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

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INTRODUCTION

Following the Second Circuit's decision in *Gelboim v. Bank of America Corp.*, 823 F.3d 759 (2d Cir. 2016), "a critical mass of judges within this district have concluded that plaintiffs who are not direct purchasers [from the alleged conspirators] are not efficient enforcers in a benchmark manipulation [antitrust] case." *In re London Silver Fixing, Ltd., Antitrust Litig.*, 332 F. Supp. 3d 885, 905 (S.D.N.Y. 2018) ("*Silver II*"). Plaintiffs' claims fall directly within the heartland of this "critical mass" of on-point authority: Plaintiffs are asserting benchmark manipulation antitrust claims even though, with one minor exception, none of them purchased any aluminum from an alleged conspirator. Plaintiffs nonetheless contend that this Court should disregard this adverse authority and allow their claims to proceed to trial. (Opp. 12–15.) In their view, Judge Forrest's 2015 motion-to-dismiss ruling compels that outcome because it irrevocably established as the "law of the case" that Plaintiffs are efficient enforcers of the antitrust laws. (*Id.*)

Plaintiffs are fundamentally mistaken. Although Judge Forrest denied a Rule 12(b)(6) motion to dismiss these cases on efficient enforcer grounds, her ruling did not address or decide the umbrella standing question presented by this summary judgment motion, *i.e.*, whether, as between plaintiffs that acquired their aluminum from an alleged conspirator and those that did not, it is only the former that possess efficient enforcer antitrust standing. Moreover, even if Judge Forrest had addressed the very question presented here, it is well settled that a motion-to-dismiss ruling would not bar consideration of a subsequent summary judgment motion directed at the same issue. *See, e.g.*, *Maraschiello v. City of Buffalo Police Dept.*, 709 F.3d 87, 97 (2d Cir. 2013). Finally, at the time of her motion-to-dismiss ruling, Judge Forrest did not have the benefit of the Second Circuit's *Gelboim* decision or the other on-point decisions that *Gelboim* generated. This intervening authority is a sufficient basis by itself for rejecting Plaintiff's contention that the law-of-the-case doctrine bars this Court from reaching the merits of the umbrella standing question.

Plaintiffs also argue that the numerous cases dismissing claims similar to Plaintiffs' umbrella claims are "not controlling" and should not be followed here. (Opp. 24.) But the Second Circuit's guidance in *Gelboim* is controlling, and the various district court decisions applying *Gelboim* in similar cases are highly persuasive. Those decisions highlight three essential reasons why Plaintiffs lack efficient enforcer standing to sue over any purchases they made from non-conspiring aluminum smelters. First, the smelters' independent decisions about whether to incorporate the Midwest Premium into Plaintiffs' aluminum contracts render Plaintiffs' claims too indirect to support antitrust standing. Second, purchasers such as Reynolds and Southwire that acquired their aluminum directly from Defendants are far more efficient enforcers of the antitrust laws. Third, granting standing to purchasers like Plaintiffs would expose Defendants to liability vastly disproportionate to any anticompetitive profits that allegedly accrued to Defendants.

For these reasons, as more fully set forth below, Defendants' motion should be granted.

I. The Law-of-the-Case Doctrine Does Not Apply.

Plaintiffs' law-of-the-case argument revolves around Judge Forrest's March 2015 ruling on Defendants' Rule 12(b)(6) motion to dismiss Plaintiffs' amended complaints. In that motion, Defendants argued that Plaintiffs lacked efficient enforcer antitrust standing because "another group of potential plaintiffs is better positioned to prosecute the alleged antitrust violation: users of defendants' warehouse services." *In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419, 444 (S.D.N.Y. 2015) ("*Aluminum II*").[1] Judge Forrest denied that motion, reasoning that, with respect to injuries allegedly occurring in the aluminum market as opposed to the warehouse services market, buyers of aluminum are better positioned to enforce the antitrust laws. *See id.* Judge Forrest did not, however, address the further question now presented by this motion:

[1] Unless otherwise noted, emphasis is added, and citations and internal quotations are omitted.

whether efficient enforcer standing to sue over injuries allegedly occurring in the aluminum market should be limited to plaintiffs that purchased aluminum directly from an alleged conspirator. *See id*. Although Plaintiffs argue that Judge Forrest's March 2015 ruling created law of the case that bars this Court from reaching the merits of that distinct umbrella standing question (Opp. 2), Plaintiffs are mistaken for several reasons.

First, Judge Forrest's denial of Defendants' motion to limit efficient enforcer standing to participants in the warehouse services market cannot preclude this Court from considering a distinct and separate umbrella standing question that was neither discussed nor decided in the motion-to-dismiss ruling. Rather, it is hornbook law that "[l]aw of the case does not reach a matter that was not decided," even if the matter "could have been decided in earlier proceedings." 18B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 4478.

Second, Judge Forrest did not have the benefit of the evidentiary record that accompanies this summary judgment motion. Judge Forrest thus lacked highly relevant evidence demonstrating, for example, (i) the potential for liability grossly disproportionate to the alleged wrongdoing (SUMF Reply ¶¶ 3, 8, 10, 34, 61), (ii) the extended chain of causation that underlies Plaintiffs' theory of causation and injury (*id.* ¶¶ 54–55, 57), (iii) that all-in aluminum prices are heavily negotiated (*id.* ¶¶ 15, 20, 26, 30, 38, 42, 48, 53), or (iv) that large numbers of aluminum contracts do not incorporate the Midwest Premium (*id.* ¶¶ 12–13, 18–19, 23–24, 29, 45–46, 51, 58–59), contrary to Judge Forrest's assumption at the motion-to-dismiss stage that all aluminum purchasers unavoidably "must pay prices for aluminum that incorporated the Midwest Premium," *Aluminum II*, 95 F. Supp. 3d at 442. Both the change in the evidentiary record and the change of procedural standard between a motion to dismiss and a motion for summary judgment render the law-of-the-case doctrine inapplicable here. *See, e.g.*, *Maraschiello*, 709 F.3d at 97 (law of the case

"would not preclude a district court from granting summary judgment based on evidence after denying a motion to dismiss based only on the plaintiff's allegations"); *United States v. Johnson*, 616 F.3d 85, 93 (2d Cir. 2010) ("the application of law-of-the-case doctrine is generally inappropriate when relevant issues are governed by different standards of review"), *abrogated on other grounds*, 576 U.S. 591 (2015); *Harlow v. Children's Hosp.*, 432 F.3d 50, 55 (1st Cir. 2005) ("Interlocutory orders, including denials of motions to dismiss, remain open to trial court reconsideration, and do not constitute the law of the case.").

Third, even if this motion presented the very same question previously decided by Judge Forrest, a host of intervening authority would bar application of the law-of-the-case doctrine. Over a year after Judge Forrest issued her motion-to-dismiss ruling, the Second Circuit *sua sponte* raised the question of umbrella standing in *Gelboim* and directed the district court to consider that question on remand as part of an efficient enforcer analysis. *See Gelboim*, 823 F.3d at 778–80. In the wake of *Gelboim*, "a critical mass of judges within this district" have dismissed claims similar to Plaintiffs' claims for lack of efficient enforcer standing. *See, e.g.*, *Silver II*, 332 F. Supp. 3d at 905. This critical mass of intervening authority is sufficient by itself to bar application of the law-of-the-case doctrine. *See, e.g.*, *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) ("intervening change in controlling law" is one of the "major grounds justifying reconsideration" of a prior decision); *In re MTBE Prod. Liab. Litig.*, 148 F. Supp. 3d 309, 316 (S.D.N.Y. 2015) (reconsidering prior decision because "the overwhelming weight of later decisions considering this issue, while not an intervening change of law, has convinced this Court that its earlier decisions were clear error."); *Fero v. Excellus Health Plan, Inc.*, 304 F. Supp. 3d 333, 340 (W.D.N.Y. 2018) (reconsidering prior decision based on intervening Second Circuit decision even though the decision "does not explicitly reach [a] holding" on the question before

the district court); WRIGHT & MILLER, § 4478 ("the most obvious justifications for departing from the law of the case arise when there has been an intervening change of law").

Finally, even if the law-of-the-case doctrine were applicable here, this Court would have good grounds for declining to apply that discretionary doctrine. The law-of-the-case doctrine grants district courts broad discretion to reconsider interlocutory rulings such as motion-to-dismiss rulings so long as the parties are afforded "notice and an opportunity to persuade the court that it should not alter its prior ruling." *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991); *see also Virgin Atl. Airways*, 956 F.2d at 1255 (doctrine is "admittedly discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment"); *In re "Agent Orange" Prod. Liability Litig.*, 733 F.2d 10, 13 (2d Cir. 1984) (interlocutory rulings "are subject to modification by the district judge at any time prior to final judgment, and may be modified to the same extent if the case is reassigned to another judge"). Here, the better discretionary decision would be to reach the merits of the umbrella standing question because Judge Forrest's motion-to-dismiss ruling does not address that question and leaves the Second Circuit without a district court ruling on that issue to review on appeal. Thus, all that this Court would accomplish by declining to consider the merits of the umbrella standing question would be to force the Second Circuit—contrary to its explicit preference—to review that question without the benefit of a district court's analysis. *See Gelboim*, 823 F.3d at 778 ("nor are we inclined to answer the several relevant questions without prior consideration of them by the district court").[2]

[2] Citing *Donohue v. Pendleton Woolen Mills*, 1988 WL 36317 (S.D.N.Y. 1988), Plaintiffs argue that a motion-to-dismiss ruling can foreclose a subsequent summary judgment motion directed at the same question, but unlike this case, *Donahue* did not involve a different legal question, different evidence, or intervening authority, and did not leave the Second Circuit without a "very extensive and carefully considered opinion" on the precise question raised in the summary judgment motion. *See id.* at *8. To the extent that *Donohue* suggests that a motion-to-dismiss ruling can foreclose a subsequent summary judgment motion, it also goes against the grain of considerable appellate authority. *See supra* at 3–4.

Plaintiffs fare no better with their assertion that Defendants "waived" the umbrella standing question by failing to present it to the Second Circuit in *Eastman Kodak Co. v. Henry Bath LLC*, 936 F.3d 86 (2d Cir. 2019). In *Eastman Kodak*, "the only issue on appeal [was] whether the plaintiffs have suffered an antitrust injury." *Id*. at 94. The Second Circuit did not consider the separate question of efficient enforcer standing, let alone the specific umbrella standing arguments presented in this motion. *See id*. Plaintiffs nevertheless assert that Defendants waived the umbrella standing issue by failing to present it as an alternative ground for affirmance (Opp. 15–16), but Defendants could not have properly presented their summary judgment arguments in *Eastman Kodak* because (i) no summary judgment motion had yet been filed, and (ii) there was no district court ruling on the umbrella issue for the Second Circuit to review. Furthermore, Plaintiffs' waiver argument is squarely foreclosed by controlling law holding that: "The role of the appellee is to defend the decision of the lower court. *This Court has not held that an appellee is required, upon pain of subsequent waiver, to raise every possible alternate ground upon which the lower court could have decided an issue*." *Brown v. City of N.Y.*, 862 F.3d 182, 188 (2d Cir. 2017).[3]

This Court therefore should proceed to the merits of this summary judgment motion.

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

A. Plaintiffs' claims are umbrella claims.

Recognizing that "[t]he overwhelming majority of recent court decisions . . . have rejected umbrella claims," *In re LIBOR-Based Financial Instruments Antitrust Litig.*, 2016 WL 7378980, at *15 n.24 (S.D.N.Y. 2016) ("*LIBOR VI*"), Plaintiffs assert that they "do not seek damages under an 'umbrella theory.'" (Opp. 2.) Plaintiffs concede that their claims are based on purchases from

[3] *Doe v. East Lyme Board of Education*, 962 F.3d 649 (2d Cir. 2020), is inapposite. *Doe* involved an appeal in which the appellant "offer[ed] no compelling reason to revisit" issues decided in her prior appeal, *see id*. at 662, 665, not an appellee's failure to present an alternative ground for affirmance.

non-conspirators, but they argue that the umbrella standing doctrine bars such claims only in traditional cartel cases in which "some competitors, but not all, conspire to fix prices and non-conspirator rivals raise their prices under the price umbrella created by the conspirators." (*Id.*) In such cases, Plaintiffs argue, the independent decision of a non-conspirator about whether to charge the cartel price "is an intervening cause" that breaks the causal chain between the defendants' conduct and the plaintiff's injuries. (*Id.*) Plaintiffs assert that no such "intervening cause" exists here because the Midwest Premium is "hardwired" into their aluminum contracts. (*Id.*) These arguments fail to distinguish this case from other umbrella standing cases for three main reasons.

First, this case involves the same types of "intervening causes" that give rise to the rule against umbrella standing. Here, the intervening events that "break[] the chain of causation between defendants' actions and a plaintiff's injury," *LIBOR VI*, 2016 WL 7378980, at *16, are the decisions of non-conspiring aluminum smelters about such matters as (i) whether to incorporate the Midwest Premium into Plaintiffs' contracts, (ii) whether to adjust other price components in response to changes in the Midwest Premium, and (iii) what all-in price to charge for their aluminum. Plaintiffs fail to identify a meaningful distinction between these smelter pricing decisions and a non-cartel member's decision about whether to charge the cartel price. Nor does the case-law recognize any such distinction. Instead, courts routinely hold that when, as here, a plaintiff enters into a contract with a non-conspirator that incorporates an allegedly-manipulated benchmark price, the non-conspirator's independent decision about whether and how to incorporate the benchmark "breaks the chain of causation" between the defendants' conduct and the plaintiff's alleged injuries. *See, e.g.*, *id.*; *In re Platinum & Palladium Antitrust Litig.*, 449 F. Supp. 3d 290, 305 (S.D.N.Y. 2020) ("*Platinum II*"); *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC*, 366 F. Supp. 3d 516, 545–46 (S.D.N.Y. 2018); *FrontPoint Asian Event*

Driven Fund, L.P. v. Citibank, N.A., 2018 WL 4830087, at *6 (S.D.N.Y. 2018); *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 560–61 (S.D.N.Y. 2017).

Second, Plaintiffs' assertion that the Midwest Premium was "hardwired" into their contracts fails to distinguish this case from the numerous benchmark manipulation cases that reject umbrella claims. In almost all of those cases, the allegedly-manipulated benchmark was hardwired into the plaintiffs' contracts in the sense that the contracts expressly incorporated the relevant benchmark, but the courts nevertheless dismissed all claims arising out of contracts entered into with non-conspirators. *See, e.g.*, *FrontPoint*, 2018 WL 4830087, at *6; *Sonterra*, 277 F. Supp. 3d at 559–66; *LIBOR VI*, 2016 WL 7378980, at *16. Furthermore, Plaintiffs' assertion that the Midwest Premium was "hardwired" into their contracts (Opp. 2) and "non-negotiable" (Opp. 4) turns out to be greatly exaggerated. *See infra* at 12-13.

Third, upon inspection, Plaintiffs' claims closely resemble the type of traditional cartel claims that Plaintiffs identify as the source of the rule against umbrella standing. For example, suppose a group of aluminum smelters formed a traditional cartel and agreed to cut their output in order to raise aluminum prices. If a non-conspiring smelter raised its prices under the price umbrella created by the cartel, Plaintiffs presumably would agree that the usual rule against umbrella standing would apply. According to Plaintiffs, however, the claims asserted in this action are simply a variation on this traditional type of cartel output restriction. Plaintiffs argue that warehouse queues were simply the means that Defendants used to create "bottlenecks" that "restrain[ed] physical supply and increase[d] the price of aluminum." (Opp. 10, 17.) Plaintiffs thus argued to the Second Circuit that they are alleging only a "slight variation" on a "traditional supply-restriction scheme" and that "defendants set out to and did in fact restrain supply in th[e]

physical aluminum market in order to reap supracompetitive profits on sales to buyers."[4] To be sure, the alleged "supply-restriction scheme" involved a much more indirect and elongated chain of causation than a typical cartel output restriction (*see* Defs.' Mem. 14–16), but the indirect nature of the alleged supply restriction only strengthens the grounds for dismissing Plaintiffs' claims.

Plaintiffs counter that traditional umbrella standing principles should be set aside here because raising the Midwest Premium raised prices to "the entire market" (Opp. 27), but in arguing that Defendants should be liable for damage allegedly done to the *entire* primary aluminum market, Plaintiffs concede that this case presents "the very concern of damages disproportionate to wrongdoing" that supports the traditional rule against umbrella claims. *See, e.g.*, *Gelboim*, 823 F.3d at 779; *Platinum II*, 449 F. Supp. 3d at 310 ("*Gelboim*'s concern about disproportionate liability is particularly relevant in benchmark cases.") Plaintiffs' "entire market" argument also fails to distinguish this case from the many benchmark price cases that reject umbrella claims, all of which involve allegations that the defendants harmed an entire market by manipulating a benchmark price. *See, e.g.*, *LIBOR VI*, 2016 WL 7378980, at *1, *16. Nor does Plaintiffs' "entire market" argument distinguish this case from a traditional cartel output restriction: an output restriction raises prices throughout an entire market by changing the market-wide balance of supply and demand. *See, e.g.*, *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir.

[4] FLP Reply Br., *Eastman Kodak*, No. 16-4230, ECF No. 421 (2d Cir. Aug. 15, 2019) at 5; IPs' Reply Br., *Eastman Kodak*, No. 16-4230, ECF No. 413 (2d Cir. Aug. 15, 2017) at 1–2; *see also* FLP Br., *Eastman Kodak*, No. 16-4230, ECF No. 414 (2d Cir. Apr. 19, 2017) at 34 ("Defendants' conspiracy functions as a classic supply restriction scheme because Defendants hoarded aluminum in the Detroit-LME-warehouse system in order to drive up prices by preventing it from reaching the market.); IP Br., *Eastman Kodak*, No. 16-4230, ECF No. 412 (2d Cir. Apr. 12 2017) at 13 ("Defendants conspired to manipulate the spot price of physically delivered aluminum . . . by restricting the supply of aluminum immediately available to the spot market . . . ." (quoting IP Joint Am. Compl., ECF No. 745 ("IP Compl.") ¶ 2; Fujifilm Am. Compl., ECF No. 886 ("Fuji Compl.") ¶ 2)); FLP Opp. to Mot. for Judgment, ECF No. 1059, at 8 ("FLPs allege a conspiracy to manipulate aluminum prices by restricting the physical supply available to the market in order to inflate the Midwest Premium.").

1995) ("[p]rices increase marketwide in response to the reduced output because consumers bid more in competing against one another to obtain the smaller quantity available").

For all these reasons, the usual rule against umbrella standing fully applies here.

B. Plaintiffs are not efficient enforcers as to their umbrella claims.

Plaintiffs' Opposition fails to overcome Defendants' showing that Plaintiffs lack standing to assert their umbrella claims under the Second Circuit's four efficient enforcer factors.

1. Directness. Defendants' opening brief cites abundant authority holding that, even in cases in which the defendants directly "fix" a benchmark price, claims arising out of contracts with non-conspirators that incorporate the benchmark price are too indirect to support efficient enforcer standing. (Defs.' Mem. 9–11, 13–14.) These cases reason that a non-conspirator's "independent decision" to incorporate a benchmark price into a contract "without any action by defendants whatsoever" is enough to "break[] the chain of causation between defendants' actions and a plaintiff's injury." *LIBOR VI*, 2016 WL 7378980, at *16. Likewise here, the independent decisions of non-conspiring smelters about whether to incorporate the Midwest Premium into Plaintiffs' contracts "breaks the chain of causation" between Defendants' actions and Plaintiffs' alleged injuries. *See id*. Plaintiffs' umbrella claims are therefore fatally indirect. *See, e.g.*, *id.* ("where a plaintiff's counterparty is reasonably ascertainable and is not a defendant bank, a plaintiff is not an efficient enforcer"); *Silver II*, 332 F. Supp. 3d at 909 (directness factor was "an independently adequate basis" for dismissing umbrella claims).

Plaintiffs nevertheless assert that Defendants "directly" caused their alleged injuries because "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." (Opp. 17.) But this assertion addresses only a minor component of Plaintiffs' five-step theory of causation and

injury. Plaintiffs' Opposition does not deny that, to show causation and injury, Plaintiffs must prove each of the following steps in the alleged chain of causation:

1. Defendants lengthened the queues at Metro Detroit.

2. Longer queues at Metro Detroit caused third-party participants in the spot market to enter into spot transactions at higher prices.

3. These spot transactions were reported to Platts price assessors and caused Platts to raise its assessment of the Midwest Premium.

4. Longer queues did *not* cause third-party participants in the LME futures market to reduce the prices at which they bought and sold LME futures contracts.

5. Higher Midwest Premiums caused Plaintiffs to pay higher aluminum prices because third-party aluminum smelters made independent decisions to (a) incorporate the Midwest Premium into some of their contracts with Plaintiffs, and (b) provide no discounts or price adjustments to offset the alleged increases in the Midwest Premium.

(Opp. 18; Defs.' Mem. 5–6.) Step five alone is sufficient to "break the chain of causation" because it depends on independent decisions of non-conspiring smelters about how to price their aluminum. *See, e.g.*, *LIBOR VI*, 2016 WL 7378980, at *16. Accordingly, step five alone places this case on par with *LIBOR VI* and the many other benchmark price cases that dismiss umbrella claims. Steps two through four, in turn, make the case for dismissal even stronger here because those steps depend on still more independent decisions of non-conspiring third parties.

Although Plaintiffs do their best to minimize the importance of this five-step chain of causation, their efforts are unconvincing. Plaintiffs assert that the "first through third steps are merely the mechanisms Defendants used to fix the MWP" (Opp. 18), but in fact, the second and third steps revolve around independent decisions of spot market participants and Platts price assessors that are made "without any action by defendants whatsoever." *LIBOR VI*, 2016 WL

7378980, at *16.[5] Plaintiffs also assert that the fourth step regarding the effects of queues on LME prices "is not a causal factor" and is instead "a question of damages" (Opp. 18), but in fact, it is *both* a damages question *and* a causation-and-injury question that depends on the independent decisions of non-conspiring third parties that trade aluminum contracts on the LME. *See, e.g.*, Class Cert. Order, ECF No. 1274, at 103 (plaintiffs' alleged injuries depend on the effects of queues "not merely on one component part (the MWP) of the all-in price . . . but on the all-in price in its entirety (including the LME component)"). It makes no difference that Plaintiffs characterize the question of whether queues affect LME prices as "a hotly contested factual matter." (Opp. 18.) Even if that is so, the fact remains that this "hotly contested" question creates yet another link in the causal chain that erodes the directness of Plaintiffs' claims. (Reply SUMF ¶ 57.)

Plaintiffs' efforts to minimize the fifth and final step of the causal chain—the question of whether queue-driven increases in the Midwest Premium produced higher all-in prices—are equally unavailing. Plaintiffs argue that this question does not dilute the directness of their claims because the Midwest Premium was "non-negotiable" and "automatically" incorporated into their contracts (Opp. 4, 19), but that is incorrect for at least three reasons.

First, the role of the Midwest Premium was far from non-negotiable: Plaintiffs concede that (i) very few contracts contain the Midwest Premium as opposed to the Midwest Transaction Price, (ii) roughly 31 percent of Alcoa and Rio Tinto contracts do not incorporate either of those two benchmarks, and (iii) a number of their own contracts do not incorporate either benchmark. (Reply SUMF ¶¶ 12–13, 18–19, 23–24, 29, 45–46, 51, 58–59; *see also* Class Cert. Order, ECF

[5] *See also* Ex. 75 (Vazquez Rep.) Attach. B at 11 ("physical premiums are negotiated between buyers and sellers"); Opp. 4 ("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"); *id.* ("The regional premiums are compiled [by Platts] based on reporting of transactions between buyers and sellers of aluminum on a given day for delivery to relevant geographic points.").

No. 1274, at 9–10 (observing that "many purchase contracts do not reference the MWTP or MWP at all").) Second, whether or not the *Midwest Premium* was negotiable, the *all-in prices* paid by Plaintiffs certainly were negotiable, which means that changes in other price components potentially could offset any changes in the Midwest Premium. (Reply SUMF ¶¶ 15, 20, 26, 30, 38, 42, 48, 53.) Third, for the umbrella claims at issue here, the "negotiability" of the prices paid by Plaintiffs depended entirely on the decisions of non-conspiring smelters and not on any conduct of Defendants. Under these circumstances, courts in benchmark price cases have dismissed umbrella claims notwithstanding assertions that a non-negotiable benchmark price was hardwired into a plaintiff's contracts. *See, e.g.*, *Platinum II*, 449 F. Supp. 3d at 309 (denying standing despite allegation that "the benchmark is hardwired into legal relationships"); *LIBOR VI*, 2016 WL 7378980, at *16, *20 (denying umbrella standing for contracts incorporating a benchmark and recognizing that "there is every expectation that the negotiated component compensated for [the benchmark]"); *see also Gelboim*, 823 F.3d at 780 (characterizing umbrella claim as speculative "notwithstanding that the negotiated component was the increment above" the benchmark).

Plaintiffs are thus reduced to asserting that Judge Forrest and the Second Circuit previously resolved the "directness" question in their favor. (Opp. 16–17.) Plaintiffs' citation to Judge Forrest's motion-to-dismiss opinion to try to establish "directness" is unavailing for the same reasons as their law-of-the-case argument: Judge Forrest never addressed the umbrella standing question presented in this motion, lacked the factual record that underlies this motion, and lacked the benefit of *Gelboim* and the raft of district court decisions applying *Gelboim*.

The Second Circuit's *Eastman Kodak* decision is even further afield. In *Eastman Kodak*, the Second Circuit reviewed Judge Forrest's August 2016 ruling that Plaintiffs lacked "antitrust injury" because "the anticompetitive conduct alleged by [Plaintiffs] occurred in the LME

warehousing services market, not the market for primary aluminum, in which [Plaintiffs] allegedly suffered injury." 936 F.3d at 92. The Second Circuit reversed that ruling on the ground that the alleged injuries and the alleged anticompetitive conduct both occurred in the same market, *i.e.*, the primary aluminum market. *See id.* at 95 ("The plaintiffs in these cases allege that the injury they suffered was in the very [primary aluminum] market that the defendants restrained."). The Second Circuit never considered the separate question of which plaintiffs, if any, possess efficient enforcer standing. *See id.* at 94 ("[T]he only issue on appeal is whether the plaintiffs have suffered an antitrust injury.") Seizing on a single sentence in the Second Circuit's opinion, Plaintiffs nevertheless suggest that the Second Circuit characterized their alleged injuries as "direct" for efficient enforcer purposes (Opp. 16), but the cited sentence merely states that the alleged injuries "were a direct result of the defendants' anticompetitive conduct" in the sense that the alleged injuries and the alleged conduct both occurred in the same market. *See id.* at 96 (holding that Plaintiffs adequately alleged antitrust injury "by pleading that the defendants restrained the market for the sale of primary aluminum, and that the plaintiffs were injured in making purchases in the market for the sale of primary aluminum"). Finally, in deciding the narrow antitrust injury question presented by Judge Forrest's August 2016 ruling, the Second Circuit "focus[ed] on the sufficiency of the plaintiffs' legal theory, rather than on their evidence." *Id.* at 93 n.3.

2. <u>More efficient enforcers</u>. Plaintiffs do not dispute that purchasers like Reynolds and Southwire that acquired their aluminum directly from an alleged conspirator are "persons whose self-interest would normally lead them to sue for the [alleged] violation." *Gelboim*, 823 F.3d at 772. These purchasers "are obviously the most efficient enforcers" of the antitrust laws here because, in contrast to umbrella purchasers like Plaintiffs, their claims present no danger of liability disproportionate to wrongdoing. *See Silver II*, 332 F. Supp. 3d at 909. The existence of

these superior enforcers "greatly diminishe[s]" the justification for granting standing to Plaintiffs. *See, e.g.*, *IQ Dental Supply, Inc. v. Henry Schein, Inc*., 924 F.3d 57, 66 (2d Cir. 2019).

Plaintiffs respond that they were the first to purchase aluminum after it was smelted, whereas purchasers that acquired their aluminum from Defendants are "secondary or indirect purchasers." (Opp. 20.) But the relevant question for efficient enforcer purposes is not "who was the first to purchase *aluminum* after it was smelted," but rather "who was the first to pay *the alleged overcharge* to an antitrust violator." The FLPs' own complaint supplies the answer: buyers that purchased aluminum from Defendants are the true first purchasers here because they "purchased primary aluminum directly from the parties that actually monopolized or restrained trade" and "were the closest to the anticompetitive conduct." FLP 3d Am. Compl., ECF No. 738 ("FLP Compl.") ¶¶ 39–40; *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").

Plaintiffs get it backwards with their suggestion that the claims of parties that purchased directly from Defendants might be barred by the direct purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). (Opp. 20.) Under *Illinois Brick,* "the immediate buyers from the alleged antitrust violators may maintain a suit against the antitrust violators." *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019). Indeed, a core rationale of *Illinois Brick* is that "concentrating the full recovery for the overcharge" in the parties that dealt directly with the antitrust violators will result in more efficient enforcement of the antitrust laws than dispersing antitrust claims among "every plaintiff potentially affected" by a violation. *See Illinois Brick*, 431 U.S. at 735.

3. <u>Speculative damages</u>. Numerous courts have held that "the speculative damages factor weighs strongly against the standing of [] umbrella plaintiffs" in benchmark price cases. *Sonterra*,

277 F. Supp. 3d at 564; *see also FrontPoint*, 2018 WL 4830087, at *6; *Sonterra*, 366 F. Supp. 3d at 547. Plaintiffs fail to cite a single case that reaches a contrary conclusion. (Opp. 20–22.)

Plaintiffs counter that this case is different because aluminum contracts "are relatively straight-forward" and "damages can be readily calculated by determining the amount by which the Premiums were artificially inflated." (Opp. 21.) Plaintiffs are mistaken: not all contracts include the Midwest Premium, those that do include it do so in a variety of ways, and the Midwest Premium at most accounts for only a small fraction of all-in prices. (Reply SUMF ¶¶ 12–13, 18–19, 23–24, 29, 45–46, 51, 56, 58–59.) Accordingly, determining the extent of any alleged injury to a purchaser is not just a matter of calculating the amount by which the Midwest Premium rose, but instead involves highly speculative estimation of the "numerous considerations" presented by these "highly negotiated contracts." *Sonterra*, 366 F. Supp. 3d at 547.

4. <u>Complex apportionment and duplicative damages</u>. Plaintiffs argue that there is no potential for duplicative damages or complex apportionment here (Opp. 22), but even if that were true, it would not distinguish this action from numerous cases that dismissed umbrella claims even where there was no such potential. *See, e.g.*, Defs.' Mem. 23 (citing authority); *Platinum II*, 449 F. Supp. 3d at 307 (denying standing even though plaintiffs' claims "would not present a risk of duplicative recoveries"); *LIBOR VI*, 2016 WL 7378980, at *23 (similar). Furthermore, Plaintiffs' claims present a clear potential for *disproportionate* damages, which raise the same concerns.

C. Plaintiffs' umbrella claims present the threat of disproportionate liability.

Plaintiffs' umbrella claims present the troubling prospect of disproportionate liability, over-deterrence, and chilling potentially procompetitive conduct. (Defs.' Mem. 18–20.) Plaintiffs respond by asserting that "the disproportionate damages concern" is only a "prudential concern" that should have no role in determining antitrust standing. (Opp. 23–24.) But the Second Circuit rejected that view in *Gelboim* when it remanded with instructions to consider the potential for

"damages disproportionate to wrongdoing" as part of an efficient enforcer analysis. *See* 823 F.3d at 779. Many other courts likewise have recognized that considerations of disproportionate liability and over-deterrence are critically important to antitrust standing. *See, e.g.*, *Platinum II*, 449 F. Supp. 3d at 308–11; *Sonterra*, 277 F. Supp. 3d at 559–61; Defs. Mem. 9–10, 18–20 (citing additional authority). Plaintiffs thus concede in a footnote that "damages disproportionate to wrongdoing" is a valid concern when an independent third-party's "voluntary decision" about whether to incorporate a benchmark price into a contract presents an "intervening cause" that "may break the chain of direct causation." (Opp. 24 n.11.) That is exactly the situation here.

Although Plaintiffs argue that this case presents no genuine threat of disproportionate liability (Opp. 23), that is plainly incorrect. Plaintiffs emphasize that Defendants sold large quantities of aluminum during the relevant period (*id.*), but it is undisputed that aluminum smelters sold vastly *larger* quantities. Indeed, Plaintiffs have acknowledged throughout this litigation that the vast majority of aluminum is sold directly by smelters to aluminum users pursuant to long-term supply contracts. *See, e.g.*, FLP Compl. ¶ 166 ("vast majority" of aluminum sold directly to users); IP Compl. ¶ 102 (same); Fuji Compl. ¶ 89 (same). Accordingly, allowing Plaintiffs to proceed on their umbrella claims would expose Defendants to the threat of enormous liability based on smelter sales many times larger than Defendants' sales even though those smelter 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.

Plaintiffs respond with misleading and irrelevant characterizations of Defendants' aluminum holdings. For example, Plaintiffs estimate that Defendants' *worldwide* aluminum holdings peaked at roughly eight million tons and unfairly compare that figure to an estimate of *United States* aluminum consumption (Opp. 7), but even assuming it is accurate, Plaintiffs'

estimate of Defendants' worldwide holdings is only a small fraction of the more than 125 million tons of worldwide consumption during the relevant period (excluding China).[6] Plaintiffs also offer an unsubstantiated guess that Defendants made "hundreds of millions" in worldwide profits on aluminum sales (Opp. 23), but the relevant profits figure would be the alleged increase in Defendants' U.S. profits that is attributable to the alleged conspiracy—a far smaller figure.[7] Plaintiffs nevertheless rely on their irrelevant guess at Defendants' total worldwide profits to support an assertion that the total recoveries at trial "will be far smaller than Defendants' ill-gotten gains from their anticompetitive scheme." (Opp. 23.) For umbrella purchasers as a whole, however, the total recoveries if they prevailed at trial *necessarily* would be far larger than any alleged anticompetitive profits because smelters sold far more aluminum than Defendants did.[8]

Finally, Plaintiffs attempt to distinguish a few of the many cases rejecting umbrella claims on the ground that they involved not just "disproportionate" but "astronomical" liability. (Opp. 23–27 & n.12.) The case-law, however, explicitly rejects the notion that umbrella standing principles vary based on the raw size of the alleged exposure. For example, *Platinum II* explains that the relevant question "is *not* . . . whether defendants are subject to 'ruinous liability,'" but rather "whether defendants—no matter their size—are subject to liability that is *disproportionate*

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[6] SUMF Reply ¶¶ 64–69, 84. Plaintiffs' estimate of Defendants' worldwide aluminum holdings is also inapposite because it includes large volumes of LME warrants that were not sold to aluminum users, but instead were delivered to the LME to settle LME futures positions. (*Id.*) No regional premium is received when a party delivers warrants to the LME to settle futures obligations. (*Id.*)

[7] Any alleged anticompetitive profits earned in foreign markets would be irrelevant to this U.S. antitrust case because protecting foreign consumers from foreign antitrust violations is the province of foreign governments. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 163–69 (2004) (limiting Sherman Act's extraterritorial reach based in part on the need to "avoid unreasonable interference with the sovereign authority of other nations").

[8] Contrary to Plaintiffs' implicit assumption (Opp. 23), it makes no difference whether all umbrella purchasers ultimately choose to sue here because efficient enforcer standing does not depend on the outcome of individual decisions about whether to sue. (*See* Defs.' Mem. 22 n.13 (citing authority).)

to their allegedly ill-gotten gains." 449 F. Supp. 3d at 310 n.14 (emphasis in original). Similarly, *Gelboim* emphasizes that "if the Banks control *only a small percentage of the ultimate identified market*, this case may raise the very concern of damages disproportionate to wrongdoing noted in *Mid-West Paper*." 823 F.3d at 779. Consistent with this emphasis on the *proportions* and not the raw size of the alleged exposure, the rule against umbrella standing has been applied in numerous cases involving mundane products such as paper, milk, vitamins, shoes, copper, and silver that presented no obvious risk of "astronomical" liability. *See, e.g.*, Defs.' Mem. at 12–13; *Mid-West Paper Prods. Co. v. Continental Grp.*, 596 F.2d 573, 583–87 (3d Cir. 1979); *Silver II*, 332 F. Supp. 3d at 912; *Allen v. Dairy Farmers of Am., Inc.*, 2014 WL 2610613, at *28 (D. Vt. 2014); *In re Vitamins Antitrust Litig.*, 2001 WL 855463, at *4 (D.D.C. 2001).

D. The numerous cases rejecting umbrella claims were not overruled in *Lexmark* and cannot be disregarded as "non-controlling."

Faced with a mountain of authority rejecting umbrella claims in both benchmark and non-benchmark antitrust cases (*see* Defs.' Mem. 9–13), Plaintiffs contend that *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), implicitly overruled those decisions and narrowed the Second Circuit's four-factor efficient enforcer analysis to the single question of whether the defendants' conduct was the "proximate cause" of the plaintiff's injuries. (*See* Opp. 29 (arguing that "the question that matters is solely one of proximate cause").) But *Lexmark* was a Lanham Act case, not an antitrust case, and did not purport to overrule the efficient enforcer analysis set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). *See Lexmark*, 572 U.S. at 132. Accordingly, following *Lexmark*, the Second Circuit has continued to apply the four-factor efficient enforcer analysis that it distilled from *AGC* without the slightest suggestion that *Lexmark* overruled or altered that analysis. *See, e.g.*, *IQ Dental*, 924 F.3d at 65; *Gelboim*, 823 F.3d at 772; *7 W. 57th St.*

Realty Co., LLC v. Citigroup, Inc., 771 F. App'x 498, 501 (2d Cir. 2019). Similarly, at least nine decisions in this District dismissed umbrella claims after *Lexmark* was decided, and none of those decisions provides the slightest indication that *Lexmark* altered either the Second Circuit's efficient enforcer analysis or the rule against umbrella claims. (*See* Defs.' Mem. at 9–12.)

Plaintiffs also assert that the many decisions in this District that dismiss umbrella claims should be disregarded as "not controlling" (Opp. 24), but the consensus reached in the "balance of cases" in a District is "relevant and persuasive." *Weissman v. Collecto, Inc.*, 2019 WL 254035, at *8 (E.D.N.Y. 2019). This District's umbrella decisions, moreover, are amply reinforced by *Gelboim* and other appellate precedent. (Defs.' Mem. 11–13.) By contrast, the cases cited by Plaintiffs either do not address umbrella standing at all, *see DNAML Pty, Ltd. v. Apple Inc.*, 25 F. Supp. 3d 422, 424 (S.D.N.Y. 2014), involve non-umbrella claims based on purchases made directly from the defendants, *see Nypl v. JPMorgan Chase & Co.*, 2017 WL 3309759, at *6 (S.D.N.Y. 2017), or expressly withhold or defer judgment on the viability of umbrella claims.[9] Plaintiffs thus fail to cite a single case that actually allowed an umbrella claim to proceed to trial.

CONCLUSION

For the foregoing reasons, Defendants' summary judgment motion should be granted.

[9] *See Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 483 n.4 (7th Cir. 2002) ("leav[ing] [the umbrella standing] issue open for further exploration at the district court level"); *In re Commodity Exch., Inc.*, 213 F. Supp. 3d 631, 656 (S.D.N.Y. 2016) (recognizing "substantial challenges to Plaintiffs' causation theory," but finding that questions relating to umbrella standing "must be deferred to the class certification stage"); *In re London Silver Fixing, Ltd.*, 213 F. Supp. 3d 530, 555 (S.D.N.Y. 2016) (same); *see also LIBOR VI*, 2016 WL 7378980, at *20 (distinguishing *Loeb* on the ground that, unlike here, there was "no possibility" of any offset between price components). Although *Loeb* suggested in dicta that a group of defendants that conspired to "rig[] product standards" should not be heard to complain "that they should be immune from damages for a product they did not sell," *see* 306 F.3d at 484 n.4, this is not a product standards case, and Defendants are not accused of literally rigging or fixing the Midwest Premium. Instead, Defendants are accused of creating a supply restraint that allegedly *affected* spot prices, which in turn allegedly *affected* the Midwest Premium, which in turn allegedly *affected* Plaintiffs as a result of the intervening decisions of non-conspiring smelters.

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