UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ALUMINUM WAREHOUSING ANTITRUST LITIGATION	MDL No. 2481 Master Docket No. 13 MD 2481 (PAE)
This Document Relates To: *In re Aluminum Warehousing Antitrust Litigation* (First Level Purchaser Plaintiffs), Case No. 1:14-cv-03116-PAE (S.D.N.Y.) *Agfa Corporation and Agfa Graphics, N.V. v. The Goldman Sachs Group, Inc.* (Agfa), Case No. 1:14-cv-0211-PAE (S.D.N.Y.) *Mag Instrument, Inc. v. The Goldman Sachs Group, Inc.* (Mag), Case No. 1:14-cv-00217-PAE (S.D.N.Y.) *Eastman Kodak Company v. The Goldman Sachs Group, Inc.* (Kodak), Case No. 1:14-cv-06849-PAE (S.D.N.Y.) *FUJIFILM Manufacturing U.S.A., Inc. v. Goldman Sachs & Co., et al.* (Fujifilm), Case No. 1:15-cv-08307-PAE (S.D.N.Y.)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AGAINST THE FLPS' AND IPS' UMBRELLA CLAIMS

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INTRODUCTION

Defendants submit this memorandum in support of their motion for summary judgment against all "umbrella" claims asserted by the First-Level Purchasers ("FLPs") and the Individual Plaintiffs ("IPs").[1] "Umbrella" claims are antitrust claims asserted by plaintiffs who purchase goods or services from non-conspiring third parties rather than from the defendants. *See, e.g.*, *In re LIBOR-Based Financial Instruments Antitrust Litig.*, 2016 WL 7378980, at *15–16 & n.26 (S.D.N.Y. 2016) ("*LIBOR VI*"). Seven of the eight FLPs and IPs—all of them except Ampal—assert umbrella claims exclusively. During the alleged conspiracy period, these seven Plaintiffs purchased all of their aluminum from non-defendant suppliers; none acquired any aluminum from a Defendant or an alleged co-conspirator. The eighth Plaintiff, Ampal, acquired all of its aluminum from non-defendant third parties except for approximately 2,200 metric tons of aluminum it purchased from defendant Glencore Limited ("Glencore") and alleged co-conspirator Century Aluminum ("Century").[2] Accordingly, if this motion is granted, the claims of all FLPs and IPs other than Ampal will be eliminated in their entirety, and Ampal's claims will be narrowed to the roughly 2,200 tons of aluminum it acquired from Glencore and Century.

"The overwhelming majority of recent court decisions that have addressed the viability of the umbrella theory" have held that umbrella purchasers lack "efficient enforcer" standing to assert antitrust claims. *LIBOR VI*, 2016 WL 7378980, at *15 n.24. Moreover, a "critical mass of judges within this district" have applied the rule against umbrella claims in a series of "benchmark price"

[1] All references to "Ex." are to the exhibits accompanying the Declaration of John S. Playforth dated September 2, 2020. Unless otherwise noted, emphasis is added, and citations and internal quotations are omitted.

[2] Defendant Glencore Ltd. held a minority stake in Century during the period in question. Defendants believe that Plaintiffs have not adequately alleged that Century was a co-conspirator and in any event cannot show that Century (or Defendants) participated in any alleged conspiracy, but those issues are beyond the scope of this narrow motion.

antitrust cases much like this one in which (i) the defendants allegedly manipulated a benchmark price, and (ii) the plaintiffs' claims arose from contracts with non-defendants that incorporated the benchmark price. *In re London Silver Fixing, Ltd., Antitrust Litig.*, 332 F. Supp. 3d 885, 905 (S.D.N.Y. 2018) ("*Silver II*"). These cases recognize that the "independent decision" of a non-defendant third party to incorporate a benchmark price into a contract with a plaintiff "breaks the chain of causation between defendants' actions and a plaintiff's injury." *LIBOR VI*, 2016 WL 7378980, at *16. These cases also recognize that "hold[ing] defendants trebly responsible for transactions, over which defendants had no control, in which defendants had no input, and from which defendants did not profit would result in damages disproportionate to wrongdoing." *Silver II*, 332 F. Supp. 3d at 908. For these reasons and others, "courts in this District have drawn a line between plaintiffs who transacted directly with defendants and those who did not." *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC*, 366 F. Supp. 3d 516, 533 (S.D.N.Y. 2018).

This case presents an even stronger basis for denying efficient enforcer standing to umbrella purchasers than the other benchmark price cases considered in this District. Plaintiffs here allege that (i) Defendants conspired to manipulate a benchmark price for aluminum, and (ii) Plaintiffs entered into contracts with non-defendant aluminum suppliers that either incorporated or were influenced by the allegedly-manipulated benchmark. Like the other benchmark price cases decided in this District, the "independent decision[s]" of non-defendant third parties to include a benchmark price in some (but not all) of their contracts with Plaintiffs "breaks the chain of causation" between Plaintiffs' alleged injuries and Defendants' alleged misconduct. *See LIBOR VI*, 2016 WL 7378980, at *16. But unlike those other benchmark cases, this case involves an unusually long and complex chain of causation that renders Plaintiffs' claims especially indirect and attenuated. Furthermore, exposing Defendants to treble damages claims

arising from the *millions* of tons of aluminum sold by third-party suppliers would create the prospect of "potentially astronomical damages totally untethered from any wrongful profits made by defendants." *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 560 (S.D.N.Y. 2017). Purchasers that acquired their aluminum directly from Defendants, by contrast, "present little concern of disproportionate damages because any losses suffered from defendants' manipulation would have resulted in wrongful profits to defendants." *Id*.

This Court should therefore join the many other courts in this District "that have drawn a line between plaintiffs who transacted directly with defendants and whose who did not," *Sonterra*, 366 F. Supp. 3d at 533, and grant summary judgment for Defendants against Plaintiffs' umbrella claims.

FACTUAL BACKGROUND

A. Plaintiffs' claims.

The FLPs and IPs assert highly similar claims: all eight of those Plaintiffs accuse Defendants of conspiring to inflate a benchmark price—the Platts Midwest Premium—in an effort to earn supra-competitive profits on aluminum they sold during the alleged conspiracy period. *See, e.g.*, *Eastman Kodak Co. v. Henry Bath LLC*, 936 F.3d 86, 96 (2d Cir. 2019) ("[Plaintiffs'] allegations are that the defendants restrained the market . . . by artificial manipulation of a number (the Midwest Premium) that serves as a price component for sales of the metal."); FLP 3d Am. Compl., ECF No. 738 ("FLP Compl.") ¶ 424 (alleging injury based on "artificially-inflated pricing component benchmarks such as the Midwest Premium"); IP Joint Am. Compl., ECF No. 745 ("IP Compl.") ¶ 322 (same); Fujifilm Am. Compl., ECF No. 886 ("Fuji Compl.") ¶ 323 (same).

The crux of the FLPs' complaint is that Defendants conspired to raise the Midwest Premium by lengthening aluminum delivery queues at London Metal Exchange ("LME") warehouses. (Class Cert. Order, ECF No. 1274, at 6; FLP Compl. ¶¶ 603–607.) Defendants

supposedly carried out this alleged conspiracy through six distinct types of conduct. First, the Defendant trading firms acquired the Defendant LME warehouse firms following the financial crisis. (Class Cert. Order at 18–19; FLP Compl. ¶¶ 464–472.) Second, the Defendant warehouse firms allegedly made large "incentive payments" to attract deposits of aluminum. (Class Cert. Order at 20; FLP Compl. ¶¶ 8, 9(b).) Third, the warehouse Defendants allegedly treated the LME's "minimum load-out rule as a *de facto* maximum." (Class Cert. Order at 23; FLP Compl. ¶¶ 523–531.) Fourth, the Defendant trading firms allegedly "coordinated the timing" of their Metro Detroit warrant cancellations to "maximize the impact of those cancellations on queues." (Class Cert. Order at 24; FLP Compl. ¶¶ 567–573.) Fifth, some or all of the Defendants allegedly agreed "not to de-stock each other's warehouses." (Class Cert. Order at 21; FLP Compl. ¶¶ 510–522.) And sixth, Metro Detroit allegedly entered into so-called "merry-go-round" transactions with three of its customers (not including Goldman Sachs or JPMorgan) that purportedly lengthened the Metro Detroit delivery queue. (Class Cert. Order at 25–26; FLP Compl. ¶¶ 559–566.)

The IPs assert almost exactly the same claims. Like the FLPs, the IPs assert that Defendants conspired to inflate the Midwest Premium by lengthening LME warehouse queues. (IP Compl. ¶ 322; *see also id.* ¶¶ 289–294; Fuji Compl. ¶¶ 288–295.) And like the FLPs, the IPs allege that Defendants used six distinct types of conduct to carry out the purported conspiracy: (i) acquiring LME warehouses following the financial crisis (IP Compl. ¶ 3; Fuji Compl. ¶ 3); (ii) paying large incentives to attract aluminum to those warehouses (IP Compl. ¶ 5; Fuji Compl. ¶ 7); (iii) treating the LME's minimum load-out rate as a maximum (IP Compl. ¶¶ 210–218; Fuji Compl. ¶¶ 196–204); (iv) engaging in coordinated warrant cancellations at Metro Detroit (IP Compl. ¶¶ 254–260; Fuji Compl. ¶¶ 229–234); (v) agreeing not to destock each other's

warehouses (IP Compl. ¶ 5; Fuji Compl. ¶ 7); and (vi) engaging in "merry-go-ground transactions" at Metro Detroit (IP Compl. ¶¶ 246–260; Fuji Compl. ¶¶ 217–252).

The FLPs and IPs also agree that the ultimate goal of the alleged conspiracy was to "enable the Financial Defendants to realize artificially inflated prices in selling off their positions in primary aluminum." *Eastman Kodak*, 936 F.3d at 96; *see also id.* ("The purpose was to inflate the prices of the metal, so that the defendants' large stocks of aluminum would be re-sold at artificially inflated prices because of their inflation of the Midwest Premium.").[3] The FLPs and IPs further agree on the following five-step theory of injury and causation:

1. Defendants' warehouse-related conduct allegedly lengthened the aluminum queue at Metro Detroit. (Class Cert. Order at 19–26; IP Compl. ¶¶ 254–260; Fuji Compl. ¶¶ 229–234.)

2. Longer queues at Metro Detroit allegedly caused unknown participants in the spot market to enter into spot transactions at higher prices.[4]

3. These spot transactions allegedly were reported to Platts surveyors and allegedly caused Platts to raise its assessment of the Midwest Premium.[5]

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[3] *See also Eastman Kodak*, 936 F.3d at 97 ("The complaints asserted that the defendants' objective was to restrain the market for the purchase and sale of aluminum by inflating the prices the defendants would realize in their sales by reason of the inclusion of the inflated Midwest Premium as a price element."); IPs' Reply Br., *Eastman Kodak Co. v. Henry Bath LLC*, No. 16-4230, ECF No. 413 (2d Cir. Aug. 15, 2017) at 1–2 ("[D]efendants set out to and did in fact restrain supply in [the] physical aluminum market in order to reap supracompetitive profits on sales to buyers."); FLP Compl. ¶¶ 603–604 ("Defendants sell aluminum to industrial users on both an annual and spot basis," and "[b]y artificially driving up the Midwest Premium, Defendants stood to reap additional profits" on those sales); IP Compl. ¶¶ 289–290 (same); Fuji Compl. ¶¶ 603–604 (same).

[4] *See* Defs.' Statement of Undisputed Material Facts ("SUMF") ¶¶ 54–55, filed concurrently with this motion (Platts surveys aluminum spot market participants to calculate the Midwest Transaction Price and Midwest Premium); *see also* Class Cert. Order at 8; FLP Compl. ¶¶ 36–37, 185; IP Compl. ¶¶ 120–122; Fuji Compl. ¶ 31.

[5] Class Cert. Order at 9; FLP Compl. ¶¶ 176, 178; IPs' Br., *Eastman Kodak*, No. 16-4230, ECF No. 412 (2d Cir. Apr. 12, 2017) at 6–7; IP Compl. ¶ 120; Fuji Compl. ¶ 197.

4. Longer queues allegedly did *not* cause participants in the LME futures market to reduce the prices at which they bought and sold LME futures contracts. (Class Cert. Order at 84; FLP Compl. ¶¶ 458–459; IP Compl. ¶ 313; Fuji Compl. ¶ 318.)

5. Higher Midwest Premiums allegedly caused Plaintiffs to pay higher aluminum prices because Plaintiffs and non-defendant suppliers (a) decided, without any involvement by Defendants, to incorporate the Midwest Premium or Midwest Transaction Price into some of their aluminum contracts, and (b) did not negotiate any discounts or price adjustments that offset the alleged queue-driven increases in the Midwest Premium. (Class Cert. Order at 9; IP Compl. ¶¶ 118–126; Fuji Compl. ¶¶ 105–112.)

Although this narrow motion does not present the broader question of whether Plaintiffs' five-step theory of causation and injury is correct or incorrect, Defendants note that the LME, the CRU Group, and other sophisticated industry participants disagree with Plaintiffs' contention that LME warehouse queues raise all-in aluminum prices.[6] In addition, the FLPs' own expert, Dr. Douglas Zona, has opined that queues raise regional premiums because they *depress* LME futures market prices relative to the price of aluminum in the spot market:

> [Q]ueues decrease the relative value of aluminum stored in LME warehouses as compared to aluminum outside warehouses . . . . These changes in relative value impact regional premiums for aluminum . . . .
>
> The local premium (*e.g.*, MWP in Detroit) which measures the difference in value between the LME price and the local transaction reference price (*e.g.*, [the Midwest Transaction Price] in Detroit), increases with a decrease in value of the stored LME aluminum. Since a local queue decreases the value of the stored LME aluminum (by increasing the cost of taking delivery), a queue increases the local premium.

(Zona Report, ECF No. 920-4, ¶¶ 73–74.)

B. Plaintiffs' aluminum purchases.

Plaintiffs collectively purchased a total of about 549,000 metric tons of aluminum during the alleged conspiracy period. (SUMF ¶ 1.) The prices at which Plaintiffs purchased this

[6] *See, e.g.*, Ex. 57, 2013 LME Warehousing Consultation Report at 43 (Nov. 2013) ("[T]he LME's economic analysis is that the impact of queues and incentives has been not to change the absolute price of metal, but rather to depress the LME price relative to the absolute price, and consequently to increase the contribution of the premium to the absolute price."); SUMF ¶ 57 (additional industry participants and observers concluding that queues depress LME prices and do not increase the all-in price).

aluminum were the subject of individualized negotiations (*id.* ¶¶ 15, 20, 26, 30, 38, 42, 48, 53), and these negotiations had a meaningful impact on the all-in prices paid by Plaintiffs (*id.* ¶ 48). Plaintiffs had the option to purchase aluminum at prices that did not incorporate the Midwest Premium or Midwest Transaction Price. (*Id.* ¶¶ 12–13, 18–19, 23–24, 29, 37, 41, 45–46, 51, 58.) At least six Plaintiffs entered into contracts that did not, in fact, incorporate those benchmark prices. (*Id.* ¶¶ 12, 18, 23, 29, 45, 51.) Plaintiffs also had the opportunity to hedge their exposure to the Midwest Premium, and several of them entered into hedges or other arrangements that limited or avoided any exposure to changes in the Midwest Premium. (*Id.* ¶¶ 14, 18, 25, 47, 52.)

Seven of the eight Plaintiffs did not purchase *any* aluminum from a Defendant or an alleged co-conspirator during the relevant period. (SUMF ¶¶ 17, 22, 28, 36, 40, 44, 49.) The eighth Plaintiff—Ampal—purchased all of its aluminum from suppliers that are not alleged conspirators except for (i) roughly 2,100 metric tons it purchased from Glencore, and (ii) roughly 100 metric tons it purchased from Century. (*Id.* ¶¶ 9–11.) Taken together, Plaintiffs obtained well over 99 percent of their aluminum from suppliers that are not alleged conspirators. (*Id.* ¶¶ 1–3.)

SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if . . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the initial burden of identifying the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the moving party meets its burden, then the non-moving party must identify facts showing that a genuine issue for trial exists. *Id.* ("Rule 56[] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

ARGUMENT

I. Plaintiffs Lack Efficient Enforcer Standing to Assert Their Umbrella Claims.

Plaintiffs attempting to assert private antitrust claims under the Clayton Act must establish both that they (i) "suffered antitrust injury" and (ii) are "efficient enforcers of the antitrust laws." *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 771–72 (2d Cir. 2016). Here, Plaintiffs have survived a narrow challenge to the adequacy of their allegations of antitrust injury. *See Eastman Kodak*, 936 F.3d at 91, 93 n.3.[7] But, "[e]ven a plaintiff that has suffered an antitrust injury must also demonstrate that it is a suitable plaintiff, *i.e.*, an efficient enforcer of the antitrust laws." *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157–58 (2d Cir. 2016); *see also Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 443 (2d Cir. 2005) ("A showing of antitrust injury is necessary, but not always sufficient, to establish [antitrust] standing.").

The efficient enforcer inquiry recognizes that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Gatt Commc'ns, Inc., v. PMC Assocs., LLC*, 711 F.3d 68, 75 (2d Cir. 2013) (quoting *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983)). Courts in this circuit consider the following four factors in determining whether a plaintiff qualifies as an efficient enforcer:

> (1) the directness or indirectness of the asserted injury, which requires evaluation of the chain of causation linking [plaintiffs'] asserted injury and the [defendants' alleged conduct]; (2) the existence of more direct victims of the alleged conspiracy; (3) the extent to which [plaintiffs'] damages claim is highly speculative; and (4) the

[7] In *Eastman Kodak*, the Second Circuit considered Defendants' argument that Plaintiffs had failed as a matter of law to plead antitrust injury because the operative complaints alleged an anticompetitive restraint in one market (the warehouse market) and an injury in another market (the primary aluminum market). *See* 936 F.3d at 90. In rejecting that argument, the Second Circuit "focus[ed] on the sufficiency of the plaintiffs' legal theory, rather than on their evidence." *Id.* at 93 n.3. Neither Defendants nor the Second Circuit addressed the entirely separate question of whether Plaintiffs have efficient enforcer standing to assert umbrella claims.

> importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.

Gelboim, 823 F.3d at 778. As demonstrated below, overwhelming authority establishes that umbrella purchasers such as Plaintiffs lack efficient enforcer standing under these four factors.

A. Plaintiffs' claims are fatally indirect.

Although all four efficient enforcer factors support the conclusion that Plaintiffs lack standing to assert their umbrella claims, on-point authority in this District establishes that the first factor alone—the "directness" factor—is sufficient to foreclose Plaintiffs' claims.

1. Overwhelming authority holds that umbrella claims are too indirect to sustain efficient enforcer standing.

The Second Circuit's decision in *Gelboim* provides the framework for evaluating whether a plaintiff asserting manipulation of a benchmark price has efficient enforcer standing to assert umbrella claims. *See* 823 F.3d at 778–80. In *Gelboim*, the plaintiffs accused sixteen banks of conspiring to submit artificially low interest rates to the entity responsible for setting the LIBOR benchmark interest rate. *Id.* at 764–67. Although several of the plaintiffs had entered into LIBOR-based contracts directly with the defendant banks, several other plaintiffs asserted umbrella claims based on contracts entered into with non-defendants. *Id.* at 778. The Second Circuit *sua sponte* raised the question of whether these umbrella plaintiffs qualified as "efficient enforcers" of the antitrust laws and suggested that the district court consider that question on remand. *See id.* at 772, 778, 780. The Second Circuit invited the district court to consider, in particular, "the directness or indirectness" of the umbrella plaintiffs' alleged injuries, the potential for "damages disproportionate to wrongdoing," and "whether the [umbrella plaintiffs'] damages would necessarily be highly speculative." *Id*. at 778–80.

On remand, Judge Buchwald took up the Second Circuit's invitation and held that, "where a plaintiffs' counterparty is reasonably ascertainable and is not a defendant bank, a plaintiff is not

an efficient enforcer" of the antitrust laws. *LIBOR VI*, 2016 WL 7378980, at *16. Although the decision in *LIBOR VI* considered all four efficient enforcer factors, *see id.* at *17–23, the court found that the "directness" factor alone was sufficient to "draw a line between plaintiffs who transacted directly with defendants and those who did not," *id*. at *15–16. The court reached that conclusion for two principal reasons. First, the "independent decision" of a plaintiff and a non-defendant third party to incorporate LIBOR into a contract "without any action by defendants whatsoever" was enough to "break[] the chain of causation between defendants' actions and a plaintiff's injury." *Id.* at *16. Second, allowing umbrella claims would have risked precisely the type of "damages disproportionate to wrongdoing" that the Second Circuit warned about in *Gelboim*:

> [P]laintiffs who did not purchase directly from defendants . . . made their own decisions to incorporate LIBOR into their transactions, over which defendants had no control, in which defendants had no input, and from which defendants did not profit. To hold defendants trebly responsible for these decisions would result in "damages disproportionate to wrongdoing."

Id. (quoting *Gelboim*, 823 F.3d at 779).

Judge Caproni's decision in *Silver II* further illustrates these principles. There, the court addressed "a comprehensive scheme of market manipulation" in the silver market. *See* 332 F. Supp. 3d at 906. Recognizing that "a critical mass of judges within this district have concluded that plaintiffs who are not direct purchasers are not efficient enforcers in a benchmark manipulation case," the court dismissed all claims based on transactions with non-defendants under the efficient enforcer "directness" factor. *Id.* at 905–09. The court reasoned that the "likelihood of intervening causative factors" was even greater for the complex benchmark-manipulation scheme alleged in *Silver II* than in a more straightforward "benchmark-fixing case" like *LIBOR VI*. *Id.* at 908. The court also emphasized that the plaintiffs' umbrella claims raised "serious concerns of ruinous, potentially disproportionate liability," especially since there were no allegations that the

defendants "substantially control[led] the [silver] market." *Id.* at 908–09. The court thus concluded that the directness factor alone was "an independently adequate basis" for dismissing the plaintiffs' umbrella claims. *Id.* at 909.

Consistent with *Silver II* and *LIBOR VI*, overwhelming authority in this District holds that plaintiffs in benchmark-price antitrust cases lack "efficient enforcer" standing to assert umbrella claims. *See, e.g.*, *In re Platinum & Palladium Antitrust Litig.*, — F. Supp. 3d —, 2020 WL 1503538, at *10 (S.D.N.Y. 2020) ("*Platinum II*") ("The Court concludes that plaintiffs who sold physical platinum and palladium and did not transact directly with Defendants are not efficient enforcers of the antitrust laws"); *Sonterra*, 366 F. Supp. 3d at 545–46 (dismissing Sterling-LIBOR claims that were "based solely on financial transactions with third-parties, and not with Defendants"); *7 West 57th Street Realty Comp., LLC v. Citigroup, Inc.*, 314 F. Supp. 3d 497, 512–14 (S.D.N.Y. 2018) (dismissing LIBOR-related umbrella claim as "too indirect to support antitrust standing"), *aff'd on other grounds*, 771 F. App'x 498 (2d Cir. 2019); *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, 2018 WL 4830087, at *5 (S.D.N.Y. 2018) ("That [purchaser of SIBOR-based contracts] did not trade directly with any defendants is sufficient reason to dismiss [its] antitrust claims"); *Sonterra*, 277 F. Supp. 3d at 559 (dismissing plaintiffs in Swiss Franc LIBOR case "who did not transact directly with defendants"); *Sullivan v. Barclays PLC*, 2017 WL 685570, at *15 (S.D.N.Y. 2017) (dismissing "umbrella-type damages claims [that] would include virtually any loss on a Euribor-based derivative transaction, regardless of the nature of the transaction or identity of counterparty"); *Ocean View Capital, Inc. v. Sumitomo Corp. of Am.*, 1999 WL 1201701, at *7 (S.D.N.Y. 1999) (dismissing umbrella claims based on alleged manipulation

of copper futures markets because plaintiff "does not allege that it purchased copper from" defendants).[8]

Overwhelming authority rejects umbrella claims in non-benchmark cases as well. *See, e.g.*, *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 265 (3d Cir. 2016) ("When, as in *Mid-West Paper*, the anticompetitive conduct is price-fixing, the only customers who will have antitrust standing are the direct customers of the conspiracy members."); *Mid-West Paper Prods. Co. v. Continental Grp.*, 596 F.2d 573, 583–87 (3d Cir. 1979) (rejecting claims in which the plaintiff was "not in a direct or immediate relationship to the antitrust violators" such that "defendants secured no illegal benefit at [the plaintiff]'s expense"); *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 2020 WL 227425, at *7–8 (E.D.N.Y. 2020) ("district courts in this circuit to have considered such a theory of liability—under which a customer who deals with non-defendants alleges injury by virtue of the defendants' conspiracy—have determined that it cannot create antitrust standing"); *Allen v. Dairy Farmers of Am., Inc.*, 2014 WL 2610613, at *28 (D. Vt. 2014) (rejecting "umbrella theory"); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2002887, at *9 (E.D. Tenn. 2014) (same); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2012 WL 6708866, at *6 (N.D. Cal. 2012) ("most

[8] An exception to the usual rule against umbrella standing is sometimes made when (i) the plaintiff traded in an anonymous market in which it is impossible to identify the parties that dealt directly with the defendants, and (ii) the defendants "dominated" the anonymous market. *See, e.g.*, *Platinum II*, 2020 WL 1503538, at *13–17 (noting potential exception for anonymous markets, but declining to apply it where "Defendants' market share was at most 45%"); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 2016 WL 5108131, at *9 (S.D.N.Y. 2016) (allowing umbrella standing where defendants allegedly "dominated the FX market with a combined market share of over 90%"). That exception is "inapposite" in a market like this one in which "it can be determined who purchased from whom." *Ocean View*, 1999 WL 1201701, at *7 n.2 (discussing the physical copper market); *see also* SUMF ¶¶ 5, 32. In addition, two decisions in this District declined to apply the rule against umbrella claims at the motion-to-dismiss stage. *See Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 167–68 (S.D.N.Y. 2018) (declining to dismiss umbrella claims "at this most preliminary stage"); *In re Commodity Exch., Inc.*, 213 F. Supp. 3d 631, 656 (S.D.N.Y. 2016) ("Due to the uncertainty surrounding the viability of the umbrella liability theory, and the unique facts of this case, analyzing Plaintiffs' claims under an umbrella theory of liability leads to no dispositive conclusions"). Those decisions do not apply to this motion for summary judgment following completion of fact discovery.

federal courts in recent years have rejected [umbrella] claims"), *aff'd*, 637 F. App'x 981 (9th Cir. 2016); *In re Online DVD Rental Antitrust Litig.*, 2011 WL 1629663, at *8 (N.D. Cal. 2011) (same); *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1155 (N.D. Cal. 2001) ("[T]he 'price umbrella' is not a legal basis for conferring standing on an antitrust plaintiff."); *In re Vitamins Antitrust Litig.*, 2001 WL 855463, at *4 (D.D.C. 2001) (same); *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1166 (C.D. Cal. 2000) ("The Court Declines to Recognize 'Umbrella Standing'"); *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 39 (D.D.C. 1999) ("[T]his Court will decline the States' invitation to consider umbrella damages."); *Gross v. New Balance Athletic Shoe, Inc.*, 955 F. Supp. 242, 246–47 (S.D.N.Y. 1997) (rejecting umbrella claim because "Plaintiffs' alleged injury was suffered, if at all, only indirectly as a result of a general price increase which in turn resulted from the direct effects of the conspiracy"); *see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1339–41 (9th Cir. 1982) ("[A]ny umbrella claims plaintiffs may assert for damages based on those purchases of gasoline not acquired originally from the defendants also must fail."); *Ambook Enters. v. Time, Inc*., 612 F.2d 604, 620 (2d Cir. 1979) (Friendly, J.) (reinstating plaintiff's antitrust claims based on transactions with defendants but affirming summary judgment for defendants "in respect of [plaintiff's] dealings with media not named as defendants").[9]

[9] A few out-of-circuit cases have allowed or suggested in dicta that they might allow umbrella claims, but those cases either involved considerations not present here, applied outdated law, or both. For example, the Fifth Circuit's decision in *In re Beef Indus. Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), contains a footnote suggesting in dicta that an umbrella *seller* has antitrust standing if it satisfies the outdated "target area" test for standing, *see id*. at 1166 n.24, but the Second Circuit "abandoned that [target area] test over thirty years ago," *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 66 n.4 (2d Cir. 2019). The Fifth Circuit's footnote had no effect on the outcome of the case, which turned on the scope of the "cost-plus" exception to *Illinois Brick*. *See In re Beef Indus. Antitrust Litig*, 710 F.2d 216, 219 (5th Cir. 1983) (affirming summary judgment for defendants based on evidence that multiple "factors" influenced purchasers' "pricing decisions"). In addition, *U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623 (7th Cir. 2003), suggests in dicta that the umbrella standing doctrine

2. Plaintiffs' claims are barred by this authority.

Plaintiffs' umbrella claims are foreclosed by the on-point authority cited above. Collectively, Plaintiffs purchased less than 1 percent of their aluminum from alleged conspirators, and seven of the eight Plaintiffs did not purchase *any* aluminum from alleged conspirators. (SUMF ¶¶ 2–3.) Plaintiffs nevertheless seek to recover treble damages on 100 percent of their purchases—a 100-fold increase in Defendants' exposure—based on "their own decisions to incorporate [a benchmark price] into their transactions, over which defendants had no control, in which defendants had no input, and from which defendants did not profit." *LIBOR VI*, 2016 WL 7378980, at *16. But, Plaintiffs and their third-party suppliers made "independent decision[s]" regarding the prices they included in their aluminum contracts, and these independent decisions "break[] the chain of causation between defendants' actions and a plaintiff's [alleged] injury." *Id*. Plaintiffs' claims are therefore too "indirect" to support antitrust standing. *See id*. Any other conclusion would expose Defendants to "disproportionate" treble-damages claims hundreds of times larger than any alleged "overcharges" Defendants could have received on sales to Plaintiffs. *See id*.

In several respects, Plaintiffs' umbrella claims are even more indirect and attenuated than the umbrella claims asserted in the other benchmark-price cases considered in this District, thus providing an even stronger rationale for denying efficient enforcer standing.

First, Plaintiffs' claims rely on an unusually complex chain of causation. In a typical benchmark-price antitrust case, the plaintiffs allege that the defendants "fixed" a benchmark price

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would not bar a claim for injunctive relief, but also states that if the plaintiff "were seeking damages, and [defendant's] direct or derivative customers also wanted . . . monetary relief, then defendants would have a point." *Id.* at 627.

by, for example, conspiring to make false submissions to the entity responsible for setting the benchmark.[10] Here, by contrast, Plaintiffs do not allege that Defendants "fixed" the Midwest Premium. Instead, Plaintiffs contend that Defendants engaged in various conduct in the warehouse market that allegedly *affected* the Midwest Premium through a five-step chain of causation: (i) Defendants' conduct in the warehouse market allegedly lengthened LME warehouse queues, (ii) longer warehouse queues allegedly resulted in higher spot-market prices for aluminum, (iii) higher spot-market prices allegedly caused Platts to raise its assessment of the Midwest Premium, (iv) longer warehouse queues allegedly did *not* reduce LME prices, and (v) Plaintiffs' individualized price negotiations with third-party aluminum suppliers allegedly did not account for or avoid the alleged increases in the Midwest Premium. *Supra* at 5–6.

All five steps of this causal chain present complex questions that, at a minimum, will be heavily disputed by Defendants. For example, at the very first step of determining whether the alleged conspiracy lengthened LME warehouse queues, Plaintiffs face the difficult task of distinguishing the effects of the alleged conspiracy from the effects of unilateral conduct by Defendants and natural market forces.[11] In addition, whereas a typical benchmark-price case may

[10] *See, e.g.*, *Sonterra*, 366 F. Supp. 3d at 519 (submissions to Sterling LIBOR-setting panel); *FrontPoint*, 2018 WL 4830087, at *1 (submissions to SIBOR-setting panel); *LIBOR VI*, 2016 WL 7378980, at *1 (submissions to U.S. dollar LIBOR-setting panel).

[11] *See, e.g.*, Class Cert. Order at 87–91. This task is complicated by, among other things, Plaintiffs' assertion that Defendants agreed not to destock each other's warehouses because such an agreement "is itself, necessarily, an agreement to cancel fewer warrants and thus maintain *lower* queues." *Id.* at 97. To cite another example, Plaintiffs' assertion that Defendants agreed to treat the LME's minimum load-out rule as a maximum runs up against the stubborn fact that "the warehouse plaintiffs were, after all, in the business of collecting rent for storage; and the longer the storage, the higher the rent. In this sense it would be in the warehouse defendants' economic self-interest to turn a minimum load-out rule into a maximum, so long as they were not losing business due to their slow load-out times." *In re Aluminum Warehousing Antitrust Litig.*, 2014 WL 4277510, at *33 (S.D.N.Y. 2014); *see also* Class Cert. Order at 88 ("If a warehouse loads out faster than the minimum, it is giving away money for free." (quoting OA Tr. at 65–66)); FLP Compl. ¶¶ 524, 588.

involve only a single "break" in the causal chain in the form of a contract negotiation between the plaintiff and an independent third party, the claims asserted here depend on at least two *additional* sets of independent decisions by third parties. First, Plaintiffs' claims assume that unknown parties involved in spot-market transactions (a) negotiated higher spot prices as a result of LME warehouse queues, and (b) reported those higher spot prices to Platts. *Supra* at 5–6. Second, Plaintiffs' claims assume that unknown parties that traded on the LME did *not* discount the prices at which they bought and sold LME futures contracts as a result of LME warehouse queues. *Id*. For each of these reasons, the "likelihood of intervening causative factors is greater" in this case—indeed, far greater—than in cases involving one-step "fixing" of a benchmark price. *See Silver II*, 332 F. Supp. 3d at 906–08; *see also Reading Indus., Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 13–14 (2d Cir. 1980) (rejecting antitrust standing where it would be necessary to "engage . . . in hopeless speculation concerning the relative effect of an alleged conspiracy" because "countless other market variables could have intervened to affect . . . pricing decisions"); *Laydon v. Mizuho Bank, Ltd.*, 2014 WL 1280464, at *9 (S.D.N.Y. 2014) (denying standing where "Plaintiff alleges a causal chain with at least four discrete links, requiring a complicated series of market interactions").

Second, Plaintiffs here do not contend that the allegedly-manipulated benchmark price—the Midwest Premium—was the primary component of the ultimate price they paid. In other benchmark-price cases in this District, the plaintiffs claimed that a manipulated benchmark price (i) was incorporated directly into their contracts or financial instruments, and (ii) formed the base or dominant price set forth in the contract or financial instrument. *See, e.g.*, *Sullivan*, 2017 WL 685570, at *3 (addressing standing of parties that traded "five categories of derivatives identified

by the plaintiffs [as] directly affected by Euribor rates"); *LIBOR VI*, 2016 WL 7378980, at *16 (addressing standing of parties that allegedly "incorporate[d] LIBOR into a financial transaction").

Here, by contrast, the Midwest Premium is not the base or dominant price component for aluminum and generally ranged between a low of about 5 percent and a high of about 23 percent of all-in prices during the relevant period. (SUMF ¶ 56.) In addition, most of Plaintiffs' contracts do *not* incorporate the Midwest Premium, and many of their contracts do not even include the Midwest Transaction Price. (*Id.* ¶¶ 12, 18, 23, 29, 37, 41, 45, 51, 59.) Plaintiffs might argue that inclusion of the Midwest Transaction Price is tantamount to inclusion of the Midwest Premium, but that is incorrect. Platts does not determine the Midwest Transaction Price by starting with the Midwest Premium and then adding on the LME settlement price; rather, Platts ordinarily relies on all-in spot prices picked up by its surveyors and reports its assessment of those all-in spot prices as the Midwest Transaction Price. (*Id.* ¶¶ 54–55.) The fact that the Midwest Premium is not the dominant price component in Plaintiffs' contracts—and in many instances is not a price component *at all*—further confirms that Plaintiffs' claims are too indirect to support antitrust standing. *See Sonterra*, 366 F. Supp. 3d at 545–46 (transactions that "incorporated LIBOR only implicitly through a complex formula involving numerous other causal factors" were "too indirect to support the causation element"); *Ocean View*, 1999 WL 1201701, at *4 (applying umbrella standing rule to copper purchases in part because "plaintiff concedes that the copper cash price is partially based on a 'premium factor' and not solely dependent on the [allegedly manipulated] futures price"); *see also 7 West 57th Realty*, 771 F. App'x. at 502–03 (affirming dismissal of LIBOR manipulation claim where LIBOR was not incorporated into the plaintiff's bonds).

Third, the extensive factual record in this action establishes especially clear "breaks" in the causal chain. Most of the benchmark cases cited above dismissed umbrella claims at the pleadings

stage, thus requiring the courts to "draw[] all reasonable inferences in the plaintiff's favor." *E.g.*, *Sonterra*, 277 F. Supp. 3d at 551. Here, by contrast, a well-developed factual record establishes that (i) Plaintiffs engaged in individualized negotiations with non-defendant suppliers regarding their contracts, (ii) Plaintiffs had the option of entering into contracts that did not incorporate the Midwest Premium or Midwest Transaction Price, (iii) at least six Plaintiffs actually *did* enter into contracts that did not incorporate those benchmarks, and (iv) Plaintiffs took steps in their negotiations to hedge, offset, or limit their exposure to increases in the Midwest Premium. *Supra* at 6–7. These various choices, options, and individualized negotiations create "significant intervening causative factors," each of which further "attenuate[s] the causal connection between the violation and the [alleged] injury." *Platinum II*, 2020 WL 1503538, at *8 (quoting *LIBOR VI*, 2016 WL 7378980, at *15).

Finally, the risk of imposing "liability disproportionate to wrongdoing," *Gelboim*, 823 F.3d at 779, is especially pronounced here. As noted above, Plaintiffs seek treble damages on aluminum purchases more than 100 times greater than their collective purchases from Defendants. (SUMF ¶ 3.) If Plaintiffs were granted efficient enforcer standing to assert those disproportionate claims, then Defendants in principle could be exposed to treble damages claims arising from *all* of the millions of tons of aluminum that third-party smelters sold to U.S. purchasers during the relevant six-year period. (*See id.* ¶ 61.) Defendants would face this massive exposure even though those third-party aluminum sales are "transactions, over which defendants had no control, in which defendants had no input, and from which defendants did not profit." *Sonterra*, 277 F. Supp. 3d at 560–61. This case therefore presents the very prospect of "overkill," *Sullivan*, 2017 WL 685570, at *15, "ruinous liabilities," *Mid-West Paper*, 596 F.2d at 586, and "damages

disproportionate to wrongdoing," *Gelboim*, 823 F.3d at 779, that courts have long relied upon as a basis for rejecting umbrella claims.

Indeed, to an even greater degree than in the benchmark cases cited above, allowing umbrella claims to proceed here would create the prospect of "overdeterrence" and could easily "chill[] economically efficient competitive behavior." *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 394 (7th Cir. 1993). The benchmark cases cited above generally involved allegations of *per se* unlawful price-fixing conduct. *See, e.g.*, *Gelboim*, 823 F.3d at 771. Here, on the other hand, the challenged conduct is potentially procompetitive rule-of-reason conduct. *See Aluminum II*, 95 F. Supp. 3d at 434, 449 (noting that this case does not involve "a traditional 'price fix'" and that, "[i]n the absence of familiarity with a type of business conduct and competitive impact, courts apply the rule of reason analysis"). For example, although Plaintiffs challenge Metro Detroit's practice of paying incentives to attract aluminum, those payments provide an up-front discount on warehouse rent, and discounts ordinarily are viewed as procompetitive. *See Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 269 (2d Cir. 2001) ("low prices"—including "incentives"—"are a positive aspect of a competitive marketplace and are encouraged by the antitrust laws"). Similarly, although Plaintiffs allege that Defendants engaged in excessive cancellations of Metro Detroit warrants, *see, e.g.*, Class Cert. Order at 87, cancelling those warrants was the only way to remove aluminum from Metro Detroit and make it more available to users.[12]

[12] Even Metro Detroit's so-called "merry-go-round deals"—none of which involved JPMorgan or Goldman Sachs—are vertical agreements between a warehouse and a warehouse customer that have the potential procompetitive benefits of (i) conferring a rent discount on the customer and (ii) enabling Metro Detroit to compete to retain metal that otherwise might move to another warehouse. In any event, the unusual mix of vertical and horizontal conduct challenged by Plaintiffs does not fall within the categories of strictly horizontal conduct that, on the basis of long experience, courts can safely conclude will *never* be efficient or procompetitive. *See Aluminum II*, 95 F. Supp. 3d at 447–48; *see*

Rational market participants are unlikely to come anywhere near this potentially procompetitive conduct if there is a possibility that doing so could expose them to "ruinous" umbrella claims vastly disproportionate to their participation in the aluminum market. *See Mid-West Paper*, 596 F.2d at 586. Denying standing to assert such claims would thus avoid the danger of overdeterrence and ensure that "persons operating in the market do not restrict procompetitive behavior because of a fear of antitrust liability." *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 10 (1st Cir. 1999); *see also Blue Shield of Va. v. McCready*, 457 U.S. 465, 477 (1982) ("[T]he potency of [the treble-damages] remedy implies the need for some care in its application."); *Mid-West Paper*, 596 F.2d at 587 (umbrella claims risk "overkill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress" (quoting *Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971)); Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 4, 16 & n.32 (1984) (observing that antitrust law can deter more procompetitive than anticompetitive conduct if it "errs even a few percent of the time" and that the "rate of error may be quite high").

B. Purchasers that acquired aluminum directly from Defendants are the better enforcers here.

The second efficient enforcer factor is "whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation." *Gelboim*, 823 F.3d at 772. As the Reynolds and Southwire complaint confirms, such persons exist here in the form of non-umbrella purchasers that acquired aluminum directly from Defendants.

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also Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 886–87 (2007) ("[T]he *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason."); *In re Interest Rate Swaps Antitrust Litig.*, 2019 WL 1147149, at *14 (S.D.N.Y. 2019) (similar).

Non-umbrella purchasers "are obviously the most efficient enforcers" of the antitrust laws in cases like this one. *See Sonterra*, 277 F. Supp. 3d at 560. That is in part because if Plaintiffs' allegations are correct, then these purchasers "were more directly injured than Plaintiffs." *Silver II*, 332 F. Supp. 3d at 909; *see also Platinum II*, 2020 WL 1503538, at *8 ("those who transacted directly with defendants may be conceived of as more direct victims . . . than those who did not"); *Ocean View*, 1999 WL 1201701, at *7 ("there are more direct victims than plaintiff, such as those who purchased copper directly from the defendants"). In addition, non-umbrella purchasers "present little concern of disproportionate damages because any losses suffered from defendants' manipulation would have resulted in wrongful profits to defendants." *Sonterra*, 277 F. Supp. 3d at 560. By contrast, umbrella purchasers like Plaintiffs create the potential for "astronomical damages totally untethered from any wrongful profits made by defendants." *Id*. Accordingly, limiting efficient enforcer standing to purchasers that obtained their aluminum from Defendants "has the further advantage of rendering Plaintiffs' recovery essentially proportional to Defendants' allegedly ill-gotten gains." *Platinum II*, 2020 WL 1503538, at *12.

Plaintiffs doubtless will object that barring their umbrella claims will leave them without a remedy for their alleged injuries, but "[t]he effective enforcement of the antitrust laws does not require private plaintiffs to impose liability that is wildly disproportionate to the defendants' gain." *Sullivan*, 2017 WL 685570, at *16. Indeed, "[i]mplicit in the inquiry is recognition that not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced." *Gelboim*, 823 F.3d at 779; *see also IQ Dental*, 924 F.3d at 67 ("the efficient enforcer factors are concerned with finding the plaintiffs best suited to serve as private attorneys general, and not with identifying every plaintiff who might sue"). Thus, the existence of non-umbrella purchasers "whose self-interest would normally motivate them to

vindicate the public interest in antitrust enforcement diminishes the justification for allowing . . . more remote part[ies] such as [Plaintiffs] to perform the office of a private attorney general." *Assoc. Gen. Contractors*, 459 U.S. at 542; *see also IQ Dental*, 924 F.3d at 66 ("the justification for permitting [plaintiff] to perform the office of a private attorney general is greatly diminished because denying [plaintiff] a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied"); *Paycomm Billing Servs., Inc. v. MasterCard Int'l., Inc.*, 467 F.3d 283, 294 (2d Cir. 2006) (same).[13]

C. Plaintiffs' alleged damages are speculative.

The third factor—highly speculative damages claims—also weighs against a finding of efficient enforcer standing. Plaintiffs' aluminum contracts were heavily negotiated, *see supra* at 6–7, and "highly negotiated contracts" such as those at issue here are precisely the type of contracts that "make the effect of [benchmark] manipulation highly speculative." *Sonterra*, 336 F. Supp. 3d at 547; *see also LIBOR VI*, 2016 WL 7378980, at *19 ("*Gelboim* expressed skepticism about the measure of damages in such highly negotiated transactions"). In addition, the fact that Defendants had no role in the negotiation of Plaintiffs' aluminum contracts "makes it even harder to determine what role, if any, [the benchmark] played in the ultimate price." *Sonterra*, 277 F. Supp. 3d at 564. The "admittedly still difficult" effort to determine the extent of any damages here "will be simplified considerably by confining it to those transactions in which defendants actually

[13] Even if Reynolds and Southwire had not sued (and even if no other non-umbrella plaintiffs choose to assert claims before the statute of limitations expires), it would make no difference because the existence of antitrust standing depends on principles of law, not on individual decisions about whether to sue. *See IQ Dental*, 924 F.3d at 67 ("Indeed, it would be strange and unworkable if new efficient enforcers sprang up simply by operation of the statute of limitations on the other enforcers."); *Gatt*, 711 F.3d at 79 ("That no [other plaintiff] has brought suit to date does not support recognizing Gatt's standing. Instead, it suggests . . . perhaps, that the facts were other than as alleged by plaintiff."); *Daniel*, 428 F.3d at 444 (absence of suits by efficient enforcers "does not support recognizing plaintiffs' standing"); *see also Mid-West Paper*, 596 F.2d at 586 n.49 ("inasmuch as we are fashioning a rule of standing, we must consider the general situation and not the unusual exception").

took part." *Id*. Plaintiffs' complex and elongated theory of causation further compounds the speculative nature of their damages claims. *See, e.g.*, *Ocean View*, 1999 WL 1201701, at *5 ("Not only would a calculation of alleged damages require a determination of the relationship between the prices on the LME and the prices on the COMEX, but it also would require a determination of the effect of the COMEX on the cash market. This speculative nature of damages further supports the dismissal of plaintiff's claims."). Finally, where, as here, a plaintiff's estimate of damages "rests on multiple layers of speculation," "[n]o amount of expert testimony can adequately ameliorate the highly speculative nature of [the plaintiff's] alleged losses." *IQ Dental*, 924 F.3d at 67 (denying efficient enforcer standing).

For all these reasons, "the speculative damages factor weighs strongly against the standing of the umbrella plaintiffs" in this action. *Sonterra*, 277 F. Supp. 3d at 564; *see also Gelboim*, 823 F.3d at 779 ("[H]ighly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement.").

D. Plaintiffs' claims present complex apportionment questions and the threat of disproportionate liability.

The fourth factor—the potential for duplicative damages or complex questions relating to the apportionment of damages—often is not decisive in the efficient enforcer inquiry. *See, e.g.*, *7 West 57th Realty*, 771 F. App'x at 503 (affirming dismissal on efficient enforcer grounds even though "Defendants do not offer any serious argument why allowing Appellant to assert antitrust standing would require any sort of complex apportionment of damages or would run the risk of duplicative recovery"); *Sonterra*, 277 F. Supp. 3d at 565 (dismissing on efficient enforcer grounds despite "no apparent risk of duplicative recovery"). This factor nonetheless weighs in favor of dismissal here. Although Plaintiffs' umbrella claims present no obvious risk of duplicative recovery, they present closely-related concerns of overdeterrence and disproportionate liability.

See supra at 18–20. Similarly, Plaintiffs' umbrella claims at a minimum raise issues closely related to the question of complex apportionment because "where non-defendant parties decided to incorporate [a benchmark] into transactions without Defendants' knowledge, those decisions may make apportioning damages particularly complex." *Platinum II*, 2020 WL 1503538, at *10; *see also Sullivan*, 2017 WL 685570, at *19 ("the apportionment of damages on umbrella-type claims would likely be extraordinarily complex").

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Taken together, the four efficient enforcer factors weigh even more heavily against allowing umbrella claims here than in the many other cases in this District that dismissed umbrella claims on the pleadings. Indeed, the "directness" factor alone is sufficient to dispose of Plaintiffs' umbrella claims. This Court should therefore join the many other courts that have "drawn a line between plaintiffs who transacted with defendants and those who did not," *Sonterra*, 366 F. Supp. 3d at 533, and grant summary judgment against Plaintiffs' umbrella claims.

CONCLUSION

For the foregoing reasons, summary judgment should be granted for Defendants on all claims asserted by all FLPs and IPs, with the sole exception of Ampal's claims arising from the approximately 2,200 metric tons of aluminum it allegedly purchased from Glencore and Century.

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