No. 13-1174

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

BRIEF OF MAYOR AND CITY COUNCIL OF BALTIMORE, CITY OF NEW BRITAIN FIREFIGHTERS' AND POLICE BENEFIT FUND, TEXAS COMPETITIVE ELECTRIC HOLDINGS COMPANY, LLC, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, COUNTY OF SAN MATEO, THE SAN MATEO COUNTY JOINT POWERS FINANCING AUTHORITY, CITY OF RICHMOND, THE RICHMOND JOINT POWERS FINANCING AUTHORITY, SUCCESSOR AGENCY TO THE RICHMOND COMMUNITY REDEVELOPMENT AGENCY, CITY OF RIVERSIDE, THE RIVERSIDE PUBLIC FINANCING AUTHORITY, COUNTY OF SAN DIEGO, EAST BAY MUNICIPAL UTILITY DISTRICT, SAN DIEGO ASSOCIATION OF GOVERNMENTS, COUNTY OF SONOMA, DAVID E. SUNDSTROM, IN HIS OFFICIAL CAPACITY AS TREASURER FOR THE COUNTY OF SONOMA, AND COUNTY OF SACRAMENTO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are plaintiffs—including cities, pension funds, educational institutions, and corporations—that have filed actions concerning the manipulation of the London Interbank Offered Rate ("LIBOR"), currently pending in the United States District Court for the Southern District of New York (*In re LIBOR-Based Financial Instruments Antitrust Litig.*, No. 11-MD-2262). *Amici* Mayor and City Council of Baltimore, City of New Britain Firefighters' and Police Benefit Fund, and Texas Competitive Electric Holdings Company LLC purchased LIBOR-based instruments directly from one or more of the banks that served on the panel that set LIBOR. The district court designated their counsel as interim class counsel for a putative class of persons who purchased LIBOR-based instruments "over the counter"—that is, directly from the panel banks (the OTC plaintiffs). App. 9a. The OTC plaintiffs, like petitioners, have been consolidated for pretrial purposes with the other LIBOR-related class actions (Pet. App. 11a); *amici* thus have a strong interest in the rules governing appeals in cases subject to the consolidation order.

SUMMARY OF ARGUMENT

This case will enable this Court to resolve the conflict in the Courts of Appeals regarding whether a party in an action consolidated for pretrial purposes with other actions

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[1] *Amici* provided petitioners and respondents with timely notice of their intent to file this brief. All parties have consented to the filing of this brief; the parties' letters consenting to the filing of this brief have been filed with the Clerk's office. No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

may pursue an immediate appeal after a district court dismisses its action in full. The district court dismissed petitioners' complaint "in [its] entirety," Pet. App. 219a, without leave to replead, and judgment was deemed entered by operation of Federal Rule of Civil Procedure 58(c)(2)(B). Pet. 5. If petitioners' action were not consolidated for pretrial purposes with other actions, petitioners clearly would have the right to an immediate appeal.[2] *See* 28 U.S.C. § 1291 (courts of appeals have jurisdiction of "all final decisions of the district courts"). However, petitioners' action was consolidated for pretrial purposes under the authority of the multidistrict litigation statute (28 U.S.C. § 1407), Pet. App. 10a–11a, and in some Circuits (including the Second Circuit) consolidation has been held to impair one's appellate rights. As a result, petitioners could not appeal immediately in the Second Circuit (nor in the Federal, Ninth, and Tenth Circuits), but they could have done so in the D.C., First, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits. Pet. 8–11.

This split is not new. It has existed for many years and drawn the attention of numerous commentators. *See, e.g.*, 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 54.29[7][a] (3d ed. 1999) (section heading, "Courts of Appeals Disagree Over Necessity of Rule 54(b) Certification in Consolidated Cases"); 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2656 (3d ed. 1998) ("The circuits are divided on the question whether Rule 54(b) applies in a consolidated

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[2] Petitioners' appeal would have raised the issue of whether the district court erred by holding that the LIBOR panel banks' alleged collusion to manipulate the LIBOR rate, which affected the price of trillions of dollars of financial instruments, did not cause an antitrust injury within the scope of Section 1 of the Sherman Act, 15 U.S.C. § 1. *See* Pet. App. 39a–59a.

action that does not dispose of all the claims . . . ."); Gaylord A. Virden, *Consolidation Under Rule 42 of the Federal Rules of Civil Procedure: The U.S. Courts of Appeals Disagree On Whether Consolidation Merges the Separate Cases and Whether the Cases Remain Separately Final for Purposes of Appeal,* 141 F.R.D. 169, 183–208 (1991). The split exists because some Courts of Appeals, including the Second Circuit, have ignored this Court's direction that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496–97 (1933). Neither the Federal Rules of Civil Procedure nor the multidistrict litigation statute (28 U.S.C. § 1407) treat multiple actions subject to a consolidation order as a single unified "action": rather, the Rules and 28 U.S.C. § 1407 use the term "action" to refer to a single lawsuit initiated by filing a complaint. The appeal certification procedure in Rule 54(b) is thus irrelevant: it applies only to "an action" with multiple claims or parties. Fed. R. Civ. P. 54(b). The Circuits that deny immediate appeals in situations such as petitioners' base their holdings on policy rather than statute or rule. And even as to policy, they fail to acknowledge that the concerns behind the policy against piecemeal review are absent in these situations, while the danger of delayed final adjudication—possibly by several years—is very real. The petition should be granted.

ARGUMENT

I. The dismissal of an action consolidated for pretrial purposes with other actions should be immediately appealable.

A. Consolidation is a procedural device to improve judicial economy; it does not transform multiple separate actions into a single action.

Consolidation—whether under Federal Rule of Civil Procedure 42(a), after a transfer pursuant to 28 U.S.C. § 1407, or similar statutes or doctrines—is a procedural device to improve judicial economy. It enables a court to deal efficiently with cases involving related issues, eliminating the need for duplicative proceedings across similar actions. *See Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 292 (1892) (consolidation of actions that "appear[] to the court to be of like nature and relative to the same question" permitted in order to "avoid unnecessary cost and delay"); 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 42.10[1][a] (3d ed. 1999) (Rule 42(a) consolidation is a "managerial device" that "makes possible the streamlined processing of groups of cases").

Before the adoption of the Federal Rules of Civil Procedure, this Court made clear that a consolidation order did not extinguish the separate character of the consolidated actions. *See Johnson*, 289 U.S. at 496–97 ("[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."); *Hillmon*, 145 U.S. at 293 ("[A]lthough the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and

judgments . . . .”). This Court thus permitted appeals from judgments that disposed of one or more but not all cases subject to a consolidation order. *See, e.g.*, *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 413–14 (1926); *Withenbury v. United States*, 72 U.S. 819, 821-22 (1866).

The Federal Rules of Civil Procedure did not change pre-Rules doctrine that consolidation does not merge separate lawsuits into one. The Rules established “one form of action”: a “civil action” that is “commenced by filing a complaint with the court.” Fed. R. Civ. P. 2, 3. Here, petitioners commenced their “action” by filing their complaint, just as the OTC plaintiffs commenced their own separate “action” by filing their own separate complaint. Rule 42(a) speaks of consolidation of “actions before the court,” recognizing the actions’ separate identities, and does not suggest that it intends to alter this Court’s holdings and transform the separate actions subject to the consolidation order into a single “action.” Rule 20(a), by contrast, speaks of joining parties “in one action”: joinder, rather than consolidation, permits parties to be added to a single action.

The federal rules use the term “action” in ways that would make no sense if consolidation created a single unified “action” out of separate individual “actions.” For example, a court may dismiss an “action” against a defendant who has not been served properly. Fed. R. Civ. P. 4(m). A defendant in two cases subject to a consolidation order, properly served in one but not the other, would not be able to secure dismissal of both cases; rather, the adequacy of service would be evaluated separately for each action. *See Greenberg v. Giannini*, 140 F.2d 550, 552 (2d Cir. 1944) (Hand, J.) (question of validity of service “must be decided as though the two actions had remained unconsolidated, because the order did not merge them . . . but was only a convenience, accomplishing no more than to obviate the duplication of

papers and the like."). A plaintiff may dismiss "an action" without a court order by securing a stipulation of dismissal "signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii). The plaintiff can obtain such a dismissal with signatures from all parties appearing in the plaintiff's own action; she need not additionally secure the signatures of parties in all other actions subject to a consolidation order. *See United States v. Altman*, 750 F.2d 684, 695–97 (8th Cir. 1984) (quoting *Johnson*, 289 U.S. at 496–97); *State Mutual Life Assurance Co. v. Deer Creek Park*, 612 F.2d 259, 267 (6th Cir. 1979) (also quoting *Johnson*). A court must dismiss "the action" if it lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(h)(3). But surely a district court need not dismiss every action subject to a consolidation order if it concludes it lacks jurisdiction over one; rather, it should consider its jurisdiction over each action separately, just as this Court does. *See Butler v. Dexter*, 425 U.S. 262, 267 n.12 (1976) ("This case was consolidated in the District Court with several other cases, at least some of which did bring into question the constitutionality of a state statute. Each case before this Court, however, must be considered separately to determine whether or not this Court has jurisdiction to consider its merits.").

Rule 54(b) is no different. Rule 54(b) relates to the appealability of orders in "an action" with more than one claim or party and provides that any order or decision "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties" absent the district court's entry of a final judgment after determining there is no just reason for delay. Consistent with Rules 2 and 3, the "action" in Rule 54(b) is the single lawsuit. Rule 54(b) does not suggest that multiple actions subject to a consolidation order become a single "action" so a party cannot appeal a dismissal of its own action without a Rule 54(b) certification. Such a reading would be inconsistent

with Rule 54(b)'s purpose. Before the adoption of the Rules, the federal courts generally prohibited appeals from judgments that disposed of fewer than all claims in multiclaim cases, reasoning that the entire case (rather than the individual claims) was the "judicial unit" for appeal purposes. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 431–32 & n.3 (1956). In pre-Rules multiparty cases, the federal courts would in some circumstances permit immediate appeals from judgments finally disposing of separate and distinct claims. *See id.* at 432 n.3. Rule 54(b) "authoriz[ed] a limited relaxation of the former general practice that, in multiple claims actions, all the claims had to be finally decided before an appeal could be entertained from a final decision upon any of them." *Id.* at 433–34. But the original Rule 54(b) did not refer explicitly to multiparty cases, which led to some courts denying Rule 54(b) appeals in such cases. *See* Fed. R. Civ. P. 54 advisory committee's note. Observing that "[t]he danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases," (*id.*), the rule was amended so it clearly covered multiparty cases. *Id.* Rule 54(b) thus expanded rather than contracted the categories of decisions subject to immediate appellate review (*Sears, Roebuck, & Co.*, 351 U.S. at 438): it does not suggest an intention to reverse this Court's holding about the nature of consolidation and, in the process, narrow the scope of appellate review.

The multidistrict litigation statute (28 U.S.C. § 1407) does not create a single unified "action" post-transfer out of many pre-transfer "actions." The statute authorizes transfer for "coordinated or consolidated pretrial proceedings" when such proceedings will be "for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. The statute assumes the transferred actions retain

their individual identities: not only does it refer to "such actions" rather than a single unified "action" post-transfer, but at the conclusion of pretrial proceedings, "[e]ach action so transferred" is to be remanded for trial to the transferor court—a mandatory remand (*Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998)) that would make no sense if consolidation eliminated the separate natures of the pre-transfer actions.

The foregoing authorities demonstrate why immediate appeal is appropriate: (1) this Court held before the adoption of the Federal Rules of Civil Procedure and 28 U.S.C. § 1407 that consolidation does not merge multiple separate lawsuits into one; (2) neither the Rules nor the multidistrict litigation statute suggest any intent to modify this Court's holdings about the nature of consolidation; to the contrary, the Rules and the multidistrict litigation statute use the word "action" to refer to a single lawsuit, not the fictional agglomerated result of a consolidation order; (3) Rule 54(b) thus does not apply to petitioners' situation, as on its face it addresses only orders within a single "action," and therefore (4) the district court's dismissal of petitioners' action "in its entirety," with judgment deemed entered by operation of Federal Rule of Civil Procedure 58(c)(2)(B), Pet. 5, was an immediately appealable final decision under 28 U.S.C. § 1291, just as if petitioners' lawsuit had never been subject to a consolidation order.

B. Denying immediate appealability delays final adjudication without satisfying the goals of the policy against piecemeal review.

The Courts of Appeals that reject immediate appealability do not engage in any depth with these authorities. Instead, they rest their decision on policy considerations, primarily the policy against piecemeal

review. *See Spraytex, Inc. v. DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996); *Hageman v. City Investing Co.*, 851 F.2d 69, 72 (2d Cir. 1988); *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984); *Trinity Broadcasting Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987). But policy considerations cannot override a party's statutory appellate rights, especially where the result might be a delay of several years before an appeal—a very likely outcome in a large MDL proceeding such as the one below.

In any event, the Circuits' concerns about piecemeal review are misplaced. In contrast to the policy against piecemeal review in a single action, there is no similar policy against appellate review in distinct actions simply because the distinct actions may present related issues. The concerns this Court has expressed about piecemeal review are not present in an appeal in an action consolidated for pretrial purposes with other actions.

Piecemeal review of prejudgment decisions in a single action is disfavored because it creates inefficiency at the appellate level: it "risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary." *Johnson v. Jones*, 515 U.S. 304, 309 (1995). But in situations such as petitioners', there will be no further trial court work in the dismissed action, and thus there is no risk that further developments in that action may render an appeal unnecessary or create a fuller record. The district court's decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). To be sure, it is possible that developments in some other case may present the issues on appeal in a different light—but that is always true in any appeal, whether or not the case on appeal has been

consolidated. That possibility does not permit a court to disregard a party's statutory right to an appeal.

Piecemeal review within a single action tends to create delay: multiple appeals from various prejudgment decisions may delay the action from proceeding to a swift and final resolution in the trial court. "To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause." *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 434 (1985) ("One purpose of the final judgment rule embodied in § 1291 is to avoid the delay that inherently accompanies time-consuming interlocutory appeals."). But actions such as petitioners' have already been dismissed in their entirety: an appeal will not delay their resolution because there is nothing left to resolve.

Finally, piecemeal review within a single action "encroaches upon the prerogatives of district court judges, who play a special role in managing ongoing litigation." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106–07 (2009) (quotations omitted). "[T]he *district judge* has primary responsibility to police the prejudgment tactics of litigants, and . . . the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." *Richardson-Merrell*, 472 U.S. at 434. But in situations such as petitioners', the case is over: there can be no repeated second-guessing of prejudgment rulings because there will be no further rulings; there is only the final judgment. The appeal here will simply be "a single appeal . . . deferred until final judgment has been entered, in which the claims of district court error at any stage of the litigation may be ventilated." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

This Court has summarized the competing policy considerations concerning appealability as "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). Although the concerns implicated by the rule against piecemeal review are not present in situations such as petitioners', the danger of denying justice by delay is very real. The threshold for consolidation is low: there need only be "a common question of law or fact" for consolidation under Rule 42(a) and "one or more common questions of fact" for transfer under 28 U.S.C. § 1407 for coordinated or consolidated pretrial proceedings. A plaintiff may thus find herself consolidated with other actions with just a single question of fact—not burdensome if consolidation is, as this Court has explained, merely a procedural device to enhance judicial efficiency, but very problematic if the plaintiff's appeal rights are now hostage to the proceedings of every other action subject to the consolidation order, so that no one can pursue an appeal until everyone's case is finished. This could take years, contrary to the direction to construe the federal rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Although this Court "decide[s] appealability for categories of orders rather than individual orders" and does "not now in each individual case engage in ad hoc balancing to decide issues of appealability" (*Johnson v. Jones*, 515 U.S. 304, 315 (1995)), petitioners' situation illustrates the harsh consequences of the Second Circuit's rule: litigation related to LIBOR involves many separate actions and damages that could be in the billions of dollars (Pet. App. 194a), raising the prospect that litigation could go on for many years before the last of the LIBOR-related cases is resolved and petitioners may, finally, pursue the appeal that they would

have had immediately, as a matter of right, had their case not been subject to a consolidation order.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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April 25, 2014

APPENDIX

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

Pursuant to this Court's October 18, 2011 Memorandum and Order, counsel seeking to serve as interim class counsel have presented the Court with supplemental submissions and revised leadership proposals. For the reasons discussed below, we appoint Hausfeld LLP ("Hausfeld") and Susman Godfrey LLP ("Susman Godfrey") as interim class counsel for the putative class of over-the-counter plaintiffs, and we appoint Kirby McInerney LLP ("Kirby McInerney") and Lovell Stewart Halebian Jacobson LLP ("Lovell Stewart") as interim class counsel for the putative class of exchange-based plaintiffs. We also grant the motion to consolidate related class action complaints.

BACKGROUND

This multi-district litigation involves twenty-three related complaints filed against member banks of the British Bankers' Association ("BBA") London Interbank Offer Rate ("LIBOR") Panel (collectively "defendants"). Plaintiffs in these cases allege that defendants artificially suppressed LIBOR by understating their borrowing costs to the BBA.

In our October 18, 2011 Memorandum and Order, we determined that even though all plaintiffs make similar substantive allegations, separate putative classes should be maintained for those plaintiffs who engaged in over-the-counter transactions and those plaintiffs who purchased financial instruments on an exchange. Because the record was unclear as to the proper classification of several of the plaintiffs, we requested that counsel inform us as to the plaintiffs they currently represent and whether those plaintiffs are over-the-counter purchasers or exchange-based purchasers. Counsel have now provided us with the requested information, and several firms have reorganized their leadership proposals to conform with our decision to maintain separate putative classes.

DISCUSSION

I. Interim Class Counsel Proposals

Previously, the law firms of Grant & Eisenhofer PA ("Grant & Eisenhofer"), Kirby McInerney, Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), and Lovell Stewart had submitted a proposal under which the four firms would act as interim class counsel for both categories of plaintiffs. These firms have now divided, with two of the firms proposing to represent over-the-counter plaintiffs and the other two seeking to represent exchange-based plaintiffs. We are separately presented with an additional class counsel proposal for each of the putative classes. Thus, we are now faced with two proposals with respect to each putative class of plaintiffs.

A. Over-the-Counter Plaintiffs[1]

[1] We have also received a motion for appointment as interim class counsel from the law firms of Scott & Scott LLP and Robbins, Kaplan, Miller & Ciresi LLP. These firms seek to represent a putative class of plaintiffs that engaged in interest rate swaps only. This motion

1. Grant & Eisenhofer Proposal

Grant & Eisenhofer and Robbins Geller – previously part of the four-firm proposal – now seek to represent the putative class of over-the-counter plaintiffs ("Grant & Eisenhofer Proposal"). Robbins Geller currently represents two institutional plaintiffs, Carpenters Pension Fund of West Virginia and City of Dania Beach Police & Firefighters Retirement System, that purchased floating rate debt tied to LIBOR from one or more of the defendants. Grant & Eisenhofer currently represents Ravan Investments, LLC ("Ravan"), an institutional plaintiff that entered into unspecified types of over-the-counter transactions with defendant UBS. The Grant & Eisenhofer Proposal is also supported by plaintiff's counsel in Insulators & Asbestos Workers Local 14 v. Bank of Am. Corp., No. 11 civ. 3781 (S.D.N.Y.).

2. Baltimore Proposal

Hausfeld and Susman Godfrey submit a competing proposal with respect to the over-the-counter plaintiffs ("Baltimore Proposal"). These firms currently represent the Mayor and City Council of Baltimore in connection with Baltimore's having entered into "hundreds of millions of dollars" of interest rate swaps with defendants.

B. Exchange-Based Plaintiffs

1. Kirby McInerney Proposal

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was submitted on November 15, 2011, roughly two and a half months after the deadline we set for counsel to submit motions for appointment as interim class counsel. We deny these firms' motion on this ground alone, but we also note that after reviewing the firms' submissions, we disagree that there is a need for separate putative class treatment for plaintiffs who engaged in different forms of over-the-counter transactions.

Kirby McInerney and Lovell Stewart – the other two firms in the previous four-firm proposal – now seek to represent the putative class of exchange-based plaintiffs ("Kirby McInerney Proposal"). Kirby McInerney currently represents two foreign institutional investors, FTC Capital GmbH and Metzler Investment GmbH, that purchased exchange-based derivatives. Lovell Stewart currently represents Roberto E. Calle Gracey, an individual investor who purchased LIBOR-based futures contracts on the Chicago Mercantile Exchange. The Kirby McInerney Proposal also has the support of plaintiffs in six of the other cases pending before this Court.[2]

2. Lowey Dannenberg Proposal

The law firm Lowey Dannenberg Cohen & Hart PC ("Lowey Dannenberg") also seeks to be appointed interim class counsel for the exchange-based plaintiffs. In the initial round of submissions on this issue, Lowey Dannenberg did not actually apply to serve as interim class counsel, but rather acquiesced to the previously referenced four-firm proposal, under which Lowey Dannenberg would have served as a "designated fiduciary" for exchange-based plaintiffs. Lowey Dannenberg currently represents Jeffrey Laydon and Richard Hershey, two individual investors who purchased LIBOR-based futures contracts.

II. Interim Class Counsel Selection

Rule 23(g) of the Federal Rules of Civil Procedure allows a court to "designate interim counsel to act on behalf of a putative class before determining whether to

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[2] These plaintiffs are 303030 Trading LLC, Atlantic Trading USA, LLC, AVP Properties LLC, Independence Trading Inc., Gary Francis, and Nathanial Haynes.

certify the action as a class action." Fed. R. Civ. P. 23(g)(3). The designation of interim class counsel is especially encouraged in cases such as the instant matter where there are multiple, overlapping class actions that require extensive pretrial coordination. See In re Air Cargo Shipping Servs. Antitrust Litig., 240 F.R.D. 56, 57 (E.D.N.Y. 2006) (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.11 (2004)).

The considerations set out in Rule 23(g)(1)(A), which govern the appointment of class counsel once a class is certified, are widely accepted to apply to the designation of interim class counsel before certification as well. See id.; see also Walker v. Discover Fin. Servs., No. 10-cv-6994, 2011 WL 2160889, at *2 (N.D. Ill. May 26, 2011). These criteria include: (1) the work counsel has done in identifying or investigating potential claims; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will devote to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

Unfortunately, the application of these factors does not guide us to a particular result in this case. All of the firms submitting applications have extensive experience in complex litigation, and we are more than confident that they have adequate knowledge of the applicable law. In addition, we have little doubt that the firms would each devote significant resources to prosecuting plaintiffs' claims. Finally, although certain of the firms may have brought suit earlier than others, all of the firms have demonstrated that they have thoroughly investigated the relevant claims, rendering this factor not determinative. We are therefore forced to rely on other case-specific factors to choose between the competing proposals.

A. Over-the-Counter Plaintiffs

Although the Grant & Eisenhofer Proposal carries the support of a greater number of plaintiffs, the Baltimore Proposal has the support of a plaintiff with by far the greatest economic interest. As previously referenced, the Mayor and City Council of Baltimore claim that Baltimore entered into hundreds of millions of dollars of interest rate swaps with defendants. Plaintiffs supporting the Grant & Eisenhofer Proposal do not allege to have held anywhere near this level of exposure. Furthermore, the market for interest rate swaps in general constitutes an extremely high percentage of the overall market for over-the-counter LIBOR-based transactions. Counsel for Baltimore present data suggesting that the worldwide nominal value of LIBOR-based interest rate swaps – $300 million as of September 2008 – is nearly thirty times the market for LIBOR-based debt (which is the market in which plaintiffs represented by Robbins Geller participated).[3] While this case is not governed by the Private Securities Litigation Reform Act of 1995, and therefore we are not guided entirely by the magnitude of a plaintiff's economic interest, we nevertheless find this consideration highly relevant.

We also find persuasive the fact that Hausfeld maintains an office in London with a full-time staff of at least five solicitors. Given that the case appears to involve extremely complicated factual issues, we believe that having dedicated and locally trained attorneys at the site of the core operative facts could prove extremely beneficial.

Finally, although less important to our determination, we note that Hausfeld and Susman Godfrey have only

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[3] As previously described, Grant & Eisenhofer has not specified the type of over-the-counter transactions entered into by its client, Ravan. However, even if Ravan did enter into interest rate swaps, we safely assume that the size of its holdings did not approach that of Baltimore's.

ever sought to represent over-the-counter plaintiffs, while Grant & Eisenhofer and Robbins Geller previously sought to represent exchange-based plaintiffs as well. Although we have no doubt that the latter two firms would zealously pursue the interests of over-the-counter plaintiffs were we to appoint them, there is some possibility that these plaintiffs could be prejudiced by their counsel having minimized the antitrust standing questions facing the exchange-based plaintiffs, and more generally from having suggested that all plaintiffs should be treated in a like manner.

Based on these considerations, we appoint Hausfeld and Susman Godfrey as interim class counsel for the putative class of over-the-counter plaintiffs.

B. Exchange-Based Plaintiffs

Our decision with respect to interim class counsel for the exchange-based plaintiffs is less difficult. Kirby McInerney and Lovell Stewart currently represent two institutional plaintiffs and one individual plaintiff, and the firms' proposal has the support of plaintiffs in six other cases. In contrast, Lowey Dannenberg currently represents just two individual plaintiffs and its proposal has the support of no other plaintiffs. The diversity and sheer number of plaintiffs supporting the Kirby McInerney Proposal are compelling factors in favor of their appointment.

We also find that Kirby McInerney and Lovell Stewart have adequately addressed the Article III standing issues raised by Lowey Dannenberg with respect to the foreign plaintiffs represented by Kirby McInerney. With that said, we caution that if any representation made by Kirby McInerney and Lovell Stewart on this issue is found to be inaccurate, and the proposed plaintiffs lack standing as a result, Kirby McInerney and Lovell Stewart will be

removed as lead counsel and Lowey Dannenberg will be substituted.[4]

Subject to this proviso, we appoint Kirby McInerney and Lovell Stewart as interim class counsel for the exchange-based plaintiffs.

III. Consolidation

We have also been presented a motion to consolidate the related class action complaints before this Court.[5] (Docket no. 10 at 22-25.)

Consolidation of actions under Federal Rule of Civil Procedure 42(a) is appropriate when "actions before the court involve a common question of law or fact." Fed. R. Civ. P. 42(a). Here, there is substantial overlap in defendants across the cases, and the underlying factual issues presented are seemingly identical – namely whether these defendants deliberately manipulated LIBOR. The legal issues presented are also common across the complaints, as the cases to be consolidated all involve claims under the Sherman Antitrust Act and/or the Commodity Exchange Act.

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[4] This Court experienced the waste and delay that occurs when a proposed plaintiff is found to lack standing in In re IMAX Securities Litigation, 06 Civ. 6128 (S.D.N.Y.). We have no interest in reliving that experience when the issue of standing has been raised up front.

[5] The motion does not seek consolidation of three cases not filed as class action complaints that were transferred to this Court by the Judicial Panel of Multi-district Litigation ("JPML") on September 14, 2011: Schwab Money Market Fund v. Bank of America Corp., No. 11 Civ. 6412 (N.D. Cal.); Charles Schwab Bank v. Bank of America Corp., No. 11 Civ. 6411 (N.D. Cal.); Schwab Short-Term Bond Market Fund v. Bank of America Corp., No. 11 Civ. 6409 (N.D. Cal.) Accordingly, we do not consolidate these actions with the related class action complaints.

We therefore consolidate all related class action complaints pending before this Court, as well as any future class action complaints alleging similar conduct and raising the same legal claims.

CONCLUSION

For the foregoing reasons, we hereby order: (1) that the LIBOR-related class action complaints currently pending before this Court be consolidated for all purposes under Federal Rule of Civil Procedure 42(a),[6] under the following caption: In Re: Libor-Based Financial Instruments Antitrust Litigation, Master File No. 1:11-md-02262-NRB; (2) that the law firms of Hausfeld LLP and Susman and Godfrey LLP are appointed to serve as interim class counsel for the putative class of over-the-counter plaintiffs; (3) that the law firms of Kirby McInerney LLP and Lovell Stewart Halebian Jacobson LLP are appointed to serve as interim class counsel for the putative class of exchange-based plaintiffs; and (4) within 20 days, interim class counsel shall submit to this Court a proposed order to facilitate their representation of the putative classes and to advance the conduct and progress of the litigation.[7]

SO ORDERED.

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[6] The captions of these cases are: 11 Civ. 2613; 11 Civ. 2883; 11 Civ. 3128; 11 Civ. 3249; 11 Civ. 3423; 11 Civ. 3781; 11 Civ. 3925; 11 Civ. 4421; 11 Civ. 4736; 11 Civ. 5450; 11 Civ. 5638; 11 Civ. 5640; 11 Civ. 5641; 11 Civ. 5927; 11 Civ. 5928; 11 Civ. 5929; 11 Civ. 5930; 11 Civ. 5931; 11 Civ. 7676; 11 Civ. 7715.

[7] If counsel believes that the litigation would benefit from an in-person conference before the Court to discuss the next steps to be taken in the litigation, they are invited to contact the Court so informing us.

UNITED STATES DISTRICT
JUDGE

Dated: New York, New York
November 29, 2011