UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION THIS DOCUMENT RELATES TO:	MDL No. 2262 Master File No. 1:11-md-2262-NRB **ORAL ARGUMENT REQUESTED**
MAYOR AND CITY COUNCIL OF BALTIMORE, et al., Plaintiffs, v. CREDIT SUISSE GROUP AG, et al., Defendants.	No. 11-cv-5450

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

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I. Plaintiffs Are Not Efficient Enforcers as to Transactions with Panel Bank Subsidiaries or Affiliates

Plaintiffs' opposition ignores *LIBOR VI*'s holding that plaintiffs cannot be efficient enforcers of transactions with non-defendants because those non-defendants' "independent decision[s]" to incorporate LIBOR "break[] the chain of causation between defendants' actions and a plaintiff's injury." *In re LIBOR-Based Fin. Instruments Antitrust Litig. (LIBOR VI)*, 2016 WL 7378980, at *16 (S.D.N.Y. Dec. 20, 2016). That logic applies equally whether the non-defendant is a third party or a corporate affiliate or subsidiary because the incorporation of LIBOR is an "independent decision" by a nonparty to the alleged conspiracy. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2017 WL 532465, at *2 (S.D.N.Y. Feb. 2, 2017) (holding that only the Panel Banks plausibly conspired). Plaintiffs point to nothing in their pleadings to suggest that Defendants played any role in the use of LIBOR by affiliates or subsidiaries.[1] Accordingly, *LIBOR VI* compels the conclusion that Plaintiffs are not efficient enforcers as to transactions with Panel Bank subsidiaries or affiliates.

Unable to rely on the pleadings, Plaintiffs oppose Defendants' Rule 12(c) motion by flooding the Court with more than 140 extrinsic exhibits to convey the appearance of a "factual" dispute. These exhibits are improper on a motion for judgment on the pleadings, and Plaintiffs do not contend otherwise. *See, e.g.*, *Korova Milk Bar of White Plains, Inc. v. PRE Props., LLC*, No. 11 Civ. 3327(ER), 2013 WL 417406, at *6-8 (S.D.N.Y. Feb. 4, 2013) (declining to consider exhibits attached to plaintiff's opposition because "[i]n ruling on a 12(c) motion, a district court generally must confine itself to the four corners of the complaint and look only to the allegations

[1] Plaintiffs cite only a single allegation in their complaint in their opposition to Defendants' motion. (Opp. at 4 n.2.) That lone allegation refers generically to the purported "integrated nature" of one Panel Bank, Credit Suisse, but does not plead any Panel Bank involvement in subsidiary or affiliate decisions to incorporate LIBOR into transactions with third parties. (ECF No. 1857 ¶ 24.)

contained therein") (internal citations omitted).[2] Even so, the exhibits are irrelevant. Assuming *arguendo* that they suggest that "every panel bank belonged to an integrated global enterprise that actively managed its interest rate risk" (Opp. at 3), Plaintiffs' claims still fail under *LIBOR VI* because *none* of the 140+ exhibits, let alone any allegation, suggests that Panel Banks played any role in their subsidiaries' or affiliates' decisions to incorporate LIBOR into their transactions. Plaintiffs thus provide no reason for this Court to reconsider its bright line "between plaintiffs who transacted directly with defendants and those who did not." *LIBOR VI*, 2016 WL 7378980, at *16.

Faced with the clear implications of this Court's rulings, Plaintiffs make a number of ineffective arguments. First, Plaintiffs rehash their argument that corporate separateness should be ignored and corporate affiliates should be treated as a "single enterprise" under *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984), for purposes of antitrust liability. (Opp. at 6-7.) Plaintiffs made this same argument after *LIBOR VI*, ECF No. 1722 at 7, and this Court rejected it: "[*Copperweld*] does not stand for the proposition that a parent company becomes a separate member of an alleged conspiracy by virtue of the membership of its wholly owned subsidiary." 2017 WL 532465, at *2 n.3.[3] The time for reconsideration has passed, and Plaintiffs provide no reason for this Court to reconsider its holding that "the proper defendant is

[2] Plaintiffs' contention that a "contested record" somehow precludes dismissal (Opp. at 10) further distorts the Rule 12(c) standard. The "record" on a Rule 12(c) motion is the pleadings; Plaintiffs' newly introduced extrinsic exhibits (which are nowhere referenced in the Complaint) are not properly before the Court. *See, e.g.*, *Torres v. Zegarelli*, 173 F. App'x 67, 69 (2d Cir. Mar. 22, 2006). Given that Plaintiffs' claims fail as a matter of law on the pleadings, they are not entitled to "targeted discovery" (Opp. at 10) to try to fix their pleadings yet again.

[3] Nothing in *Arandell Corp. v. Centerpoint Energy Servs., Inc.*, No. 16-17099, 2018 WL 3716026 (9th Cir. Aug. 6, 2018) or *Lenox Maclaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221 (10th Cir. 2017), changes the analysis. These cases recognize a limited exception to *Copperweld*'s rule, 467 U.S. at 777, by permitting, under certain conditions, "a corporation [to] be held liable . . . for the anticompetitive conduct of one or more related entities," *Lenox*, 847 F.3d at 1237. But as both cases make clear, this limited exception applies only when the acts of each affiliate are *coordinated—i.e.*, when there is evidence that "each defendant independently participated in the enterprise's scheme." *Id.*; *accord Arandell*, 2018 WL 3716026, at *7. Plaintiffs have cited no allegation that Panel Bank affiliates' or subsidiaries' transactions with third parties reflected anything but independent decisions, let alone that they were connected in any way to the alleged conspiracy to suppress LIBOR.

the panel bank." *Id.* at *2.

Next, Plaintiffs assert that "[n]o court has adopted" the argument that plaintiffs are not efficient enforcers as to transactions with subsidiaries or affiliates not plausibly involved in the alleged conspiracy. (Opp. at 5.) But, even if that is correct, it is for the unexceptional reason that no court has yet addressed the issue.[4] Notably, Plaintiffs cite no case that has considered the issue and decided it in their favor.

Finally, Plaintiffs contend that they are efficient enforcers because they "satisfy" the efficient enforcer factors *other* than causation. (*Id.* at 6.) Even if true, that would be irrelevant. In *LIBOR VI*, this Court held that whether a non-defendant's "independent decision" breaks the chain of causation is the dispositive consideration for efficient enforcer status. 2016 WL 7378980, at *16. In any event, Plaintiffs are incorrect. As to the "more direct victims" factor, to the extent that this factor carries any weight here, *see id.* at *17 ("this factor must carry diminished weight" in the LIBOR context because "[a]ny other result would vitiate the first prong of causation"), Plaintiffs' transactions *with Panel Banks* are "more direct" than transactions with Panel Banks' *subsidiaries or affiliates*. Plaintiffs' contention that they are the "most direct victim" rests on the false premise that because *some* of their transactions are with Panel Banks, their claims with respect to *all* of their transactions are equally direct.

As for the speculativeness-of-damages factor, although this Court in *LIBOR VI* did not dismiss any claims on the ground that damages were too speculative, that does not mean the factor *favors* Plaintiffs. Indeed, the Second Circuit suggested the opposite, *see Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 780 (2d Cir. 2016) ("it is difficult to see how appellants would

[4] Plaintiffs cite *Sonterra Capital Master Fund Ltd. v. Credit Suisse Group AG*, 277 F. Supp. 3d 521, 561 (S.D.N.Y. 2017), and *In re Commodity Exchange, Inc.*, 213 F. Supp. 3d 631 (S.D.N.Y. Oct. 3, 2016), for support, but the issue briefed here was not discussed by the Court in either case. As for *Merced Irrigation District v. Barclays Bank PLC*, 220 F. Supp. 3d 412, 418 (S.D.N.Y. 2016), it expressly distinguished the LIBOR litigation to find umbrella standing for transactions with *any* third party and therefore has no relevance here.

arrive at [a just and reasonable] estimate, even with the aid of expert testimony"), and this Court has recognized that this case presents unusually complex issues of absorption and netting, issues that are present as well with respect to transactions with affiliates or subsidiaries, *see LIBOR VI*, 2016 WL 7378980, at *19-20. And, as to duplicative recovery/complex apportionment, although this Court did not "foreclos[e] plaintiffs from pursuing antitrust claims" based on this factor, it recognized that "*Gelboim was* concerned with the scope of government recovery, as 'the ramified consequences are beyond conception.'" *Id.* at *23 (emphasis in original) (quoting *Gelboim*, 823 F.3d at 780).

II. Plaintiffs Are Not Efficient Enforcers as to Instruments Merely Sold by Panel Banks

The analysis is the same as to transactions involving LIBOR-based instruments sold by Panel Banks, but issued by affiliates or subsidiaries: In those transactions, affiliates or subsidiaries made the "independent decision" to incorporate LIBOR and thus "break[] the chain of causation." *LIBOR VI*, 2016 WL 7378980, at *16. Plaintiffs' assertion that Defendants' position "confuses the question of the proper *defendant* . . . with the selection of the proper *plaintiff*" is meritless. (Opp. at 7-8.) Under the efficient enforcer test set forth in *LIBOR VI*, a person is not a proper *plaintiff* as to claims that are causally remote from the alleged conspiracy.

LIBOR V, cited by Plaintiffs (Opp. at 8), does not alter this conclusion because *LIBOR V* did not address antitrust claims, let alone hold that the efficient enforcer test is satisfied when the Panel Bank does not set the LIBOR-based term. Rather, this Court held that Panel Bank Credit Suisse Group AG ("CSGAG") was a *counterparty* of plaintiff SEIU because SEIU transacted with a CSGAG affiliate that acted as CSGAG's *agent*. *In re LIBOR-Based Fin. Instruments Antitrust Litig. (LIBOR V)*, 2015 WL 6696407, at *22 (S.D.N.Y. Nov. 3, 2015). Plaintiffs do not cite any agency allegations with respect to any other Panel Bank, and "[g]eneral allegations of corporate ownership, combined marketing, shared board membership, and so forth are

insufficient to establish a principal-agent relationship between corporate entities." *Id.* at *21. Even as to CSGAG, this Court found that an agency relationship existed only between an issuer and its corporate parent in a bond issuance and held that no agency relationship existed for swaps. *Id.* at *21-22. Accordingly, *LIBOR V* has no application here.

III. *Illinois Brick* Bars Plaintiffs' Claims Based on Instruments Purchased from a Panel Bank Affiliate or Subsidiary

For instruments issued by a Panel Bank (or on which a Panel Bank otherwise paid LIBOR-based interest), but purchased from a Panel Bank affiliate or subsidiary, Plaintiffs are indirect purchasers barred by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Plaintiffs' suggestion that *Illinois Brick* does not apply to financial transactions is belied by Plaintiffs' own cases demonstrating the opposite. *In re NASDAQ Market-Makers Antitrust Litig.* (cited Opp. at 8-9 n.10), for example, held that *Illinois Brick* did not bar plaintiffs that purchased securities through non-defendant-owned brokers only because the "control" exception applied. 169 F.R.D. 493, 505-06 (S.D.N.Y. 1996). Significantly, Plaintiffs do not argue (because they cannot argue) that the control exception saves their transactions with Panel Bank affiliates or subsidiaries from *Illinois Brick*. (*See* Opp. at 8-9.)

Moreover, *Illinois Brick* has particular force in the benchmark context. As this Court recognized, alleged LIBOR suppression is absorbed into the purchase price of a LIBOR-based instrument. *See, e.g.*, *LIBOR VI*, 2016 WL 7378980, at *19-20. Thus, if a LIBOR-based instrument is purchased at issuance from a Panel Bank during the period of alleged LIBOR suppression, the direct purchaser will have paid less for the instrument. If the instrument is then resold during the alleged suppression period, the reduced price will be passed on to the subsequent purchaser, triggering the same double recovery/apportionment concern that animates

Illinois Brick. *See Illinois Brick*, 431 U.S. at 737.[5] Plaintiffs' argument that this case is different from one involving a "price-fixed *good*" (Opp. at 8) cuts against Plaintiffs. Far from avoiding issues of double recovery and apportionment, this case presents *even more* complexities, such as the need to determine absorption and netting for purchasers.

As a final effort, Plaintiffs suggest that "practical considerations" warrant ignoring *Illinois Brick*. (Opp. at 9-10.) As an initial matter, the Supreme Court has held that it is "an unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick*. *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216-17 (1990).[6] Moreover, the cases that Plaintiffs cite to support this "practical" argument all apply the control or co-conspirator exceptions to *Illinois Brick*—two exceptions that Plaintiffs do not attempt to invoke here—or hold that *Illinois Brick* bars plaintiffs' claims. *See, e.g.*, *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 749 n.3 (9th Cir. 2012) (describing *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980), and *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1145-46 (9th Cir. 2003), as "really describing . . . a 'control' or perhaps a 'co-conspirator' exception" (quoting Phillip E. Areeda et al., Antitrust Law ¶ 346f (3d ed. 2007))).[7]

Plaintiffs' "practical" argument also fails on its own terms because this is not a case without direct purchasers; Plaintiffs that purchased swaps directly from Panel Banks or bonds issued and sold by Panel Banks satisfy *Illinois Brick*. Accordingly, Plaintiffs have not articulated

[5] Plaintiffs cite *Simon v. Keyspan Corp.*, 694 F.3d 196, 202 (2d Cir. 2012), for the proposition that alleged damages here are "easily traced to the antitrust violation" (Opp. at 9), but *Keyspan barred* a plaintiff's antitrust claims because the plaintiff did not qualify for the "cost-plus" exception to *Illinois Brick*. Plaintiffs do not attempt to invoke the "cost-plus" exception to *Illinois Brick* here, nor could they.

[6] *See also Del. Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1123-24 (9th Cir. 2008) ("The [Supreme] Court's firm rule does not provide us the leeway to make a policy determination on a case-by-case basis as to whether standing should be recognized when there are special business arrangements.").

[7] As discussed in Defendants' moving brief, courts in this circuit have interpreted the control exception narrowly to apply only where there is "such functional economic or other unity that there effectively has been only one sale." *Leider v. Ralfe*, No. 01 Civ. 3137 (HB), 2003 WL 22339305, at *4 (S.D.N.Y. Oct. 10, 2003) (internal quotation marks and citations omitted); *see* Mem. at 6-7. Plaintiffs have not attempted to meet this standard.

a basis in law or on the pleadings to avoid *Illinois Brick*'s application to their claims.

CONCLUSION

For all of these reasons, the Court should grant Defendants' Motion for Partial Judgment on the Pleadings.

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Respectfully submitted,

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