13-3565-cv(L)

13-3636-cv(CON), 15-432-cv(CON), 15-441-cv(CON), 15-454-cv(CON), 15-477-cv(CON), 15-494-cv(CON), 15-498-cv(CON), 15-524-cv(CON), 15-537-cv(CON), 15-547-cv(CON), 15-551-cv(CON), 15-611-cv(CON), 15-620-cv(CON), 15-627-cv(CON), 15-733-cv(CON), 15-744-cv(CON), 15-778-cv(CON), 15-825-cv(CON), 15-830-cv(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELLEN GELBOIM, on behalf of herself and all others similarly situated, LINDA ZACHER, SCHWAB SHORT-TERM BOND MARKET FUND, SCHWAB TOTAL BOND MARKET FUND, SCHWAB U.S. DOLLAR LIQUID ASSETS FUND, SCHWAB MONEY

(*Caption continued on inside covers*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (NEW YORK CITY)

BRIEF FOR *AMICI CURIAE* SCHOLARS DARREN BUSH, MICHAEL CARRIER, PETER C. CARSTENSEN, JOHN M. CONNOR, JOSHUA PAUL DAVIS, BETH FARMER, SHARON E. FOSTER, ELEANOR FOX, THOMAS L. GREANEY, JEFFREY L. HARRISON, THOMAS HORTON, HERBERT HOVENKAMP, J. GORDON HYLTON, JOHN B. KIRKWOOD, STEPHEN MARTIN, MARK PATTERSON, LAWRENCE J. WHITE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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FUND, on behalf of PRUDENTIAL CORE SHORT-TERM BOND FUND, PRUDENTIAL CORE TAXABLE MONEY MARKET FUND, SALIX CAPITAL US INC., DARBY FINANCIAL PRODUCTS, CAPITAL VENTURES INTERNATIONAL, CITY OF PHILADELPHIA, PENNSYLVANIA INTERGOVERNMENTAL COOPERATION AUTHORITY, FTC FUTURES FUND PCC LTD. on behalf of themselves and all others similarly situated, FTC FUTURES FUND SICAV, on behalf of themselves and all others similarly situated, METZLER INVESTMENT GMBH, on behalf of itself and all others similarly situated, 303030 TRADING LLC, ATLANTIC TRADING USA, LLC, GARY FRANCIS, NATHANIEL HAYNES, CITY OF NEW BRITAIN FIREFIGHTERS' AND POLICE BENEFIT FUND, on behalf of itself and all others similarly situated, MAYOR AND CITY COUNCIL OF BALTIMORE, TEXAS COMPETITIVE ELECTRIC HOLDINGS COMPANY LLC, REGENTS OF THE UNIVERSITY OF CALIFORNIA, EAST BAY MUNICIPAL UTILITY DISTRICT, SAN DIEGO ASSOCIATION OF GOVERNMENTS, CITY OF RICHMOND, RICHMOND JOINT POWERS FINANCING AUTHORITY, Successor Agency to the RICHMOND COMMUNITY REDEVELOPMENT AGENCY, CITY OF RIVERSIDE, RIVERSIDE PUBLIC FINANCING AUTHORITY, COUNTY OF SACRAMENTO, COUNTY OF SAN DIEGO, COUNTY OF SAN MATEO, COUNTY OF SONOMA, DAVID E. SUNDSTROM, in his official capacity as Treasurer of the county of Sonoma for and on behalf of SONOMA COUNTY TREASURY POOL INVESTMENT, CITY OF HOUSTON,

Plaintiffs-Appellants,

FTC CAPITAL GMBH, on behalf of themselves and all others similarly situated, FTC FUTURES FUND PCC LTD, on behalf of themselves and all others similarly situated, FTC FUTURES FUND SICAV, on behalf of themselves and all others similarly situated, CARPENTERS PENSION FUND OF WEST VIRGINIA, CITY OF DANIA BEACH POLICE & FIREFIGHTERS' RETIREMENT SYSTEM, Individually and on behalf of all others similarly situated, RAVAN INVESTMENTS, LLC, MAYOR AND CITY COUNCIL OF BALTIMORE, RICHARD HERSHEY, JEFFREY LAYDON, on behalf of himself and all others similarly situated, METZLER INVESTMENT GMBH, on behalf of itself and all others similarly situated, ROBERTO E. CALLE GRACEY, CITY OF NEW BRITAIN FIREFIGHTERS' AND POLICE BENEFIT FUND, on behalf of itself and all others similarly situated, AVP PROPERTIES, LLC, 303030 TRADING LLC, ATLANTIC TRADING USA, LLC, COMMUNITY BANK & TRUST, BERKSHIRE BANK, Individually and On Behalf of All Others Similarly Situated, 33-35 GREEN POND ROAD ASSOCIATES, LLC, on behalf of itself and all others similarly situated, ELIZABETH LIEBERMAN, on behalf of themselves and all other similarly situated, TODD AUGENBAUM, on behalf of themselves and all others similarly situated, GARY FRANCIS, NATHANIEL HAYNES, COURTYARD AT AMWELL II, LLC, GREENWICH COMMONS II, LLC, JILL COURT ASSOCIATES II, LLC, MAIDENCREEK VENTURES II LP, RARITAN COMMONS, LLC, LAWRENCE W. GARDNER, on behalf of themselves and all others similarly situated, ANNIE BELL ADAMS, on behalf of herself and all others similarly situated, DENNIS PAUL FOBES, on behalf of himself and all others similarly situated, LEIGH E. FOBES, on behalf of herself and all others similarly situated, MARGARET LAMBERT, on behalf of herself and all others similarly situated, BETTY L. GUNTER, on behalf of herself and all others similarly situated, GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO, CARL A. PAYNE, individually, and on behalf of other members

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Plaintiffs,

—against—

BANK OF AMERICA CORPORATION, BARCLAYS BANK PLC., CITIBANK NA, CREDIT SUISSE GROUP AG, DEUTSCHE BANK AG, HSBC HOLDINGS PLC., J.P. MORGAN CHASE & CO., NORINCHUKIN BANK, UBS AG, WESTLB AG, RABOBANK GROUP, DOES 1-10, HBOS PLC, BANK OF TOKYO-MITSUBISHI UFJ, LTD, ROYAL BANK OF CANADA, SOCIETE GENERALE, DEUTSCHE BANK

FINANCIAL LLC, DEUTSCHE BANK SECURITIES INC., BANK OF AMERICA, N.A., NATIONAL ASSOCIATION, JPMORGAN CHASE & CO., HSBC BANK PLC, WESTDEUTSCHE IMMOBILIENBANK AG, CITIGROUP INC, COOPERATIEVE CENTRALE RAIFFEISENBOERENLEENBANK B.A., JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, JPMORGAN CHASE BANK, BARCLAYS BANK PLC, LLOYDS BANKING GROUP PLS, HSBC HOLDING PLC, LLOYDS BANKING GROUP PLS, JPMORGAN CHASE BANK N.A., CITIGROUP, INC., CITIBANK N.A., BANK OF TOKYO-MITSUBISHI UFJ, LTD., COOPERATIVE CENTRALE-RAIFFEISEN-BOERNLEENBANK B.A., JPMORGAN CHASE BANK N.A., ROYAL BANK OF SCOTLAND, PLC, STEPHANIE NAGEL, BRITISH BANKERS' ASSOCIATION, BBA ENTERPRISES, LTD, BBA LIBOR, LTD, PORTIGON AG, JOHN DOES #1-#5, LLOYDS TSB BANK PLC, NATIONAL COLLEGIATE TRUST, CHASE BANK USA, N.A., CREDIT SUISSE GROUP, AG, CITIBANK, N.A., UBS SECURITIES LLC, J.P. MORGAN CLEARING CORP., BANK OF AMERICA SECURITIES LLC, BANK OF TOKYO-MISTSUBISHI UFJ, JPMORGAN & CO., BANK OF AMERICA N.A., CENTRALE RAIFFEISEN-BERENLEENBANK B.A., UBS AG, ROYAL BANK OF SCOTLAND GROUP PLC, SOCIETE GENERAL, ROYAL BANK OF CANADA, BANK OF NOVA SCOTIA, BANK OF TOKYO MITSUBISHI UFJ LTD., CHASE BANK USA, NA, ROYAL BANK OF SCOTLAND, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, ROYAL BANK OF SCOTLAND GROUP PLC.,

Defendants-Appellees,

LLOYDS BANKING GROUP PLC, CREDIT ARGICOLE, S.A., ROYAL BANK OF SCOTLAND GROUP PLC, CREDIT SUISSE GROUP, NA, BARCLAYS CAPITAL INC., BARCLAYS U.S. FUNDING LLC, CREDIT SUISSE SECURITIES (USA) LLC, BARCLAYS PLC, CITIZENS BANK OF MASSACHUSETTS, agent of RBS Citizens Bank, NA, RBS CITIZENS, N.A., FKA CITIZENS BANK OF MASSACHUSETTS, RBS CITIZENS, N.A., incorrectly sued as the Charter One Bank NA, BNP PARIBAS S.A, SUMITOMO MITSUI BANKING CORP., CITIIGROUP GLOBAL MARKETS INC., HSBC SECURITIES (USA) INC.,

Defendants.

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Atlantic Richfield Co. v. USA Petroleum Co.,
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Bell Atlantic Corp. v. Twombly,
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Broadcom Corp. v. Qualcomm, Inc.,
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Brunswick v. Pueblo Bowl-O-Mat,
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Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,
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In re Foreign Exchange Antitrust Litigation,
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In re LIBOR-Based Financial Instruments Antitrust Litigation,
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Indian Head, Inc. v. Allied Tube & Conduit Corp.,
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Irvin Industries, Inc. v. Goodyear Aerospace Corp.,
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Knevelbaard Dairies v. Kraft Foods, Inc.,
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Oneok, Inc. v. Learjet, Inc.,
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State Oil Co. v. Khan,,
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1996 Department of Justice and Federal Trade Commission
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ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW
DEVELOPMENTS (7th ed., 2012).. 21

J. Farrell, J. Hayes, C. Shapiro and T. Sullivan, "Standard Setting,
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M. Patterson, "Who is Responsible for Libor Rate-Fixing," Blog post,
The Harvard Law School Forum on Corporate Governance and
Financial Regulation (Dec. 26, 2013), *available at*

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R. Davis, "Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury," 70 Antitrust L.J. 697, No. 3 (2003)........... 21

INTEREST OF AMICI CURIAE

Amici Curiae are law professors and economists at U.S. law schools, business schools and economics departments who specialize in antitrust law and policy.[1] *Amici* support the appeal by plaintiffs of the decision below[2] dismissing their antitrust claims for failure to plausibly allege antitrust injury. Plaintiffs allege that the defendants violated Section 1 of the Sherman Act by colluding in the setting of the London Interbank Offered Rate (LIBOR) global interest rate benchmark, causing financial loss to the plaintiffs. *Amici* believe that the District Court erred in its application of the doctrine of antitrust injury. The ruling must be corrected lest it sow broader legal confusion and improperly constrain legal challenges to collusion in other markets, including other financial benchmarks.[3]

STATEMENT OF THE ISSUES

Did the District Court err in holding that the plaintiffs failed to plausibly plead antitrust injury in support of their claims under Section 4 of the Clayton Act, 15 U.S.C. § 15?

[1] *See* List of Amici Scholars, attached hereto as Addendum.

[2] *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 935 F.Supp.2d 666 (S.D.N.Y. 2013) ("*LIBOR*").

[3] No counsel for any party authored this brief in whole or in part and no person made a monetary contribution for its preparation or submission. It is filed on consent of counsel for all defendants.

STATEMENT OF FACTS

Amici adopt Plaintiffs' Statement of Facts in their consolidated brief on appeal, filed on May 20th, 2015.

SUMMARY OF ARGUMENT

The District Court's holding that the defendants' alleged collusion did not cause antitrust injury rests on two main findings: first, that the LIBOR-setting process is collaborative, not competitive, so any collusive rate-setting did not displace competition; any resulting harm therefore did not result from suppressed competition, so there was no antitrust injury. Second, the injury could have occurred in the absence of the alleged collusion, that is, in normal competitive conditions – hence, the plaintiffs may have been injured but it was not antitrust injury.

As to the first leg of the District Court's rationale, *Amici* focus on the upstream lending market, where each bank was expected to submit its daily estimated interbank borrowing costs independently to the British Banking Association (BBA), and on the downstream markets for the sale by the defendant banks of various financial instruments indexed to LIBOR.

The Court's finding that the banks did not compete in LIBOR rate-setting in the interbank lending market, as a predicate for its conclusion that any resulting injury from the alleged collusion was not antitrust injury,

invites scrutiny, and ultimately fails, on at least four grounds. First, each bank was motivated not only by an incentive to understate its borrowing costs to portray a picture of stronger financial health, but also by a desire not to substantially overstate or understate its estimated borrowing costs vis à vis those of the other banks contributing their data to the LIBOR fix, thereby prompting collusion. Second, resemblance between the BBA's LIBOR-setting process and the 'messenger model' in antitrust, and the structural safeguards in each of these mechanisms against improper information exchange, reflects the competitive interrelationship among the participants. Third, LIBOR-setting resembles standard setting, a collaborative process with judicially recognized potential competitive effects. And fourth, case law supports a finding of antitrust injury from rigging the LIBOR benchmark in the upstream interbank lending market.

As for the competitive downstream markets for the sale of LIBOR-indexed financial instruments to investors, the Supreme Court in *Brunswick v. Pueblo Bowl-O-Mat* ("*Brunswick*") instructed that antitrust "injury should reflect the anticompetitive effect either of the violation or of the anticompetitive effects made possible by the violation."[4] Even assuming, *arguendo*, that the LIBOR-setting process was entirely collaborative, so that

[4] 429 U.S. 477, 489 (1977).

any collusion among the banks could not displace competition among them at the rate-setting stage, the suppression of downstream competition, as the "anticompetitive acts made possible by the violation," surely constitutes antitrust injury.

The second leg of the Court's rationale – that whatever harm the plaintiffs may have suffered is not *antitrust injury* because it could have occurred even in the absence of the alleged collusion, that is, in normal competitive conditions – similarly collapses on closer scrutiny. Accepting this application of the antitrust injury doctrine would eviscerate private antitrust litigation: assuming away the alleged collusion would leave only independent conduct by the banks here, and any resulting injury would not be the kind the antitrust laws were intended to prevent.

ARGUMENT

I. Antitrust Injury

In order to sustain a claim for damages under U.S. federal antitrust law, private plaintiffs must show that they have standing under Section 4 of the Clayton Act. One element of standing is antitrust injury. As the Supreme Court has explained, antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful;" also, "[t]he injury should reflect the

anticompetitive effect *either of the violation or of anticompetitive acts made possible by the violation*."[5] And as the District Court notes in the decision below, "[a]lthough 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' [. . . and] 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 defendants' conduct."[6]

II. The First Leg of the Court's Rationale Mischaracterizes the LIBOR-Setting Process as Entirely Cooperative and Improperly Isolates It from Competition by the Defendants in the Downstream Markets.

The crux of the Court's rationale for the first leg of its holding dismissing the antitrust claims is that notwithstanding defendants' alleged collusion, plaintiffs failed to allege that their harm resulted from an "antitrust aspect" of the defendants' conduct. The LIBOR-setting process itself, starting with each bank's daily submission of rates, is not itself competitive, the Court reasoned. Implied in this logic is the assumption that

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[5] *Brunswick,* 429 U.S. at 489 (emphasis added).

[6] *LIBOR*, 935 F.Supp.2d at 686 (S.D.N.Y. 2013) (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) ("*ARCO*")) (emphasis in original).

a process said to be cooperative, as a component of a larger whole, cannot be turned to anticompetitive purposes or thus distort competition itself. As the lower court opined, the defendants' conduct "did not displace competition where it normally would have occurred."[7]

But the Court's underlying rationale, and its conclusion, are flawed. First, the LIBOR-setting process contains elements of both collaboration (the process by which the banks were expected to submit their estimated borrowing costs) and competition. To say that the LIBOR defendants' conduct did not displace competition where it normally would have occurred ignores the opportunity for anticompetitive abuse of a semi-collaborative process among competitors. It also neglects the effect of collusion on their interaction as competitors in the downstream markets, and on the plaintiffs. On both accounts, the District Court's conclusion that LIBOR-setting is cooperative, not competitive, does not withstand closer scrutiny.

The rate-setting process was intended to be 'blind': the banks were required to submit their daily estimated interbank loan interest rates without consulting with their peer BBA panel banks, resulting in an objectively determined average – the benchmark rate. 'Blind' submission was presumably intended to prevent collusive distortion of the LIBOR rate, so

[7] *Id.* at 693.

that it would accurately reflect an average of each bank's perception of the market and other conditions affecting its own borrowing costs. If this independent process is compromised, the LIBOR rate predictably is distorted. Notwithstanding the foregoing, the Court reasoned that because the rate setting process is itself not competitive, such distortion through collusion is not anticompetitive, and the resulting harm from the collusion cannot constitute antitrust injury.

To test the rationale for this first leg of the Court's rationale, one must examine the relationships and conduct of the banks in both the upstream interbank lending market and the downstream markets for the sale of financial instruments indexed to LIBOR.

A. The Interrelationship of the Banks in the Interbank Lending Market

Four possible approaches shed light on the character of the LIBOR-setting process in the interbank lending market.

1. Defendants' incentive to compete in their self-portrayal of financial health warrants credit under *Twombly* as a question of fact on the competitive component of the LIBOR-setting process.

The banks were allegedly motivated in their submission of estimated interbank borrowing costs in part by the desire to portray themselves as financially more solvent than they were, and thus, typically, to understate

their expected borrowing costs. At the same time, no bank wanted to state its costs appreciably below those of any other bank because it would then be flooded with requests to draw on pre-existing credit lines. If too low, that bank likely would see an increased demand for credit that it could not profitably supply because its borrowing costs would be higher than what it represented. Alternatively, if the bank were to price its rates higher than the market rate, no client likely would draw on the credit lines and the bank would incur significant deadweight losses from uninvested capital.

In short, one of the banks' principal incentives to collude in submitting what were supposed to be independent estimates was the desire not to be 'the odd man out'. As reflected in the Barclays' settlement, each bank could quite plausibly have had independent reasons to understate or overstate its expected interbank borrowing costs. But there was a constraint on this independent incentive and it stems from each bank's relationship with the other banks: appreciably understating or overstating its estimated borrowing costs would hurt it vis à vis its competitor peers unless they all submitted substantially similar estimates – hence, the incentive to ensure that they would join in any understatement (or overstatement). In this respect, the interplay of the independent incentives of each bank to suppress LIBOR

and the competitive interrelationship of the banks could plausibly prompt the alleged collusion.

Not wanting to be 'the odd man out' reflects a competitive dynamic in the interbank lending market itself, which the District Court's monochromatic characterization of LIBOR-setting as 'cooperative' appears to ignore. Also, dismissal before discovery for lack of antitrust injury forecloses the opportunity for the plaintiffs to seek factual support for their contention that the banks are driven by competitive incentives in submitting their estimated costs to the BBA. The contention should be credited under *Twombly*[8] as plausibly showing that LIBOR-setting has sufficient competitive characteristics to warrant discovery on this question of fact.

2. The resemblance between the antitrust 'messenger model' and the LIBOR-setting process, *as intended*, reflects the competitive relationship of the participants.

The LIBOR-setting process, as intended, bears a marked resemblance to the 'messenger model' in antitrust. Under this model, an independent third-party entity collects information about prices and price conditions from providers, as a conduit, in order to negotiate on their behalf with payors. For instance, the 1996 Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care set forth

[8] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

guidelines for compliance with antitrust law by such information exchange activity in health care.[9] The Statements prescribe rigorous adherence to the messenger model as a key safeguard for achieving procompetitive efficiencies in payor-provider contracting, with independent submission of pricing information by a third-party messenger to prevent providers, as competitors, from conferring and agreeing on price terms or conditions. This, too, may be characterized as a cooperative mechanism, just like LIBOR rate setting, in that it imposes a framework and set of operational rules and requires participation at an individual and collective level in order to function effectively, but it is also structured in recognition of the competitive relationship among the providers.[10] Certainly, just as participating physicians compete on the services they provide, so the banks in *LIBOR* compete downstream in the sale of LIBOR-indexed products. And the messenger model, like LIBOR-setting, has been abused, with anticompetitive effects.

The similarity to the messenger model of the BBA-required independent submission of estimated borrowing costs reflects the underlying competitive interrelationship of the banks. In this regard, as well, the

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[9] *Available at* http://www.justice.gov/atr/public/guidelines/0000.htm.

[10] Id., Statement 6 (regarding provider participation in exchanges of price and cost information).

Court's characterization of the LIBOR-setting process as entirely cooperative, so as to preclude discovery relevant to the possibility of antitrust injury from the banks' alleged collusion, is shortsighted and creates the problem of false negatives.

3. Judicial treatment of standard setting holds lessons for correctly interpreting the nature of LIBOR-setting and the possibility of antitrust injury from its collusive manipulation.

A useful analogy may be drawn between the LIBOR-setting process and standard setting, which, when abused, has led to antitrust liability.

Standard setting is a collaborative process, usually among competitors, who cooperate in the development of standards (e.g., wireless communications standards) and in following certain ground rules for standard setting (such as licensing terms for standard essential patents); also they compete to have their intellectual property included in the standard that ultimately emerges from the standard setting process. Competition among the participants for inclusion of their IP (or bare technology) in the standard within the collaborative standard setting process has been one of the key conceptual 'hooks' in stating antitrust claims that a participant has abused the standard setting process.[11]

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[11] *See generally* J. Farrell, J. Hayes, C. Shapiro and T. Sullivan, "Standard Setting, Patents, and Hold-Up," 74 Antitrust L.J. 603 (Issue 3, 2007).

It is undeniable that standard setting, as described above, involving competition among the participants for inclusion of their technology or intellectual property in the standard, differs from the collaborative LIBOR-setting process by the banks with the BBA. But, on the whole, standard setting is treated by the courts as a collaborative process. And assuming compliance with standard setting organization rules to prevent capture of a standard and subsequent abusive exploitation of the power gained through ownership of intellectual property that is essential to the standard (e.g., patent hold-up), antitrust gives a qualified 'pass' to this collaboration among competitors because of the procompetitive, efficiency-enhancing benefits that typically result from standard setting. Also, there can be downstream harm to users of the technology encompassed by the standard, so that they also might have an antitrust claim stemming from the standard setting.

As one commentator has observed: "Standards resemble Libor rates in that they are both forms of collectively created information that define the products offered on the market. And the standard-setting process resembles Libor rate-setting because both are collaborative information-gathering processes. The processes are not themselves competition in the usual sense, as [the District Court] points out, but they are part of collective processes

that [are] intended to and [do] have competitive effects."[12] In short, collaborative standard setting is predicated on agreement among its participants and thus restrains trade when it is anticompetitive.

Furthermore, efforts by the District Court to distinguish *Allied Tube & Conduit Corp. v. Indian Head, Inc.*[13] are misguided. In *Allied Tube*, the Second Circuit found injury from distortion of what was intended to be a collaborative process for standard setting.[14] The District Court herein sought to distinguish the case, first, because the Supreme Court's decision addressed only the question of petitioning immunity under the Noerr-Pennington doctrine,[15] and, second, on the question of antitrust injury, because unlike in *Allied Tube*, where the plaintiff alleged that collusion distorting a cooperative process[16] "gave the defendants an advantage over

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[12] M. Patterson, "Who is Responsible for Libor Rate-Fixing," Blog post, The Harvard Law School Forum on Corporate Governance and Financial Regulation (Dec. 26, 2013), *available at* http://blogs.law.harvard.edu/corpgov/2013/12/26/who-is-responsible-for-libor-rate-fixing.

[13] 486 U.S. 492 (1988).

[14] *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (2d Cir. 1987).

[15] *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[16] The incumbent steel interests packed a vote of the Fire Protection Association of America for safety standards for insulation of electrical wire in order to prevent certification of plaintiff's newer, PVC, technology.

their competitors," here the LIBOR plaintiffs did not allege that "defendants' suppression of LIBOR gave them an advantage over their competitors."[17]

Two observations are in order: First, the District Court in *LIBOR* failed to consider the Second Circuit's *Allied Tube* decision, which squarely addressed and found antitrust liability for abuse of the standard setting process as an illegal agreement in restraint of trade in violation of Section 1 of the Sherman Act; and the appellate decision has been widely cited as authoritative precedent on antitrust liability from distortion of collaborative standard setting. Second, the only significance that may attach to the *LIBOR* plaintiffs' not alleging that the collusion gave the defendants a competitive advantage over their competitors is that the plaintiffs in this case, of course, are not competitors of the defendants, but instead purchasers or consumers from the defendants. And it is beyond question that antitrust affords rights of redress from injury to both purchasers and competitors.

In sum, *Allied Tube* and other cases concerning standard setting, which recognize the possibility of antitrust injury, whether to competitors or downstream users or purchasers of technology based on the standardized technology, have significant bearing on allegations that distortion through

[17] *LIBOR*, 935 F.Supp.2d at 693.

collusion of a collaborative benchmark process can result in antitrust injury to purchasers of financial instruments indexed to that benchmark figure.[18]

4. Case law supports a finding of antitrust injury from rigging the LIBOR benchmark in the upstream interbank lending market.

Appellants' consolidated brief, among others, thoroughly addresses case law, including *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), finding antitrust injury where defendants collude to rig a benchmark as a component of price. To this point, even assuming the LIBOR-setting process may be characterized as collaborative in part, there is no principle in antitrust that would *a priori* exempt the distortion of a collaborative process among competitors from having anticompetitive effects and causing antitrust injury. As the Supreme Court has noted, "the machinery employed by a combination for price-fixing is immaterial." *United States v. Socony-Vaccuum Oil Co.*, 310 U.S. 150, 223 (1940). The ongoing vitality of this principle is reflected in a recent decision by the Supreme Court holding that the Natural Gas Act does not preempt state law antitrust claims (some of them modeled on the Sherman Act) by retail natural gas buyers who alleged that natural gas traders collusively

[18] *See, e.g., Hydrolevel Corp. v. Am. Soc'y of Mech. Eng'rs,* 456 U.S. 556 (1982); *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297 (3d Cir. 2007); *In re Dell Computer Corp.*, 121 F.T.C. 616 (1996).

manipulated prices by voluntarily reporting false information to two trade publications which collected this information and then published the most widely-used price indices. *Oneok, Inc. v. Learjet, Inc.*, 2015 WL 1780926 (S.Ct. April 21, 2015) (Breyer, J.) These indices served as reference points for buyers and sellers to determine the market prices for natural gas transactions. The collusion allegedly led to excessively high retail gas prices. The reporting process was no less 'collaborative' than the defendant banks' submission of their daily estimated borrowing costs to the BBA and the underlying claims of collusive misrepresentation by competing energy traders of pricing information are closely analogous to the conduct at issue herein.

B. The Interrelationship and Conduct of the Banks in the Downstream Markets.

Brunswick itself suggests that, to look for any anticompetitive effects, we examine the nature of the interrelationship of the banks not only in the upstream interbank lending market but also in the downstream markets where they sell LIBOR-indexed financial instruments. As the court below stated, citing *Brunswick*, to constitute antitrust injury, the "injury should reflect the anticompetitive effect either of the violation *or of the*

anticompetitive acts made possible by the violation."[19] The "violation" and "the anticompetitive acts made possible by the violation" cannot be the same thing. If the "violation" is the alleged collusive price (LIBOR)-fixing, then the anticompetitive acts "*made possible* by the violation" must refer in this case not to the self-same conduct, i.e., the collusion, but to the subsequent pricing by the defendants of their financial instruments pegged to the LIBOR rates, where allegedly plaintiffs paid more or received less than they would have in a market free from the collusion. These are the acts made possible by the violation.

The question then resolves to whether the injury also or alternatively reflects the anticompetitive effects of these acts – that is, the pricing of the instruments, or the interest rates on them, which have allegedly been influenced by the collusive rate-setting. The lower court concluded that the injury does not reflect the anticompetitive effects of these acts, on the rationale that the rate-setting process is not one in which the banks compete in submitting their daily estimated interbank borrowing rates. But even assuming, *arguendo*, that the banks did not compete in the LIBOR-setting process, they still are expected to compete in marketing their LIBOR-indexed financial instruments. If, however, they have distorted the LIBOR

[19] *LIBOR*, 935 F.Supp.2d at 686 (quoting *Brunswick*, 429 U.S. at 489) (emphasis added).

rate as a group so as to cause their customers (the plaintiffs) to pay more or receive less than in the absence of the collusion, then the acts made possible by the violation – the pricing of the instruments based on collusive setting of LIBOR – are anticompetitive, and the alleged injury suffered as a result of that pricing constitutes antitrust injury.

Furthermore, what is 'cooperative' in the 'but for' world, as a component in the calculus of the financial instruments, evidently does not obscure or diminish the competitive character of the banks' efforts to outsell each other in the downstream markets. The banks' conduct in the 'but for' world was not any the less competitive in the sale of the instruments for being based in part on the LIBOR-setting process, however 'cooperative' it may be; for the same reason, the suppression of that competition through collusion in that process cannot logically be said to *promote* competition or otherwise have no effect on it.

As with the treatment of LIBOR-setting itself by the District Court, its handling of the alleged effects in the downstream market of collusion in the upstream interbank lending market begs rather than squarely addresses the question of antitrust injury; given the allegations, the issue is at the very least a question of fact worthy of discovery.

III. The District Court's Additional Rationale – that 'Plaintiffs Could have Suffered the Same Harm under Normal Circumstances of Free Competition' – is Logically Flawed and Misapplies Supreme Court Precedent.

For the second leg of its rationale, the District Court explained that the plaintiffs could have suffered the same harm under normal circumstances of free competition and that plaintiffs' alleged loss thus "did not occur 'by reason of that which made the [conduct] unlawful'" under the antitrust laws.[20] Instead, as in *Brunswick* and *ARCO*, the lower court found, "the alleged harm 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."[21] According to the Court, the independent incentives of any given bank to misrepresent its borrowing costs would be consistent with the two motives alleged by the plaintiffs – namely, first, to portray itself as financially more solvent than it actually was, and second, to pay lower interest rates on LIBOR-based financial instruments that defendants sold to investors. And "precisely because the process of setting LIBOR is not competitive," the Court continued, "collusion among

[20] *LIBOR*, 935 F.Supp.2d at 689-92 (citing *Brunswick*, 429 U.S. at 488 (1977)).
[21] *Id.* at 690.

defendants would not have allowed them to do anything that they could not have done otherwise."[22]

A. The "Trap of the Irrelevant Hypothetical"

If one applied the District Court's rationale as the *ratio decidendi* for antitrust injury to any claim of collusion, whether a concerted refusal to deal, conspiracy to fix prices or reduce output, or the like, then virtually all such claims would collapse on a motion to dismiss for failure to show antitrust injury because in virtually all such instances, what an individual defendant may not do legally in concert with competitors, it may legally do unilaterally, such as unilaterally setting a given price or refusing to deal. The illegality thus stems from the concerted nature of the conduct, which distorts the expected competitive, market-driven motives of firms. If each of several sellers independently and unilaterally decides not to sell to a given prospective buyer, the harm to the buyer is the same as if the sellers decided jointly not to sell to it; but only in the latter instance would the injury be the kind the antitrust laws are intended to address, in prohibiting joint refusals to deal as illegal boycotts while respecting firms' right unilaterally, as a general principle, to decide whom they deal with and on what terms.[23] Just because

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[22] *Id.* at 691.

[23] *Compare Federal Trade Commission v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (group boycott violates Sect. 1 of the Sherman Act) *with*

conduct *absent the collusion* would be legal under antitrust law does not mean that the plaintiffs' allegations of collusion do not satisfy the burden on a motion to dismiss of plausibly showing antitrust injury.

The flaw in the logic adopted by the Court in *LIBOR* has been recognized before, in a seminal article on antitrust injury, and it has a 'handle' – the "Trap of the Irrelevant Hypothetical."[24] The Trap of the Irrelevant Hypothetical is the "fallacious proposition that any time one can construct a counterfactual hypothetical in which (a) the facts are changed such that there is no antitrust violation, yet (b) the plaintiff still suffers damage similar to the injury it actually suffered as a result of the violation, there is no antitrust injury."[25] The hypothetical is fallacious because "such a hypothetical can *always* be created[; and, t]herefore, conscientiously applied, the Irrelevant Hypothetical leads ineluctably to the conclusion that no plaintiff ever suffers antitrust injury. It wipes out all private antitrust litigation."[26]

United States v. Colgate & Co., 250 U.S. 300 (1919) (upholding right of manufacturer unilaterally to announce pricing policies and terminate distributors who failed to follow them).

[24] *See* R. Davis, "Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury," 70 Antitrust L.J. 697, No. 3 (2003).

[25] Id. at 725, n.103.

[26] Id. *See also* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (7th ed., 2012) at 763 (describing the Sixth Circuit's earlier 'necessary predicate test' for antitrust injury, which more

B. The District Court's Reliance on *Brunswick* and *ARCO* for its Rationale is Misplaced; the Court Correctly States their Teaching on Antitrust injury but Misapplies It.

The District Court purports to rely on *Brunswick* and *ARCO* to show an absence of antitrust injury when hypothetical independent conduct would result in the same injury as concerted conduct, but this reliance is misplaced.

1. *Brunswick* – 'no antitrust injury from more competition' – does not support the District Court's rationale.

The lower court first cites *Brunswick* in support of the proposition that because the plaintiffs here could have suffered the same harm under normal circumstances of free competition, they fail to plausibly plead antitrust injury. In *Brunswick*, Pueblo Bowl-O-Mat, a bowling alley operator, alleged that the acquisitions of certain financially distressed bowling alleys by Brunswick, a much larger, 'deep-pockets' operator, violated Section 7 of the Clayton Act. The Court dismissed for lack of antitrust injury. Although the plaintiffs, as competitors, might have suffered injury, it clearly was not the kind that Section 7 of the Clayton Act was intended to prevent, namely, supracompetitive prices, a reduction of output or other consequences from

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recently it has limited to circumstances where the plaintiff's injury clearly would have been caused by other actual factors, not hypothetical occurrences), and 763, n.80 (noting that the Sixth Circuit's earlier version of the test has not been adopted by other circuits, citing cases from the Second, Third, Fourth, Fifth and Ninth Circuits). The Sixth Circuit thus also fell into the Trap with its earlier 'necessary predicate test'.

the acquisition of power through merger that might substantially lessen competition or tend to create a monopoly. The reason was simple: the plaintiffs claimed a loss of future income from the acquisitions because the distressed alleys otherwise would have gone bankrupt and exited the market; in short, plaintiffs sought a *reduction* of competition whereas Section 7 is intended to prevent a substantial loss of competition.[27]

Even assuming the acquisitions were unlawful, given the 'deep pockets' of the purchaser and that the plaintiffs' injury occurred by reason of such unlawful acquisitions, the alleged injury still did not occur by reason of that which *made* the acquisitions unlawful. The plaintiffs would have suffered the identical loss had the acquired alleys instead obtained refinancing or been purchased by shallow-pockets parents instead of a deep-pockets operator, and thus, for this reason also, they were not injured by reason of that which (otherwise) made the acquisitions unlawful – i.e., the size of the acquiring company.[28] The plaintiffs would have suffered the same injury anyway – from more, not less, competition. *Brunswick* thus teaches that there is no antitrust injury to plaintiff competitors from an

[27] *Brunswick*, 429 U.S. at 485-88.
[28] *Id.* at 487.

acquisition that results in more, or at least not substantially less, competition than before the acquisition at issue.[29]

The question then arises whether the *sine qua non* of the *Brunswick* holding on antitrust injury is that there is no antitrust injury if the plaintiffs would suffer the same injury – in this case, lost profits – even absent the conduct that allegedly violates the antitrust laws (the acquisition by a deep-pockets operator), or instead that there is no antitrust injury if the object of the plaintiff's complaint would enhance rather than reduce competition. Both characterizations accurately describe *Brunswick*. For the propositions to constitute accurate tests for antitrust injury, however, they should retain their logical consistency and 'sense' in other circumstances as well. But in fact, assuming away alleged collusion on the *LIBOR* facts and conjuring a hypothetical of similar damage from independent conduct by the defendant banks cannot make sense because here, and as a general proposition, it leads necessarily to the conclusion not only that the plaintiffs suffer no antitrust injury but also that no plaintiff ever could suffer antitrust injury – at least not in the collusive conduct scenario, where independent unilateral conduct of the same nature by the same defendants would result in the same injury. A test for antitrust injury that would eviscerate private antitrust litigation

[29] *Id.* at 488.

cannot be correct. It is thus only the alternative proposition that is meaningfully testable and makes logical sense – namely, that there is no antitrust injury if the harm complained of results from competition-enhancing rather than competition-reducing conduct.

The correct antitrust injury test from *Brunswick* applied to the allegations in *LIBOR* asks whether the conduct at issue reduced or enhanced competition. Plaintiffs allege that the banks' collusion in failing to independently submit their estimated borrowing costs reduced competition, resulting in the plaintiffs receiving lower payments on (or paying more for) the financial instruments. Plaintiffs satisfy the *Brunswick* test and the case thus does not provide the support for the rationale that the Court claims.

2. *ARCO* – 'maximum RPM policy cannot cause antitrust injury to competitor unless predatory' – also does not support the District Court's rationale.

The Supreme Court's decision in *ARCO*[30] is similarly unavailing as support for the District Court's conclusion that the LIBOR plaintiffs did not suffer antitrust injury. USA Petroleum, an owner of independent discount gas stations, lost sales to ARCO, whose branded gas was selling at the same price as USA Petroleum's discount gas as a result of maximum resale price-fixing agreements it entered into with its dealers allegedly in an effort to

[30] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (*"ARCO"*).

increase its retail market share. USA Petroleum sued under Section 1 of the Sherman Act alleging that the (then-)per se illegal maximum RPM agreements by ARCO with its dealers illegally suppressed the retail price of ARCO gasoline and thereby caused USA Petroleum to lose profits.[31] The Court held that the plaintiff failed to establish antitrust injury from the antitrust violation: although the maximum RPM pricing was per se unlawful, it could cause no injury to a *competitor* unless it was also predatory, that is, unless the defendant priced below cost to drive competitors out of business.[32] The Supreme Court explained that maximum RPM is "unlawful because of its potential effects on dealers and consumers, not because of its effect on *competitors*."[33] The plaintiff's alleged injury – lost profits from the maximum RPM agreements – did not reflect the anticompetitive effect sought to be prevented by the prohibition.

Just as in *Brunswick*, the Court in *ARCO* in effect held that there can be no antitrust injury from conduct that enhances competition, and as the District Court noted, in the absence of predatory pricing, "'cutting prices to

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[31] At the time of the suit, maximum resale price maintenance (RPM) was per se illegal under *Albrecht v. Herald Co*., 390 U.S. 145 (1968). *Albrecht* was overruled in 1997 by *State Oil Co. v. Khan*, 522 U.S. 3 (1997), which held that maximum RPM is subject to the rule of reason.
[32] *ARCO*, 495 U.S. 337-340.
[33] *Id.* at 336. The harm sought to be prevented from maximum RPM was, among other things, the risk that the maximum resale (retail) price might be fixed too low for a dealer to furnish related services desired by consumers.

increase business often is the very essence of competition'."[34] And yet, the lower court's reliance on *ARCO*, just as with its reliance on *Brunswick*, is misplaced. Instead of applying the Supreme Court's test in *ARCO* – does the alleged injury reflect the anticompetitive effect of the alleged violation – which requires an examination of the rationale for the prohibition, the District Court instead reverts to its more formulaic test, that is, whether the alleged injury *could* have resulted from normal competitive conduct. But, once again, the assumption of normal competitive conduct is the "Irrelevant Hypothetical," which, as shown, leads to a meaningless result.

ARCO, properly understood, therefore lends no support for the Court's use of the test that if there is still injury even if the anticompetitive conduct is removed, then it is not antitrust injury.

C. Other Case Law Supports a Finding that Plaintiffs Plausibly Pled Antitrust Injury.

Case law in the Second Circuit, including most recently in the Southern District of New York, rejects the antitrust injury rationale utilized in *LIBOR*.

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[34] *LIBOR*, 935 F.Supp.2d at 690 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

1. Second Circuit case, addressing causation, rejects reasoning utilized by Judge Buchwald.

The Second Circuit has rejected the very line of reasoning employed by the District Court in finding no antitrust injury, but instead framed in terms of causation. In *Irvin Industries, Inc. v. Goodyear Aerospace Corp.*, a Second Circuit panel reversed a summary judgment dismissal of a contractor's predatory pricing claim under Section 2 of the Sherman Act.[35] The district court held that Irvin failed to show sufficient facts that would enable it to prove causation. Irvin and Goodyear were competing to win a government defense contract for a product used to decelerate bombs when dropped from low-flying aircraft. For the relevant time period, the Army's fiscal year 1986, Irvin bid $376 per unit; Goodyear, the incumbent provider, reduced its bid price to $332 per unit from $608 per unit for 1985. Irvin sued for predatory pricing, alleging that Goodyear's average variable cost, the measure for determining illegal predatory pricing, was between $367.16 and $378.82, well above its $332 bid price.

Although the district court found that Goodyear had monopoly power, as the prior sole source provider of the product, and that its bid of $332 was predatory, it ruled that Irvin could not establish as a matter of law that the predatory bid caused the alleged injury – Irvin's lost profits from not

[35] 974 F.2d 241 (2d Cir. 1992) ("*Goodyear*").

winning the contract. The court reasoned that Goodyear could have bid above $367 yet below Irvin's bid of $376 and thereby underbid Irvin without engaging in predatory pricing; in this way, then, Goodyear lawfully could have won the contract. The district court concluded that because Goodyear thus could have lawfully won the contract, it was not the unlawful nature of Goodyear's bid that caused Irvin to lose the contract but instead Irvin's own bid price; the court then reasoned on this basis that Irvin had not shown causation. But what Goodyear *could* have done, the Court of Appeals emphasized in reversing the lower court, is not what Goodyear in fact did: "Goodyear argues . . . that it would have won the contract anyway with a lawful bid between $367.16 and $376. But Goodyear did not submit such a bid. The possibility that it might have submitted a lawful bid, and if so, the same damage might have resulted, cannot in and of itself negate causation as a matter of law."[36]

Framed in terms of antitrust injury instead of causation, Goodyear's argument is exactly equivalent, in logical terms, to contending that hypothetical legal pricing negates antitrust injury. The court found that

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[36] *Id.* at 245 and 246, n.3 (citing *Lee-Moore Oil Co. v. Union Oil Co. of Calif.*, 599 F.2d 1299, 1302 (4th Cir. 1979) (reversing dismissal for lack of 'competitive injury', reasoning that if plaintiff could show damages resulting from defendant's unlawful refusal to deal, "the fact that [defendant] might have caused the same damages by a lawful cancellation of the contract is irrelevant")).

"under the facts of [the] case[,] the possibility that Irvin would have lost the contract anyway [if Goodyear had submitted a lawful bid] is too speculative to negate, as a matter of law, the causal link shown by Irvin" between the predatory bid and Irvin's loss of the contract.[37] Similarly, the possibility that each of the *LIBOR* defendants independently would submit figures equivalent to those they submitted allegedly through collusion, which the District Court credits as negating antitrust injury, is equally speculative.

The antitrust injury inquiry – whether the injury reflects the anticompetitive effect or competition-reducing aspects of the challenged conduct – is distinct from the causation inquiry – whether the challenged conduct materially caused the alleged injury. But there is no principled difference in the invalidity of the test proposed by Goodyear as applied to determining causation – or to antitrust injury in another case: it fails on either inquiry. If a court assumes away the violation or other plausible causation-related allegations on a motion to dismiss then of course the court will find no causation. For the same reason, there can be no antitrust injury on the assumption that the defendants *could* have engaged in legal conduct that would have resulted in the same injury to the plaintiff as if they had engaged in illegal anticompetitive conduct, because the injury then would

[37] *Id.* at 246.

not reflect the anticompetitive or competition-reducing aspects of the violation or conduct.

In short, in *Goodyear* the Second Circuit, on a causation analysis, clearly rejected the reasoning employed by the District Court herein as to antitrust injury.[38] Logic and Second Circuit precedent itself strongly suggest that the rationale employed by the lower court herein, elsewhere discredited, cannot negate antitrust injury in *LIBOR* on a motion to dismiss, before discovery.

2. In *FOREX*, a sister district court in this Circuit, addressing alleged collusion concerning a similar financial benchmark, expressly rejected the *LIBOR* rationale on antitrust injury.

As previously suggested, the *LIBOR* rationale on antitrust injury also would improperly preclude the factual inquiry that *Twombly* authorizes, once the threshold showing has been plausibly made. And so a sister court in the Southern District of New York has recently opined, correctly, in the FOREX litigation.[39]

In *FOREX*, defendants, some of the world's largest banks (including many of the *LIBOR* defendants), cited the *LIBOR* rationale in contending

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[38] The lower court herein, however, did not mention, let alone discuss, *Goodyear*.

[39] *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 2015 WL 363894 (S.D.N.Y. Jan. 28, 2015) ("*FOREX*").

that their alleged collusive manipulation of foreign exchange benchmarks did not cause antitrust injury because "plaintiffs would have suffered the same injury from any alleged manipulation of the London fix even if individual defendants had unilaterally engaged in such manipulation."[40] Rejecting this argument as "doom[ing] almost every price-fixing claim at the pleading stage," Judge Schofield in *FOREX* explained that the defendants' argument, "if accepted, would impose an additional pleading requirement: that private antitrust plaintiffs must plead that the alleged antitrust violation could not have occurred through Defendants' unilateral action."[41] The requirement that a plaintiff present evidence ruling out unilateral action does not apply at the pleading stage but instead only later, on summary judgment or at trial. The *LIBOR* rationale would turn this rule on its head. As Judge Schofield further explained, expressly disagreeing with the reasoning in *LIBOR*, "[t]o the extent *LIBOR I* suggests that no antitrust injury will be found at the pleading stage where 'the harm alleged . . . could have resulted from normal competition conduct' [. . .] this Court respectfully disagrees with its conclusion because it blurs the lines between two separate analytic

[40] *Id.* at *11 (quoting defendants' argument).
[41] *Id.*

categories – the sufficiency of a complaint under *Twombly* and antitrust injury."[42]

IV. Conclusion

The doctrine of antitrust injury must be applied rigorously and correctly, lest it improperly foreclose plaintiffs' right to discovery, whether in this case, in other financial benchmark cases or as a matter of general antitrust jurisprudence. On the basis of the foregoing, *Amici* respectfully submit that the District Court misapplied, if not misconstrued, antitrust injury, and therefore request that this Court reverse the District Court's dismissal of the antitrust claims.

Dated: May 27, 2015

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[42] *Id.* at *12 (quoting *LIBOR*, 935 F. Supp. 2d at 690).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,982 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

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ADDENDUM

List of Amici Scholars

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