. Directness of the Injury

In our view, the district court correctly "dr[e]w a line between [P]laintiffs who transacted directly with [D]efendants and those who did not," finding that only those who transacted with the Banks suffered a direct antitrust injury. *LIBOR VI*, 2016 WL 7378980, at *16. For the purposes of antitrust standing, proximate cause is determined according to the so-called "first-step rule." "Under th[at] rule,

injuries that happen at the first step following the harmful behavior are considered proximately caused by that behavior." *In re Am. Express Anti-Steering Rules Antitrust Litig.*, No. 20-1766, slip op. at 15 (2d Cir. Nov. 22, 2021); *see also Gatt*, 711 F.3d at 78 ("Directness . . . means close in the chain of causation.") (internal quotation marks omitted). It is thus not enough that a plaintiff "suffered a loss in some manner that might conceivably be traced to the conduct of the defendants." *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157 (2d Cir. 2016) (internal quotation marks omitted). Rather, "'the general tendency of [§ 4 of the Clayton Act] is not to go beyond the first step.'" *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 417 (2004) (Stevens, J., concurring in the judgment) (internal quotation marks omitted); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (citing *AGC*, 459 U.S. at 532–33) (holding that the Clayton Act covers only plaintiffs "whose injuries were proximately caused by a defendant's antitrust violations.")

The first-step rule and traditional proximate cause considerations require drawing a line between those whose injuries resulted from their direct transactions with the Banks and those whose injuries stemmed from their deals with third parties. *See In re Am. Express*, No. 20-1766, slip op. at 17 (holding that "if there are

'direct victims,' those victims are the merchants to which Amex's Anti-Steering Rules applied," not the appellants who "were allegedly injured when Amex's competitors, . . . raised their own prices"); 2A Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 335c(3) (2014) ("Beyond the actual customers, most other plaintiffs would be classified as 'remote' and denied standing even though they have suffered injury-in-fact."). This is because the decision of a third party to incorporate LIBOR as a term in a financial instrument could be made without any connection to the actions of the Banks. Such independent decisions snap the chain of causation linking Plaintiffs' injury to the Banks' misconduct.

The disconnect between Plaintiffs' injury and the Banks' alleged benefit further demonstrates the attenuated nature of the causal chain. Schwab and the Bondholder Plaintiffs were allegedly harmed because they received lower-interest payments due to the conspirators' suppression of LIBOR, which resulted in Plaintiffs' counterparties receiving a corresponding benefit of lower-interest payments. But the reduced-interest payment in no way enriched the Banks, who had no financial stake in the transactions whatsoever. Rather, for every Plaintiff who was harmed by a reduced-interest payment, there was a third party who benefited from being the counterparty to the transaction. None of that benefit,

however, flowed to the Banks. And while Plaintiffs insist that the Banks derived a reputational benefit from falsely touting their ability to get lower rates on borrowing than was actually the case, that benefit too is wholly unrelated to the purported harm. Though the Banks may have increased their profits by selling LIBOR-indexed instruments, those who purchased from third parties were "not the target" of such harm; they were "simply collateral damage." *IQ Dental Supply*, 924 F.3d at 65–66.

To be sure, some courts have occasionally looked past intervening decisions by third parties to find "umbrella standing," which allows a consumer who dealt with a non-cartel member to pursue antitrust claims against cartel members who rigged the market as a whole. *See Gelboim*, 823 F.3d at 778 (collecting cases and noting a circuit split). We have never adopted this theory of antitrust standing, and the unique nature of the LIBOR conspiracy makes umbrella standing particularly inappropriate here. *See, e.g.*, *In re Am. Express*, No. 20-1766, slip op. at 23 ("[I]t is not the appellants' status of umbrella plaintiffs or otherwise that resolves the antitrust standing question but 'the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff.'" (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1058 (9th Cir.

1999)). Unlike the archetypal price-fixing conspiracy, which involves a cartel that controls a market for a good and sells that good at an inflated price, *see, e.g.*, *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1166 n.24 (5th Cir. 1979), the LIBOR conspiracy entailed the fixing of a number that was available for unlimited third parties to reference and incorporate into their own products and transactions without any input from, or involvement by, the Banks. There is no allegation that the Banks controlled the market for LIBOR-referencing products, nor any claim that the Banks pressured third parties to adhere to a LIBOR-based index. Instead, third parties independently decided to peg their bonds' terms to LIBOR.

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

The Supreme Court's decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), is not to the contrary. There, the plaintiff argued that an insurance

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

Not so here. As noted above, Defendants derived no benefit from Plaintiffs' transactions with third parties. Those transactions, while arguably foreseeable to the Banks, were entirely separate from the purpose of the alleged conspiracy and took place merely because of LIBOR's unlimited public availability as a reference

point for innumerable transactions. This case thus has little in common with *McCready*.

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

financial benefit from the use of LIBOR as an index number for *third-party* transactions.

We thus reject the attempts of Schwab and the Bondholder Plaintiffs "to impose liability for transactions [that] [D]efendants did not control and of which they were likely not even aware." *Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 560 (S.D.N.Y. 2017); *see also In re Am. Express*, No. 20-1766, slip op. at 17; *Sullivan v. Barclays PLC*, No. 13-cv-2811 (PKC), 2017 WL 685570, at *17–18; *In re Platinum & Palladium Antitrust Litig.*, No. 14-cv-9391 (GHW), 2017 WL 1169626, at *22 (S.D.N.Y. Mar. 28, 2017). As aptly summarized by the district court, the Bondholder Plaintiffs "did not purchase directly from [D]efendants," and "made their own decisions to incorporate LIBOR into their transactions, over which [D]efendants had no control, in which [D]efendants had no input, and from which [D]efendants did not profit." *LIBOR VI*, 2016 WL 7378980, at *16. The same is true of Schwab insofar as it purchased LIBOR-related bonds from third parties.[6] Accordingly, since Defendants did not proximately cause the injury flowing from

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

the purchases of these LIBOR-related bonds, neither set of Plaintiffs has statutory standing to raise a federal antitrust claim related to those purchases. *See Lexmark*, 572 U.S. at 126.

b. Other *AGC* Factors

While the first factor alone furnishes ample justification for affirming the district court, the other *AGC* factors, on the whole, likewise cut against a finding of antitrust standing. The second factor – "the existence of more direct victims of the alleged conspiracy," *AGC*, 459 U.S. at 545 – clearly weighs against antitrust standing since there is no shortage of other parties in this very case who purchased LIBOR-indexed financial instruments directly from the Banks. Those victims' injuries are directly linked to the Banks' profit from the conspiracy, thus underscoring the attenuated nature of the harms allegedly flowing from third-party bond sales. *See id.*

The third factor, which focuses on whether the alleged damages are "highly speculative," *id.* at 542, also favors Defendants. As we previously stated, "highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement." *Gelboim*, 823 F.3d at 779. Schwab and the Bondholder Plaintiffs contend that their "damage theory is simple," and only requires the district court

to compare the "difference between the fixed price and the price that would have obtained in a competitive market but for the price fixing." Appellant's Antitrust Br. at 37–38.

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

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

Finally, the fourth *AGC* factor – "the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other" – reflects a "strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." *AGC*, 459 U.S. at 543–44. This case does not present the problem of upstream and downstream purchasers that is the usual focus of this factor. *See id.* After all, the third parties who sold the bonds – and *benefited* from the suppressed rate – would clearly not

be in a position to enforce the antitrust laws. Although the ongoing government enforcement actions might pose some minimal risk of duplicative recoveries, *see Gelboim*, 823 F.3d at 780, we nevertheless view this fourth factor as favoring Schwab and the Bondholder Plaintiffs.

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

2. Antitrust Standing for California Antitrust Claims

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

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

California would apply the *AGC* factors in accordance with federal precedents. . . ."), we ultimately agree with the court below that California law substantially incorporates the *AGC* factors.

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

To date, the California Supreme Court has not addressed the question before us; instead, the best data point for assessing California's antitrust standing analysis is a decision from a California intermediate appellate court, *Vinci v. Waste Mgmt., Inc.*, 43 Cal. Rptr. 2d 337, 338–39 (Cal. Ct. App. 1995), which expressly described the antitrust standing required under state law in terms of the *AGC* factors. *See also Wholesale Elec. Antitrust Cases I & II*, 55 Cal. Rptr. 3d 253, 265 (Cal. Ct. App. 2007) (quoting federal antitrust standing elements as deciding antitrust standing under California's Cartwright Act). The *Vinci* court looked to federal

antitrust elements both because the Cartwright Act contains "similar language" to the federal antitrust statute interpreted in *AGC* and "[b]ecause the Cartwright Act has objectives identical to the federal antitrust acts." *Vinci*, 43 Cal. Rptr. 2d at 338 & n.1.

Schwab nonetheless contends that the California Supreme Court's more recent decision in *Aryeh v. Canon Business Solutions, Inc.*, 292 P.3d 871, 877 (Cal. 2013), casts doubt on *Vinci*. While it is true that *Aryeh* stated in dicta that "[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act," 292 P.3d at 877, *Aryeh* does not compel us to conclude that interpretations of federal and state antitrust standing law always diverge. Indeed, we recently held – on the strength of *Aryeh*'s instructions alone – that "the California legislature, like Congress, was 'familiar with the common-law rule' of proximate cause" and did not intend "to displace it *sub silentio*" when it enacted the Cartwright Act. *In re Am. Express*, No. 20-1766, slip op. at 23 (quoting *Lexmark*, 572 U.S. at 132). This conclusion is strengthened by *Vinci*, which remains the California case most directly on point. We therefore hold that Schwab also lacks antitrust standing to bring its state-law claims based on its purchasing of bonds from third parties.

B. Personal Jurisdiction

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

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

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

Only the third requirement – compliance with due process – is contested here. As the Supreme Court has long held, due process demands that each defendant over whom a court exercises jurisdiction have some "minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wahsington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted); *see also Waldman*, 835 F.3d at 330–31 (applying analysis to Fifth Amendment). Our inquiry narrows further, however, since the district court did not address traditional notions of fair play and substantial justice, and Defendants do not rely on that prong as an alternative

basis for affirmance. We thus likewise limit our analysis to the assessment of Defendants' minimum contacts. *See Schwab*, 883 F.3d at 82.

The district court determined that the "relevant forum for the assessment of minimum contacts is the United States as a whole." *LIBOR VI*, 2016 WL 7378980, at *8. In reaching this conclusion, the district court cited its analysis in an earlier opinion, *id.*, in which the court had observed that some of Plaintiffs' claims "arise under federal statutes containing provisions authorizing nationwide service of process," *LIBOR IV*, 2015 WL 6243526, at *23; *see* 15 U.S.C. § 22. There, the district court grounded its nation-based approach on the theory that "[w]hen the national sovereign is applying national law, the relevant contacts are the contacts between the defendant and the sovereign[] nation." *LIBOR IV*, 2015 WL 6243526, at *23 (quoting *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279, 1294 (7th Cir. 1992)); *see also Chew v. Dietrich*, 143 F.3d 24, 28 n.4 (2d Cir. 1998). No party challenges the district court's conclusion that a nation-wide contacts analysis is appropriate here, and neither do we. *See In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 207 (2d Cir. 2003) (assuming that district court correctly decided that the "minimum contacts analysis looks to a corporation's contacts with the United States as a whole," "given that the parties do not question it on appeal").

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

In *Schwab*, we held that a defendant can similarly avail itself of a forum through certain actions taken by a co-conspirator in the forum. *See Schwab*, 883 F.3d at 86–87. Much like an agent who operates on behalf of, and for the benefit

of, its principal, a co-conspirator who undertakes action in furtherance of the conspiracy essentially operates on behalf of, and for the benefit of, each member of the conspiracy. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984) ("In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit.").

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

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

Only *Schwab*'s third prong is at issue here.[8] When viewed in favor of the non-moving party, the pleadings and record evidence establish several overt, conspiratorial acts that are sufficient to subject each co-conspirator to personal jurisdiction in the United States. *See Licci*, 732 F.3d at 167; *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 85 (2d Cir. 2013).

Plaintiffs allege that Bank executives and managers in the United States mandated that their subordinates manipulate LIBOR. For starters, they allege that a "senior UBS manager in Stamford, Connecticut issued [a] standing directive to 'submit low LIBOR contributions' for USD LIBOR, and to keep submissions in the 'middle of the pack of other banks' expected LIBOR submissions.'" Confidential App'x at 3–4 (quoting UBS's admissions to the Department of Justice). Similarly,

[8] Although Defendants state for the first time in their sur-reply that Plaintiffs failed to satisfy the first two *Schwab* factors, we consider this delayed argument to be forfeited. *See McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 96 (2d Cir. 2009) ("[W]e ordinarily will not consider issues raised for the first time in a reply brief."); 16AA Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3974.2 (5th ed.) ("An appellee who fails to include and properly argue a contention in the appellee's brief takes the risk that the court will view the contention as forfeited."). Indeed, even after Plaintiffs' opening brief articulated essentially the same conspiracy-based jurisdictional test later adopted in *Schwab* and relied on *Gelboim* as "confirm[ing] that the first and second elements are met," Appellants' Jurisdiction Br. at 59, Defendants' 73-page response brief on personal jurisdiction did not hint at any disagreement on that score. Under these circumstances, no "manifest injustice" would result from following our ordinary course and declining to consider Defendants' belated argument. *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005).

Plaintiffs rely on emails between a senior JPMorgan Chase executive in New York and the Banks' LIBOR submitter discussing the importance of staying in "the pack" and asking the submitter to "err on the low side" when setting LIBOR. *Id*. at 3, 30, 139. They also quote an email in which a U.S.-based employee of Citibank urged the Bank's LIBOR submitter that "we should take a leadership [role] in bringing these LIBORS back to more sensible levels," "[e]xactly as we did 3–4 months back"; the Bank's LIBOR submissions then decreased. *Id.* at 34–35. Finally, Plaintiffs assert that a Barclays' executive "who was based in New York . . . has admitted that he instructed subordinates to submit artificially low USD LIBOR rates." *Id.* at 343.

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

jurisdiction where a party allegedly discriminated in the forum "[i]n furtherance of, and in accordance with, th[e] conspiracy").[9]

The district court, however, was not convinced because it found each allegation to be "easily discounted, especially in light of the moving [D]efendants' declarations stating that they did not determine or transmit their LIBOR submissions from the United States." *LIBOR VI*, 2016 WL 7378980, at *11. But this is not the stage in the litigation to decide competing factual assertions; "in the absence of an evidentiary hearing, it was error for the district court to resolve that factual dispute in [Defendants'] favor." *Dorchester*, 722 F.3d at 86.

Defendants nonetheless argue that Plaintiffs' allegations cannot survive scrutiny. Attacking the allegations concerning the UBS-related LIBOR bids, they contend that the document on which Plaintiffs rely (a non-prosecution agreement with the Department of Justice) actually "contradicts" Plaintiffs' assertion that the UBS manager in Stamford, Connecticut directed subordinates to manipulate the inter-bank rate. Appellee's Jurisdiction Br. at 43. To be sure, the non-prosecution agreement mentions suppression-related emails from a UBS manager "in Zurich,"

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

but the agreement further states that the Zurich manager "in turn indicated that the direction came from the Stamford-based Group Treasury senior manager." App'x at 3399, 3408. And while Defendants would discount these statements as "apparently not based on . . . personal knowledge," Appellee's Jurisdiction Br. at 43, we are not at liberty to draw that inference against Plaintiffs at this stage of the litigation. *See Dorchester*, 722 F.3d at 85–86.

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

2. Conspiracy jurisdiction does not require allegations of control.

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

In adopting "the appropriate test for alleging a conspiracy theory of jurisdiction," *Schwab* noticeably did not endorse Defendant's argument, even though Defendants advanced the same point there. *Compare Schwab*, 883 F.3d at 86–87, *with* Brief for Defendants-Appellees, *Schwab*, 883 F.3d 68, 2017 WL 395989, at *30–35. Our silence was not due to oversight – indeed, elsewhere in *Schwab* we discussed the very portions of *Leasco* on which Defendants now rely. *See Schwab*, 883 F.3d at 85. *Leasco*, however, did not demand a relationship of control before one defendant's minimum contacts are imputed to its co-conspirator. It held instead that "the mere presence of one conspirator" would not be enough to

"confer personal jurisdiction over another alleged conspirator," and that actions taken by a lawyer in the forum could not be attributed to a partner at the law firm merely on the basis of the partnership. *Leasco*, 468 F.2d at 1343. True, we went on to state in dicta that the "matter could be viewed differently" if the partner had delegated the in-forum tasks, meaning that delegation and control can be important indicia of purposeful availment through a third party. *Id.* But that observation in no way amounts to a holding that a defendant *must* control a co-conspirator before its purposeful availment is imputed to the defendant; rather, *Schwab* provides "the appropriate test for alleging a conspiracy theory of jurisdiction." 883 F.3d at 87.

Moreover, although we conclude that our caselaw does not require a relationship of control, direction, or supervision, we should also underscore that *Schwab*'s three-prong test *serves* the purposeful availment requirement, rather than supplants it. *See id.* (fashioning the test to avoid "inconsisten[cies] with the 'purposeful availment' requirement"). To that end, the conspiracy theory could not get off the ground if a defendant were altogether blindsided by its co-conspirator's contacts with the forum; the conspiratorial contacts must be of the sort that a defendant "should reasonably anticipate being haled into court" in the

forum as a result of them. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *see also Schwab*, 883 F.3d at 82 ("[The] minimum contacts necessary to support such jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there.").

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

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court dismissing the Bondholder Plaintiffs' complaint, as well as dismissing Schwab's federal and state antitrust claims to the extent that they depend on its purchases

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

of LIBOR-related bonds from third parties. But since we hold that Defendants had the relevant minimum contacts with the United States to satisfy due process, we **REVERSE** the judgment in part, and **REMAND** for further proceedings.

APPENDIX A

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