SHEARMAN & STERLING LLP

599 Lexington Avenue
New York, NY 10022-6069
+1.212.848.4000

ahakki@shearman.com
212.848.4924

Via ECF

August 3, 2020

The Hon. J. Paul Oetken
United States District Judge
Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

RE: *In re Mexican Gov't Bonds Antitrust Litig.*, No. 18-cv-2830-JPO (S.D.N.Y)

Dear Judge Oetken:

We represent Bank of America México, S.A. and write on behalf of Moving Defendants[1] in response to Plaintiffs' letter to the Court of July 30, 2020 (ECF No. 216) regarding the motion to dismiss decision in *In re European Government Bonds Antitrust Litigation* ("*EGB*"), No. 19-cv-2601, 2020 WL 4273811 (S.D.N.Y. July 23, 2020). For the reasons explained below, the *EGB* decision does not support denial of Defendants' motion to dismiss.

I. The *EGB* Decision Supports Moving Defendants' Argument That Plaintiffs' Purported Statistical Evidence Constitutes Impermissible Group Pleading

The *EGB* decision dismissed the plaintiffs' claims against all defendants for which the plaintiffs failed to allege individualized statistical data. *EGB*, 2020 WL 4273811, at *19–20. That holding expressly followed the Court's decision in *this* action that Plaintiffs' First Amended Complaint engaged in impermissible group pleading because, among other things, Plaintiffs offered only "average" or "aggregated" data, rather than individualized information about each Defendant's trading. *Id.* at *17 (citing *In re Mexican Gov't Bonds Antitrust Litig.*, 412 F. Supp. 3d 380, 389–90 (S.D.N.Y. 2019)). As explained in Moving Defendants' fully-briefed motion to dismiss in this action, the statistical allegations in Plaintiffs' Second Amended Complaint continue to be

[1] Moving Defendants are the defendants whose motion to dismiss is pending before the Court: Banco Nacional de México, S.A., Institución de Banca Múltiple, Grupo Financiero Banamex; Banco Santander (México), S.A., Institución de Banca Múltiple, Grupo Financiero Santander México; Bank of America México, S.A., Institución de Banca Multiple, Grupo Financiero Bank of America; BBVA Bancomer S.A., Institución de Banca Múltiple, Grupo Financiero BBVA Bancomer; Deutsche Bank México, S.A., Institutción de Banca Múltiple; and HSBC México, S.A., Institución de Banca Múltiple, Grupo Financiero HSBC.

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entirely aggregated, with no individualized data whatsoever. *See* Moving Defs.' Mot. to Dismiss for Failure to State a Claim, ECF No. 185, at 18, 27–28; Moving Defs.' Reply in Support of Mot. to Dismiss for Failure to State a Claim, ECF No. 207, at 10. The *EGB* decision sustained claims only against defendants for which individualized statistics were alleged, 2020 WL 4273811 at *19, and thus is of no help to Plaintiffs here who make no individualized statistical allegations at all.

II. The *EGB* Decision Highlights Plaintiffs' Failure to Plead Antitrust Standing

Plaintiffs also cite the *EGB* decision in support of their allegations of antitrust injury. But the court there rejected the argument that "specific transactions must necessarily be pled in every antitrust case." 2020 WL 4273811 at *13. Defendants make no such argument here. Rather, Defendants argue that the Plaintiffs have failed to plead any actual injury.[2]

A plaintiff fails to plead actual injury where "[o]nly speculation could lead [the court] to that belief." *Harry*, 889 F.3d at 115. Here, Plaintiffs fail to plead any non-speculative harm from alleged auction-related manipulation because they do not identify even a single instance in which they purchased an MGB on the day it was auctioned. ECF No. 185 at 31-33. And with respect to Plaintiffs' claims of bid-ask spread manipulation, the purported statistical evidence Plaintiffs offer merely consists of crude averages over an *eleven-year period*. The average spread in an entire market over an eleven-year period says absolutely nothing about what spread any Plaintiff received on any of its own transactions with a particular Defendant. *Id.* at 33–34. Nor can Plaintiffs tie even *a single one* of their transactions to any of the alleged chats identified in their Complaint. *Id.* at 26 n. 21, 34.

Lastly, the *EGB* decision further confirms that Plaintiffs here are not efficient enforcers of claims arising out of transactions with non-Defendants. The *EGB* decision held that plaintiffs were efficient enforcers only "as to those Defendants with whom they directly transacted." 2020 WL 4273811, at *14. Because Plaintiffs here have failed to allege that they transacted directly with *any* Defendant, their claims should be dismissed. ECF 185 at 35–39; *see also* Moving Defs.' Reply in Support of Mot. To Dismiss for Lack of Personal Jurisdiction, ECF No. 206, at 4–6; Moving Defs.' Mot. To Dismiss for Lack of Personal Jurisdiction, ECF No. 178, at 13 n.19.

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[2] To the extent Plaintiffs contend that the *EGB* decision, if followed, would require *only* a transaction between the parties to plead antitrust injury, such a reading would be contrary to the Second Circuit's holding in *Harry v. Total Gas & Power N.A.* that statutory standing requires a showing that (1) "the [defendant] must have taken an action that *had an impact* on the [plaintiff's] position" and (2) "that impact must have been *negative*." 889 F.3d 104, 112 (2d Cir. 2018) (emphases added); *see also id.* at 115 (holding that "the court must 'identify the actual injury the plaintiff alleges' by 'look[ing] to the ways in which the plaintiff claims *it is in a worse position* as a consequence of defendant's conduct'" (emphasis added) (quoting *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 76 (2d Cir. 2013))). Indeed, plaintiffs must "plausibly and clearly allege a concrete injury" in all cases under Article III of the Constitution. *Thole v. U. S. Bank N.A.*, 140 S. Ct. 1615, 1621 (2020).

III. The *EGB* Decision Does Not Excuse Plaintiffs' Failure to Establish Personal Jurisdiction

The court's finding of personal jurisdiction over some defendants in *EGB* did nothing to cure Plaintiffs' failure to plead personal jurisdiction, for several reasons. *First*, Plaintiffs here allege that New York sales desks—which are employed by the Defendants' U.S.-based affiliates—played an "essential role[]" in the U.S. MGB trading business by, among other things, managing customer relationships, marketing MGBs to U.S. investors, and arranging MGB trades with U.S. customers. *See* Pls.' Opp'n to Mot. to Dismiss for Lack of Personal Jurisdiction, ECF No. 200, at 4; ECF No. 206, at 4–5. These allegations—specific to *this* litigation—render implausible in *this* case the inference the court drew in the *EGB* decision: that foreign defendants "exercised control over" the U.S. affiliates' sales activities. *EGB*, 2020 WL 4273811 at *9.

Second, unlike here, the foreign defendants subject to personal jurisdiction in *EGB* allegedly maintained an in-forum branch office or designated the forum as a "trading hub." *See* Third Amended Complaint, *EGB*, No. 19-cv-2601 (S.D.N.Y. Dec. 3, 2019), ECF No. 87, at ¶ 16 (alleging that foreign defendants conducted business in this District through "branch offices and trading hubs"); *id.* ¶ 30 (identifying New York as foreign defendants' designated "trading hub")). The *EGB* decision repeatedly relied on these alleged U.S. contacts to find that foreign defendants transacted in the forum directly with U.S. investors or exerted control over their U.S. affiliates. *See, e.g.*, *EGB*, 2020 WL 4273811 at *9 ("Like MLI, Natixis, and Nomura International, UBS Europe treats New York as a fixed income trading hub"). Plaintiffs here allege no analogous in-forum contacts, and Defendants' sworn declarations refute such contacts.

Third, to the extent Plaintiffs are contending that the *EGB* decision should be interpreted to hold that Defendants' alleged activities—quoting prices, creating "recommendations," and collecting proceeds—suffice to create an agency relationship, that position would contravene the long line of post-*Schwab* precedent in this District.[3] Similarly, if Plaintiffs are suggesting that the *EGB* decision should be interpreted to hold that purporting to allege a profit-motivated antitrust conspiracy obviates the need for non-conclusory allegations linking in-forum trades with the alleged misconduct, that position would also contravene a long line of recent decisions in this district that have rejected identical bases for personal jurisdiction.[4]

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[3] *See, e.g.*, *City of Long Beach v. Total Gas & Power N. Am., Inc.*, 2020 WL 3057796, at *12 (S.D.N.Y. June 8, 2020); *Dennis v. JPMorgan Chase & Co.*, 2020 WL 729789, at *3 (S.D.N.Y. Feb. 13, 2020) ("*BBSW II*"); *In re Platinum & Palladium Antitrust Litig.*, 2020 WL 1503538, at *19-20 (S.D.N.Y. Mar. 29, 2020) ("*Platinum II*"); *In re SSA Bonds Antitrust Litigation*, 420 F. Supp. 3d 219, 232–35 (S.D.N.Y. 2019) ("*SSA II*");; *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2019 WL 1331830, at *9-10 (S.D.N.Y. Mar. 25, 2019) ("*LIBOR VIII*");.

[4] *See, e.g.*, *Allianz Glob. Inv'rs GmbH v. Bank of Am. Corp.*, 2020 WL 2085875, at *7 (S.D.N.Y. Apr. 30, 2020); *In re ICE LIBOR Antitrust Litig.*, 2020 WL 1467354, at *3 n.9 (S.D.N.Y. Mar. 26, 2020); *Contant v. Bank of Am. Corp.*, 385 F. Supp. 3d 284, 295 (S.D.N.Y. 2019); *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 204-06 (S.D.N.Y. 2018) ("*BBSW I*"); *SSA II*, 420 F. Supp. 3d at 241.

August 3, 2020

Respectfully submitted,

/s/ Adam S. Hakki

Adam S. Hakki

Attorney for Bank of America México, S.A.,
Institución de Banca Multiple, Grupo
Financiero Bank of America

cc: All Counsel of Record (Via ECF)