13-3565-cv(L)

13-3636-cv(CON), 15-0432-cv(CON), 15-0441-cv(CON), 15-0454-cv(CON), 15-0477-cv(CON), 15-0494-cv(CON), 15-0498-cv(CON), 15-0524-cv(CON), 15-0537-cv(CON), 15-0547-cv(CON), 15-0551-cv(CON), 15-0611-cv(CON), 15-0620-cv(CON), 15-0627-cv(CON), 15-0733-cv(CON), 15-0744-cv(CON), 15-0778-cv(CON), 15-0825-cv(CON), 15-0830-cv(CON)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ELLEN GELBOIM, on behalf of herself and all others similarly situated,

(For Continuation of Caption See Inside Cover)

On Appeal from the United States District Court
for the Southern District of New York, No. 11 MD 2262 (NRB)

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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May 26, 2015

Linda Zacher, Schwab Short-Term Bond Market Fund, Schwab Total Bond Market Fund, Schwab U.S. Dollar Liquid Assets Fund, Schwab Money Market Fund, Schwab Value Advantage Money Fund, Schwab Retirement Advantage Money Fund, Schwab Investor Money Fund, Schwab Cash Reserves, Schwab Advisor Cash Reserves, Charles Schwab Bank, N.A., Charles Schwab & Co., Inc., Charles Schwab Corporation, Schwab YieldPlus Fund, Schwab YieldPlus Fund Liquidation Trust, 33-35 Green Pond Road Associates, LLC, on behalf of itself 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, Metzler Investment GmbH, on behalf of itself and all others similarly situated, 303030 Trading LLC, Atlantic Trading USA, LLC, 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, Mayor and City Council of Baltimore, City of New Britain Firefighters' and Police Benefit Fund, on behalf of itself and all others similarly situated, Texas Competitive Electric Holdings Company LLC, Guaranty Bank & Trust Company, Individually and on behalf of all others similarly situated, National Credit Union Administration Board, as Liquidating Agent of U.S. Central Federal Credit Union, Western Corporate Federal Credit Union, Members United Corporate Federal Credit Union, Southwest Corporate Federal Credit Union, and Constitution Corporate Federal Credit Union, City of Philadelphia, Pennsylvania Intergovernmental Cooperation Authority, Darby Financial Products, Capital Ventures International, Salix Capital US Inc., Prudential Investment Portfolios 2, FKA Dryden Core Investment Fund, on behalf of Prudential Core Short-Term Bond Fund, Prudential Core Taxable Money Market Fund, City of Riverside, Riverside Public Financing Authority, East Bay Municipal Utility District, County of San Mateo, San Mateo County Joint Powers Financing Authority, City of Richmond, Richmond Joint Powers Financing Authority, Successor Agency to the Richmond Community Redevelopment Agency, County of San Diego, County of Sonoma, David E. Sundstrom, in his official capacity as Treasurer of the county of Sonoma for and on behalf of the Sonoma County Treasury Pool Investment, Regents of the University of California, San Diego Association of Governments, County of Sacramento, The County of Mendocino, City of Houston, Bay Area Toll Authority, Joseph Amabile, Louie Amabile, individually & on behalf of Lue Trading, Inc., Norman Byster, Michael Cahill, Richard Deogracias, individually on behalf of RCD Trading, Inc., Marc Federighi, individually on behalf of MCO Trading, Scott Federighi, individually on behalf of Katsco, Inc., Robert Furlong, individually on behalf of XCOP, Inc., David Cough, Brian Haggerty, individually on behalf of BJH Futures, Inc., David Klusendorf, Ronald Krug, Christopher Lang, John Monckton, Philip Olson, Brett Pankau, David Vecchione, individually on behalf of Vecchione & Associates, Randall Williams, John Henderson, 303 Proprietary Trading LLC, Margery Teller, Nicholas Pesa, Eduardo Restani, Vito Spillone, Prudential Investment Portfolios 2, FKA Dryden Core Investment 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 others 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 of the general public similarly situated, Kenneth W. Coker, individually, and on behalf of other members of the general public similarly situated, City of Riverside, Riverside Public Financing Authority, East Bay Municipal Utility District, County of San Mateo, San Mateo County Joint Powers Financing Authority, City of Richmond, Richmond Joint Powers Financing Authority, Successor Agency to the Richmond Community Redevelopment Agency, County of San Diego, Guaranty Bank & Trust Company, Individually and on behalf of all others similarly situated, Heather M. Earle, on behalf of themselves and all others similarly situated, Henryk Malinowski, on behalf of themselves and all others similarly situated, Linda Carr, on behalf of themselves and all others similarly situated, Eric Friedman, on behalf of themselves and all others similarly situated, County of Riverside, Jerry Weglarz, Nathan Weglarz, on behalf of plaintiffs and a class, Directors Financial Group, individually and on behalf of all others similarly situated, SEIU Pension Plans Master Trust, individually and on behalf of all others similarly situated, Highlander Realty, LLC, Jeffrey D. Buckley, Federal Home Loan Mortgage Corporation, County of Sonoma, David E. Sundstrom, in his official capacity as Treasurer of the county of Sonoma for and on behalf of the Sonoma County Treasury Pool Investment, Regents of the University of California, San Diego Association of Governments, CEMA Joint Venture, County of Sacramento, City of Philadelphia, Pennsylvania Inter-

governmental Cooperation Authority, Principal Funds, Inc., PFI Bond & Mortgage Securities Fund, PFI Bond Market Index Fund, PFI Core Plus Bond I Fund, PFI Diversified Real Asset Fund, PFI Equity Income Fund, PFI Global Diversified Income Fund, PFI Government & High Quality Bond Fund, PFI High Yield Fund, PFI High Yield Fund I, PFI Income Fund, PFI Inflation Protection Fund, PFI Short-Term Income Fund, PFI Money Market Fund, PFI Preferred Securities Fund, Principal Variable Contracts Funds, Inc., PVC Asset Allocation Account, PVC Money Market Account, PVC Balanced Account, PVC Bond & Mortgage Securities Account, PVC Equity Income Account, PVC Government & High Quality Bond Account, PVC Income Account, PVC Short-Term Income Account, Principal Financial Group, Inc., Principal Financial Services, Inc., Principal Life Insurance Company, Principal Capital Interest Only I, LLC, Principal Commercial Funding, LLC, Principal Commercial Funding II, LLC, Principal Real Estate Investors, LLC, Texas Competitive Electric Holdings Company LLC, Salix Capital Ltd.,

Plaintiffs,

– v. –

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-Raiffeisenboernleenbank 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-Mitsubishi 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 Agricole, 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., Citigroup Global Markets Inc., HSBC Securities (USA) Inc.,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent and non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1]

The AAI submits this amicus brief in support of plaintiffs-appellants because the district court's erroneous application of the antitrust-injury doctrine, if upheld, threatens to undermine the enforcement of the Sherman Act against criminal price-fixing conspiracies when the means used to effectuate the conspiracies, such as fraud, arguably are not "competitive." The opinion below fundamentally misapprehends the range of conduct that can violate

[1] All parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae has made a monetary contribution to its preparation or submission. The AAI's Board of Directors alone has approved this filing for the AAI. Individual views of directors or members of the Advisory Board may differ from the AAI's positions. Several members of the AAI's Advisory Board or their law firms represent parties on either side of this matter; they played no role in the directors' deliberations or the drafting of this brief.

the Sherman Act, which does not distinguish between price-fixing conspiracies effectuated through "competitive" and "non-competitive" means.

INTRODUCTION AND SUMMARY OF ARGUMENT

Antitrust violations are often committed by fraud. *See, e.g., Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (no preemption of state antitrust claims alleging price-fixing conspiracy based on fraudulent manipulation of natural gas industry benchmark); *United States v. Broce*, 488 U.S. 563 (1989) (upholding Sherman Act conviction for bid-rigging based on false bids); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) (monopolist's fraud on the patent office may violate Section 2 of the Sherman Act). And while common law and non-antitrust statutory remedies are sometimes available to address fraudulent conduct, antitrust law addresses unique concerns when fraud is used to obtain or maintain a monopoly, or when competitors conspire to restrain trade through the use of fraud. Thus, in prosecuting the manipulation of LIBOR as wire fraud *and* price fixing, the government has emphasized the fraudulent aspects of the scheme that particular banks and their traders "concocted to manipulate these key LIBOR rates," as well as the collusive nature of the scheme. Press Release, Assistant Attorney General Bill Baer Delivers Remarks for the Deutsche Bank Manipulation of LIBOR Conference Call (Apr.

23, 2015), http://www.justice.gov/atr/public/press_releases/2015/313382.pdf ("It is important to highlight that Deutsche Bank's traders conspired with competing traders too.").

The district court's dismissal of the complaints reflects an unduly restrictive approach to antitrust conspiracies predicated upon fraud. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 688 (S.D.N.Y. 2013) ("Plaintiffs' injury . . . resulted from defendants' misrepresentation, not from harm to competition."); *id.* at 689 ("This theory is one of misrepresentation, and possibly of fraud, but not of failure to compete."); *id.* at 692 ("the injury plaintiffs suffered derived from misrepresentation, not from harm to competition"). While not every conspiracy among competitors to commit fraud violates the antitrust laws, a conspiracy using fraud to fix prices in markets in which the competitors compete is a per se antitrust violation for which criminal and civil antitrust remedies are entirely appropriate.

The district court's dismissal of the complaints for failure to allege antitrust injury was wrong for three reasons. First, the court misapprehended the principal locus of harm to competition alleged in the complaints. Even if the *means* used by the defendants were not themselves "competitive," plaintiffs adequately pleaded harm to markets in which defendants do compete,

namely the markets for LIBOR-based financial instruments. Second, the district court failed to recognize that price fixing impairs competition, and is per se illegal, even when it affects only one element of price, or the starting point for negotiations. The fact that the terms of LIBOR-based financial instruments—other than LIBOR—were set by competition and market forces provides no basis for the court's conclusion that plaintiffs failed to allege harm to competition in the affected markets. Third, the district court erred in concluding that antitrust injury is lacking because defendants could have inflicted the same injury on plaintiffs without engaging in collusion. The court fell into "the trap of the Irrelevant Hypothetical." In assessing antitrust injury, courts are required to assume the violation alleged—here, that defendants did collude to suppress LIBOR. Plaintiffs' injuries flow from the collusion that makes the defendants' acts unlawful under the Sherman Act, and therefore they have alleged antitrust injury.

ARGUMENT

I. THE DISTRICT COURT MISAPPREHENDED THE LOCUS OF HARM TO COMPETITION

The district court accepted, at various points, that plaintiffs alleged a per se violation of the Sherman Act for price fixing. *See* 935 F. Supp. 2d at 686 n.7, 687, 688. That is consistent with the proper approach to antitrust injury, which assumes a completed violation. *See infra* note 9. However,

the court reasoned that plaintiffs alleged no injury from any "anticompetitive aspect" of the violation because their injury stemmed from a process or "arena" in which defendants "never did and never were intended to compete." 935 F. Supp. 2d at 688-89. In other words, because the defendants do not compete in the "LIBOR-setting process itself," the court believed that manipulation of LIBOR did not amount to a "competitive" injury.

An initial problem with this reasoning is that it is contradictory. How could a conspiracy to manipulate LIBOR be a per se, criminal antitrust offense[2] if it involves no harm to competition?[3] The reason that horizontal price fixing is per se illegal is that it is *inherently* anticompetitive. As the Supreme Court explained in the seminal *Socony-Vaccum* case:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they

[2] As noted above, the Justice Department has brought criminal antitrust charges against some of the defendants in connection with the manipulation of LIBOR. *See also infra* at 7-8.

[3] The logical implication of the court's conclusion that an agreement to fix LIBOR does not harm competition is that there is no antitrust violation at all. Indeed, that is exactly what defendants argued below. *See* Mem. of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Antitrust Claims 22-25 (June 29, 2012) (Doc. 26) (hereafter "Def. Mem."). Defendants' antitrust-injury argument was one paragraph and followed from the purported failure to allege a restraint of trade. *See id.* at 4, 27 ("For the same reasons they fail to allege any restraint on competition, Plaintiffs fail to allege the required 'antitrust injury' needed to establish standing.").

> would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).[4]

And when purchasers of price-fixed products or services are injured because they pay higher prices for those products or services, there is no doubt that such injury qualifies as antitrust injury. *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 482-83 (1982) ("an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress"). Likewise, when sellers receive less because of buyer price fixing, they suffer antitrust injury. *See Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219, 243 (1948). Thus, in *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789(LGS), 2015 WL 363894 (S.D.N.Y. Jan. 28, 2015) *(FOREX)*, the court found that purchasers of foreign currency instruments

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[4] The district court observed that "conduct in violation of the Sherman Act might reduce, increase, or be neutral with regard to competition," citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (*ARCO*). 935 F. Supp. 2d at 686. But *ARCO* involved a vertical maximum-price-fixing agreement, which frequently has pro-competitive effects. In contrast, horizontal price fixing is inherently anticompetitive, even if it may be ineffective in some circumstances. *Cf. Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (per se rule appropriate for restraints that have "manifestly anticompetitive effects . . . and lack any redeeming virtue." (internal quotation marks and alteration omitted)).

suffered antitrust injury from colluding banks' conspiracy to manipulate a foreign exchange benchmark similar to LIBOR because "a consumer's injury of having to pay supra-competitive prices as a result of a horizontal price-fixing conspiracy is the quintessential antitrust injury." *Id.* at *12.

Beyond its contradictory nature, the problem with the court's reasoning is that the court misapprehended the principal locus of the harm to competition alleged in the complaints. Even if the defendants do not compete over the setting of LIBOR, they manifestly *do* compete in the markets for LIBOR-based financial instruments, as defendants conceded. *See* Def. Mem. at 3.[5] And in these markets competition is plainly harmed. In other words, while plaintiffs allege that defendants fixed the LIBOR benchmark, the "price fixing" in antitrust terms occurs in the markets the conspirators seek to affect. *See, e.g., United States v. Deutsche Bank AG,* No. 3-15CR61-RNC (D. Conn. Apr. 23, 2015) (criminal information alleging price-fixing

[5] The district court recognized that defendants also compete in the market for interbank loans, and that "LIBOR is a proxy for the interbank lending market." 935 F. Supp. 2d at 692. But the court concluded that there was no harm to competition in this market, notwithstanding that "if LIBOR was set at an artificial level, it no longer reflected competition in the market for interbank loans and its value as a proxy for that competition was diminished, even 'snuffed out.'" *Id.* Given that the LIBOR process was designed to ensure that the reporting of rates reflected, and did not subvert, competition in the interbank loan market—and such a competitor collaboration would not be permitted otherwise—it is difficult to understand how the subversion of the process did not harm competition in the interbank loan market.

conspiracy to "fix the price of Yen LIBOR-based derivative products by fixing Yen LIBOR, a key component of the price thereof"); *United States v. Royal Bank of Scotland PLC*, No. 3-13CR74-MPS (D. Conn. Apr. 12, 2013) (same); *Socony-Vacuum*, 310 U.S. at 190-91 (conspiracy by major oil companies to fix wholesale and retail gasoline prices was effectuated by the companies' "fixing" spot market prices to which wholesale prices were pegged); *cf. Oneok,* 135 S. Ct. 1591 (conspiracy among natural gas sellers to fix retail natural gas prices by fraudulently manipulating industry benchmark on which such prices were based).

The district court erred by focusing entirely on whether plaintiffs were injured by anticompetitive aspects of the *mechanism* used to fix prices, rather than the anticompetitive effects of defendants' conduct in the markets in which the defendants compete. *See ARCO*, 495 U.S. at 344 ("antitrust injury requirement . . . ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect *or effect* of the defendant's behavior") (emphasis omitted; emphasis added); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation"). There is no requirement that the mechanism for fixing prices itself be a "competitive" one. *Socony-Vacuum,* 310 U.S. at 222

(agreements to raise or lower prices are illegal "whatever machinery for price-fixing [is] used"); *e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (upholding Section 1 violation for conspiracy to subvert association's consensus standard-setting process, which adversely affected competition in markets in which association members competed).[6] Indeed, nothing is more common than cartelists using otherwise lawful co-operative activity (i.e., trade associations) as a means to effectuate their price-fixing conspiracies. *See, e.g., Sugar Institute v. United States*, 297 U.S. 553 (1936); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

To be sure, the district court stated that plaintiffs failed to allege any restraint on competition in the market for LIBOR-based financial instru-

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[6] The district court recognized that, "[l]ike the LIBOR-setting process, the process of forming the safety standard [in *Allied Tube*] was a cooperative endeavor by otherwise-competing companies under the auspices of a trade association." 935 F. Supp. 2d at 693. The court purported to distinguish *Allied Tube* by the fact that the conspiracy gave defendants "a competitive advantage" over their rival, and no such advantage is alleged here. *Id.* But "harm to competition" is obviously not limited to conduct that harms competitors. *See, e.g., In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677 (2d Cir. 2009) (consumers have standing to challenge higher prices resulting from monopolist's exclusion of competitor). Quite the opposite. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (antitrust laws were enacted for "the protection of competition, not competitors"). In *Allied Tube*, if no rival had been excluded but the standard was adopted to prevent the use of a cheaper product because of that product's lower margins, then downstream consumers who paid supracompetitive prices would surely suffer antitrust injury and be able to recover. *See also infra* note 8.

ments. 935 F. Supp. 2d at 688. But the court's erroneous conclusion on this point is predicated on its misunderstanding that competition is not restrained if ultimate prices continue to be set by market forces, as explained in the following section.[7]

II. THE DISTRICT COURT FAILED TO RECOGNIZE THAT A PRICE-FIXING CONSPIRACY IMPAIRS COMPETITION EVEN WHEN ONLY ONE ELEMENT OF PRICE IS FIXED

The district court's understanding of "harm to competition" is unduly narrow and incorrect. The court recognized that "the prices of LIBOR-based financial instruments are set through competition, and that a change in LIBOR may have altered the baseline from which market actors competed to set the price of LIBOR-based instruments." 935 F. Supp. 2d at 691. However, the court concluded, "competition proceeded unabated and plaintiffs have alleged no sense in which it was displaced." *Id.* According to the court, "the price of LIBOR-based financial instruments can be set at any level above or below LIBOR, and thus defendants' alleged conspiracy to fix LIBOR did not constrain the free and competitive bargaining of actors in the market for LIBOR-based financial instruments." *Id.* at 694; *see also id.* at

[7] In discussing whether plaintiffs alleged harm to competition in the market for LIBOR-based financial instruments, the court, in circular fashion, also referred back to the fact that the "alleged collusion occurred in an arena in which defendants never did and never were intended to compete." 935 F. Supp. 2d at 689.

693 ("the price of LIBOR-based financial instruments had always contained a 'fixed' component—LIBOR—and thus defendants' alleged conspiracy . . . did not displace competition."); *see also* Def. Mem. at 25 (arguing that there is no restraint of trade because "buyers and sellers are free to seek out the most favorable rates that the market will bear, regardless of USD LIBOR levels").

The court failed to recognize that a conspiracy to fix any component of a price is per se illegal and harms competition, even if the price-setting process is otherwise subject to competition. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (horizontal agreement to eliminate one form of competition among sellers—credit sales—is per se illegal even if it could ultimately lead to corresponding decreases in invoice prices); *Socony-Vacuum*, 310 U.S. at 220, 224 n.59 ("fact that sales on the spot markets were still governed by some competition is of no consequence;" "[p]rice fixing agreements may or may not be aimed at complete elimination of price competition"). In short, the fact that the alleged conspiracy "altered the baseline from which market actors competed to set the price of LIBOR-based instruments," 935 F. Supp. 2d at 691, is sufficient to establish that the alleged scheme harmed competition (and was per se illegal), particularly in light of

the allegation that the scheme was intended to depress the interest rates on LIBOR-based financial instruments defendants issued to investors.[8]

III. THE DISTRICT COURT FELL INTO THE TRAP OF THE IRRELEVANT HYPOTHETICAL

The district court also erred in holding that the absence of antitrust injury is "confirmed" by the fact that "the plaintiffs here could have suffered the same injury had each bank decided independently to submit an artificially low LIBOR quote." 935 F. Supp. 2d at 689, 691. In "more traditional antitrust conspiracies," the district court stated, "the sellers' supracompetitive prices could exist only where the sellers conspired not to compete." *Id*. at 690-91. Here, "collusion among defendants would not have allowed them to do anything that they could not have done otherwise." *Id*. at 691. "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." *Id*. at 690.

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[8] The district court also found no competitive harm because there is no allegation that defendants improved their position relative to their competitors. 935 F. Supp. 2d at 691, 692; *see also supra* note 6. However, that would be true of *any* price-fixing conspiracy; competitors that are *not* part of the conspiracy benefit because they can take advantage of the resulting pricing umbrella and/or "cheat" on the cartel without reprisal. That is why competitors generally have no standing to challenge the price fixing of rivals. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.8 (1986); Hebert Hovenkamp, *Federal Antitrust Policy* 655 (4th ed. 2011).

The district court's reasoning is deeply flawed, and its hypothesis is a red herring. It may be true that collusion is not a "necessary" ingredient of the plaintiffs' claimed injury in this case, but collusion is not a necessary ingredient of a plaintiff's claimed injury in any case. Collusion is a necessary ingredient of a claimed *violation*. What the court calls "[t]he question"—"whether [defendants] could have caused plaintiffs the same injury had they acted independently," *id*. at 691—is a tautology. Every economic injury caused by collusion *could* be caused by the colluding firms instead acting independently. The relevant question, which the court elides, is whether the plaintiffs' injuries flow from the collusion that makes the defendants' acts unlawful under the Sherman Act.

Particularly in the context of price setting, "[t]he Sherman Act contains a basic distinction between concerted and independent action." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984). The Act flatly prohibits competitors from doing collusively what it unequivocally permits them to do independently, with good reason. "If Congress prohibited independent action that merely restrains trade . . ., that prohibition could deter perfectly competitive conduct." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 n.2 (2010). "[C]oncerted action," however, "may be remedied simply through prohibition," because it "'deprives the market-

place of independent centers of decisionmaking that competition assumes and demands.'" *Id.* at 190 (quoting *Copperweld*, 467 U.S. at 768-69). That is why "[p]roof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the Act." *Socony-Vacuum*, 310 U.S. at 224. At the same time, mere interdependent oligopoly pricing—which has exactly the same effect as price fixing—is not unlawful. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553-54 (2007).

Moreover, courts assessing antitrust injury are required to assume the alleged antitrust violation.[9] In this case, the district court was required to assume the defendants *did* collude, and did not act unilaterally. It is therefore irrelevant whether defendants could have suppressed LIBOR without collud-

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[9] As Professors Areeda and Hovenkamp have explained, "the antitrust injury element of standing demands that the plaintiff's alleged injury result from the threat to competition that underlies the alleged violation." 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 335, at 74 (3d ed. 2007). "To test standing in a private suit, therefore, the court should assume the existence of a violation[.]" *Id*. at 75; *see ARCO*, 495 U.S. at 347 (Stevens, J., dissenting); *Brunswick*, 429 U.S. at 489; *Gatt Communs., Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 76 n.9 (2d Cir. 2013) ("When assessing antitrust injury, we assume that the practice at issue is a violation of the antitrust laws[.]"); *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 437 (2d Cir. 2005) ("[W]hile the issue of an antitrust violation in this case is by no means clear, for purposes of this appeal we assume the alleged violation and assess only plaintiffs' standing to pursue their claim.").

ing.[10] As the district court in *FOREX* explained, "Defendants' argument—that there can be no antitrust injury where they could have accomplished unilaterally the same result that they allegedly achieved through collusion—does not even implicate the concept of antitrust injury." *FOREX*, 2015 WL 363894 at *11. The *FOREX* court rejected the reasoning of the court below because it "blurs the lines between two separate analytic categories—the sufficiency of a complaint under *Twombly* and antitrust injury"—and "would doom almost every price-fixing claim at the pleading stage." *Id.* at *11-*12.

One commentator aptly summarized the flaw in the district court's reasoning as follows:

> [T]he phrase ["and that flows from that which makes the defendant's acts unlawful"], read out of context by those unmindful of the point of *Brunswick*, *Cargill*, and *ARCO*, has led not a few courts into what we may call the trap of the Irrelevant

[10] The district court also theorized that it would have been "rational" and "sustainable" for the defendants to act independently rather than collusively in suppressing LIBOR, because to do so would have been consistent with the banks' "normal commercial incentives" to portray themselves as economically healthier than they actually are and to pay artificially lower interest rates on the LIBOR-based financial instruments they issue to investors. 935 F. Supp. 2d at 690-91; *see also In re LIBOR-Based Financial Instruments Antitrust Litig.*, 962 F. Supp. 2d 606, 627 (S.D.N.Y. 2013) (denying motion to amend as futile because plaintiffs did not plausibly allege "that each defendant failed to act in its independent individual self-interest"). While a motive to act independently may constitute circumstantial evidence militating against a finding of conspiracy, it has no analytical relevance to the question whether plaintiffs' injuries flow from the defendants' *collusion*, which is what makes their acts unlawful under Section 1 of the Sherman Act.

> Hypothetical. The trap of the Irrelevant Hypothetical is the fallacious proposition that any time one can construct a counter-factual 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.
>
> The proposition is fallacious for two reasons. First, such a hypothetical can *always* be created. Therefore, conscientiously applied, the Irrelevant Hypothetical leads ineluctably to the conclusion that no plaintiff ever suffers antitrust injury. It wipes out all private antitrust litigation. . . .
>
> Second, the Irrelevant Hypothetical leads a court away from the whole point of the antitrust injury exercise, as laid out in *Brunswick, Cargill*, and *ARCO*, which is to determine [whether the plaintiff's injury is within] the intended purpose of the statute or rule invoked by the plaintiff.

Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L.J. 697, 725 n.103 (2003); *see also* Richard Wolfram, *In Re Libor: More Light, Please!* at 35, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584746 (Jan. 28, 2015) (making similar point).

In deciding the antitrust-injury question based on hypothetical harm from independently suppressed LIBOR submissions, the district court committed this well-worn error. Plaintiffs' alleged injuries flow from the collusion that makes the defendants' acts unlawful under the Sherman Act. Accordingly, they have alleged antitrust injury.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgments of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 29(d), this amicus brief is proportionally spaced, has a typeface of 14 points in Times New Roman font using Microsoft Word 2008, and contains 4,088 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Richard M. Brunell

May 26, 2015

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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