No. 21-643-cv(L)

21-651-cv(con); 21-660-cv(con); 21-663-cv(con); 21-954-cv(con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re ALUMINUM WAREHOUSING ANTITRUST LITIGATION

[Caption continued on following pages.]

Appeal from the United States District Court
for the Southern District of New York
The Honorable Paul A. Engelmayer
District Court Nos. 14-cv-3116 and 13-md-2481

FIRST-LEVEL PURCHASER PLAINTIFFS-APPELLANTS AMPAL, INC., CUSTOM ALUMINUM PRODUCTS, INC., CLARIDGE PRODUCTS AND EQUIPMENT, INC., AND EXTRUDED ALUMINUM CORP.'S OPENING BRIEF [redacted]

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Plaintiffs-Appellants,

SUPERIOR EXTRUSION INCORPORATED, MASTER SCREEN INCORPORATED, GRACE ADRIANNA FLETCHER, GULF DISTRIBUTING CO. OF MOBILE, LLC, RIVER PARISH CONTRACTORS, INC., Individually, and on Behalf of All Others Similarly Situated, VIVA RAILINGS, LLC, on Behalf of Themselves and All Others Similarly Situated, REGAL RECYCLING, INC., D-TEK MANUFACTURING, on Behalf of Itself and All Others Similarly Situated, PETERSON INDUSTRIES, INC., Individually and on Behalf of All Others Similarly Situated, THULE, INC., Individually and on Behalf of All Others Similarly Situated, EXTRUDED ALUMINUM INC., INTERNATIONAL EXTRUSIONS INC., TEAM WARD INC., Individually and on Behalf of All Others Similarly Situated, DBA War Eagel Boats, EVERETT ALUMINUM INCORPORATED, On Behalf of Itself and All Others Similarly Situated, PIERCE ALUMINUM COMPANY, INC., Individually and on Behalf of All Others Similarly Situated, DAVID J. KOHLENBERG, WELK-KO FABRICATORS, INC., TYLER SALES INC., DBA Norther Metals, Incorporated, QUICKSILVER WELDING SERVICES, INC., LEXINGTON HOMES, INC., BREEZIN METAL WORKS, INC., TALAN PRODUCTS, INC., BIG RIVER OUTFITTERS, LLC, SEATING CONSTRUCTORS USA, INC., ADMIRAL BEVERAGE CORPORATION, CENTRAL ALUMINUM COMPANY, HALL ENTERPRISES METALS, INC., BRICK PIZZERIA LLC, on Behalf of Themselves, and All Others Similarly Situated, SUNPORCH STRUCTURES, INC., ENERGY BEVERAGE MANAGEMENT, LLC, GOLDRING GULF DISTRIBUTING COMPANY, LLC, ALLSTATE BEVERAGE COMPANY, LLC, DUNCAN GALVANIZING CORPORATION, Individually and on Behalf of All Those Similarly Situated, COMMERCIAL END-USER PLAINTIFFS, REYNOLDS CONSUMER PRODUCTS LLC, SOUTHWIRE COMPANY, LLC,

Plaintiffs,

v.

GOLDMAN SACHS & CO. LLC, GOLDMAN SACHS INTERNATIONAL, J. ARON & COMPANY, METRO INTERNATIONAL TRADE SERVICES, L.L.C., J.P. MORGAN SECURITIES PLC, HENRY BATH LLC, GLENCORE LTD., PACORINI METALS USA, LLC, PACORINI METALS VLISSINGEN B.V., JPMORGAN CHASE BANK, N.A., GLENCORE INTERNATIONAL AG, GLENCORE AG,

Defendants-Appellees,

GOLDMAN SACHS GROUP, INC., GLENCORE XSTRATA PLC, LONDON METAL EXCHANGE LIMITED, GOLDMAN SACHS & CO., PACORINI METAL AG, HENRY BATH & SON LIMITED, F&F CUSTOM BOATS, LLC, GOLDMAN SACHS GROUP, INC., GS POWER HOLDINGS LLC, JOHN DOES 1-10, GLENCORE XSTRATA INCORPORATED, THE LONDON METAL EXCHANGE POWER HOLDINGS LLC, UNIDENTIFIED PARTIES, PACORINI METALS USA, LLC, LIMITED METAL EXCHANGE LIMITED, LME HOLDINGS LIMITED, JOHN DOES 1-20, JOHN DOES 1-25, MCEPF METRO I, INC., NEMS (USA) INC., HONG KONG EXCHANGES & CLEARING, LTD., LIME HOLDINGS LIMITED, GLENCORE UK LTD, BURGESS-ALLEN PARTNERSHIP LTD., ROBERT BURGESS-ALLEN,

Defendants.

In re Aluminum Warehousing Antitrust Litigation
Second Circuit No. 21-643-cv(L)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), First-Level Purchaser Plaintiffs Ampal, Inc., Claridge Products and Equipment, Inc., Custom Aluminum Products, Inc. and Extruded Aluminum Corp. ("FLPs"), by their undersigned counsel, certify as follows: Plaintiff Ampal, Inc. has a single parent corporation, United States Metal Powders, Inc. No publicly held corporation owns 10% or more of its stock. Plaintiffs Claridge Products and Equipment, Inc., Custom Aluminum Products, Inc. and Extruded Aluminum Corp. have no parent corporations and no publicly held corporation owns 10% or more of their stock.

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I. JURISDICTION

First-Level Purchaser Plaintiffs ("FLPs"), individually and on behalf of others similarly situated, allege violations of Sherman Act §1, 15 U.S.C. §1. The district court had subject-matter jurisdiction under 28 U.S.C. §§1331, 1337, and Clayton Act §§4, 16, 15 U.S.C. §§15 and 26.

The district court granted Defendants' summary-judgment motion on February 17, 2021, and the Parties' Joint Stipulation and Order Regarding Dismissal of Certain Claims with Prejudice on March 16, 2021. (Special Appendix ("SA") 120-85); Joint Appendix ("JA") 1460-65) Judgment was entered March 17, 2021. (SA186)

FLPs timely filed their notice of appeal on April 14, 2021. (JA1496-98)

II. ISSUES PRESENTED

A. Whether the district court erred in granting summary judgment on efficient-enforcer grounds.

B. Whether the district court erred in disregarding FLPs' direct evidence of predominance both separately and in conjunction with FLPs' expert's models in denying class certification.

C. Whether the district court committed multiple errors in rejecting Dr. Gilbert's models and denying class certification.

III. STATEMENT OF THE CASE

A. Statement of Facts

1. The evidence of Defendants' scheme to cause the MWP to go "raging higher" offered in support of class certification

This Sherman Act antitrust action is before this Court a second time—this Court previously reversed a summary-judgment grant in *Eastman Kodak Co. v. Henry Bath LLC*, 936 F.3d 86 (2d Cir. 2019).[1] This appeal is from the district court's (Engelmayer, J.) judgment based upon its order granting Defendant's summary-judgment motion on umbrella-standing grounds[2] and the denial of Plaintiffs' class-certification motion.[3] Plaintiffs are First-Level Purchasers, *i.e.*, the first parties to buy aluminum and pay regional premiums to North American aluminum producers/smelters. (JA144¶419)[4]

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[1] As in that appeal, FLPs' operative pleading is the Third Amended Complaint ("TAC"). (JA1-265) Unless noted, citations are omitted and emphasis is added.

[2] *In re Aluminum Warehousing Antitrust Litig.*, No. 13 MD 2481 (PAE), 2021 U.S. Dist. LEXIS 29459 (S.D.N.Y. Feb. 17, 2021).

[3] *In re Aluminum Warehousing Antitrust Litig.*, 336 F.R.D. 5 (S.D.N.Y. 2020).

[4] FLPs are Ampal, Inc.; Custom Aluminum Products, Inc.; Claridge Products and Equipment, Inc.; and Extruded Aluminum Corp. Defendants are Goldman, Sachs & Co. LLC; Goldman Sachs International (collectively "Goldman"); Metro International Trade Services LLC; J. Aron & Company; Mitsi Holdings LLC; JPMorgan Securities plc; HenryBath LLC; JPMorgan Chase Bank, N.A.; Glencore

Before Defendants' 2010 takeover, the London Metals Exchange ("LME") warehousing system in the U.S. operated as intended—as a market of last resort designed to ensure that aluminum prices were in line with the physical market. (JA1020) LME warehouses were intended to absorb metal near eventual consumption, provide liquidity to producers in times of excess supply, and serve as a source of additional volume that could timely be delivered into consumption in times of excess demand. (*Id.*)[5] Customers could load out aluminum within days or weeks. (JA935) Everything changed in 2010.

In 2010, Goldman, JPMorgan, and Glencore each purchased an LME-warehouse company. Defendants increased the cost of aluminum paid by class members by causing inflation of the MWP component of aluminum's unique price-setting mechanism via manipulation of queues at Defendants' LME warehouses.

International AG; Glencore Ltd.; Access World (USA) LLC (f/k/a Pacorini Metals USA, LLC); and Access World (Vlissingen) B.V.

[5] The LME price—resulting from traders' negotiations on the London Exchange (JA411)—plus a regional premium (the Midwest Premium ("MWP") in the U.S.) is the "all-in" price for aluminum. (JA10¶4) LME-certified-aluminum warehouses comprise one portion of the physical-aluminum supply, providing an important price discipline. (JA10¶3) They issue warrants—bearer documents of title to a specified lot of aluminum. (JA77-78¶¶194-195) To earmark aluminum to be shipped out of a warehouse, the warrant owner cancels the warrant. *Id*. The aluminum then enters a "queue" awaiting shipment. (JA11¶6(c))

MWP inflation injures FLPs across the board—as Goldman admitted, the MWP is "the cornerstone of *nearly all* aluminum physical transactions" (Joint Appendix (Sealed) ("SJA") 1744) Novelis Inc., the world's largest producer of flat-rolled aluminum, agrees: "'*All* purchases of primary aluminum … are priced on a similar basis. The base price includes the LME … price … plus a local market premium,'" the MWP in the U.S. (JA875¶89)

The core facts—common to all class members—are that Defendants conspired to:

- Acquire control of LME warehouses in the face of a market in flux (*see* JA158-61¶¶464-472, JA856-58¶¶42-47; SJA2886¶9(d), SJA2890-93¶¶17-22);
- Aggregate and trap vast quantities of LME-warranted aluminum in certain LME warehouses through, among other anticompetitive pacts, agreements not to destock or attract aluminum away from each other's warehouses, to treat the LME minimum load-out rules as *de facto* maxima, and to divide the market (*see* JA125¶345, JA177-84¶¶510-525, JA195¶559; SJA2890-93¶¶17-22); and, then,
- Execute an unprecedented series of strategically-planned warrant cancellations in which vast quantities of aluminum were placed in specific load-out queues (including specific "merry-go-round" and shuffle transactions whereby significant amounts of aluminum were placed in the queue in order to significantly delay the loading out of other aluminum from the warehouses, only to have these large cancelled quantities placed back on warrant), which had the effect of substantially increasing the time it would take otherwise available off-warrant aluminum to become available, and vastly increasing the MWP as wait and delivery

costs rose dramatically. (JA13-14¶¶9(B), JA94-103¶¶251-286, JA862-67¶¶56-72; SJA2894-99¶¶23-39)

In 2008 the aluminum market was in flux, and in August 2009 Detroit LME-warehouse company (and Defendant) Metro advised Defendants Goldman and JPMorgan of opportunities for lucrative aluminum-market manipulation through combining large-financial-institution trading operations with LME-warehouse ownership. (SJA1966) Metro offered admittedly "overly candid" (SJA1968) talking points, explaining that owning an LME warehouse:

- "effectively provides the ability to control the LME metal markets" (SJA2022);
- provides "a huge advantage to affect [the] pricing" (SJA1968);
- "would allow [the bank] to [m]ove metal stocks on and off LME warrant to benefit their market positions" (*id.*);
- "would allow a trader/finance institution to [m]ove market positions to influence value of metal stocks held" (*id.*); and
- "would give [the bank] a view on the real physical market and this has bigger implication to their own economic view and research around which they base a lot of their trading decisions." (*Id.*)

Defendants agreed and by early 2010, Goldman acquired Metro, JPMorgan acquired Henry Bath, and Glencore acquired Pacorini. With these acquisitions, Defendants ultimately controlled over 83% of the U.S. LME-warehousing market during the Class Period. (JA852-53¶31)

Defendants exploited that dominant position to build a critical mass of aluminum, enabling them to manipulate the MWP. (JA1011) For instance, Metro "increased its spending on 'freight incentives' to entice aluminum owners to move metal into its Detroit warehouses." (JA945)

During this time, to capitalize on "cash and carry" arbitrage—*i.e.*, profits available when financing and other costs were less than the aluminum-futures price due to the aluminum-market contango[6]—financial institutions, hedge funds, traders, and Defendants swallowed up massive amounts of aluminum, tying it up in warehouse deals for periods of 3-12 months. JPMorgan, for example, acquired 3.3 million metric tons worth over $7 billion. (JA861¶¶52-53)[7] Goldman acquired 1.5 million metric tons worth $3 billion. (JA928)

Like traders, producers were "happy" with the cash-and-carry trade, because they could continue existing production rates (it is noneconomic to idle or reduce a smelter's production), obtain large incentives from warehouses such as Metro to store metal, and use the inventory as collateral for financing deals. (JA1093-94) By

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[6] A market is in contango when futures prices exceed expected spot prices. JA217-18¶608).

[7] From producers alone, Defendants' purchases made them the largest primary-aluminum purchasers (12.5%) according to smelter data. (JA830-31¶¶11-14, JA832¶¶16-17)

the start of the Class Period, "*60-80% of [aluminum] inventories [were] tied up in financing deals*." (JA1100, 1068 ("[c]ollateral is kept off market and hedged using futures or derivatives, which yield a positive return for investors due to the contango"); JA1104 (half of global inventories have been removed from the market due to inventory financing))

The cash-and-carry trade enabled the flow of massive amounts of LME and non-LME aluminum into warehouses, where it stayed. (JA1065-68, 1112(15:3-8)) Goldman recognized metal becomes "sticky" and "rarely moves" once warehoused during a contango market. (JA1115-16) Defendants, with their massive physical position in global stocks, understood that "producers, traders and warehouses can potentially benefit from [the contango] while consumers are forced to pay higher premiums," and did not arbitrage the metal they owned; rather, they aggressively accumulated more metal and ensured it never reached the market. (JA1067) Consequently, although excess inventory existed, the aluminum market was exceptionally tight. (JA1065-68, 1071)

Defendants agreed not to compete, including an agreement not to destock each other (*i.e.*, not to compete for warehousing customers by taking each other's warehousing stock). In July 2010, JPMorgan assured Metro that it and its Henry Bath operation "do NOT take material for re-warehousing." (SJA1539) A month

later, Metro's and Pacorini's leadership expressed the same agreement. (SJA1542 (Metro V.P. Whelan: "[W]e [Metro/Goldman] have already approached [Glencore] with offers of varying degrees to try to come to an agreement to make things stop." Pacorini CEO Casciano: "I regard you as a friend before as a competitor.")) This understanding was re-confirmed in 2012. (SJA1506 (Glencore "ha[s] maintained all along that they have no desire to nitpick [Metro] in Detroit."); SJA2241 (Casciano to Whelan "[W]e would not destock you, u [sic] know that"))

In summer 2010, Metro devised the so-called "Smart Ass Plan," whereby queue lengths would be manipulated to manufacture tremendous profits. (SJA1528; *see also* JA94-103¶¶252-286) Under the "Smart Ass Plan," an LME warehouse like Metro would induce tenants (typically market participants with substantial aluminum positions) to cancel a large volume of aluminum warrants with the purpose of obstructing the warehouse's load-out queue for its combined warehouses. (SJA310; JA928) This lengthened queue, along with Defendants' collective treatment of the LME *minimum* load-out rule as a *maximum*, kept aluminum legitimately taken off warrant from flowing freely to consumers. (SJA1528-33; *see also* SJA2921-34)

Executing the "Smart Ass Plan," Defendants strategically coordinated queue manipulation, including a number of massive Class-Period warrant-cancellation

deals involving Metro, Glencore, DB Energy, Red Kite, JPMorgan, and Goldman, vastly inflating queues and driving up the MWP. (JA94-103¶¶251-286, JA953-71; SJA2899-900¶¶38-42) The Senate's Permanent Subcommittee on Investigations identified the cause of the dramatic MWP increases to be the Detroit-queue increases brought about by the "number of large warrant cancellations by a small group of financial institutions." (JA937, 953)

Some of these massive cancellations were agreements called "merry-go-round" cancellations in which aluminum was placed in the queue, loaded out in turn, re-warranted and returned to an affiliated warehouse, sometimes only blocks away, only to be canceled again and re-introduced into the queue. This included cancellations Metro and Goldman undertook in concert with "Deutsche Bank, Red Kite, and Glencore [involving] 'merry-go-round' deals in which aluminum was loaded out of one Metro warehouse and loaded into another." (SJA953 & SJA953-71 (detailing the September 2010 "Deutsche Bank Merry-Go-Round Deal," "Four [2011-2013] Red Kite Merry-Go-Round Deals," the "Glencore Merry-Go-Round Deal" and JPMorgan's and Goldman's four massive 2012 "proprietary

cancellations”))[8] Through these cancellations, massive amounts of aluminum were taken off warrant—and soon largely or completely re-warranted post-load-out—for the purpose of blocking the queue. (SJA1527-33 (describing Smart Ass Plan); *see also* SJA2921-34)

The Senate documented the tonnage in the merry-go-round transactions—between “February 2010 and January 2014 more than 625,000 tons of aluminum were loaded out of a Metro facility in Detroit, *only to be loaded right back into another Metro warehouse in Detroit, all part of the Metro metal merry-go-round*.” (JA964)[9] Additionally, in 2012 Goldman and JPMorgan cancelled another 500,000 metric tons. (JA967-68) These massive, illusory cancellations resulted in lengthening queues that created delays well over 600 calendar days in May 2014 from around 40 days in February 2010. (JA937, 952) Defendants also caused

[8] On July 29, 2016, the LME announced Metro agreed to pay a $10 million fine for wrongdoing in conjunction with Class-Period merry-go-round deals. (JA359-61)

[9] For the Senate, Goldman identified at least six merry-go-round transactions involving over 600,000 metric tons of aluminum. (JA949) The Senate also noted the number of truck shipments and costs for certain round trips. For example, for the 190,000 metric tons covered by the fourth Red Kite merry-go-round deal, 4,300 trucks drove in a circle *with some shipments as short as 200 feet*. (JA961-64)

Glencore and Pacorini's Vlissingen warehouse to become "the only other warehouse in the world with lengthy aluminum queues." (JA943 n.1089)

The Senate Report described the "highly correlated" increases in the queues *and* in the MWP, finding "broad consensus" that increased queue lengths led to MWP increases. (JA937-39) Industry publications and analyses repeatedly concluded lengthening queues were inflating aluminum prices. (*See*, JA411-13)

Leading-aluminum-analyst Jorge Vazquez of Harbor Aluminum stated his company's "mathematical studies confirm that the lengthening of the queue in LME Detroit (Metro) has been the main driver behind the unprecedented increase in Midwest premiums." (JA413) Independent market analysts such as Morgan Stanley found in 2013 that "reduction in metal availability for those awaiting physical metal delivery from warehouses is placing upward pressure on aluminum premiums." (SJA1417)

During the Class Period, Defendants repeatedly acknowledged that longer queues result in higher regional premiums, including the MWP:

- The premium will go "raging higher" once Metro "lock[s]" certain aluminum owned by JPMorgan into one of its LME warehouses. (SJA1518)
- "What is true though, is that the metal we [Metro] get is withheld from consumers and makes the [MWP] go up ...." (SJA1514)

- "As you know, the premium on Ali is a function of a few things • Industry Demand/supply • The queues in the warehouse • The contango that someone can earn by borrowing the metal vs. what they pay for storage." (SJA2136)
- "[High cancellations are] putting pressure on the premium, hence also the premium that we have to pay to get the metal into the warehouse." (SJA2231)
- If the contango is staying consistent, more tonnage coming to warehouses will "put incredible pressure on the midwest premium." (SJA2253-54)

Similarly, Glencore's global head of aluminum described the strategy to build a "critical mass" of aluminum and observed "[t]he bottleneck effect" would "support premiums." (JA1011) Pacorini's Casciano similarly observed "traders keep the bottleneck tight to inflate the premium." (JA1002)

Goldman's head metals trader testified that a "litany" of aluminum consumers complained that lengthening Detroit queues were inflating aluminum prices. (SJA2426-27 (111:3-114:17)) Several of Defendants' current and former executives testified that longer queues in Detroit "dislocate[d]" the market, and "potentially" had "an upwards effect on premiums." (SJA2330 (133:1-8); SJA2641(244:16-247:6)) Pacorini's Casciano admitted: "one way to manipulate the market [is] not allowing metal to flow into the consumption market and keep [the] market tight and keep the premium at all-time high, despite the huge amount of metal on and off warrant." (SJA2234)

Goldman's Evans explained "*the money you earn as a trader is primarily earned around the [midwest] premium*." (SJA2414 (61:2-63:22) ("[T]hat's the primary tool of earnings for a trader.")) Evans added that "whether or not that premium is trending up or trending down can result in either gains or losses for—for the trader." (*Id*.)

While it was widely understood that burgeoning queues inflated the MWP, there was little or no contemporaneous evidence that industry actors believed MWP increases caused decreases in the LME component of the all-in price. Regional premiums are negotiated by local buyers and sellers within a specific market, outside the LME, and include the logistical cost of delivering the metal in a specific region. (SJA2113; JA399 ("Each of the above three components has its own drivers of variability.")) In contrast, LME prices are typically driven by *macroeconomic* factors, resulting from traders' negotiations on the London Exchange. (JA411 (Vazquez Stmt.)) The LME price "provides the official aluminum base price for virtually *all* of the transactions taking place in the Western World." (JA401)

Because LME prices and regional premiums have their own drivers, each component moves independently. (JA401; *see also* SJA2113 (JPMorgan researcher noted "[p]hysical premia ... are regional by their nature")) Defendants' contemporaneous internal analyses confirmed this understanding, considering the

risk of movement in the MWP, without considering an offsetting increase in LME prices. (SJA1970-79, 2102-05, 2165-69)

Contrary post-litigation LME reporting is unpersuasive—Defendants had significant LME-ownership stakes, enjoying high-ranking committee positions. (SJA1473, 2196)

2. The Class-Certification Motion

The FLPs moved to certify a class, employing a definition narrowed before the hearing as set forth below in pertinent part:

> All persons who from February 2010 to March 25, 2016 made a first level purchase of a primary aluminum product with a price term based, in any part, on the Midwest Transaction Price [("MWTP")], the Platts Metals Week US Transaction Price or other "all-in" price used in the United States, or the Midwest Premium, the Platts MW Premium or similar terminology or other regional premium used in the U.S., including, but not limited to, an averaging over a period of days of any such premium or adjusting for a grade or type of primary aluminum product. Excluded from the Class [are purchases made pursuant to Alcoa's North American Primary Metals contracts].

(ECF1238:6; SJA3080)[10]

The class-certification motion was based upon the direct evidence of class-wide impact as well as expert analyses, primarily those of Dr. Gilbert, who served as a professor of economics and applied econometrics at various renowned European

[10] The MWTP includes the LME price and the MWP. (JA10¶4)

universities. (SJA2884¶1) He has expertise in commodities markets and in particular in the aluminum market, publishing many papers on non-ferrous metals. (SJA2884¶3) Dr. Gilbert shows that economic theory is fully consistent with the universal industry-participant observations that aluminum stored in warehouses during the Class Period—LME *and* non-LME—was not effectively available to commercial purchasers. (SJA3028-30¶¶17-20)

Using sales data from three of the major aluminum smelters (Alcoa, Rusal, and Rio-Tinto) accounting for more than 82% of U.S. purchases, Dr. Gilbert undertook a variety of well-accepted statistical analyses to allow him to measure whether increased queue lengths at LME warehouses in Detroit and Vlissingen increased the MWP paid by purchasers of aluminum and whether increases in the MWP were passed through to the "all-in" prices paid by aluminum purchasers, and then to develop an estimate of aggregate harm to the Class resulting from Defendants' blocking access to aluminum by lengthening queues at these warehouses. (SJA2886-87¶10) Dr. Gilbert determined that longer Detroit and Vlissingen queues directly translated into a higher MWP. (SJA2909-10¶¶66-72, SJA2958-65, 2974-92) He found clear evidence of what industry participants, including Defendants, already knew—the relationship between load-out queue lengths and the MWP. (SJA2910-11¶72)

Dr. Gilbert specifies a model to measure aggregate class-wide damages—*i.e.*, the difference between the actual MWP and what the MWP would have been absent Defendants' anticompetitive conduct. (SJA2911¶73) Dr. Gilbert's regression model accounts for various market features, using historical data to estimate the competitive level of aluminum load-out from LME warehouses. (SJA2912-13¶77, SJA2993-3006) His analyses demonstrate that impact and damages can be shown through economic evidence common to the class. (SJA3021-22¶3)

3. The FLPs' contracts establish they paid the MWP and are efficient enforcers

The vast majority of FLPs' aluminum purchases were made with non-Defendants' (IPs[11] Confidential Joint Appendix ("CA")-1922), and the remaining purchases made from Defendants were voluntarily dismissed with prejudice. (JA1460-65) The summary-judgment portion of this appeal pertains only to purchases from non-Defendants.

As is standard, every FLP contract for purchase of aluminum included payment of the MWP, whether explicitly listed or not. (CA-1923¶12, CA-1933-

[11] "IP" refers to Individual Purchasers, *i.e.*, first-level purchasers pursuing individual actions. IPs are appellants in the appeals consolidated with the FLPs' appeal. *See* 2d Cir. Nos. 21-643-cv(L), 21-651-cv(con), 21-660-cv(con), 21-663-cv(con).

35¶¶18-19, CA-1937¶23, CA-1942¶29, CA-1982-84¶¶58-59; CA-826-29 (Vazquez analysis confirming various contracts included the MWP, explicitly or otherwise)) Most FLP and absent-class-member contracts were made pursuant to long-term-supply agreements, generally one year. (*See* SJA3080-102) FLPs made occasional spot purchases, which also required MWP payment. (SJA3080-102; CA-1929¶13, CA-1934¶19, CA-1938¶24) While FLPs negotiated surcharges in price related to shape, purity, location, cash payment, and delivery, they could not negotiate the MWP. (CA-1931¶15, CA-1935¶20, CA-1938¶24, CA-1940-41¶26, CA-1944-45¶30)

B. Relevant Procedural History

FLPs' actions were part of a multi-district litigation originally comprising the putative FLP class action, putative class actions filed by two indirect-purchaser groups, and IPs' individual actions.

The previous district court (Judge Forrest) sustained the TAC and the IPs' complaints as adequately alleging antitrust standing. (*In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419, 444 (S.D.N.Y. 2015)). The court concluded that even though FLPs bought aluminum from producers, rather than from Defendants,[12]

[12] One named FLP purchased from a Defendant, *id.* at 442 n.24, but those claims were dismissed. (SA184)

the FLPs (and IPs) were "the most efficient enforcers of claims that defendants' anticompetitive conduct" injured aluminum purchasers who paid prices "that incorporated the Midwest Premium." *Aluminum*, 95 F. Supp. 3d at 444. Because FLPs purchased directly from producers pursuant to contracts incorporating the non-negotiable MWP, Judge Forrest found "conduct that causes the Midwest Premium to be higher than it would be otherwise harms these plaintiffs directly," and further concluded the TAC stated a Sherman Act claim alleging conspiracy to inflate regional premiums. *Id.* at 444-46.

On February 23, 2016, FLPs requested leave to file an amended complaint adding additional defendants and allegations regarding Defendants' misconduct in Vlissingen. (ECF891-893) That motion was denied on April 25, 2016. (ECF946)

On March 25, 2016, FLPs moved for class certification. (ECF917) Before that motion was heard, Defendants moved for judgment on the pleadings, which Judge Forrest converted to summary judgment and granted on October 5, 2016. (ECF1080) FLPs' post-judgment motion to amend was denied. (ECF1095, 1103).

This Court reversed, viewing FLPs' claimed injuries as "a direct result of the defendants' anticompetitive conduct." *Eastman Kodak*, 936 F.3d at 96. This Court cited record evidence "support[ing] [FLPs'] contention that the defendants' conspiratorial acts inflated a component of the price of primary aluminum,"

including Defendants' admissions "underscor[ing] the extent to which maximizing profits from premiums was central to the defendants' business strategy." *Id.* at 97 & n.4. This Court understood FLPs "purchased primary aluminum ... mainly through long-term supply contracts with aluminum producers." *Id.* at 88.

On remand and reassignment, Judge Engelmayer denied FLPs' class-certification motion solely on predominance grounds. (SA71-72) The court applied a *per se* rule that antitrust injury and predominance cannot be established by direct evidence alone. (SA85) It refused to consider the direct evidence at any stage of its analysis.

The court also rejected Dr. Gilbert's models, relying on four separate grounds. First, it held Dr. Gilbert's analysis was flawed under *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), because he supposedly failed to consider an LME-rule change raising warehouse companies' minimum daily load-out from 1,500 metric tons to 3,000. (SA88-91) Second, it held Dr. Gilbert's analysis of Defendants' misconduct in Vlissingen also comprised *Comcast* error because it thought the TAC disavowed that misconduct. (SA91-95) Third, it further rejected Dr. Gilbert's models showing class-wide injury, holding he did not adequately address Defendants' fanciful theory that decreases in the LME price subsumed the MWP inflation, and also (fourth) because his models supposedly relied on improper averaging. (SA99-111) Finally,

it provided an undeveloped list of purported additional individual issues but never stated that these would justify denying class certification if its predominance analysis were rejected. (SA112-18)

Additionally, Defendants revisited the efficient-enforcer arguments Judge Forrest rejected, arguing FLPs were not "efficient enforcers" because they did not purchase aluminum directly from Defendants. FLPs submitted record evidence confirming the factual allegations Judge Forrest had previously deemed sufficient to establish them as efficient enforcers. (*See supra* at 16-17) On February 17, 2021, the district court granted Defendants' summary-judgment motion "for want of antitrust standing," dismissing nearly all the FLPs' claims. (SA184)

IV. SUMMARY OF ARGUMENT

Because FLPs purchased aluminum pursuant to long-term contracts or spot agreements based on the LME price plus the non-negotiable MWP, they were directly harmed by Defendants' conspiracy and are plainly efficient enforcers. FLPs join the arguments made in the IPs' brief, *see* Fed. R. App. P. 28(i), which explain why the IPs—who are identically situated to FLPs—are efficient enforcers. Those arguments require reversal as to FLPs as well.

Additionally, the district court erred in denying FLPs' class-certification motion.

The court erred in refusing to consider FLPs' direct evidence of predominance, *see* Fed. R. Civ. P. 23(b)(3), which demonstrates that class-wide injury and causation can be resolved "'through generalized proof,'" and "'are more substantial than the issues subject only to individualized proof.'" *In re Petrobras Sec.*, 862 F.3d 250, 270 (2d Cir. 2017). That showing comprised Defendants' admissions, evidence derived from discovery and the nearly two-year Senate investigation, and assertions by the primary-aluminum market's largest players. The district court's total disregard of that evidence—both standing alone and in conjunction with FLPs' expert's models—was error.

The district court also committed multiple errors in rejecting Dr. Gilbert's models of antitrust impact.

The court held that the models twice ran afoul of *Comcast*.

First, it found Dr. Gilbert failed to consider LME-rule changes increasing the minimum amount of aluminum to be loaded out each day, an omission that supposedly attributed load-outs to Defendants that were caused by the rule change. But Dr. Gilbert *did* consider the rule changes and, regardless, *no LME-rule change causes load-outs*—only cancelling warrants does that and cancellations were the linchpin of Defendants' conspiracy.

Second, the court held Dr. Gilbert relied in part on Defendants' misconduct in Vlissingen, which the TAC supposedly disavowed. Not so. The TAC alternatively pleads Defendants' Vlissingen misconduct as FLPs were entitled to do. *See Henry v. Daytop Vill., Inc.*, 42 F.3d 89, 95 (2d Cir. 1994).

The court also held Dr. Gilbert's models showing class-wide injury did not adequately address Defendants' theory that decreases in the LME price subsumed the MWP inflation. But Defendants' theory has no basis in fact and the district court disregarded evidence from leading aluminum-industry figures—and FLPs' experts—dismissing it.

The district court also held Dr. Gilbert relied on improper averaging, but "averages may be acceptable where they do not mask individualized injury," *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 194 (3d Cir. 2020), as is the case here.

Finally, the court offered a truncated list of purported additional individual issues but they lack merit and the court never stated that these would justify denying class certification if its predominance analysis were rejected.

V. ARGUMENT

A. The district court erred in granting summary judgment.

The IPs filed their Opening Brief in this consolidated appeal on June 30, 2021, arguing the district court erred in granting Defendants' summary-judgment motion on efficient-enforcer grounds. Because the class FLPs seek to certify is limited to a class of contracts containing the MWP, and the named plaintiffs purchased aluminum pursuant to long-term contracts or spot agreements based on the LME price plus the non-negotiable MWP (ECF1238:6; SJA3080; CA-1930-33¶¶14-17, CA-1935-37¶¶20-22, CA-1940-43¶¶26-29, CA-1973-75¶¶54-56, CA-1985-86¶¶61-63), the IPs' arguments apply equally to the FLPs.[13] The IPs and FLPs jointly opposed Defendants' summary-judgment motion below (ECF1296), and Defendants acknowledged the IPs and FLPs "assert almost exactly the same claims." (ECF1287:4) Accordingly, FLPs "join in [the IPs'] brief" pursuant to Fed. R. App. P. 28(i), and request this Court reverse.

[13] The FLPs' showing that they were required to pay the MWP in *all* purchases is confirmed by Goldman's admission that the MWP is "the cornerstone of *nearly all* US aluminum physical transactions" (SJA1747), and Novelis's statement to the same effect. (JA875¶89)

B. Denying class certification was error.

1. Standard of Review

This Court reviews an order denying class certification for "'abuse of discretion.'" *Petrobras*, 862 F.3d at 260-61. This Court "'review[s] the district court's construction of legal standards *de novo*,'" "'review[s] the district court's application of those standards for whether the district court's decision falls within the range of permissible decisions,'" and reviews factual findings "'for clear error.'" *Id.* at 261.

2. Background Law

The district court erroneously denied the class-certification motion on predominance grounds, dismissing FLPs' extensive factual showing as merely "anecdotal" and rejecting Dr. Gilbert's analysis on several grounds. (SA70-71)

"[P]redominance is a comparative standard: 'Rule 23(b)(3) [] does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof. [It] … require[s] … that common questions "predominate over any questions affecting only individual [class] members."'" *Petrobras*, 862 F.3d at 268. The "'predominance' requirement is satisfied if: (1) resolution of any material 'legal or factual questions ... can be achieved through generalized proof,' and (2) 'these [common] issues are more substantial than the

issues subject only to individualized proof.'" *Id.* at 270. "'[I]ndividual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole.'" *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 81 (2d Cir. 2015).

"When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) *even though other important matters will have to be tried separately, such as damages*.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453-54 (2016).

3. The district court erred in creating and applying an atextual rule that direct evidence is irrelevant to predominance.

FLPs offered factual evidence—comprising, *inter alia*, statements made by leading industry actors and admissions by Defendants—demonstrating that class-wide injury and causation can be resolved "'through generalized proof,'" and "'are more substantial than the issues subject only to individualized proof.'" *Petrobras*, 862 F.3d at 270. But the district court applied a *per se* rule that antitrust injury and predominance cannot be established by direct evidence alone—"reliable expert modeling substantiating this claim is *unavoidably necessary*." (SA86)

FLPs' real-world evidence played no role in the district court's analysis—it was mere "context." (SA83) Nothing in Rule 23 supports the district court's wholesale disregard of this highly probative evidence. *Cf. Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1960 (2021) (in the context of "assessing price impact at class certification, courts '"should be open to *all* probative evidence on that question—qualitative as well as quantitative—aided by a good dose of common sense"'"). The out-of-Circuit authorities cited by the district court are inapposite, offering only cursory analyses of meager records.

The district court's dismissal of FLPs' direct evidence as "anecdotal" (SA71), mischaracterizes the record: the direct-evidence showing of class-wide antitrust impact and predominance here is extraordinarily robust, including Defendants' admissions, evidence (including various statistical analyses) adduced during the nearly two-year Senate investigation, and assertions by the largest players in the primary-aluminum market.

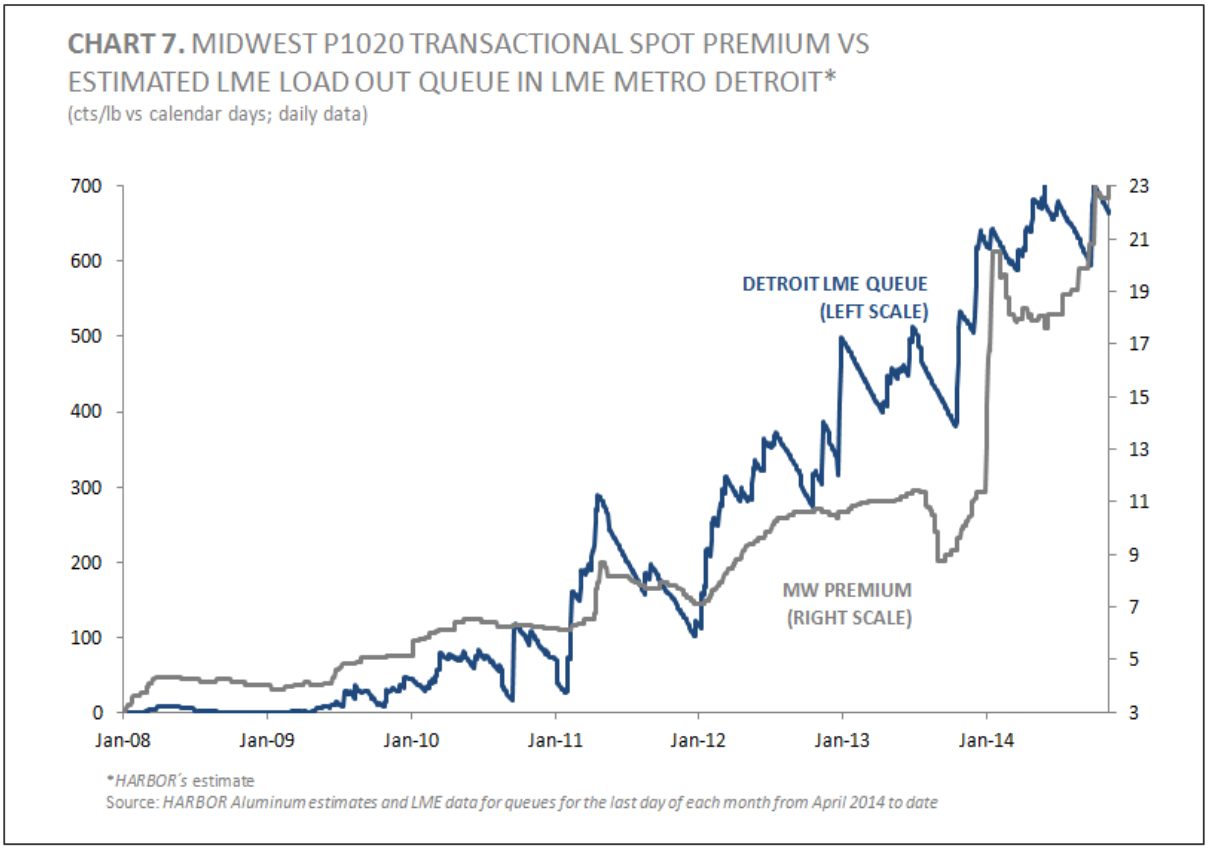
Defendants *admitted* that lengthening queues increased regional premiums. (JA939)

- The premium will go "raging higher" once Metro "lock[s]" certain JPMorgan aluminum into one of its LME warehouses. (JA1118)

- "What is true though, is that the metal we [Metro] get is withheld from consumers and makes the [MW] premium go up ...." (JA993)

- "[High cancellations are] putting pressure on the premium …." (JA1123)

Current and former executives of Defendants testified that longer Detroit queues increased premiums and "dislocate[d]" the market (JA1130(133:1-8), JA1133-36(244:16-247:6)), as a chart submitted to the Senate confirms:[14]



[14] (*See* JA414)

Eastman Kodak held FLPs offered evidence supporting their "contention that the defendants' conspiratorial acts inflated a component of the price of primary aluminum," noting Metro's CEO's 2010 email that "'physical traders in conjunction with banks and producers hold [aluminum] stock ... *in order to squeeze up the premiums*.'" 936 F.3d at 97. Glencore's global-aluminum head "described the strategy to get a 'critical mass' of aluminum into a particular warehouse and observed '[t]he bottleneck effect' there would 'support premiums.'" *Id.* Pacorini's CEO similarly "posited that 'traders keep the bottleneck tight to inflate the premium.'" *Id.* at 97 & n.4; JA1002. Defendants' executives' contemporaneous admissions to the precise conduct and consequences alleged by FLPs are evidence that any Class Member would present to a jury to prove liability *and* injury.

That injury was suffered by the class members—Goldman admitted the MWP is "the cornerstone of *nearly all* aluminum physical transactions" (SJA1744), and Novelis agreed that "'*[a]ll* purchases of primary aluminum'" include a "'local market premium.'" (JA875¶89)

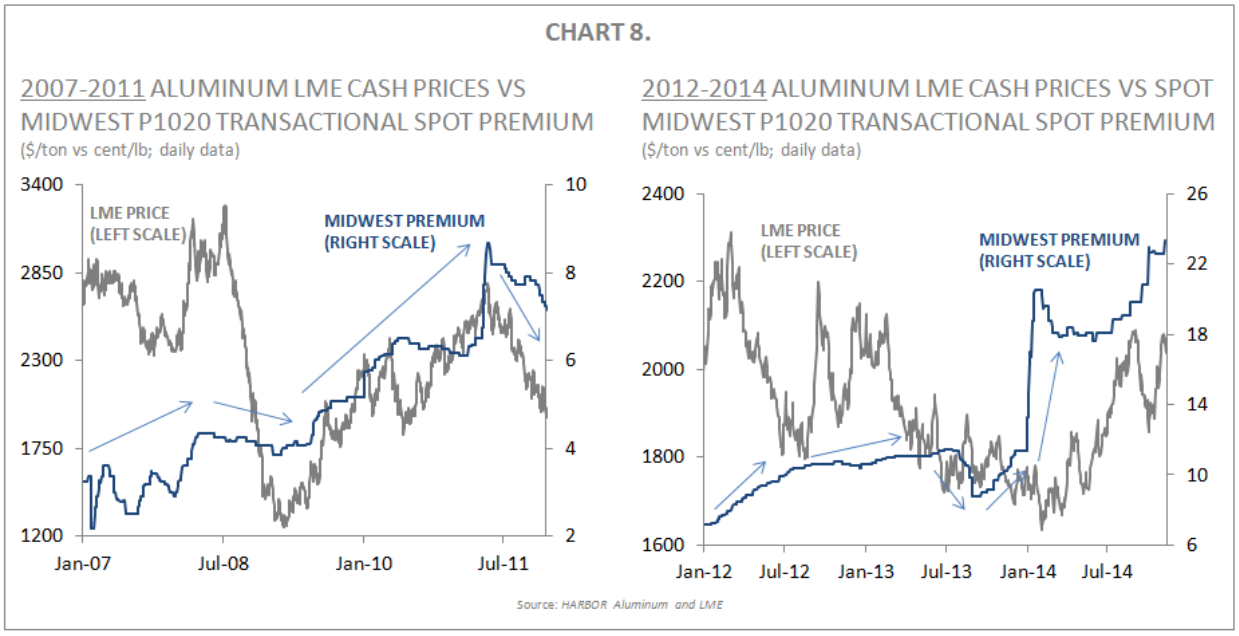
Direct evidence also refutes Defendants' made-for-litigation speculation—embraced by the district court—that although longer queues increase *regional* premiums, they somehow reduce the *internationally-determined* LME price. (SA100-08) Class-Period aluminum-market realities described in the direct

evidence offered below demonstrate that regional premiums and LME prices are *distinct* all-in-price components.

Regional premiums unsurprisingly reflect local-market conditions, including metal-delivery costs. (JA180, 1252) But macroeconomic factors—such as global production and use, global-growth expectation, and global inventories—typically drive LME prices. (*Id.*)

Because LME prices and regional premiums have their own *distinct* drivers, each component moves independently. (*Id.*; JA939 ("LME and premium prices are not inversely related, but move independently of one another") (citing Alcoa Senate briefing)) Relatedly, Harbor—a leading global-aluminum-industry analyst boasting Alcoa, Rio Tinto, Coca Cola, and GE as clients—undertook various statistical analyses for the Senate investigation demonstrating LME price and regional premiums have *not* historically moved inversely but rather in the same direction. (JA939)

Harbor's submitted charts showing the day-to-day relationship between LME prices and the MWP:



These models show the impact of warehouse queues on the aluminum market generally and that there is no inverse relationship between the MWP and LME prices. Harbor concluded higher premiums negatively impacted end-users financially (JA1161), estimating the effects of lengthening queues on market premiums cost U.S. consumers billions. (JA938-39)

Through the end of 2010, Harbor found that MWP premiums traded for less than 10% of the all-in price. When Harbor's report issued, that figure exceeded *20%* of the all-in price. (JA1161)

Defendants' own contemporaneous analyses demonstrate how tenuous the LME-price-decrease theory is. In internal-trading models, Defendants considered the risk of MWP movement, *without accounting for offsetting LME-price movement*.

(JA1191-92, 1193-202, 1203-05, 1206-09, 1210-13) These analyses—including up to 96 different scenarios—neither mention nor model an inverse relationship between the LME price and regional premiums.

The district court's justifications for ignoring this evidence are insubstantial. It cited *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 514 (S.D.N.Y. 2018) (SA83-84), but *LIBOR* addressed nothing more than three communications between traders reflecting only their "beliefs." *Id.* at 514. Unlike the sophisticated analyses and party admissions offered below, those comments in *LIBOR were* anecdotal. They were not party admissions, admissible without proof of personal knowledge. *See United States v. McKeon*, 738 F.2d 26, 32 (2d Cir. 1984).

The court also cited *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 934 F.3d 619 (D.C. Cir. 2019) (SA85), but that case, too, lacks the robust showing made here. There, plaintiffs cited "documentary evidence that the defendants enforced fuel surcharges 'uniformly and with few exceptions,' … [b]ut imposing fuel surcharges does not show injury caused by a conspiracy," and the parties "dispute[d] whether higher overall prices during the class period were attributable to causes besides any conspiracy." *Id.* at 626. But FLPs offered contemporaneous direct evidence that Defendants' conduct *caused* MWP inflation

that was not offset by LME price reductions *and that Defendants admitted the MWP was* "*the cornerstone of nearly all aluminum physical transactions.*" (*See supra* at 3-14) *Rail Freight*'s rejection of the incomplete showing there is inapposite.

In re Asacol Antitrust Litig., 907 F.3d 42 (1st Cir. 2018) (SA85), is similarly irrelevant. There "plaintiffs point[ed] to *no documents or admissions* that would support a finding that all class members suffered injury," 907 F.3d at 54, but FLPs' evidence does precisely that, and includes Defendants' admissions.

The district court thus crafted its own rule supposedly justifying disregard of compelling direct—non-anecdotal—evidence. Nothing supports that innovation; this Court should reverse.

The district court sought to further justify ignoring FLPs' direct evidence by asserting that because the evidence did not "uniform[ly]" point one way, the court "hesitate[d]" to "treat[]" either side of the debate "as authoritative as to whether lengthening queues at the Metro Detroit warehouses unitarily worked price injury on first-level purchasers." (SA84) The court's reluctance to engage with the evidence is inexplicable—the direct-evidence record overwhelmingly favored FLPs. (*See supra* at 3-14) And much of Defendants' purported contemporaneous evidence—*e.g.*, their contention that increases in the locally-driven MWP were

offset by decreases in the internationally-derived LME price—are *post hoc* rationalizations from them and affiliates.

By remaining above the fray as to FLPs' direct evidence, the district court abdicated its responsibility to adjudicate FLPs' predominance showing. Even worse, the court's ruling reveals its fundamental misunderstanding of FLPs' burden—FLPs are not required to show that their evidence is "*authoritative*" (SA84)—their "burden [is] to prove predominance by a *preponderance of the evidence*." *In re Nassau Cnty. Strip Search Cases*, 639 F. App'x 746, 751 (2d Cir. 2016). This legal error compels reversal.

Even if FLPs' direct evidence could not alone justify class certification, it was error to refuse to give it substantive consideration, consigning it instead to the limbo of "context." (SA83) Courts recognize that the combination of statistical and direct evidence can be "'potent.'" *See Eng'g Contractors Ass'n Of S. Florida Inc. v. Metro. Dade Cnty.*, 122 F.3d 895, 925-26 (11th Cir. 1997) (collecting discrimination-claim cases). So, too, in antitrust cases. *See In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1217 (N.D. Cal. 2013) ("the importance of [the experts'] statistical models is diminished in light of the extensive documentary evidence that supports Plaintiffs' theory of impact").

"[E]xpert testimony need not shoulder the plaintiffs' burden alone," *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1175 (JG)(VVP), 2014 WL 7882100, at *43 (E.D.N.Y. Oct. 15, 2014), but the district court held otherwise, even though it acknowledged FLPs' evidence comprised "statements from industry observers and employees of the defendants, smelters, and aluminum purchasers." (SA104) The breathtaking breadth and scope of that list unquestionably demonstrates that the district court invented an atextual *per se* rule precluding consideration of real-world evidence. This Court should vacate the class-certification order and remand with directions to consider *all* the evidence supporting class certification, separately *and* in tandem with Dr. Gilbert's models. *Cf. Goldman*, 141 S. Ct. at 1960.

4. The district court erred in rejecting Dr. Gilbert's analyses and refusing to consider real-world evidence supporting his conclusions.

a. Dr. Gilbert properly considered LME-rule changes.

The district court held Dr. Gilbert failed to take into account Class-Period LME-load-out-rules changes. (SA87-91) It erred.

The court's analysis is muddled from the start, stating Dr. Gilbert's models attempt "to show defendants loaded 'excess' amounts of aluminum out of Metro Detroit and Pacorini Vlissingen, *thereby* lengthening the queues at those

warehouses." (SA87) Dr. Gilbert did not argue that load-outs lengthened the queues—his analysis permitted him to infer *excess cancellations* of aluminum warrants *from excess load-outs*. Excess cancellations grew the queue.

Because "an intention to load-out is the sole reason for cancelling warrants in a competitive environment," Dr. Gilbert examined the history of load-outs in order to "estimate[] a two equation model to explain aluminum load-outs from all U.S. and all European LME warehouses." (SJA2994-95) His "objective" was "to estimate excess load-out rates arising from Defendants' alleged illegal behavior" which allowed him to "infer excess cancellation rates." (SJA2995)[15]

After estimating excess load-outs, he "adjust[ed] monthly cancellations in Detroit and Vlissingen down by [his] estimates of their excess load-outs"—down by 16,200 tons per month in Detroit and 46,333 tons in Vlissingen—because "absent Defendants' alleged illegal conduct, outflows from these warehouse locations would have been lower by these amounts and hence cancellations of the implied warrants [in the but-for world] would not have been required." (SJA2996)

Defendants argued Dr. Gilbert overlooked LME-rule changes in 2012 and 2015 increasing *minimum* load-outs. (JA813¶75) Not so. On reply, Dr. Gilbert

[15] He adopted this approach "because load-outs are much less volatile than cancellations." (SJA2995)

emphatically stated that "[t]he estimated queue series in my econometric models controls for both the 2012 and 2015 LME rule changes," and he did so in calculating queue lengths in his original report. (SJA3043¶51(b)) Applying the LME-rule change to Dr. Gilbert's estimated-queue series was appropriate because queue length is determined by two factors—the quantities of cancelled metal removed from the queue by loading out and the amount of cancelled metal added to the queue. If Dr. Gilbert had not included the rule change in his estimation, he would have underestimated the former. Avoiding that error was significant because queue length affects the MWP. (JA937-39)

Dr. Gilbert did *not* consider the rule changes in his regression analysis as to load-outs—as opposed to his "estimated queue series" (SJA3043¶51(b))—because in the years preceding Defendants' conspiracy, *LME load-out rules had not constrained load-outs*: "there is *very little evidence* that, prior to 2009, the LME rule was seen as imposing *a maximum load-out rate*." (*See* SJA2996)

Thus, Dr. Gilbert's model did *not* mistakenly attribute an increase in load-outs to the conspiracy rather than LME-rules changes. (SJA664¶100; SA89) Rather, Dr. Gilbert had an econometric reason for applying the rule changes in calculating queues but not load-outs—LME load-out rules did not limit previous load-outs.

(SJA3043¶51(b))[16] Because pre-conspiracy load-outs were not limited by LME rules, they were also not limited in the but-for world.

Dr. Gilbert further explained that the rule changes had come into effect because of Defendants' queue-building activity and therefore he needn't consider them for load-outs. (SJA3043-45¶¶51-53) This was further support for his analytical model, *not* an excuse for not applying the rule changes to load-outs.

Nonetheless, the court held that "because Dr. Gilbert's model [supposedly] fails to isolate the effects of the conspiracy—and instead appears to isolate the effect of doubling the LME load-out rule in April 2012, two years into the six-year alleged conspiracy—the FLPs lack classwide proof that the alleged conspiracy lengthened queues throughout the relevant period." (SA90) That ruling betrays a fundamental misunderstanding of both Dr. Gilbert's analysis and Defendants' scheme.

Dr. Gilbert recognized that "[a] possible concern is that load-outs in this counterfactual scenario might have been *constrained* by the LME load-out limit." (SJA2996) Thus LME load-out rules might have suppressed the quantity of aluminum loaded out, and artificially lowered his estimates of excess load-outs from

[16] The court erroneously asserted Dr. Gilbert's deposition admitted (a non-existent) error. (SA90) Dr. Gilbert explained in subsequent reports that he misspoke in his deposition (SJA3041¶47 n.43), and, post-deposition, reaffirmed his initial report analysis. (SJA3043¶51(b))

which he would infer excess cancellations. He rejected that concern because "there is very little evidence that, prior to 2009, the LME rule was seen as imposing a maximum load-out rate." (*Id.*; *accord* JA813-14¶78, JA815¶81) Indeed, before 2012, "[t]here were multiple instances of load-outs in excess of the 1,500 ton 'minimum' limit and *no* instances of load-outs of exactly 1,500 tons, which is what one would expect if the rule was constraining loadouts." (JA813-14¶78) Consequently, he concluded that "[i]t was therefore not the 2012 change in the rule that resulted in increased load-outs but the change in defendants' behavior. This change in load-out behavior started prior to the 2012 rule change which was a response to it." (*Id.*)

Dr. Gilbert reasoned that "to the extent that the [LME rules] did restrict load-outs after 2009"—in contrast to the pre-2009 situation in which the rules did not constrain over-the-minimum load-outs—"my estimates of excess load-outs will be too low, *thereby making estimated damages conservative*." (SJA2996) Dr. Gilbert was correct because the new LME rule—even though it specified a higher minimum quantity of aluminum than the pre-2012 rule—would actually result in a quantity of aluminum load-outs that was substantially less than the quantities of aluminum corresponding to cancelled warrants *if* the new rule acted as a maximum. That is so because lengthy queues persisted in 2012 and continued to grow for years afterward,

the increased minimum notwithstanding. (SJA2916, 2918) Because massive quantities of already-cancelled metal would not be loaded out each month under that scenario, Dr. Gilbert's estimate of excess load-outs would necessarily produce an understated inference of excess cancellations, *resulting in an underestimation of the damage to FLPs*.

The district court, however, got it exactly backward, mistaking an understatement of Defendants' liability for an overstatement. It reasoned that because Dr. Gilbert supposedly failed to control for LME-rule changes his "model mistakenly attributes to the alleged conspiracy an increase in Detroit load-outs *actually attributable to the LME rule change*"—the load-outs were purportedly "a result of the rule change." (SA89) From this flawed reasoning, it concluded Dr. Gilbert's model "isolate[s] the effect of doubling the LME load-out rule in April 2012." (SA90) *But the court's premise is dead wrong—load-outs are not caused by LME rules*—only aluminum associated with a cancelled warrant is loaded out (JA403), and LME rules do not require warrant holders to cancel their warrants.

Indeed, there were so many cancellations that the Detroit and Vlissingen queues continued to grow at a breakneck pace for approximately two years after the rule change took effect. (SJA2916, 2918); *accord* JA402 ("raising the load-out minimum rate failed to stop the on-going concentration of metal in Detroit, and the

ever-longer load-out queue")) Accordingly, Dr. Gilbert explained: "*My damages estimates took the 2012 rule change fully into account in my econometric modeling*. I saw excess load-outs both before and after the rule change as resulting from defendants' actions in concentrating aluminum stocks in their warehouse locations and then blockading the stock through their queue-building programs. I did not need to take the 2015 rule change into account because it did not result in any change in load-out behavior and because it would not have affected Metro's Detroit warehouse in the counterfactual simulation." (JA813¶76)

The district court offered no reasoned rebuttal, instead denigrating Dr. Gilbert's analysis as "'sleight-of-hand'" and remaining blind to the causal connection between warrant cancellations—not caused by LME rules—and load-outs. (SA89-90) Its holding that Dr. Gilbert's models violated *Comcast* because his models do not "'identif[y] damages that are not the result [of the] wrong'" was thus legal error. (SA89)

The direct evidence disregarded by the district court confirms this conclusion. The district court observed that defense expert Hausman undertook what the court termed a purported "correct[ion]" of Dr. Gilbert's analysis that supposedly showed "the alleged conspiracy had no effect on the Detroit queue." (*Id.*) Because

overwhelming evidence belies that conclusion (*see supra* at 11-13), the court erred by favoring Hausman's musings over real-world facts.

That Metro itself never complied with the LME rule changes further undermines criticisms of Dr. Gilbert. The minimum load-out rules at all times required that the minimum be loaded out per LME company—*i.e.*, Metro—*and* LME location—*i.e.*, Detroit. (CA-1991¶70) Goldman and Metro both understood the rule in 2009 to be 1500 MT per day per warehouse company per LME location. (ECF1282; CA-1439) Yet in Glencore's merry-go-round transaction, all 91,000 MT for Glencore were loaded from one Detroit Metro warehouse into another Detroit Metro warehouse. (JA961-63, 865¶65 n.85) The merry-go-round deals left neither the LME company—Metro—nor the LME location—Detroit. In 2016 Metro agreed to pay a multi-million-dollar fine for violating LME rules in conjunction with the merry-go-round deals. (*See* ECF1040:11n.14) Dr. Gilbert's analysis of a rule Defendants did not follow cannot be error.

b. Dr. Gilbert's Detroit/Vlissingen analysis neither violated *Comcast* nor was its Vlissingen component inextricable.

The district court found a second purported *Comcast* deficiency, reasoning Dr. Gilbert's models improperly incorporated Defendants' misconduct in Vlissingen, a theory supposedly disavowed in the TAC. (SA91-95) While Dr.

Gilbert analyzed the Detroit *and* Vlissingen queues' effects on the MWP, he also provided broken-out data as to each and assured the court he could perform a Detroit-specific analysis if required. The district court's analysis is deeply flawed.

Comcast is a poor fit for the district court's reasoning. This Court "interpret[s] *Comcast* as precluding class certification '*only* ... because the sole theory of liability that the district court determined was common in that antitrust action, overbuilder competition, was a theory of liability that the plaintiffs' model *indisputably* failed to measure when determining the damages for that injury.'" *Waggoner v. Barclays PLC*, 875 F.3d 79, 105-06 (2d Cir. 2017). The *Comcast* plaintiffs alleged—and their expert relied upon—four antitrust-injury theories, but the trial court held only one was "capable of classwide proof and rejected the rest" as not subject to class-wide proof. 569 U.S. at 31 & n.3. The expert's model "did not attribute damages to any one particular theory of anticompetitive impact," *id.* at 37, and thus could not "bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the [surviving theory]." *Id.* at 38.

Unlike *Comcast*, the district court here did not independently hold that Defendants' conduct in Vlissingen was not subject to class-wide proof. Rather, the court (erroneously) interpreted the TAC to "unambiguous[ly] disavow[] … any link between the Vlissingen queue and increases in the Midwest Premium," and held that

because Dr. Gilbert's model incorporates Defendants' Vlissingen misconduct, it "fails to withstand rigorous *Comcast* review." (SA91, 95) That analysis is hardly "indisputabl[e]." *See Waggoner*, 875 F.3d at 105-06.

The court misread the TAC. The TAC's third claim (JA157-222¶¶461-627) is its only live claim alleging a §1 violation. *See Aluminum*, 95 F. Supp. 3d at 439, 453-56. That claim is alleged "[i]n the alternative or in addition" (JA157¶462), to the TAC's other claims, and *explicitly* belies the district court's insistence that FLPs disavowed the "link between the Vlissingen queue and increases in the Midwest Premium." (SA91) The third claim alleges the incentive payments paid to encourage owners to store their aluminum in warehouses in Detroit *and* Vlissingen (JA193-94¶¶552-553), and explains that "[t]hese incentive payments have … been paid by the strategic chokepoint warehouses, *e.g.*, Metro in Detroit *and Pacorini in Vlissingen*, as a means to attract metal to particular warehouses *where existing and growing queues were thereby exacerbated in order to drive up the price of physical aluminum*." (JA194¶553 (original emphasis deleted)) Such incentive payments enabled Defendants to increase queues through strategic cancellations and to inflate premiums, and Defendants were successful in doing so in Detroit *and* Vlissingen. (JA194-95¶¶556-557, JA195-99¶¶567-569) Thus, contrary to the district court's holding, the third claim unambiguously embraces—rather than disavows—Dr.

Gilbert's Detroit/Vlissingen analysis. The district court committed reversible error by ignoring ¶553 and related allegations.

Rather than address FLPs' allegations as to their sole remaining claim, the district court cobbled together an alternative version of the TAC from stray allegations that are either irrelevant to the third claim or focused on a dismissed §2 claim. (SA91-92 (citing JA20-21¶13, JA75¶187)) The district court observed ¶187 alleges "'[t]he increases in aluminum stored in Vlissingen have virtually no explanatory power for the increases in the Midwest Premium,'" and from that concluded that "according to the TAC, *the Detroit queue alone—wholly unabetted by the Vlissingen queue*—raised the Midwest Premium during the class period." (SA91-92 (quoting JA75¶187)) But that analysis is mistaken—¶187 contains allegations about the *quantity* of aluminum stored, *not* the length and effects of the *queue*. Because the district court itself recognized that Dr. Gilbert's analysis was focused on the *queues* in Detroit and Vlissingen (SA92), its reliance on ¶187—*which addresses stocks, not queues*—is misplaced.

The district court also cited ¶13, an allegation supporting FLPs' previously-dismissed §2 claim, stating "'[t]he length of the queues in the Vlissingen warehouses held by Glencore/Pacorini does not Granger-cause the Midwest [P]remium.'" (SA92 (quoting JA20-21¶13)) As Judge Forrest recognized, the §2 monopolization

claim—which alleges Metro's market power (JA12-17¶¶8-9, JA149-50¶¶438-440)—was "incompatible" with the TAC's §1 claim. *Aluminum*, 95 F. Supp. 3d at 453-56. Allegations of (preliminary, pre-discovery) regression analyses[17] supported the notion that market power as to the MWP was exercised by Metro and Goldman in Detroit—as required by §2—rather than by Glencore/Pacorini in Vlissingen. (JA20-21¶13)

But Judge Forrest held the TAC as a whole did "not support Metro and its Goldman financial affiliates alone being able to carry out the scheme," and required the participation of "the JPMorgan entities and the Glencore entities and their affiliated companies." *Aluminum*, 95 F. Supp. 3d at 455-56. She therefore dismissed the §2 claim. *Id.* Nonetheless, Judge Engelmayer construed the §2-related allegations in ¶13 and ¶187 to deny FLPs the ability to proceed on their §1 allegations that were pleaded alternatively.

"Under Rule 8(e)(2) of the Federal Rules of Civil Procedure, a plaintiff may plead two or more statements of a claim, even within the same count, regardless of consistency. … 'The inconsistency may lie either in the statement of the facts or in the legal theories adopted ….'" *Henry*, 42 F.3d at 95. Although it was not necessary

[17] (SJA959-60)

to do so explicitly, *see Adler v. Pataki*, 185 F.3d 35, 41 (2d Cir. 1999), FLPs pleaded their live §1 claim "[*i*]*n the alternative* or in addition" to the TAC's other claims. (JA157¶462) The district court was therefore precluded from construing ¶13—and other allegations supporting the §2 claim—"as … admission[s] against [the TAC's] alternative or inconsistent claim" in ¶553 that Defendants committed misconduct in Vlissingen that also caused MWP inflation in violation of §1. *Henry*, 42 F.3d at 95; *accord Adler*, 185 F.3d at 41.

Even if it were necessary to cure any inconsistency, it was error for the district court to narrowly construe the TAC to preclude amendments to it to conform to the theory of the Detroit and Vlissingen queues' joint effect on the MWP that FLPs and Dr. Gilbert have advanced *for years*. Ultimately, Defendants would have sought at trial to preclude Dr. Gilbert's Detroit/Vlissingen-based testimony on the same mistaken grounds asserted by the district court in its class-certification order, but Fed. R. Civ. P. 15(b)(1) provides that "[i]f, at trial, a party objects that evidence is *not within the issues raised in the pleadings*, the court may permit the pleadings to be amended. *The court should freely permit an amendment when doing so will aid in presenting the merits* and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." *Id.* Thus, even if Vlissingen's effect on the MWP were not properly alleged in the TAC—it

plainly is—and Defendants sought to exclude Dr. Gilbert's Detroit/Vlissingen testimony at trial, Rule 15(b)(1) would direct the district court to "freely permit an amendment" to conform the TAC to FLPs' long-standing theory regarding Defendants' misconduct in Vlissingen. *See id.*; *see also Fid. & Deposit Co. of Maryland v. Krout*, 157 F.2d 912 (2d Cir. 1946) (approving amendment of plaintiff's liability theory at trial).

It makes no sense at the class-certification stage to adopt a strict, inflexible reading of the TAC that would necessarily be abandoned at trial based upon both Rule 15(b)(1)'s text and the Federal Rules' emphasis on deciding cases on their merits. *See Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 908-09 (2d Cir. 1977) (abuse of discretion to deny leave to amend under Rule 15(b) where, as here, there was no unfair surprise); *Farfaras v. Citizens Bank & Tr. of Chicago*, 433 F.3d 558, 568 (7th Cir. 2006) ("'The intent of rule 15(b) is "to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties."'"). The district court's class-certification order exalts "procedural niceties" and frustrates the Federal Rules' goal of adjudication on the merits. It should be reversed.

Finally, even if the district court properly disregarded the TAC's §1 allegations regarding the effects of Defendants' misconduct in Vlissingen on the

MWP and the policies underlying Rule 15(b), its conclusion that the effects of Vlissingen were "*inextricably* interw[oven] in [Dr. Gilbert's] analysis" (SA94), contradicts the record. FLPs explained at oral argument that Dr. Gilbert *had* performed alternate calculations that removed Vlissingen's impact (*see* JA1366:10-12 ("[H]e did so in his reports, and he supplied the underlying data, the backup data to the defendants.")), and cited Exhibit F1 of Dr. Gilbert's reply report to the court. (JA1387) Exhibit F1 details for each year of the Class Period: (1) damages directly attributable to Detroit; (2) damages directly attributable to Vlissingen; and (3) damages attributable to the combined effects of the queues in the two locations. (*See* SJA3077)[18] The district court simply disregarded that information. There is thus zero evidence that Dr. Gilbert's Vlissingen analysis is "inextricabl[e]" from his models—rather, Dr. Gilbert repeatedly offered to perform Detroit-only analyses. (*See, e.g.*, SJA3048¶59 (ignoring Vlissingen is not "an obstacle to reliably estimating damages"); SJA812-13¶74 (he "can very easily recalculate damages")).

The district court's class-certification order represents the first ruling in this lengthy litigation precluding FLPs from relying upon crucial evidence of

[18] (*See also* SJA2984-89 (Exhibits F2-F7)) These exhibits relate the MWP to the average queue. The model reported by those exhibits allows the same counterfactual to be applied solely to Metro leaving Pacorini uninvolved.

Defendants' conspiracy and its effects. To refuse to allow FLPs to respond to that bolt from the blue, and then to baselessly assert that the Vlissingen analysis was "inextricable" when the opposite is true was an abuse of discretion.

c. Dr. Gilbert's models reliably show class-member injury.

The district court acknowledged that "the core of the FLPs' theory has consistently been that defendants took coordinated actions to lengthen queues, which made it more difficult and expensive for other market participants to retrieve aluminum from the Metro Detroit warehouse, which in turn led to increases in the Midwest Premium." (SA96) Despite agreeing that the queues are the instrumentality through which the conspiracy inflicted harm, the district court focused on everything but the queue—including Defendants' agreement not to destock each other (*i.e.*, remove their metal from each other's warehouses), the episodic nature of Defendants' conspiratorial warrant cancellations, and Dr. Gilbert's purported excess load-in theory—and concluded that Dr. Gilbert's models were "insensitive to conduct which is conspiratorial and conduct which is not and … they elide salient differences over time." (SA99) It erred.

The district court reasoned that "[a]n agreement *not* to destock is itself, necessarily, an agreement to cancel fewer warrants and thus maintain lower queues; it is the refrained-from act of 'destocking' that would have required *more* cancelled

warrants." (SA97 (emphasis in original)) That analysis overlooks the most-striking facts supporting FLPs' allegations of Defendants' conspiracy—Defendants' merry-go-round transactions. (*See supra* at 9-10)[19] Because, as the district court acknowledged, merry-go-round transactions permitted Defendants to both cancel warrants *and* refrain from destocking each other (SA25), the district court's assumption that an agreement not to destock "necessarily" entails fewer cancellations is wrong. (SA97)

Defendants cancelled warrants for the purpose of facilitating merry-go-round transactions, all of which were concentrated in the period during which they built the critical mass of aluminum at Metro's Detroit warehouses. (*See* JA94-103¶¶251-286) As Dr. Gilbert put it, FLPs "allege that Defendants conspired to amass U.S. aluminum stocks in Metro's Detroit warehouses by [*inter alia*] agreeing not to de-stock each other's warehouses (*i.e.* attract metal away from a competitor's warehouse by offering more favorable terms) [and] by agreeing to artificially increase warehouse queues for loading out aluminum through various 'merry-go-round' transactions." (SJA2890-91¶17)

[19] The district court described the merry-go-round evidence as "malodorous facts." (JA1440:25)

Defendants' agreement to refrain from destocking each other was thus directed at building that critical mass of aluminum in Detroit. Those refrain-from-destocking agreements were also supplemented by the payment of incentives to store metal by the warehousing companies, thus further increasing warehouse stocks. (SJA1411-14, 2892-93¶21; JA814¶79) These efforts succeeded as Detroit's share of LME-aluminum stocks in the U.S. rose from 40% prior to the conspiracy to 84% just four years later, at 2013's end. (SJA2891¶18 (citing LME figures)) Defendants' agreement not to destock each other was concentrated in that period (*see, e.g.*¸ JA1044-55), and the success of that agreement, as well as the merry-go-round cancellations and the warehouse-incentive payments, in accumulating a critical mass demonstrates that the district court's concerns regarding Dr. Gilbert's supposed "11th-hour 'excess load-in' model" (SA98), are insubstantial—merry-go-round transactions and incentive payments necessarily affect load-ins.

Moreover, the district court's concerns regarding whether Dr. Gilbert's models' ability to "point towards an adverse price impact on all purchasers throughout the six-year class period," and "reliably prove that *each* putative class member suffered individual injury" (SA96-97 (emphasis in original)), are similarly unfounded.

The court misstates FLPs' class-certification burden. The district court adopted the extreme view that FLPs must show that they can prove "'*all* class members'" were injured. (SA73, 96-97) But this Court has long held that "[e]ven in cases where 'the issue of injury-in-fact [not just damages calculation] presents individual questions, … it does not necessarily follow that they *predominate* over common ones and that class action treatment is therefore unwarranted.'" *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) (quoting *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108 (2d Cir. 2007)) (emphasis & alterations in original). Indeed, "even a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct." *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016); *accord Lacy v. Cook Cnty., Illinois*, 897 F.3d 847, 864 (7th Cir. 2018); *Nexium*, 777 F.3d at 25. Consequently, "'[s]ome class members' claims will fail on the merits if and when damages are decided, *a fact generally irrelevant to the district court's decision on class certification*,'" *Ruiz Torres*, 835 F.3d at 1136 (quoting *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012)), as *Cordes* confirms. *See* 502 F.3d at 108.

The district court did not cite *Cordes*, relying on dicta outside the antitrust context stating "'plaintiffs must … show that they can prove, through common

evidence, that all class members were … injured by the alleged conspiracy.'" *Sykes*, 780 F.3d at 82 (quoting *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 252 (D.C. Cir. 2013)); (SA73, 80-81). This Court has never overruled *Cordes*—which is consistent with post-*Comcast* opinions in *Nexium*, *Ruiz Torres*, and *Lacy*—and is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of [this] Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). *Cordes* thus controls. Because the district court applied an erroneous *per se* rule, this Court must reverse.

The district court's insistence on temporal precision—"adverse price impact on all purchasers throughout the six-year class period" (SA96)—also comprises reversible legal error. *Waggoner* rejected the defendants' argument "that class certification was improper under *Comcast* because the Plaintiffs' damages model failed to account for variations in inflation over time." 875 F.3d at 105-06. It reasoned that "*Comcast* does not suggest that damage calculations must be so precise at this juncture. To the contrary, *Comcast* explicitly states that '[c]alculations need not be exact.'" *Id.* So too here.

Even if FLPs were required to prove that every class member suffered injury, the district court's analysis lacks merit. While it focuses on when particular merry-

go-round transactions or warrant cancellations occurred, and "[t]he 'lumpiness' of the allegedly conspiratorial warrant cancellations" (SA97), Dr. Gilbert's "model attributes the impact of defendants' behavior on the Midwest Premium to have arisen through the channel of load-out queues." (JA809¶66) Defendants' conspiracy—and the conspiratorial conduct identified by the district court—produced "a steady and symmetric increase in the length of both the Detroit and Vlissingen load-out queues'" (SJA2897-98¶33), leaving little doubt that each putative class member was injured.

That conclusion is confirmed by direct evidence offered below—evidence the district court erred in disregarding. The Senate Report described the "highly correlated" increases in the queues *and* in the MWP, finding "broad consensus" that increased queue lengths led to MWP increases. (JA937-39) Thus, the direct evidence confirms that "the channel of load-out queues" produced increases in the queue and MWP over time and confirms Dr. Gilbert's models' conclusion that each putative class member suffered injury. That is so because class members' injuries arise from an inflated MWP, and the class is defined as persons paying the MWP (ECF1238:6; SJA3080), which is "non-negotiable" and paid "in all or nearly all purchases of aluminum made directly from producers." (SJA2902¶47; *accord*

SJA2886-88¶10, SJA2902-03¶¶48-49, SJA2943-57; JA874-76¶¶88-91; *see also* CA-1915-46, 1973-85)

Finally, the district court's criticism of Dr. Gilbert for "elid[ing] this problem by utilizing averaging" is meritless. (SA97) Contrary to the court's implication, there is no *per se* rule prohibiting reliance on averaging—"averages may be acceptable where they do not mask individualized injury." *See Lamictal*, 957 F.3d at 194. As Goldman made clear, the MWP is "the cornerstone of *nearly all* aluminum physical transactions" (SJA1744), and that ubiquity—confirmed by Novelis (JA875¶89)—convincingly demonstrates that Dr. Gilbert's models are not "mask[ing] individualized injury." *See Lamictal*, 957 F.3d at 194.

d. The conspiracy had no effect on LME prices.

Even though Alcoa and leading-industry-analyst Vazquez both informed the Senate that "LME and [MWP] prices are not inversely related, but move independently of one another" (JA939), the district court held that because Dr. Gilbert's analysis supposedly did not demonstrate that longer queues increased the MWP without an accompanying reduction in the LME price, "his model attributes to the conspiracy harm that it did not necessarily cause and generates false positives." (SA100) That holding—which does not explain Alcoa's and Vazquez's apparent ignorance of their own industry—is erroneous.

First, there is no basis for concluding Defendants' fanciful offset theory has any basis in fact, still less that it calls Dr. Gilbert's models into question. The district court stated that the question "is whether *queues* cause the MWP and LME price to move in opposite directions so as potentially to cause less than a classwide impact from queue-driven increases in the MWP" (SA108 (emphasis in original)), and FLPs' direct evidence answers it, demonstrating that the district court's concern is unfounded—each price component moves independently, animated by its unique drivers. (JA939 & n.1065; JA1157, 1160) But the district court disregarded that evidence, refusing to decide what direct evidence was "authoritative." (SA84, 104) It dismissed Alcoa's, Vazquez's, *and* Novelis's evidence that there was no LME-price offset. (JA367-68, 939, 1157-62 (while the LME-price-offset "notion has a logical conceptual explanation, [it] does not reflect how the physical aluminum market actually works")) The district court did not explain why these leading industry figures were all so wrong about their own field.

Moreover, Defendants' own contemporaneous internal analyses did not consider the purported LME-offset theory. (*See supra* at 13-14) Ignoring this overwhelming evidence was an abdication of the court's adjudicative role, requiring reversal. (*See supra* at 31-34)

With little explanation, the district court accepted Hausman's contrary declaration—which is not affirmative evidence as it is not based upon a well-specified model[20]—and a November 2013 LME report—hardly independent given Goldman's and JPMorgan's LME-ownership stakes. (SA101; SJA1473, 2196)[21] Although it accepted Defendants' gossamer-thin showing of what the Senate Report described as "a minority view" (JA939), the district court offered no explanation why the November 2013 LME report was not disregarded in the same manner as the evidence from Alcoa, Novelis, and Vazquez that refutes it.

Second, Defendants' LME-offset theory is irrelevant to whether FLPs suffered antitrust injury in Dr. Gilbert's models because collusion to manipulate a price—even if only the component of a larger price—violates the antitrust laws. *See Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 771 (2d Cir. 2016). Thus, if FLPs prove Defendants colluded to lengthen the queue in Detroit and thereby "squeeze[d] up the [Midwest] premium[]," they will have proven a violation of the antitrust laws.

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[20] (SJA2740 (278:8-280:5) (Hausman denied offering "a well-specified model," conceding "*I'm not saying this is correct*.")

[21] The district court also cited a statement in a book supposedly "co-edited" by Dr. Gilbert (SA104 n.45), but Dr. Gilbert merely helped "bring the book to publication after ['the *sole* author' died]." (JA788¶16 n.5) The court also cited FLPs' expert Dr. Zona (SA104 n.45), but Dr. Zona derided Defendants' position as "unsupported by the data." (SJA192¶86)

(SJA1535) The antitrust injury (*i.e.*, impact) from that violation is the payment of the collusively imposed price, here, the inflated MWP. *See, e.g.*, *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 482-83 (1982) ("an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress").

Regardless of whether an LME-price decline offsetting the collusive inflation of the MWP (to some unknown extent) determines the fact and amount of class members' monetary damage, that does not defeat the showing of class-wide impact. *See, e.g.*, *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 88 (D. Conn. 2009) ("'impact' (or 'injury-in-fact') and 'damages' are two distinct elements of an antitrust claim—injury-in-fact is whether the plaintiffs were harmed and damages quantify by how much"); *see also Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) ("'that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification'"). In short, the district court "incorrectly assume[s] that if a class member offsets an overcharge through later savings attributable to the same or related transaction, there is no injury. But antitrust injury occurs the moment the purchaser incurs an overcharge, *whether or not that injury is later offset*." *Nexium*, 777 F.3d at 27.

Even if Defendants' LME-offset theory were valid, the situation would closely resemble the line of cases holding that when a "conspiracy artificially inflate[s] the baseline for price negotiations"—*i.e.*, when some of the inflation may be offset—"[t]he inference of class-wide impact is especially strong." *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014); *accord In re Disposable Contact Lens Antitrust*, 329 F.R.D. 336, 386 (M.D. Fla. 2018); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y. 1996).

Defendants' argument, accepted by the district court, "that the price increase in the MWP was offset—and, at least for some direct purchases, wholly offset—by the downward impact on the LME Settlement Price, thereby eliminating any injury attached to those purchases" (SA103), is both contrary to the authorities set forth above and unintelligible. If the purported LME offset is less than the inflation of the MWP, there is no coherent argument that it "eliminat[ed] *any* injury" (*id.*), because the "conspiracy artificially inflated the [MWP] baseline for price negotiations." *Urethane*, 768 F.3d at 1254.

The court further posits that "at least for some [unknown number of] direct purchases" the MWP inflation might be "wholly offset," and could "*potentially* … cause less than a classwide impact from queue-driven increases in the MWP." (SA108) The court reasoned that for some *unknown* number of class

members, there *conceivably* may have been a perfect offset such that supposed LME-price deflation precisely equaled MWP inflation. *Nexium*, however, explains that in this far-fetched context, there is still injury, even though no damages. *See* 777 F.3d at 27.

Moreover, the mere possibility that some class members might be subject to perfect offsets is no basis for denying class certification given FLPs' showing that all or nearly all class members were injured as evinced by Goldman's admission that the MWP is "the cornerstone of *nearly all* aluminum physical transactions." (SJA1744) "[O]nce plaintiffs had shown broad antitrust impact, certification could not be denied just because defendants pointed to a class of uninjured members *but* '[*gave*] *no indication how many such individuals actually exist*.'" *Nexium*, 777 F.3d at 31 (quoting *Messner*, 669 F.3d at 825). Defendants have not demonstrated that *any* perfect-offset cases exist, let alone a number of them that is more than *de minimis*. *See Nexium*, 777 F.3d at 21 ("We do not think the need for individual determinations or inquiry for a *de minimis* number of uninjured members at later stages of the litigation defeats class certification."). "[D]efendants' [perfect-offset] speculation cannot defeat [Plaintiffs'] showing." *Id.* at 31 (citing *Urethane*, 768 F.3d at 1254).

Third, regardless, Dr. Gilbert's models reliably demonstrated class-wide impact, Defendants' speculations notwithstanding. Based upon economic principles and regression analyses, Dr. Gilbert demonstrated that increases in queue length did not have a negative impact on LME prices; they had a weak upward impact (SJA2906-11¶¶58, 61-72, SJA3033-34¶29), just as Alcoa, Novelis, and Vazquez stated. (*See supra* at 29-30, 56)

However, Dr. Hausman added to Dr. Gilbert's regression analysis a new variable representing the 12-month-contango spread (*i.e.*, the difference between the price of LME aluminum today and its price twelve months forward). (SJA641¶47) He claimed including this variable demonstrated that queue-length increases cause LME prices to decrease, and generally move in the opposite direction of the MWP. (*Id.*)

In reply, Dr. Gilbert demonstrated that the inclusion of the contango-spread variable in an equation for the LME price generates results that are contrary to the economic theory of storage, and that such variable is not a proper variable in the regression. (SJA3033¶¶27-28)

By finding that inclusion of a contango-spread variable "illuminates" a methodological failure by Dr. Gilbert, the district court necessarily held Dr. Gilbert's analysis was wrong and Hausman's was right. (SA103-08) But Dr. Gilbert's

purported "failure to control for variables [Defendants] deem to be major factors affecting price," and that Defendants "question the relevance of his conclusion under the regression analysis which necessarily involves averaging, as opposed to individual consumer experiences" comprise "merits debate[s] for the factfinder" and "do not affect whether Plaintiffs have offered a reasonable method for determining impact on a class-wide basis." *Contact Lens*, 329 F.R.D. at 390. Demanding consideration of Hausman's preferred variable and "[r]ejecting Dr. [Gilbert's] regression analyses, which appear to follow accepted regression methodology," as the district did, "is inappropriate at this juncture." *See id.*

Indeed, "to certify a class, the proponent of class certification need not show that the common questions 'will be answered, on the merits, in favor of the class.'" *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 138 (2d Cir. 2015). FLPs were not required to demonstrate that a jury would reject Hausman's approach and find that Dr. Gilbert's methodology was apt as a precondition to class certification.

Moreover, even where an expert's "model account[ed] for a wide range of variables," but "fail[ed] to consider some arguably significant variables," the "'[*n*]*ormal*[]'" rule is that "'*failure to include variables will affect the analysis' probativeness, not its admissibility.*'" *Kurtz v. Costco Wholesale Corp.*, 818 F. App'x 57, 62 (2d Cir. 2020). That is, normally, an omitted variable does not

"illuminate" a shortcoming in "admissibility" but instead creates, at most, probativeness issues. *See Bazemore v. Friday*, 478 U.S. 385, 400 & n.10 (1986) (Brennan, J., concurring in part, joined by all members of the Court) ("While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence ….'"); *accord Kurtz*, 818 F. App'x at 62; *Contact Lens*, 329 F.R.D. at 388-89.

The same analysis applies on summary judgment: even when the defense offers an expert with well-specified variables which "presto" cause the plaintiff expert's model's results to dissolve, the issue of which variables must be considered—a question disputed by the experts—ordinarily does not indicate a methodological flaw, but rather creates a contested issue of fact sufficient to defeat summary judgment. *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 660-61 (7th Cir. 2002).

Moreover, the district court ultimately held that Hausman's approach to the analysis of LME prices was the *only* correct one, and that Dr. Gilbert's was necessarily "methodologically" flawed—in other words, it determined that Hausman's approach was authoritative, an analysis it refused to undertake as to the

compelling evidence from Alcoa, Novelis, and Vazquez demonstrating that Hausman's approach was dead wrong. (SA84, 104) While the district court asserted that Hausman has no burden "to provide a better model than Dr. Gilbert[]" (SA106)—and Hausman did not claim he proposed a well-specified model (SJA2740-41 (278:8-281:3); JA595¶47)—it nonetheless affirmatively relied upon Hausman to conclude that inclusion of a contango-spread variable was mandatory. It was error to hold that Hausman's analysis—*not* based upon a well-specified model as in *High Fructose*—was definitive and that Dr. Gilbert's disagreement with it necessarily meant his approach was methodologically flawed.

e. Dr. Gilbert did not improperly rely on averaging.

The district court also accepted Defendants' criticism of Dr. Gilbert's pass-through models as based on "averaging." (SA108-10) But there is no *per se* rule prohibiting reliance on averaging. *See Lamictal*, 957 F.3d at 194; *Contact Lens*, 329 F.R.D. at 390.

The term of most aluminum contracts is at least a year and based on monthly averages. Dr. Gilbert explained *why* averaging was sound from an econometric basis. (JA804-07¶¶56-63) This was not error. *See In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 369-71 (D.D.C. 2007) (granting class certification and rejecting challenge to expert's use of averaged data and "calculations of *aggregate* changes

in price" to show class-wide impact) (emphasis in original); *accord Contact Lens*, 329 F.R.D. at 390.

Regardless, because FLPs are *only* seeking certification of a class of contracts containing the MWP, this criticism of Dr. Gilbert lacks persuasive power. Indeed, Hausman explicitly relied upon his view that "not all class members purchased aluminum under contracts that reference the MWP or MWTP" (SA109)—a critique obviated by FLPs' narrowed class definition—and his unsupported belief that "queues impact the LME price" (SA110), a position debunked by Alcoa, Novelis, and Vazquez. The district court's unfounded concern regarding "varying contractual pricing arrangements" (*id.*), would not apply to a class in which all members paid the MWP, and "defendants cannot simply speculate that a more than de minimis number of class members departed from the average." *Nexium*, 777 F.3d at 28 n.24.

The district court also described Dr. Gilbert's exclusion of certain Alcoa contracts as evidence his models produced false positives. (SA110-11) It is doubly mistaken. First, the point is moot—FLPs excluded those contracts from the class definition. (SJA3080) Second, Dr. Gilbert explained that 40% of the inflated MWP passed through in those contracts. (SJA2902-03¶49 & n.30) Because paying 40% of an inflated MWP comprises injury, *see Nexium*, 777 F.3d at 27, the district court's

qualms go only to damages, which "'is not sufficient to defeat class certification.'" *Roach*, 778 F.3d at 405.

f. The district court's list of purported individualized issues is no basis for affirmance.

The district court briefly mentioned "additional individualized issues," which were unsupported by the record, and contradicted by industry experts and Defendants' admissions. (SA112-18) The district court did not hold that these purported individual issues would predominate and prevent certification in the event its mistaken class-wide-injury analyses were rejected. (SA112) None of these purported individualized issues have merit.

The district court first stated that for a "majority of certain smelters' sales [the ones for which FLPs had useable data], many purchase contracts do not reference the MWTP or MWP at all." (SA113) It overlooks the fact that the MWP is paid whether explicitly listed or not, and the FLPs' class definition includes those paying the MWP regardless of a specific term. (ECF1238:6; SJA3080) Indeed, FLPs demonstrated the MWP was paid by all or nearly all class members for all or nearly all transactions under the class definition. (SJA2886-88¶10, SJA2902-03¶¶48-49, SJA2943-57; JA874-76¶¶88-91; *see* CA-1915-46, 1973-85) Goldman agrees. (SJA1744)

As the district court noted (SA113), FLPs excluded some transactions from early in the class period from one smelter (Alcoa) in which it appeared that 40% of the inflated MWP was passed through. (SJA2902-03¶49 & n.30) Those contracts are excluded from the narrowed class definition, and the district court's related objections go only to damages (SA113-15)—not injury—and therefore are "'not sufficient to defeat class certification.'" *Roach*, 778 F.3d at 405.

Nor is there any factual basis for the court's concerns. It surmised there would be "similar fixed premium and fixed price contracts for the purchase of aluminum from Rio Tinto and Rusal" (SA113), but cites no evidence. Defendants were unable to point to any Rio Tinto contract where the MWP was not paid, and did not engage the point as to Rusal. (SJA3089, 3093, 3100) Such "speculation cannot defeat [Plaintiffs'] showing." *Nexium*, 777 F.3d at 31.

The same is true of the court's speculation that "individualized inquiries" of whether, when, and how much aluminum was purchased when the MWP was paid, suggesting each contract would need to be examined to see whether the MWP was paid. (SA114) The court ignores the fact that the "cornerstone" MWP[22] was paid in *every* transaction under the class definition as discussed above, and to the extent

[22] (SJA1744)

data were unavailable from a smelter, a class member need simply submit proof of how much aluminum it purchased and on what date, and the overcharge could be calculated for each purchase using Dr. Gilbert's model.

The district court next suggested determining who made a first-level primary-aluminum purchase requires individualized inquiry. (SA115) It first identified the approximately 2% of primary aluminum sales that were smelter-to-smelter and suggested there would be no method to determine whether purchases made from those smelters were first-level purchases or were second-level purchases of aluminum that had already been sold, and thus outside the class definition. (SA115-16)

This analysis conflates two issues. If it is one of proper "class membership," as the district court suggested (SA116, 117 n.51), it ignores that FLPs' proffered evidence that it is nearly mathematically impossible that anyone who purchased from a smelter would not have made a single first-level purchase. (SJA1342¶¶25-26, SJA3040¶¶44-45, SJA3068-71) If it is a question of damages, the proper course is not to deny certification, but rather to reduce damages by the proportion of transactions that were smelter-to-smelter, which was already done. (*See* SJA3041-42¶48; *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 490 (7th Cir. 2002) ("if Viacom can prove at trial that 97.7% of all copper Asarco sold it was cathode it had

refined itself, then Viacom should be permitted to recover 97.7% of its proved damages from cathode purchases”))

The district court next supposed that determining whether class members have purchased primary, as opposed to secondary, aluminum, would similarly “appear to require individualized inquiries” and that “Dr. Gilbert identified 1,272 Alcoa transactions in the produced data as involving “‘scrap aluminum.’” (SA117) This criticism ignores that Dr. Gilbert excluded those transactions from his calculations (SJA2945), and Defendants have never demonstrated what those transactions actually represented. No secondary purchases were included in the damages analysis, and Defendants present no hard evidence that any were. Regardless, all aluminum made by smelters is, by definition, primary aluminum. (CA-823-26 (Vazquez Report Section 5)); *id.* at 823 (“[p]rimary aluminum smelters only make virgin or primary aluminum”); *id.* at 825-26 (“[s]melters that sell primary aluminum in the U.S. market use irrelevant volumes of external scrap if at all”))

VI. CONCLUSION

This Court should reverse the judgment entered on Defendants’ behalf and vacate the order denying the FLPs’ class-certification motion.

DATED: August 26, 2021

Respectfully submitted,

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RULE 32(g) CERTIFICATE

The undersigned counsel certified that FIRST-LEVEL PURCHASER PLAINTIFFS-APPELLANTS AMPAL, INC., CUSTOM ALUMINUM PRODUCTS, INC., CLARIDGE PRODUCTS AND EQUIPMENT, INC., AND EXTRUDED ALUMINUM CORP.'S OPENING BRIEF [FILED UNDER SEAL] uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 13,777 words according to the word count provided by Microsoft Word 2016 word processing software.

s/Patrick J. Coughlin
PATRICK J. COUGHLIN