UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re ALUMINUM WAREHOUSING ANTITRUST LITIGATION	Civil Action No. 1:13-md-02481-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.)	FIRST-LEVEL PURCHASERS' AND INDIVIDUAL PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AGAINST THE FLPS' AND IPS' UMBRELLA CLAIMS

[REDACTED]

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I. INTRODUCTION

Defendants' motion attacks the First-Level Purchasers' ("FLPs") and the Individual Plaintiffs' ("IPs") (collectively "Plaintiffs") standing as efficient enforcers of the antitrust laws. This Court has already resolved that question. In 2015, Judge Forrest denied Defendants' 12(b)(6) motion and found Plaintiffs satisfied all the efficient enforcer factors under *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). *See In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419, 444 (S.D.N.Y. 2015) ("*Aluminum II*"). Judge Forrest found that each Plaintiff bought directly from a producer; the contracts were tied to the Midwest Premium ("MWP"); there were no buyers higher up or more direct in the distribution chain; damages would not be duplicative; and damages were not speculative as defined by the amount the MWP was inflated. *Id*.

Later, Judge Forrest dismissed Plaintiffs' case on summary judgment on other grounds, leaving undisturbed her prior finding that Plaintiffs were efficient enforcers. Plaintiffs appealed. *In re Aluminum Warehousing Antitrust Litig.*, No. 13-md-2481 (KBF), 2016 WL 5818585 (S.D.N.Y. Oct. 5, 2016). Defendants did not raise an efficient-enforcer issue on appeal. Last year, the Second Circuit found that Plaintiffs suffered antitrust injury, reversing Judge Forrest's grant of summary judgment against Plaintiffs. Though it had the power to do so, the Second Circuit did not disturb her ruling that Plaintiffs were efficient enforcers. *See Eastman Kodak Co. v. Henry Bath LLC*, 936 F.3d 86 (2d Cir. 2019). Instead, the Second Circuit ruled, "plaintiffs' injuries were ***a direct result*** of the defendants' anticompetitive conduct." *Id*. at 96.[1] "Because the defendants manipulated the Midwest Premium, the plaintiffs were forced to pay a higher Midwest Premium." *Id.*

[1] Unless otherwise noted, citations are omitted and emphasis is added, here and throughout. All references to Exs. 1-74 are to the exhibits attached to the Declaration of John Playforth, dated September 2, 2020. All references to Exs. 75-145 are to the Declaration of Patrick J. Coughlin, filed

The facts and the law have not changed since Judge Forrest's 2015 decision that Plaintiffs are efficient enforcers. If anything, the development of the facts since 2015 and the Second Circuit's opinion confirm her decision. The Court should give her decision "if not conclusive deference, considerable deference." Ex. 77, 11/4/19 Hr'g Tr. at 27:14-18. Under the law-of-the-case doctrine, this Court should deny Defendants' motion. *See Waverly Props., LLC v. KMG Waverly*, No. 09 Civ. 3940 (PAE), 2011 WL 13322667 (S.D.N.Y. Dec. 19, 2011) (acknowledging and applying the law-of-the-case doctrine).

Defendants' effort to recast Plaintiffs' claims as "umbrella claims" to avoid the Court's previous ruling is misguided. Contrary to Defendants' argument, Plaintiffs do not seek damages under an "umbrella theory." Umbrella claims arise when some competitors, but not all, conspire to fix prices and non-conspirator rivals raise their prices under the price umbrella created by the conspirators. *See* Phillip E. Areeda, *et al.*, 2A *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶347 (4th ed. 2018). Under this theory, purchasers who buy from non-conspirators who choose to raise their prices under the price umbrella have sometimes been held to lack standing because the non-conspirators' decision to raise prices is an intervening cause of the alleged damages. Here, Plaintiffs are purchasers of primary aluminum from smelters or integrated producers pursuant to contracts that all incorporated a regional premium, such as the Midwest Premium ("MWP") or the Rotterdam Premium, which was not subject to negotiation. There is no intervening cause here because the regional premium is hardwired into the purchase contracts for primary aluminum.

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concurrently. All references to Exs. IP-1-IP-28 are to the exhibits attached to the Declaration of Derek Y. Brandt, filed concurrently.

As the Second Circuit recognized, Plaintiffs' injuries are a direct result of Defendants' anticompetitive conduct in raising the MWP, not some remote unanticipated conduct by a third party. *Eastman Kodak Co.*, 936 F.3d at 95 ("[t]he plaintiffs suffered harm because [of] the defendants' manipulation of the Midwest Premium (designed to inflate the sale price of defendants' aluminum holdings)"). Defendants' executives admitted that "the bottleneck effect . . . will support premiums" and "traders keep the bottleneck tight to inflate the premium." These admissions, and others, create a genuine issue for trial and drive a stake through the heart of Defendants' causation argument at summary judgment.

Where, as here, the Defendants have manipulated a component of the price or product standard applicable to the entire market, they "cannot be heard to complain that they should be immune from damages for a product they did not sell." *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 483 n.4 (7th Cir. 2002). The financial benchmark cases cited by Defendants are based on starkly different facts and recognize that determination of antitrust standing is a factually intensive inquiry.

Accordingly, in view of the law-of-the-case doctrine, the fact that Defendants directly caused Plaintiffs' damages, and the inapplicability of the Defendants' "umbrella damages" theory, the Court should deny Defendants' motions.

II. STATEMENT OF FACTS

A. Plaintiffs' Aluminum Purchases

Plaintiffs purchased aluminum from large integrated producers.[2] RSUMF, ¶¶1, 4, 31. Each Plaintiff purchased aluminum pursuant to long-term contracts or spot agreements based on the LME

[2] *See* Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts ("RSUMF"), filed concurrently; *see also* Plaintiffs' Statement of Additional Material Facts ("PSAMF"), filed concurrently.

cash price plus the applicable premiums. *Id.*, ¶¶14-17, 20-22, 26-29, 32-33, 40-42, 44-45, 48-51, 54-56, 61-63. The applicable regional premium covers logistical costs, including the cost of delivery, storage, loading and shipping costs. *Id.*, ¶¶57-58. The regional premiums are compiled based on reporting of transactions between buyers and sellers of aluminum on a given day for delivery to relevant geographic points. *Id.* Thus, the regional premiums reflect current trades along with outstanding bids and offers ***for immediately available aluminum for delivery*** from producers, traders, and holders of warehoused aluminum, and these offers incorporate the fluctuating delivery, storage, finance, and insurance costs incurred by these competing suppliers of aluminum. *Id.* The premium included in Plaintiffs' purchases was non-negotiable. *Id.*, ¶¶14-17, 20-22, 26-29, 32-33, 40-42, 44-45, 48-51, 54-60. On each of Plaintiffs' contracts that Defendants submitted in support of their Motion the premium was paid, as it was on all contracts for the first sale of primary aluminum for which Plaintiffs seek damage. *Id.*

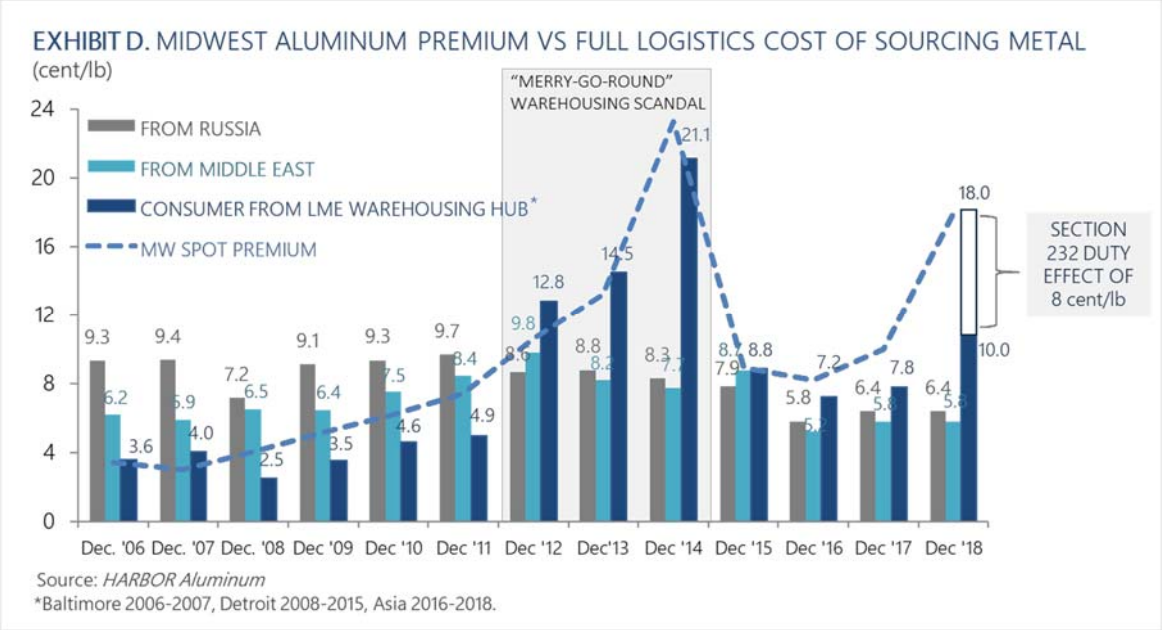
B. The Aluminum Market and Pricing

The price paid by first-level purchasers of aluminum (except in mainland China) consists of three elements: (1) the official LME settlement price; (2) a regional premium; and (3) an aluminum specification premium.[3] RSUMF, ¶54. The first two components are at issue and contested in this litigation. Together, these two components are commonly referred to as the "all in" price for physical delivery of primary aluminum. Platts combines these two components and publishes the

[3] Defendants' motion focuses solely on the MWP. IPs purchased aluminum under contracts specifying either the MWP or the European Community Premium (sometimes called the Rotterdam Premium). RSUMF, ¶¶37-38, 41-42, 45, 48. Like the MWP, the Rotterdam Premium was hardwired into IPs' contracts. *Id.* IPs allege that Defendants' conduct artificially raised the Rotterdam Premium (13-md-02481, ECF No. 745, ¶¶2, 3, 5, 8, 11, 18, 31, 33, 43, 45, 123, 256, 263; 15-cv-08307, ECF No. 35, ¶¶2, 16-17, 234) and they seek relief for purchases that incorporated the Rotterdam Premium. 13-md-02481, ECF No. 745, ¶¶18, 313; 15-cv-08307, ECF No. 35, ¶¶34, 318. Defendants have not argued that IPs cannot recover their damages for these purchases, and whether their contracts contained the MWP or the Rotterdam Premium, the analysis of the issue is the same.

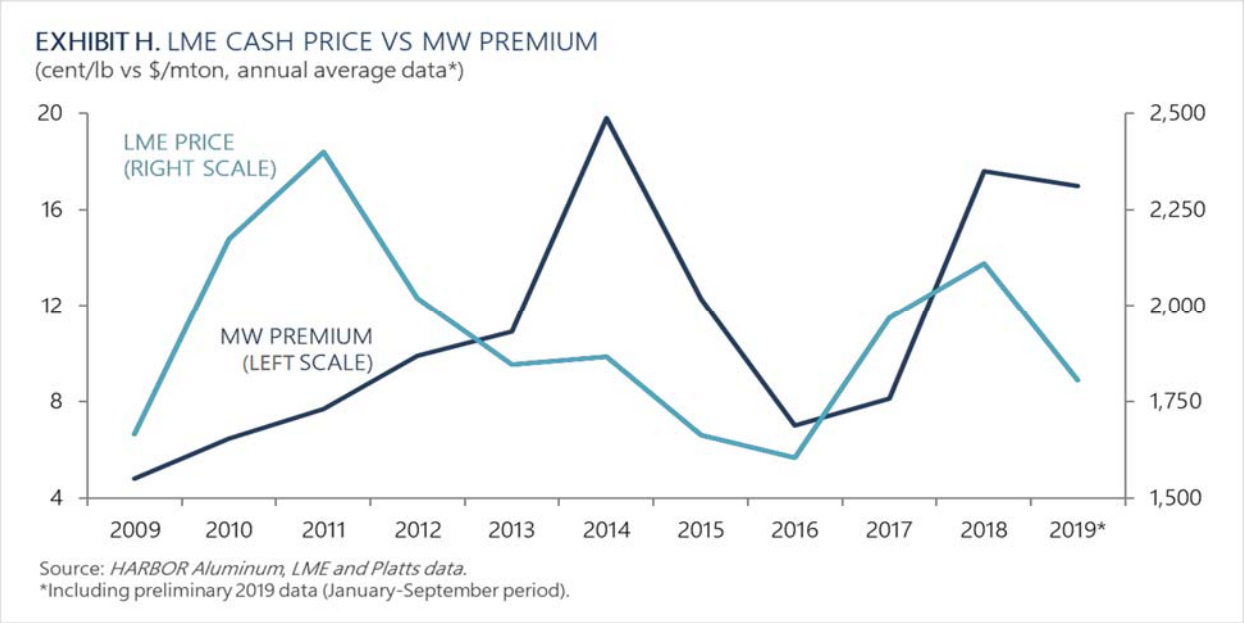
Midwest Transaction Price ("MWTP"). RSUMF, ¶54 (The MWP is defined as the regional differential on "premium" to the LME price which represents the value of having aluminum supplied directly to where it is needed when it is needed to locations across the market.).

While they are combined by Platts, the LME price and the Midwest Premium represent different concepts and are driven by different market factors. PSAMF, ¶57 ("the LME price and MWP stand for completely different concepts and are directly driven by different market factors"). The official LME price is determined daily by trading at the LME based on the global supply and demand for that particular contract. PSUMF, ¶57. The MWP also incorporates the full costs of logistics of transporting aluminum to the United States Midwest, as demonstrated by this chart:



See Ex. 75, (Vazquez Decl.), Exhibit D.

Importantly, the LME price and the MWP do not offset each other, as this next chart clearly demonstrates:



See id., Exhibit H (the dark line represents the MWP and the lighter line represents the LME price).

Historically, the LME had emphasized the LME warehouse market as necessary because its "presence, or threat, of delivery has the result of constantly ensuring that the LME price is in line with the physical market price." PSAMF, ¶¶87-88. Thus, the LME warranting system has, for much of its history, enabled the LME to function as a market of last resort for market participants seeking to buy metal and have it delivered to them. *Id.* During the period at issue in this case, an inflated all-in price (LME price plus the MWP) set the "market price." Defendants made it economically infeasible to obtain aluminum from the LME warehouses as the wait time to obtain such aluminum had skyrocketed from just a few weeks to over two years. Defendants' manipulative actions, not some independent intervening cause, broke the system and directly caused Plaintiffs' injuries. PSAMF, ¶¶84-86.

C. Defendants' Illegal Conduct Inflated Premiums

Defendants' conspiracy began at or before the time they acquired control of the LME warehousing system in 2010. In 2010, Goldman acquired Metro, JPM acquired Henry Bath, and

Glencore acquired Pacorini. PSAMF, ¶62. The head of JPMorgan's commodities business, Blythe Masters, explained the rationale for these acquisitions: "[j]ust being able to trade financial commodities is a serious limitation because financial commodities represent only a tiny fraction of the reality of the real commodity exposure picture . . . . We need to be active in the underlying physical commodity markets in order to understand and make prices." *Id.*, ¶63.

Glencore, Goldman, and JP Morgan also began acquiring massive amounts of aluminum. Goldman's aluminum holdings increased from less than $100 million in 2009 to more than $3 billion by 2012, an amount equivalent to 25% of North America's annual consumption. *Id.*, ¶64-68. In July 2010, Glencore acquired approximately one million tonnes of physical aluminum from Rusal. *Id.*, ¶65. From 2010-2015, JPMorgan owned significant quantities of aluminum warehoused both on- and off-warrant, for sale to customers. *Id.*, ¶66. On January 10, 2012, JPMorgan's aluminum inventory peaked at over 3.5 million metric tons, with an estimated value of approximately $7,480,000,000. *Id.*, ¶67. [redacted]

Id., ¶68, *see also* Ex. 75 (Vazquez Decl.), §4.

Once a sufficient quantity of aluminum was warehoused in Detroit, Defendants began to cancel massive numbers of warrants to create large load out queues and drive up the MWP. PSAMF, ¶¶69-82. As the U.S. Senate's Permanent Subcommittee on Investigations put it, the cause of the dramatic increases in the MWP was the Detroit queue increases (PSAMF, ¶74), which were caused by the "number of large warrant cancellations by a small group of financial institutions." *Id.* Defendants coordinated massive warrant cancellations with each other as well as Red Kite and DB Energy which created an enormous delivery queue out of Detroit Metro warehouses. PSAMF, ¶69.

Many of these warrant cancelations resulted in metal being loaded out of Detroit Metro warehouses only to be loaded back in the other Detroit Metro warehouses in a practice that has been referred to as an aluminum "merry-go-round." *Id*. Much of this aluminum was loaded out of a Detroit Metro warehouse only to be loaded right back in to another nearby Detroit Metro warehouse, in a practice known as "merry-go-round" deals. Because this metal never left Detroit much less Metro, these load-outs did not satisfy ***any*** of the minimum applicable LME load-out rules during the time period which generally prohibited intra-location transfers of aluminum. PSAMF, ¶¶69-70.

At the same time, Defendants were lengthening the queue in Detroit, they also were active in Vlissingen. In December 2011, Glencore and JPMorgan engineered a swap of aluminum and cancellation of warrants that instantly created a large queue at Pacorini's Vlissingen warehouse. PSAMF, ¶¶77-81. Glencore International AG provided JPMorgan Chase Bank, N.A. warrants for 860,000 tonnes of physical aluminum stored in Vlissingen in return for warrants for 860,000 tonnes of physical aluminum stored in Metro's Detroit warehouse. *Id*., ¶78. The amount of aluminum involved was equivalent to approximately 80% of annual U.S. domestic production and involved over one-third of global LME aluminum stocks. *Id*., ¶78.

As part of the arrangement between JPMorgan and Glencore, JPMorgan affirmatively ***agreed not to sell the aluminum it received to any third party*** before first removing it from Vlissingen warehouse, transporting it, and then re-warehousing it in the JPMorgan-controlled Henry Bath warehouse in Rotterdam. *Id*., ¶79. JPMorgan immediately cancelled warrants for 500,000 tonnes of aluminum in Vlissingen, did not sell the aluminum, and created an instant queue. The effect: 860,000 tonnes of supply was restrained from the physical market, a lengthy Pacorini Vlissingen queue developed, and the Rotterdam premium rose sharply. *Id*., ¶79.

Together the massive and illusory warrant cancellations in Detroit and Vlissingen created queues of more than 600 days in both locations. *Id.*, ¶¶75-76, 79. The Vlissingen queues likewise reached over 600 days – during the entirety of which any warrant-holder would have to pay daily rent to the warehouse. *Id.*, ¶79. Goldman's Jacques Gabillon admitted to the Senate Subcommittee that both Goldman and Metro knew cancellations drive the queue. *Id.*, ¶80. As Metro CEO Wibbelman explained, queues drove up the regional premium. *Id.*, ¶81. The LME agreed [redacted] *Id.* By controlling the LME warehousing system, Defendants controlled the amount of aluminum immediately available for release into the spot market, and, thus, in the words of JPMorgans's Blythe Masters, "make prices." *Id.*, ¶63.

Defendants knew that creating queues or bottlenecks in Detroit and Vlissingen would drive up premiums. PSAMF, ¶82. In July 2010, Glencore aluminum head Gary Fegel met with Peter Waszkis, the head of Pacorini warehousing. *Id.*, ¶81. Waszkis informed other Pacorini executives, including the head of Pacorini US, Mario Casciano, and the head of Vlissingen operations, Simon Yntema, that Glencore wanted to create a "bottleneck" at Pacorini's Vlissingen warehouse: "They [Glencore] have decided that for this material we will make our own Detroit: and it will be Vlissingen." *Id.* Waszkis relayed Glencore's plan that "The ***bottleneck effect . . . will support premiums***" and off-warrant aluminum will be sold at those higher premiums. *Id.*, ¶¶81-82; *see also id.* [redacted] And, at the time, other Defendants acknowledged longer queues led to higher regional premiums, stating: (1) The premium will go "raging higher" once Metro "lock[s]" certain aluminum owned by JPMorgan into one of its LME warehouses; (2) "What is true though, is that the metal we [Metro] get is withheld from consumers and makes the [MW] premium go up . . . ." (*id.*); (3) "[High cancellations] is putting pressure on the premium, hence also the premium that we have to pay to get

the metal into the warehouse" (*id.*); and (4) [redacted] *Id.*[4]

Defendants admit that this was an aluminum-trader-driven scheme to restrain physical supply and increase the price of aluminum. *Id.*, ¶¶81-83. Pacorini's Casciano testified that the traders cancelled warrants and took aluminum off warrant to "cow pastures" instead of delivering it to customers, causing tightness in the market. ¶83. This caused the premium to rise. *Id.*, ¶¶81-83. Casciano wrote that it was "[v]ery much in the interest of the traders to 'dry' out the market and squeeze the premium, so the more they park in Cow pasture, [the] more pressure they can put on the premium." *Id.*, ¶83. In 2011, he wrote to a reporter: "***nobody mentions that traders keep the bottleneck tight to inflate the premium***?" *Id.* Casciano stated that the aluminum traders' creation of bottlenecks "***was one way to manipulate the market***, not allowing metal to flow into the consumption market and keep[ing the] market tight and ***keep[ing] the premium at all time high, despite the huge amount of metal on and off warrant***." *Id.* Casciano's colleague, Sergio Garbin, believed that physical aluminum traders were preventing consumers from sourcing aluminum from LME warehouses in order to keep premiums high. *Id.* Casciano made this admission about Glencore: "They have plenty of [aluminum] units available, but they are not selling it, squeezing the premium and pushing clients to sign long term delivery contracts." *Id.* He testified that "the large

[4] At deposition, several of Defendants' current and former executives testified that longer queues in Detroit "dislocated" the market. PSAMF, ¶80 (Mark Askew, former Vice President at Metro: "Q. And you believe that [the material blocked behind the queues] distorted the market, right? A. I think I used the term dislocation. Q. Okay. A. It could, on a large scale, dislocate – Q. The market? A. – the market."); *id.* (Peter Goertzen, aluminum trader at Goldman Sachs: "Everything else equal, I think that the – I believe that the longer the queue could potentially have an upwards effect on premiums.").

cancellations of aluminum done by traders or banks . . . created the tightness in the market." *Id.*[5] He firmly believed that the premium increased because of physical traders' conduct. *Id.* Casciano's testimony is undisputed and corroborated by other evidence. *Id.*, ¶¶80-83.

Defendants wanted higher premiums. Goldman trader Scott Evans testified: "In the business we do, you're normally hedging the base price [LME Cash Price] of all the material that you own . . . [a]nd so the money you earn as a [physical aluminum] trader is primarily earned around the premium." *Id.*, ¶82. For JPMorgan, [redacted] *Id.* Glencore Ltd.'s head U.S. aluminum trader, Patrick Wilson, testified "for us premium is very important." *Id.*

Defendants profited from the conspiracy by selling physical aluminum into the market at inflated prices, including the MWP and Rotterdam Premium. Between 2010 and December 2014, Glencore sold more than $13 billion worth of aluminum, the price of which included the MWP. *Id.*, ¶84. Goldman sold more than one million metric tons of aluminum worth more than $3 billion and JPMorgan "frequently" sold physical aluminum to consumers. *Id.*

III. ARGUMENT

A. Plaintiffs are Efficient Enforcers

Two issues bear on antitrust standing: (1) Have Plaintiffs suffered antitrust injury?; and (2) Are Plaintiffs efficient enforcers of the antitrust laws? *See Gelboim v. Bank of Am., Corp.*, 823 F.3d 759, 772 (2d Cir. 2016). The Second Circuit has already determined that Plaintiffs have

[5] Glencore trader Brian Brigham testified that Glencore put aluminum coming out of the queue into off-warrant storage. Ex. 78, (Brigham Dep. Tr.) at 205:13-207:7; Ex. 79, GLEN-ALI-0979164; *see also* Ex. 80, Senate Report ("SR") at 194-205 (describing mechanics of merry-go-round transactions).

suffered antitrust injury. *See Eastman Kodak*, 936 F.3d at 95. Specifically, the Second Circuit found that Plaintiffs suffered injury in the very market that Defendants restrained, the market for sales of primary aluminum, by artificial manipulation of the MWP, a price component of primary aluminum sales. *Id*. The Second Circuit found that its own precedents established that an injury of this sort is an antitrust injury. *Id.*

Defendants elected not to raise Judge Forrest's earlier finding that Plaintiffs were efficient enforcers. The efficient enforcer inquiry considers: "(1) whether the violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to recover duplicative damages or that damages would be difficult to apportion among possible victims of the antitrust injury." *See Gelboim*, 823 F.3d at 772; *see also AGC*, 459 U.S. at 540-44. Built into the analysis is an assessment of the "'chain of causation'" between the violation and the injury. *Gelboim*, 823 F.3d at 772; *AGC*, 459 U.S. at 540.

1. The Court Previously Determined Plaintiffs Were Efficient Enforcers. No Changes in Fact or Controlling Law Have Occurred. Law of the Case Applies

In 2015 Judge Forrest determined that Plaintiffs were the efficient enforcers in this case. Judge Forrest noted that the same facts that support antitrust injury supported Plaintiffs' roles as efficient enforcers. *See Aluminum II*, 95 F. Supp. 3d at 444. Each Plaintiff bought directly from a producer; the contracts were tied to the MWP; there were ***no*** buyers higher up or more direct in the distribution chain; damages would not be duplicative; and damages were not speculative as defined by the amount the MWP was inflated. *Id.* "[W]hen a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case." *United States v.*

Uccio, 940 F.2d 753, 758 (2d Cir. 1991). A court should adhere "to its own prior rulings in a given case 'absent "cogent" or "compelling" reasons' to deviate, such as '"an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice."'" *Id.* (quoting *Doe v. N.Y. City Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983)); *see also Am. Hotel Int'l Grp., Inc. v. OneBeacon Ins. Co.*, 611 F. Supp. 2d 373, 380 (S.D.N.Y. 2009) ("this is not one of the cases in which a district judge has 'cogent' or 'compelling' reasons to overturn a prior district court holding that is law of the case"), *aff'd*, 374 F. App'x 71 (2d Cir. 2010); *Scottish Air Int'l, Inc. v. British Caledonian Grp., PLC.*, 152 F.R.D. 18, 25 (S.D.N.Y. 1993) (courts should consider previously decided issue only in light of "'compelling circumstances'"). "The law of the case doctrine 'forecloses reconsideration of issues that were decided – nor that could have been decided – during prior proceedings.'" *Doe v. E. Lyme Bd. of Educ.*, 962 F.3d 649, 662 (2d Cir. 2020).

"Under the 'law of the case' doctrine, 'courts are understandably reluctant to reopen a ruling once made,' especially 'when one judge or court is asked to consider the ruling of a different judge or court.'" *Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 94 (2d Cir. 2005) (cited with approval in *Waverly Props.*, 2011 WL 13322667, at *1). "[U]pon reassignment, 'the new judge is well advised to pay particular heed to the doctrine of "law of the case," and not to attempt a de novo review of . . . decisions made over a lengthy period by diligent and experienced judicial officers who have handled the case previously.'" *Waverly Props.*, 2011 WL 13322667, at *1 (quoting *Peyser v. Searle Blatt & Co., Ltd.*, No. 99 Civ. 10785 (GEL), 2004 WL 307300, at *1 (S.D.N.Y. Feb. 17, 2004)); *see also Olin Corp. v. Lamorak Ins. Co.*, 332 F. Supp. 3d 818, 842 (S.D.N.Y. 2018) (on summary judgment court held that previous ruling by different judge in the same case that was not "plainly erroneous" was law of the case); *Dandong v. Pinnacle Performance*

Ltd., No. 10 Civ. 8086(JMF), 2012 WL 6217646, at *2 (S.D.N.Y. Dec. 3, 2012) ("[C]ase reassignment does not put settled issues back into play. If it did, the result would be increased uncertainty and needless depletion of judicial resources."). This Court expressed this same sound reasoning at the November 4, 2019 Case Management Conference in this case: "I want to give fair warning which is I'm not a fan of the approach that says, new judge, wholesale do-over. What Judge Forrest did in her supervision of this case that was unaffected by the appellate decisions seems to me to merit, if not conclusive deference, considerable deference." Ex. 77, 11/4/19 Hr'g Tr. at 27:14-18.

A ruling on a motion to dismiss that a plaintiff has antitrust standing is the law of the case on a subsequent motion for summary judgment in the same case. *Donahue v. Pendleton Woolen Mills, Inc.*, No. 84 CIV. 7149 (MGC), 1988 WL 36317, at *7-*9 (S.D.N.Y. Apr. 13, 1988). In *Donahue*, Judge Ward had denied a motion to dismiss, ruling that the plaintiff had antitrust standing. Judge Cedarbaum, to whom the case was subsequently reassigned, declined to revisit antitrust standing on a motion for summary judgment:

> In view of the closeness of the question of antitrust standing, and the absence of a substantial change in the law or the facts as previously presented to Judge Ward on Pendleton's motion for judgment on the pleadings on this issue, there appears to be no good reason to depart from the law of the case as established by Judge Ward in his very extensive and carefully considered opinion.

Id. at *8; *see also Laumann v. Nat'l Hockey League*, 105 F. Supp. 3d 384, 398 n.54 (S.D.N.Y. 2015) (ruling on motion to dismiss that plaintiff had antitrust standing was the law of the case on motion for class certification).

Here, there is no compelling reason to revisit Judge Forrest's carefully considered decision that Plaintiffs are "efficient enforcers" who have antitrust standing. There has been no change in the controlling Second Circuit law and the district-court decisions upon which Defendants rely cannot justify reconsideration because they are not only inapposite, they also are not controlling law.

Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("'A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.'"); *Dutt v. Young Adult Inst., Inc.*, No. 17 Civ. 5855 (RWS), 2019 WL 463848, at *2 n.1 (S.D.N.Y. Feb. 6, 2019) (citing *Camreta*, 563 U.S. at 709 n.7).

Nor is Defendants' new motion based on new evidence or facts. It is based on the fact that only one Plaintiff purchased aluminum directly from Defendants, a fact that Judge Forrest expressly considered and acknowledged when she ruled that Plaintiffs were efficient enforcers with antitrust standing. *Aluminum II*, 95 F. Supp. 3d at 444 ("each plaintiff is alleged to buy aluminum ***directly*** from a producer (and, in one instance, from one of the defendants)") (emphasis in original).

Judge Forrest's efficient enforcer ruling is also not subject to reconsideration on the ground that it was clearly erroneous. Her ruling properly applies Second Circuit case law including *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 76 (2d Cir. 2013), and *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.*, 467 F.3d 283, 291 (2d Cir. 2006).

Likewise, because Defendants did not raise the issue they lost on the prior appeal, they waived their right to do so now. *See, e.g.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334 (1980) ("appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III"); *Elec. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939) (allowing appeal by party that prevailed below because it was aggrieved by ruling on discrete part of claim: "though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated"). The Second Circuit could have affirmed summary judgment on the basis that plaintiffs are not efficient enforcers. *See Gmurzynska v. Hutton*, 355 F.3d 206, 210 (2d Cir. 2004) ("An appellate court is 'free to affirm a district court decision on

any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court.'") (quoting *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987)). Like Judge Forrest, the Second Circuit knew that Plaintiffs purchased aluminum not from Defendants, but from aluminum producers. *Eastman Kodak*, 936 F.3d at 88, 92. The fact that the Second Circuit reversed and remanded rather than affirming summary judgment on efficient enforcer grounds strongly suggests that the Second Circuit agreed with Judge Forrest's earlier ruling that Plaintiffs were efficient enforcers. *See Glendora v. Cablevision Sys. Corp.*, 893 F. Supp. 264, 267 & n.2 (S.D.N.Y. 1995) (Because "[o]ur Court of Appeals may affirm a judgment for reasons not considered by the district court" by "remanding the matter to this Court for further proceedings rather than simply affirming dismissal of the action, our Court of Appeals suggests that such an implied right exists."). Accordingly, Judge Forrest's efficient enforcer ruling remains the law of the case which need not and should not be reconsidered.

2. Plaintiffs Satisfy the Four Efficient Enforcer Factors of *AGC*

Even if Judge Forrest had not already determined that Plaintiffs are the efficient enforcers in the primary aluminum physical market, the Second Circuit's ruling in *Eastman Kodak* and the facts developed in discovery further support that conclusion.

a. Defendants' Conduct Was the Direct and Proximate Cause of Plaintiffs' Injuries

The first efficient enforcer question is whether Defendants' conduct was the direct or remote cause of Plaintiffs' injury. The Second Circuit has already answered this question: "plaintiffs' injuries were a ***direct result*** of the defendants' anticompetitive conduct." *Eastman Kodak*, 936 F.3d at 96.[6] "Because the defendants manipulated the Midwest Premium, the plaintiffs were forced to pay

[6] Factors 1-3 appear to be antitrust injury factors, but if to be considered separately from the antitrust injury analysis should only be considered in the context of duplicative damages and

a higher Midwest Premium." *Id.* As demonstrated above, Defendants admitted that bottlenecks support premiums, traders keep the bottleneck tight to support the premium, and traders restrain the flow of aluminum to the market to keep premiums high. PSAMF, ¶¶81-83. Defendants' conduct directly caused Plaintiffs' injury.

Judge Forrest found, "plaintiffs are not affected through a chain of transactions, or through side-effects of others' economic activity; rather, they are the first parties in the distribution chain to be affected by fluctuations in the Midwest Premium, because they are both the first to buy aluminum and the first to do so at a price that incorporates the Midwest Premium." *Aluminum II*, 95 F. Supp. 3d at 444.

Other decisions in this district, applying the *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), and *AGC*, 459 U.S. at 519, proximate cause analysis in adjudicating the efficient enforcer element of antitrust standing support Plaintiffs' position here. In *DNAML Pty, Ltd. v. Apple Inc.*, 25 F. Supp. 3d 422, 430-32 (S.D.N.Y. 2014), the court ruled that an e-book retailer had antitrust standing under *Lexmark* because it claimed injuries that were proximately caused by Apple's price-fixing conspiracy. Judge Cote explained that the first efficient enforcer factor under *Gatt*, 711 F.3d at 78, "is essentially a proximate cause analysis and asks 'whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.'" *DNAML*, 25 F. Supp. 3d at 430 (quoting *Lexmark*, 572 U.S. at 133). The *DNAML* court found that although "the immediate victims of the defendants' price-fixing conspiracy were consumers . . . . [R]etailers were directly impacted as well; their injuries were not 'too remote' from the defendants' unlawful conduct." *Id*. (quoting *Lexmark*, 572 U.S. at 133).

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complex apportionment. These two concerns are ***not*** at play in this case. *See* Ex. 81, Sharon E. Foster, *Antitrust Efficient Enforcer and the Financial Products Benchmark Manipulation Litigation*, 13:1 Ohio State Bus. L.J. 99, 118 (2019).

Defendants argue that causation is remote, setting forth a flawed five-step chain of causation. Defendants' purported five-step chain is: (1) Defendants' conduct in the warehouse market allegedly lengthened LME warehouse queues; (2) longer warehouse queues allegedly resulted in higher spot-market prices for aluminum; (3) higher spot-market prices allegedly caused Platts to raise its assessment of the MWP; (4) longer warehouse queues allegedly did not reduce LME prices; and (5) Plaintiffs' individualized price negotiations with third-party aluminum suppliers allegedly did not account for or avoid the alleged increases in the MWP.[7] Defs' Br. at 15.

Defendants' manufactured chain gets it wrong from start to finish. The first through third steps are merely the mechanisms Defendants used to fix the MWP. The fourth step, whether the LME price and the MWP are inversely related, is not a causal factor. It is a question of damages. Not only that, but it is a hotly contested factual matter.[8] Defendants have argued there is an inverse relationship between the LME price and the MWP and that while longer queues (increased storage price) drove the MWP up, the LME price was driven down. Defs' Br. at 6; Ex. 80, (SR) at 180.[9] The facts – including statistical facts – demonstrate the LME price and the MWP do ***not*** have an

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[7] All references to "Defs' Br." are to Defendants' Memorandum in Support of their Motion for Summary Judgment Against the FLPs' and IPs' Umbrella Claims, ECF No. 1287.

[8] "Where the facts are subject to legitimate dispute, they are construed in favor of Plaintiffs as the non-moving party." *In re Term Commodities Cotton Futures Litig.*, No. 12-cv-5126(ALC), 2020 WL 5849142, at *2 (S.D.N.Y. Sept. 30, 2020) (citing *Tindall v. Poultney High Sch. Dist.* , 414 F.3d 281, 284 (2d Cir. 2005)).

[9] Defendants assert that 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. Defs' Br. at 6. FLPs' expert Dr. Zona offered no such opinion and makes clear in his supplemental declaration, that: (i) Defendants mischaracterize his opinions in their selective quotation from his prior reports and; (ii) his opinion remains that the MWP "was not fully offset by any changes in LME prices" and "Defendants' conduct led to increases in prices paid for aluminum by all or substantially all class members." *See* RSUMF, ¶57; *see also id.*, ¶60.

inverse relationship and are independent of each other. In any event, as Defendants concede, in the context of this motion, it cannot be decided against Plaintiffs. *See* Defs' Br. at 6.

The fifth step is spurious because the MWP was automatically incorporated into Plaintiffs' purchase contracts and was ***not*** subject to price negotiations. RSUMF, ¶¶12, 15, 20, 24, 26, 30, 38, 41-42, 48, 53. (Absent this standard pricing by industry convention, it is unlikely defendants would have identified the physical aluminum market as a target for their scheme). The causal links of Defendants' scheme to inflate the MWP have already been considered by the Second Circuit in ruling that Plaintiffs suffered antitrust injury because they allege injury "in the very market that the defendants restrained" and "plaintiffs' injuries were a direct result of the defendants' anticompetitive conduct." *Eastman Kodak*, 936 F.3d at 95-96.

Defendants cite *Ocean View Capital, Inc. v. Sumitomo Corp. of Am.*, No. 98 Civ. 4067(LAP), 1999 WL 1201701, at *7 (S.D.N.Y. Dec. 15, 1999). This opinion was an unpublished, "ineffectual" order issued by a transferor court after the case was transferred out of the SDNY. *See In re Copper Antitrust Litig.*, No. 99-C-621-C, 2000 WL 34230131, at *15 (W.D. Wis. July 12, 2000) (subsequent order). The transferee court found that plaintiffs had antitrust standing. *See In re Copper Antitrust Litig.*, 98 F. Supp. 2d 1039, 1053 (W.D. Wis. 2000). The transferee court, applying the *AGC* analysis, rejected defendants' argument that plaintiff lacked antitrust standing because it sought "damages for copper that it purchased from sellers other than defendants" and never purchased copper on the commodity exchanges (COMEX and LME) that defendants had allegedly manipulated to inflate the market price of physical copper. *Id.* at 1051. Plaintiff alleged that the price of physical copper that it purchased was determined with reference to the futures market prices, the market which defendants had manipulated. *Id.* "Therefore, if defendants caused the COMEX price to rise, they injured plaintiff every time plaintiff bought physical copper regardless who the seller was." *Id.*

The court found that "[t]his directness between plaintiff's injury and the market restraint" favored plaintiff (*id*.), and plaintiff had antitrust standing. *Id*. at 1053. Ultimately, the Seventh Circuit confirmed that plaintiffs had standing. *See Loeb*, 306 F.3d at 469.

b. Plaintiffs Are the First to Pay the MWP

The next question to be answered is whether the Plaintiffs are the first level of "purchasers" to be impacted. They are. "Plaintiffs here are the most efficient enforcers of claims that defendants' anticompetitive conduct caused injuries to economic actors who paid prices in the primary aluminum market that incorporated the Midwest Premium." *Aluminum II*, 95 F. Supp. 3d at 444. The MWP is only paid in the physical market for primary aluminum and the Plaintiffs are first to pay it to producers in the physical market. And perhaps more importantly, while Defendants' primary purchases of aluminum from smelters puts them on the same level as Plaintiffs for their purchases, Defendants' sales are not first-level sales, but secondary sales to indirect purchasers. While Defendants acknowledge in their statement of undisputed facts that first-level purchases are only purchases from smelters, Defendants do not address the fact that purchases directly from Defendants are secondary purchases. *See* Defs' Statement of Undisputed Facts, ECF No. 1291 ("Defs' SUMF") at 1 n.2.[10] Generally, secondary or indirect purchasers cannot sue for damages under federal antitrust law. *See Ill. Brick Co. v. Ill.*, 431 U.S. 720, 730 (1977).

c. Plaintiffs' Injuries Are Not Speculative

The third factor is whether the injury is speculative. It is not. The MWP was inflated. While there is no uncertainty regarding damages here, "'[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong

[10] Due to this fact, as Class Certification was being briefed, the Class definition was adjusted, dropping the sales by the Defendants to potential class members. Class Cert. Reply Br., ECF No. 1238 at 6; RSUMF, ¶58.

has created.'" *Gelboim*, 823 F.3d at 779 (quoting *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 689 (2d Cir. 2009) (in turn quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946))). Defendants cite *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC*, 366 F. Supp. 3d 516 (S.D.N.Y. 2018), a LIBOR case, but it is distinguishable. There, that Court found that plaintiffs, who sought to represent a class of persons who traded FX forwards and futures that "incorporated LIBOR only implicitly through a complex formula involving numerous other causal factors," were not efficient enforcers. *Id*. at 546. The court found that causation was too indirect to support standing because FX forwards were "highly negotiated contracts that incorporate numerous considerations as to make the effect of Sterling LIBOR manipulation highly speculative." *Id*. at 546-47. The court also found the plaintiff who had traded futures on an exchange failed to allege how his damages could be calculated. *Id*. Those considerations do not apply here. Contracts for the purchase of aluminum are relatively straight-forward, and damages can be readily calculated by determining the amount by which the Premiums were artificially inflated due to Defendants' conspiracy. *Id.* at 444.

In *In re London Silver Fixing, Ltd., Antitrust Litig.*, 332 F. Supp. 3d 885 (S.D.N.Y. 2018), the court found that plaintiffs had not established a causal connection between defendants' actions and plaintiffs' injuries because they did not explain what effect defendants' actions had on the manipulated market or related markets. *Id*. at 907. The effects of Defendants' alleged "episodic manipulation of individual trades" may have been "transient by design" making it difficult to determine what effect it had on market prices. *Id*. at 907, 909. Thus, it was not clear, and the complaint "allege[d] nothing to make it clear, the extent to which class members were injured by Defendants' manipulations." *Id*. at 907. Here, Defendants' manipulation of the MWP was not transient or episodic, but was sustained and universal, and clearly impacted Plaintiffs directly in

causing them to pay higher prices for physical aluminum. The *London Silver* decision was also animated by the fact that "[t]he breadth of Plaintiffs' proposed class definition," which included "every participant in a silver or silver-denominated transaction on a U.S.-based exchange for approximately six years," "raises serious concerns of ruinous, potentially-disproportionate liability." *Id*. at 908. Again, in this case, where the claims are far more constrained, this concern is not present.

d. No Duplicate Damages or Apportionment Problems

The last of the four *AGC* factors asks whether there is the potential for duplicate damages or if damages are difficult to apportion. There are no duplicate damages as only the First-Level Purchasers and Individual Plaintiffs remain in the case. For that same reason, there will be no difficulty in apportioning damages. In any event, under *Lexmark*, "'potential difficulty in ascertaining and apportioning damages is not . . . an independent basis for denying standing'" where proximate cause was adequately alleged. *DNAML*, 25 F. Supp. 3d at 430 (citing *Lexmark*, 572 U.S. at 135). There, the court held that there was no "concern about duplicative recoveries here, as *DNAML* seeks damages only for injury to its own business, which does not overlap with injury to either consumers or any other retailer." *Id*. at 432. Moreover, as Judge Forrest noted, the damages here are not duplicative as there is no one higher in the distribution chain. *Aluminum II*, 95 F. Supp. 3d at 444.

In *In re Platinum & Palladium Antitrust Litig.*, 449 F. Supp. 3d 290, 308 (S.D.N.Y. 2020), does not support Defendants' arguments. There, the court examined the efficient enforcer factors and found that the causation analysis did not preclude plaintiffs' standing. The court recognized that "some courts have held that plaintiffs alleging injury via manipulation of a benchmark price satisfy the proximate causation requirement because their allegation is that they are directly injured by defendants' manipulation of the benchmark, regardless of whether they have transacted directly with

defendants." *Id*. at 304-05. Even if causation was "problematic" because, in the court's view, the plaintiffs and third parties had chosen to incorporate the benchmark price without defendants' involvement, the principal factor motivating the court's decision to deny standing was the risk of duplicate recoveries and the danger of complex apportionment, which the court called "arguably the most important factor in the efficient enforcer analysis." *Id*. at 305, 307. The court expressed concern that apportioning damages among those parties that decided to incorporate the benchmark fix price into transactions without the defendants' knowledge would be "particularly complex." *Id*. at 307-08. That is not the case here. Defendants knew for a certainty the MWP ***would*** be incorporated into Plaintiffs' contracts. RSUMF, ¶58.

B. Defendants Do Not Face Disproportionate Damages

Defendants argue potential damages are disproportionate to the wrongdoing. This is not so. The Defendants purchased billions of dollars' worth of aluminum as the premium went from 4 cents to more than 20 cents per pound. The Defendants made hundreds of millions, if not billions, of dollars in profit on their sales of physical aluminum. PSAMF, ¶84. The total estimation of the Class damages was less than a billion dollars. 13-md-02481 ECF No. 1195-3, 8/5/16 Gilbert Reply Rpt. at 56-57& Ex. F2; *see also* 13-md-02481 ECF No. 1195-1, 12/16/19 Gilbert Sur-Reply Rpt., ¶¶89-91. The IPs' damages are in the tens of millions. Thus, damages are not disproportionate to Defendants' activities in fixing the entire aluminum market. Even if Plaintiffs prevail at trial, the amount they recover will be far less than Defendants' ill-gotten gains from their anticompetitive scheme. But as importantly, this "disproportionate damages" concern is not one of the four *AGC* efficient enforcer factors. It is just the kind of judicially imposed "prudential" concern the Supreme Court rejected in

Lexmark as a basis for dismissing statutory causes of action – while characterizing *AGC*'s factors as simply an inquiry into proximate cause.[11]

The cases cited by Defendants are not controlling. *See Camreta*, 563 U.S. at 709 n.7 ("'A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.'") (citing 18 J. Moore et al., Moore's Federal Practice §134.02[1] [d], at 134-26 (3d ed. 2011)). Nor are they persuasive. An overarching theme of many of the cases cited by Defendants is the threat of astronomical damages awards that would bankrupt defendants, which is not an issue in this case. It is also a prudential concern, not a statutory concern, that should not bear on standing under *Lexmark*. This follows from the fact that financial benchmarks, like LIBOR, manipulations of which are the subject of many of Defendants' cases, are incorporated into a virtually limitless variety of instruments, including basic contracts, collateral debt obligations, asset swaps, and forward rate agreements. *See Gelboim*, 823 F.3d at 765.

For example, between January 1, 2005 and December 31, 2010, an estimated $100 trillion in Sterling LIBOR-based derivatives were traded within the United States. *Sonterra*, 366 F. Supp. 3d at 531. This amount is more than the United States' GDP during that period. With a financial benchmark, like the one at issue in *Sonterra*, remote parties incorporated the benchmark in an

[11] The dicta in *Gelboim* concerning "damages disproportionate to wrongdoing" does not support Defendants' argument. *Gelboim*, 823 F.3d at 779. *Gelboim* quoted the four efficient enforcer factors verbatim from *AGC*. *Id*. at 778. In discussing the first factor, the Second Circuit found that because "the Banks control only a small percentage of the ultimate identified market," the voluntary decision of independent third parties to incorporate LIBOR into myriad derivative instruments may break the chain of direct causation. It is only such intervening cause, present in the context of *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666 (S.D.N.Y. 2013), *vacated sub nom. Gelboim v. Bank of Am. Corp.*, 823 F.3d 759 (2d Cir. 2016), but absent here, that "may raise the very concern of damages disproportionate to wrongdoing noted in [*Mid-West Paper Prods. Co. v. Cont'l Grp.*, 596 F.2d 573, 580-87 (3d Cir. 1979)]." *Gelboim*, 823 F.3d at 779.

extensive variety of instruments and contracts. Here, however, a reasonable constraint on damages exists: the amount of physical aluminum produced and sold to users in a geographic area in which the MWP was customarily included in supply contracts. And those damages were incurred by Plaintiffs who actually paid the premium, which was designed to capture costs associated with delivery of aluminum to purchasers of the physical commodity, was incorporated in contracts for physical delivery of aluminum, and was known to Defendants before and during their conspiracy. Unlike the financial benchmark cases, the premiums here are not incorporated into derivatives or CDOs with trillions of dollars of nominal value. This fact alone obviates the statutory and prudential concerns expressed in these district court cases about directness of injury, speculativeness and apportionment of damages, and on the potential of bankrupting major, publicly traded financial institutions that are the foundation of the global economy.[12]

In *7 W. 57th St. Realty Co., LLC v. Citigroup, Inc.*, 314 F. Supp. 3d 497, 512-14 (S.D.N.Y. 2018), *aff'd on other grounds*, 771 F. App'x 498 (2d Cir. 2019), *cert. denied*, __ U.S. __, 140 S. Ct. 71 (2019), plaintiff sought to recover for the diminution in value of his non-LIBOR denominated bonds due to Defendants' manipulation of LIBOR. Plaintiffs lacked standing because their injury was too indirect, being even "more attenuated than those of the bondholders in *In re LIBOR-Based Fin. Instruments Antitrust Litig.*" *Id.* at 513. On appeal, the Second Circuit affirmed, finding that the panel's concern in *Gelboim* of bankrupting major financial institutions and "'vastly extend[ing] the potential scope of antitrust liability in myriad markets where derivative instruments have

[12] *See* PSAMF, ¶85 (Defendants are very large, publicly traded companies. JPMorgan, Goldman Sachs, and Glencore reported 2019 revenues of $118.7 billion, $36.6 billion, and $215 billion, respectively. *See* Ex. 82, JPMorgan Chase & Co., Annual Report (2019) at 3; Ex. 83, The Goldman Sachs Group, Inc., Annual Report (2019) at 2; Ex. 84, Glencore, Annual Report (2019) at 5. Recently, Goldman Sachs settled a dispute with the Malaysian government for $3.9 billion but still posted a profit in its second quarter of this year. *See* Ex. 85, Ben Winck, *Goldman Sachs cuts quarterly profit by 91% after $3.9 billion 1MDB settlement*, Market Insider (Aug. 7, 2020).

proliferated' . . . . [wa]s exponentially more present in this case, where the bonds were not actually tied to LIBOR." *7 W. 57th St. Realty Co., LLC*, 771 F. App'x at 502.

In *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521 (S.D.N.Y. 2017), the court denied antitrust standing to a putative class of plaintiffs because of the "benumbing," "truly astronomical" potential damages that could potentially be awarded to a class of persons that engaged in trillions of dollars' worth of transactions priced, benchmarked, or settled to CHF LIBOR over an eleven-year period. *Id*. at 559-61, 565. Here, the scope of damages is limited by the U.S. market for physical aluminum and is orders of magnitude smaller than those presented in *Sonterra* and other LIBOR cases.

In *Sullivan v. Barclays PLC*, No. 13-cv-2811 (PKC), 2017 WL 685570 (S.D.N.Y. Feb. 21, 2017), the court was concerned with Plaintiffs' "extraordinarily large" derivatives market, the notional amount of just a portion of which was more than double the U.S. GDP in 2015. *Id*. at *1, *16. The court found that Gelboim's concern of bankrupting "'16 of the world's most important financial institutions'" applied in *Sullivan*. *Id*. at *16. If the putative class were to prove damages of even one tenth of one percent of the notional market value of the financial instruments in the relevant market, it would receive $123 billion in damages and "[d]amages theoretically could accrue into the trillions of dollars." *Id*.

The *Sullivan* court also found that plaintiffs' class claims would include "virtually any loss on a Euribor-based derivative transaction," which would make calculation and apportionment of damages "exceptionally complex" and partially "speculative." *Id*. at *15. The court, quoting *Gelboim*, found that the subject transactions "'are countless and the ramified consequences are beyond conception.'" *Id*. at *19. "In certain of these transactions, it may not even be apparent which party profited and which party was injured by the Euribor manipulation . . . . " *Id*. In stark

contrast, these concerns are not present here for the reasons stated herein. Though experts have not yet submitted merits reports, damages should principally involve the calculation of a but-for premium price. The premium was paid by Plaintiffs, purchasers of physical aluminum. There are no questions about which of plaintiffs' transactions were inflated as a result of the artificially higher premiums. *See* Defs' SUMF, ¶5 ("The sellers from which FLPs purchased are known or identifiable"); *id*., ¶1 (identifying quantity of aluminum purchased).

C. Plaintiffs' Claims Are Not Umbrella Claims

Defendants argue that many recent district court decisions that have addressed the "umbrella theory" have held that umbrella purchasers lack "efficient enforcer" standing. Defs' Br. at 1. Plaintiffs' claims, however, are not based on an umbrella theory. Rather than suffering injury at the hands of a third-party that voluntarily chose to raise prices, Plaintiffs' injuries were "a direct result of," Defendants' manipulation of the MWP. *Eastman Kodak*, 936 F.3d at 96. In essence, Defendants' manipulative actions fixed the entire primary physical aluminum market. By industry convention, the MWP was included in Plaintiffs' contracts and every contract submitted by Defendants contains an MWP component. RSUMF, ¶58.

As explained in *Loeb*, there is a clear distinction between umbrella claims and the type of claims at issue here where an entire market is fixed. In *Loeb*, the court noted that the defendants' "'umbrella standing'" theory was based on their "object[ion] to the possibility that they might be held responsible for higher copper prices throughout the physical market, rather than just for the sales they made." 306 F.3d at 483 n.4. The court distinguished an umbrella claim stemming from "an ordinary cartel case" from antitrust claims stemming from a "conspiracy to rig prices for the entire physical market" or a conspiracy to "rig[] product standards, which affects everyone who tries

to participate in a particular product market." *Id*. Loeb, thus rejected defendants' characterization of plaintiffs' claims as umbrella claims.

Here, Defendants rigged the entire aluminum market by artificially inflating the MWP, a non-negotiable component of all Plaintiffs' aluminum purchases. RSUMF, ¶58. As the Second Circuit noted earlier in this case, "'[t]he fixing of a component of price violates the antitrust laws.'" *Eastman Kodak*, 936 F.3d at 95-96 (quoting *Gelboim*, 823 F.3d at 771). "'[A]ny conspiracy formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se, and the precise machinery employed . . . is immaterial.'" *Eastman Kodak*, 936 F.3d at 95-96 (quoting *United States v. Apple, Inc.*, 791 F.3d 290, 328 (2d Cir. 2015)).

In *In re Commodity Exch., Inc.*, 213 F. Supp. 3d 631 (S.D.N.Y. 2016), the Court ruled that plaintiffs had antitrust standing where defendants rigged the entire market for gold. The Court distinguished umbrella liability cases where non-conspiring parties voluntarily raise their prices under the conspiring parties' price umbrella.

> In the typical umbrella liability case, plaintiffs' injuries arise from transactions with non-conspiring retailers who are able, but not required, to charge supra-competitive prices as the result of defendants' conspiracy to create a pricing "umbrella." *See, e.g.*, *Gross v. New Balance Athletic Shoe, Inc.*, 955 F. Supp. 242, 245-47 (S.D.N.Y. 1997) (rejecting umbrella theory of liability and noting that "the causal connection between the alleged injury and the conspiracy is attenuated by significant intervening causative factors," most notably, the "independent pricing decisions of non-conspiring retailers"). Here, in contrast, Plaintiffs allege that Defendants rigged the "entire . . . market" for gold investments and that all market participants "moved in line" according to Defendants' price manipulation, leaving little room for any interfering price impact due to the actions of non-culpable entities or exogenous market forces.

Id. at 656.

Loeb and *Commodity Exch.*, demonstrate that seeking damages for purchases from non-defendants does not automatically create an umbrella claim. By loosely using the term "Umbrella Claims," as shorthand for purchases not from defendants, Defendants here attempt to import a

privity requirement into antitrust standing law. Neither the Supreme Court nor any Circuit Court, however, has imposed a privity requirement to the efficient enforcer factors. It has been clear since *McCready*, that privity is not required for antitrust standing; moreover, the Supreme Court recently clarified that the question that matters is solely one of proximate cause. *See Lexmark*, 572 U.S. at 125-28 (construing materially similar Lanham Act text and describing Clayton Act §4 standing as a question of "proximate cause").

In *Commodity Exch.*, the Court further rejected defendants' argument that the "Plaintiffs lack standing because they do not allege that they transacted directly with Defendants." 213 F. Supp. 3d at 654-55. The court found that defendants' contention that antitrust standing requires privity contravened *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982), and *Loeb*, 306 F.3d at 481, and held that privity was not required where defendants conspired to "'corrupt a separate market in order to achieve its illegal ends'" and "each plaintiff suffered a unique and sufficiently direct injury as a result of defendants' anticompetitive conduct." *Commodity Exch.*, 213 F. Supp. 3d at 655 (quoting *In re Aluminum Warehousing Antitrust Litig*, 833 F.3d 151, 161 (2d Cir. 2016)). The court concluded that "at least some subset of Plaintiffs has suffered a sufficiently direct injury and therefore is sufficiently interested to litigate the antitrust claims at issue," and that the other efficient enforcer factors were also satisfied as well. *Commodity Exch.*, 213 F. Supp. 3d at 656-58.

A proximate-cause analysis was similarly applied to find that plaintiffs were efficient enforcers although they were not in privity with defendants in *In re London Silver Fixing, Ltd., Antitrust Litig.*, 213 F. Supp. 3d 530, 552-55 (S.D.N.Y. 2016), and *Nypl v. JPMorgan Chase & Co.*, No. 15 Civ. 9300 (LGS), 2017 WL 3309759, at *5-*6 (S.D.N.Y. Aug. 3, 2017) (plaintiff "alleges facts that, if proven, show that Plaintiffs' injury flows directly from Defendants' alleged manipulation of FX benchmark rates").

In *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789 (LGS), 2016 WL 5108131 (S.D.N.Y. Sept. 20, 2016), the court explained that "[t]he antitrust laws do not require a plaintiff to have purchased directly from a defendant in order to have antitrust standing" (*id.* at *9) and held that plaintiffs were "efficient enforcers" where defendants '"dominated the FX market with a combined market share of over 90%.'" *Id.*; *see also Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 165 (S.D.N.Y. 2018) (ruling that plaintiffs were efficient enforcers and rejecting defendants' umbrella theory standing arguments).

Plaintiffs are simply not "umbrella purchasers" as that term is properly understood but, rather, are direct purchasers whose harm was proximately caused by Defendants' conspiracy. The cases cited by Defendants do not support their assertion that Plaintiffs' claims are umbrella claims or that umbrella claims are universally rejected. For example, Defendants cite *In re Modafinil Antitrust Litig.*, 837 F.3d 238 (3d Cir. 2016), and *Mid-West Paper*, 596 F.2d at 573, two Third Circuit cases. In *Modafinil*, the Third Circuit, in considering a class certification order in a pharmaceutical pay-for-delay case, found that putative class members did not lack antitrust standing. 837 F.3d at 264. The court acknowledged that *Mid-West Paper* was "pre-*AGC*" and found that "Defendants' argument that *Mid-West Paper* means that a customer of a non-defendant cannot have antitrust standing is an oversimplification." *Id*. The court reminded defendants that *Mid-West Paper* was based on the fact that calculating damages would be "'almost impossible' . . . because so many variables went into the competitor's price calculation irrespective of the existence of the monopoly." *Id.* The *Modafinil* court also noted that the defendants in *Mid-West Paper* "gained no advantage from the plaintiff's injury." *Id.* Here, the premium had to be pushed higher in the entire market for Defendants' scheme to succeed. If purchasers of primary aluminum could avoid the premium, Defendants would have not been able to sell their massive stocks of metal at artificially inflated prices. Defendants' other

cases are similarly unavailing. *See, e.g.*, *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 433 F. Supp. 3d 395, 409 (E.D.N.Y. 2020) (declining to rule on whether umbrella theory could create antitrust standing "where adopting Plaintiffs' proposed theory of liability would expose Amex to damages for every merchant fee charged by every credit card network in the United States"); *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09-cv-230, 2014 WL 2610613, at *28 (D. Vt. June 11, 2014) (finding that Plaintiffs had not put forward method for calculating "umbrella theory" damages where Plaintiffs' expert assumed that non-conspiring entities had paid prices "roughly equivalent to the prices paid in the conspiracy"); *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 1:12-md-2343, 2014 WL 2002887, at *9 (E.D. Tenn. May 15, 2014) (explaining that *Loeb* "did not definitively decide the issue of 'umbrella' damages but dealt with commodities markets, in which there is a more direct causal link between price structures than is present in this case"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2012 WL 6708866, at *7 (N.D. Cal. Dec. 26, 2012) (declining to allow "alternative umbrella damages theories" given absence of state authority and "based on the particular facts of these cases involving a multi-layered distribution chain"), *aff'd*, 637 F. App'x 981 (9th Cir. 2016).[13]

IV. CONCLUSION

Judge Forrest's well-reasoned ruling that Plaintiffs are efficient enforcers should be followed as law of the case. Plaintiffs are not proceeding under an umbrella theory of liability; rather as the Second Circuit stated, their injuries are a "direct result of" Defendants' conspiracy to increase the MWP. There are no victims of Defendants' scheme who were more directly affected than Plaintiffs.

[13] The Plaintiffs, FLPs and IPs have coordinated to jointly filed one brief addressing Defs' Br. As a result, the Plaintiffs requested from Defendants a 10-page extension to 35 pages. Defendants agreed. Plaintiffs informed Defendants they have no objection to a similar page extension for Defendants on reply.

Damages are not speculative and there is no apparent need to apportion damages here. The facts of this case differ significantly from the financial benchmark district court cases relied on by Defendants and there is no prudential concern of massive, ruinous liability lurking behind Plaintiffs' antitrust standing. The liability case against Defendants is very strong and deserves a remedy. Plaintiffs are well-situated to seek that remedy.

DATED: October 20, 2020

Respectfully submitted,

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SIGNATURE CERTIFICATION

Plaintiffs use electronic signatures with consent in accordance with Rule 8.5(b) of the Court's ECF Rules and Instructions.

Dated: October 20, 2020

s/ Patrick J. Coughlin
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