

No. 13-_____

IN THE
Supreme Court of the United States

ELLEN GELBOIM AND LINDA ZACHER,
INDIVIDUALLY FOR THEMSELVES AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

CREDIT SUISSE GROUP AG, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question “whether consolidated cases retain their separate identity or become one case for purposes of appellate jurisdiction has divided the courts of appeals.” *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216 (D.C. Cir. 2003). “Some circuits hold that consolidated cases remain separate actions and no Rule 54(b) certification is needed to appeal the dismissal of any one of them. Others treat consolidated cases as a single action, or presume that they are, allowing the presumption to be overcome in highly unusual circumstances. Still other circuits apply no hard and fast rule, but focus on the reasons for the consolidation to determine whether the actions are one or separate.” *Id.* (citations and alterations omitted). This Court granted certiorari to resolve the conflict in *Erickson v. Maine Central Railroad Co.*, 111 S. Ct. 38 (1990) (mem.), but the petition was subsequently dismissed, 111 S. Ct. 662 (1990) (mem.).

The Question Presented is:

Whether and in what circumstances is the dismissal of an action that has been consolidated with other suits immediately appealable?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the following parties were appellants below and petitioners in this Court:

Ellen Gelboim and Linda Zacher, individually for themselves and on behalf of all others similarly situated

The following parties were appellees below and are respondents in this Court:

Bank of America Corp.

Bank of America, N.A.

Barclays Bank plc

Citibank, N.A.

Citigroup Inc.

Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.

Credit Suisse Group AG

Deutsche Bank AG

HSBC Holdings plc

HSBC Bank plc

JPMorgan Chase & Co.

JPMorgan Chase Bank, N.A.

Lloyds Banking Group plc

The Norinchukin Bank

Royal Bank of Canada

The Royal Bank of Scotland Group plc

The Bank of Tokyo-Mitsubishi UFJ, Ltd.

UBS AG

WestLB AG (n/k/a Portigon AG)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's opinion granting respondents' motion to dismiss petitioners' claim (App. F) is published at 935 F. Supp. 2d 666. The district court's order denying petitioners leave to amend their complaint (App. G) is unpublished. The court of appeals' order dismissing petitioners' appeal (App. A) is unpublished.

JURISDICTION

The court of appeals entered its order dismissing petitioners' appeal (App. A) on October 30, 2013, and denied petitioners' timely request for reconsideration of that order (App. B) on December 16, 2013. On March 7, 2014, Justice Ginsburg extended the time to file this petition for certiorari to and including April 15, 2014. App. No. 13A913. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 1291 provides, in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States"

STATEMENT OF THE CASE

Petitioners sued respondents in a complaint that was consolidated with other litigation for pretrial purposes only. The district court dismissed petitioners' sole claim for relief, and therefore their

complaint, with prejudice. The court of appeals dismissed petitioners' appeal for lack of appellate jurisdiction because the district court had not dismissed all of the consolidated complaints. Respondents acknowledged that the court's ruling was the subject of a significant circuit conflict.

1. This petition arises from litigation alleging that respondents manipulated the London Interbank Offered Rate ("LIBOR"), which is the most important benchmark for short-term interest rates in the United States and around the world. LIBOR ostensibly identifies banks' short-term borrowing costs. It is an essential financial term in countless financial instruments.

The British Bankers Association (BBA) publishes LIBOR every day in ten currencies, including U.S. dollars. Various banks—respondents here—together provided the information that the BBA used to set the U.S. dollar LIBOR. It has been revealed, however, that respondents conspired to manipulate LIBOR by submitting false information. The respondents' collusion suppressed LIBOR, which directly suppressed the payments on LIBOR-linked financial instruments, including the interest paid to floating rate bondholders for the use of their money.

2. Respondents' actions gave rise to a variety of suits by parties claiming that they were injured by the suppression of U.S. dollar LIBOR. The Judicial Panel on Multidistrict Litigation (JPML) ordered that LIBOR-related litigation be transferred for pretrial proceedings to the United States District Court for the Southern District of New York. App. 5a-7a; *see* 28

U.S.C. § 1407 (“When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”).

The district court permitted one group of non-class action claims—those filed by entities related to Charles Schwab & Co. (Schwab)—to go forward. Schwab asserted a federal antitrust claim, as well as a state antitrust claim, a federal racketeering claim, and other state law claims.

The district court ordered that the LIBOR-related class actions be consolidated “for pretrial purposes only.” App. 11a. The court did not direct the plaintiffs to file a single, integrated class action complaint. Rather, it ordered that the case proceed with respect to three separate class action complaints:

- a. The complaint filed by petitioners Ellen Gelboim and Linda Zacher on behalf of purchasers of bonds with LIBOR-linked interest rates, alleging a single claim that the defendants had violated federal antitrust law;
- b. A unified complaint on behalf of “over-the-counter” purchasers of LIBOR-linked instruments (the OTC plaintiffs), alleging a federal antitrust claim, as well as a state law claim for unjust enrichment;
- c. A unified complaint on behalf of purchasers of LIBOR-linked instruments on exchanges (the exchange plaintiffs), alleging a federal antitrust claim, Commodity Exchange Act claims based on

respondents' conduct regarding certain Eurodollar futures contracts, and a state law claim for unjust enrichment.

Subsequently, roughly thirty more LIBOR-related complaints were filed and transferred to the Southern District of New York. Those complaints largely raised the same allegations as the previously filed complaints. The court stayed all proceedings on those follow-on complaints. *See* App. 18a.

3. The district court granted respondents' motion to dismiss almost all the claims set forth in the four non-stayed cases. *Id.* 18a-19a, 155a-58a. The district court specifically held that none of the plaintiffs could assert antitrust claims because they failed to assert antitrust injury. *Id.* 59a, 155a-56a. That ruling disposed entirely of the only claim for relief asserted in petitioners' complaint, resulting in the dismissal of petitioners' action.

The district court further held that the plaintiffs could not assert a federal racketeering claim. *Id.* 124a, 157a. Having thereby dismissed all of Schwab's federal claims, the court declined to exercise supplemental jurisdiction over Schwab's remaining state law claims. *Id.* 147a, 157a.

Those rulings left pending a few claims in the non-stayed cases. The court denied respondents' motion to dismiss the exchange plaintiffs' claim under the Commodity Exchange Act. *Id.* 65a, 156a. The court also permitted the OTC plaintiffs to amend their complaint to assert state law claims for unjust enrichment and violation of the implied covenant of good faith and fair dealing. *Id.* 161a.

The court denied petitioners leave to file a second amended complaint. *Id.* 193a-200a. The court accordingly specified that the action was “dismissed in [its] entirety.” *Id.* 219a. The case’s docket provided that it was “terminat[ed] pursuant to instructions from Chambers.” *Id.* 12a. (Because the district court did not enter judgment on a separate document as required by Federal Rule of Civil Procedure 58(b)(1)(C), judgment on its decision denying all relief in petitioners’ action was deemed entered after 150 days pursuant to Federal Rule of Civil Procedure 58(c)(2)(B).)

4. Federal law gives the courts of appeals “jurisdiction of appeals from all final decisions of the district courts.” 28 U.S.C. § 1291. Petitioners accordingly filed a timely notice of appeal, as did Schwab.

The district court then entered judgment under Federal Rule of Civil Procedure 54(b) to permit the exchange plaintiffs and OTC plaintiffs to appeal with respect to their antitrust claims, which paralleled those of the petitioners and Schwab. The court explained that petitioners and Schwab were “in a position to appeal as of right because their complaints were dismissed in their entirety.” App. 220a. Further, the issues on appeal “rais[e] issues that affect all four categories of plaintiffs equally.” *Id.* In those circumstances, “there is no just reason for delay.” *Id.* 221a.

The court of appeals, however, dismissed petitioners’ appeal, stating:

This Court has determined *sua sponte* that it lacks jurisdiction over these appeals because a final order has not been issued by the district court as contemplated by 28 U.S.C. § 1291, and the orders appealed from did not dispose of all claims in the consolidated action. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *Houbigant, Inc. v. IMG Fragrance Brands, LLC*, 627 F.3d 497, 498 (2d Cir. 2010) (per curiam). Upon due consideration, it is hereby ORDERED that the appeals are DISMISSED.

App. 2a. The Second Circuit precedent cited by the court's order, *Houbigant*, 627 F.3d at 498, applied that court's prior ruling that "when there is a judgment in a consolidated case that does not dispose of all the claims which have been consolidated, there is a strong presumption that the judgment is not appealable absent Rule 54(b) certification." *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988). That presumption may be overcome only in "highly unusual circumstances." *Id.*

In response to the court of appeals' dismissal of the appeals, the district court then withdrew its own order permitting the exchange plaintiffs and OTC plaintiffs to appeal under Rule 54(b). App. 222a.

Petitioners sought reconsideration. In their opposition to that request (at 9), respondents explained that the Second Circuit had "expressly considered and rejected the bright-line rules utilized in similar contexts by the First and Sixth Circuits (interim appeals always allowed in consolidated actions) and the Ninth and Tenth Circuits (interim

appeals never allowed in consolidated actions), as well as the flexible approaches of adopted by the Third, Fifth, and Seventh Circuits.” The rulings of other circuits that would permit petitioners’ appeal were, respondents explained (at 11), “non-binding precedent.” The court of appeals denied reconsideration. App. 4a.

This petition followed.

REASONS FOR GRANTING THE WRIT

This case is an ideal vehicle to resolve the four-way circuit conflict—involving every court of appeals but one—over whether and when the dismissal of an action that has been consolidated with other actions is an appealable final order. Like respondents in opposing petitioners’ request for reconsideration, the courts of appeals have repeatedly acknowledged the conflict—indeed, they have done so for more than a quarter century. *See, e.g., United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216 (D.C. Cir. 2003) (“Whether consolidated cases retain their separate identity or become one case for purposes of appellate jurisdiction has divided the courts of appeals.”); *Spraytex, Inc. v. DJS&T & Homax Corp.*, 96 F.3d 1377, 1380 (Fed. Cir. 1996) (“Our sister circuits have answered this fundamental question in three different ways.”); *Road Sprinkler Fitters Local Union v. Cont’l Sprinkler Co.*, 967 F.2d 145, 148 (5th Cir. 1992) (“A divergence of opinion exists among these courts as to the appealability of a judgment in one but not all of the actions.”); *Albert v. Maine Cent. R.R. Co.*, 898 F.2d 5, 7 (1st Cir. 1990) (“Other courts have taken different approaches to this issue.”), *cert. granted sub*

nom, *Erickson v. Maine Cent. R.R. Co.*, 111 S. Ct. 38 (mem.), *cert. dismissed*, 111 S. Ct. 662 (1990) (mem.); *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988) (“We have not previously considered this precise question. Several other circuits have decided it, however, although they have come to differing conclusions.”); *Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987) (summarizing the conflict), *cert. denied*, 108 S. Ct. 2883 (1988) (mem.).

This Court granted certiorari to resolve the conflict in *Erickson v. Maine Central Railroad Co.*, 111 S. Ct. 38 (1990) (mem.), but the petition was subsequently dismissed, 111 S. Ct. 662 (1990) (mem.).

1. Petitioners would not have been permitted to appeal in the Federal, Ninth, and Tenth Circuits, which apply a categorical rule that the dismissal of one of several consolidated cases is not immediately appealable. *See Spraytex*, 96 F.3d 1377 at 1381 (“We now extend this approach to join the Ninth and Tenth Circuits in adopting the rule that, absent Rule 54(b) certification, there may be no appeal of a judgment disposing of fewer than all aspects of a consolidated case.”); *Trinity*, 827 F.2d at 675 (“We agree with the Ninth Circuit’s approach, and adopt the rule that a judgment in a consolidated action that does not dispose of all claims shall not operate as a final, appealable judgment under 28 U.S.C. § 1291.”); *Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984) (“In our view, the best approach is to permit the appeal only when there is a final judgment that resolves all of the consolidated actions unless a 54(b) certification is entered by the district court.”).

Petitioners were forbidden to appeal by the Second Circuit, which adopts a near-*per se* bar to appeal. In *Hageman*, the Second Circuit “agree[d] with the Ninth and Tenth Circuits that there are certain benefits to adopting a uniform rule [forbidding all such appeals], rather than a more flexible approach.” 851 F.2d at 71. But the court was “somewhat hesitant to adopt an absolute rule,” and thought it better to “preserv[e] some flexibility,” in light of “the infinite array of consolidated actions that can arise.” *Id.* On that basis, the court adopted “a strong presumption that the judgment is not appealable,” which may only be overcome “[i]n highly unusual circumstances.” *Id.*

By contrast, petitioners would have been permitted to appeal in the First and Sixth Circuits, which apply the opposite categorical rule that the dismissal of one of several consolidated cases is immediately appealable. See *Beil v. Lakewood Eng’g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994) (“This court has held that consolidated cases remain separate actions. Thus, a case which is disposed on summary judgment is appealable pursuant to 28 U.S.C. § 1291 despite the fact that the case with which it is consolidated has not been disposed.”); *Albert*, 898 F.2d at 7 (even consolidation for trial is insufficient to “merge separate suits into a single action,” as the suits “retain their separate identity and judgments rendered in each individual action are appealable as final judgments” (citation omitted)); see also *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 589 (6th Cir. 2013) (immediate appeal is permitted from dismissal of suit subject to MDL consolidation, so

long as non-dismissed actions were not part of same filed complaint).

So too, petitioners would have been permitted to appeal in the D.C., Third, Fifth, Seventh, Eighth, and Eleventh Circuits. Those courts nominally apply a case-by-case approach. But that approach dictates that an immediate appeal is permitted whenever the underlying complaint was not consolidated with still-pending suits for *all* purposes. *See Schippers v. United States*, 715 F.3d 879, 884 (11th Cir. 2013) (immediate appeal is permitted when “the district court did not consolidate the cases ‘for all purposes’; rather, the cases were consolidated for pre-trial and discovery purposes”); *Hampton*, 318 F.3d at 216 (where actions were not consolidated “for all purposes,” then “[d]espite the consolidation, [the dismissed] action retained its separate status and the order dismissing it was a final judgment, appealable without the need for a Rule 54(b) certification.”); *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 711-12 (8th Cir. 1996) (when suits were consolidated “for joint proceedings and hearings, for convenience, then each suit retains its individual nature, and appeal in one suit is not precluded solely because the other suit is still pending before the district court[,]” even when “the district court grouped both suits under a single docket number”) (citation omitted); *Hall v. Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991) (the “dispositive” factor is “whether the cases were consolidated for trial or simply for pre-trial administration”); *Brown v. United States*, 976 F.2d 1104, 1107 (7th Cir. 1992) (“[W]here it is clear that cases have been consolidated only for limited purposes, a decision disposing of all the claims in only one of the

cases is a final decision subject to immediate appeal.”); *Road Sprinkler Fitters Local*, 967 F.2d at 149 (appeal is precluded only where “consolidation of causes that could have been filed as a single suit existed, and the consolidation was clearly for all purposes” (citation omitted)).

Particularly relevant here, under that rule, the dismissal of a single action consolidated for pretrial purposes in an MDL action—*i.e.*, the circumstances of this case—is immediately appealable. For example, in *Hampton*, the D.C. Circuit held that a party may appeal the dismissal of a single action that had been transferred by the MDL panel and consolidated by the district court for pretrial proceedings with roughly thirty cases relating to fraud by Columbia/HCA. 318 F.3d at 216. And in *Brown*, the Seventh Circuit held that a plaintiff could immediately appeal from the dismissal of a suit that had been transferred by the MDL panel “for coordinated or consolidated pretrial proceedings,” and consolidated with other actions for pretrial proceedings by the transferee district court. 976 F.3d at 1106.

Only the Fourth Circuit has not decided the Question Presented expressly, but it has strongly signaled its agreement with a case-by-case approach. *Eggers v. Clinchfield Coal Co.*, 11 F.3d 35, 38-39 (4th Cir. 1993) (adopting interpretation of the right to appeal under 33 U.S.C. § 921 based on case law interpreting 28 U.S.C. § 1291).

2. There can be no dispute that the Question Presented is sufficiently important to merit this Court’s attention. The issue has the potential to arise

not only from every body of litigation that is subject to coordination by the Judicial Panel on Multidistrict Litigation, but each time a district court consolidates related actions. The frequency with which the issue arises is obvious from the fact that every court of appeals but one has already squarely decided it. For precisely that reason, the circuits' positions are well defined and fixed, so that there is no benefit to permitting the conflict—which has already existed for at least a quarter century—to fester any longer. The circuit split confounds a frequently recurring issue that should be clear and uniform: the interplay between 28 U.S.C. § 1291, Federal Rule of Civil Procedure 42(a), Federal Rule of Civil Procedure 54(b), and (in multidistrict proceedings) 28 U.S.C. § 1407.

This case is moreover an ideal vehicle in which to resolve the conflict. The Second Circuit dismissed petitioners' appeal in an order that rested exclusively on that court's near-*per se* bar to the immediate appeal from the dismissal of a consolidated action. In the proceedings below, respondents expressly acknowledged that the circuit split is determinative of petitioners' right to pursue their appeal. Finally, the significance of the legal issues raised by the well-known allegations that the defendants manipulated LIBOR cannot be disputed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 26, 2014

APPENDIX A

S.D.N.Y.–N.Y.C.
11-md-2262 Buchwald, J.

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

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

Present:

José A. Cabranes,
Barrington D. Parker¹,
Circuit Judges.

In re LIBOR-Based Financial Instruments
Antitrust Litigation. 13-3565 (L); 13-3636 (Con)

¹ The Honorable John M. Walker, originally a member of the panel sitting on October 29, 2013, recused himself from consideration of this matter. The remaining members of this panel, who are in agreement, have decided this case pursuant to 2d Cir. R § 0.14(b).

Ellen Gelboim, *et al.*,
Plaintiffs - Appellants,

v.

Bank of America Corporation, *et al.*,
Defendants - Appellees.

This Court has determined *sua sponte* that it lacks jurisdiction over these appeals because a final order has not been issued by the district court as contemplated by 28 U.S.C. § 1291, and the orders appealed from did not dispose of all claims in the consolidated action. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *Houbigant, Inc. v. IMG Fragrance Brands, LLC*, 627 F.3d 497, 498 (2d Cir. 2010) (per curiam). Upon due consideration, it is hereby ORDERED that the appeals are DISMISSED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

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

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of December, two thousand and thirteen.

Before: José A. Cabranes
Barrington D. Parker*,
Circuit Judges.

Ellen Gelboim, on behalf of
herself and all others similarly
situated, *et al.*,

Plaintiffs-Appellants

v.

Bank of America Corporation,
et al.,

Defendants Appellees,

Lloyds Banking Group plc, *et
al.*,

Defendants

ORDER

Docket No.

13-3565 (L);

13-3636 (con)

* The Honorable John M. Walker, Jr., originally a member of the panel sitting on October 29, 2013, recused himself from consideration of this matter. The remaining members of this panel, who are in agreement, have decided this case pursuant to Second Circuit Internal Operating Procedure E(b).

4a

Appellants move for reconsideration of this Court's order of October 30, 2013, which dismissed these appeals *sua sponte*, and for reinstatement.

Upon due consideration, IT IS HEREBY ORDERED that the motions are DENIED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX C

**UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

**IN RE: LIBOR-BASED
FINANCIAL INSTRUMENTS
ANTITRUST LITIGATION**

MDL No. 2262

TRANSFER ORDER

Before the Panel:¹ Pursuant to 28 U.S.C. § 1407, plaintiff in an action pending in the Southern District of New York (*Ravan Investments*) moves to centralize this litigation in that district.

The motion encompasses seven actions: four in the Southern District of New York and three in the Northern District of Illinois, as listed on Schedule A. The Panel has been notified of ten additional related actions.²

All responding parties support centralization, but there is disagreement as to an appropriate transferee district. All responding defendants³ support

¹ Judge John G. Heyburn II, Judge Paul J. Barbadoro, and Judge Marjorie O. Rendell took no part in the disposition of this matter.

² These actions and any other related actions are potential tag-along actions. *See* Rules 1.1(h), 7.1, and 7.2.

³ The Norinchukin Bank; Bank of America Corporation; The Bank of Tokyo-Mitsubishi UFJ, Ltd.; Barclays Bank plc; Citibank, N.A.; Credit Suisse Group AG; Deutsche Bank AG; HBOS plc; J.P. Morgan Chase & Co.; Lloyds Banking Group plc;

centralization in the Southern District of New York, as do plaintiffs in the first-filed *FTC Capital* action, which is pending in that district, and plaintiffs in two Southern District of New York potential tag-along actions. Plaintiffs in the three actions pending in the Northern District of Illinois, however, argue for centralization in that district, as does plaintiff in a Northern District of Illinois potential tag-along action. Finally, plaintiffs in potential tag-along actions pending in the District of Minnesota and the District of New Jersey argue for selection of their respective districts.

On the basis of the papers filed and hearing session held, we find that these seven actions involve common questions of fact, and that centralization under Section 1407 in the Southern District of New York will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. All seven actions share factual issues arising from allegations concerning defendants' participation in the British Bankers' Association (BBA) London Interbank Offered Rate (Libor) panel. More specifically, plaintiffs allege that defendants manipulated Libor 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 defendants' products with rates of return tied to Libor, and also avoided disclosing the true risk premium that the market was

Coöperative Centrale Raiffeisen Boerenleenbank B.A.; the Royal Bank of Canada; The Royal Bank of Scotland Group plc; Société Générale; UBS AG; and WestLB AG.

attaching to them during the global financial crisis. Centralization under Section 1407 will eliminate duplicative discovery, prevent inconsistent pretrial rulings on class certification, discovery, and other pretrial issues, and conserve the resources of the parties, their counsel and the judiciary.

We conclude that the Southern District of New York is an appropriate transferee district for pretrial proceedings in this litigation. Two of the three United States-based defendants have their headquarters in that district, and it is also relatively more convenient for those defendants based in the United Kingdom and Europe. At least some foreign discovery in this docket appears probable. As proponents of selection of the Southern District of New York argue, the actions involve the alleged manipulation of an interest rate benchmark determined in London. Discovery thus will almost certainly encompass (and, indeed, likely focus on) the setting of Libor rates, defendants' alleged underreporting of the cost of actual borrowing, communications by defendants regarding Libor, and defendants' profits from Libor-based transactions. Although the litigation may entail some discovery regarding the trading of Libor-based derivatives on the Chicago exchanges, it appears that most discovery will be concentrated elsewhere.

IT IS THEREFORE ORDERED that pursuant to 28 U.S.C. § 1407, the actions listed on Schedule A and pending outside the Southern District of New York are transferred to the Southern District of New York and, with the consent of that court, assigned to the Honorable Naomi Reice Buchwald for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A.

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PANEL ON MULTIDISTRICT LITIGATION

/s/ Kathryn H. Vratil

Acting Chairman

W. Royal Furgeson, Jr. Frank C. Damrell, Jr.

Barbara S. Jones

**IN RE: LIBOR-BASED
FINANCIAL INSTRUMENTS
ANTITRUST LITIGATION**

MDL No. 2262

SCHEDULE A

Northern District of Illinois

Richard Hershey v. Credit Suisse Group AG, et al.,
C.A. No. 1:11-02625

Brian McCormick, et al. v. Bank of America
Corporation, et al., C.A. No. 1:11-02706

Jeffrey Laydon v. Credit Suisse Group AG, et al., C.A.
No. 1:11-02824

Southern District of New York

FTC Capital GMBH, et al. v. Credit Suisse Group AG,
et al., C.A. No. 1:11-02613

Carpenters Pension Fund of West Virginia v. Bank of
America Corporation, et al., C.A. No. 1:11-02883

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City of Dania Beach Police & Firefighters' Retirement
System v. Bank of America Corporation, et al., C.A.
No. 1:11-03128

Ravan Investments, LLC v. Bank of America
Corporation, et al., C.A. No. 1:11-03249

APPENDIX D

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**In re: LIBOR-Based Financial
Instruments Antitrust Litigation.**

**THIS DOCUMENT RELATES TO:
Exchange-Based Plaintiff Action**

11 MD 2262 (NRB)

MEMORANDUM AND ORDER

In our Memorandum and Order of November 29, 2011, we granted counsel's request to consolidate the class action complaints then-pending before the Court pursuant to Federal Rule of Civil Procedure 42(a). (Docket No. 66 at 10.) In the course of our research, we have realized that the consolidation pursuant to Rule 42(a) was in error given that our authority over actions transferred from districts outside of the Southern District of New York extends only to pretrial matters, while Rule 42 effectuates consolidation for all purposes (including trial) See 17 Moore's Federal Practice § 112.07[b] (3d ed. 2012) (*citing Shulman v. Goldman, Sachs & Co. (In re Penn Cent. Commercial Paper Litig.)*, 62 F.R.D. 341, 344 (S.D.N.Y. 1974), *aff'd* 515 F.2d 505 (2d Cir. 1975)).

This error does not affect the class structure and motion schedule that has been put into place, as such measures fall within the Court's authority to coordinate and consolidate pretrial proceedings pursuant to 28 U.S.C. § 1407. See *In re Packaged Ice Antitrust Litig.*, No. 08 Md. 1952 (E.D. Mich.) (similarly appointing interim class counsel for distinct

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classes of plaintiffs, directing the filing amended complaints for each class, and ruling on dispositive motions as to each class); *In re Rail Freight Surcharge Antitrust Litig.*, No. 07 Md. 1869 (D. D. C.) (same).

Accordingly, we reverse our previous consolidation order pursuant to Rule 42(a) and instead consolidate the class action complaints pending in the MDL for pretrial purposes only.

SO ORDERED.

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT
JUDGE

Dated: New York, New York
July 18, 2012

APPENDIX E

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

**In re: LIBOR-Based Financial
Instruments Antitrust Litigation.**
11 MD 2262 (NRB)

CIVIL DOCKET FOR CASE #:

1:12-cv-01025-NRB

Gelboim et al. v. Credit Suisse Group AG et al

Text of Docket Entry No. 43, Mar. 29, 2013

MEMORANDUM AND ORDER granting in part and denying in part 25 Motion to Dismiss; terminating pursuant to instructions from Chambers; 32 Motion to Dismiss. For the reasons stated above, defendants motions to dismiss are granted in part and denied in part. First, defendants motion to dismiss plaintiffs federal antitrust claim is granted. Regardless of whether defendants conduct constituted a violation of the antitrust law “antitrust injury.” An antitrust injury is an injury that results from an anticompetitive aspect of defendants conduct. Here, although plaintiffs have alleged that defendants conspired to suppress LIBOR over a nearly three-year-long period and that they were injured as a result, they have not alleged that their injury resulted from any harm to competition. The process by which banks submit LIBOR quotes to the BBA is not itself competitive, and plaintiffs have not alleged that defendants conduct had an anticompetitive effect in any market in which

defendants compete. Because plaintiffs have not alleged an antitrust injury, their federal antitrust claim is dismissed. Second, defendants' motion to dismiss plaintiffs' commodities manipulation claims is granted in part and denied in part. Contrary to defendants' arguments, plaintiffs' claims do not involve an impermissible extraterritorial application of the CEA, and plaintiffs have adequately pleaded their claims. However, certain of plaintiffs' claims are time-barred because numerous articles published in April and May 2008 in prominent national publications placed plaintiffs on notice of their injury. Therefore, plaintiffs commodities manipulation claims based on contracts entered into between August 2007 and May 29, 2008, are time-barred. However, plaintiffs claims based on contracts entered into between April 15, 2009, and May 2010 are not time-barred, and plaintiffs' claims based on contracts entered into between May 30, 2008, and April 14, 2009, may or may not be barred, though we will not dismiss them at this stage. Additionally, because the Barclays settlements brought to light information that plaintiffs might not previously have been able to learn, we grant plaintiffs leave to move to amend their complaint to include allegations based on such information, provided that any such motion addresses the concerns raised herein and is accompanied by a proposed second amended complaint. Third, defendants' motion to dismiss plaintiffs' RICO claim is granted. For one, the PSLRA bars plaintiffs from bringing a RICO claim based on predicate acts that could have been the subject of a securities fraud action. Here, the predicate acts of mail and wire fraud underlying plaintiffs' RICO claim could have been the subject of a claim for securities fraud. Additionally, RICO applies only domestically, meaning

that the alleged enterprise must be a domestic enterprise. However, the enterprise alleged by plaintiffs is based in England. For these reasons, plaintiffs RICO claim is dismissed. Finally, plaintiffs' state-law claims are all dismissed, some with prejudice and some without. Plaintiffs' Cartwright Act claim is dismissed with prejudice for lack of antitrust injury. The exchange-based plaintiffs' New York common law unjust enrichment claim is also dismissed with prejudice, as plaintiffs have not alleged any relationship between them and defendants. With regard to the remaining state-law claims, we decline to exercise supplemental jurisdiction and We recognize that it might be unexpected that we are dismissing a substantial portion of plaintiffs claims, given that several of the defendants here have already paid penalties to government regulatory agencies reaching into the billions of dollars. However, these results are not as incongruous as they might seem. Under the statutes invoked here, there are many requirements that private plaintiffs must satisfy, but which government agencies need not. The reason for these differing requirements is that the focuses of public enforcement and private enforcement, even of the same statutes, are not identical. The broad public interests behind the statutes invoked here, such as integrity of the markets and competition, are being addressed by ongoing governmental enforcement. While public enforcement is often supplemented by suits brought by private parties acting as "private attorneys general," those private actions which seek damages and attorneys fees 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.

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Therefore, although we are fully cognizant of the settlements that several of the defendants here have entered into with government regulators, we find that only some of the claims that plaintiffs have asserted may properly proceed. (Signed by Judge Naomi Reice Buchwald on 3/29/2013) (tro) Modified on 4/2/2013 (tro). (Entered: 03/29/2013)

APPENDIX F

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

**In re: LIBOR-Based Financial
Instruments Antitrust Litigation.
THIS DOCUMENT RELATES TO: All Cases**

11 MD 2262 (NRB)
March 29, 2013, Decided
March 29, 2013, Filed

MEMORANDUM AND ORDER

I. Introduction

These cases arise out of the alleged manipulation of the London InterBank Offered Rate (“LIBOR”), an interest rate benchmark that has been called “the world’s most important number.” British Bankers’ Ass’n, *BBA LIBOR: The World’s Most Important Number Now Tweets Daily* (May 21, 2009), <http://www.bbalibor.com/news-releases/bba-libor-the-worlds-most-important-number-now-tweets-daily>. As numerous newspaper articles over the past year have reported, domestic and foreign regulatory agencies have already reached settlements with several banks involved in the LIBOR-setting process, with penalties reaching into the billions of dollars.

The cases presently before us do not involve governmental regulatory action, but rather are private lawsuits by persons who allegedly suffered harm as a result of the suppression of LIBOR. Starting in mid-

2011, such lawsuits began to be filed in this District and others across the country. On August 12, 2011, the Judicial Panel on Multidistrict Litigation transferred several such cases from other districts to this Court for “coordinated or consolidated pretrial proceedings.” *In re Libor-Based Fin. Instruments Antitrust Litig.*, 802 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011); *see also* 28 U.S.C. § 1407 (2006).

On June 29, 2012, defendants filed motions to dismiss. Four categories of cases are subject to defendants’ motions to dismiss: cases brought by (1) over-the-counter (“OTC”) plaintiffs, (2) exchange-based plaintiffs, (3) bondholder plaintiffs, and (4) Charles Schwab plaintiffs (the “Schwab plaintiffs”). The first three categories each involve purported class actions, and each has a single lead action. The lead action for the OTC plaintiffs is *Mayor and City Council of Baltimore v. Bank of America* (11 Civ. 5450); the lead action for the exchange-based plaintiffs is *FTC Capital GmbH v. Credit Suisse Group* (11 Civ. 2613), and the lead action for the bondholder plaintiffs is *Gelboim v. Credit Suisse Group* (12 Civ. 1025). By contrast, the Schwab plaintiffs do not seek to represent a class, but rather have initiated three separate cases: *Schwab Short-Term Bond Market Fund v. Bank of America Corp.* (11 Civ. 6409), *Charles Schwab Bank, N.A. v. Bank of America Corp.* (11 Civ. 6411), and *Schwab Money Market Fund v. Bank of America Corp.* (11 Civ. 6412).

Subsequent to defendants’ filing of their motion to dismiss, several new complaints were filed. It quickly became apparent to us that information relating to

this case would continue indefinitely to come to light, that new complaints would continue to be filed, and that waiting for the “dust to settle” would require an unacceptable delay in the proceedings.

Therefore, on August 14, 2012, we issued a Memorandum and Order imposing a stay on all complaints not then subject to defendants’ motions to dismiss, pending the present decision. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262, 2012 WL 3578149 (S.D.N.Y. Aug. 14, 2012). Although we encouraged the prompt filing of new complaints, *see id.* at *1 n.2, we determined that the most sensible way to proceed would be to wait on addressing those cases until we had clarified the legal landscape through our decision on defendants’ motions.

For the reasons stated below, defendants’ motions to dismiss are granted in part and denied in part. With regard to plaintiffs’ federal antitrust claim¹ and RICO claim, defendants’ motions are granted. With regard to plaintiffs’ commodities manipulation claims, defendants’ motions are granted in part and denied in part. Finally, we dismiss with prejudice the Schwab plaintiffs’ Cartwright Act claim and the exchange-

¹ Because each amended complaint asserts only one federal antitrust claim, we will refer in the singular to plaintiffs’ federal antitrust “claim.” Similarly, because each of the Schwab amended complaints asserts one RICO claim and one Cartwright Act claim, we will refer in the singular to the Schwab plaintiffs’ RICO “claim” and Cartwright Act “claim.”

based plaintiffs' state-law claim, and we decline to exercise supplemental jurisdiction over the remaining state-law claims.

II. Background

Despite the legal complexity of this case, the factual allegations are rather straightforward. Essentially, they are as follows: Defendants are members of a panel assembled by a banking trade association to calculate a daily interest rate benchmark. Each business day, defendants submit to the association a rate that is supposed to reflect their expected costs of borrowing U.S. dollars from other banks, and the association computes and publishes the average of these submitted rates. The published average is used as a benchmark interest rate in financial instruments worldwide. According to plaintiffs, defendants conspired to report rates that did not reflect their good-faith estimates of their borrowing costs, and in fact submitted artificial rates over the course of thirty-four months. Because defendants allegedly submitted artificial rates, the final computed average was also artificial. Plaintiffs allege that they suffered injury because they held positions in various financial instruments that were negatively affected by defendants' alleged fixing of the benchmark interest rate.

As one would expect, the parties' primary factual disagreement concerns whether defendants conspired to submit artificial rates and whether they in fact did so. Plaintiffs have included in their complaints extensive evidence that allegedly supports their allegations on these points, and defendants, were this

case to proceed to trial, would surely present evidence to the contrary with equal vigor. However, our present task is not to resolve the parties' factual disagreements, but rather to decide defendants' motions to dismiss. These motions raise numerous issues of law, issues that, although they require serious legal analysis, may be resolved without heavy engagement with the facts. Therefore, we will set out in this section only those factual allegations necessary to provide context for our decision, and will cite further allegations later as appropriate. This section will begin by explaining what LIBOR is and will then discuss defendants' alleged misconduct and how it allegedly injured plaintiffs.

A. LIBOR

LIBOR is a benchmark interest rate disseminated by the British Bankers' Association (the "BBA"), a "leading trade association for the U.K. banking and financial services sector." OTC Am. Compl. ¶ 42 (quoting BBA, *About Us*, <http://www.bba.org.uk/about-us> (last visited Mar. 29, 2013)).² LIBOR is calculated

² The six amended complaints subject to defendants' motions to dismiss are essentially identical in their allegations regarding the background of this case and the misconduct that defendants allegedly committed. Therefore, in section A, providing background on LIBOR, and section B, discussing defendants' alleged misconduct, we will cite exclusively to the OTC Amended Complaint, with the understanding that parallel allegations are contained in most or all of the other amended complaints. By contrast, the primary areas in which the amended complaints differ are in their allegations of who the plaintiffs are, how they were allegedly injured, and what claims they are asserting

for ten currencies, including the U.S. dollar (“USD LIBOR”). *Id.* ¶ 43. For each of the currencies, the BBA has assembled a panel of banks whose interest rate submissions are considered in calculating the benchmark (a “Contributor Panel”); each member of the Contributor Panel must be a bank that “is regulated and authorized to trade on the London money market.” *Id.* ¶ 46. The Contributor Panel for USD LIBOR, the only rate at issue in this case, consisted at all relevant times of sixteen banks. The defendants here, or one of their affiliates, are each members of that panel.

Each business day, the banks on a given LIBOR Contributor Panel answer the following question, with regard to the currency for which the bank sits on the Contributor Panel: “At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?” *Id.* ¶ 48. Importantly, this question does not ask banks to report an interest rate that they actually paid or even an average of interest rates that they actually paid; rather, it inquires at what rate the banks “predict they can borrow unsecured funds from other banks in the London wholesale money market.” *Id.* ¶ 44. Each bank will answer this question with regard to fifteen maturities,

against defendants. Accordingly, in Part C, when we discuss plaintiffs’ alleged injury, we will explore the allegations particular to specific amended complaints.

or tenors, ranging from overnight to one year. *Id.*; Settlement Agreement Between Dep't of Justice, Criminal Div., and Barclays (June 26, 2012), Appendix A, ¶ 5, Ex. 3, Scherrer Decl. [hereinafter DOJ Statement]. The banks submit rates in response to this question ("LIBOR quotes" or "LIBOR submissions") each business day by 11:10 AM London time to Thomson Reuters, acting as the BBA's agent. OTC Am. Compl. ¶ 47; DOJ Statement ¶ 3. Each bank "must submit its rate without reference to rate contributed by other Contributor Panel banks." DOJ Statement ¶ 6.

After receiving quotes from each bank on a given panel, Thomson Reuters determines the LIBOR for that day (the "LIBOR fix") by ranking the quotes for a given maturity in descending order and calculating the arithmetic mean of the middle two quartiles. OTC Am. Compl. ¶ 48; DOJ Statement ¶ 4. For example, suppose that on a particular day, the banks on the Contributor Panel for U.S. dollars submitted the following quotes for the three-month maturity ("three-month USD LIBOR"): 4.0%, 3.9%, 3.9%, 3.9%, 3.8%, 3.8%, 3.7%, 3.6%, 3.5%, 3.5%, 3.4%, 3.3%, 3.3%, 3.1%, 3.0%, and 3.0%. The quotes in the middle two quartiles would be: 3.8%, 3.8%, 3.7%, 3.6%, 3.5%, 3.5%, 3.4%, and 3.3%. The arithmetic mean of these quotes, 3.575%, would be the LIBOR fix for that day.

Thomson Reuters publishes the new LIBOR fix each business day by approximately 11:30 AM London time. DOJ Statement ¶ 5. In addition to publishing the final fix, "Thomson Reuters publishes each Contributor Panel bank's submitted rates along with

the names of the banks.” *Id.* Therefore, it is a matter of public knowledge not only what the LIBOR fix is on any given business day, but also what quote each bank submitted and how the final fix was calculated.

LIBOR is “the primary benchmark for short term interest rates globally.” OTC Am. Compl. ¶ 44. For example, market actors “commonly set the interest rate on floating-rate notes [in which the seller of the note pays the buyer a variable rate] as a spread against LIBOR,” such as LIBOR plus 2%, and “use LIBOR as a basis to determine the correct rate of return on short-term fixed-rate notes [in which the seller of the note pays the buyer a fixed rate] (by comparing the offered rate to LIBOR).” In short, LIBOR “affects the pricing of trillions of dollars’ worth of financial transactions.” *Id.* ¶ 45.

B. Defendants’ Alleged Misconduct

According to plaintiffs, “Defendants collusively and systematically suppressed LIBOR during the Class Period,” defined as August 2007 to May 2010. OTC Am. Compl. ¶ 2; *see also id.* ¶¶ 4-8; Exchange Am. Compl. ¶ 1. Defendants allegedly did so by each submitting an artificially low LIBOR quotes to Thomson Reuters each business day during the Class Period. OTC Am. Compl. ¶ 6.

Plaintiffs argue that defendants had two primary motives for suppressing LIBOR. First, “well aware that the interest rate a bank pays (or expects to pay) on its debt is widely, if not universally, viewed as embodying the market’s assessment of the risk associated with that bank, Defendants understated their borrowing costs (thereby suppressing LIBOR) to

portray themselves as economically healthier than they actually were.” OTC Am. Compl. ¶ 5. Moreover, “because no one bank would want to stand out as bearing a higher degree of risk than its fellow banks, each Defendant shared a powerful incentive to collude with its co-Defendants to ensure it was not the ‘odd man out.’” *Id.* ¶ 52. Second, “artificially suppressing LIBOR allowed Defendants to pay lower interest rates on LIBOR-based financial instruments that Defendants sold to investors, including [plaintiffs], during the Class Period.” *Id.* ¶ 5; *see also id.* ¶ 53.

Plaintiffs devote the bulk of their complaints to amassing evidence that LIBOR was fixed at artificially low levels during the Class Period. For one, plaintiffs offer statistical evidence showing that LIBOR diverged during the Class Period from benchmarks that it would normally track. First, each defendant’s LIBOR quotes allegedly diverged over the Class Period from its probabilities of default, as calculated by experts retained by plaintiffs. OTC Am. Compl. ¶¶ 57-66. A bank’s probability of default should correlate positively with its cost of borrowing, based on the basic principle that “investors require a higher . . . rate of return as a premium for taking on additional risk exposure.” *Id.* ¶ 59. However, plaintiffs’ experts found “a striking negative correlation between USD-LIBOR panel bank’s LIBOR quotes and [probabilities of default] during 2007 and 2008.” *Id.* ¶ 66. This suggests that defendants “severely depressed LIBOR during that time.” *Id.*

Second, LIBOR diverged during the Class Period from another comparable benchmark, the Federal

Reserve Eurodollar Deposit Rate (the “Fed Eurodollar Rate”). Eurodollars are defined as “U.S. dollars deposited in commercial banks outside the United States.” Exchange Am. Compl. ¶ 200 (quoting CME Group, *Eurodollar Futures*, http://www.cmegroup.com/trading/interest-rates/files/IR148_Eurodollar_Futures_Fact_Card.pdf). Like LIBOR, the Fed Eurodollar Rate “reflect[s] the rates at which banks in the London Eurodollar money market lend U.S. dollars to one another,” OTC Am. Compl. ¶ 68, though because LIBOR is based on the interest rate that banks expect lenders to offer them (an “offered rate”), whereas the Fed Eurodollar Rate is based on what banks are willing to pay to borrow (a “bid rate”), “the Fed’s Eurodollar rate should be less than LIBOR.” Scott Peng et al., Citigroup, *Special Topic: Is LIBOR Broken?*, Apr. 10, 2008. However, plaintiffs’ experts found that LIBOR was lower than the Fed Eurodollar Rate, and that individual defendants’ LIBOR quotes were also lower than the Fed Eurodollar Rate, for most of the Class Period. OTC Am. Compl. ¶¶ 67-88. According to plaintiffs, this finding suggests not only that “suppression of LIBOR occurred during the Class Period,” but also that defendants conspired to suppress LIBOR, as “[t]he sustained period during which the [Fed Eurodollar Rate] - LIBOR Spread fell and remained starkly negative . . . is not plausibly achievable absent collusion among Defendants.” *Id.* ¶ 88.

In addition to the above statistical analysis, plaintiffs cite “publicly available analyses by academics and other commentators” which “collectively indicate ILBOR was artificially

suppressed during the Class Period.” *Id.* ¶ 89. For instance, plaintiffs discuss studies that found “variance between [banks’] LIBOR quotes and their contemporaneous cost of buying default insurance . . . on debt they issued during [the Class Period].” *Id.* ¶ 90; *see also id.* ¶¶ 90-103. Plaintiffs also note commentators’ findings that defendants’ LIBOR quotes “demonstrated suspicious ‘bunching’ around the fourth lowest quote submitted by the 16 banks,” which “suggests Defendants collectively depressed LIBOR by reporting the lowest possible rates that would not be excluded from the calculation of LIBOR on a given day. *Id.* ¶ 105; *see also id.* ¶¶ 105-13.

Plaintiffs further observe that “during 2008 and 2009 at least some of [defendants’] LIBOR quotes were too low in light of the dire financial circumstances the banks faced.” *Id.* ¶ 128. For instance, the LIBOR submissions of Citigroup, RBS, and WestLB were suspiciously low given the financial troubles facing those banks during the Class Period. *Id.* ¶¶ 128-38.

Finally, plaintiffs allege that they were not aware of defendants’ manipulation “until March 15, 2011, when UBS released its annual report 20-F stating that it had received subpoenas from the Department of Justice, the SEC, the CFTC, as well as an information request from the Japanese Financial Supervisory Agency, all relating to its interest rate submissions to the BBA.” *Id.* ¶ 205. UBS had explained that these investigations addressed “whether there were improper attempts by UBS, either acting on its own or together with others, to manipulate LIBOR at certain times.” Plaintiffs maintain that, even though several

news articles had warned as early as spring 2008 that LIBOR was suspiciously low,³ these warnings did not provide notice of defendants' alleged manipulation of LIBOR because they were counteracted by public statements from the BBA and individual defendants that provided alternative explanations for why LIBOR had failed to track comparable benchmarks. *Id.* ¶¶ 192-204.

Following the filing of plaintiffs' amended complaints on April 30, 2012, several governmental agencies disclosed that they had reached settlements with Barclays with regards to Barclays' submission of artificial LIBOR quotes. Although plaintiffs were not able to incorporate information from these settlements into their amended complaints, they have submitted to the Court, in the course of opposing defendants' motions to dismiss, settlement documents issued by the Criminal Division of the Department of Justice, the Commodities Futures Trading Commission (the "CFTC"), and the United Kingdom Financial Services Authority (the "FSA"). See DOJ Statement; CFTC Settlement Order (June 27, 2012) [hereinafter CFTC Order], Ex. 4, Scherrer Decl.; FSA Final Notice (June 27, 2012), Ex. 5, Scherrer Decl. [hereinafter FSA Notice].

These agencies found that Barclays had engaged in "wrongful conduct spann[ing] from at least 2005

³ These articles will be discussed in detail below in the context of whether plaintiffs' commodities manipulation claims are time-barred.

through at least 2009,” at times “on an almost daily basis.” CFTC Order 2. Specifically:

During the period from at least mid-2005 through the fall of 2007, and sporadically thereafter into 2009, Barclays based its LIBOR submissions for U.S. Dollar (and at limited times other currencies) on the requests of Barclays’ swaps traders, including former Barclays swaps traders, who were attempting to affect the official published LIBOR, in order to benefit Barclays’ derivatives trading positions; those positions included swaps and futures trading positions

Id. The agencies documented instances in which Barclays’ LIBOR submitters had accommodated requests from traders for an artificially high LIBOR quote as well as instances where the LIBOR submitters had accommodated requests for an artificially low LIBOR quote. *See, e.g., id.* at 7-11. In addition to this manipulation to benefit daily trading positions, leading to either an artificially high or artificially low LIBOR quote, the agencies found that from “late August 2007 through early 2009,” Barclays’ LIBOR submitters, “[p]ursuant to a directive by certain members of Barclays’ senior management,” consistently submitted artificially low LIBOR quotes “in order to manage what [Barclays] believed were inaccurate and negative public and media perceptions that Barclays had a liquidity problem.” *Id.* at 3.

C. Plaintiffs’ Alleged Injury

As discussed above, the present motions to dismiss apply to the amended complaints of four groups of

plaintiffs: the OTC, bondholder, exchange-based, and Schwab plaintiffs. Each of these groups alleges that it suffered a distinct injury as a result of defendants' alleged misconduct. We will address each group in turn.

1. OTC Plaintiffs

The lead OTC plaintiffs are the Mayor and City Council of Baltimore (“Baltimore”) and the City of New Britain Firefighters’ and Police Benefit Fund (“New Britain”). Baltimore “purchased hundreds of millions of dollars in interest rate swaps directly from at least one Defendant in which the rate of return was tied to LIBOR.” OTC Am. Compl. ¶ 12. New Britain “purchased tens of millions of dollars in interest rate swaps directly from at least one Defendant in which the rate of return was tied to LIBOR.” *Id.* ¶ 13. These plaintiffs seek to represent a class of “[a]ll persons or entities . . . that purchased in the United States, directly from a Defendant, a financial instrument that paid interest indexed to LIBOR . . . any time during the [Class Period].” *Id.* ¶ 34. According to plaintiffs, they suffered injury as a result of defendants’ alleged misconduct because their financial instruments provided that they would receive payments based on LIBOR, and when defendants allegedly suppressed LIBOR, plaintiffs received lower payments from defendants. *See id.* ¶¶ 8, 219.

2. Bondholder Plaintiffs

The lead bondholder plaintiffs are Ellen Gelboim (“Gelboim”) and Linda Zacher (“Zacher”). Gelboim “is the sole beneficiary of her Individual Retirement Account that during the Class Period owned a . . .

LIBOR-Based Debt Security issued by General Electric Capital Corporation.” Bondholder Am. Compl. ¶ 15. Similarly, Zacher “is the sole beneficiary of her late husband’s Individual Retirement Account that during the Class Period owned a . . . LIBOR-Based Debt Security issued by the State of Israel.” *Id.* ¶ 16. These plaintiffs seek to represent the following class:

[A]ll [persons] who owned (including beneficially in ‘street name’) any U.S. dollar-denominated debt security (a) that was assigned a unique identification number by the [Committee on Uniform Securities Identification Procedures] system; (b) on which interest was payable at any time [during the Class Period]; and (c) where that interest was payable at a rate expressly linked to the U.S. Dollar Libor rate.

Id. ¶ 1; *see also id.* ¶ 198. This class excludes holders of debt securities to the extent that their securities were “issued by any Defendant as obligor.” *Id.* Plaintiffs allege that they suffered injury as a result of defendants’ alleged misconduct because they “receiv[ed] manipulated and artificially depressed amounts of interest on [the] [d]ebt [s]ecurities they owned during the Class Period.” *Id.* ¶ 14.

3. Exchange-Based Plaintiffs

In order to place the exchange-based plaintiffs’ claims in context, we will first provide a brief overview of Eurodollar futures contracts. We will then summarize who plaintiffs are and how they allege they were injured.

a. Eurodollar Futures Contracts

A futures contract “is an agreement for the sale of a commodity on a specific date (the ‘delivery date’).” *In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. 366, 372 (S.D.N.Y. 2010). The seller of a futures contract, known as the “short,” agrees to deliver the commodity specified in the contract to the buyer, known as the “long,” on the delivery date. *See id.* However, in most cases, the commodity never actually changes hands; rather, “[m]ost investors close out of their positions before the delivery dates,” *id.*, such as by entering into offsetting contracts whereby the commodity delivery requirements cancel out and “[t]he difference between the initial purchase or sale price and the price of the offsetting transaction represents the realized profit or loss,” Exchange Am. Compl. ¶ 208.

Although many futures contracts are based on an underlying commodity that is a physical good, such as copper, others are not. One such futures contract is a Eurodollar futures contract, which is “the most actively traded futures contract[] in the world.” *Id.* ¶ 201; *see also* DOJ Statement 4 (“In 2009, according to the Futures Industry Association, more than 437 million Eurodollar futures contracts were traded”). Eurodollar futures contracts, traded on the Chicago Mercantile Exchange (the “CME”), Exchange Am. Compl. ¶ 201, are based on an “underlying instrument” of a “Eurodollar Time Deposit having a principal value of USD \$1,000,000 with a three-month maturity.” CME Group, *Eurodollar Futures: Contract Specifications*, <http://www.cmegroup.com/trading/>

interest-rates/stir/eurodollar_contract_specifications.html (last visited Mar. 29, 2013). “Eurodollars are U.S. dollars deposited in commercial banks outside the United States.” CME Group, *Eurodollar Futures*, http://www.cmegroup.com/trading/interest-rates/files/IR148_Eurodollar_Futures_Fact_Card.pdf.

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 “settlement date,” the seller pays the buyer a specified price. The price at settlement “is equal to 100 minus the three-month Eurodollar interbank time deposit rate,” which rate is defined as the USD three-month LIBOR fix on the contract’s last trading day. CME Group, *Eurodollar Futures Final Settlement Procedure*, <http://www.cmegroup.com/trading/interest-rates/files/final-settlement-procedure-eurodollar-futures.pdf>. Like other futures contracts, Eurodollar futures contracts may be traded prior to settlement, and their trading price will reflect “the market’s prediction of the [three]-month [USD] LIBOR on [the contract’s last trading day].” DOJ Statement ¶ 9.

Finally, options on Eurodollar futures contracts are also traded on the CME. Exchange Am. Compl. ¶ 210. A trader might purchase a “call,” which gives him “the right, but not the obligation, to buy the underlying Eurodollar futures contract at a certain price - the strike price.” *Id.* A trader could also purchase a “put,” giving him “the right, but not the obligation, to sell the underlying Eurodollar futures contract at the strike price.” *Id.* The price at which a

Eurodollar option trades “is affected by the underlying price of the Eurodollar futures contract, which, in turn, is directly affected by the reported LIBOR.” *Id.*

b. Plaintiffs and Their Alleged Injury

There are seven lead exchange-based plaintiffs. Plaintiff Metzler Investment GmbH (“Metzler”) is a German company that launched and managed investment funds which traded Eurodollar futures. Exchange Am. Compl. ¶ 20. Plaintiffs FTC Futures Fund SICAV (“FTC SICAV”) and FTC Futures Fund PCC Ltd. (“FTC PCC”) are each funds, based in Luxembourg and Gibraltar, respectively, which traded Eurodollar futures. *Id.* ¶¶ 21-22. Plaintiffs Atlantic Trading USA, LLC (“Atlantic”) and 303030 Trading LLC (“303030”) are both Illinois limited liability companies with principal places of business in Illinois and which traded Eurodollar futures. *Id.* ¶¶ 23-24. Finally, plaintiffs Gary Francis (“Francis”) and Nathaniel Haynes (“Haynes”) are both residents of Illinois who traded Eurodollar futures. *Id.* ¶¶ 25-26. These plaintiffs seek to represent a class of “all persons . . . that transacted in Eurodollar futures and options on Eurodollar futures on exchanges such as the CME [during the Class Period] and were harmed by Defendants’ manipulation of LIBOR.” *Id.* ¶ 221.

Plaintiffs allege that they suffered injury from defendants’ alleged manipulation of LIBOR. According to plaintiffs, defendants’ suppression of LIBOR caused Eurodollar contracts to trade and settle at artificially high prices. *Id.* ¶¶ 215-16. Plaintiffs purchased Eurodollar contracts during the Class Period, *id.* ¶ 214, and “the direct and foreseeable effect of the

Defendants' intentional understatement of their LIBOR rate was to cause Plaintiffs and the Class to pay supracompetitive prices for [their] CME Eurodollar futures contracts." *Id.* ¶ 217.

4. Schwab Plaintiffs

The last group of plaintiffs comprises the Schwab plaintiffs. As discussed above, these plaintiffs do not seek to represent a class, but rather have filed three separate amended complaints. First, the "Schwab Bank" amended complaint has three plaintiffs.⁴ Plaintiff The Charles Schwab Corporation is a Delaware corporation with its principal place of business in California. Schwab Bank Am. Compl. ¶ 17. Plaintiff Charles Schwab Bank, N.A., is a national banking association which is a wholly-owned subsidiary of The Charles Schwab Corporation and is organized under the laws of Arizona, with its principal place of business in Nevada. *Id.* ¶ 18. Finally, Plaintiff Charles Schwab & Co., Inc., is a California corporation and a wholly owned subsidiary of The Charles Schwab Corporation, which through its division Charles Schwab Treasury, manages the investments of Charles Schwab Bank, N.A. *Id.* ¶ 19. Each of these plaintiffs "purchased or held LIBOR-based financial instruments during the [Class Period]." *Id.* ¶¶ 17-19.

⁴ The "Schwab Bank" action is *Charles Schwab Bank, N.A. v. Bank of America Corp.* (11 Civ. 6411).

Second, the “Schwab Bond” amended complaint also has three plaintiffs.⁵ Plaintiff Schwab Short-Term Bond Market fund is “a series of Schwab Investments, an open-end, management investment company organized under Massachusetts law.” Schwab Bond Am. Compl. ¶ 17. Plaintiff Schwab Total Bond Market Fund “is also a series of Schwab Investments.” *Id.* ¶ 18. Finally, plaintiff Schwab U.S. Dollar Liquid Assets Fund is a fund managed in California and which is “a series of Charles Schwab Worldwide Funds plc, an investment company with variable capital, incorporated in Ireland.” *Id.* ¶ 19. Each of these plaintiffs “purchased or held LIBOR-based financial instruments during the [Class Period].” *Id.* ¶¶ 17-19.

Third, the “Schwab Money” amended complaint has seven plaintiffs.⁶ Plaintiff Schwab Money Market Fund is “a series of The Charles Schwab Family of Funds, an open-end investment management company organized as a Massachusetts business trust.” Schwab Money Am. Compl. ¶ 17. Plaintiffs Schwab Value Advantage Money Fund, Schwab Retirement Advantage Money Fund, Schwab Investor Money Fund, Schwab Cash Reserves, and Schwab Advisor Cash Reserves are each also “a series of The Charles Schwab Family of Funds.” *Id.* ¶¶ 18-22. Finally, Plaintiff Schwab YieldPlus Fund is “a series of Schwab

⁵ The “Schwab Bond” action is *Schwab Short-Term Bond Market Fund v. Bank of America Corp.* (11 Civ. 6409).

⁶ The “Schwab Money” action is *Schwab Money Market Fund v. Bank of America Corp.* (11 Civ. 6412).

Investments, an open-end investment management company organized as a Massachusetts business trust.” *Id.* ¶ 23. “Contingent interests of Schwab YieldPlus Fund have passed to Plaintiff Schwab YieldPlus Fund Liquidation Trust.” *Id.* Each of these plaintiffs “purchased or held LIBOR-based financial instruments during the [Class Period].” *Id.* ¶¶ 17-23.

Plaintiffs argue that they were injured as a result of defendants’ alleged suppression of LIBOR, which “artificially depress[ed] the value of tens of billions of dollars in LIBOR-based financial instruments the [plaintiffs] held or purchased.” *Id.* ¶ 194. These financial instruments included floating-rate instruments paying a rate of return directly based on LIBOR, *id.* ¶ 195, and fixed-rate instruments which plaintiffs decided to purchase by comparing the instruments’ fixed rate of return with LIBOR, *id.* ¶ 197. Plaintiffs purchased both floating- and fixed-rate instruments directly from defendants, from subsidiaries or other affiliates of defendants, and from third parties. *Id.* ¶¶ 196, 198-99.

III. Discussion

Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To avoid dismissal, a complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Where plaintiffs have not “nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” *Id.* In applying this standard, a court must accept as true all

well-pleaded factual allegations and must draw all reasonable inferences in favor of the plaintiff. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). The Court may also “properly consider ‘matters of which judicial notice may be taken, or documents either in plaintiff[’s] possession or of which plaintiff[] had knowledge and relied on in bringing suit.’” *Halebian v. Berv*, 644 F.3d 122, 130 n.7 (2d Cir. 2011) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)).

In the case at bar, defendants have moved to dismiss all of plaintiffs’ claims. Our analysis will proceed in an order roughly based on the structure of the parties’ briefing: (1) antitrust claims, (2) exchange-based claims, (3) RICO claim, and (4) state-law claims.

A. Antitrust Claim

Each amended complaint asserts a cause of action for violation of section 1 of the Sherman Act. OTC Am. Compl. ¶¶ 220-26; Bondholder Am. Compl. ¶¶ 205-11; Exchange Am. Compl. ¶¶ 245-49; Schwab Bond Am. Compl. ¶¶ 202-08; Schwab Bank Am. Compl. ¶¶ 201-07; Schwab Money Am. Compl. ¶¶ 214-20. The Schwab plaintiffs have also asserted a cause of action for violation of California’s antitrust statute, the Cartwright Act. Schwab Bond Am. Compl. ¶¶ 239-45; Schwab Bank Am. Compl. ¶¶ 238-44; Schwab Money Am. Compl. ¶¶ 251-57. Defendants have moved to dismiss these claims on four grounds: (1) plaintiffs do not adequately plead a contract, combination, or conspiracy, (2) plaintiffs fail to allege a restraint of trade, (3) plaintiffs lack antitrust standing, and (4)

indirect purchasers lack standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Because we find that the third ground, that plaintiffs lack antitrust standing, is a sufficient reason to dismiss plaintiffs' antitrust claims, we need not reach the remaining grounds.

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2006). The private right of action to enforce this provision is established in section 4 of the Clayton Act:

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

Id. § 15. Here, plaintiffs claim that they were injured by defendants' alleged conspiracy in restraint of trade, in violation of section 1 of the Sherman Act, and accordingly bring suit pursuant to section 4 of the Clayton Act.

To have standing under the Clayton Act, a private plaintiff must demonstrate (1) antitrust injury, and (2) “that he is a proper plaintiff in light of four ‘efficient enforcer’ factors” derived from the Supreme Court’s decision in *Associated General Contractors v. California State Council of Carpenters* (“AGC”), 459 U.S. 519 (1983). *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009). Here, plaintiffs have not plausibly alleged that they suffered antitrust injury, thus, on that basis alone, they lack standing. We need not reach the AGC “efficient enforcer” factors.

1. Antitrust Injury

a. Antitrust Injury Defined

As articulated by the Supreme Court in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (“ARCO”), “antitrust injury” refers to injury “attributable to an anticompetitive aspect of the practice under scrutiny.” *Id.*; see also *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (“Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.”).⁷

⁷ Here, plaintiffs have alleged that defendants violated the Sherman Act through a horizontal price-fixing conspiracy. The element of defendants’ alleged price fixing which makes it unlawful, as with any conduct in violation of the antitrust laws, is

Although conduct in violation of the Sherman Act might reduce, increase, or be neutral with regard to competition, a private plaintiff can recover for such a violation only where “the loss stems from a competition-*reducing* aspect or effect of the defendant’s behavior.” *ARCO*, 495 U.S. at 344 (emphasis in original). Moreover, it is not enough that defendant’s conduct disrupted or distorted a competitive market: “Although all antitrust violations . . . ‘distort’ the market, not every loss stemming from a violation counts as antitrust injury.” *Id.* at 339 n.8. Therefore, a plaintiff must demonstrate *not only* that it suffered injury and that the injury resulted from defendants’ conduct, *but also* that the injury resulted from the anticompetitive nature of defendant’s conduct. See *Nichols v. Mahoney*, 608 F. Supp. 2d 526, 543-44 (S.D.N.Y. 2009). The rationale, of course, is that the Clayton Act’s rich bounty of treble damages and attorney’s fees should reward only those plaintiffs who further the purposes of the Sherman and Clayton Acts, namely, “protecting competition.” *Brooke Grp. Ltd. v.*

its effect of restraining competition. See *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 345 (1982) (“The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed” (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927))).

Brown & Williamson Tobacco Corp., 509 U.S. 209, 251 (1993).

b. A Per Se Violation of the Sherman Act Does Not Necessarily Establish Antitrust Injury

Critically, even when a plaintiff can successfully allege a per se violation of section 1 of the Sherman Act, such as horizontal price fixing, the plaintiff will not have standing under section 4 of the Clayton Act unless he can separately demonstrate antitrust injury. *See ARCO*, 495 U.S. at 344 (“[P]roof of a per se violation and of antitrust injury are distinct matters that must be shown independently.” (quoting Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 334.2c, p. 330 (1989 Supp.))); *see also Paycom Billing Servs., Inc. v. Mastercard Int’l, Inc.*, 467 F.3d 283, 290 (2d Cir. 2006) (“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.” (quoting *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983)) (internal quotation marks omitted)). In other words, even though a defendant might have violated the Sherman Act and thus be subject to criminal liability, it is a separate question whether Congress intended to subject the defendant as well to civil liability, in particular to the plaintiffs suing.

c. California’s Cartwright Act also Requires Antitrust Injury

The antitrust injury requirement also applies to claims pursuant to the Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq. (West 2012). *See Flagship Theatres of Palm Desert, LLC v. Century Theatres*,

Inc., 198 Cal. App. 4th 1366, 1378, 1380 (App. 2d Dist. 2011) (“[F]ederal case law makes clear that the antitrust injury requirement also applies to other federal antitrust violations [beyond anticompetitive mergers]. California case law holds that the requirement applies to Cartwright Act claims as well. . . . [T]he antitrust injury requirement means that an antitrust plaintiff must show that it was injured by the anticompetitive aspects or effects of the defendant’s conduct, as opposed to being injured by the conduct’s neutral or even procompetitive aspects.”); *Morrison v. Viacom, Inc.*, 66 Cal. App. 4th 534, 548 (App. 1st Dist. 1998) (“The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. . . . An ‘antitrust injury’ must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants’ acts unlawful.” (alteration in original) (quoting *Kolling v. Dow Jones & Co.*, 137 Cal. App. 3d 709, 723 (App. 1st Dist. 1982))); *id.* (“Appellants failed to allege antitrust injury . . . because they have failed to allege any facts to show they suffered an injury which was caused by restraints on competition.”). The common antitrust injury requirement derives from the Cartwright Act’s and Sherman Act’s common purpose. *See Exxon Corp. v. Superior Court*, 51 Cal. App. 4th 1672, 1680 (App. 6th Dist. 1997) (citations omitted) (“The Cartwright Act, as the Sherman Antitrust Act, was enacted to promote free market competition and to prevent conspiracies or agreements in restraint or monopolization of trade.”).

2. Defendants' Alleged Conduct Was Not Anticompetitive

a. The LIBOR-Setting Process Was Never Competitive

Here, plaintiffs do not argue that the collaborative LIBOR-setting process itself violates the antitrust laws, but rather that defendants violated the antitrust laws by conspiring to set LIBOR at an artificial level. *See, e.g.*, OTC Compl. ¶¶ 217-26. According to plaintiffs:

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

Id. ¶ 219; *see also* Tr. 17-18.⁸

Although these allegations might suggest that defendants fixed prices and thereby harmed plaintiffs, they do not suggest that the harm plaintiffs suffered resulted from any anticompetitive aspect of defendants' conduct. As plaintiffs rightly acknowledged at oral argument, the process of setting

⁸ References preceded by "Tr." refer to the transcript of the oral argument held on March 5, 2013.

LIBOR was never intended to be competitive. Tr. 12, 18. Rather, it was a cooperative endeavor wherein otherwise-competing banks agreed to submit estimates of their borrowing costs to the BBA each day to facilitate the BBA's calculation of an interest rate index. Thus, even if we were to credit plaintiffs' allegations that defendants subverted this cooperative process by conspiring to submit artificial estimates instead of estimates made in good faith, it would not follow that plaintiffs have suffered antitrust injury. Plaintiffs' injury would have resulted from defendants' misrepresentation, not from harm to competition.

b. Plaintiffs Do Not Allege a Restraint on Competition in the Market for LIBOR-Based Financial Instruments

It is of no avail to plaintiffs that defendants were competitors outside the BBA. Tr. 29-30. Although there might have been antitrust injury if defendants had restrained competition in the market for LIBOR-based financial instruments or the underlying market for interbank loans, plaintiffs have not alleged any such restraint on competition.

First, with regard to the market for LIBOR-based financial instruments, plaintiffs have not alleged that defendants' alleged fixing of LIBOR caused any harm to competition between sellers of those instruments or between buyers of those instruments. Plaintiffs' allegation that the prices of LIBOR-based financial instruments "were affected by Defendants' unlawful behavior," such that "Plaintiffs paid more or received less than they would have in a market free from Defendants' collusion," Antitrust Opp'n 36, might

support an allegation of price fixing but does not indicate that plaintiffs' injury resulted from an anticompetitive aspect of defendants' conduct.⁹ In

⁹ Contra to plaintiffs' argument, the Ninth Circuit's decision in *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), is not to the contrary. *Knevelbaard Dairies* involved a claim by plaintiff milk producers that defendant cheese makers had conspired to fix a low price for bulk cheese, thereby depressing the price defendants paid plaintiffs for milk because California regulators used the bulk cheese price to set the minimum milk price. Plaintiffs had argued that defendants "did not compete," but rather "collusively manipulate[ed] [bulk cheese] prices to levels lower than would prevail under conditions of free and open competition." *Id. at 984*. The Ninth Circuit held that plaintiffs had adequately alleged antitrust injury. As quoted by plaintiffs, the Court reasoned:

Since the plaintiffs allegedly were subjected to artificially depressed milk prices, the injury flows "from that which makes the conduct unlawful," i.e., from the collusive price manipulation itself. . . . When horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs.

Antitrust Opp'n 37 (quoting *Knevelbaard Dairies*, 232 F.3d at 987-88). However, in the context of the claims before it, the Ninth Circuit clearly intended to refer to collusive price manipulation *in place of competition*, and its reference to paying more or receiving less than the prices that would prevail in a market free of the unlawful trade restraint clearly contrasted prices in a market with such a restraint to a market operating under free competition. Moreover, the Ninth Circuit explicitly recognized that "the central purpose of the antitrust laws, state and federal, is to preserve competition," *Knevelbaard Dairies*, 232 F.3d at 988, and it quoted a leading antitrust treatise for the proposition that the harm to sellers from a price-fixing conspiracy by buyers

other words, it is not sufficient that plaintiffs paid higher prices because of defendants' collusion; that collusion must have been anticompetitive, involving a failure of defendants to compete where they otherwise would have. Yet here, undoubtedly as distinguished from most antitrust scenarios, the alleged collusion occurred in an arena in which defendants never did and never were intended to compete.

c. Plaintiffs Do Not Allege a Restraint on Competition in the Interbank Loan Market

Second, there was similarly no harm to competition in the interbank loan market. As discussed above, LIBOR is an index intended to convey information about the interest rates prevailing in the London interbank loan market, but it does not necessarily correspond to the interest rate charged for any actual interbank loan. Plaintiffs have not alleged that defendants fixed prices or otherwise restrained competition in the interbank loan market, and likewise have not alleged that any such restraint on competition caused them injury. Plaintiff's theory is that defendants competed normally in the interbank loan market and then agreed to lie about the interest rates they were paying in that market when they were

"constitutes antitrust injury, for it reflects the rationale for condemning buying cartels – namely, *suppression of competition* among buyers, reduced upstream and downstream output, and distortion of prices," *id.* (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 375b at 297 (rev. ed. 1995)) (emphasis added).

called upon to truthfully report their expected borrowing costs to the BBA. This theory is one of misrepresentation, and possibly of fraud, but not of failure to compete.

3. Plaintiffs Could Have Suffered the Harm Alleged Here Under Normal Circumstances

The above analysis is confirmed by inquiring, as courts previously have in evaluating antitrust injury, whether plaintiff could have suffered the same harm under normal circumstances of free competition. For example, in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), defendant was a manufacturer of bowling equipment that had purchased financially distressed bowling centers. Plaintiffs, operators of other bowling centers, brought suit against defendant pursuant to the Clayton Act, arguing that they had lost future income because the distressed bowling centers purchased by defendant would otherwise have gone bankrupt. The Supreme Court held that these allegations did not establish antitrust injury. Although defendants' actions might have violated the Sherman Act by bringing "a 'deep pocket' parent into a market of 'pygmies,'" plaintiffs did not suffer antitrust injury because their alleged harm bore "no relationship to the size of either the acquiring company or its competitors." *Id.* at 487. Plaintiffs "would have suffered the identical 'loss' but no compensable injury had the acquired centers instead obtained refinancing or been purchased by 'shallow pocket' parents." *Id.* Therefore, even if respondents were injured, "it was not 'by reason of anything forbidden in the antitrust laws': while

respondents' loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful." *Id.* at 488.

In *ARCO*, the Court reaffirmed this approach in the context of price fixing. Defendant in that case was an integrated oil company that marketed gasoline both directly through its own stations and indirectly through dealers operating under its brand name. Facing competition from independent "discount" gas dealers, such as those operated by plaintiff, defendant allegedly conspired with its dealers to implement a vertical, maximum-price-fixing scheme. *ARCO*, 495 U.S. at 331-2. Many independent gas dealers could not compete with the below-market prices established by this scheme, and consequently went out of business.

Despite the harm that defendant's conspiratorial conduct had caused plaintiff, the Supreme Court held that plaintiff had not suffered antitrust injury. The Court reasoned that a competitor could establish antitrust injury only by demonstrating predatory pricing, that is, pricing below cost in order to drive competitors out of business:

When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an "anticompetitive" consequence of the claimed violation. A firm complaining about the harm it suffers from nonpredatory price competition "is really claiming that it [is] unable to raise prices." Blair & Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. 1539, 1554 (1989). This

is not antitrust injury; indeed, “cutting prices in order to increase business often is the very essence of competition.” [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)].

Id. at 337-38 (footnote omitted). In other words, cutting prices to a level still above cost is not merely consistent with competition - something that could be expected to occur under normal circumstances - but indeed is often “the very essence of competition” - something to be desired. Because the harm plaintiffs suffered resulted from competitive, healthy conduct, it did not constitute antitrust injury.

As with the harm alleged in *Brunswick* and *ARCO*, the harm alleged here could have resulted from normal competitive conduct. Specifically, the injury plaintiffs suffered from defendants’ alleged conspiracy to suppress LIBOR is the same as the injury they would have suffered had each defendant decided independently to misrepresent its borrowing costs to the BBA. Even if such independent misreporting would have been fraudulent, it would not have been anticompetitive, and indeed would have been consistent with normal commercial incentives facing defendants. Those incentives, of course, are alleged on the face of plaintiffs’ complaints: defendants allegedly had incentive (1) “to portray themselves as economically healthier than they actually were” and (2) “to pay lower interest rates on LIBOR-based financial instruments that Defendants sold to investors.” OTC Compl. ¶ 5.

In this respect, the present case contrasts with more traditional antitrust conspiracies, such as a conspiracy among sellers to raise prices. Whereas in such a scenario, the sellers' supracompetitive prices could exist only where the sellers conspired not to compete, here, each defendant, acting independently, could rationally have submitted false LIBOR quotes to the BBA. The reason why it would have been sustainable for each defendant individually to submit an artificial LIBOR quote is that, as discussed above, the LIBOR submission process is not competitive. A misreporting bank, therefore, would not have been concerned about being forced out of business by competition from other banks. In other words, precisely because the process of setting LIBOR is not competitive, collusion among defendants would not have allowed them to do anything that they could not have done otherwise.

This analysis would not change if we were to accept plaintiffs' argument that defendants could not, absent collusion, have submitted the "clustered" rates that they submitted during the Class Period. The question is not whether defendants could have submitted independently the exact quotes that they in fact submitted, but rather whether they could have caused plaintiffs the same injury had they acted independently. As discussed above, the answer is yes: each defendant could have submitted, independently, a LIBOR quote that was artificially low. Further, whether the quotes would have formed a "cluster" or

not is irrelevant: plaintiffs' injury resulted not from the clustering of LIBOR quotes, but rather from the quotes' alleged suppression.¹⁰ In short, just as the bowling center operators in *Brunswick* could have suffered the same injury had the failing bowling centers remained open for legitimate reasons, and just as the gas dealers in *ARCO* could have suffered the same injury had defendant's prices been set through normal competition, the plaintiffs here could have suffered the same injury had each bank decided independently to submit an artificially low LIBOR quote.

Moreover, *Brunswick* and *ARCO*, which each held that plaintiffs did not suffer antitrust injury, involved more harm to competition than was present here. In *Brunswick*, defendant's conduct brought "a 'deep pocket' parent into a market of 'pygmies,'" altering the positions of competitors in the bowling center market in a manner that was potentially harmful to competition. In *ARCO*, similarly, the prices set by defendants' conspiracy displaced prices set through free competition and thereby gave defendants' dealers a competitive advantage over other dealers in the retail gas market. Here, by contrast, there is no allegation of harm to competition. For one, LIBOR was

¹⁰ Indeed, given that a bank's LIBOR quote represents the bank's expectation of its own costs of borrowing, and that different banks based in different countries could sensibly face significantly different borrowing costs, it would not be surprising for banks to submit LIBOR quotes that differed persistently over the course of several years.

never set through competition, even under normal circumstances. While it is true that the prices of LIBOR-based financial instruments are set through competition, and that a change in LIBOR may have altered the baseline from which market actors competed to set the price of LIBOR-based instruments, competition proceeded unabated and plaintiffs have alleged no sense in which it was displaced.

Additionally, there is no allegation that defendants' conduct changed their position vis-à-vis their competitors. At any given time, there is only one LIBOR, used by all actors throughout the relevant market. Although defendants' alleged manipulation of the level of LIBOR might have had the distributive effect of transferring wealth between the buyers and sellers of LIBOR-based financial instruments, including between defendants and their customers, plaintiffs have not alleged any structural effect wherein defendants improved their position relative to their competitors. Because *Brunswick* and *ARCO* each involved more harm to competition than was present here, yet the Supreme Court held in each case that plaintiff had not suffered antitrust injury, it is even clearer here that antitrust injury does not exist.

4. Plaintiffs' "Proxy" Argument Is Unavailing

At oral argument, plaintiffs contended that LIBOR is a proxy for competition in the underlying market for interbank loans, and thus defendants effectively harmed competition by manipulating LIBOR. According to plaintiffs, when defendants reported artificial LIBOR quotes to the BBA, they "snuff[ed] out . . . the proxy for competition" by

“interdicting the competitive forces that set [defendants’] rates” and otherwise would have affected LIBOR and the price of LIBOR-based instruments. Tr. 24, 27. This argument was advanced in the context of Eurodollar futures contracts, which are based on the underlying market for interbank loans, but it also applies to other LIBOR-based financial instruments. If LIBOR “interdict[ed]” competition that would otherwise have affected the market for Eurodollar futures contracts, it equally interdicted competition that would have affected the market for LIBOR-based financial instruments more broadly.

Although there is a sense in which this argument accurately characterizes the facts, the argument does not demonstrate that plaintiffs suffered antitrust injury. It is true that LIBOR is a proxy for the interbank lending market; indeed, it is precisely because LIBOR was thought to accurately represent prevailing interest rates in that market that it was so widely utilized as a benchmark in financial instruments. It is also true that if LIBOR was set at an artificial level, it no longer reflected competition in the market for interbank loans and its value as a proxy for that competition was diminished, even “snuffed out.” However, the fact remains that competition in the interbank lending market and in the market for LIBOR-based financial instruments proceeded unimpaired. If LIBOR no longer painted an accurate picture of the interbank lending market, the injury plaintiffs suffered derived from misrepresentation, not from harm to competition.

Contrary to plaintiffs' contention, Tr. 28, their "proxy" argument does not derive support from the line of cases finding an antitrust violation where a defendant manipulated one component of a price, both because those cases do not involve a proxy for competition and because they are distinguishable. Plaintiffs cite *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), in which the Supreme Court held that beer wholesalers violated the Sherman Act by conspiring to discontinue a previously common practice of extending short-term interest-free credit to retailers. However, not only did *Catalano* not involve a proxy for competition, but it also is plainly distinguishable: whereas the beer wholesalers in *Catalano* had previously competed over the credit terms they offered to retailers, such that the conspiracy to fix credit terms displaced an arena of competition, here there was never competition over LIBOR - a rate that, at any given time, is necessarily uniform throughout the market - and thus defendants' alleged conspiracy to fix LIBOR did not displace competition.

Plaintiffs also cite *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), in which the Fifth Circuit considered a scheme whereby a manufacturer of yarn processing machines which also owned the patent in those machines conspired with other manufacturers to split the royalty income the patent holder received equally among all of the manufacturers. The Court held that the scheme violated the antitrust laws because it fixed a portion of the prices that manufacturers received for the machines - prices over which the manufacturers

competed. *Id.* Here, by contrast, the LIBOR-based financial instruments that defendants competed to sell had always contained LIBOR, a value uniform throughout the market, and thus defendants' conduct did not displace competition where it normally would have occurred.

Finally, plaintiffs cite *Northwestern Fruit Co. v. A. Levy & J. Zentner Co.*, 665 F. Supp. 869 (E.D. Cal. 1986), which considered a claim by cantaloupe purchasers that cantaloupe sellers had conspired to fix the cooling and palletizing charge added to the price of cantaloupe. The Court held that the conspiracy violated the antitrust laws, even if cantaloupe sellers continued to compete on the underlying price, because fixing even a component of price is unlawful. *Id.* at 872. Our case is plainly distinguishable because the price of LIBOR-based financial instruments had always contained a "fixed" component - LIBOR - and thus defendants' alleged conspiracy, as discussed above, did not displace competition.

5. Plaintiffs' Remaining Cases Are Distinguishable

The other cases plaintiffs put forward as addressing arguably similar facts are also distinguishable because they involve harm to competition which is not present here. To begin, plaintiffs read *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), as establishing that "plaintiffs who lost business due to defendants' manipulation of a standard-setting process with persuasive influence on marketplace transactions were entitled to Sherman Act relief." Antitrust Opp'n 37.

However, not only did *Allied Tube* not rule on antitrust injury or liability, addressing instead the single question of whether defendants were immune from antitrust liability under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); see *Allied Tube*, 486 U.S. 492, but to whatever extent it might provide persuasive authority regarding antitrust injury, it is distinguishable. In *Allied Tube*, a manufacturer of plastic electrical conduit sued a manufacturer of steel conduit that had conspired with other members of a trade association to exclude plastic conduit from the association's safety standard, which standard was widely incorporated into local government regulations. *Allied Tube*, 486 U.S. at 495-96. Like the LIBOR-setting process, the process of forming the safety standard was a cooperative endeavor by otherwise-competing companies under the auspices of a trade association. Critically, however, whereas the conspiracy in *Allied Tube* gave defendants a competitive advantage over plaintiff by shutting plaintiff's product out of the industry safety standard, here plaintiffs have not alleged that defendants' suppression of LIBOR gave them an advantage over their competitors.

Each of the other decisions plaintiffs cite involving defendants' failure to provide accurate information also involved a harm to competition beyond what is present here. See *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (dentists agreed not to submit x-rays to dental insurance companies, where dentists would otherwise have competed over their degree of cooperation with insurance companies); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978)

(trade association of engineers adopted rule prohibiting the discussion of costs until the client had selected an engineer, thus prohibiting competitive bidding among engineers); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971) (defendant oil producers submitted artificially low sales forecasts to state regulator in order to lower the total production limit in an oil field in which both plaintiffs and defendants operated, where the regulator's formula for allotting production allowables favored plaintiffs and thus a decrease in the total production limit disproportionately harmed plaintiffs).

Similarly, plaintiffs' "list price" cases are distinguishable. For instance, the Ninth Circuit in *Plymouth Dealers' Ass'n of N. Cal. v. United States*, 279 F.2d 128 (9th Cir. 1960), considered a conspiracy among Plymouth car dealers to fix the list prices for cars and accessories. The Court held that the conspiracy violated the Sherman Act, despite the fact that dealers were free to bargain down from the list price. *Id.* Here, plaintiffs would have us follow similar reasoning, but the defect in the comparison is that list prices are a very different sort of benchmark than LIBOR. The Plymouth dealers' conspiracy to fix list prices "established as a matter of actual practice one boundary of 'the range within which . . . sales would be made,'" thus "prevent[ing] the determination of (market) prices by free competition alone." *Id.* at 134 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23 (1940)). By contrast, the price of LIBOR-based financial instruments can be set at any level above or below LIBOR, and thus defendants'

alleged conspiracy to fix LIBOR did not constrain the free and competitive bargaining of actors in the market for LIBOR-based financial instruments.

Finally, plaintiffs' cases involving manipulation of indices are distinguishable for the same reason. Plaintiffs cite *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 587 F. Supp. 2d 27, 593 F. Supp. 2d 29 (D.D.C. 2008), which addressed a conspiracy by major railroads to remove fuel costs from a cost escalation index that was published by a trade association and widely used in rail freight transportation contracts, and instead to implement a uniform fuel surcharge. The Court held that plaintiffs had established antitrust injury: "through their allegations identifying defendants' supracompetitive prices, plaintiffs here have alleged an injury to competition itself." 593 F. Supp. 2d at 42. Importantly, though, the Court clarified that defendants' collaboration in the industry association to publish the new cost escalation index was not necessarily anticompetitive by itself, but rather was anticompetitive when combined with defendants' other actions, notably imposing the uniform fuel surcharge. 587 F. Supp. 2d at 35. In our case, although defendants allegedly fixed a benchmark, LIBOR, published by a trade association, the BBA, they did not add a uniform charge, like the fuel surcharge in *Rail Freight*, to an otherwise competitively determined price. The other decisions cited by plaintiffs that found antitrust injury where defendants manipulated an index are also distinguishable because they each involved a failure of defendants to compete. *See, e.g., Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979

(9th Cir. 2000) (defendants failed to compete in the bulk cheese market and thus manipulated the government-mandated minimum price for milk, which was calculated using a formula that incorporated the price of bulk cheese); *Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc.*, 253 F. Supp. 2d 262 (D. Conn. 2003) (same, except defendants failed to compete in the butter market, which also affected a minimum milk price).

6. Conclusion

For these reasons, plaintiffs' allegations do not make out a plausible argument that they suffered an antitrust injury. Plaintiffs, therefore, do not have standing to bring claims pursuant to the Clayton Act or the Cartwright Act.¹¹ Accordingly, plaintiffs' antitrust claims are dismissed.

B. Exchange-Based Claims

The Exchange-Based Plaintiffs have asserted causes of action for manipulation of Eurodollar futures in violation of the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 1-25 (2006), and vicarious liability for and aiding and abetting such manipulation. Exchange Am. Compl. ¶¶ 228-44. Defendants have moved to dismiss these claims on three grounds: (1) the claims involve an impermissible extraterritorial application of the CEA, (2) the claims are time-barred, and (3) plaintiffs fail to state a claim for manipulation under the CEA.

¹¹ As discussed below, we assert supplemental jurisdiction over plaintiffs' Cartwright Act claim.

For the reasons stated below, we find that, although plaintiffs' claims do not require an extraterritorial application of the CEA and do not fail to plead commodities manipulation, they are time-barred at least to the extent that they rely on contracts purchased from August 2007, the start of the Class Period, through May 29, 2008, the date by which plaintiffs were clearly on inquiry notice of their injury.

1. Extraterritoriality

Defendants first argue that plaintiffs' claims must be dismissed because the CEA does not apply extraterritorially, yet plaintiffs' claims rely exclusively on foreign commodities manipulation. As discussed below, although we agree that the CEA does not apply extraterritorially, we find that the alleged manipulation nonetheless falls within the CEA's purview.

a. Legal Standard

Both sides agree that *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), governs the question of whether plaintiffs' claims involve an impermissibly extraterritorial application of the CEA. Tr. 35; Exchange MTD 13-17. In *Morrison*, the Supreme Court reaffirmed the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison*, 130 S. Ct. at 2877 (quoting *EEOC v. Arabian Am. Oil Co. ("Aramco")*, 499 U.S. 244, 248 (1991)) (internal quotation marks omitted). The Court observed that this principle is not a limit on Congress's authority to legislate, but rather "represents a canon

of construction . . . [that] rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.” *Id.*

The Court established a two-part test for deciding questions of extraterritoriality. First, “unless there is the affirmative intention of the Congress clearly expressed’ to give a statute extraterritorial effect, ‘we must presume it is primarily concerned with domestic conditions.” *Id.* (quoting *Aramco*, 499 U.S. at 248). “When a statute gives no clear indication of an extraterritorial application, it has none.” *Id.* at 2878. Second, if a statute applies only domestically, a court must determine which domestic conduct the statute regulates. The reason for this inquiry is that “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States,” and thus the presumption against extraterritoriality, to have any meaning, must limit the statute’s application to those domestic activities that “are the objects of the statute’s solicitude,” that “the statute seeks to ‘regulate.’” *Id.* at 2884. To carry out this analysis, a court must ascertain “the ‘focus’ of congressional concern.” *Id.* (quoting *Aramco*, 499 U.S. at 255).

Applying this framework to section 9(a) of the CEA, the provision under which plaintiffs assert their claims, we first observe that “neither the CEA nor its legislative history specifically authorizes extraterritorial application of the statute.” *CFTC v. Garofalo*, 10 CV 2417, at *11 (N.D. Ill. Dec. 21, 2010) (citing *Tamari v. Bache & Co.*, 730 F.2d 1103, 1107 (7th Cir. 1984)). Rather, “the statute is silent on this

issue and shows neither a Congressional intent to apply the CEA to foreign agents nor a wish to restrict the statute to domestic activities.” *Id.* (citing *Tamari*, 730 F.2d at 1107). Indeed, there is even less of an indication of extraterritorial application here than in section 10(b) of the Securities and Exchange Act of 1934 (the “34 Act”), 15 U.S.C. §§ 78a-78pp (2006 & Supp. IV 2010), as amended by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code), which the *Morrison* Court held did not apply extraterritorially. The Court reasoned in *Morrison* that even though one of section 10(b)’s terms, “interstate commerce,” was defined to include foreign commerce, *see* 15 U.S.C. § 78c(a)(17), “[t]he general reference to foreign commerce in the definition of ‘interstate commerce’ does not defeat the presumption against extraterritoriality.” *Morrison*, 130 S. Ct. at 2882. Here, “interstate commerce,” as referenced in section 9(a) of the CEA, 7 U.S.C. § 13(a)(2), does not even include a reference to foreign commerce, *id.* § 1a(30). Because section 9(a) of the CEA “gives no clear indication of an extraterritorial application, it has none.” *Morrison*, 130 S. Ct. at 2878.

Having concluded that section 9(a) of the CEA applies only domestically, we must still determine which domestic activities “are the objects of the statute’s solicitude,” which activities “the statute seeks to ‘regulate.’” *Id.* at 2884. We therefore must determine “the ‘focus’ of congressional concern” in enacting section 9(a) of the CEA. *Id.* (quoting *Aramco*, 499 U.S. at 255).

Section 9(a) makes it a crime for “[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.” 7 U.S.C. § 13(a)(2). This provision clearly focuses on commodities in interstate commerce and futures contracts traded on domestic exchanges. Such an interpretation of the statute’s focus is consistent with the CEA’s statement of purpose, *see* 7 U.S.C. § 5(b), as well as decisions interpreting the CEA, *see, e.g. Tamari v. Bache & Co.*, 730 F.2d 1103, 1108 (7th Cir. 1984) (“[T]he fundamental purpose of the [CEA] is to ensure the integrity of the domestic commodity markets.”); *cf. CFTC v. Garofalo*, 10 CV 2417, at *12 (ruling that sections 6c(a) and (b) of the CEA, prohibiting certain transactions in commodities future or option contracts, “are concerned with where the underlying options contracts were actually traded”). Accordingly, a claim is within the CEA’s domestic application if it involves (1) commodities in interstate commerce or (2) futures contracts traded on domestic exchanges.

b. The Present Allegations

Here, plaintiffs’ claims plainly involve futures contracts traded on domestic exchanges. By manipulating LIBOR, defendants allegedly manipulated the price of Eurodollar futures contracts, which is directly based on LIBOR. Eurodollar futures contracts, of course, are traded on the *Chicago Mercantile Exchange*. Indeed, defendants acknowledged at oral argument that Eurodollar futures contracts are within the scope of the CEA’s

manipulation provision. Tr. 42. Because plaintiffs' claims involve manipulation of the price of domestically traded futures contracts, they are not impermissibly extraterritorial.

According to defendants, plaintiffs "don't allege that the defendants . . . manipulated the futures contract with Chicago," but rather allege only that defendants manipulated the Eurodollar contract's underlying commodity. *Id.* at 43. Defendants contend that "[t]here are all kinds of things one can do to manipulate futures contracts," but "[n]ot one of those things is alleged here." *Id.*

We do not concur. LIBOR was directly incorporated into the *price* of Eurodollar futures contracts, and by allegedly manipulating LIBOR, defendants manipulated the price of those contracts. Moreover, as discussed further below, LIBOR cannot plausibly be understood as the commodity underlying Eurodollar futures contracts; the only plausible way to characterize the components of a Eurodollar contract is that the underlying commodity is a USD 1,000,000 deposit in a foreign commercial bank with a three-month maturity, and the price is settled or traded at a value based on LIBOR. This understanding of Eurodollar futures contracts limits which claims have been adequately pleaded, but it also forecloses defendants' argument that the only thing plaintiffs have alleged is manipulation of Eurodollar contracts' underlying commodity. In short, plaintiffs' claims clearly involve manipulation of the price of Eurodollar futures contracts, and manipulating the price of futures contracts traded on domestic exchanges is

precisely the conduct that the CEA was designed to regulate. Accordingly, plaintiffs' claims fall within the purview of the CEA.

2. Statute of Limitations

Defendants next argue that plaintiffs' claims are barred by the CEA's statute of limitations. As discussed below, we find that certain of plaintiffs' claims are barred, certain are not, and others may or may not be, though we will not dismiss them at this stage.

a. Legal Standard

A claim pursuant to the CEA must be brought "not later than two years after the date the cause of action arises." 7 U.S.C. § 25(c). The CEA does not elaborate, however, on the circumstances that start the running of its statute of limitations. Where a federal statute "is silent on the issue" of when a cause of action accrues, as the CEA is, courts apply a "discovery accrual rule" wherein "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 148-49 (2d Cir. 2012) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)) (internal quotation marks omitted) (interpreting the statute of limitations for RICO claims, which requires plaintiffs to bring suit no later than "[four] years after the cause of action accrues," 28 U.S.C. § 1658(a)); see also *Premium Plus Partners, L.P. v. Goldman, Sachs & Co.*, 648 F.3d 533, 536 (7th Cir. 2011) (Easterbrook, C.J.) ("Section 25(c) of the Commodity Exchange Act . . . says that suit must be filed within two years of 'the date the cause of action arises.' We have understood this to mean the date on

which the investor discovers that he has been injured.”).

Under Second Circuit precedent, courts apply an “inquiry notice” analysis to determine when a plaintiff has discovered his injury:

Inquiry notice - often called “storm warnings” in the securities context - gives rise to a duty of inquiry “when the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded.” In such circumstances, the imputation of knowledge will be timed in one of two ways: (i) “[i]f the investor makes no inquiry once the duty arises, knowledge will be imputed as of the date the duty arose”; and (ii) if some inquiry is made, “we will impute knowledge of what an investor in the exercise of reasonable diligence[] should have discovered concerning the fraud, and in such cases the limitations period begins to run from the date such inquiry should have revealed the fraud.”

Koch, 699 F.3d at 151 (quoting *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 168 (2d Cir. 2005)); *see also id.* at 153 (“[O]nce there are sufficient ‘storm warnings’ to trigger the duty to inquire, and the duty arises, if a plaintiff does not inquire within the limitations period, the claim will be time-barred.”). In short, we first ask at what point the circumstances were such that they “would suggest to [a person] of ordinary intelligence the probability that she has been defrauded.” *Id.* at 151 (internal quotation marks omitted). If plaintiffs do not then inquire within two years, they are deemed to

have knowledge of their injury at the point at which the duty to inquire arose, and the period of limitations starts to run on that date. Here, plaintiffs do not allege that they made any inquiry into their injury prior to March 15, 2011. *See* Exchange Am. Compl. ¶¶ 182-99. Thus, if circumstances would have suggested to a person of ordinary intelligence the probability that he had been defrauded more than two years prior to March 15, 2011, that is, prior to March 15, 2009, then, to the extent plaintiffs' claims are based on Eurodollar contracts purchased through the date of inquiry notice, the claims are barred by the statute of limitations.

Contrary to plaintiffs' contention, the amount of public information necessary to start the period of limitations for commodities manipulation under the CEA is significantly less than the amount necessary to commence the period of limitations for securities fraud under the '34 Act. The two-year limitations period for securities fraud begins to run upon "the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b)(1) (2006). In *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010), the Supreme Court held that "the 'facts constituting the violation' include the fact of scienter, 'a mental state embracing intent to deceive, manipulate, or defraud.'" *Id.* at 1790 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976)). The Court reasoned: "[T]his 'fact' of scienter 'constitut[es]' an important and necessary element of a § 10(b) 'violation.' A plaintiff cannot recover without proving that a defendant made a material misstatement with an intent to deceive – not merely innocently or negligently." *Id.* at 1796 (emphasis omitted). According to the Second Circuit, this analysis

indicates that the Court “thought about the requirements for ‘discovering’ a fact in terms of what was required to adequately plead that fact and survive a motion to dismiss.” *City of Pontiac Gen. Emps.’ Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011).

Plaintiffs argue that this pleading-based standard applies here, such that the statute of limitations did not begin to run until they could have adequately pleaded a claim for commodities manipulation. Exchange Opp’n 24-26. In support of this argument, plaintiffs rely on language in *City of Pontiac* in which the Circuit, considering “the basic purpose of a statute of limitations,” reasoned that because the purpose is to prevent plaintiffs from unfairly surprising defendants by bringing stale claims, and because a claim cannot be stale until it has “accrued,” a statute of limitations cannot commence until a claim has “accrued.” *City of Pontiac*, 637 F.3d at 175; *see also* Exchange Opp’n 25. Further, “[o]nly after a plaintiff can adequately plead his claim can that claim be said to have accrued.” *City of Pontiac*, 637 F.3d at 175. Plaintiffs argue that this language applies to statutes of limitations generally, including in the CEA context.

However, despite this general discussion of the purposes of statutes of limitations, the fact remains that *City of Pontiac* interpreted only the statute of limitations of the ‘34 Act, which is different on its face than the statute of limitations of the CEA. In *Koch v. Christie’s Int’l PLC*, 699 F.3d 141 (2d Cir. 2012), the Circuit confirmed that the analysis in *Merck*, which was the basis for the pleading-based standard established in *City of Pontiac*, “does not apply outside

the realm of the statute that it interpreted.” *Id.* at 150; see also *Premium Plus Partners, L.P. v. Goldman, Sachs & Co.*, 648 F.3d 533, 536 (7th Cir. 2011) (Easterbrook, C.J.) (“The language of [the ‘34 Act’s statute of limitations] . . . is hard to impute to [the CEA’s statute of limitations.]”). “It remains the law in this Circuit that a RICO claim accrues upon the discovery of the injury alone.” *Koch*, 699 F.3d at 150. As discussed above, the CEA, like RICO, is silent regarding when a cause of action arises. Therefore, the Second Circuit’s holding in *Koch* that the RICO statute of limitations is based on a “discovery of the injury” standard is controlling in the context of the CEA.

Moreover, the pleading-based standard applicable to securities fraud claims is instructive here to the extent that it sets an upper bound on the amount of information necessary to commence the period of limitation for plaintiffs’ commodities manipulation claims. As discussed below, a plaintiff seeking damages for commodities manipulation must satisfy the following four elements: “(1) that [defendant] had the ability to influence market prices; (2) that [he] specifically intended to do so; (3) that artificial prices existed; and (4) that the [defendant] caused the artificial prices.” *DiPlacido v. CFTC*, 364 F. App’x 657, 661 (2d Cir. 2009) (quoting *In re Cox*, No. 75-16, 1987 WL 106879, at *3 (C.F.T.C. July 15, 1987)). In order for the period of limitations to commence, however, a plaintiff need not be able to make such a showing. In particular, plaintiffs here did not need to be able to allege “that Defendants were knowingly colluding to suppress LIBOR.” Exchange Am. Compl. ¶ 197 (emphasis omitted). Rather, it was necessary only that

“circumstances would [have] suggest[ed] to [a person] of ordinary intelligence the probability that she ha[d] been defrauded.” *Koch*, 699 F.3d at 151 (quoting *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 168 (2d Cir. 2005)). Specifically, plaintiffs here would have been on inquiry notice of their injury if circumstances would have suggested to a person of ordinary intelligence the probability that the LIBOR fixes which affected the prices of plaintiffs’ Eurodollar contracts had been manipulated. If inquiry notice was triggered on a date prior to March 15, 2009, plaintiffs’ claims based on Eurodollar futures contracts purchased through the date of inquiry notice are barred.

Finally, we are mindful that “defendants bear a heavy burden in establishing that the plaintiff was on inquiry notice as a matter of law.” *Newman v. Warnaco Grp., Inc.*, 335 F.3d 187, 194-95 (2d Cir. 2003) (quoting *Nivram Corp. v. Harcourt Brace Jovanovich, Inc.*, 840 F. Supp. 243, 249 (S.D.N.Y. 1993)). Nonetheless, “[d]ismissal is appropriate when the facts from which knowledge may be imputed are clear from the pleadings and the public disclosures themselves.” *In re Ultrafem Inc. Sec. Litig.*, 91 F. Supp. 2d 678, 692 (S.D.N.Y. 2000).

b. Publicly Available Information Relating to LIBOR Manipulation

By May 29, 2008, seven articles published in prominent national news sources, along with one report referenced in several of those articles, suggested that LIBOR had been at artificial levels since August 2007, the start of the Class Period. As discussed below,

these articles put plaintiffs on inquiry notice of their claims based on Eurodollar futures contracts purchased during that period.¹²

On April 10, 2008, Citigroup strategists Scott Peng, Chintan Gandhi, and Alexander Tyo published a research report entitled, “Special Topic: Is LIBOR Broken?” (the “Peng Report”). Scott Peng et al., Citigroup, *Special Topic: Is LIBOR Broken?*, Apr. 10, 2008. The Report found that “[three-month] LIBOR probably understates real interbank lending costs by 20-30 [basis points].”¹³ *Id.* To support this determination, the Report compared LIBOR with the three-month Eurodollar deposit rate calculated by the Federal Reserve. “Because the Fed’s data are based on the bid-side rate of interbank borrowing, the Fed’s Eurodollar rate should be less than LIBOR (which, by definition, is an offered rate).” *Id.* Yet, the Report observed, “the Fed’s bid-side rate is now 29 [basis points] higher than LIBOR’s offered-side rate,” and had generally been higher than LIBOR since August 2007. *Id.* This made “no economic sense.” *Id.* The Report concluded that the Federal Reserve Eurodollar deposit rate, which seemed reasonable, “may be a

¹² Plaintiffs argue in their opposition brief that the Barclays settlement documents suggest LIBOR manipulation extending as far back as 2005, and that they should, accordingly, be granted leave to amend their complaint to include allegations based on information derived from the Barclays settlements. Exchange Opp’n 29-30. As discussed below, we will grant plaintiffs leave to move to amend their complaints to include such allegations.

¹³ One basis point is one-hundredth of a percentage point.

better gauge than LIBOR of short-term funding levels.” *Id.*

The Report also compared one-month LIBOR to the rate at which the Federal Reserve auctioned off collateralized shortterm loans to banks under a program known as the Term Auction Facility (“TAF”). TAF loans had recently been auctioned at a rate higher than LIBOR, though “[g]iven that the TAF is a securitized borrowing rate as opposed to LIBOR, which is an unsecuritized lending rate, it seem[ed] counterintuitive for banks to pay a higher interest rate to borrow from the TAF than to borrow from the interbank market.” *Id.* Something was off, and because the TAF rate appeared “entirely normal,” the Report concluded that “the real issue lies in a much bigger arena - LIBOR.” *Id.* The Report observed that a likely explanation for the unusual LIBOR rates was that banks were seeking to bolster the market’s perception of their financial health: “[A]ny bank posting a high LIBOR level runs the risk of being perceived as needing funding. With markets in such a fragile state, this kind of perception could have dangerous consequences.” *Id.*

According to a Bloomberg article published on May 18, 2009, the Peng Report “brought widespread attention to the possibility [that LIBOR] might be understating actual bank lending costs.” Liz Capo McCormick, *Citigroup’s Head of Rates Strategy*, *Scott Peng, Leaves Firm*, Bloomberg.com, May 18, 2009.

On April 16, 2008, the *Wall Street Journal* published an article entitled, “Bankers Cast Doubt on Key Rate amid Crisis.” Carrick Mollenkamp, *Bankers*

Cast Doubt on Key Rate amid Crisis, Wall St. J., Apr. 16, 2008. The article commenced by explicitly observing that LIBOR might be inaccurate: “One of the most important barometers of the world’s financial health could be sending false signals. In a development that has implications for borrowers everywhere, . . . bankers and traders are expressing concerns that the London inter-bank offered rate, known as Libor, is becoming unreliable.” *Id.* As evidence that LIBOR was diverging from its “true” level, the article included a graph comparing three-month LIBOR to the three-month Federal Reserve Eurodollar deposit rate, with the heading “Broken Indicator?” and the caption “Since the financial crisis began, the rate on three-month interbank loans has diverged at times from the comparable rate for dollars deposited outside the U.S.” *Id.* The article also discussed the Peng Report, noting that the Report had “compare[ed] Libor with [the TAF] indicator and others - such as the rate on three-month bank deposits known as the Eurodollar rate” to conclude that “Libor may be understated by 0.2 to 0.3 percentage points.” *Id.*

The article suggested that banks had several incentives to underreport LIBOR, notably the same incentives now alleged by plaintiffs: “Some banks don’t want to report the high rates they’re paying for short-term loans because they don’t want to tip off the market that they’re desperate for cash,” and “banks might have an incentive to provide false rates to profit from derivatives transactions.” *Id.* Finally, the article reported that the BBA was investigating the LIBOR submission process in response to concerns from “bankers and other market participants,” and that,

“[i]n one sign of increasing concern about Libor, traders and banks are considering using other benchmarks to calculate interest rates.” *Id.*

The next day, on April 17, 2008, the *Wall Street Journal* published another article raising questions about LIBOR’s accuracy. Carrick Mollenkamp & Laurence Norman, *British Bankers Group Steps up Review of Widely Used Libor*, Wall St. J., Apr. 17, 2008. The article reported that the BBA, “[f]acing increasing questions about the reliability of [LIBOR],” had “fast-tracked an inquiry into the accuracy of the rate” and declared that “if banks are found to have submitted inaccurate figures, they would be removed from the panels that submit rates.” *Id.* According to the article, “the credit crisis,” commonly understood to have begun in August 2007, *see* Peng Report, “ha[d] highlighted gaps between Libor and other interest rates, and it ha[d] raised questions about whether banks are submitting rates that accurately reflect actual borrowing costs,” Mollenkamp & Norman, *supra*. Bankers and traders “ha[d] expressed concerns that some banks don’t want to report the high rate they are paying for fear of creating the impression they are desperate for cash.” *Id.* Significantly, “[t]he problems with Libor ha[d] also been a hot topic among traders in the market for Eurodollar futures.” *Id.*

On April 18, 2008, the *Wall Street Journal* published its third article in as many days regarding questions over LIBOR. Carrick Mollenkamp, *Libor Surges After Scrutiny Does, Too*, Wall St. J., Apr. 18, 2008. The article observed that after the BBA announced on April 16, 2008, that it would fast-track

its review of the LIBOR submission process, three-month USD LIBOR increased the next day by over eight basis points - “its largest jump since the advent of the credit crisis.” *Id.* The increase, according to the article, might have been “a sign that banks could be responding to increasing concerns that the rate doesn’t reflect their actual borrowing costs.” *Id.* The article repeated the observations of the previous two that the BBA’s move “came amid concerns among bankers that their rivals were not reporting the high rates they were paying for short-term loans for fear of appearing desperate for cash.” *Id.* Additionally, the article noted the belief of some analysts that LIBOR had still not fully corrected: a strategist at Credit Suisse believed that three-month USD LIBOR was too low by 40 basis points, while the Peng Report had found LIBOR to be low by up to 30 basis points. *Id.*

On April 21, 2008, the *Financial Times* published an article entitled, “Doubts over Libor Widen.” Gillian Tett & Michael Mackenzie, *Doubts over Libor Widen*, *Fin. Times*, Apr. 21, 2008. The article reported that “the credibility of Libor as a measure [was] declining,” though this was “not entirely new: as the *Financial Times* first revealed [in 2007], bankers ha[d] been questioning the way Libor is compiled ever since the credit turmoil first erupted.” *Id.* Regarding why LIBOR “ha[d] started to lag other, traded measures of market stress, such as the funding trends in the dollar deposit market,” the article reported that although bankers thought it unlikely that there was collusion to suppress LIBOR, “there [was] a widespread belief that some banks ha[d] an incentive to keep their bids low.” *Id.* Indeed, even though LIBOR is inherently a matter

of guesswork, especially when interbank lending is at a depressed level, the article quoted an economist's observation that "[i]t is not surprising that [the LIBOR panel banks] make guesses that avoid unwelcome publicity." *Id.*

The next month brought three additional articles on the questions surrounding LIBOR. On May 16, 2008, Reuters published an article providing background on the issue and summarizing various suggestions regarding how best to move forward. *European, U.S. Bankers Work on Libor Problems*, Reuters, May 16, 2008. The article noted that "[t]hreats from the BBA in late April to expel any bank found acting improperly was the trigger for a surge in the daily fix[es] over the next couple of days." *Id.* Further, the article reported "worries that some banks were understating how much they had to pay to borrow money in order to avoid being labeled desperate for cash and, as a result, vulnerable to solvency rumors." *Id.*

On May 29, 2008, Bloomberg published an article that quoted a Barclays strategist's statement that "[b]anks routinely misstated borrowing costs to the [BBA] to avoid the perception they faced difficulty raising funds as credit markets seized up." Gavin Finch & Elliott Gotkine, *Libor Banks Misstated Rates, Bond at Barclays Says*, Bloomberg.com, May 29, 2008. The article also reported that LIBOR "show[ed] little correlation to banks' cost of insuring debt from default," despite the fact that, because lending rates and the cost of default insurance are both theoretically based on a bank's likelihood of defaulting on its debts,

they should be correlated. *Id.* As an example, the article observed that, over the period from July 2, 2007, through April 15, 2008, UBS's default insurance costs rose over 900 percent, while its USD LIBOR quotes "were lower than its rivals on 85 percent of the days during that period." *Id.* Finally, the article noted the unusual jump in three-month USD LIBOR after the BBA's April 16, 2008, announcement, and that traders had been "resorting to alternative measures for borrowing costs as the BBA struggle[d] to maintain Libor's status." *Id.* Indeed, trading in Eurodollar futures declined by 7.5 percent from March to April 2008, while trading in alternative future contracts experienced significant increases. *Id.*

Also on May 29, 2008, the *Wall Street Journal* reported the findings of a study on LIBOR that the newspaper had conducted. Carrick Mollenkamp & Mark Whitehouse, *Study Casts Doubt on Key Rate*, Wall St. J., May 29, 2008. The *Journal's* analysis, based on data from January 23, 2008, through April 16, 2008, "indicate[d] that Citigroup Inc., WestLB, HBOS PLC, J.P. Morgan Chase & Co. and UBS AG [were] among the banks that ha[d] been reporting significantly lower borrowing costs for [LIBOR] than what another market measure suggest[ed] they should [have been]." *Id.* Over the period analyzed by the study, LIBOR and the cost of bank default insurance had diverged, "with reported Libor rates failing to reflect rising default-insurance costs." *Id.* Specifically, "the three-month and six-month dollar Libor rates were about a quarter percentage point [i.e. 25 basis points] lower than the borrowing rates suggested by the default-insurance market." *Id.* The *Journal's*

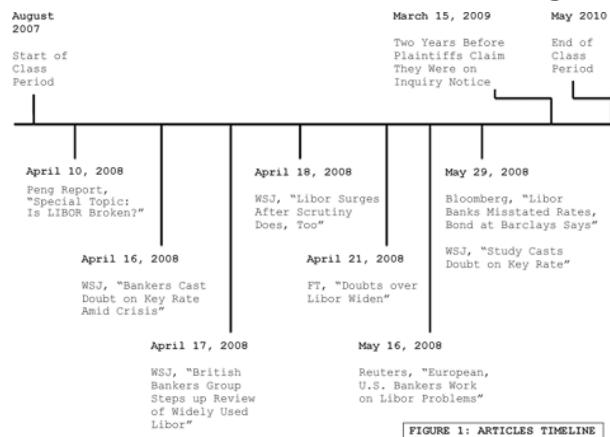
methodology and findings were reviewed by “three independent academics,” each of whom “said the approach was a reasonable way to analyze Libor.” *Id.* Indeed, one reviewer stated that “the [*Journal’s*] calculations show ‘very convincingly’ that reported Libor rates are lower than what the market thinks they should be.” *Id.*

The article also suggested that LIBOR was at an artificial level both before and after the study period. At a November 2007 meeting of a Bank of England money-market committee, concerns had emerged that “Libor wasn’t high enough.” *Id.* In late April 2008, moreover, after banks had reacted to the BBA’s announcement, LIBOR remained 15 basis points too low. *Id.*

The article included the caveat that “[t]he *Journal’s* analysis doesn’t prove that banks are lying or manipulating Libor,” given other possible explanations for the observed data, such as the guesswork inherent in calculating LIBOR and the fact that certain banks “have ample customer deposits and access to loans from the Federal Reserve.” *Id.* Nonetheless, the article noted that “[i]f any bank submits a much higher rate than its peers, it risks looking like it’s in financial trouble[, s]o banks have an incentive to play it safe by reporting something similar.” *Id.* Indeed, a Stanford finance professor had determined that the observed three-month USD LIBOR quotes were “far too similar to be believed,” a conclusion buttressed by the fact that “[a]t times, banks reported similar borrowing rates even when the default-insurance market was drawing big distinctions

about their financial health.” *Id.* The article concluded by observing that some traders had “beg[un] thinking about using other benchmarks,” such as “the federal-funds rate - the rate at which banks loan to each other overnight.” *Id.*

These articles are summarized in Figure 1, below.



c. Inquiry Notice

Plaintiffs argue that despite all of these articles, they were not on inquiry notice until March 15, 2011, “when UBS released its annual report 20-F stating that it had received subpoenas from the Department of Justice, the SEC, the CFTC, as well as an information request from the Japanese Financial Supervisory Agency, all relating to its interest rate submissions to the BBA.” OTC Am. Compl. ¶ 205; *see also* Exchange Am. Compl. ¶¶ 197-98; Exchange Opp’n 24-30. Plaintiffs offer three reasons for why the articles published in April and May 2008 failed to put them on inquiry notice: the articles “[1] did nothing more than speculate about possible LIBOR discrepancies, [2] did not even suggest that such discrepancies resulted from

Defendants' intentional manipulation of their LIBOR submissions, and [3] were accompanied by denials from the BBA that the panel banks[] submissions represented anything other than their true borrowing costs." Exchange Opp'n 26.

These arguments are unconvincing. First, although it is accurate that none of the articles definitively established that LIBOR was being manipulated, they did not need to do so to place plaintiffs on inquiry notice. Rather, they needed only to suggest to a person of ordinary intelligence the probability that LIBOR had been manipulated. Accepting as true plaintiffs' allegations that they were injured by paying too high a price for Eurodollar futures contracts and that the price at which Eurodollar contracts trade is affected by existing LIBOR fixes, Exchange Am. Compl. ¶¶ 209-17, it follows that if plaintiffs were on notice that LIBOR had been set at artificial levels, they were also on notice of their injury. As discussed above, the Peng Report and the seven articles published in the ensuing weeks reported that (1) since August 2007, LIBOR had diverged from benchmarks with which it should have been correlated, (2) independent experts had confirmed this comparative methodology and concluded that LIBOR was too low, (3) the BBA had accelerated its review of the LIBOR submissions process and publicly declared that a bank submitting false rates would be disqualified from the LIBOR panel, (4) LIBOR quotes jumped abnormally on the day following the BBA's announcement, and (5) market actors had begun to shift away from LIBOR-based instruments toward instruments based on

alternative benchmarks because of their distrust of recent LIBOR fixes. Faced with this information, and especially in light of the fact that it was reported by five separate institutions, a person of ordinary intelligence would clearly have been on notice that LIBOR was probably being set at artificial levels and, consequently, that Eurodollar futures contract prices had also been artificial.

Second, contrary to plaintiffs' argument, plaintiffs need not have been aware that the artificiality in LIBOR fixes "resulted from Defendants' intentional manipulation of their LIBOR submissions." Exchange Opp'n 26. Unlike inquiry notice under the '34 Act, which requires plaintiffs to be able to plead a claim for securities fraud, including scienter, inquiry notice under the CEA requires only that plaintiffs be on inquiry notice of their injury. In other words, plaintiffs need not have known that the artificial LIBOR levels resulted from intentional conduct by defendants; it is sufficient that plaintiffs knew that the LIBOR quotes defendants submitted did not reflect their actual expected borrowing rates, and thus that the prices of plaintiffs' Eurodollar contracts, based on LIBOR, were artificial. For the reasons stated above, plaintiffs clearly had such knowledge.

Finally, the fact that defendants and the BBA consistently denied that LIBOR fixes were artificial does not necessarily defeat inquiry notice. "[R]eassuring statements will prevent the emergence of a duty to inquire or dissipate such a duty only if an investor of ordinary intelligence would reasonably rely on the statements to allay the investor's concern." *LC*

Capital Partners, LP v. Frontier Ins. Grp., Inc., 318 F.3d 148, 155 (2d Cir. 2003); *see also In re Ambac Fin. Group, Inc. Sec. Litig.*, 693 F. Supp. 2d 241, 276 (S.D.N.Y. 2010).

Here, plaintiffs could not have reasonably relied on the reassurances of defendants and the BBA. A person of ordinary intelligence would have understood that defendants each had a strong incentive to portray themselves as truthful and that the BBA had a strong incentive to maintain market confidence in LIBOR's integrity. This is not to say that plaintiffs could never have reasonably relied on assurances by defendants and the BBA, but rather that they should have been cautious about accepting such assurances. As discussed above, repeated news reports provided evidence that LIBOR was being fixed at artificial levels. Additionally, each defendant's LIBOR quotes, as well as comparable benchmarks, were available every business day, such that plaintiffs could feasibly have investigated LIBOR's accuracy. Therefore, defendants' and the BBA's assurances that all was well with LIBOR could not have been reasonably relied on by plaintiffs and thus do not excuse plaintiffs' failure to inquire.

The cases cited by plaintiffs are not on point. First, this case is distinguishable from *Staeher v. Hartford Financial Services Group, Inc.*, 547 F.3d 406 (2d Cir. 2008). In *Staeher*, investors sued an insurance company in which they had purchased stock, alleging that they had purchased at inflated prices because they were unaware that the company's strong financial performance was actually the result of paying

unlawful kickbacks to insurance brokers. The Circuit held that the investors were not placed on inquiry notice by newspaper articles which, like the articles held not to trigger inquiry notice in *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161 (2d Cir. 2005), reported generally on “structural conflicts in [the insurance] industry” but did not contain information specific to the company at issue. *Staeher*, 547 F.3d at 429. Indeed, one article’s failure to provide specific information was “a particularly important omission, since the writer acknowledged that not all insurers paid [kickbacks] to get business.” *Id.* at 419. The Court distinguished *Shah v. Meeker*, 435 F.3d 244 (2d Cir. 2006), which held that plaintiff was placed on inquiry notice by an article in *Fortune* magazine that included a “specific description of the business practices at the defendant company . . . which served as the basis of the plaintiff’s complaint against that company.” *Staeher*, 547 F.3d at 430 (citing *Shah*, 435 F.3d at 251).

Here, the notice afforded plaintiffs more resembles that in *Shah* than it does the notice in *Staeher* and *Lentell*. To start, *Staeher* established a “sliding scale in assessing whether inquiry notice was triggered by information in the public domain: the more widespread and prominent the public information disclosing the facts underlying the fraud, the more accessible this information is to plaintiffs, and the less company-specific the information must be.” *Id.* at 432. Here, the articles providing evidence that LIBOR was artificial were reported in “widespread and prominent” sources, such as the *Wall Street Journal* and the *Financial Times*, and were presented in an accessible fashion, explaining their conclusions in clear English that a

person of ordinary intelligence, without technical training, could understand. The required degree of specificity is therefore diminished.

In any event, the Peng Report and ensuing articles are sufficiently specific because they gave notice that plaintiffs had likely paid artificially high prices for their Eurodollar contracts. The specificity required to trigger inquiry notice is not necessarily specificity with regard to defendant, but rather specificity that notifies a plaintiff that he has been injured. For instance, the newspaper articles in *Staeher* failed to provide notice because they did not inform plaintiffs that the particular company plaintiffs had invested in had perpetrated an unlawful kickback scheme, and the articles in *Lentell* failed to provide notice because they did not inform plaintiffs that the particular research reports that plaintiffs had relied on were fraudulent. Here, by contrast, even though the Peng Report and ensuing articles mostly focused on LIBOR itself rather than the individual quotes of the panel banks,¹⁴

¹⁴ That said, the May 29, 2008, *Wall Street Journal* article presenting the Journal's analysis of LIBOR did single out the submissions of individual panel banks. In its second paragraph, it reported: "The Journal analysis indicates that Citigroup Inc., WestLB, HBOS PLC, J.P. Morgan Chase & Co. and UBS AG are among the banks that have been reporting significantly lower borrowing costs for [LIBOR] than what another market measure suggests they should be." Mollenkamp & Whitehouse, *supra*. Additionally, it included a chart that presented, for each USD LIBOR panel bank, "[t]he difference between banks' reported borrowing rates [i.e. LIBOR quotes] and rates computed by The

plaintiffs were on notice that LIBOR had likely been suppressed and thus that the prices of Eurodollar contracts, including the contracts plaintiffs had purchased, were artificial. Therefore, like in *Shah* and unlike in *Staehr* and *Lentell*, the published articles were sufficient to place plaintiffs on inquiry notice of their injury.

Additionally, to whatever extent plaintiffs needed notice of who was responsible for their injury, such notice existed. It was a matter of public knowledge which banks were on the USD LIBOR panel, what rate those banks submitted to the BBA each day, and how the final LIBOR fix was determined. Plaintiffs, that is, knew which banks affected the final LIBOR fixes and precisely how they affected those fixes.¹⁵ Especially given that LIBOR is an average of the eight middle quotes, thus insulated to some extent from outlier

Wall Street Journal, using information from the default-insurance market.” *Id.*

¹⁵ Although, on any given day, only the middle eight quotes would be included in the computation to determine the LIBOR fix, all of the submitted quotes “affected” the ultimate fix. For example, if a bank’s “true” LIBOR quote would have been the tenth highest, within the middle eight, but the bank submitted instead an artificially low quote that was the fourteenth highest, outside the middle eight, the bank’s quote would not be included in the computation to determine the LIBOR fix. Nonetheless, the quote would have affected the fix by “bumping up” the quote that would have been in the thirteenth highest spot, excluded from the calculation, into the twelfth highest spot, included in the calculation. Thus, on any given day, every LIBOR quote had some “effect” on the ultimate LIBOR fix.

quotes from individual banks, the fact that LIBOR persisted at a level that was likely artificial should have raised serious doubts about all panel banks' submissions. Moreover, it would have been feasible to investigate each bank's submissions: plaintiffs could have compared the submissions to the bank's cost of default insurance - a comparison that, to some extent, had already been performed and published in the May 29, 2008, *Wall Street Journal* article. See Mollenkamp & Whitehouse, *supra*. The notice here is thus stronger than when articles merely report general structural issues in an industry or particular unlawful acts by other companies within defendant's industry. Because the Peng Report and the articles published in April and May 2008 indicated that LIBOR was likely artificial, and LIBOR is affected by the actions of each of the panel banks, plaintiffs had sufficient notice of who was responsible for their injury, to whatever extent this is necessary.

For similar reasons, this case is unlike *In re Copper Antitrust Litigation*, 436 F.3d 782 (7th Cir. 2006). There, the Seventh Circuit held, in the antitrust context, that although copper purchasers were on inquiry notice that they had been injured by one defendant, a trading company that allegedly fixed the price of copper, there was insufficient publicly available information to notify the purchasers that their injury was attributable as well to another defendant, a bank that had provided loans to the trading company. In light of the Second Circuit decisions discussed above, holding that inquiry notice is triggered when the plaintiff discovers his injury, it is not clear that the Second Circuit would follow the

Seventh Circuit in finding no inquiry notice with respect to a defendant when a plaintiff had discovered his injury but not that the particular defendant was responsible. In any event, even if inquiry notice required plaintiffs to know who was responsible for their injury, the requirement would still be satisfied, for the reasons discussed above.

Plaintiffs also cite *Anderson v. Dairy Farmers of America, Inc.*, Civil No. 08-4726 (JRT/FLN), 2010 WL 1286181 (D. Minn. Mar. 29, 2010). In that case, a trader in milk futures sued a dairy marketing cooperative, alleging that the cooperative had purchased substantial quantities of cheese on the spot market not for normal business purposes, but rather to inflate artificially the price of milk futures, which incorporated the price of cheese. The Court found that the trader's knowledge of the cooperative's cheese purchases was insufficient to trigger inquiry notice, given that those purchases could have been justified by legitimate commercial reasons. The cooperative's purchases would constitute manipulation under the CEA only if there was "something more,' some additional factor that cause[d] the dissemination of false or misleading information." *Id.* at *6 (quoting *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 534 (S.D.N.Y. 2008)) (internal quotation marks omitted). Under the circumstances, the question of when the trader was on inquiry notice turned on when he "knew or should have known of [the cooperative]'s alleged intent to cause artificial cheddar cheese and [milk] futures prices." *Id.*

Anderson is plainly distinguishable. Whereas the cooperative's cheese purchases might have been legitimate, depending on the purpose they were intended to further, the present defendants' alleged submission of artificial LIBOR quotes was necessarily illegitimate, regardless of defendants' motives. In other words, although purchasing large quantities of cheese is not inherently improper, submitting artificial LIBOR quotes is. Therefore, plaintiffs' knowledge that LIBOR was likely artificial was sufficient to place plaintiffs on inquiry notice of their injury.

More broadly, our case is distinguishable from those in which the information necessary to place plaintiffs on inquiry notice of their injury is solely in the control of the defendants. Here, not only were LIBOR and each bank's LIBOR submission publicly available on a daily basis, but benchmarks of general interest rates and each bank's financial health were also publicly available, and the Peng Report and the *Wall Street Journal* analysis compared the *LIBOR* fixes and quotes to these benchmarks to conclude that LIBOR was likely artificial. In other words, by May 29, 2008, plaintiffs' investigative work had already been done for them and had been published in the pages of the *Wall Street Journal*.

Relatedly, we cannot credit plaintiffs' argument that they were not on inquiry notice because their complaint rests on analyses created only after tremendous effort by "world-class financial and statistical experts." Exchange Opp'n 28. As discussed above, by May 29, 2008, several sophisticated analyses comparing LIBOR to relevant benchmarks had already

been conducted, and their results were published in a plain-English format accessible to a person of “ordinary intelligence.” Moreover, the conclusions of these analyses were supported by other reported evidence, such as the BBA announcement, the subsequent jump in LIBOR, and the decision by market actors to switch from LIBOR-based instruments to instruments based on more reliable indices. Thus, although plaintiffs are correct that the standard is not what would place an expert on notice but rather what would place a person of ordinary intelligence on notice, the fact is that a person of ordinary intelligence reading the information available as of May 29, 2008, would have been on notice of his injury.

Finally, plaintiffs argue that “the statute of limitations cannot bar CEA claims based on the conduct relating to the trading scheme described in Barclays settlements made public on June 27, 2012 and not alleged in the Exchange Complaint.” *Id.* 29. The reason, according to plaintiffs, is that, “prior to June 27, 2012, there was not a single public article or news report even hinting at this day-to-day opportunistic manipulation of LIBOR to benefit Barclays’ and other banks’ traders, or that this misconduct began as early as 2005.” *Id.*; *see also* CFTC Order 2 (“The wrongful conduct spanned from at least 2005 through at least 2009, and at times occurred on an almost daily basis.”). Plaintiffs request that they “be permitted to amend the complaint to include these allegations.” Exchange Opp’n 30.

As discussed below, we are inclined to believe that at least some potential claims based on day-to-day, trading-motivated manipulation are not time-barred. Therefore, we will grant plaintiffs leave to move to amend their complaint to include allegations based on information derived from the Barclays settlements, such motion to be accompanied by a proposed second amended complaint. However, if plaintiffs pursue such a motion, they should respond to the following concerns.

As we see it, the question of whether plaintiffs' potential claims based on day-to-day manipulation are time-barred presents two issues: (1) whether the period of limitations has expired on potential claims based on contracts purchased *prior* to August 2007, the start of the Class Period alleged in plaintiffs' amended complaint, and (2) whether the period of limitations has expired on potential claims based on contracts purchased *after* August 2007, given that the articles discussed above did not suggest the sort of manipulation alleged in the Barclays settlement papers.

With regard to the first issue, we are inclined to believe that plaintiffs' potential claims based on contracts purchased prior to August 2007 are not time-barred. Although the articles discussed above suggested that LIBOR was fixed at artificial levels starting in August 2007, they did not suggest artificiality in LIBOR levels prior to that time. Especially given that August 2007 is commonly recognized as the start of the financial crisis, and that banks' incentive to manipulate LIBOR, as reported in

the articles, was related to that crisis, a person of ordinary intelligence could reasonably have thought that LIBOR manipulation started in August 2007, but no earlier. Therefore, it seems that the articles discussed above did not place plaintiffs on inquiry notice of their injury based on contracts purchased prior to August 2007; indeed, plaintiffs might not have been on inquiry notice of their injury until the Barclays settlements were made public on June 27, 2012, after plaintiffs' amended complaint was filed. Consequently, plaintiffs' potential claims based on this conduct are probably not time-barred. Although we expect that claims based on contracts purchased prior to August 2007 will face even greater challenges with regard to loss causation than plaintiffs' other claims face, plaintiffs should have an opportunity to supplement their complaint with these allegations and to squarely address the issues those allegations raise.

By contrast, with regard to the second issue, we are inclined to think that the articles discussed above placed plaintiffs on inquiry notice of their injury based on any sort of LIBOR manipulation, including both the persistent suppression alleged in plaintiffs' amended complaint and the day-to-day manipulation for trading advantage suggested by the Barclays settlements. As discussed below, plaintiffs can recover for their claims only to the extent that they suffered "actual damages" from defendants' conduct. 7 U.S.C. § 25(a)(1). Plaintiffs could have suffered actual damages only if the price of their Eurodollar contracts decreased over the period during which they owned the contracts; otherwise, plaintiffs would have either broken even or profited. To the extent that defendants are liable for the

decrease in the price of plaintiffs' Eurodollar contracts, it must be because LIBOR increased over the time during which plaintiffs owned the contracts and the trading prices of Eurodollar contracts were correlated with the LIBOR fixes. In a basic sense, there are two scenarios in which LIBOR could have increased over the time period that plaintiffs owned their contracts: (1) it started too low and then increased towards its "true" level, or (2) it started at its "true" level and then increased to an artificially high level. The "persistent LIBOR suppression" theory of plaintiffs' amended complaint is based on the first scenario, and the "day-to-day, up or down, manipulation for trading advantage" theory of the Barclays settlements adds the second scenario, at least for those days on which LIBOR was allegedly manipulated upward.

Critically, although these two scenarios differ in how plaintiffs' injury would be caused, the injury would be the same. Specifically, plaintiffs' injury would be that they lost money because the prices of their Eurodollar contracts decreased over the time that they owned them due to defendants' manipulation of those prices. Further, because plaintiffs were not in a position to know the "true" level of LIBOR, they could not have distinguished between injury caused, on the one hand, by LIBOR starting too low and approaching the "normal" level and, on the other, LIBOR starting at a "normal" level and being manipulated upward. Therefore, notice that the prices of plaintiffs' Eurodollar contracts likely decreased due to defendants' alleged manipulation of LIBOR would have been sufficient for inquiry notice, regardless of whether defendants allegedly caused the injury by

setting LIBOR too high or too low. Moreover, as discussed above, plaintiffs were on inquiry notice of their injury by May 29, 2008, as the Peng Report and ensuing articles informed plaintiffs that they likely had been injured by defendants' submission of artificial LIBOR quotes starting in August 2007.

For these reasons, we are skeptical that potential claims based on day-to-day manipulation are timely to the extent they involve contracts purchased between August 2007 and May 29, 2008. In any event, we grant plaintiffs the opportunity to move to amend their complaint to include allegations of day-to-day manipulation, with the expectation that any such motion will address the concerns presented here.

d. Fraudulent Concealment

Plaintiffs additionally argue that the CEA's statute of limitations should be tolled due to defendants' fraudulent concealment of their unlawful conduct. Exchange Opp'n 30-32. The statute of limitations may be tolled "if a plaintiff can show fraudulent concealment of the violation by a defendant." *In re Natural Gas Commodity Litig.* ("Natural Gas"), 337 F. Supp. 2d 498, 512 (S.D.N.Y. 2004). To demonstrate fraudulent concealment, a plaintiff must plead, with particularity: "(1) that the defendant concealed the existence of the CEA violation; (2) that the plaintiff remained unaware of the violation during the limitations period; and (3) that the plaintiff's continuing ignorance as to the claim was not a result of a lack of due diligence." *Id.* at 513; *see also id.* at 513-14; Fed. R. Civ. P. 9(b). The first element, the fact of concealment, may be demonstrated

“by showing either [1] that the defendant took affirmative steps to prevent the plaintiff’s discovery of his claim or injury or [2] that the wrong itself was of such a nature as to be self-concealing.” *Natural Gas*, 337 F. Supp. 2d at 513 (quoting *New York v. Hendrickson Bros.*, 840 F.2d 1065, 1083 (2d Cir. 1988)) (internal quotation marks omitted).

Here, plaintiffs have not adequately alleged fraudulent concealment. For one, they did not “remain[] unaware of [defendants’] violation during the limitations period,” as they were on notice no later than May 29, 2008, that they had likely been injured. Moreover, because of this, they could not have reasonably relied on defendants’ and the BBA’s reassurances that LIBOR was accurate.

For the same reason, defendants’ alleged manipulation was not self-concealing. Although plaintiffs cite *Natural Gas* for the proposition that “report[ing] false trade data to entities that collect that information for public dissemination” is “inherently self-concealing,” *id.* at 513, the false reporting in *Natural Gas* was distinguishable from the allegedly false reporting here. In *Natural Gas*, the reporting was “designed to be concealed from the general public,” and there was “no explanation for how [defendants’] actions, if true, could or should have been discovered by the general public.” *Id.* Here, by contrast, Thomson Reuters published daily both the final LIBOR fix and the quotes from each of the panel banks. A person of ordinary intelligence could have reviewed the submitted quotes along with numerous articles analyzing these quotes and explaining why they were

likely artificial. Under these circumstances, plaintiffs have not adequately alleged fraudulent concealment.

e. Which Claims Are Barred

Having determined that plaintiffs were on inquiry notice of their injury no later than May 29, 2008, we must now determine which claims are barred by the statute of limitations. We will present our conclusions by reference to Figure 2, below.

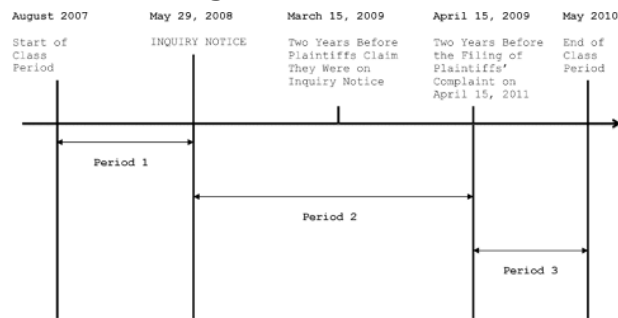


FIGURE 2: INQUIRY NOTICE TIMELINE

As discussed below, we find that some of plaintiffs' claims are barred and some are not, depending on when the contracts that are the basis for those claims were purchased. Specifically, claims based on Eurodollar contracts purchased during Period 1 are barred; claims based on contracts purchased during Period 3 are not barred; and claims based on contracts purchased during Period 2 may or may not be barred, though we will not dismiss them at this stage.

We begin with Period 1, the time from the start of the Class Period, August 2007, to the date of inquiry notice, May 29, 2008. Plaintiffs have argued that the earliest they had notice of their claims is March 15,

2011, and they do not allege that they inquired into their claims any earlier than that date. Assuming that their inquiry in fact commenced on March 15, 2011, it would have been too late, as it would have been more than two years after the date of inquiry notice. By May 29, 2008, any plaintiff who had purchased a Eurodollar contract would have been on notice of his injury, as he would have known that he had likely paid an artificial price for the contract. Accordingly, plaintiffs' claims are barred to the extent that they are based on contracts purchased during Period 1, that is, from the beginning of the Class Period through May 29, 2008.

We next consider Period 3, the time between April 15, 2009, two years prior to the filing of plaintiffs' complaint, and May 2010, the end of the Class Period. As a general matter, inquiry notice is based on a plaintiff's discovery of his injury, and a plaintiff cannot discover his injury until he has been injured. Here, even if plaintiffs who purchased Eurodollar contracts during Period 3 were aware of the articles published in April and May 2008, they could not have been on inquiry notice of their claims any earlier than the date on which they purchased their contracts. Therefore, the claims of plaintiffs who purchased Eurodollar contracts on or after April 15, 2009, are not barred because the complaint was filed within two years of the date of inquiry notice.

Finally, Period 2 describes the time between May 30, 2008, the day after inquiry notice was triggered, and April 14, 2009, two years and one day before the filing of plaintiffs' complaint. Plaintiffs who purchased

Eurodollar contracts during this period, like plaintiffs who purchased during Period 3, could have been on inquiry notice no earlier than the date on which they purchased their contracts. It is not clear, however, precisely when they were on notice. We cannot necessarily charge these plaintiffs with knowledge of the articles published through May 29, 2008, as they had not purchased their contracts yet and may not have had reason to follow LIBOR-related news. However, other articles may have been published during Period 2 that would have put plaintiffs on notice. We are aware of one newspaper article published during this period that focused on LIBOR, albeit one-month USD LIBOR instead of the three-month rate on which Eurodollar contracts are based, Carrick Mollenkamp, *Libor's Accuracy Becomes Issue Again*, Wall St. J., Sept. 24, 2008, and there may be more. In order to decide whether claims based on contracts purchased during this period are barred, we would need to determine (1) when inquiry notice was triggered, (2) whether plaintiffs actually inquired within two years of the date of inquiry notice, and, (3) if so, whether the complaint was filed within two years of the date on which a person of ordinary intelligence, “in the exercise of reasonable diligence,” would have discovered his injury. *Koch*, 699 F.3d at 151 (quoting *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 168 (2d Cir. 2005)). At present, we are not in a position to address these questions. Therefore, we cannot conclude that the statute of limitations bars the claims of plaintiffs who purchased Eurodollar contracts during Period 2, between May 30, 2008, and April 14, 2009.

In sum, the CEA's statute of limitations bars plaintiffs' claims based on contracts entered into during Period 1, between August 2007 and May 29, 2008, and does not bar claims based on contracts entered into during Period 3, between April 15, 2009, and May 2010. Plaintiffs' claims based on contracts entered into during Period 2, between May 30, 2008, and April 14, 2009, may or may not be barred, though we will not dismiss them at this stage.¹⁶ Finally, plaintiffs may move to amend their complaint to include allegations based on information derived from the Barclays settlements, provided that any such motion addresses the concerns raised herein and is accompanied by a proposed second amended complaint.

3. Pleading Commodities Manipulation

Finally, defendants argue that plaintiffs have inadequately pleaded their primary claim for commodities manipulation and their secondary claims for vicarious liability for and aiding and abetting commodities manipulation. For the reasons discussed below, we disagree.

a. Legal Standard

¹⁶ On March 27, 2013, we received from plaintiffs two documents issued by the UK Financial Services Authority (the "FSA"): (1) the "FSA Internal Audit Report: A Review of the Extent of Awareness Within the FSA of Inappropriate LIBOR Submissions," dated March 2013, and (2) the "Management Response" to that report, also dated March 2013. These documents do not alter our conclusions.

Section 9(a) of the CEA makes it a crime for any person “to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or of any swap” 7 U.S.C. § 13(a)(2). In *DiPlacido v. Commodity Futures Trading Commission*, 364 F. App’x 657 (2d Cir. 2009), the Second Circuit established a four-part test for pleading manipulation under the CEA: plaintiff must show “(1) that [defendant] had the ability to influence market prices; (2) that [he] specifically intended to do so; (3) that artificial prices existed; and (4) that [defendant] caused the artificial prices.” *Id.* at 661 (quoting *In re Cox*, No. 75-16, 1987 WL 106879, at *3 (C.F.T.C. July 15, 1987)); see also *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 598 (S.D.N.Y. 2011). “[T]o determine whether an artificial price has occurred, one must look at the aggregate forces of supply and demand and search for those factors which are extraneous to the pricing system, are not a legitimate part of the economic pricing of the commodity, or are extrinsic to that commodity market.” *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 91 (S.D.N.Y. 1998) (quoting *In re Indiana Farm Bureau Coop. Ass’n, Inc.*, No. 75-14, 1982 WL 30249, at *39 n.2 (C.F.T.C. Dec. 17, 1982)) (internal quotation marks and emphasis omitted).

Whether plaintiffs are required to allege commodities manipulation with particularity depends on the facts alleged. As we observed in *In re Crude Oil Commodity Litigation* (“*Crude Oil*”), No. 06 Civ. 6677 (NRB), 2007 WL 1946553 (S.D.N.Y. June 28, 2007), Rule 9(b) “is cast in terms of the conduct alleged, and

is not limited to allegations styled or denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action.” *Id.* at *5 (quoting *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004)) (internal quotation marks omitted). In that case, we held, in the context of a claim for commodities manipulation, that because “the crux of plaintiffs’ allegations is that defendants misled the market with regard to supply and demand at Cushing by concealing its capacity and its actions, resulting in artificial prices,” plaintiffs’ allegations sounded in fraud and therefore were subject to Rule 9(b). *Id.* Similarly, here the crux of plaintiffs’ claim is that they paid too much for their Eurodollar contracts because their expectation of the contracts’ value was informed by existing LIBOR fixes, which were artificial as a result of defendants’ submission of artificial quotes to the BBA. In other words, the claim is that defendants, by submitting artificial LIBOR quotes, misled the market with regard to future levels of LIBOR, and by extension future prices of Eurodollar contracts, and thus caused Eurodollar contracts to trade at artificial prices. Like the allegations in *Crude Oil*, the present allegations sound in fraud and thus must be pled with particularity.

However, courts generally relax Rule 9(b)’s requirements in the context of manipulation claims, as such claims often “involve facts solely within the defendant’s knowledge.” *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d Cir. 2007). In the securities context, the Second Circuit has held that “a manipulation complaint must plead with particularity the nature, purpose, and effect of the fraudulent

conduct and the roles of the defendants.” *Id.* “This test will be satisfied if the complaint sets forth, to the extent possible, ‘what manipulative acts were performed, which defendants performed them, when the manipulative acts were performed, and what effect the scheme had on the market for the securities at issue.’” *Id.* (quoting *Baxter v. A.R. Baron & Co., Inc.*, No. 94 Civ. 3913 (JGK), 1995 WL 600720, at *6 (S.D.N.Y. Oct. 12, 1995)). This standard has also been applied in the context of commodities manipulation. *See, e.g., In re Amaranth Natural Gas Commodities Litig.* (“*Amaranth I*”), 587 F. Supp. 2d 513, 535 (S.D.N.Y. 2008).

Finally, the scienter element “may be alleged generally,” Fed. R. Civ. P. 9(b), though plaintiffs must still allege facts that “give rise to a *strong inference* of scienter,” *In re Amaranth Natural Gas Commodities Litig.* (“*Amaranth II*”), 612 F. Supp. 2d 376, 384 (S.D.N.Y. 2009) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007)). Plaintiffs may demonstrate scienter “either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.” *Crude Oil*, 2007 WL 1946553, at *8 (quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290-91 (2d Cir. 2006)) (internal quotation marks omitted). “Sufficient motive allegations entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged.” *Amaranth II*, 612 F. Supp. 2d at 383 (quoting *Kalnit v. Eichler*, 264 F.3d

131, 139 (2d Cir. 2001)) (internal quotation marks omitted).

In addition to alleging a violation of the CEA, plaintiffs must also show that they have standing to sue. Section 22(a) of the CEA grants a private right of action to any person “who purchased or sold a [futures contract] or swap if the violation constitutes . . . (ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap.” 7 U.S.C. § 25(a)(1)(D). The manipulation must cause the plaintiff “actual damages,” *id.* § 25(a)(1), which courts have understood to require a “net loss[],” *In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. 366, 379 (S.D.N.Y. 2010).

b. The Present Allegations

Here, plaintiffs have stated a claim for commodities manipulation. There are two ways that plaintiffs’ manipulation claims can be framed: (1) manipulation of the price of Eurodollar futures contracts, and (2) manipulation of the price of the commodity underlying Eurodollar futures contracts. As discussed below, we find that plaintiffs state a claim for the first type of manipulation, but not for the second.

i. Manipulation of the Price of Eurodollar Futures Contracts

Plaintiffs have stated a claim for commodities manipulation based on manipulation of the price of Eurodollar futures contracts. With regard to the first element of the *DiPlacido* test, there is no question that defendants had the ability to influence the price of

Eurodollar futures contracts. At settlement, the price of Eurodollar contracts is set according to a formula that directly incorporates LIBOR. Prior to settlement, Eurodollar contracts trade “based on what LIBOR is expected to be in the future,” and “[t]o the extent that LIBOR is mispriced in the present, expectations of what LIBOR will be in the future will also be skewed.” Exchange Am. Compl. ¶ 209. Each defendant, of course, had the ability to influence LIBOR through the quotes it submitted daily to the BBA. Because each defendant had the ability to influence LIBOR and LIBOR affected the price of Eurodollar contracts, each defendant had the ability to influence the price of Eurodollar contracts.

With regard to the second element, plaintiffs’ plausibly allege that defendants specifically intended to manipulate the price of Eurodollar futures contracts. Plaintiffs’ amended complaint alleges concrete benefits that defendants stood to gain from manipulating Eurodollar futures contract prices. Specifically, plaintiffs allege that “subsidiaries or other affiliates of Defendants . . . trad[ed] LIBOR-based financial instruments such as Eurodollar futures contracts at manipulated prices not reflecting fundamental supply and demand, to the direct benefit of Defendants.” *Id.* ¶ 43; *see also id.* ¶ 218 (“Defendants, through their broker-dealer affiliates[,] actively traded Eurodollar futures and options on those futures during the Class Period.”).

Moreover, the Barclays settlement documents suggest that Barclays had a concrete economic interest in manipulating the price of Eurodollar contracts and,

indeed, may have manipulated LIBOR for the express purpose of profiting on Eurodollar contracts. *See, e.g.*, CFTC Order 2 (“Barclays based its LIBOR submissions for U.S. Dollar . . . on the requests of Barclays’ swaps traders, including former Barclays swaps traders, who were *attempting to affect the official published LIBOR, in order to benefit Barclays’ derivatives trading positions; those positions included swaps and futures trading positions . . .*”) (emphasis added); DOJ Statement ¶ 10 (“Barclays employs derivatives traders in New York, New York and in London, England who trade financial instruments tied to LIBOR and EURIBOR, including interest rate swaps and Eurodollar futures contracts . . .”). These allegations do not describe merely a generalized interest in appearing profitable, but rather identify concrete economic benefits that defendants stood to gain from manipulating the price of Eurodollar futures contracts.

As discussed above, scienter may be established by showing that defendants had both motive and opportunity. *See Crude Oil*, No. 06 Civ. 6677 (NRB), 2007 WL 1946553, at *8 (S.D.N.Y. June 28, 2007). Here, plaintiffs have adequately pleaded motive by alleging that defendants stood to gain concrete benefits from manipulating the price of Eurodollar futures contracts. *See Amaranth II*, 612 F. Supp. 2d 376, 383 (S.D.N.Y. 2009). Additionally, defendants undeniably had the opportunity to manipulate Eurodollar contract prices by submitting artificial LIBOR quotes. Therefore, plaintiffs’ allegations give rise to a strong inference of scienter.

The remaining two elements are also satisfied. With regard to the third element, plaintiffs have adequately alleged that artificial Eurodollar futures contract prices existed. The allegations in plaintiffs' amended complaint, together with the facts reported in the Barclays settlement documents, make plausible that LIBOR was set at an artificial level for significant portions of the Class Period. As discussed above, if LIBOR was at an artificial level, the prices at which Eurodollar futures contracts traded and settled necessarily were, as well. Although, as discussed above, LIBOR is set through a cooperative process rather than through supply and demand, there is no question that the manipulation of LIBOR alleged in the amended complaint would be a factor that was "not a legitimate part" of how LIBOR was fixed or Eurodollar contracts were priced. *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 91 (S.D.N.Y. 1998) (quoting *In re Indiana Farm Bureau Coop. Ass'n, Inc.*, No. 75-14, 1982 WL 30249, at *39 n.2 (C.F.T.C. Dec. 17, 1982)) (emphasis omitted).

Finally, with regard to the fourth element, plaintiffs have adequately alleged that defendants' conduct caused Eurodollar futures contracts to trade and settle at artificial prices. There is no question that defendants submitted LIBOR quotes to the BBA each day and these quotes collectively determined where LIBOR was fixed. As discussed above, plaintiffs have adequately alleged that LIBOR was fixed at artificial levels for substantial parts of the Class Period and that the price of Eurodollar futures contracts is significantly influenced by existing LIBOR fixes. Therefore, although, as discussed below, there are

serious questions regarding whether defendants harmed plaintiffs, plaintiffs have adequately alleged that defendants caused the prices of Eurodollar futures contracts to be artificial.

Moreover, plaintiffs have satisfied Rule 9(b). They have alleged “what manipulative acts were performed” - submitting artificial LIBOR quotes to the BBA - and “which defendants performed them” - each defendant. They have also alleged “when the manipulative acts were performed”: on all or a substantial number of the business days during the Class Period, from August 2007 to May 2010. Finally, plaintiffs have adequately alleged “what effect the scheme had on the market for [Eurodollar contracts]”: LIBOR is directly incorporated into Eurodollar futures contracts’ settlement price and, because of that, also strongly affects the trading price of Eurodollar contracts prior to settlement. In short, by allegedly submitting false LIBOR quotes, defendants manipulated the price of Eurodollar contracts.

Although plaintiffs have not identified precisely how each LIBOR quote from each defendant on each day during the Class Period was or was not artificial, they could not reasonably be expected to do so at this stage of the litigation. It is not a matter of public knowledge what interest rate each bank subjectively expected to pay to borrow U.S. dollars in the London interbank lending market each day during the Class Period, nor is it publicly known what interest rates each bank paid in fact. Because plaintiffs could not have known the “true” level of any LIBOR quote, they could not have pleaded, consistent with Rule 11, precisely which quotes were inaccurate and by how

much. If anyone currently possesses this information for each day during the Class Period, it is defendants, and in such a situation, Rule 9(b)'s requirements are relaxed. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d Cir. 2007).

What plaintiffs have provided are, *inter alia*, graphs showing how LIBOR as well as individual defendants' LIBOR quotes diverged during the Class Period from benchmarks that they should have tracked. These graphs, of course, are one way of presenting a series of data points that correspond to individual LIBOR quotes and corresponding benchmarks on each day during the Class Period, just as a chart would. However presented, this information describes, to the degree plaintiffs are able, which LIBOR quotes were likely artificial and by roughly how much. Moreover, even to the extent that plaintiffs have affirmatively alleged LIBOR manipulation not for each day, but only over a 34-month-long period, this does not necessarily mean that the allegations are insufficiently specific. *See, e.g., In re Natural Gas*, 358 F. Supp. 2d 336, 344-45 (S.D.N.Y. 2005) (finding that plaintiffs had adequately pleaded a commodities manipulation claim where they had alleged that defendants engaged in manipulative acts "from June 1999 to February 2001" and "between March 2001 and December 2002"). In light of the limited information publicly available, plaintiffs have adequately alleged that defendants submitted artificial LIBOR quotes during the Class Period and thereby manipulated the price of Eurodollar futures contracts.

Finally, plaintiffs have adequately demonstrated that they have standing to sue under the CEA. Plaintiffs have plainly alleged that they purchased Eurodollars futures contracts during the Class Period. They have also alleged that defendants manipulated the price of Eurodollar futures contracts.

Defendants dispute whether plaintiffs have alleged “actual damages.” 7 U.S.C. § 25(a)(1). The showing plaintiffs must make to demonstrate actual damages, understood, as discussed above, as a net loss, depends on the type of manipulation involved. Where plaintiffs’ injury results from isolated manipulative conduct by defendants, such as artificial stock purchases in the immediate aftermath of an initial public offering in order to drive up price, “allegations of artificial inflation are sufficient to plead loss causation because it is fair to infer that the inflationary effect must inevitably diminish over time.” *In re Initial Public Offering Sec. Litig. (“IPO”)*, 297 F. Supp. 2d 668, 674-75 (S.D.N.Y. 2003). In such a situation, “[i]t is that dissipation - and not the inflation itself - that caused plaintiffs’ loss.” *Id.* at 675.

By contrast, where plaintiffs’ injury results from defendants’ dissemination of false information, “an inflated purchase price will not itself constitute or proximately cause the relevant economic loss.” *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). “Once a misstatement or omission infects the pool of available information, it continues to affect the stock price until contradictory information becomes available.” *IPO*, 297 F. Supp. 2d at 674. 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. See *Dura*, 544 U.S. at 342-43; see also *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 679 (7th Cir. 2009) (interpreting *Dura* to hold that "an allegation that the plaintiffs had bought securities at 'artificially inflated prices' did not state a claim that the plaintiffs had been injured by the inflation because, for all that appeared, the prices had remained at that level, or even a higher one, or the plaintiffs had sold before the price bubble burst"). In short, if the manipulation alleged here is analogous to isolated artificial stock purchases, we can presume that plaintiffs suffered damages based on an inflated purchase price. If, however, the manipulation is more akin to disseminating inaccurate information, plaintiffs need to show that they sold or settled their Eurodollar contracts at a loss.

In this case, the alleged manipulation is less like isolated manipulative activity and more like disseminating false information. In addressing isolated manipulative activity, courts have justified their conclusion that the plaintiff only needs to show that he paid an inflated purchase price by reasoning that the price will presumably return to its normal level, and thus the plaintiff will presumably have suffered injury. Here, by contrast, plaintiffs have alleged that LIBOR was at an artificial level for the duration of the Class Period, not returning to its "normal" level until after the Class Period had ended. Exchange Am. Compl. ¶ 3 (alleging that defendants

“systematically manipulated LIBOR rates . . . during the Class Period”); *id.* ¶ 13 (alleging that defendants’ manipulation persisted “[t]hroughout the Class Period”). This is not to deny that, as plaintiffs allege, the degree of artificiality, or how many basis points LIBOR was “off” by, likely varied. *See* Tr. 70 (“The degree of artificiality got much worse, particularly after Lehman Brothers [filed for bankruptcy protection, on September 15, 2008], and then had fluctuations, and then . . . , after the subpoenas, disappeared. But it’s varied.”); Exchange Am. Compl. 22 (showing that the spread between LIBOR and the Federal Reserve Eurodollar Deposit Rate varied over the Class Period). However, because LIBOR never returned to its “normal” level within the Class Period, the mere fact that plaintiffs purchased their Eurodollar contracts at an inflated price does not show that they suffered a loss on those contracts.

Rather, as in the “false information” scenario, plaintiffs may or may not have suffered a loss caused by defendants’ manipulation, depending on what the price was when they sold their contracts and what else might have been responsible for the loss. Although the manipulation alleged here is not perfectly analogous to disseminating false information, given that LIBOR was fixed anew every day and that the degree of artificiality likely varied, the two types of manipulation are similar in the important respect that the price remained at artificial levels, such that it is not clear that a contract purchased at artificial prices would have been sold at a loss.

In their amended complaint, plaintiffs have not identified each individual Eurodollar futures contract that they purchased, let alone these contracts' purchase price, sale date, and sale price. Rather, they allege that they purchased Eurodollar contracts during the Class Period at prices that were artificially high as a result of defendants' manipulation of LIBOR, Exchange Am. Compl. ¶¶ 214-220, that the degree of LIBOR artificiality likely varied over the Class Period, *id.* ¶ 22, and that they "were harmed as a consequence of Defendants' unlawful conduct," *id.* ¶ 20; *see also id.* ¶¶ 21-26. Defendants argue that these allegations are insufficient to allege actual damages. Exchange MTD 23.

We disagree. Although plaintiffs will not be able to recover unless they prove that they sold or settled their contracts at a loss due to defendants' manipulation, they cannot be expected to have alleged with such precision in their amended complaint. To know which contracts were sold or settled at a loss because of defendants' conduct, plaintiffs would need to compare the spread between LIBOR's "true" level and its actual level at the time the contract was purchased and the time the contract was sold or settled. Plaintiffs would suffer loss only if the spread changed in a manner that resulted in a lower sale price. In other words, to have pleaded loss causation in the manner suggested by defendants, plaintiffs would have needed to know the "true" LIBOR level at the time they purchased and sold their contracts.

Although this information might be in the possession of defendants, it could not be known by plaintiffs.¹⁷ The benchmarks referenced by plaintiffs, though generally probative of when LIBOR was at an artificial level, do not indicate precisely at which level LIBOR should have been fixed on any given day. *See, e.g.*, Mollenkamp & Whitehouse, *supra* (explaining that default insurance prices, though they provide a good long-term picture of “investors’ assessment of the financial health of banks,” are imperfect indicators when viewed individually because they are “based on dealers’ quotes, which can be volatile and vary widely in times of market turmoil”); Peng Report (noting that the Federal Reserve Eurodollar Deposit Rate measures the “bid rate,” or rate at which banks are willing to borrow, rather than the “offered rate,” or rate at which banks are willing to lend). Therefore, in contrast to a situation in which the defendant disseminated false information and the plaintiff can allege precisely when the false statements were made and what was false about them, here plaintiffs cannot reasonably be expected to know the spread between LIBOR’s “true”

¹⁷ Indeed, it may be that no one knows what LIBOR’s “true” level was for any day during the Class Period. As discussed above, LIBOR is inherently a theoretical value, derived as it is from quotes that are not based directly on any objective data. Moreover, the challenge of determining LIBOR’s “true” level would be compounded with respect to periods of time, such as the Class Period, during which the volume of actual interbank trading was at a significantly reduced level.

value and its actual level on any given day, let alone how this spread changed over time.

In these circumstances, plaintiffs have adequately alleged actual damages by alleging that they purchased their contracts at an inflated price, that the degree of LIBOR artificiality later changed, and that they suffered damages as a result. That said, in order to recover, plaintiffs will ultimately need to demonstrate that they sold or settled their Eurodollar contracts at a loss and that this loss resulted from defendants' misconduct. We anticipate that meeting this burden might pose a serious challenge for plaintiffs, especially with regard to Eurodollar contracts that were both purchased and sold within the Class Period.

In short, although we have doubts about whether plaintiffs will ultimately be able to demonstrate that they sold or settled their Eurodollar contracts at a loss as a result of defendants' conduct, we find that they have adequately alleged that defendants manipulated the price of Eurodollar contracts and that this manipulation caused them actual damages.

ii. Manipulation of the Price of the Commodity Underlying Eurodollar Futures Contracts

By contrast, plaintiffs do not even have standing to bring suit for commodities manipulation when framed as defendants' manipulation of LIBOR as the

commodity underlying Eurodollar futures contracts.¹⁸ As discussed above, section 22(a) of the CEA grants a private right of action to any person “who purchased or sold a [futures contract] or swap if the violation constitutes . . . (ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap.” 7 U.S.C. § 25(a)(1)(D). A “commodity” is broadly defined to include “all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.” 7 U.S.C. § 1a(9).

If plaintiffs had a viable claim for manipulation of LIBOR qua commodity, the claim would be that defendants manipulated “the price of the commodity underlying [the] contract or swap” that plaintiffs purchased or sold. *Id.* § 25(a)(1)(D)(ii). The relevant question, therefore, is not whether LIBOR is a “commodity” in some freestanding sense, but rather

¹⁸ The implication of this conclusion is that, although plaintiffs will proceed on their commodities manipulation claims, they are precluded from pursuing those claims with regard to defendants’ alleged manipulation of LIBOR qua commodity. In order to recover, therefore, they will need to show that defendants specifically intended to manipulate the price of Eurodollar futures contracts, not merely LIBOR itself. As a practical matter, we anticipate that this limitation might have significant repercussions for the relief that plaintiffs are ultimately able to recover.

whether LIBOR is the commodity underlying Eurodollar futures contracts.¹⁹

As discussed above, a Eurodollar futures contract is a futures contract whose “underlying instrument” is a “Eurodollar Time Deposit having a principal value of USD \$1,000,000 with a three-month maturity.” CME Group, *Eurodollar Futures: Contract Specifications*, http://www.cmegroup.com/trading/interest-rates/stir/eurodollar_contract_specifications.html (last visited Mar. 29, 2013). “Eurodollars are U.S. dollars deposited in commercial banks outside the United States.” CME Group, *Eurodollar Futures*, http://www.cmegroup.com/trading/interest-rates/files/IR148_Eurodollar_Futures_Fact_Card.pdf. At settlement, the price of a Eurodollar futures contract “is equal to 100 minus the three-month Eurodollar interbank time deposit rate,” which rate is defined as the LIBOR fix on the contract’s last trading day. CME Group, *Eurodollar Futures Final Settlement Procedure*, <http://www.cmegroup.com/trading/interest-rates/files/final-settlement-procedure-eurodollar-futures.pdf>. Prior to settlement, “the price of a 3-month Eurodollar futures contract is an indication of

¹⁹ For this reason, we need not take a position on what degree of deference we owe, if any, to the CFTC statements cited by plaintiffs. *See, e.g.*, CFTC Order, at 27 (“Barclays’ traders and submitters each specifically intended to affect the price at which the daily BBA LIBOR for U.S. Dollar, Sterling, and Yen (for particular tenors), and the EBF Euribor (for particular tenors), all commodities in interstate commerce, would be fixed.”).

the market's prediction of the 3-month Dollar LIBOR on [that] date." DOJ Statement ¶ 9.

The only plausible way to characterize the components of a Eurodollar contract is that the underlying commodity is a USD 1,000,000 deposit in a foreign commercial bank with a three-month maturity, and the price of the contract is settled or traded at a value based on LIBOR. In other words, Eurodollar contracts use LIBOR to represent the price of U.S. dollars deposited in commercial banks abroad. This makes sense because LIBOR, in theory, is an average of the rates at which banks lend U.S. dollars to each other in the London market.

Understood thusly, a Eurodollar futures contract is not fundamentally different from any other futures contract traded on the CME. For example, in a corn futures contract, the underlying commodity is 5000 bushels of corn of a specified grade. CME Group, *Corn Futures*, http://www.cmegroup.com/trading/agricultural/grain-and-oilseed/corn_contract_specifications.html (last visited Mar. 29, 2013). Because these contracts require the "short" to deliver to the "long" the specified quantity and quality of corn at the end of the contract (even though traders may in reality enter into offsetting contracts to avoid actual physical delivery, see Am. Compl. ¶ 208), see CME Group, *CBOT Corn Final Settlement Procedure*, <http://www.cmegroup.com/trading/agricultural/files/final-settlement-procedure-cbot-corn.pdf>, the price of the corn futures contract will track the price of physical corn, that is, corn in the "spot" or "cash" market. Indeed, as a general matter, the prices in a

given commodity's futures market and cash market will be closely correlated. *See, e.g., Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 488 (7th Cir. 2002) (finding that “the prices of cathode and cathode futures ‘tend to move in lockstep’”); *Sanner v. Bd. of Trade of City of Chicago*, 62 F.3d 918, 929 (7th Cir. 1995) (“It is clear that ‘[w]hen the futures market experiences a significant price change, the prices of that commodity in the cash market will usually experience a similar movement.’ The reason for this is obvious: both markets involve the same commodities to be delivered currently or in the future.” (citation omitted) (quoting I. Philip Johnson & Thomas Hazen, *Commodities Regulation* § 104 (2d ed. 1989))).

In the context of Eurodollar futures, even though the “short” is not even nominally required to deliver the underlying cash deposit to the “long,” the contract’s pricing structure, which is what matters here, is the same as with corn futures. Just as in corn futures contracts, the underlying commodity is corn and the price of the contract tracks the price of corn, so in Eurodollar futures contracts, the underlying commodity is a deposit of U.S. dollars in a foreign commercial bank and the price of the contract is based on LIBOR, which represents the price of (i.e. interest on) that deposit. Indeed, plaintiffs have characterized LIBOR as “the reference price for the [Eurodollar] futures contract just as the physical prices of soybean or silver are the reference price for their respective futures contracts traded on exchanges.” Exchange Am. Compl. ¶ 207.

Despite apparently acknowledging that the above understanding of Eurodollar contracts is correct, plaintiffs advance an alternative theory in their opposition brief. Specifically, plaintiffs maintain that the underlying commodity of Eurodollar futures contracts is LIBOR and the price of those contracts is “the level of LIBOR.” Exchange Opp’n 10. This characterization strikes us as strained, at best. Indeed, if there is any meaningful distinction between the London Interbank Offered *Rate* and the “level of” that rate, it eludes us. Therefore, LIBOR is not the commodity underlying Eurodollar futures contracts, and plaintiffs do not have standing to bring suit against defendants based on the manipulation of LIBOR as a commodity.

c. Vicarious Liability

Plaintiffs also assert a cause of action for vicarious liability for commodities manipulation. With regard to vicarious liability, section 2(a)(1) of the CEA provides:

The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

7 U.S.C. § 2(a)(1)(B). “[T]o state a claim for vicarious liability, plaintiffs must allege that the principal manifested an intent to grant the agent authority, the agent agreed, and the principal ‘maintain[ed] control over key aspects of the undertaking.’” *In re Amaranth*

Natural Gas Commodities Litig., 587 F. Supp. 2d 513, 546 (S.D.N.Y. 2008) (quoting *Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A.*, 347 F.3d 448, 462 (2d Cir. 2003)).

Defendants argue, in a discussion confined to one footnote, that plaintiffs have failed to state a claim for vicarious liability. According to defendants, “Plaintiffs have neither alleged any facts regarding any agent of any of the Defendants nor identified any conduct allegedly taken by such agents within the scope of this principal-agent relationship to further the alleged violations of the CEA.” Exchange MTD 29 n.27.

Defendants’ argument is not convincing. In their amended complaint, plaintiffs have identified several “[i]ndividuals employed by the Defendants and their affiliates who have engaged in the illegal communications and conduct among Defendants to report artificially low LIBOR quotes.” Exchange Am. Compl. ¶ 181. For instance, the complaint names Yvan Ducrot, “the Cohead of UBS’s rates business,” and Holger Seger, “the global head of short-term interest rates trading at UBS.” *Id.* According to an article cited by plaintiffs, these persons were suspended by UBS in connection with investigations into the manipulation of LIBOR. The employees are clearly agents of UBS, and it is plausible that they contributed to the alleged manipulation of LIBOR within the scope of their employment.

Moreover, the Barclays settlement papers indicate that Barclays employees contributed to the manipulation of USD LIBOR within the scope of their employment. *See, e.g.*, DOJ Statement ¶ 50 (“Barclays

acknowledges that the wrongful acts taken by the participating employees in furtherance of this misconduct set forth above were within the scope of their employment at Barclays. Barclays acknowledges that the participating employees intended, at least in part, to benefit Barclays through the actions decried above.”). Therefore, although plaintiffs will only be able to recover on this claim with regard to those employees involved in the manipulation of USD LIBOR, not of other indices such as Yen LIBOR or TIBOR, we find that plaintiffs have adequately stated a claim for vicarious liability for commodities manipulation.

d. Aiding and Abetting

Finally, plaintiffs assert a cause of action for aiding and abetting commodities manipulation. Under section 22(a) of the CEA, plaintiffs may bring suit against “[a]ny person . . . who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter.” 7 U.S.C. § 25(a)(1). “[T]o state a claim for aiding and abetting a violation of the CEA, plaintiffs must allege that a defendant, [1] knowing of a principal’s intent to manipulate the market and [2] intending to further that manipulation, [3] performed an act in furtherance of the manipulation.” *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 541 (S.D.N.Y. 2008).

Defendants argue that plaintiffs fail to state a claim for aiding and abetting, both because they fail to state a primary violation of the CEA and because they fail to satisfy the elements set out above. Exchange

MTD 28-29. At oral argument, defendants elaborated that even if each bank had an incentive to improve the market's perception of its financial health, this incentive would have given the bank at most an interest in having a low LIBOR quote itself, not in there being a low LIBOR fix. Tr. 78. Indeed, defendants argued, each defendant would have wanted "to show [itself] as comparatively healthier than the next bank," and thus would not have had incentive to aid another bank in submitting a low LIBOR quote. *Id.*

Although we are skeptical, as discussed below, that plaintiffs' aiding and abetting claim involves separate conduct from plaintiffs' primary claim for commodities manipulation, we find that plaintiffs have adequately stated a claim. First, as discussed above, plaintiffs have adequately alleged that defendants committed the primary violation of manipulation of the price of Eurodollar futures contracts. Second, although defendants are correct that no defendant would have had an incentive to make other banks' look financially healthier, this is not sufficient to dismiss plaintiffs' claim. Given that the London interbank lending market involved lending between defendants, among other banks, it is plausible that each defendant was aware that other defendants' LIBOR quotes did not reflect the rate at which those banks actually expected to borrow. Moreover, in light of the fact that Eurodollar futures contracts "are the largest and most actively traded futures contracts," Exchange Am. Compl. ¶ 218, each bank likely knew that other banks had an interest in manipulating the price of Eurodollar contracts.

Additionally, plaintiffs have alleged that the affiliates of all or a substantial number of defendants traded Eurodollar contracts “to the direct benefit of Defendants.” *Id.* ¶ 43; *see also id.* ¶ 218. Thus, it is plausible that defendants had a common interest not only in LIBOR’s being fixed at an artificial level, but also in the price of Eurodollar contracts being manipulated. Even beyond this common interest, moreover, the Barclays settlement documents suggest that Barclays cooperated with other banks, including banks on the USD LIBOR panel, in ways that were not necessarily in the mutual interest of all parties involved. For example:

From at least approximately August 2005 through at least approximately May 2008, certain Barclays swaps traders communicated with swaps traders at other Contributor Panel banks and other financial institutions about requesting LIBOR and EURIBOR contributions that would be favorable to the trading positions of the Barclays swaps traders and/or their counterparts at other financial institutions.

DOJ Statement ¶ 23. Although these allegations do not directly implicate specific defendants other than Barclays, they indicate that Barclays cooperated with other panel banks in a manner that each bank might not have if it were acting solely in its own interest.

Finally, it is plausible that each bank, by allegedly submitting artificial LIBOR quotes, furthered other banks’ manipulation of the price of Eurodollar futures contracts. For one, as discussed above, each LIBOR quote influenced the final LIBOR fix, whether it was

included in the final average or not, and thus influenced the price of Eurodollar futures contracts. Additionally, it is plausible that each defendant furthered other defendants' manipulation by submitting a quote that was roughly in line with ("clustered with") other quotes, thus decreasing the chance of detection. *See* Tr. 75; *see also* Mollenkamp & Whitehouse, *supra* (quoting Stanford finance professor's observation that the USD LIBOR quotes from January 2008 to April 2008 were "far too similar to be believed").

In short, plaintiffs have adequately alleged a claim for aiding and abetting defendants' manipulation of the price of Eurodollar futures contracts. That said, we have serious questions about whether this claim would support awarding plaintiffs any damages beyond those awarded based on the underlying manipulation claim. It appears that the only way a defendant could aid or abet another defendants' manipulation is by itself submitting an artificial LIBOR quote. Moreover, because an aiding and abetting claim would require the specific intent to further another defendant's manipulation of the price of Eurodollar futures contracts, it would seem that the scienter element plaintiffs would need to satisfy for aiding and abetting would be the same as the scienter element for the primary CEA violation. Therefore, it is hard for us to envision a scenario in which we would award plaintiffs any damages based on their aiding and abetting claim beyond what they would be awarded based on their underlying manipulation claim. If, after discovery, it appears that the aiding and abetting claim is wholly duplicative of the primary

claim, plaintiffs will not have the benefit of submitting both claims to the factfinder.

C. RICO Claim

The Schwab plaintiffs assert a single cause of action for violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961-1968 (2006 & Supp. III 2009). Defendants have moved to dismiss this claim on six grounds: (1) the claim is barred by the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); (2) the claim seeks an impermissible extraterritorial application of U.S. law; (3) plaintiffs lack standing; (4) plaintiffs fail to plead predicate acts of racketeering; (5) plaintiffs fail to plead a pattern of racketeering activity; and (6) to the extent plaintiffs assert a claim for conspiracy to violate RICO, plaintiffs fail to state a claim. We find that each of the first two grounds is sufficient to dismiss plaintiffs’ RICO claim.

1. RICO

Although we do not need to decide whether plaintiffs have adequately pleaded their RICO claim, a brief overview of RICO and its alleged application to the present facts is necessary to provide context to the issues we do need to decide. Under 18 U.S.C. § 1962(c), it is unlawful for “any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” 18 U.S.C. §

1962(c). The RICO statute grants a private right of action to “[a]ny person injured in his business or property by reason of a violation of section 1962.” 18 U.S.C. § 1964(c). Plaintiffs may recover treble damages and attorney’s fees. *Id.*

One way of pleading an enterprise is to allege an “association in fact,” that is, “a group of persons associated together for a common purpose of engaging in a course of conduct.” *Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 305 (S.D.N.Y. 2010). Under *Boyle v. United States*, 556 U.S. 938 (2009), “an association in fact enterprise must have a ‘structure’ exhibiting three features: [1] a purpose, [2] relationships among the individuals associated with the enterprise, and [3] longevity sufficient to permit the associates to pursue the purpose of the enterprise.” *Elsevier*, 692 F. Supp. 2d at 305-06 (citing *Boyle v. United States*, 556 U.S. at 946).

Racketeering activity includes, *inter alia*, wire fraud, mail fraud, and bank fraud. 18 U.S.C. § 1961(1). To state a claim for mail or wire fraud, a plaintiff must allege “(1) the existence of a scheme to defraud, (2) the defendant’s knowing or intentional participation in the scheme, and (3) the use of interstate mails or transmission facilities in furtherance of the scheme.” *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 301 (S.D.N.Y. 2000) (citing *S.Q.K.F.C., Inc. v. Bell Atlantic Tricon Leasing Corp.*, 84 F.3d 629, 633 (2d Cir. 1996)); *see also* 18 U.S.C. § 1341 (mail fraud); *id.* § 1343 (wire fraud). To state a claim for bank fraud, a plaintiff must allege that defendant executed or attempted to execute a

scheme “to defraud a financial institution” or “to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.” 18 U.S.C. § 1344.

A pattern of racketeering activity requires “at least two acts of racketeering activity” occurring within ten years of each other. *Id.* § 1961(5). “[T]o establish a ‘pattern’ of racketeering activity, plaintiffs ‘must show [1] that the racketeering predicates are related, and [2] that they amount to or pose a threat of continued criminal activity.’” *Jerome M. Sobel & Co. v. Fleck*, No. 03 Civ.1041, 2003 WL 22839799, at *9 (S.D.N.Y. Dec. 1, 2003) (alteration in original) (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989)). “Predicate acts are related if they have the ‘same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.’” *Davis Lee Pharmacy, Inc., v. Manhattan Central Capital Corp.*, 327 F. Supp. 2d 159, 164 (E.D.N.Y. 2004) (quoting *H.J. Inc.*, 492 U.S. at 240 (1989)). The “continuity” element may be satisfied by, *inter alia*, “closed-ended” continuity, involving “a closed period of repeated conduct.” *H.J. Inc.*, 492 U.S. at 241.

Under 18 U.S.C. § 1962(d), it is also unlawful “for any person to conspire to violate” section 1962(c). 18 U.S.C. § 1962(d). “To adequately plead a violation of § 1962(d) in the Second Circuit, a plaintiff need only allege that a ‘conspirator intend[ed] to further an

endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense.” *Gulf Coast Development Group, LLC v. Lebror*, No. 02 Civ. 6949, 2003 WL 22871914, at *5 (S.D.N.Y. Dec. 4, 2003) (quoting *Baisch v. Gallina*, 346 F.3d 366, 376 (2d Cir. 2003)). Plaintiffs need not show an overt act in order to plead a violation of section 1962(d), though “injury from an overt act is necessary and sufficient to establish civil standing for a RICO conspiracy violation.” *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990).

Here, plaintiffs claim that defendants violated both section 1962(c) and section 1962(d). With regard to section 1962(c), plaintiffs allege that all of the defendants were part of an association in fact, whose purpose was to “cause the BBA to set LIBOR artificially low” by each defendant’s misrepresentation of its expected borrowing costs, and thereby to “allow[] Defendants to increase their net interest revenues by making artificially low payments to investors such as [plaintiffs].” *Schwab Bank Am. Compl.* ¶ 219. This enterprise allegedly lasted “[f]or at least four years before [plaintiffs’] Complaint[s were] filed.” *Id.* ¶ 220. The enterprise’s affairs, moreover, were allegedly conducted through a pattern of racketeering activity, namely mail fraud, wire fraud, and bank fraud. *Id.* ¶ 222. In addition to allegedly committing the above RICO violation, defendants allegedly conspired to violate RICO. According to plaintiffs, “[d]efendants organized and implemented the scheme, and ensured it continued uninterrupted by concealing their manipulation of LIBOR from investors, including [plaintiffs].” *Id.* ¶ 232. Plaintiffs allege that they

suffered direct and foreseeable injury from defendants' scheme by "unknowingly pa[ying] money to Defendants for LIBOR-based financial instruments that paid interest at a manipulated rate, and in fact collect[ing] less interest than they would have absent the conspiracy." *Id.* ¶ 234.

2. The PSLRA

Plaintiffs' RICO claim is barred by the PSLRA. In a provision that has become known as the "RICO Amendment," the PSLRA amended RICO to provide that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." 18 U.S.C. § 1964(c). This provision is interpreted "broadly," *Eagletech Commc'ns Inc. v. Citigroup, Inc.*, No. 07-60668-CIV, 2008 WL 3166533, at *9 (S.D. Fla. June 27, 2008), and bars a RICO claim "even where a plaintiff cannot itself pursue a securities fraud action against the defendant," *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277 (2d Cir. 2011); *see also Gilmore v. Gilmore*, No. 09 Civ. 6230, 2011 WL 3874880, at *4 (S.D.N.Y. Sept. 1, 2011). In other words, a plaintiff is prohibited from bringing a RICO claim not only when she, herself, could have brought a securities fraud claim based on the RICO predicate acts, but also when the SEC could have brought such a claim. *See Eagletech*, 2008 WL 3166533, at *14 (holding that "the PSLRA acts as a bar to Plaintiffs' RICO claims" because "the predicate acts are actionable as securities fraud and may be prosecuted by the SEC"). The question here, therefore, is whether the predicate acts of plaintiffs' RICO claim could have

been the subject of a securities fraud action brought either by plaintiffs themselves or by the SEC.

a. Securities Fraud

Under section 10(b) of the '34 Act, the provision criminalizing securities fraud:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange – . . . To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j.

Because the requirements for the SEC to bring suit for securities fraud are less stringent than the requirements for a private plaintiff to bring suit, *see SEC v. Boock*, No. 09 Civ. 8261, 2011 WL 3792819, at *21 (S.D.N.Y. Aug. 25, 2011), the dispositive inquiry is whether the alleged predicate acts could form the basis for a securities fraud suit by the SEC, *see Eagletech*, 2008 WL 3166533, at *14. The SEC may assert a cause of action for securities fraud if it alleges that the defendant: “(1) made a material misrepresentation or a material omission as to which he had a duty to speak,

or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities.” *Boock*, 2011 WL 3792819, at *21 (quoting *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999)) (internal quotation marks omitted); *cf. Gilmore*, 2011 WL 3874880, at *4 (holding that a private plaintiff asserting a cause of action for securities fraud under section 10(b) would need to prove, in addition to the above three elements: (1) reliance by plaintiff on defendant’s misrepresentation or omission, (2) economic loss, and (3) loss causation).

To prove scienter, the SEC must demonstrate the defendant’s “intent to deceive, manipulate, or defraud, or knowing misconduct.” *Boock*, 2011 WL 3792819, at *21 (quoting *In re Carter-Wallace, Inc. Sec. Litig.*, 220 F.3d 36, 39 (2d Cir. 2000)) (internal quotation marks omitted). To prove that the defendant’s material misrepresentation or omission was made “in connection with the purchase or sale of securities,” the SEC need only show that “the scheme to defraud and the sale of securities coincide[d].” *Seippel v. Jenkins & Gilchrest, P.C.*, 341 F. Supp. 2d 363, 373 (S.D.N.Y. 2004) (quoting *SEC v. Zandford*, 535 U.S. 813, 820 (2002)) (internal quotation marks omitted). The scheme to defraud and the sale of securities “coincide” when they are not “independent events,” *id.* at 374 (quoting *Zandford*, 535 U.S. at 820), but rather “are ‘less tangentially related,’ or more closely dependent on each other,” *id.* (quoting *Jacoboni v. KPMG LLP*, 314 F. Supp. 2d 1172, 1179 (M.D. Fla. 2004)). In other words, although showing that the plaintiff purchased a security in reliance on a misrepresentation or omission by the defendant regarding the security’s value would

likely be sufficient to satisfy the “in connection with” element, such a showing would not be necessary. *See id.* at 373. Indeed, the “in connection with” element should be “construed not technically and restrictively, but flexibly to effectuate [the statute’s] remedial purposes.” *Id.* at 372 (quoting *Zandford*, 535 U.S. at 819) (internal quotation marks omitted).”

b. Application of the RICO Amendment

Plaintiffs concede that at least some of the LIBOR-based financial instruments they purchased from defendants were securities. Schwab Opp’n 5-10. At least with regard to these instruments, the conduct alleged by plaintiffs could have been the subject of a suit for securities fraud brought by the SEC.

First, defendants allegedly “made a material misrepresentation or a material omission as to which [they] had a duty to speak.” *Boock*, 2011 WL 3792819, at *21 (quoting *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999)). In their amended complaint, plaintiffs allege that defendants mailed, in furtherance of their fraudulent scheme, “(i) documents offering for sale LIBOR-based financial instruments and (ii) correspondence regarding offerings of LIBOR-based financial instruments.” Schwab Bank Am. Compl. ¶ 223. Defendants also allegedly transmitted by wire, in furtherance of their fraudulent scheme, “documents offering LIBOR-based financial instruments for sale.” *Id.* ¶ 225. Both the mailings and the wires were sent “for the purpose of obtaining money from [holders of LIBOR-based financial instruments] through ‘false or fraudulent pretenses,

representations, or promises.” *Id.* ¶ 224; *see also id.* ¶ 225.

Plaintiffs argue that, despite these allegations, “the mailings and wire transmissions that actually were directed to Plaintiffs are not alleged to have been false or misleading.” Schwab Opp’n 9; *see also* Tr. 88. Rather, plaintiffs maintain, “Defendants’ misrepresentations were directed not at buyers of specific securities, but at the BBA.” Schwab Opp’n 9; *see also* Tr. 88. This argument, however, is in irreconcilable tension with plaintiffs’ allegation that defendants sent them mailings and wires for the purpose of obtaining money from them through “false or fraudulent pretenses, representations, or promises.” Schwab Bank Am. Compl. ¶¶ 224-25. Only through a contorted reading of this allegation could plaintiffs suggest that defendants’ “false or fraudulent pretenses, representations, or promises” were made not in the mailings and wires to plaintiffs, but rather in wires to the BBA. A more plausible reading of plaintiffs’ allegations is that the misleading statements were made to plaintiffs in the offering materials they received from defendants.

Indeed, such a reading makes sense. If the offering materials described how LIBOR was calculated by reference to the “proper” procedures rather than the manipulation that allegedly was occurring, they would contain a material misrepresentation. If they did not describe how LIBOR was calculated, they would still be omitting that LIBOR was being manipulated, surely a material omission.

The allegations in plaintiffs' original complaints confirm our conclusion that the offering materials defendants sent plaintiffs were misleading. Those complaints asserted a cause of action for securities fraud in violation of section 10(b). *See, e.g.*, Schwab Bank Compl. ¶¶ 138-47 (Aug. 23, 2011). The securities fraud claim was withdrawn in the amended complaint, a decision that, according to plaintiffs' counsel, was not manipulative, but rather took account of their realization that they would not have been able to prove reliance on defendants' misrepresentations. Tr. 86-87. Frankly, this explanation strikes us as a dubious position adopted in an effort by plaintiffs to disown their original complaint and thereby avoid dismissal of their RICO claim, a claim whose siren song of treble damages apparently proved irresistible. Nonetheless, for purposes of the present analysis, we need not decide whether plaintiffs amended their complaint in good faith. Even crediting plaintiffs' withdrawal of their securities fraud claim in their amended complaint, the factual allegations plaintiffs made in support of that claim remain relevant as party admissions. *See Austin v. Ford Models, Inc.*, 149 F.3d 148, 155 (2d Cir. 1998), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) ("The amendment of a pleading does not make it any the less an admission of the party." (quoting *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 707 (2d Cir. 1989)) (internal quotation marks omitted)).

In their original complaint, plaintiffs clearly alleged that defendants made misleading statements in connection with the sale of securities. Specifically, plaintiffs alleged that "Defendants, directly and

indirectly, by the use, means or instrumentalities of interstate commerce or of the mails, engaged and participated in a continuous course of conduct to conceal adverse material information about the manipulation of LIBOR.” Schwab Bank Compl. ¶ 141. Further, defendants’ fraudulent conduct included:

the making of, or participation in the making of, untrue statements of material facts and omitting to state material facts necessary to make Defendants’ statements during the Relevant Period – including their representations that the rates of the securities Defendants sold to Plaintiffs were based on LIBOR – in the light of the circumstances under which they were made, not misleading.

Id. ¶ 142. In sum, defendants’ conduct constituted a “deceit upon the purchasers of the subject securities during the Relevant Period, including Plaintiffs.” *Id.*

While we acknowledge that some of these allegations track statutory provisions, nevertheless, the allegations are of a factual nature and must, of necessity, have been based on factual positions. Fairly read, these allegations plainly indicate that defendants made misleading statements to plaintiffs, likely in the offering materials themselves but, at any rate, certainly “in connection with” defendants’ sale of LIBOR-based securities to plaintiffs. While it is true that the allegations are not conclusive admissions and thus may be rebutted by plaintiffs, *see Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 32 (2d Cir. 2002), *overruled on other grounds by Slayton v. Am. Express Co.*, 460 F.3d 215 (2d Cir. 2006), plaintiffs’ attempt to

rebut them is unconvincing. Although plaintiffs now assert that the offering materials did not contain misrepresentations and generally were not misleading, they do not deny that the offering materials omitted the fact that LIBOR was being manipulated. Indeed, for plaintiffs to deny this would be absurd: plaintiffs' argument that they "rel[ied] on the accuracy of LIBOR when [they] entered into the purchases," Tr. 87, requires the conclusion that the offering materials omitted the alleged material fact that LIBOR was being manipulated.

In light of the allegations in plaintiffs' original and amended complaints, it seems clear that the offering materials defendants sent plaintiffs contained either material misrepresentations or material omissions. Moreover, the remaining two elements of securities fraud have also been alleged. Without question, plaintiffs have alleged that defendants acted with scienter, or "intent to deceive, manipulate, or defraud, or knowing misconduct." *SEC v. Boock*, 2011 WL 3792819, at *21 (S.D.N.Y. Aug. 25, 2011) (quoting *In re Carter-Wallace, Inc. Sec. Litig.*, 220 F.3d 36, 39 (2d Cir. 2000)). For instance, the amended complaint alleges that the offering materials were sent "for the purpose of obtaining money from [holders of LIBOR-based financial instruments] through 'false or fraudulent pretenses, representations, or promises.'" *Id.* ¶ 224; see also *id.* ¶ 225. Finally, the material misrepresentations or omissions in the offering materials sent to plaintiffs were clearly made in connection with the purchase or sale of securities. Therefore, the mailings and wires by which defendants offered LIBOR-based securities to plaintiffs could, at a

minimum, have been the subject of a securities fraud action brought by the SEC.

Additionally, all of defendants' misrepresentations to the BBA would likely be grounds for a securities fraud claim by the SEC. First, plaintiffs allege that among the wire communications sent by defendant in furtherance of their fraudulent scheme were "phony statements about their costs of borrowing." Schwab Bank Am. Compl. ¶ 225. These statements, which apparently refer to the wires that defendants sent daily to the BBA, would clearly be material misrepresentations. *See* Schwab Opp'n 9; Tr. 88. Second, plaintiffs have explicitly alleged scienter. Schwab Bank Am. Compl. ¶ 225.

Finally, defendants' "phony statements" to the BBA, under plaintiffs' own construct, would qualify as having been made "in connection with" the purchase or sale of securities. Even if plaintiffs did not rely on each defendant's LIBOR quote in deciding to purchase LIBOR-based securities, it is sufficient that "the scheme to defraud and the sale of securities coincide[d]." *Seippel v. Jenkins & Gilchrest P.C.*, 341 F. Supp. 2d 363, 373 (S.D.N.Y. 2004) (quoting *SEC v. Zandford*, 535 U.S. 813, 820 (2002)) (internal quotation mark omitted). Far from being "independent events," *id.* at 374 (quoting *Zandford*, 535 U.S. at 820), defendants' scheme to defraud and their sale of securities to plaintiffs were "closely dependent on each other," *id.* Indeed, one of the alleged reasons why defendants "transmit[ted] phony statements about their costs of borrowing" to the BBA was in order to "obtain[] money from holders of LIBOR-based financial

instruments through ‘false or fraudulent pretenses, representations, or promises’ about LIBOR-based financial instruments.” Schwab Bank Am. Compl. ¶ 225; *see also id.* ¶ 5 (alleging that one of defendants’ “primary reasons” for engaging in their fraudulent scheme was that “artificially suppressing LIBOR allowed Defendants to pay lower interest rates on LIBOR-based financial instruments that Defendants sold to investors, including [plaintiffs], during the Relevant Period”).

Although defendants’ misrepresentations to the BBA may have been intended in part to facilitate defendants’ sale of non-security instruments, it remains the case, given that certain of the LIBOR-based financial instruments that defendants sought to sell to plaintiffs were securities, that a significant part of the alleged reason for *all* of defendants’ misrepresentations to the BBA was to defraud purchasers of securities. In short, because defendants’ alleged misrepresentations to the BBA were allegedly made for the purpose of profiting unfairly from their sale of securities to plaintiffs, defendants’ misrepresentations to the BBA were made “in connection with” the sale of securities. Therefore, all of defendants’ alleged misrepresentations to the BBA would be grounds for a securities fraud action brought by the SEC.²⁰

²⁰ It is of no avail to plaintiffs that they allege that they “do not base their RICO claim[] on any conduct that would have been actionable as fraud in the purchase or sale of securities.” Schwab

Plaintiffs argue that even if their RICO claim may not rely on predicate acts that would have been grounds for a securities fraud suit, the claim should survive to the extent it involves predicate acts that would not have been actionable as securities fraud. Schwab Opp'n 5-7. Such predicate acts might include communications offering non-security financial instruments.

Plaintiffs' argument is inconsistent with how courts have consistently applied the RICO Amendment. Specifically, where plaintiffs allege "a single scheme," courts have held that "if any predicate act is barred by the PSLRA it is fatal to the entire RICO claim." *Ling v. Deutsche Bank*, No. 04 CV 45662005, 2005 WL 1244689, at *4 (S.D.N.Y. May 26, 2005).

For example, in *Gilmore v. Gilmore*, No. 09 Civ. 6230, 2011 WL 3874880, at *4 (S.D.N.Y. Sept. 1, 2011), "[plaintiff]'s RICO claims [were] based on his allegations that [defendant] and [defendant's outside financial and investment advisor] engaged in a multi-year scheme to defraud him and his siblings by looting the family companies through self-dealing, fraudulent

Bank Am. Compl. ¶ 227. First, this is a legal conclusion that we need not accept as true. Second, regardless of whether plaintiffs are correct that they could not have brought a private action for securities fraud based on the alleged RICO predicate acts, those predicate acts could, as discussed above, have been the basis for a securities fraud action brought by the SEC. This is sufficient for plaintiffs' RICO claim to be barred under the PSLRA's RICO Amendment.

securities transactions, and overbilling.” *Id.* at *2. The Court held that defendant’s alleged plots to loot the family companies “count[ed] as a single scheme.” *Id.* at *6. Therefore, “the securities aspects of the fraud [needed to] be aggregated with the non-securities aspects.” *Id.* In other words, having alleged that defendant’s acts “were part of a single fraudulent scheme[,] the [plaintiff] [could not] divide the scheme into its various component parts,” as “such surgical presentation . . . would undermine the Congressional purpose” behind the RICO Amendment. *Id.* (quoting *Seippel v. Jenkins & Gilcrest, P.C.*, 341 F. Supp. 2d 363, 373 (S.D.N.Y. 2004)). Because there was “no genuine dispute that components of Plaintiffs alleged action could have been brought under the securities laws,” the Court dismissed plaintiff’s RICO claims. *Id.*

Similarly, in *Ling v. Deutsche Bank*, 2005 WL 1244689, the Court dismissed RICO claims based on a fraudulent scheme to offer illegitimate tax strategy advice where “[f]or at least some of the[] individual Plaintiffs, the sale of securities was necessary to effectuate the tax strategy.” *Id.* at *6. Because “the Plaintiffs contend[ed] the wrongful acts were committed as part of a single fraudulent scheme, all of the components [needed to] be considered together for securities fraud purposes.” *Id.* at *4.

Here, the PSLRA bars plaintiffs’ RICO claim despite the fact that certain of the alleged predicate acts might not have been actionable as securities fraud. Plaintiffs have unambiguously alleged that defendants’ conduct constituted a single fraudulent scheme. See, e.g., *Schwab Bank Am. Compl.* ¶ 219

(alleging that defendants formed an association-in-fact enterprise with the “common purpose” of “using [their] false quotes to cause the BBA to set LIBOR artificially low, thereby allowing Defendants to increase their net interest revenues by making artificially low payment to investors such as [plaintiffs]”). Because they have done so, and because some of the alleged predicate acts could have been grounds at least for a securities fraud action brought by the SEC, plaintiffs’ RICO claim, in its entirety, is barred by the PSLRA.

3. Extraterritoriality

Apart from being barred by the PSLRA’s RICO Amendment, plaintiffs’ RICO claim rests on an impermissible extraterritorial application of the RICO statute. This provides an independent basis for dismissing plaintiffs’ RICO claim.

a. RICO’s Reach

As discussed above, *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), establishes a two-part test for deciding extraterritoriality questions. First, “unless there is the affirmative intention of the Congress clearly expressed’ to give a statute extraterritorial effect, ‘we must presume it is primarily concerned with domestic conditions.’” *Id.* at 2877 (quoting *EEOC v. Arabian American Oil Co. (“Aramco”)*, 499 U.S. 244, 248 (1991)). “When a statute gives no clear indication of an extraterritorial application, it has none.” *Id.* at 2878. With regard to RICO, the Second Circuit has established that “RICO is silent as to any extraterritorial application.” *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32 (2d Cir. 2010)

(citing *N.S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996)) (internal quotation marks omitted); see also *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp. 2d 933, 937 (N.D. Cal. 2012) (“Since *Morrison* made it clear that the presumption against extraterritoriality is a canon of construction applicable to any statute, a half-dozen courts have applied its reasoning in the RICO context. These courts have uniformly held that RICO is silent as to its extraterritorial application and that, under *Morrison*, it therefore has none.”). Therefore, RICO does not apply extraterritorially.²¹

Second, if a statute applies only domestically, a court must determine which domestic conduct the statute regulates by reference to “the ‘focus’ of congressional concern.” *Morrison*, 130 S. Ct. at 2884 (quoting *Aramco*, 499 U.S. at 255). With regard to RICO, some courts have found that the statute focuses on the enterprise. See, e.g. *Cedeno v. Intech Group, Inc.*, 733 F. Supp. 2d 471, 474 (S.D.N.Y. 2010) (“[T]he focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity. . . . RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign.”); see also *Mitsui*, 871 F. Supp. 2d at

²¹ It is irrelevant whether the statutes prohibiting the alleged predicate acts apply extraterritorially. See *Norex*, 631 F.3d at 33 (“*Morrison* similarly forecloses [plaintiff]’s argument that because a number of RICO’s predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach.”).

938 (“[C]ourts have broadly agreed that . . . in the RICO context ‘it is the “enterprise” that is the object of the statute’s solicitude, and the “focus” of the statute.’” (quoting *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771 (NGG) (VVP), 2011 WL 843957, at *5 (E.D.N.Y. Mar. 8, 2011))).

By contrast, other courts have found that RICO focuses “on the pattern of racketeering activity and its consequences.” *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 245 (S.D.N.Y. 2012); *see also id.* at 242 (reasoning that “foreign enterprises have been at the heart of precisely the sort of activities – committed in the United States – that were exactly what Congress enacted RICO to eradicate,” and concluding that Congress probably was concerned with “the conduct of the affairs of foreign enterprises through patterns of racketeering activity, at least if the prohibited activities injured Americans in this country and occurred here, either entirely or in significant part”). The Second Circuit has not decided this issue. *See Cedeno v. Castillo*, 457 F. App’x 35, 37 (2d Cir. 2012).

We agree with the Court in *Cedeno* that the focus of RICO is on the enterprise. In any RICO complaint, each of the predicate acts would be actionable independently, criminally and possibly also civilly. *See* 18 U.S.C. § 1961(1) (defining “racketeering activity”). The additional element that elevates isolated criminal acts to a RICO violation is the involvement of an enterprise, either as a passive victim of racketeering activity or as an active mechanism for perpetrating the racketeering activity. Indeed, the Supreme Court has held that the two primary purposes of RICO are to

“protect[] a legitimate ‘enterprise’ from those who would use unlawful acts to victimize it,” *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001) (citing *United States v. Turkette*, 452 U.S. 576, 591 (1981)), and to “protect[] the public from those who would unlawfully use an ‘enterprise’ (whether legitimate or illegitimate) as a ‘vehicle’ through which ‘unlawful . . . activity is committed,’” *id.* (quoting *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994)); *see also European Cmty.*, 2011 WL 843957, at *5 (reasoning that RICO “does not punish the predicate acts of racketeering activity . . . but only racketeering activity in connection with an ‘enterprise,’” and that the statute “seeks to regulate ‘enterprises’ by protecting them from being victimized by or conducted through racketeering activity”). As the *Cedeno* Court reasoned, “RICO is not a recidivist statute designed to punish someone for committing a pattern of multiple criminal acts[, but rather] prohibits the use of such a pattern to impact an enterprise.” *Cedeno*, 733 F. Supp. 2d at 473. Therefore, we conclude that Congress’s focus in enacting RICO was the enterprise. Under *Morrison*, a RICO enterprise must be a “domestic enterprise.” *European Cmty.*, 2011 WL 843957, at *5.

b. The Location of the Alleged RICO Enterprise

To determine where an enterprise is located, courts have employed the “nerve center” test, adopted from the Supreme Court’s use of that test in *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010), to locate a corporation’s principal place of business for purposes of

diversity jurisdiction. *See, e.g., European Cmty.*, 2011 WL 843957, at *5-6; *see also Mitsui*, 871 F. Supp. 2d at 940 (“The nerve center test provides a familiar, consistent, and administrable method for determining the territoriality of RICO enterprises in cases such as the one at bar, which blend domestic and foreign elements.”). As articulated in *Hertz*, the “nerve center” of a corporation is “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities.” *Hertz*, 130 S. Ct. at 1192. In the RICO context, courts have found that although “RICO enterprises . . . may not have a single center of corporate policy,” the test is nonetheless useful in focusing on the “brains” of the enterprise - where its decisions are made - as opposed to its “brawn” - where its conduct occurs. *European Cmty.*, 2011 WL 843957, at *6.

Here, for obvious reasons, plaintiffs resist the most natural way to apply RICO to the factual circumstances, namely to identify the BBA as the enterprise and to allege that the BBA’s LIBOR-setting process had been corrupted by defendants and used to carry out a pattern of racketeering activity. Because the BBA is plainly a foreign enterprise, such a construct would result in an impermissible extraterritorial application of RICO. Therefore, plaintiffs have alleged that the enterprise is an association in fact whose members are the BBA panel banks, and their affiliates, and whose purpose is to submit artificially low LIBOR quotes to the BBA so that LIBOR is fixed at artificially low levels and the defendants profit on LIBOR-based financial instruments. Tr. 95; Exchange Am. Compl. ¶ 219. This

strikes us as a strained attempt by plaintiffs to plead around an obvious defect in their theory.

Even evaluating plaintiffs' construct of an association-infact enterprise on its merits, the enterprise would be foreign. In locating the enterprise, the nerve center test, despite its usefulness in other cases, has little value here. The decisionmaking of the alleged enterprise likely occurred in several different countries, and might even have been located in each of the countries in which a defendant was headquartered. *See Schwab Bank Am. Compl.* ¶¶ 20-35 (identifying the countries of defendants' headquarters as the United States, England, Japan, the Netherlands, Switzerland, Germany, Canada, and Scotland). Plaintiffs have not alleged that defendants met in any one physical location in furtherance of their fraudulent scheme; rather, they have alleged that "Defendants used the mails and wires in conjunction with reaching their agreement to make false statements about their costs of borrowing, to manipulate LIBOR." *Schwab Bank Am. Compl.* ¶ 226. Indeed, if plaintiffs are correct that defendants joined together to fix LIBOR over the course of several years, it would seem highly improbable that defendants physically met in one location to discuss the scheme. Therefore, because the decisionmaking in furtherance of the alleged scheme would likely have occurred in many countries, the "nerve center" test does not point us to a single location.

Given that the location of the enterprise's "brain" is indeterminate, we will consider the location of the enterprise's "brawn," or where the enterprise acted.

The alleged fraudulent scheme essentially comprised two parts: (1) the defendants' submission of artificial LIBOR quotes to the BBA, and (2) each defendant's sale of LIBOR-based financial instruments to its customers. The first part involves joint action: the defendants allegedly agreed to coordinate their LIBOR submissions such that they would each submit an artificially low quote to the BBA each day. Indeed, giving the formula for calculating LIBOR, the only way to have a significant effect on the final LIBOR fix is through coordinated, collective action. The second part, by contrast, is independent: even if all of the defendants had a common interest in a low LIBOR fix, each defendant acted independently in selling LIBOR-based financial instruments to its customers.

In locating a RICO enterprise based on its activities, it makes sense to focus on activities done collectively. As discussed above, the focus of Congressional concern in enacting RICO was the RICO enterprise; in the context of an association-in-fact enterprise, the focus is not each defendant's independent commission of predicate acts, but rather the association of defendants together to commit predicate acts. Therefore, based on defendants' collective submission of false LIBOR quotes to the BBA, we find that the alleged RICO enterprise is located in England. The defendants were each members of the BBA, an entity based in England, and participated in the affairs of the BBA by submitting quotes each day to the BBA. In other words, the

collective action of defendants centered on the BBA. As the BBA is located in England, the most sensible place to locate the RICO enterprise is England.²²

Because RICO applies only to domestic enterprises, and because the enterprise alleged here was located abroad, plaintiffs' claim involves an impermissible extraterritorial application of U.S. law. Accordingly, plaintiffs' RICO claim is dismissed.

D. State-Law Claims

At least one state-law cause of action is asserted in the OTC amended complaint, the Schwab amended complaints, and the exchange-based plaintiffs' amended complaint. For the reasons stated below, we decline to exercise supplemental jurisdiction over the state-law claims in the OTC amended complaint and the Schwab amended complaints, with the exception of

²² Even if we considered the second stage of the alleged fraud - each defendant's sale of LIBOR-based financial instruments to its customers - we would not necessarily locate the enterprise in the United States. Contrary to plaintiffs' argument, Tr. 97, the fact that only U.S. customers have brought suit pursuant to RICO does not indicate that defendants in fact targeted their sale of LIBOR-based instruments at the U.S. Because LIBOR is a reference point around the world, *id.*, it seems likely that defendants, which are headquartered around the world, would have sold LIBOR-based financial instruments to plaintiffs around the world. Consequently, even if we focused on where defendants sold LIBOR-based instruments, our analysis would not necessarily point to the United States. Furthermore, given that the first stage of the alleged fraud clearly centered on England, the indeterminate location of the second stage reinforces our conclusion that the alleged RICO enterprise was located abroad.

the Schwab plaintiffs' claim pursuant to the Cartwright Act. The Cartwright Act claim and the exchange-based plaintiffs' state-law claim are dismissed with prejudice.

1. OTC Amended Complaint

The OTC amended complaint asserts a cause of action for unjust enrichment and restitution, without stating which state's common law it seeks to apply. OTC Am. Compl. ¶¶ 227-30. The only other cause of action asserted the amended complaint is for violation of section 1 of the Sherman Act, *id.* ¶¶ 220-26, and, as discussed above, we are dismissing this claim for failure to allege antitrust injury. Thus, the question before us is whether we should exercise supplemental jurisdiction over the state common law claim in light of the fact that no federal causes of action remain.²³

Under 28 U.S.C. § 1367, "district courts may decline to exercise supplemental jurisdiction over a

²³ Although it is conceivable that we could retain jurisdiction over this claim by virtue of diversity of citizenship, we need not consider this ground because plaintiffs have not pled it. "It is the plaintiff's burden to plead and prove subject matter jurisdiction." *Moses v. Deutsche Bank Nat. Trust Co.*, No. 11-cv-5002 (ENV) (VVP), 2012 WL 2017706, at *1 (E.D.N.Y. June 5, 2012) (citing *Standard Chartered Bank Malaysia Holdings v. Lehman Bros. Asia Holdings Ltd.*, No. 08 CV 8152, 2008 WL 4355355, at *1 (S.D.N.Y. Sept. 22, 2008)). Here, plaintiffs have not pleaded that this Court has diversity jurisdiction over their state law claim, nor have they alleged facts that would support our exercise of diversity jurisdiction. Therefore, if we have jurisdiction over plaintiffs' state-law claim, it is not by virtue of diversity of citizenship.

[state law claim] if . . . (3) the district court has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c) (2006). In *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118 (2d Cir. 2006), the Second Circuit held that “[o]nce a district court’s discretion is triggered under [section] 1367(c)(3), it balances the traditional ‘values of judicial economy, convenience, fairness, and comity’ in deciding whether to exercise jurisdiction.” *Id.* at 122 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)) (internal citation omitted). “In weighing these factors, the district court is aided by the Supreme Court’s additional guidance in [*Carnegie-Mellon University v. Cohill*, 484 U.S. 343,] that ‘in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.’” *Kolari*, 455 F.3d at 122 (alteration in original) (quoting *Cohill*, 484 U.S. at 350 n.7). Indeed, as the Supreme Court explained in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), *superseded by statute*, 28 U.S.C. § 1367, “[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.” *Id.* at 726.

Here, considerations of judicial economy, convenience, fairness, and comity suggest that we should decline to exercise supplemental jurisdiction over plaintiffs’ as-yet-unspecified-state-law claim. First, given that discovery has not yet commenced, it would not significantly compromise judicial economy for another court to start afresh on plaintiffs’ state law

claim. Second, in light of the early stage of the proceedings, it would not be particularly inconvenient for plaintiffs to refile their amended complaint in state court. Third, considerations of fairness suggest that plaintiffs' state-law claim would best be decided in state court. Finally, comity to the States counsels us not to decide unnecessarily a question of state law. In sum, we find that in this case, as in "the usual case in which all federal-law claims are eliminated before trial," the *Cohill* factors "point toward declining to exercise jurisdiction over the remaining state-law claims." *Kolari*, 455 F.3d at 122 (quoting *Cohill*, 484 U.S. at 350 n.7) (internal quotation mark omitted). Accordingly, we decline to exercise supplemental jurisdiction over the OTC plaintiffs' state-law claim.

2. Schwab Amended Complaints

The Schwab amended complaints assert four causes of action pursuant to California state law: (1) violation of the Cartwright Act, Schwab Bank Am. Compl. ¶¶ 238-44, (2) interference with economic advantage, *id.* ¶¶ 245-49, (3) breach of the implied covenant of good faith, *id.* ¶¶ 250-55, and (4) unjust enrichment, *id.* ¶¶ 256-63. With regard to each of these claims other than the Cartwright Act claim, the same considerations of judicial economy, convenience, fairness, and comity that counsel us to decline to exercise supplemental jurisdiction over the OTC plaintiffs' state-law claim also counsel us to decline to

exercise supplemental jurisdiction here.²⁴ In light of the early stage of the proceedings, there is no reason why a California court should not decide plaintiffs' California common law claims.

With regard to plaintiffs' cause of action for violation of the Cartwright Act, the *Cohill* factors suggest a different result. As discussed earlier, California courts interpreting the Cartwright Act have required plaintiffs to satisfy the same antitrust injury requirement that federal courts have applied in the context of the Sherman and Clayton Acts. *See Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, 198 Cal. App. 4th 1366, 1378, 1380 (App. 2d Dist. 2011) (“[F]ederal case law makes clear that the antitrust injury requirement also applies to other federal antitrust violations [beyond anticompetitive mergers]. California case law holds that the requirement applies to Cartwright Act claims as well. . . . [T]he antitrust injury requirement means that an antitrust plaintiff must show that it was injured by the anticompetitive aspects or effects of the defendant’s conduct, as opposed to being injured by the conduct’s neutral or even procompetitive aspects.”). Therefore, our decision that plaintiffs have failed to

²⁴ Like the OTC plaintiffs, the Schwab plaintiffs do not allege that we have diversity jurisdiction, nor do they allege facts that would support our exercise of diversity jurisdiction. *See Schwab Bank Am. Compl.* ¶ 14; *Schwab Money Am. Compl.* ¶ 14; *Schwab Bond Am. Compl.* ¶ 14. Therefore, we need not consider whether we have jurisdiction over plaintiffs' state-law claims by virtue of diversity.

allege an antitrust injury applies equally to their Cartwright Act claims.

In these circumstances, considerations of judicial economy, convenience, fairness, and comity suggest that we should exercise supplemental jurisdiction over plaintiffs' Cartwright Act claims. First, as a matter of judicial economy, because our analysis of antitrust injury in the federal context is also sufficient to dispose of plaintiff's Cartwright Act claims, there is no reason for another court to duplicate our efforts. Second, with regard to the parties' convenience, although it would be easy for plaintiffs to refile their claim in state court, it would also be an unnecessary burden for defendants to relitigate an issue that has already been decided here. Third, although fairness to the parties often suggests that issues of state law should be decided by courts of that state, there is nothing unfair about our deciding the issue of antitrust injury in the context of the Cartwright Act given that this requirement is directly based on the federal antitrust injury requirement. Finally, because California has chosen to streamline its Cartwright Act jurisprudence with federal antitrust law to the extent that California courts have endorsed the federal requirement of antitrust injury, there are not strong considerations of comity here in favor of deferring to California courts.

Therefore, we will exercise supplemental jurisdiction over plaintiffs' Cartwright Act claims. As discussed above, plaintiffs must show an antitrust injury to recover under the Cartwright Act, yet here,

plaintiffs have failed to do so. Accordingly, plaintiffs' Cartwright Act claims are dismissed.

3. Exchange-Based Plaintiffs' Amended Complaint

The exchange-based plaintiffs assert a cause of action pursuant to New York law for "restitution/disgorgement/unjust enrichment." Exchange Am. Compl. ¶¶ 250-53.²⁵ As discussed above, plaintiffs' CEA claims will, in part, survive defendants' motion to dismiss. Plaintiffs have alleged that their state-law claim is also properly before us pursuant to our diversity jurisdiction and supplemental jurisdiction, and defendants have not disputed this. Defendants have, however, moved to dismiss plaintiffs' state-law cause of action for failure to state a claim. Exchange MTD 29-31.

Under New York law, "[t]he theory of unjust enrichment lies as a quasi-contract claim' and contemplates 'an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties.'" *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 516 (2012) (quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009)). In order to state a claim for unjust enrichment, a plaintiff must allege that "(1) the

²⁵ Although the amended complaint does not specify which state's law the plaintiffs are seeking to apply, the parties have assumed for purposes of briefing that the claim is asserted pursuant to New York common law. Accordingly, we will analyze this claim under New York law.

other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Id.* (quoting *Mandarin Trading Ltd. V. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (internal quotation mark omitted).

Given that unjust enrichment is a claim in quasi-contract, it requires some relationship between plaintiff and defendant: "while 'a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment,' there must exist a relationship or connection between the parties that is not 'too attenuated.'" *Id.* (quoting *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215-16 (2007)). Where plaintiff and defendant "simply had no dealings with each other," their relationship is "too attenuated." *Georgia Malone*, 19 N.Y.3d at 517-518.

Here, the relationship between plaintiffs and defendants, to the extent that there was any relationship, is surely too attenuated to support an unjust enrichment claim. Although plaintiffs have alleged that they "purchased standardized CME Eurodollar futures contracts" and that "Defendants . . . manipulated and directly inflated CME Eurodollar futures contract prices to artificially high levels," Exchange Am. Compl. ¶¶ 214-15, they have not alleged that they purchased Eurodollar contracts from defendants or that they had any other relationship with defendants. In other words, even if plaintiffs are correct that "the direct and foreseeable effect of the Defendants' intentional understatements of their LIBOR rate was to cause Plaintiffs and the Class to

pay supra-competitive prices for CME Eurodollar futures contracts,” *id.* ¶ 217; *see also* Exchange Opp’n 36, this does not establish a relationship, of any sort, between plaintiffs and defendants. *Cf. In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 547 (S.D.N.Y. 2008) (“Plaintiffs have alleged that their losses were caused by defendants’ market manipulations But they have not alleged any direct relationship, trading or otherwise, between themselves and [defendants]. The alleged link between plaintiffs and defendants - from defendants’ manipulations to the general natural gas futures market to plaintiffs’ trades - is too attenuated to support an unjust enrichment claim.”).

Because plaintiffs have not alleged any relationship between themselves and defendants, they fail to state a claim for unjust enrichment under New York law. Accordingly, plaintiffs’ unjust enrichment claim is dismissed.

IV. Conclusion

For the reasons stated above, defendants’ motions to dismiss are granted in part and denied in part. First, defendants’ motion to dismiss plaintiffs’ federal antitrust claim is granted. Regardless of whether defendants’ conduct constituted a violation of the antitrust laws, plaintiffs may not bring suit unless they have suffered an “antitrust injury.” An antitrust injury is an injury that results from an anticompetitive aspect of defendants’ conduct. Here, although plaintiffs have alleged that defendants conspired to suppress LIBOR over a nearly three-year-long period and that they were injured as a result, they have not alleged

that their injury resulted from any harm to competition. The process by which banks submit LIBOR quotes to the BBA is not itself competitive, and plaintiffs have not alleged that defendants' conduct had an anticompetitive effect in any market in which defendants compete. Because plaintiffs have not alleged an antitrust injury, their federal antitrust claim is dismissed.

Second, defendants' motion to dismiss plaintiffs' commodities manipulation claims is granted in part and denied in part. Contrary to defendants' arguments, plaintiffs' claims do not involve an impermissible extraterritorial application of the CEA, and plaintiffs have adequately pleaded their claims. However, certain of plaintiffs' claims are time-barred because numerous articles published in April and May 2008 in prominent national publications placed plaintiffs on notice of their injury. Therefore, plaintiffs' commodities manipulation claims based on contracts entered into between August 2007 and May 29, 2008, are time-barred. However, plaintiffs' claims based on contracts entered into between April 15, 2009, and May 2010 are not time-barred, and plaintiffs' claims based on contracts entered into between May 30, 2008, and April 14, 2009, may or may not be barred, though we will not dismiss them at this stage. Additionally, because the Barclays settlements brought to light information that plaintiffs might not previously have been able to learn, we grant plaintiffs leave to move to amend their complaint to include allegations based on such information, provided that any such motion addresses the concerns raised herein and is

accompanied by a proposed second amended complaint.

Third, defendants' motion to dismiss plaintiffs' RICO claim is granted. For one, the PSLRA bars plaintiffs from bringing a RICO claim based on predicate acts that could have been the subject of a securities fraud action. Here, the predicate acts of mail and wire fraud underlying plaintiffs' RICO claim could have been the subject of a claim for securities fraud. Additionally, RICO applies only domestically, meaning that the alleged "enterprise" must be a domestic enterprise. However, the enterprise alleged by plaintiffs is based in England. For these reasons, plaintiffs' RICO claim is dismissed.

Finally, plaintiffs' state-law claims are all dismissed, some with prejudice and some without. Plaintiffs' Cartwright Act claim is dismissed with prejudice for lack of antitrust injury. The exchange-based plaintiffs' New York common law unjust enrichment claim is also dismissed with prejudice, as plaintiffs have not alleged any relationship between them and defendants. With regard to the remaining state-law claims, we decline to exercise supplemental jurisdiction and therefore dismiss the claims without prejudice.

We recognize that it might be unexpected that we are dismissing a substantial portion of plaintiffs' claims, given that several of the defendants here have already paid penalties to government regulatory agencies reaching into the billions of dollars. However, these results are not as incongruous as they might seem. Under the statutes invoked here, there are

many requirements that private plaintiffs must satisfy, but which government agencies need not. The reason for these differing requirements is that the focuses of public enforcement and private enforcement, even of the same statutes, are not identical. The broad public interests behind the statutes invoked here, such as integrity of the markets and competition, are being addressed by ongoing governmental enforcement. While public enforcement is often supplemented by suits brought by private parties acting as “private attorneys general,” those private actions which seek damages and attorney’s fees 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. Therefore, although we are fully cognizant of the settlements that several of the defendants here have entered into with government regulators, we find that only some of the claims that plaintiffs have asserted may properly proceed.

SO ORDERED.

/s/ Naomi Reice Buchwald
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT
JUDGE

Dated: New York, New York
March 29, 2013

APPENDIX G

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

**In re: LIBOR-Based Financial Instruments
Antitrust Litigation.
THIS DOCUMENT RELATES TO: All Cases**

11 MD 2262 (NRB)
August 23, 2013, Decided
August 23, 2013, Filed

MEMORANDUM AND ORDER

I. Introduction

On March 29, 2013, we issued a Memorandum and Order granting in part and denying in part defendants' motions to dismiss plaintiffs' complaints (the "March 29 Order"). *In re LIBOR-Based Fin. Instruments Antitrust Litig. (Mar. 29 Order)*, No. 11 MD 2262 (NRB), 2013 U.S. Dist. LEXIS 45909, 2013 WL 1285338 (S.D.N.Y. Mar. 29, 2013). Specifically, we dismissed plaintiffs' antitrust and RICO claims in full; we dismissed plaintiffs' commodities manipulation claims to the extent they were based on contracts entered into between August 2007 and May 29, 2008; and, we allowed plaintiffs' commodities manipulation claims to the extent they were based on contracts entered into between May 30, 2008, and May 2010.¹

¹ In ruling on plaintiffs' commodities manipulation claims, we trifurcated the Class Period (as defined in the plaintiffs'

Finally, we dismissed with prejudice the exchange-based plaintiffs' state-law claim for unjust enrichment and declined to exercise supplemental jurisdiction over the remaining state-law claims.

Since the issuance of the March 29 Order, the parties have filed a number of motions. First, the exchange-based plaintiffs have moved for certification of the March 29 Order for interlocutory appeal on the question of whether LIBOR is the commodity underlying Eurodollar futures contracts ("plaintiffs' motion for interlocutory appeal"). Second, three defendants, Bank of Tokyo-Mitsubishi UFJ, Ltd. ("BT-MU"), Credit Suisse Group AG ("Credit Suisse"), and Norinchukin Bank ("Norinchukin") have moved for reconsideration of that portion of our Memorandum and Order denying their motion to dismiss the exchange-based plaintiffs' commodity manipulation claims ("defendants' motion for reconsideration"). Third, the over-the-counter ("OTC"), bondholder, and exchange-based plaintiffs have each moved for leave to file a second amended complaint to add allegations in

complaints then before us) into three periods: August 2007 through May 29, 2008 ("Period 1"), May 30, 2008, through April 14, 2009 ("Period 2"), and April 15, 2009, through May 2010 ("Period 3"). *Mar. 29 Order*, 2013 WL 1285338, at *34-*36. We found that the Commodity Exchange Act ("CEA")'s statute of limitations barred plaintiffs' claims to the extent they were based on contracts entered into during Period 1, but did not bar plaintiffs' claims based on contracts entered into during Period 3. *Id.* With regard to claims based on contracts purchased during Period 2, we declined to dismiss plaintiffs' claims because we "[were] not in a position to address" the issues bearing on whether those claims were timely. *Id.* at *35.

response to our ruling that plaintiffs had not plausibly alleged antitrust injury (“plaintiffs’ motion to amend their antitrust claims”).² Finally, the exchange-based plaintiffs have moved for leave to file a second amended complaint to add allegations relating to their commodity manipulation claims (“plaintiffs’ motion to amend their commodities manipulation claims”).

For the reasons stated below, the exchange-based plaintiffs’ motion for interlocutory appeal is denied; the OTC, bondholder, and exchange-based plaintiffs’ motions to add allegations with respect to antitrust are denied; the exchange-based plaintiffs’ motion to add allegations with respect to trader-based manipulation is denied; BT-MU, Credit Suisse, and Norinchukin’s motion for reconsideration is denied without prejudice to a similar motion being filed by defendants that addresses the issues raised herein; and, the OTC plaintiffs’ motion for leave to reassert their unjust enrichment claim and to add a claim for breach of the implied covenant of good faith and fair dealing is granted.

Because the background of this case has been thoroughly set out in the March 29 Order, we will proceed directly to our consideration of the pending motions.

² The motion to amend filed by the OTC plaintiffs also seeks leave (1) to add an allegation that we have jurisdiction under the Class Action Fairness Act (“CAFA”) over the OTC plaintiffs’ state-law claims, (2) to reassert the previously pleaded claim for unjust enrichment, which we dismissed without prejudice due to lack of subject matter jurisdiction, and (3) to advance a new claim for breach of contract.

II. Discussion

A. Plaintiffs' Motion for Interlocutory Appeal

Plaintiffs have moved for certification of the March 29 Order for interlocutory appeal on the following question: “Whether LIBOR is the ‘commodity underlying’ the Eurodollar futures contract within the meaning of Section 25(a)(1)(D) of the Commodity Exchange Act (‘CEA’).” Letter from Christopher Lovell and David E. Kovel to the Court (Apr. 22, 2013) [hereinafter Pls.’ Letter Mot. for Interlocutory Appeal].³ Under 28 U.S.C. § 1292:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals

³ In a Memorandum filed on May 3, 2013, we noted that we had received a letter from the exchange-based plaintiffs seeking leave to move for certification of our Memorandum and Order of March 29 for interlocutory appeal, as well as a letter from defendants in opposition. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2013 WL 1947367, at *2 (S.D.N.Y. May 3, 2013). We further observed that, “[b]ased on the submissions to date, this Court could not enter such a certification.” *Id.* Nonetheless, “to give exchange-based plaintiffs a full opportunity to support their position,” we permitted plaintiffs to submit a reply submission within two weeks, noting that we would treat plaintiffs’ original letter as a letter motion. Plaintiffs submitted their reply on May 20.

which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order[.]

28 U.S.C. § 1292(b).⁴ As the Second Circuit has held: “It is a basic tenet of federal law to delay appellate review until a final judgment has been entered. Section 1292(b)’s legislative history reveals that . . . [this law] is a rare exception to the final judgment rule that generally prohibits piecemeal appeals.” *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996) (citation omitted). Indeed, “only exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment,” *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 426 F. Supp. 2d 125, 127 (S.D.N.Y. 2005) (alteration in original) (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990)) (internal quotation marks omitted), and district courts must “exercise great care in making a § 1292(b) certification,” *id.* (quoting *Westwood Pharm., Inc. v. Nat’l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992)).

Here, interlocutory appeal is not warranted because there is not “substantial ground for difference of opinion” regarding whether LIBOR is the commodity underlying Eurodollar futures contracts.

⁴ Although section 1292 also authorizes appeals of interlocutory orders in several other situations, none of those situations is present here.

As we explained in the March 29 Order, a Eurodollar futures contract is a futures contract whose “underlying instrument” is a “Eurodollar Time Deposit having a principal value of USD \$1,000,000 with a three-month maturity.” CME Group, *Eurodollar Futures: Contract Specifications*, http://www.cmegroup.com/trading/interest-rates/stir/eurodollar_contract_specifications.html (last visited August 23, 2013). “Eurodollars are U.S. dollars deposited in commercial banks outside the United States.” CME Group, *Eurodollar Futures*, http://www.cmegroup.com/trading/interest-rates/files/IR148_Eurodollar_Futures_Fact_Card.pdf. At settlement, the price of a Eurodollar futures contract “is equal to 100 minus the three-month Eurodollar interbank time deposit rate,” which rate is defined as the LIBOR fix on the contract’s last trading day. CME Group, *Eurodollar Futures Final Settlement Procedure*, <http://www.cmegroup.com/trading/interest-rates/files/finalsettlement-procedure-eurodollar-futures.pdf>. Prior to settlement, “the price of a 3-month Eurodollar futures contract is an indication of the market’s prediction of the 3-month Dollar LIBOR on [that] date.” Settlement Agreement Between Dep’t of Justice, Criminal Div., and Barclays (June 26, 2012), Appendix A, ¶ 9, Ex. B, Porpora Decl.

Plaintiffs argue that LIBOR is the commodity underlying Eurodollar futures contracts for purposes of the CEA. But this position is simply implausible. For one, LIBOR is a price index; it is not a “commodity,” which the CEA defines to include “all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.” 7 U.S.C. § 1a(9). Moreover, to call LIBOR a

commodity, one would need to be able to articulate a price of LIBOR independent from LIBOR itself. Plaintiffs have not plausibly done so, and we cannot imagine how they could.

As we reasoned in the March 29 Order, “[t]he only plausible way to characterize the components of a Eurodollar contract is that the underlying commodity is a USD 1,000,000 deposit in a foreign commercial bank with a three-month maturity, and the price of the contract is settled or traded at a value based on LIBOR.”⁵ *Mar. 29 Order*, 2013 WL 1285338, at *43. Just as the prices of futures contracts based, for example, on gold or copper track the prices of their respective underlying commodities, *see Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 488 (7th Cir. 2002); *Sanner v. Bd. of Trade of City of Chicago*, 62 F.3d 918, 929 (7th Cir. 1995), so the prices of Eurodollar futures contracts track (generally) the prices of three-month U.S. dollar time deposits in foreign banks. In the case of futures based on physical commodities, the correlation of futures contract price with underlying commodity price occurs by virtue of the natural operation of the market. In the case of Eurodollar futures, the correlation occurs because the futures price directly incorporates LIBOR, which is an

⁵ Given that the commodity underlying Eurodollar futures contracts is a USD 1,000,000 deposit in a foreign commercial bank with a three-month maturity, the price of that commodity would be the interest rate charged for the use of such a time deposit. LIBOR, of course, does not correspond to any actual interest rate charged for the use of U.S. dollars, but rather is an index based on the LIBOR panel banks’ estimates of the rate at which they would be able to borrow funds.

index intended to represent the average price paid by banks for three-month U.S. dollar time deposits. If, as plaintiffs allege, defendants submitted false LIBOR quotes to the BBA, it would be inaccurate to say that they manipulated the commodity underlying Eurodollar futures contracts or the price of that commodity, thereby affecting Eurodollar futures prices indirectly. Rather, the best characterization of what defendants allegedly did would be that they affected Eurodollar futures prices directly by manipulating the index that was directly incorporated into the formula for those prices.

Contrary to plaintiffs' argument, *see* Pls.' Letter Mot. for Interlocutory Appeal 2, the fact that defendants have described Eurodollar futures contracts as "bets on LIBOR" does not suggest that LIBOR is the commodity underlying those contracts. Every futures contract is a bet. Strictly speaking, however, a futures contract is not a bet on the underlying commodity itself (whatever that might mean). Rather, a futures contract is a bet on which direction the average price for the underlying commodity will move. So also with Eurodollar futures, which are bets on which direction the average interest rate for three-month U.S. dollar time deposits in foreign banks, represented by LIBOR, will move. In short, although it is undoubtedly correct to say that Eurodollar futures contracts are bets on LIBOR, to say this is not to embrace plaintiffs' assertion that LIBOR is a commodity, but rather to acknowledge the obvious fact that LIBOR is a price index.

Plaintiffs also argue that, because Eurodollar futures contracts trade and settle based on LIBOR and do not involve any actual delivery of three-month U.S.

dollar time deposits, those contracts can be manipulated only by manipulating LIBOR, not by manipulating the time deposit market. *See Id.* at 2-3. According to plaintiffs, “[t]he amounts of phantom dollar deposits that are never delivered have no significance whatsoever for purposes of manipulation of Eurodollar futures prices (except as to supply a multiplication unit by which to measure the degree of loss from such manipulation of LIBOR).” Pls.’ Reply Mem. of Law in Supp. of Mot. to Certify the Mar. 29, 2013 Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b), at 8 [hereinafter Pls.’ Interlocutory Appeal Reply]. In light of this, plaintiffs contend that the CEA’s purposes of deterring and remedying manipulation of the commodities futures markets⁶ support a finding that LIBOR is the commodity underlying Eurodollar futures contracts. *Id.*

Although we appreciate the important functions served by the CEA, we do not agree with plaintiffs that the only way to manipulate Eurodollar futures is to manipulate LIBOR directly. When properly calculated, LIBOR reflects the average interest rate for three-month U.S. dollar loans in the London interbank lending market. By manipulating this market, which is a subset of the broader market for three-month U.S. dollar time deposits in foreign banks, an entity would cause LIBOR, and thereby Eurodollar futures prices,

⁶ Further, plaintiffs argue that Congress’s specific purpose in adding a cause of action based on manipulation of the price of the commodity underlying futures contracts was to “expand[] the prevention of manipulation and the protection of the integrity of futures contract prices.” Pls.’ Interlocutory Appeal Reply 8.

to be artificial. Thus, one could plausibly manipulate the price of Eurodollar futures contracts by manipulating the price of foreign three-month U.S. dollar time deposits; one need not manipulate LIBOR directly.

Finally, not only is plaintiffs' position implausible, but there is no split of authority on this issue which would counsel in favor of certifying our decision for interlocutory appeal. *See Consub Del. LLC v. Schahin Engenharia Limitada*, 476 F. Supp. 2d 305, 309 (S.D.N.Y. 2007) ("The requirement that such a substantial ground [for a difference of opinion] exist may be met when '(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit.'" (quoting *In re Lloyd's Am. Trust Funds Litig.*, No. 96 Civ. 1262, 1997 WL 458739, at *5 (S.D.N.Y. Aug. 12, 1997))). The only authority that even arguably supports plaintiffs' claim that LIBOR is the commodity underlying Eurodollar futures contracts consists of a few stray clauses in the Barclays CFTC settlement order stating that LIBOR is "a commodity in interstate commerce" for purposes of sections 9(a)(2) and 6(c) of the CEA. *See* CFTC Barclays Settlement Order (June 27, 2012), at 4, 25-26, Ex. A, Porpora Decl.; *see also* Pls.' Interlocutory Appeal Reply 5-6. However, these stray references do not convince us that there is a substantial ground for difference of opinion.

First, even assuming that LIBOR is "a commodity in interstate commerce" for purposes of sections 9(a)(2) and 6(c) of the CEA, it does not necessarily follow that LIBOR is the commodity underlying Eurodollar futures contracts for purposes of section 22(a). Indeed, section 22(a), the provision of the CEA which

establishes a private right of action for any person “who purchased or sold a [futures contract] or swap if the violation constitutes . . . (ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap,” 7 U.S.C. § 25(a)(1)(D), is not even referenced in the CFTC settlement order at issue.

Moreover, to whatever extent the CFTC’s “commodity in interstate commerce” language is in tension with our finding that LIBOR is not the commodity underlying Eurodollar futures contracts, such tension is not substantial enough to warrant interlocutory appeal. Although courts generally “defer to an agency’s reasonable interpretation of a statute it is charged with administering,” *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 525 (2009), such deference is not appropriate when the court is “not reviewing an agency rulemaking or adjudication, but only a settlement agreement,” *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1327 (D.C. Cir. 2008) (Silberman, J., concurring). This is especially so when “the agency itself [was] an interested party to the agreement.” *Id.* (alteration in original) (quoting *Nat’l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987)). Here, although we would normally afford deference to the CFTC’s interpretation of the CEA, *see Damato v. Hermanson*, 153 F.3d 464, 472 (7th Cir. 1998), we need not defer to statements made in the Barclays settlement order. *See Sec. Investor Protection Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 336 (Bkrcty. S.D.N.Y. 1999) (“The Second Circuit has clearly held that consent judgments . . . are not the result of actual adjudications on the merits”); *cf. In re Platinum*

and Palladium Commodities Litig., 828 F. Supp. 2d 588, 594 (S.D.N.Y. 2011) (prohibiting plaintiffs from relying on a CFTC order to plead the “underlying facts of liability” because, “[a]lthough the CFTC Order included certain factual findings, it nevertheless was the product of a settlement between the CFTC and the Respondents, not an adjudication of the underlying issues in the CFTC proceeding”). Therefore, we cannot conclude, based on the references to LIBOR as “a commodity in interstate commerce” in the CFTC’s Barclays settlement order, that a substantial ground for difference of opinion exists that would justify interlocutory appeal.

For the foregoing reasons, plaintiffs have not even approached satisfying the requirements of 28 U.S.C. § 1292(b), and their motion for certification of the March 29 Order for interlocutory appeal is denied.

B. Defendants’ Motion for Reconsideration

1. Background

Defendants BT-MU, Credit Suisse, and Norinchukin (collectively, the “moving defendants”) have moved for reconsideration of that portion of our Memorandum and Order denying their motion to dismiss the exchange-based plaintiff’s commodity manipulation claims, on the ground that we improperly found that plaintiffs had adequately pleaded scienter. In the March 29 Order, we held that, although the scienter element of a commodities manipulation claim “may be alleged generally,” *Mar. 29 Order*, 2013 WL 1285338, at *37 (quoting Fed. R. Civ. P. 9(b)) (internal quotation marks omitted), plaintiffs must still allege facts that “give rise to a *strong inference* of scienter,” *id.* (alteration in original)

(quoting *In re Amaranth Natural Gas Commodities Litig.*, 612 F. Supp. 2d 376, 384 (S.D.N.Y. 2009)) (internal quotation marks omitted). Plaintiffs may demonstrate scienter by, *inter alia*, “alleging facts to show that defendants had both motive and opportunity to commit fraud.”⁷ *Id.* (quoting *In re Crude Oil Commodity Litig.*, No. 06 Civ. 6677 (NRB), 2007 WL 1946553, at *8 (S.D.N.Y. June 28, 2007)). “Sufficient motive allegations entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged.” *Id.* (quoting *In re Amaranth Natural Gas Commodities Litig.*, 612 F. Supp. 2d 376, 383 (S.D.N.Y. 2009)) (internal quotation marks omitted). In the case at bar, we found that plaintiffs’ allegations of defendants’ motive and opportunity were sufficient to demonstrate scienter. *Id.* at *38.

Our conclusion that plaintiffs had adequately pleaded that “defendants stood to gain concrete benefits from manipulating the price of Eurodollar futures contracts,” *id.*, was based on plaintiffs’

⁷ Scienter can also be pleaded “by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.” *In re Crude Oil Commodity Litig.*, No. 06 Civ. 6677 (NRB), 2007 WL 1946553, at *8 (S.D.N.Y. June 28, 2007) (quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290-91 (2d Cir. 2006)) (internal quotation mark omitted). However, plaintiffs cannot satisfy this standard. The only alleged action of defendants that might qualify as “conscious misbehavior or recklessness” is their alleged submission of artificial LIBOR quotes to the BBA. However, as discussed below, merely submitting artificial LIBOR quotes does not by itself indicate an intent to manipulate Eurodollar futures contract prices.

allegation that “[d]efendants, through their broker-dealer affiliates actively traded Eurodollar futures and options on those futures during the Class Period.” Exchange-Based Pls.’ Am. Consol. Class Action Compl. ¶ 218. Plaintiffs’ first amended complaint proceeded to list broker-dealer affiliates of certain of the defendants, including Credit Suisse, but not of others, such as BT-MU or Norinchukin. *Id.* Nonetheless, we understood plaintiffs to be alleging that each defendant, through its broker-dealer affiliate, “actively traded Eurodollar futures and options on those futures during the Class Period.” *Id.* Whether or not we were correct in our interpretation of the exchange-based plaintiffs’ first amended complaint, the exchange-based plaintiffs have since moved for leave to file a second amended complaint that would add, *inter alia*, explicit allegations that Credit Suisse, BT-MU, and Norinchukin, or their respective affiliates, each held or traded Eurodollar futures contracts during the Class Period. *See* Exchange-Based Pls.’ Second Am. Consol. Class Action Compl. ¶¶ 459, 467, 479, Ex. A, Revised Kovel Decl. [hereinafter Exchange-Based Pls.’ PSAC]. As discussed below, although we will not permit the exchange-based plaintiffs to add all of their proposed new allegations, we do not object to the paragraphs immediately at issue here. Therefore, in addressing the present motion, we understand plaintiffs to have explicitly alleged that each of the moving defendants held or traded Eurodollar futures contracts during the Class Period.

Defendants maintain that such allegations are insufficient to plead scienter. According to defendants, “plaintiffs do not allege any facts to suggest that each (or any) Movant ‘took specific actions which exhibited

an actual intent' to manipulate the price of Eurodollar futures contracts or made 'specific communications . . . about any specific plan to cause artificial prices' in that market." Defs.' Mem. of Law in Supp. of Mot. for Reconsideration or Reargument 3 (alteration in original) (quoting *In re Commodity Exchange, Inc., Silver Futures and Options Trading Litig.*, No. 11 Md. 2213 (RPP), 2012 WL 6700236, at *10-*11 (S.D.N.Y. Dec. 21, 2012)). Further, defendants argue, "plaintiffs do not allege whether each Movant was long or short – a fact that is essential to showing that each Movant would have gained 'concrete benefits' from the alleged manipulation of the price of those contracts." *Id.* Finally, although plaintiffs have alleged that defendants held or traded Eurodollar contracts, defendants contend that "[t]he desire to profit from trading such contracts is precisely the kind of general motive possessed by most corporate defendants that is insufficient to adequately allege scienter." *Id.* at 4.

Although we have considered defendants' motion carefully, we are not at present prepared to resolve it because several important issues have not been sufficiently briefed. Thus, we deny defendants' motion for reconsideration without prejudice to a similar motion being filed, by September 20, 2013, which addresses the following concerns.

2. Relevant Authority

In general, courts have held that, to plead scienter, it is insufficient to allege merely "a generalized motive" that could be "imputed to any publicly-owned, for-profit endeavor." *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996). For instance, "[t]he motive to maintain the appearance of corporate

profitability, or of the success of an investment, will naturally involve benefit to a corporation, but does not ‘entail concrete benefits.’” *Id.* Also insufficient are a corporation’s “desire[for] its stock to be priced highly by the market,” *id.* at 268 n.5, or its “desire to maintain the company’s credit rating,” *id.* at 268 (citing *San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos., Inc.* 75 F.3d 801, 813-14 (2d Cir. 1996)). Further, allegations that individual defendants “were motivated by a desire to maintain or increase executive compensation” or to “achieve the most lucrative acquisition proposal [for their company]” are inadequate to plead motive. *Kalnit v. Eichler*, 264 F.3d 131, 140-41 (2d Cir. 2001).

With regard to plaintiffs’ allegations that defendants were motivated to manipulate Eurodollar futures contract prices because they held positions in that market, the authority cited by defendants raises a serious question regarding whether plaintiffs’ allegations are sufficient.⁸ Specifically, in *In re Crude*

⁸ In their opposition, plaintiffs argue that “[the Court] could have found and held that the allegations of hundreds of manipulative acts by each Movant, accompanied by competent allegations of that Movant’s knowledge of thousands of manipulative acts by other Defendants and the circumstance that Eurodollar futures prices were the inverse of LIBOR, sufficed to give rise to a reasonable inference of manipulative intent.” Pls.’ Mem. of Law in Opp’n to Defs.’ Mot. for Reconsideration or Reargument 6 (citations omitted). We neither so found nor so held. We have never, and do not, accept the notion that intentionally submitting false LIBOR quotes is tantamount to intending to manipulate Eurodollar futures contracts. Indeed, plaintiffs themselves have alleged that one of the primary goals of each defendant in submitting false LIBOR quotes was to protect

Oil Commodity Litigation, No. 06 Civ. 6677 (NRB), 2007 WL 1946553 (S.D.N.Y. June 28, 2007), we held that plaintiffs had failed to plead motive to manipulate crude oil prices where they had alleged that “defendants had a large presence in the crude oil market [and] the NYMEX crude oil futures and options market, and also engaged in the purchase and sale of OTC contracts in crude oil.” *Id.* at *8. Similarly, in *In re Commodity Exchange, Inc., Silver Futures and Options Trading Litig.*, No. 11 Md. 2213 (RPP), 2012 WL 6700236 (S.D.N.Y. Dec. 21, 2012), the Court found that plaintiffs had failed to plead defendant’s motive to manipulate silver futures contract prices by alleging that defendant was “a large holder of COMEX silver futures contracts, short puts, and options,” had engaged in allegedly suspicious trading activity, and made allegedly “unusual’ deliveries of silver between

the market’s perception of that defendant’s financial health. Plaintiffs have also alleged that a separate goal was to profit on LIBOR-based trading, which may or may not involve Eurodollar futures contracts. In short, even accepting plaintiffs’ allegations that each defendant submitted false LIBOR quotes over a long period of time and was aware that the other defendants were doing the same, those allegations by themselves do not make plausible that defendants intended to manipulate Eurodollar futures contracts. Of course, although defendants were likely aware that submitting artificial LIBOR quotes would affect the Eurodollar market, “[m]ere knowledge that certain actions might have an impact on the futures market is not sufficient to state a private claim under the CEA.” *In re Rough Rice Commodity Litig.*, No. 11 C 618, 2012 WL 473091, at *7 (N.D. Ill. Feb. 9, 2012) (citing *Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 249 (5th Cir. 2010)).

March 2008 and October 2010.” *Id.* at *10-*12.⁹ To the extent that these cases are analogous to the facts here, they give rise to serious questions regarding whether plaintiffs have adequately pleaded motive.

3. What Plaintiffs Have, and Could Have, Alleged

Complicating the analysis is the fact that, as we were led to understand at oral argument,¹⁰ plaintiffs are operating with significantly limited information. As plaintiffs’ counsel informed us, the details of particular trades in Eurodollar futures contracts, including the identity of the transacting parties, are not publicly available. Tr. 20-23.¹¹ Specifically, according to plaintiffs’ counsel, brokers have a fiduciary duty not to disclose the details of their clients’ trades, and, although the CFTC publishes aggregated trading data, it is prohibited from publicly

⁹ The Court in *Silver Futures* did not specify whether it was applying the “motive and opportunity” standard for scienter or the “strong circumstantial evidence of conscious misbehavior or recklessness” standard. *Crude Oil*, 2007 WL 1946553, at *8; see also *Silver Futures*, 2012 WL 6700236, at *10-*12.

¹⁰ Significantly, it was not until oral argument that the issues addressed in this section, involving what information plaintiffs could reasonably be expected to know about defendants’ Eurodollar futures contract positions, received any meaningful discussion. Given that we anticipate that this issue will inform whether plaintiffs have adequately pleaded scienter, the minimal and belated attention devoted to the issue contributes to our disinclination to rule on whether reconsideration is warranted until we have received further briefing.

¹¹ Citations to “Tr.” refer to the transcript of the oral argument held on August 8, 2013.

identifying the parties to trades. *Id.* Thus, it appears that we cannot reasonably expect plaintiffs, prior to discovery, to have identified the particular contracts and transactions on which the moving defendants allegedly sought to profit. Of course, it is well established that pleading requirements are relaxed where proof of a claim “involve[s] facts solely within the defendant’s knowledge.” *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d Cir. 2007); see also *DGM Investments, Inc. v. N.Y. Futures Exchange, Inc.*, 265 F. Supp. 2d 254, 264 (S.D.N.Y. 2003) (“Dismissal on the ground that facts within Defendants’ knowledge have not yet been proven in the pleading stage is ‘particularly inappropriate.’” (quoting *Sam Wong & Son, Inc. v. New York Mercantile Exchange*, 735 F.2d 653, 678 (2d Cir. 1984))).

Indeed, there is yet another layer of uncertainty impeding plaintiffs’ ability to plead with specificity. One way of proving motive is to show that a defendant executed a transaction that yielded a concrete benefit to it as the result of the defendant’s manipulative conduct. Here, plaintiffs might have shown that a given defendant exited a position in a Eurodollar futures contract such that the defendant profited as a result of the defendant’s manipulation. However, pleading with such specificity appears to be impossible at this stage. For one, as discussed above, plaintiffs do not know which positions defendants held or when they exited those positions. Further, plaintiffs are not in a position to demonstrate that the degree of LIBOR artificiality changed over the time that defendants held their positions in such a way that defendants profited by exiting when they did.

To elaborate on the latter point: In their Proposed Second Amended Complaint (“PSAC”), plaintiffs allege that LIBOR was artificial to some degree for all or most of the period from August 2007 through May 2010.¹² Therefore, the mere fact that a defendant exited a position at a time when LIBOR was artificial does not establish that the defendant benefited from manipulation. Rather, the defendant would profit only if LIBOR’s degree of artificiality changed over the time that the defendant held its position in a manner that benefited the defendant. Regardless of whether plaintiffs will ever be able to show this, we cannot discern how they could allege it with specificity now. As we reasoned in the March 29 Order, because “[t]he benchmarks referenced by plaintiffs, though generally probative of when LIBOR was at an artificial level, do not indicate precisely at which level LIBOR should have been fixed on any given day,” plaintiffs “cannot reasonably be expected to know the spread between LIBOR’s ‘true’ value and its actual level on any given day, let alone how this spread changed over time.” *Mar. 29 Order*, 2013 WL 1285338, at *42. Therefore, although it is possible that, after discovery, plaintiffs will be able to point to particular trades by defendants to show that the defendants stood to reap a concrete benefit from their alleged manipulative conduct, we

¹² Because alleged trader-based manipulation is the basis for plaintiffs’ new allegation that the Class Period begins in January 2005 rather than August 2007, and because, for the reasons stated below, we deny the exchange-based plaintiffs leave to add allegations based on such manipulation, we will assume for purposes of the present discussion that the Class Period begins in August 2007.

question whether we can reasonably expect plaintiffs to have alleged that at this stage.

4. Important Issues that Have Not Been Adequately Briefed

In light of the above discussion, there are three issues that concern us. First, putting aside considerations of what information can be reasonably attributed to plaintiffs, have plaintiffs adequately alleged scienter?¹³ Second, if the first question is answered in the negative, do plaintiffs' informational handicaps change the result? And, third, if both of the previous questions are answered in the negative, can the analysis reasonably be confined to the moving defendants, or is it equally applicable to all defendants?¹⁴ Because these issues have not been

¹³ As we see it, this question involves at least two subparts. First, as discussed above, there is an issue regarding whether plaintiffs' allegations that defendants held positions in the Eurodollar futures market is sufficient to plead scienter. Second, in light of the fact that the various groups of plaintiffs have alleged several motives of defendants to manipulate LIBOR other than profiting from Eurodollar futures contracts, namely portraying themselves as economically healthier than they actually were and profiting on particular LIBOR-based financial instruments other than Eurodollar futures, what burden do plaintiffs bear in pleading that defendants' actions were actually motivated, at least in part, by their desire to profit on Eurodollar futures? In other words, assuming we find at least one of the non-Eurodollar-based motives to manipulate LIBOR plausible, what showing must plaintiffs make to demonstrate that defendants' LIBOR submissions were, in fact, made with the specific intent to manipulate the price of Eurodollar futures?

¹⁴ At oral argument, defense counsel sought to distinguish the moving defendants from the non-moving defendants by

adequately briefed, we think it would be imprudent, especially in a case of this magnitude, to resolve the present motion without further briefing.

Accordingly, defendants' motion for reconsideration is denied without prejudice to defendants' filing, by September 20, 2013, of a similar motion that addresses the concerns raised herein.

C. Exchange-Based Plaintiffs' Motion to Amend Their Commodities Manipulation Claims

1. Background

In the March 29 Order, we granted the exchange-based plaintiffs leave to move to file a second amended complaint to include allegations based on the day-to-day, trading-based manipulation at issue in the Barclays settlement, that is, manipulation wherein defendants allegedly submitted specific LIBOR quotes in order to benefit particular positions that they held in the Eurodollar futures market.¹⁵ *Mar. 29 Order*, 2013 WL 1285338, at *36. On May 23, plaintiffs filed such a motion, as well as a proposed second amended

arguing that plaintiffs' allegations of artificial LIBOR submissions are especially weak with respect to the movants and, indeed, that the data cited by plaintiffs actually exculpate them. *See* Tr. 10-15. However, although these arguments might be relevant to whether artificial Eurodollar futures contract prices existed and whether the moving defendants caused those artificial prices, it is unclear how the arguments are relevant to scienter.

¹⁵ We required that "any such motion address[] the concerns raised [in the March 29 Order] and [be] accompanied by a proposed second amended complaint." *Mar. 29 Order*, 2013 WL 1285338, at *36.

complaint. Defendants have opposed plaintiffs' motion on the grounds that the proposed amendments are futile, as they are time-barred and fail to state a claim under the CEA. Defs.' Mem. of Law in Opp'n to Exchange-Based Pls.' Mot. for Leave to Amend as to CEA Claims and File the Second Am. Consol. Class Action Compl. [hereinafter Defs.' Opp'n to Mot. to Amend CEA Claims.]. Among defendants' arguments is that plaintiffs have failed to plead that they suffered actual damages. *Id.* at 24-25. We agree that plaintiffs have not adequately alleged that they suffered an injury as a result of defendants' alleged trader-based conduct, and thus plaintiffs lack standing under the CEA to pursue such claims.¹⁶ This ground being sufficient to deny plaintiffs' motion to amend, we do not reach defendants' other arguments.

2. Legal Standard

Under Rule 15(a) of the Federal Rules of Civil Procedure, a second amended complaint may be filed "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Although "[t]he court should freely give leave when justice so requires," *id.*, we "ha[ve] discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *Holmes v. Grubman*, 568 F.3d 329, 334 (2d Cir. 2009) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)). "An amendment to a pleading is

¹⁶ As discussed below, although loss causation is not an element of a commodities manipulation claim, private plaintiffs must still plead actual damages in order to have standing to bring suit under the CEA.

futile if the proposed claim could not withstand a motion to dismiss pursuant to [Rule] 12(b)(6).” *Lucente v. Int’l Business Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) (citing *Dougherty v. N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002)).

Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To avoid dismissal, a complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Where plaintiffs have not “nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” *Id.* In applying this standard, a court must accept as true all well-pleaded factual allegations and must draw all reasonable inferences in favor of the plaintiff. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). The Court may also “properly consider ‘matters of which judicial notice may be taken, or documents either in plaintiff[‘s] possession or of which plaintiff[] had knowledge and relied on in bringing suit.’” *Halebian v. Berv*, 644 F.3d 122, 130 n.7 (2d Cir. 2011) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)).

3. Analysis

As discussed in the March 29 Order, to avoid dismissal, plaintiffs not only must allege the elements of a commodities manipulation claim, but also must show that they have standing to sue. *See Mar. 29 Order*, 2013 WL 1285338, at *37. Under section 25(a) of the CEA, a plaintiff has standing to bring a

commodities manipulation action only if he has suffered “actual damages” as a result of defendant’s manipulation. 7 U.S.C. § 25(a)(1). “The term ‘actual damages’ has been applied by courts in a straightforward manner to require a showing of actual injury caused by the violation.” *Ping He (Hai Nam) Co. Ltd. v. NonFerrous Metals (U.S.A.) Inc.*, 22 F. Supp. 2d 94, 107 (S.D.N.Y. 1998), *vacated on other grounds*, 187 F.R.D. 121 (S.D.N.Y. 1999) (ruling that, “[e]ven if [defendant] violated every provision of the CEA or the CFTC rules, under the express language of § 22, [plaintiff] is only authorized to bring suit, and can only recover, for those violations that caused [plaintiff] to suffer ‘actual damages’” (quoting 7 U.S.C. § 25(a))).

Here, the exchange-based plaintiffs have not adequately pleaded that they suffered actual damages as a result of the newly alleged trader-based conduct.¹⁷ In contrast to the alleged persistent suppression of LIBOR that was the sole basis for plaintiffs’ Amended Consolidated Class Action complaint, the day-to-day, trader-based LIBOR manipulation that is the basis for plaintiffs’ new allegations was episodic and varying in direction. That is, it consists of a number of discrete instances of allegedly false LIBOR submissions, and those submissions were, at times, artificially high and, at other times, artificially low. *See, e.g.* Exchange-Based Pls.’ PSAC ¶¶ 183-217. To plead actual damages based on such manipulation, plaintiffs would need to

¹⁷ We would note from the outset that plaintiffs’ allegations of trader-based manipulation of three-month USD LIBOR do not implicate every defendant, but rather are essentially confined to Barclays.

allege that the resulting artificiality in LIBOR caused them injury, in light of their trading of Eurodollar futures contracts.

Plaintiffs have failed to meet this burden. In the PSAC, plaintiffs do not include any allegations that make plausible (1) that they transacted in Eurodollar futures contracts on days on which Eurodollar futures contract prices were artificial as a result of trader-based manipulation of LIBOR, or (2) that their positions were such that they were injured.¹⁸ *Cf. In re Energy Transfer Partners Natural Gas Litig.*, No. 4:07-cv-3349, 2009 WL 2633781 (S.D. Tex. Aug. 26, 2009) (requiring plaintiffs, in order to allege actual damages under the CEA, to show an overlap between the time period during which the manipulation occurred and

¹⁸ Although plaintiffs' argument that "[t]he inquiry on a CEA manipulation claim must be on the existence of artificial prices, not whether prices were artificially high or artificially low," Pls.' Reply Mem. of Law in Supp. of Exchange-Based Pls.' Mot. for Leave to Amend as to CEA Claims and File the Second Am. Consol Class Action Compl. 16, is correct with regard to pleading the elements of a commodities manipulation claim, it is not correct with regard to pleading CEA standing, for which actual damages are required. Whereas a CEA claim brought by the CFTC is focused wholly on defendants' conduct, such that the injury suffered by individual traders is irrelevant, a CEA claim brought by private plaintiffs pursuant to section 25 is focused *both* on defendants' conduct *and* on whether that conduct caused plaintiffs' injury. As seems almost tautological, moreover, the issue of whether plaintiffs were harmed by defendants' alleged manipulative conduct, which caused the price of Eurodollar futures contracts to be either artificially high or artificially low, must turn, at least in part, on whether plaintiffs' positions were such that plaintiffs were benefited by the manipulation or harmed by it.

the period during which plaintiffs traded their contracts). Indeed, despite the fact that plaintiffs indisputably have access to their own Eurodollar futures contract trading records, the PSAC is devoid of any references to particular Eurodollar contracts.¹⁹ See Tr. 38-41, 45. Rather than plead with such specificity, plaintiffs have simply alleged that each of the named plaintiffs “traded on-exchange based products tied to LIBOR such as Eurodollar futures” during the Class Period, Exchange-Based Pls.’ PSAC ¶¶ 20-27, and that the members of the proposed class “transacted in Eurodollar futures and options on Eurodollar futures on exchanges such as the CME [during the Class Period] and were harmed by Defendants’ manipulation of LIBOR,” *id.* ¶ 502. However, because the alleged trader-based manipulation did not occur on every day of the Class Period, but rather on only a subset of those days – a subset that plaintiffs can, at least in part, identify – and because the alleged manipulation on any given day went in a particular direction – a direction which, again, plaintiffs can, at least in part, identify²⁰ – and thus would have harmed only those

¹⁹ At oral argument, plaintiffs’ counsel stated that, while plaintiffs could have alleged the particular Eurodollar contracts they traded, they did not do so because they did not think it necessary. Tr. 50. We are skeptical that plaintiffs’ motivation for failing to identify their particular Eurodollar futures contracts was in fact so innocent. At any rate, for the reasons set forth herein, which we note cannot come as any great surprise to plaintiffs’ counsel, we reject the notion that it is unnecessary here to plead the particular contracts on which plaintiffs were allegedly harmed.

²⁰ Although “plaintiffs could not have known the ‘true’ level of any LIBOR quote[and thus] could not have pleaded, consistent

entities with certain positions, the broad allegations plaintiffs have offered are insufficient to allege actual damages.

To elucidate this point, we can contrast plaintiffs' persistent suppression theory, where we found plaintiffs' pleading sufficient, with their trader-based manipulation theory, where we do not. In evaluating the persistent suppression allegations in plaintiffs' first amended complaint, we did not require plaintiffs to allege the specific days on which they traded because LIBOR, and consequently Eurodollar futures prices, was allegedly artificial throughout the Class Period. Here, by contrast, the proposed trader-based claims, even if accepted, would entail only that LIBOR was artificial for certain discrete days during the Class Period, and thus the allegation that plaintiffs traded during the Class Period is insufficient to show that plaintiffs suffered actual damages. With regard to alleging plaintiffs' positions, we relaxed the requirement in the persistent suppression context because plaintiffs could not be expected to know how LIBOR compared to "true LIBOR" on any given day (as opposed to whether LIBOR was artificial on average over a period of time). In the trader-based manipulation context, however, the Barclays allegations suggest, for at least some of the days on

with Rule 11, precisely which quotes were inaccurate and by how much," *Mar. 29 Order*, 2013 WL 1285338, at *39, the Barclays settlements reveal, for at least some of the days on which Barclays' alleged trader-based manipulation occurred, in which direction LIBOR was manipulated (and thus which positions would have been harmed).

which manipulation occurred, in which direction LIBOR deviated from “true LIBOR.” Thus, whereas we could not expect plaintiffs to allege how their specific positions were negatively affected by persistent suppression of LIBOR, we can expect plaintiffs to allege how their positions were negatively affected by trader-based manipulation.

Contrary to plaintiffs’ assertion, *see* Pls.’ CEA Reply 17, this analysis does not involve an application of the loss causation principles established in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). As we explained in the March 29 Order, *Dura* established that “where plaintiffs’ injury results from defendants’ dissemination of false information, ‘an inflated purchase price will not itself constitute or proximately cause the relevant economic loss.’” *Mar. 29 Order*, 2013 WL 1285338, at *40 (quoting *Dura*, 544 U.S. at 342). Interpreting the cases decided in the wake of *Dura*, we concluded:

[I]f the manipulation alleged here is analogous to isolated artificial stock purchases, we can presume that plaintiffs suffered damages based on an inflated purchase price [because we can presume that the artificiality dissipated soon after plaintiffs’ purchase]. If, however, the manipulation is more akin to disseminating inaccurate information, plaintiffs need to show that they sold or settled their Eurodollar contracts at a loss [because we cannot presume that artificiality resulting from inaccurate information will dissipate on its own].

Id. We found that persistent suppression “is less like isolated manipulative activity and more like disseminating false information.” *Id.* at *41. To the

extent that they assert claims based on persistent LIBOR suppression, therefore, plaintiffs will be required to show that they sold their Eurodollar contracts at a loss; at the pleading stage, we found their allegations sufficient in light of their limited access to information. *See id.* at 41-42.

By contrast, the trader-based conduct described in the Barclays settlement documents falls squarely in the category of isolated (though repeated) manipulative activity. As such, we can presume that the effect of the manipulation dissipated, *see id.* at *40, and plaintiffs need only allege that they engaged in a transaction at a time during which prices were artificial as a result of defendants' alleged trader-based manipulative conduct, and that the artificiality was adverse to their position. As discussed above, however, plaintiffs have not even alleged this.

Finally, although plaintiffs asserted at oral argument that the trader-based manipulation was sufficiently frequent to render the Eurodollar futures market artificial for the duration of the Class Period, Tr. 27-28, 46-52, this claim is not supported by the facts. As alleged in the PSAC: “[b]etween January 2005 and May 2009, at least 173 requests for USD-LIBOR submissions were made to Barclays’ Submitters.” Exchange-Based Pls.’ PSAC ¶ 195. Of these 173 requests, 111 were made between January 3, 2006, and August 6, 2007. *Id.* The United Kingdom Financial Services Authority (“FSA”) found that, of these 111 requests, “on around 70% of those occasions, the submissions were consistent with the traders’ request.” *Id.* ¶ 196. Although plaintiffs have not alleged how frequently the remaining 62 requests affected LIBOR submissions, we can assume the 70%

rate here, as well. Thus, plaintiffs' allegations indicate the following: between January 2005 and May 2009, 121 LIBOR submissions were artificial as a result of trader-based manipulation; between January 3, 2006, and August 6, 2007, 78 were; and, between August 7, 2007, and May 2009, at most 43 were.

Assuming that there are roughly 250 trading days per year,²¹ we can calculate the approximate frequency of trader-based manipulation during the Class Period. Between January 2005 and May 2009, LIBOR submissions were artificial roughly 11% of the time; in the narrower period between January 3, 2006, and August 6, 2007, submissions were artificial roughly 20% of the time; and, between August 7, 2007, and May 2009, LIBOR was artificial, at most, roughly 10% of the time. Taking these numbers at face value, we cannot say that the alleged trader-based manipulation was so constant that plaintiffs adequately plead actual damages by alleging merely that they traded during the Class Period. Moreover, there is no indication that the alleged manipulation was evenly spaced throughout the relevant time periods; given the

²¹ In 2013, the CME Group recognized 11 holidays. CME Group, CME Group Holiday Calendar, <http://www.cmegroup.com/tools-information/holiday-calendar/> (last visited Aug. 23, 2013). Assuming roughly 104 weekend days per year, there are 250 days on which Eurodollars futures contracts could be traded on the CME. (We recognize that “[o]n CME Group recognized holidays, open outcry trading and CME Globex trading observe different opening and closing times, depending on markets traded,” *id.*, and that our calculation of 250 trading days is a simplification. Nonetheless, it will do for present purposes.)

possibility that the manipulation was concentrated in certain weeks or months, it is even less likely that plaintiffs' generalized allegations demonstrate actual damages.

To whatever extent the foregoing analysis has failed to discredit plaintiffs' pleading of actual damages, a footnote in the FSA's report delivers the coup de grâce. Explaining its methodology for calculating 173 requests between January 2005 and May 2009, the FSA stated:

If more than one request was contained in the same communication, these have been counted separately. For example, a request for a "high 3 month and low 6 month" would be counted as two requests. A request for a "high 3 month for the next two days" would also be counted as two requests. A request for "high" or "low" submissions which did not specify a particular maturity would be counted as three requests (for one month, three month and six month submissions) unless the context of the communication indicates otherwise.

FSA Barclays Final Notice (June 27, 2012), ¶ 56(i) n.15, Ex. C, Porpora Decl. In other words, although Eurodollar futures contract prices are based solely on 3-month U.S. dollar LIBOR, the FSA included in its analysis requests relating to one-month and six-month LIBOR.²² Not only does this methodology suggest that

²² With regard to the 111 requests between January 3, 2006, and August 6, 2007, the FSA similarly failed to distinguish among different tenors, referring instead simply to "requests . . .

the frequencies calculated above might significantly overstate how often three-month LIBOR was artificial, but it also introduces an indefiniteness into plaintiffs' pleading that precludes their argument that Eurodollar futures prices were artificial for essentially all of the Class Period. Deprived of this argument, plaintiffs cannot justify their failure to show that their trading in Eurodollar futures was such that they suffered actual damages from defendants' alleged misconduct.²³

4. Conclusion

The exchange-based plaintiffs have not adequately pleaded that they suffered actual damages from defendants' alleged trader-based manipulation of Eurodollar futures contract prices. Therefore, plaintiffs are denied leave to amend their complaint to add allegations of such manipulation. Separately, it appears that the exchange-based plaintiffs are seeking to amend their complaint in other ways relevant to their CEA claims. Among these proposed amendments is their naming of Societe Generale as a defendant, as well as their new allegations stating more explicitly

relating to US dollar LIBOR submissions." FSA Final Notice (June 27, 2012), ¶ 71(i).

²³ Obviously, we could not expect plaintiffs to connect their trading to instances of manipulative conduct that occurred on dates that are still not publicly available. However, the Barclays settlement documents do identify the dates and circumstances of a number of instances of alleged manipulative conduct. To plead actual damages, plaintiffs would have needed to show that, at least for some of these instances, their Eurodollar futures trading was such that they suffered damages from defendants' conduct.

that (almost) every defendant, or its affiliate, traded in Eurodollar futures contracts. These proposed amendments do not appear to be opposed. Accordingly, the exchange-based plaintiffs shall submit, by September 10, 2013, a version of the PSAC that contains only those allegations consistent with the holdings herein.

Finally, we would note that defendants advanced arguments in opposing plaintiffs' motion to amend that appear to be aimed at seeking reconsideration of our March 29 Order. Specifically, whereas we had dismissed only those "persistent suppression" claims based on contracts entered into during "Period 1," from August 2007 through May 29, 2008, defendants seem to be arguing now that we should also dismiss "persistent suppression" claims based on contracts entered into at other times. Whether or not this was defendants' intention, we are not prepared to dismiss claims we previously declined to dismiss based on arguments contained in an opposition to a motion to amend. If defendants intend to seek reconsideration of our March 29 Order on statute of limitations grounds, or intend to submit a renewed motion to dismiss regarding "Period 2" claims, they may move for leave to file such a motion by September 20, 2013.

D. Plaintiffs' Motion to Amend Their Antitrust Claims

In the March 29 Order, we dismissed plaintiffs' antitrust claims because plaintiffs failed to plead antitrust injury and thus lacked standing to bring claims pursuant to the Clayton Act. *See Mar. 29 Order*, 2013 WL 1285338, at *10-*19. In response, the OTC, exchange-based, and bondholder plaintiffs have

moved to amend their respective complaints, principally to add allegations addressed to antitrust injury.

As discussed above, although “[t]he court should freely give leave [to amend] when justice so requires,” Fed. R. Civ. P. 15(a)(2), we “ha[ve] discretion to deny leave [to amend] for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.” *Holmes v. Grubman*, 568 F.3d 329, 334 (2d Cir. 2009) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)). “An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to [Rule] 12(b)(6).” *Lucente v. Int’l Business Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) (citing *Dougherty v. N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002)).

For the two independent reasons discussed below, plaintiffs’ motion for leave to amend is denied.

1. Given the Circumstances of this Case, Amendment Would Not Be Proper

In light of the history and circumstances of this case, justice does not require us to afford plaintiffs yet another opportunity to amend. Each of plaintiffs’ first amended complaints²⁴ asserted a cause of action for violation of section 1 of the Sherman Act. These amended complaints, which ranged in length from 211 to 253 paragraphs, resulted from the consolidation of

²⁴ For purposes of the present analysis, we do not address the complaints filed by the Schwab plaintiffs, who have not sought leave to replead.

twenty original complaints, and were filed following a fierce competition for appointment as class counsel. Indeed, our decision appointing class counsel reflected that we had then been persuaded that all of the firms competing to be class counsel “have extensive experience in complex litigation,” “have adequate knowledge of the applicable law,” “would each devote significant resources to prosecuting plaintiffs’ claims,” and, finally, “have demonstrated that they have thoroughly investigated the relevant claims.” *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2011 WL 5980198, at *3 (S.D.N.Y. Nov. 29, 2011). We appointed Hausfeld and Susman Godfrey as interim class counsel for the OTC plaintiffs and Kirby McInerney and Lovell Stewart as interim class counsel for the exchange-based plaintiffs, *id.* at *4; the bondholder plaintiffs, who filed later, are represented by Weinstein Kitchenoff & Asher and Morris & Morris. In short, the allegations in the first amended complaints not only drew on the work of twenty sets of plaintiffs and plaintiffs’ counsel, but also presumably represented the best efforts of six highly experienced firms to state a viable claim.

At the time that the first amended complaints were filed, it was widely projected that damages in this case might reach billions of dollars. *See* Mark Gongloff, *Libor Scandal May Cost Banks \$35 Billion: Study*, Huffington Post (July 17, 2012), http://www.huffingtonpost.com/2012/07/17/libor-scandal-costbanks_n_1680764.html; Halah Touryalai, *Libor Lawsuits Are Piling Up and Could Cost Billions, Banks Brace for Another Big Legal Battle*, Forbes (July 12, 2012), <http://www.forbes.com/sites/halahtouryalai/2012/07/12/liborlawsuits-are-piling-up->

and-could-cost-billions-banks-brace-foranother-big-legal-battle/; Alistair Osborne, *Banks Face Crippling Libor Litigation Costs: Britain's Banks Face Costs Running into Tens of Billions of Pounds from the Libor Scandal if US Litigants Prove They Were the Victims of Four Years of Mispricing, City Experts Have Warned*, Telegraph (June 28, 2012), <http://www.telegraph.co.uk/finance/newsbysector/bankandfinance/9363260/Banks-face-crippling-Libor-litigation-costs.html>; see also OTC Pls.' Consol. Am. Compl. ¶ 6 ("By acting together and in concert to knowingly understate their true borrowing costs, Defendants caused LIBOR to be calculated or suppressed artificially low, reaping hundreds of millions, if not billions, of dollars in ill-gotten gains.").

In sum, given the competition to become interim lead counsel, which revealed the experience of the competitors; the number of original complaints that had been filed; and, the obvious motivation to craft sustainable first amended complaints containing all factual and legal allegations that supported plaintiffs' claims, the Court was entitled to rely on these pleadings to contain the strongest possible statement of plaintiffs' case based on the collective skills of plaintiffs' counsel.

The subject of plaintiffs' motions to amend, namely antitrust injury, figured prominently in the case after the filing of the first amended complaints, being presented clearly and repeatedly as a flaw in the pleading of plaintiffs' complaints. In their motion papers filed on June 29, 2012, defendants argued that plaintiffs' amended complaints should be dismissed because, *inter alia*, they failed to allege antitrust injury. See Mem. of Law in Supp. of Defs.' Mot. to

Dismiss Pls.' Antitrust Claims 26-27. Although plaintiffs thereafter submitted a letter to the Court on August 1, 2012, seeking leave to amend, primarily on the basis of information contained in the Barclays settlements, there was no indication in plaintiffs' letter that the proposed amendments would bolster plaintiffs' allegations of antitrust injury. When plaintiffs perfunctorily reiterated their request for leave to amend in their opposition to defendants' motion to dismiss the antitrust claims, they again did not indicate that new allegations would remedy any previous defects regarding antitrust injury. *See* Pls.' Joint Mem. of Law in Opp'n to Defs.' Mot. to Dismiss Pls.' Antitrust Claims 36-38, 52-53. Finally, the issue of antitrust injury featured prominently in the oral argument held on March 5, 2013, and a concession by plaintiffs' counsel that the LIBOR-setting process is not competitive was the topic of significant discussion. Yet, despite being squarely on notice that the Court considered antitrust injury a serious and, indeed, threshold issue, plaintiffs did not seek to amend their complaint to strengthen their pleading of antitrust injury until after we issued the 161-page March 29 Order.²⁵

Whatever might be the appropriate result in other cases, here, justice does not require us to permit plaintiffs to file a second amended complaint. Indeed, just the opposite. This is surely a case in which "the defendants and the Court were entitled to the plaintiffs' best effort at presenting their claims in

²⁵ That decision followed briefing that exceeded 330 pages (exclusive, of course, of complaints and declarations).

response to the objections raised by the defendants.” *In re Eaton Vance Mut. Funds Fee Litig.*, 403 F. Supp. 2d 310, 318 (S.D.N.Y. 2005). Further, it would be unacceptable to allow plaintiffs, after failing to seek to amend their complaints with regard to antitrust injury in response to defendants’ motion and after tremendous effort was expended by defendants and the Court in considering and ruling on the motions to dismiss, to seek to plug the holes in their complaints identified by the March 29 Order. Plaintiffs “[are] not entitled to an advisory opinion from the Court informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies.” *Id.* (quoting *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 699 (6th Cir. 2004) (internal quotation marks omitted). Indeed, to permit amendment here might have the perverse effect of turning defense counsel and the Court into plaintiffs’ counsel’s co-counsel, with plaintiffs waiting to see what objections defendants raise and how the Court rules on those objections and then amending their complaint as necessary based on what they learned in the process. Especially in a case of this magnitude, with so much at stake and with enormous expenditure of resources by defendants and the Court, that is an unacceptable way to operate a system of justice. Nor is this a situation, as with pro se parties, where either plaintiffs or their counsel (who will, if they prevail, seek to have their fees paid by defendants) are deserving of any special solicitude.

Finally, it must be emphasized that essentially none of the allegations plaintiffs put forward with regard to antitrust injury rest on new facts that plaintiffs could not have pleaded before. Indeed, after receiving plaintiffs’ letter of August 1, 2012, we permitted

plaintiffs to rely on the Barclays settlement documents in opposing defendants' motions to dismiss, and, although settlements involving UBS and RBS have since come to light, these settlements do not advance plaintiffs' antitrust injury argument in any way that the Barclays settlement did not. Plaintiffs' new antitrust injury allegations mostly involve reframing previously known facts in an attempt to remedy the defects we identified on the fundamental issue of antitrust standing.

2. Plaintiffs' Proposed Amendments Would Be Futile

Even if we did not find plaintiffs' effort to amend their complaints for a second time with regard to antitrust standing to be wholly unwarranted in these circumstances, we would deny them leave to amend because the proposed amendment would be futile. Specifically, even taking into account plaintiffs' proposed allegations, plaintiffs do not adequately plead antitrust injury.

The issue of antitrust injury was thoroughly examined in the March 29 Order, and we stand by our reasoning in that opinion. As we stated there, antitrust injury is an injury "attributable to an anticompetitive aspect of the practice under scrutiny." *Mar. 29 Order*, 2013 WL 1285338, at *11 (quoting *Atl. Richfield Co. v. USA Petroleum Co.* ("ARCO"), 495 U.S. 328, 334 (1990)) (internal quotation marks omitted). The injury "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation," *id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)), and it must involve "loss [that] stems from a

competition-*reducing* aspect or effect of the defendant's behavior," *id.* (quoting *ARCO*, 495 U.S. at 344).

Here, after careful review of the allegations in plaintiffs' proposed second amended complaints, we conclude that none of plaintiffs' new allegations change the outcome reached in the March 29 Order. Plaintiffs' allegations include new ways of packaging previously known facts, such as arguing that the LIBOR-setting rules themselves give rise to competition, and new theories for how defendants compete, such as that they compete over their creditworthiness, that they compete to offer customers the best interest rate benchmark on financial instruments, or that they compete by "keeping other banks honest" and reporting any improper conduct by them. However, regardless of the creativity they display, none of plaintiffs' allegations make plausible that there was an arena in which competition occurred, that defendants' conduct harmed such competition, and that plaintiffs suffered injury as a result. Even where plaintiffs have identified a market in which defendants are, in fact, competitors, they have not plausibly alleged that each defendant failed to act in its independent individual self-interest. In other words, even if we grant that plaintiffs have alleged a vertical effect – that they suffered harm as a result of defendants' conduct – they have not plausibly alleged a horizontal effect – that the process of competition was harmed because defendants failed to compete with each other or otherwise interacted in a manner outside the bounds of legitimate competition.

Therefore, both because amendment would not be proper in the circumstances of this case and because

plaintiffs' new allegations would be futile, plaintiffs are denied leave to amend their antitrust claims.

E. State Law Claims

In their first amended complaint, the OTC plaintiffs asserted a single state-law claim for unjust enrichment and restitution. OTC Pls.' Consol. Am. Compl. ¶¶ 227-30. Because we dismissed the OTC plaintiffs' antitrust claim – their only other asserted claim for relief – we declined to exercise supplemental jurisdiction over their state-law claim.²⁶ *Mar. 29 Order*, 2013 WL 1285338, at *58-*59.

Since the March 29 Order was issued, plaintiffs have taken the position, despite the fact that they had not previously relied on diversity jurisdiction at all, that subject matter jurisdiction based on the Class Action Fairness Act of 2005 (“CAFA”), in fact, exists. Pls.' Mem. of Law in Supp. of Their Mot. for Leave to File Proposed Consol. Second Am. Compl. 14-15. Defendants agree. *See* Defs.' Mem. of Law in Opp'n to OTC Pls.' Request for Leave to Amend State Law Claims 1 [hereinafter Defs.' State Law Opp'n]. As do we: this is a case in which at least one member of the putative class is diverse from at least one defendant, 28 U.S.C. § 1332(d)(2) (2006); the matter in

²⁶ We also noted that, “[a]lthough it [was] conceivable that we could retain jurisdiction over [plaintiffs' state-law] claim by virtue of diversity of citizenship,” we did not need to consider this ground for jurisdiction because “plaintiffs ha[d] not pleaded that this Court has diversity jurisdiction over their state law claim, nor ha[d] they alleged facts that would support our exercise of diversity jurisdiction.” *Mar. 29 Order*, 2013 2013 WL 1285338, at *58 n.23.

controversy plausibly exceeds the sum of \$5,000,000, *id.*; and, the number of members of the proposed plaintiff class exceeds 100, *id.* § § 1332(d)(5)(B). Further, the exceptions to CAFA jurisdiction do not seem to apply. Therefore, we may assert jurisdiction over the OTC plaintiffs' proposed state-law causes of action.

As discussed above, Rule 15(a) provides that a second amended complaint may be filed "only with the opposing party's written consent or the court's leave," though "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). We "ha[ve] discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *Holmes v. Grubman*, 568 F.3d 329, 334 (2d Cir. 2009) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)).

Here, plaintiffs seek to reassert their unjust enrichment claim, Pls.' Second Consol. Am. Compl. ¶¶ 389-92, Ex. A, Pls.' Mem. of Law in Supp. of Their Mot. for Leave to File Proposed Consol. Second Am. Compl. [hereinafter OTC Pls.' PSAC], and to plead a new claim for breach of contract, based primarily on defendants' alleged breach of the implied duty of good faith and fair dealing, *id.* ¶¶ 375-88. Defendants argue that we should deny plaintiffs leave to make these amendments because the amendments are futile and because plaintiffs' delay in seeking to amend is inexcusable.

Unlike in the antitrust context, we do not believe that considerations of bad faith, undue delay, or undue

prejudice to defendants require us to deny plaintiffs leave to amend regarding their state-law claims.²⁷ For the reasons stated below, moreover, we also do not believe that futility mandates that we deny plaintiffs leave to amend, though our decision is without prejudice to a motion by defendants to dismiss any second amended complaint.

Although we grant plaintiffs' motion, we are concerned that plaintiffs failed to include contract claims in their first amended complaint. Our concern was not alleviated during oral argument, as, despite questioning, no adequate explanation was proffered by plaintiffs' counsel. We note further that this failure has the consequence of further delaying the determination of the contours of the complaint – a delay that obviously is not to plaintiffs' advantage.

1. Unjust Enrichment

Plaintiffs reassert their claim for unjust enrichment, over which we previously declined to exercise jurisdiction. In the March 29 Order, we considered the elements of an unjust enrichment claim in the context of addressing the exchange-based

²⁷ We would note that, in their letter to the Court of August 1, 2012, submitted after defendants filed their motions to dismiss but before plaintiffs filed their opposition papers, plaintiffs requested leave to amend to add, *inter alia*, new causes of action. In this respect, plaintiffs' present request to amend is differently situated from their request to add allegations to cure their amended complaint's defects relating to antitrust injury, which plaintiffs did not seek to do, despite being on notice of the issue since at least June 2012, until after we issued the March 29 Order.

plaintiffs state-law claim. As we stated there: “Under New York law, [t]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties.” *Mar. 29 Order*, 2013 WL 1285338, at *60 (quoting *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012)). To state a claim for unjust enrichment, a plaintiff must allege that “(1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.” *Id.* (quoting *Georgia Malone*, 19 N.Y.3d at 516) (internal quotation mark omitted).

Based on the present record, we cannot conclude that plaintiffs’ unjust enrichment claim would be futile. Plaintiffs have alleged that they purchased financial instruments from defendants wherein they paid defendants fixed sums and received in return a floating amount tied to LIBOR. OTC Pls.’ PSAC ¶¶ 12-13, 35. Additionally, plaintiffs have alleged that defendants “knowingly understate[d] their true borrowing costs” during the Class Period and thereby “caused LIBOR to be calculated or suppressed artificially low.” *Id.* ¶ 5. This conduct allegedly “allowed [defendants] to pay unduly low interest rates to investors, including Baltimore Plaintiffs, on LIBOR-based financial instruments during the Class Period.” *Id.* ¶ 8. In short, plaintiffs have alleged that defendants were enriched at their expense by receiving from plaintiffs fixed sums set based on an “accurate” LIBOR, *see id.* ¶ 336, and paying plaintiffs floating amounts that were artificially low due to defendants’ alleged manipulation of LIBOR. Further, plaintiffs

plausibly allege that it would be inequitable to permit defendants to retain the rewards they reaped at plaintiffs' expense. Although plaintiffs had entered into their swap agreements with the "expectation that the floating payments [they] would receive over the life of the contract would be calculated based on LIBOR submissions that conformed to the LIBOR definition, an accurate measure of interbank borrowing costs," *id.*, defendants allegedly manipulated LIBOR such that it was fixed at a lower level than it would have been at normally, and thereby paid plaintiffs less than they were entitled to receive. On face, these allegations appear to state a claim for unjust enrichment.

Nonetheless, defendants argue that plaintiffs' claims are barred because their relationships with defendants were governed by contract. Under New York law, the cause of action of unjust enrichment does not lie "where the parties have entered into a contract that governs the subject matter" at issue. *Pappas v. Tzolis*, 20 N.Y.3d 228, 234 (2012) (quoting *Cox v NAP Constr. Co.*, 10 N.Y.3d 592, 607 (2008)) (internal quotation mark omitted). Here, defendants contend that the contracts between plaintiffs and defendants "govern the consideration for the financial instruments [plaintiffs] purchased, and thus their claim for unjust enrichment fails as a matter of law." Defs.' Mem. of Law in Opp'n to OTC Pls.' Request for Leave to Amend State Law Claims 4 [hereinafter Defs.' State Law Opp'n].

We are not convinced. "[T]he predicate for dismissing quasi-contract claims is that the contract at issue 'clearly covers the dispute between the parties.'" *Union Bank, N.A. v. CBS Corp.*, No. 08 Civ. 8362

(PGG), 2009 WL 1675087, at *7 (S.D.N.Y. June 10, 2009) (quoting *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389 (1987)); *see also id.* at *8 (declining to dismiss unjust enrichment claim where there was a chance that “resolution of th[e] dispute [would] require[] going outside the four corners of the parties’ agreements”).

Here, although the swap contracts clearly required defendants to pay plaintiffs the prescribed floating rate of return using the LIBOR reported by the BBA, the contracts did not “clearly cover[]” the subject matter now at issue,²⁸ namely whether defendants were permitted to manipulate LIBOR itself and thereby depress the amount they were required to pay plaintiffs.²⁹ As such, the existence of plaintiffs’ swap

²⁸ Defendants surely overreach when they argue that plaintiffs’ unjust enrichment claim is barred because the swap contracts govern the subject matter of “the consideration for the financial instruments [plaintiffs] purchased.” Defs.’ State Law Opp’n 4. If a plaintiff could not assert a claim for unjust enrichment based on any conduct by the defendant that affected the “consideration” the plaintiff received under a contract with the defendant, unjust enrichment claims would effectively be barred whenever a contract between the plaintiff and the defendant existed. Such a result, though possibly to defendants’ liking, is not countenanced by New York law.

²⁹ Importantly, the question we face here is distinct from that we face in deciding whether plaintiffs may add a new claim for breach of the implied duty of good faith and fair dealing. In evaluating whether plaintiffs may add their contract claim, we ask whether plaintiffs have *plausibly* alleged that a duty not to manipulate LIBOR was implicit in the swaps contracts. By contrast, in evaluating whether plaintiffs may reassert their unjust enrichment claim, we ask whether the swaps contracts *clearly* govern whether defendants are permitted to submit

agreements with defendants does not bar plaintiffs' unjust enrichment claim.

Defendants also argue that plaintiffs' pleading of unjust enrichment is insufficient because plaintiffs' allegations do not show that defendants reaped a "net gain" at the expense of plaintiffs' "net loss." *See* Defs.' State Law Opp'n 5-6. In support of this argument, defendants cite *Maryland Casualty Co. v. W.R. Grace and Co.*, 218 F.3d 204 (2d Cir. 2000), which involved a dispute among insurers of a manufacturer of asbestos-containing products, in which insurers who had settled with the manufacturer early on sought reimbursement of covered litigation defense costs from insurers who settled subsequently. *Id.* The earlier-settling insurers had argued that the later-settling insurers had been unjustly enriched because they "simply sat back and waited until the early settling insurers paid amounts that settled [the manufacturer]'s claim for defense costs accruing prior to the [early] settlements." *Id.* at 212.

The Second Circuit rejected this argument. Although the early settlements entered into by plaintiffs forced them to cover the insured's then-incurred defense costs, they also absolved plaintiffs of responsibility for later defense costs, which were far greater, and allowed plaintiffs to pay out their indemnity limits before defense costs sharply escalated. *Id.* at 213. Therefore, "it [could not] be

artificial LIBOR quotes to the BBA. Apart from how we answer the former question, we answer the latter question in the negative.

determined whether (overall) [plaintiffs] paid more in combined indemnity and defense payments as a result of the non-contribution of [defendants], or whether (overall) [plaintiffs] paid less.” *Id.* Combined with the fact that the decision of when to settle was inherently risky and involved some amount of benefit and some amount of harm, the Circuit concluded that defendants had not been unjustly enriched. *Id.*

Maryland Casualty is plainly distinguishable. In that case, the issue was not whether defendants had been unjustly enriched through transactions directly with plaintiffs, but rather whether defendants had paid less than their fair share to the insured manufacturer and therefore should be compelled to reimburse plaintiffs. In light of this, the relevant comparison was necessarily between the overall amount plaintiffs paid the insured, in fact, and the overall amount plaintiffs would have paid had defendants settled earlier. Here, by contrast, plaintiffs entered into swap contracts directly with defendants, and the allegation is that defendants benefited at plaintiffs’ expense by paying plaintiffs less on those contracts. *Maryland Casualty* is inapposite to these facts.³⁰

³⁰ Defendants also argue that plaintiffs have failed to satisfy Rule 9(b)’s requirements of pleading fraud with particularity. We disagree, for substantially the reasons given in the March 29 Order for why the exchange-based plaintiffs had satisfied Rule 9(b). *See Mar. 29 Order*, 2013 WL 1285338, at *39-*40. With regard to the one requirement of Rule 9(b) that is different between the OTC and the exchange-based claims, alleging the effect that defendants’ scheme had on the market at issue, here the OTC plaintiffs have alleged, as discussed above, that the

For the foregoing reasons, we are not convinced that the OTC plaintiffs' requested amendment would be futile. Thus, although we do not preclude defendants from moving to dismiss any unjust enrichment claim asserted in a second amended complaint, we will permit plaintiffs to make such an amendment.

2. Breach of the Implied Duty of Good Faith and Fair Dealing

The OTC plaintiffs seek to add a new claim for breach of the implied covenant of good faith and fair dealing.³¹ Under New York law, "a covenant of good

contracts they entered into with defendants paid a floating rate of return based on LIBOR, such that manipulation of LIBOR directly affected defendants' payments on those contracts.

³¹ Plaintiffs style this claim: "Breach of Contract and Implied Covenant of Good Faith and Fair Dealing." OTC Pls.' PSAC, at 157. Although plaintiffs focus this claim on breach of the implied duty, they also allege that "Defendants' collusion to manipulate the LIBOR rate also breached the contractual term that provided that Plaintiffs would receive payments that were based on the LIBOR definition." *Id.* ¶ 387. However, plaintiffs have not alleged an explicit term in their swap contracts that required the benchmark used to calculate the floating amount to be based on the LIBOR definition. *See* Tr. 65, 69-71. The contracts' provision that the floating rate would be based on "USD-LIBOR-BBA," OTC Pls.' PSAC ¶¶ 377, 379, though it may give rise to an implied duty, is not such an explicit term. Moreover, given that LIBOR is, by definition, an average of eight banks' submissions to the BBA, no one bank could possibly guarantee that a particular LIBOR fix was determined in a manner that wholly complied with the BBA's rules. Therefore, plaintiffs cannot state a claim for breach of an explicit contractual provision, and our analysis here will focus instead on whether they can state a claim for breach of the implied covenant of good faith and fair dealing.

faith and fair dealing in the course of contract performance” is “[i]mplicit in all contracts.” *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (citing *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ’g Co.*, 30 N.Y.2d 34, 45 (1972)). The implied covenant of good faith and fair dealing obligates a promisor to fulfill “any promises which a reasonable person in the position of the promisee would be justified in understanding were included” in the contract. *Id.* (quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 69 (1978)) (internal quotation marks omitted). Specifically, implied in every contract is a promise that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” *Id.* (quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 N.Y. 79, 87 (1933)) (internal quotation marks omitted); see also *LJL 33rd St. Assocs., LLC v. Pitcairn Properties Inc.*, Nos. 11-5425-cv, 12-1382-cv, 2013 WL 3927615, at *9 (2d Cir. July 31, 2013) (“The implied covenant of good faith and fair dealing bars a party from taking actions ‘so directly to impair the value of the contract for another party that it may be assumed that they are inconsistent with the intent of the parties.’” (quoting *Bank of China v. Chan*, 937 F.2d 780, 789 (2d Cir. 1991))). That said, the implied covenant arises “only in connection with the rights or obligations set forth in the terms of the contract,” *Paul v. Bank of Am. Corp.*, No. 09-CV-1932 (ENV) (JMA), 2011 WL 684083, at *6 (E.D.N.Y. Feb. 16, 2011); see also *Corazzini v. Litton Loan Servicing LLP*, No. 1:09-CV-0199 (LEK/RFT), 2010 WL 1132683, at *7 (N.D.N.Y. Mar. 23, 2010) (“[T]he implied obligation is in aid and furtherance of other terms of the agreement

of the parties.” (quoting *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 304 (1983))), and “cannot create duties that negate explicit rights under a contract,” *LJL 33rd St. Assocs.*, 2013 WL 3927615, at *9.

Here, plaintiffs have plausibly alleged that defendants breached the implied covenant good faith and fair dealing. As discussed above, plaintiffs allege that they entered into swap contracts with defendants wherein they paid defendants a fixed rate and received in return a floating rate tied to LIBOR. In entering into these contracts, plaintiffs allege, they expected LIBOR to be set according to its definition, such that it reflected the average interest rate being charged in the London interbank lending market. Such an expectation would have been integral to the “bet” that is one purpose of entering into a swap: each plaintiff, as the party paying a fixed rate and receiving a floating rate, bet that interest rates would rise over the life of the contract, and each defendant, as the party paying a floating rate and receiving a fixed rate, bet that interest rates would fall.³² By allegedly

³² Defendants argue that, for at least some of the plaintiffs, such as the City of Baltimore, the purpose of entering into swap contracts was not to bet on the direction of prevailing interest rates, but rather to hedge against exposure to interest rate fluctuation resulting from other instruments plaintiffs had entered into, with the effect of making plaintiffs floating rate neutral. Tr. 62-63; Defs.’ State Law Opp’n 6 n.7; Defs.’ Mem. of Law in Supp. of Mot. to Dismiss Pls.’ Antitrust Claims 32-33. However, even if this was one of plaintiffs’ purposes in entering into the swap contracts, there is no indication that this was any plaintiff’s sole purpose; that is, it is not clear that any plaintiff purchased swaps so as to make itself actually floating rate neutral. There is also no indication that this hedging purpose was

manipulating LIBOR downward, such that it was lower than it would have been if set according to its definition, defendants depressed the consideration plaintiffs received pursuant to their contracts and undermined the contractual bargain whereby plaintiffs agreed to pay a certain fixed rate in exchange for receiving a rate that reflected prevailing interest rates. In other words, plaintiffs have alleged that defendants “injur[ed their right] to receive the fruits of the contract,” *Dalton*, 87 N.Y.2d at 389 (quoting *Kirke La Shelle*, 263 N.Y. at 87) (internal quotation mark omitted), “so directly . . . impair[ing] the value of the contract for [plaintiffs] that it may be assumed that

held by every plaintiff. Moreover, even if hedging was any plaintiff’s sole purpose in entering into a swap, that does not indicate that the plaintiff sought to be *LIBOR*-neutral, as opposed to *interest-rate*-neutral, generally; in other words, the plaintiff’s purpose might have been to receive payments tied to prevailing interest rates, as reflected through LIBOR, in order to hedge exposure to both LIBOR and non-LIBOR rates it was paying on other instruments. Although defendants might be able to establish through discovery that plaintiffs’ sole purpose in entering into the swaps was to hedge their exposure to LIBOR, we are not in a position to decide that now. For present purposes, plaintiffs have sufficiently alleged that one of their purposes in entering into the swaps was to profit from receiving a rate that reflected prevailing interest rates. *See, e.g.*, OTC Pls.’ PSAC ¶ 336 (alleging that the City of Baltimore entered into the swaps with the “expectation that the floating payments it would receive over the life of the contract would be calculated based on LIBOR submissions that conformed to the LIBOR definition, an accurate measure of interbank borrowing costs”); *id.* ¶ 386 (stating that “the purpose of the contracts” was “to make and receive payments based on a LIBOR rate that is set according to the terms of the LIBOR definition”).

[defendants' alleged actions] are inconsistent with the intent of the parties." *LJL 33rd St. Assocs.*, 2013 WL 3927615, at *9 (quoting *Bank of China*, 937 F.2d at 789) (internal quotation marks omitted). Further, an implied duty not to manipulate LIBOR is "in connection with" plaintiffs' explicit contractual right to receive a LIBOR-based rate, and defendants' obligation to pay such a rate, because manipulation of LIBOR would cause the contractual exchange to depart from what the parties intended.³³ Thus, plaintiffs plausibly allege that the duty of good faith and fair dealing implicit in their contracts with defendants included a promise by defendants not to manipulate LIBOR to their benefit and plaintiffs' detriment.

The allegations here are analogous to those in *City of New York v. Coastal Oil New York, Inc.*, No. 96 Civ. 8667 (RPP), 1999 WL 493355 (S.D.N.Y. July 12, 1999). In *Coastal Oil*, the City of New York had a contract with a fuel oil vendor whereby the City purchased fuel oil at variable prices adjusted weekly based on wholesale prices reported in an industry publication. *Id.* The defendant vendor was one of six companies that submitted prices to the publication, *id.* at *3, and, during the life of its contract with the City, submitted artificially high prices to the publication which caused the price paid by the City under the contract to be artificially high. *Id.* at *3-*4. Although the City's contract with the vendor contained "no explicit

³³ Additionally, of course, an implied duty not to manipulate LIBOR does not "negate explicit rights under [the parties'] contract[s]." *LJL 33rd St. Assocs.*, 2013 WL 3927615, at *9.

agreement . . . regarding the prices that [the vendor] could submit to [the industry publication],”³⁴ *Id.* at *3, the City brought suit on the theory that the vendor’s submission of false wholesale prices constituted a breach of the implied duty of good faith and fair dealing.

The Court held that plaintiffs had raised a genuine issue of material fact precluding summary judgment. Finding that “[t]he purpose of the price adjustment clause . . . [was] to produce a delivered price ‘which shall vary with the market . . . according to the method of adjustment,’ and reasoning that “[t]he delivered price could not vary with market conditions if it was not based on bona fide [published] quotes,” the Court concluded that “[t]he artificial manipulation of the [wholesale] price average in [the publication] would prevent the price adjustment clause from accomplishing this essential purpose.” *Id.* at *7. By manipulating the wholesale price it reported to the publication, therefore, the vendor breached its implied duty of good faith and fair dealing.

At oral argument, defendants sought to distinguish *Coastal Oil* by arguing that, whereas the purpose of the contract there was clearly frustrated by defendant’s conduct, here, the purpose of the swap contracts was merely to pay the LIBOR reported by

³⁴ There also was no “written or oral agreement between [the publication] and [the vendor] defining the prices [the vendor] could submit to [the publication],” though the submitted prices were understood to “represent advertised wholesale asking prices for the date listed in [the publication] as the effective date.” *Coastal Oil*, 1999 WL 493355, at *3 & n.4.

the BBA, which defendants undeniably did. Tr. 61-67. This distinction, however, is not convincing. Although plaintiffs surely expected to be paid at a rate incorporating reported LIBOR, there is no indication that they wanted this merely for its own sake. Rather, as plaintiffs have plausibly alleged, they expected to be paid at a rate that reflected prevailing interest rates, which LIBOR, as defined, did. Indeed, as discussed above, one of the purposes of entering into a swap is to bet on the direction prevailing interest rates will move,³⁵ and this purpose is undermined if the interest rate index incorporated into the contractual payment formula is decoupled from the market through the manipulative conduct of defendants. Thus, contrary to defendants' arguments, *Coastal Oil* counsels in favor of granting plaintiffs' motion for leave to amend.

Defendants' additional arguments also fail to convince us that plaintiffs should be denied leave to amend. Although defendants reprise their contention that plaintiffs have not shown a net loss based on LIBOR suppression in light of their overall exposure to LIBOR, *see* Defs.' State Law Opp'n 10, this argument is even weaker than it was in the unjust enrichment context, given that, here, our focus is squarely on the individual contracts on which plaintiffs received a floating rate tied to LIBOR and therefore were

³⁵ For the reasons discussed above, although defendants argue that plaintiffs entered into the swap contracts not to bet on the direction interest rates would move, but rather to hedge their exposure to LIBOR fluctuation, we cannot conclude, on the present record, that this was any plaintiff's sole purpose in entering into the swaps.

allegedly harmed when LIBOR was artificially reduced. Further, even if “the implied covenant of good faith will not be breached without some showing of intent to harm the other contracting party or a reckless disregard of it,” *Paul v. Bank of Am. Corp.*, No. 09-CV-1932 (ENV) (JMA), 2011 WL 684083, at *6 (E.D.N.Y. Feb. 16, 2011), plaintiffs here have plausibly alleged that defendants’ alleged manipulation of LIBOR was at least in reckless disregard of the detriment to plaintiffs, with whom defendants were in direct contractual privity. Finally, despite defendants’ argument that plaintiffs’ contract claim is unsuited to class treatment and that “the implausibility of certification weighs heavily against permitting the belated addition of a breach of contract claim,” Defs.’ State Law Opp’n 11 (failing to cite any authority for this proposition), we do not think that class certification concerns require us to deny the present motion. Regardless of whether plaintiffs will ultimately be able to prevail on a class certification motion, the propriety of class treatment does not bear on our decision whether to permit plaintiffs to add their contract claim.

Defendants have not demonstrated that plaintiffs’ proposed contract claim would be futile. As with plaintiffs’ unjust enrichment claim, therefore, although we do not preclude defendants from moving to dismiss any contract claim asserted in a second amended complaint, we grant plaintiffs leave to add such a claim.

F. Stay of Actions Not Subject to the Prior Motions to Dismiss

On August 14, 2012, we issued a Memorandum and Order imposing a stay on all complaints not then subject to defendants' motions to dismiss. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2012 WL 3578149 (S.D.N.Y. Aug. 14, 2012). On May 3 of this year, we issued a Memorandum in which we stated: "The stay shall remain in place for now with respect to cases that raise issues addressed in our Memorandum and Order [of March 29, 2013]. If there are any complaints that do not raise any such issue, please advise." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2013 WL 1947367, at *2 (S.D.N.Y. May 3, 2013). In response to that invitation, we have received a number of letters from plaintiffs seeking to lift the stay on their cases. Having reviewed those letters, and in light of the conclusions in the present Memorandum and Order and the fact that the legal landscape of this case, though substantially clarified, is still in somewhat of a state of flux, we think the most prudent course of action is to maintain the stay on all actions previously subject to it. Further, given the magnitude of this multi-district litigation and the fact that the universe of actions encompassed by it continues to expand, we are wary of addressing the individual cases piecemeal rather than comprehensively. Therefore, all actions not subject to defendants' previously filed motions to dismiss shall

continue to be stayed, pending further order of the Court.³⁶

III. Conclusion

For the reasons stated above, the exchange-based plaintiffs' motion for interlocutory appeal is denied; the OTC, bondholder, and exchange-based plaintiffs' motions to add allegations with respect to antitrust are denied; the exchange-based plaintiffs' motion to add allegations with respect to trader-based manipulation is denied; BT-MU, Credit Suisse, and Norinchukin's motion for reconsideration is denied without prejudice to a similar motion being filed by defendants that addresses the issues raised herein; and, the OTC plaintiffs' motion for leave to reassert their unjust enrichment claim and to add a claim for breach of the implied covenant of good faith and fair dealing is granted.

By September 10, 2013, the OTC plaintiffs and the exchange-based plaintiffs shall each file a second amended complaint that conforms with the rulings herein. If defendants believe that the new complaints are inconsistent with our rulings, they shall inform us by September 20, 2013. Further, if defendants wish to file a motion for reconsideration on grounds similar to those asserted in BT-MU's, Credit Suisse's, and Norinchukin's motion and which addresses the issues we have raised, they must file such a motion by September 20, 2013. Finally, if defendants intend to

³⁶ The stay does not apply to the motion to remand in *Salix Capital US Inc. v. Banc of America Securities LLC*, No. 13 Civ. 4018 (NRB).

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move for reconsideration of the March 29 Order on statute of limitations grounds or to make a renewed motion to dismiss with regard to “Period 2” claims, they must seek leave to file such a motion by September 20, 2013.

This Memorandum and Order resolves docket entry nos. 296, 316, 327, 330, 333, and 341.

SO ORDERED.

/s/ Naomi Reice Buchwald
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT
JUDGE

Dated: New York, New York
August 23, 2013

APPENDIX H

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**In re: LIBOR-Based Financial
Instruments Antitrust Litigation.**

THIS DOCUMENT RELATES TO: All Cases

11 MD 2262 (NRB)

MEMORANDUM AND ORDER

This multidistrict litigation (“MDL”) arises out of the alleged manipulation of the London InterBank Offered Rate (“LIBOR”). To date, this Court has issued two decisions addressed to the sufficiency of the amended complaints filed in this action: the first on March 29, 2013 and the second on August 23, 2013. The March 29, 2013 decision, *inter alia*, dismissed the Sherman Act, section 1, claims advanced in each complaint on the ground that plaintiffs had failed to plausibly allege that they suffered antitrust injury and therefore lacked standing. Plaintiffs’ motions for leave to amend their Sherman Act claims were denied in the August 23, 2013 decision. The original motions to dismiss were directed to four categories of cases denominated as follows: (1) over-the-counter plaintiffs, (2) exchange-based plaintiffs, (3) bondholder plaintiffs, and (4) Schwab plaintiffs. As a result of the decisions, the complaints brought by the bondholder and Schwab plaintiffs were dismissed in their entirety (although the state-law claims advanced by the Schwab plaintiffs were dismissed without prejudice, as the Court declined to exercise supplemental jurisdiction over them).

The bondholder plaintiffs filed a notice of appeal on September 17, 2013 and the Schwab plaintiffs did so on September 24, 2013. By separate, but essentially identical, letters dated September 18, 2013, the over-the-counter and the exchange-based plaintiffs sought certification pursuant to Federal Rule of Civil Procedure 54(b) to appeal the dismissal of their antitrust claims and the denial of their motions to amend those claims. Defendants, by letter dated October 4, 2013, suggested that the requests for Rule 54 (b) certification were committed to the Court's discretion and took no further position on the requests.

Rule 54 (b) is designed to provide flexibility to balance the benefits of a single appeal with the needs of litigants in particular multiple-claim and multiple-party cases. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956); *Ginett v. Computer Task Grp.*, 962 F. 2d 1085, 1094-95 (2d Cir. 1992). These requests for Rule 54(b) certification are presented in an atypical context. In this MDL, two groups of plaintiffs – the bondholder plaintiffs and the Schwab plaintiffs – are in a position to appeal as of right because their complaints were dismissed in their entirety. The two remaining groups of plaintiffs – the over-the-counter plaintiffs and the exchange based plaintiffs – seek to join in the pending appeals only to the extent that they raise the issues of antitrust standing and antitrust injury. Whether this Court would in other circumstances grant Rule 54(b) certification seems to be the wrong focus. Rather, given that there are already appeals raising issues that affect all four categories of plaintiffs equally, judicial efficiency would be served by permitting the over the counter and exchange based plaintiffs to participate in the

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existing appeals to the limited extent requested. Under these circumstances, there is no just reason for delay.

Accordingly, it is hereby

ORDERED, pursuant to Fed. R. Civ. P. 54(b), that final judgment is entered dismissing the first count of the over-the counter plaintiffs' consolidated amended complaint (Dkt. No. 130) for violation of section 1 of the Sherman Act, and denying leave to replead that claim in a proposed amended complaint (Dkt. No. 334-1), for the reasons given in the March 29, 2013 and August 23, 2013 orders of this Court, and it is further

ORDERED, pursuant to Fed. R. Civ. P. 54(b), that final judgment is entered dismissing the fourth count of the exchange based plaintiffs' amended consolidated class action complaint (Dkt. No. 134) for violation of section 1 of the Sherman Act, and denying leave to replead that claim in a proposed amended complaint (Dkt. No. 332 1), for the reasons given in the March 29, 2013 and August 23, 2013 orders of this Court.

SO ORDERED.

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT
JUDGE

Dated: New York, New York
October 17, 2013

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APPENDIX I

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**In re: LIBOR-Based Financial
Instruments Antitrust Litigation.**

THIS DOCUMENT RELATES TO: All Cases

11 MD 2262 (NRB)

ORDER

WHEREAS, on October 17, 2013, this Court signed a Memorandum and Order addressing the request of over-the-counter and exchange-based plaintiffs for Rule 54(b) certification of the dismissal of their antitrust claims, and

WHEREAS, the October 17 Memorandum and Order was premised on the pendency of appeals on the same claim by bondholder and Schwab plaintiffs, and

WHEREAS, on October 30, 2013 the Court of Appeals, acting *sua sponte* determined that it lacked jurisdiction over the bondholder and Schwab appeals and dismissed them, it is hereby

ORDERED that the October 17, 2013 is withdrawn.

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT
JUDGE

Dated: New York, New York

October 31, 2013