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 inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
THE HONORABLE PAUL A. ENGELMAYER

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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., DTEK 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 Eagle 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 Northern 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, GOLDMAN SACHS GROUP, INC., GS POWER HOLDINGS LLC, JOHN DOES 1-10, GLENCORE XSTRATA INCORPORATED, THE LONDON METAL EXCHANGE POWER HOLDINGS LLC, 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., LME HOLDINGS LIMITED, GLENCORE UK LTD, BURGESS-ALLEN PARTNERSHIP LTD., ROBERT BURGESS-ALLEN,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel for Defendants-Appellees state as follows. The undersigned counsel for Goldman Sachs & Co. LLC ("Goldman Sachs"), Goldman Sachs International ("GSI") and J. Aron & Company LLC ("J. Aron") (collectively, "Goldman"), and MITSI Holdings LLC and Metro International Trade Services LLC (collectively, "Metro") certifies the following: GSI and J. Aron are wholly-owned subsidiaries of The Goldman Sachs Group, Inc. ("GS Group"). Goldman Sachs is a wholly-owned subsidiary of GS Group, except for de-minimis non-voting, non-participating interests held by unaffiliated broker-dealers. GS Group is a corporation organized under the laws of Delaware, and its shares are publicly traded on the New York Stock Exchange. GS Group has no parent corporation, and to the best of GS Group's knowledge, no publicly held company owns 10% or more of GS Group's common stock. Metro is wholly-owned by Reuben Brothers SA, and to the best of Metro's knowledge, no publicly held company owns 10% or more of Reuben Brothers SA.

The undersigned counsel for J.P. Morgan Securities plc and JPMorgan Chase Bank, N.A. certifies as follows. Defendant JPMorgan Chase Bank, N.A. is a wholly-owned subsidiary of JPMorgan Chase & Co., which is a publicly held corporation. JPMorgan Chase & Co. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. However, The Vanguard Group, Inc.,

an investment adviser which is not a publicly held corporation, has reported that registered investment companies, other pooled investment vehicles, and institutional accounts that it or its subsidiaries sponsor, manage, or advise have aggregate ownership under certain regulations of 10% or more of the stock of JPMorgan Chase & Co. JPMorgan Chase & Co. indirectly owns 10% or more of the stock of J.P. Morgan Securities plc, and no other publicly held corporation owns 10% or more of the stock of J.P. Morgan Securities plc. The undersigned counsel for Henry Bath LLC certifies that its ultimate parent company is CMST Development Co. and that no publicly held corporation owns 10% or more of the stock of Henry Bath LLC.

The undersigned counsel for Access World (USA) LLC (f/k/a Pacorini Metals USA, LLC) certifies that the following are corporate parents, affiliates and/or subsidiaries of said party that are publicly held: Glencore plc (f/k/a Glencore Xstrata plc).

The undersigned counsel for Glencore Ltd. ("Glencore"), Glencore International AG ("GIAG"), and Access World (Vlissingen) BV (formerly known as Pacorini Metals Vlissingen BV) certifies that the following are corporate parents, affiliates, and/or subsidiaries of said party that are publicly held: Glencore plc (f/k/a Glencore Xstrata plc).

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INTRODUCTION

In the first of these two consolidated appeals, a group of four Plaintiffs that refer to themselves as the Individual Purchasers ("IPs") appeal from a summary judgment order dismissing their claims for lack of antitrust standing. In the second, a separate group of Plaintiffs that refer to themselves as the First-Level Purchasers ("FLPs") appeal from both the same summary judgment order and a separate order denying their motion for class certification. The two orders arise from what the district court aptly described as a "decidedly idiosyncratic" antitrust case that is "far afield" from a typical price-fixing action. SA74.

Both groups of Plaintiffs allege that Defendants conspired to lengthen the aluminum "delivery queues" that existed at certain London Metal Exchange ("LME") warehouses from 2010 to 2015. Plaintiffs further allege that these delivery queues injured them by raising a published reference price for aluminum—the Platts Midwest Premium—through an "unusually indirect" and "elongated" chain of causation. SPA47; SA75. Based in part on this indirect theory of causation, the district court issued a comprehensive, 66-page summary judgment order dismissing Plaintiffs' claims under the well-established "efficient enforcer" requirement for antitrust standing. SPA3. The court also relied on Plaintiffs' attenuated theory of causation in its equally comprehensive, 118-page order denying the FLPs' motion for class certification. SA1. Both orders rest on a meticulous analysis of the specific

facts and circumstances of these actions. Although Plaintiffs accuse the district court of relying on new and erroneous "bright-line" or "per se" rules of law in both orders, no such bright-line rules appear in either order, and both orders should be affirmed.

1. **Class Certification**. The district court correctly denied class certification on the ground that the FLPs failed to satisfy Rule 23(b)(3)'s predominance requirement. SA118. Based on an exhaustive review of the evidentiary record, the district court concluded that (i) the FLPs lacked "common proof" capable of proving classwide antitrust injury, (ii) individual inquiries into injury and causation would be necessary at trial, and (iii) these individual inquiries would predominate over common ones. SA70-111. The court also found that large numbers of additional individual inquiries would be necessary to determine which aluminum buyers satisfied the various requirements of the class definition and related requirements of antitrust standing. SA112-18. The FLPs seek reversal of the district court's order on two principal grounds, neither of which has merit.

The FLPs first argue that the district court "disregard[ed]" the "direct" documentary evidence they submitted on the issue of classwide antitrust injury and "applied a *per se* rule that antitrust injury and predominance cannot be established by [documentary] evidence alone." FLP Br. 19, 21, 25. The FLPs are incorrect. Far from disregarding the FLPs' documentary evidence, the district court carefully considered that evidence and concluded that it was "far too imprecise,

indiscriminate, and disconnected from reliable factual moorings" to establish classwide antitrust injury at trial. SA85. Similarly, far from applying a *per se* rule that documentary evidence alone is never sufficient to prove classwide antitrust injury, the district court held only that the particular documentary evidence submitted in this "decidedly idiosyncratic" case was insufficient "given the complexity of the proposition that plaintiffs must establish here." SA74; SA85. The FLPs identify no abuse of discretion, clear error, or error of law underlying that ruling. Instead, they simply disagree with the district court's assessment of the documentary evidence, which provides no basis for reversal.

The FLPs next argue that the district court erred by declining to accept their expert's statistical models as viable common proof of classwide injury. FLP Br. 34-66. But the district court found five separate "methodological flaws" in the FLPs' statistical models that "prevent a finder of fact from reliably finding, on a classwide basis, injury and causation based on [the] models." SA71. To justify reversal, the FLPs would need to establish that the district court was wrong about all five of these methodological flaws, but they fail to identify any reversible error as to a single one of them.

The FLPs likewise fail to identify any error in the district court's determination that large numbers of individual inquiries would be necessary to identify the aluminum buyers that satisfy the proposed class definition and related

requirements of antitrust standing. The order denying class certification therefore should be affirmed.

2. **Summary Judgment**. The district court's summary judgment order correctly concludes that both sets of Plaintiffs fail to satisfy the "efficient enforcer" requirement of antitrust standing.

As the district court observed, Plaintiffs' claims rely on an unusually indirect theory of causation which posits that (i) Defendants took various actions to lengthen warehouse delivery queues, (ii) longer warehouse queues resulted in a higher Midwest Premium, (iii) longer queues had no offsetting effects on other components of aluminum prices, and (iv) higher Midwest Premiums raised the prices that Plaintiffs paid for aluminum because Plaintiffs' aluminum suppliers based their prices in part on the Midwest Premium. SPA47-48 & n.31. The district court further observed that it is undisputed that Plaintiffs' aluminum suppliers were not among the alleged conspirators, that all eight Plaintiffs individually negotiated the prices they paid their suppliers, and that Plaintiffs' suppliers sometimes sold aluminum under contracts that did not reference the Midwest Premium. SPA4; SPA43-44; SPA50-51. After carefully analyzing these undisputed facts under the governing four-factor test for efficient-enforcer standing, the district court concluded that Plaintiffs failed to satisfy three of the four factors and thus dismissed their claims for lack of antitrust standing. SPA67.

The district court found that the first efficient-enforcer factor—the indirectness of the asserted injury—"decisively favors" dismissal because "the independent decision by non-defendant sellers to charge plaintiffs a price containing the allegedly inflated [Midwest Premium] . . . 'breaks the chain of causation between defendants' actions and plaintiffs' injury.'" SPA47-49. Although Defendants' conduct allegedly "enabled" Plaintiffs' suppliers to charger higher prices for aluminum, enabling a non-conspiring market participant to charge higher prices does not establish the necessary "direct relation" between the alleged injury and the alleged antitrust violation. *See In re Am. Express Anti-Steering Rules Antitrust Litig.*, — F.4th —, 2021 WL 5441263, at *6 (2d Cir. Nov. 22, 2021) ("*Amex Anti-Steering*"). With respect to the second factor—whether there are other enforcers who could more efficiently enforce the antitrust laws—the court concluded that more efficient enforcers exist in the form of aluminum buyers that acquired their aluminum directly from a Defendant or alleged co-conspirator. SPA57-58. And on the third factor—the speculativeness of the alleged injury—the court found that "the process of determining a plaintiff's damages on an aluminum purchase from a non-defendant is rife with complicating factors," including "intervening pricing and contracting decisions by nonculpable smelters" and "the challenging inquiry into whether, but for the inflated [Midwest Premium], other price terms would have been different." SPA60. The court thus granted summary judgment for lack of antitrust

standing, reasoning that Plaintiffs' claims present an even weaker case for antitrust standing than other claims of "benchmark-price manipulation" that courts have dismissed on efficient-enforcer grounds. SPA47-48.

On appeal, Plaintiffs accuse the district court of applying a "bright-line rule that a plaintiff who does not transact directly with a defendant cannot be an efficient enforcer." IP Br. 2. But the court expressly rejected an inflexible "privity" requirement or bright-line rule against "umbrella" claims based on purchases from non-defendants, holding that "a determination of standing in an individual antitrust case is highly fact-specific." SPA25 n.24. Plaintiffs also argue that the district court should have allowed a jury to decide whether Plaintiffs possess efficient-enforcer standing (IP Br. 34), but this Court has consistently recognized that it is appropriate for courts—not juries—to apply the efficient-enforcer factors to the undisputed facts. Indeed, this Court has held time and again that antitrust standing is a threshold inquiry that often can be decided on the pleadings. For these reasons, as more fully set forth below, the district court's summary judgment order should be affirmed.

STATEMENT OF THE CASE

A. The Parties

The six groups of Defendants in these appeals are three commodities trading firms (the Goldman Sachs, JPMorgan, and Glencore defendants) and their three affiliated metals warehouse companies (the Metro, Henry Bath, and Pacorini

defendants). SPA6. The FLPs are four industrial users of aluminum—Ampal, Claridge, Custom, and Extruded—that seek to represent a putative class of all entities that purchased aluminum directly from aluminum smelters. SPA5. The IPs are four other industrial users of aluminum—Kodak, Fujifilm, Agfa, and Mag Instruments—that filed their own lawsuits. SPA6.

B. The LME Warehouse System

The LME is the world's leading trading exchange for industrial metals futures. SA10. It offers standardized futures contracts that provide for the delivery of metal on specified dates. SA10. These futures contracts can be settled either through an offsetting trade or through the delivery of "warrants" issued by LME-certified warehouses. SA11; SPA8. An LME warrant entitles the bearer to a specified lot of metal stored at one of 700 LME warehouse facilities around the world. SA10-11; SPA8.

The LME employs a "seller's choice" model, which means that the seller of an LME futures contract chooses which warrants to deliver to settle the contract. SA12. Thus, "the seller can deliver to a buyer who is located in South Carolina a warrant for aluminum that is stored in South Korea." *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 154 (2d Cir. 2016) ("*Aluminum III*"). During the 2010-to-2015 period at issue here, sellers almost always chose to deliver warrants at the LME warehouses with the longest delivery queues—*i.e.*, Metro Detroit and

Pacorini Vlissingen warrants—because those warrants were less valuable than warrants at warehouses that had no queues. SA12. As a result, LME futures contracts traded at the value that traders ascribed to Metro Detroit and Pacorini Vlissingen warrants during the period at issue. SA101; SJA627-28.

Holders of LME warrants may retrieve their metal from LME warehouses by "cancelling" the warrants. SA13. A party that cancels warrants, however, must continue to pay rent to the relevant LME warehouse until the metal leaves the warehouse. SA13. As a result, when warrants are cancelled, LME warehouses generally load metal out of their warehouse facilities at the minimum load-out rate required by LME rules. SA13. Both sides' experts acknowledged in the court below that, even before the alleged conspiracy period, "'warehouses historically did not load out at rates higher than the minimum.'" SA88; *see also* SJA958 (Gilbert Dep. 67) ("Q. From 2005 up to January 2010, did LME warehouses typically load out no faster than the LME's minimum load-out rate? A. Yes.").

If the volume of warrant cancellations at an LME warehouse exceeds the warehouse's load-out rate, a delivery queue forms, and metal is loaded out in the order that the relevant warrants were cancelled. SA15. Warehouse rent continues to accumulate while the metal sits in the queue. SA13.

C. The Alleged Conspiracy

Plaintiffs' allegations focus on the delivery queue at Metro's LME warehouse in Detroit and, to a lesser extent, the similar queue that later developed at Pacorini's LME warehouse in Vlissingen. SA18; SA24. Although Plaintiffs accuse Defendants of conspiring to create those queues, the discovery record shows that the queues arose from a combination of natural market forces and the worldwide aluminum surplus that followed the Great Recession.

1. The global aluminum surplus

When the Great Recession began in early 2008, demand for aluminum plummeted, but aluminum producers were slow to cut production. SA16. As a result, millions of tons of surplus aluminum flowed into warehouses around the world. SA16. In the United States alone, "the volume of aluminum stored in LME warehouses soared from 400,000 metric tons in July 2008 to more than 2.1 million metric tons in February 2010." SA16. "During that same period, the spot price for aluminum sank." SA17. A global surplus persisted throughout the relevant period: production outstripped demand each year from 2008 through 2016. SA16.

The worldwide aluminum surplus created a "contango" in the LME futures market, *i.e.*, a market condition in which near-term futures prices were depressed relative to forward prices. SA17. The contango, in turn, "made it profitable for traders and financial institutions to engage in 'cash-and-carry' trades, in which they

bought and stored aluminum, with the expectation of selling it at higher future prices." SA17. Defendants and non-defendants alike "capitalize[d] on 'cash and carry' arbitrage" by purchasing large amounts of aluminum, storing it in warehouses, and selling it forward on the LME for a profit. FLP Br. 6; *see also* SA64 (class members "engaged in the same types of cash-and-carry trades as defendants").

At first, much of this "cash-and-carry" aluminum was stored in LME warehouses because of the ease of obtaining financing for warranted metal. *Aluminum III*, 833 F.3d at 155. As the financial crisis eased, however, traders looked for ways to improve their cash-and-carry returns by lowering their storage costs. SA17. Many traders reduced their storage costs by cancelling their warrants and moving aluminum from higher-priced LME warehouses to cheaper non-LME warehouses, and others acquired their own LME warehouses and moved aluminum into those warehouses. SA17.

Goldman Sachs, JPMorgan, Glencore, and several non-defendant trading firms all acquired LME warehouse companies in the wake of the financial crisis. SA18-19; SJA779. Each of these acquisitions was made at different times and for different reasons. SA18-19; SJA779. For example, JPMorgan acquired its LME warehouse subsidiary—Henry Bath—as a small component of a diversified

commodities business that JPMorgan purchased after a government mandate forced the prior owner of the business to divest it. JA53; A-358-59; CA1985.[1]

2. The Metro Detroit queue

Defendant Metro International Trade Services ("Metro") is an LME warehouse company headquartered in Detroit that Goldman Sachs acquired in February 2010. SA3-4. Metro was a leading beneficiary of the worldwide aluminum surplus. Following the financial crisis, nearly a million tons of surplus aluminum flowed into Metro's Detroit warehouses because of their convenient rail connections to aluminum smelters in Canada. SA19. Metro acquired this large inventory of aluminum *before* the alleged conspiracy purportedly began and *before* Goldman Sachs acquired Metro. SA18-19.

Metro leveraged its large inventory of aluminum in Detroit to attract even more aluminum to its Detroit warehouses. SA19-20. "Metro's unparalleled size allowed it to offer 'high incentive payments' to customers for new deposits of aluminum 'that other LME warehouses could not match.'" SA20. Metro could offer these high incentive payments because its large inventory of aluminum guaranteed that, on average, any additional aluminum deposited in its Detroit warehouses would

[1] *See* European Commission, State Aid No. N 422/2009 & N 621/2009, at ¶¶ 68, 76, 93 & n.58 (Dec. 14, 2009), *available at* https://ec.europa.eu/competition/state_aid/cases/233798/233798_1093298_30_2.pdf.

stay there long enough, and generate enough rent, to justify a large incentive payment. SA20. Metro thus achieved a "self-perpetuating market power" in Detroit: "Its large inventories justified large incentive payments that other LME and non-LME warehouses could not afford to offer, and these large incentives in turn attracted more inventory to Metro Detroit." SA20.

Other Defendants actively opposed Metro's accumulation of aluminum in Detroit. For example, in early 2010, JPMorgan became concerned that Metro's "'self-perpetuating dynamic' would make it impossible for any other warehouse to catch up to Metro." SA20 n.21. JPMorgan and its Henry Bath warehouse subsidiary therefore began "gunning for Metro Detroit" at the LME and "lobbied the LME to cap the amount of aluminum that could be stored in Metro Detroit and to ban Metro's practice of paying large incentives for new deposits of aluminum." SA20 n.21; *see also* JA310-11 (Henry Bath submission to LME arguing that, absent a cap imposed by the LME, "the Detroit trend will continue unchecked").

Despite these efforts to oppose Metro's accumulation of metal in Detroit, a long delivery queue formed at Metro Detroit when warrant holders cancelled large volumes of Metro Detroit warrants. Although Plaintiffs suggest that Defendants needlessly enlarged this delivery queue by cancelling "massive" numbers of Metro Detroit warrants (FLP Br. 4; IP Br. 18), Defendants cancelled Metro Detroit warrants for the same reasons that other market participants did: to move the aluminum to

cheaper warehouses or to sell it to aluminum users. SA17; SA64. Indeed, many members of the putative class "engaged in the same types of cash-and-carry trades as defendants . . . . The economics of such trades and the trading profits they generated were no different for these proposed class members than they were for defendants." SA64.

3. The Pacorini Vlissingen queue

The queue that developed at Pacorini's Vlissingen warehouse likewise had its roots in the aluminum surplus that followed the Great Recession. Beginning in 2009, Glencore International, A.G. ("GIAG") began purchasing large quantities of surplus aluminum from Russian aluminum smelter Rusal. SA24. GIAG stored much of that aluminum at Pacorini Vlissingen, a convenient destination for aluminum produced in Russia. SA24.

A queue formed at Pacorini Vlissingen when GIAG later gave up warrants for most of this aluminum to satisfy an expiring LME futures position. Specifically, in December 2011, GIAG had an expiring LME short position that required it to deliver warrants for 860,000 metric tons of aluminum. SA24. "Although GIAG could have delivered its Pacorini Vlissingen warrants to satisfy its short position, those warrants at the time were more valuable than Metro Detroit warrants due to the lengthy queue that had formed at Metro Detroit." SA24. GIAG therefore swapped its Pacorini Vlissingen warrants for an equal volume of Metro Detroit warrants plus a ten million

dollar payment, and delivered the Metro Detroit warrants in satisfaction of its short. SA24. GIAG's counterparty in the swap transaction was JPMorgan. SA24.

Upon acquiring these Pacorini Vlissingen warrants from GIAG, JPMorgan cancelled them and moved the aluminum to its own nearby warehouse subsidiary in Rotterdam, resulting in a delivery queue in Vlissingen. SA24-25. Although Plaintiffs characterize the transaction between JPMorgan and GIAG as part of a purported antitrust conspiracy, their own experts agreed that this type of "location swap" is consistent with the sort of efficient trading behavior they would expect in the absence of a conspiracy. *See* SJA1056 (Bodner Dep. 27-28) (testifying that "a location swap" by trading companies reflects "their individual economic interest"); SJA1033 (Zona Dep. 108) (testifying that "swap transactions" are "common" among metals traders); *see also* JA319 (contemporaneous JPMorgan email describing the commercial rationale for the transaction).

4. Defendants' alleged efforts to lengthen queues

Plaintiffs' core claim "has consistently been that defendants took coordinated actions to lengthen queues [at Metro Detroit], which made it more difficult and expensive for other market participants to retrieve aluminum from the Metro Detroit warehouse." SA96; *see also* FLP Br. 49; IP Br. 18-19. Although Plaintiffs' complaints also reference the Pacorini Vlissingen queue, they focus mainly on the Metro Detroit queue, and the FLPs' complaint includes an "unambiguous

disavowal" of any link between the Vlissingen queue and U.S. aluminum prices. SA91.

Plaintiffs contend that Defendants conspired to lengthen the Metro Detroit queue mainly by engaging in excessive and "coordinated" warrant cancellations. FLP Br. 8; IP Br. 18. But Plaintiffs have never identified any evidence that Defendants "coordinated" their warrant cancellations or that Defendants' reasons for cancelling warrants were any different than those of non-defendants. Moreover, in direct conflict with Plaintiffs' allegations of excessive warrant cancellations, Plaintiffs also allege that Defendants agreed to refrain from "destocking" each other's warehouses. SA21-23. As the district court observed, "[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; *see also* JA277-85 (Metro internal emails describing warrant cancellations as efforts to "destock" and target its warehouses).

Plaintiffs also contend that Metro used so-called "merry-go-round" or "off-warrant" transactions to lengthen queues and maintain its inventory of aluminum in Detroit. SA25-26. There were six such off-warrant transactions in all: five with non-defendants and one with Glencore. SA25. In these transactions, Metro offered customers that had cancelled Metro Detroit warrants an option to return the formerly warranted metal to Metro and re-warrant it in exchange for an incentive payment.

SA25. Neither JPMorgan nor Goldman Sachs ever engaged in any of these transactions, and the one off-warrant transaction between Metro and Glencore involved a relatively small amount of metal (less than 100,000 tons). SA25-26 & n.24. The record contains no evidence that these transactions were anything more than one-off, bilateral deals in which Metro competed to retain aluminum that otherwise would have left its warehouses.

D. Plaintiffs' Alleged Injuries

Plaintiffs' theory of injury relies on an "unusually indirect" and "elongated" chain of causation. SA75; SPA47; SPA60-62. Plaintiffs do not contend that Defendants "fixed" aluminum prices or any component of those prices. SA74-75. Instead, they contend that Defendants' conduct had the *effect* of raising the Platts Midwest Premium ("MWP"), a reference price sometimes incorporated into aluminum supply contracts. SA74-75; SPA54. Plaintiffs allege, in particular, that (i) Defendants engaged in conduct that had the effect of lengthening the delivery queues at Metro Detroit, (ii) longer queues had the effect of raising the MWP, (iii) longer queues had no effect on any other component of aluminum prices, and (iv) a higher MWP raised the prices they paid for aluminum because the contracts they negotiated with their aluminum suppliers included the MWP as a reference price. SA30; SA83; IP Br. 23-24. Plaintiffs further assert that there was no way to avoid paying higher prices as a result of the alleged inflation of the MWP because

the MWP was incorporated into "nearly all" aluminum supply contracts as a matter of "industry convention." IP Br. 8; FLP Br. 4, 54. As the district court found, however, aluminum contracts are individually negotiated and vary far more widely than Plaintiffs suggest. SA113.

1. Aluminum contracts vary widely.

Most industrial users of aluminum obtain their metal directly from aluminum smelters pursuant to long-term supply contracts. *See* SA7; SPA8; A368-69; A479; JA68; SJA142-45; SJA722-25. During the relevant period (and still today), these long-term supply contracts often incorporated floating "reference prices" that allowed aluminum prices to fluctuate over the term of the contract. *See* IP Br. 5-8; FLP Br. 16-17; SA7; SPA8; SJA163-64; SJA629-30.

In the United States, the reference prices most often used in aluminum contracts were the LME Cash Price, the Platts Midwest Transaction Price ("MWTP"), and the Platts Midwest Premium ("MWP"). SJA143-47; SJA163-64.[2] The LME Cash Price is the published price of certain LME futures contracts due to settle within the next few days. SA8; SPA9; A374; A484; JA72; SJA163. The MWTP, in turn, is a published estimate of the all-in spot market price of aluminum including the cost of delivery to a customer in the Midwest. SA8-9; SPA9; CA13;

[2] The MWTP sometimes is referred to as the "Midwest U.S. Transaction Price" or the "Metals Week U.S. Transaction Price."

CA590; CA1973; SJA163. The MWTP is *higher* than the LME Cash Price because the latter price does not include the cost of retrieving aluminum from an LME warehouse and delivering it to a customer in the Midwest. SPA8-9. Finally, the MWP is simply the difference between the MWTP and the LME Cash Price, *i.e.*, Platts subtracts the LME Cash Price from its estimate of all-in spot market prices and publishes the difference as the MWP. SA8-9; JA72; CA14; SJA187; SJA630.

The district court summarized the relationship among these three reference prices as follows:

> To calculate the MWP, Platts first surveys the all-in price paid on the spot market for aluminum to be delivered in the midwestern United States on a given day. That surveyed price, known as the [MWTP], reflects the "daily all-inclusive or 'all-in' price for spot physical 99.7% high-grade P1020A aluminum." The MWP, in turn, represents the mathematical difference between the MWTP and the LME settlement price for aluminum on any given day.

SPA9 (citations and alterations omitted).

Negotiations between aluminum suppliers and their customers determined which of these reference prices, if any, were included in aluminum supply contracts. SPA50. Although Plaintiffs suggest that nearly all such contracts contained either the MWP or the MWTP (IP Br. 8-14; FLP Br. 16-17), the discovery record shows that a sizeable minority of contracts did not include either of those prices. *See* SA8-9; SA113; SPA9; SPA43 & n.28; SPA50. In fact, Plaintiffs admitted in the district court that [redacted]

[redacted] *See* SPA14; SPA43; SPA50; CA1982-83; SJA755-58; SJA2859-65; SJA3080-81; SJA3084-85; SJA3088-89. Moreover, many of the supply contracts that did incorporate the MWP or MWTP included caps, collars, options, fixed-forward prices, or other arrangements that limited the buyer's exposure to increases in the MWP. *See* SPA17; SA9-10; SA113-14; CA1930-31; CA1933-34; CA1939-40; CA1964-66; CA1970-71. In addition, customers sometimes negotiated adjustments in other price components to offset increases in the MWP and reduce their all-in purchase prices. *See* IP Br. 8, 10, 11, 13; SPA18-19; SPA52; SPA65; CA1716; CA1721; SJA72-94.

In sum, many aluminum purchasers negotiated supply contracts that did not include the MWP at all, and many others negotiated arrangements that limited or offset their exposure to increases in the MWP. *See, e.g.*, SA9-10; SA113-14; SPA17-19, 43; SPA52.

2. Plaintiffs obtained their aluminum directly from smelters at individually negotiated prices.

The eight Plaintiffs in these actions—four IPs and four FLPs—obtained their aluminum directly from [redacted] and other leading aluminum producers. IP Br. 8-14; FLP Br. 16-17; SPA4; SPA12-15. Plaintiffs did not obtain any of the aluminum at issue here from a Defendant or an alleged co-conspirator. SPA13; CA1917-19. Nor did they obtain any aluminum from an LME warehouse;

in fact, the vast majority of aluminum never passes through an LME warehouse at any point in its existence. CA1917-19; SA11; SPA12-13.

Plaintiffs individually negotiated the prices they paid for aluminum with their suppliers. IP Br. 8; FLP Br. 17. Although Plaintiffs assert that they were unable to avoid inclusion of the MWP in their supply contracts (IP Br. 8; FLP Br. 16), very few of their contracts contained the MWP as opposed to the MWTP,[3] and at least six of the eight Plaintiffs entered into contracts that did not contain *either* the MWP or MWTP.[4] For example, Plaintiffs sometimes bought aluminum at fixed all-in prices that did not include a floating reference price. *See* SPA13-14 & nn.9-11; SPA63; CA43; CA44-45; CA69-70; CA117; CA126-27; CA175; CA177-80; CA186-87; CA189-91; CA205-06; CA208-09; CA212-13; CA258; CA268-73; CA276; CA540-41; CA558-59; CA572-73.

Even when the MWP was included in their supply contracts, Plaintiffs were able to negotiate other components of aluminum prices such as conversion fees and transportation costs. *See* IP Br. 10-14; FLP Br. 16-17; SPA18-19; SPA52; CA50-51; CA87; CA223-24; CA248; CA252; CA507-08; CA562-63. By negotiating lower conversion fees and transportation costs, Plaintiffs sometimes offset increases

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[3] *See* CA208; CA212; CA689; CA691; CA697; CA728; CA742; CA757; CA787.

[4] *See* IP Br. 12 n.7; CA117; CA175; CA186-87; CA276; CA540-41; CA558-59; CA572-73.

in the MWP. *See* SPA18-19; SPA52; CA1716; CA1721. For example, one Plaintiff testified:

[redacted]

CA1716. That same Plaintiff added: [redacted] CA1721; *see also* CA562-63. Moreover, all eight Plaintiffs "admit that [they] each had the ability to negotiate certain aspects of the all-in price of aluminum, and therefore the total price they paid for aluminum." SPA18-19.

Plaintiffs also had opportunities to limit their exposure to increases in the MWP through other mechanisms. *See* SPA17; CA46-47; CA57; CA170-71; CA258; CA268-77; CA558-59. For example, one Plaintiff acknowledged that it was [redacted] CA273. Under those agreements, "changes in the Midwest premium, the Rotterdam premium or the LME price would not affect the price that [the Plaintiff] paid." CA272-73. Another Plaintiff admitted that it [redacted] and thus eliminate exposure to rising premiums. CA558-59. The district court thus found that "Plaintiffs do not appear to dispute that they could, and did, hedge at least part of the all-in price they paid for aluminum." SPA17.

3. Plaintiffs' evidence of injury and causation

The only evidence that the IPs have offered on the issues of injury and causation consists of a handful of anecdotal documents that allegedly show that longer queues result in a higher MWP. *See, e.g.*, IP Br. 20-23. The FLPs, in turn, rely on similar documentary evidence and a series of statistical models to try to prove that the alleged conspiracy raised the all-in aluminum prices paid by each member of the putative class. SA70-71.

The district court found that the "broad generalizations" that appear in the documentary evidence are "far too imprecise, indiscriminate, and disconnected from reliable factual moorings" to establish "that defendants' conspiracy, as alleged in this litigation, unitarily worked antitrust pricing injury on all entities and persons now defined to fall within the putative class." SA84-85. The court also "identifie[d] a range of serious methodological flaws" in the FLPs' statistical models that "prevent a finder of fact from reliably finding, on a classwide basis, injury and causation based on [these] models." SA71.

E. Procedural History

This multi-district litigation began in 2013. The litigation originally consisted of (i) the proposed class action filed by the FLPs, (ii) the individual actions filed by the IPs, and (iii) two proposed class actions that were filed on behalf of indirect purchasers that are not part of this appeal. *See* FLP Br. 17; IP Br. 5 n.2, 24. In

addition, in 2016, two plaintiffs that are not parties to these appeals—Reynolds Consumer Products LLC ("Reynolds") and Southwire Company LLC ("Southwire")—filed a separate action that is still underway in the district court. SPA57-58.

All of these plaintiffs alleged that Defendants conspired in violation of Section 1 of the Sherman Act to lengthen LME warehouse queues. *See* A343-51; A454-64; JA157-214; SA17-26. The complex history of these cases is summarized below.

1. Prior decisions of this Court and the district court

In their briefs, Plaintiffs discuss six separate decisions that pre-date the two orders on appeal—two decisions by this Court and four by the district court.

Aluminum I. In *In re Aluminum Warehousing Litigation*, 2014 WL 4277510 (S.D.N.Y. Aug. 29, 2014) ("*Aluminum I*"), the district court (Hon. Katherine B. Forrest) initially dismissed the claims of all plaintiffs for failure to allege either antitrust standing or a plausible antitrust conspiracy. *Id.* at *15-38. Although the FLPs and IPs were permitted to amend their complaints, Judge Forrest dismissed the two indirect purchaser actions without leave to amend. *Id*. at *39. This Court later affirmed the dismissal of the indirect purchaser actions in the *Aluminum III* decision discussed below.

Aluminum II. Following *Aluminum I*, the FLPs and IPs amended their complaints. *See* JA1-263; A340-450. Defendants then moved to dismiss those amended complaints, arguing, among other things, that the FLPs and IPs lacked antitrust standing under the "efficient enforcer" doctrine because they had never been customers of an LME warehouse. *See In re Aluminum Warehousing Litig.*, 95 F. Supp. 3d 419, 444 (S.D.N.Y. 2015) ("*Aluminum II*"). In the ruling now known as *Aluminum II*, the district court denied Defendants' motion, reasoning that efficient-enforcer standing should not be limited to "users of defendants' warehouse services." *Id.* The court's ruling, however, did not reach the separate question now presented in this appeal: whether efficient-enforcer standing should be limited to parties that bought aluminum directly from an alleged conspirator as opposed to buying from an independent third party. *See id.*; SPA19-20; SPA42-45.

Aluminum III. In *In re Aluminum Warehousing Litigation*, 833 F.3d 151 (2d Cir. 2016) ("*Aluminum III*"), this Court affirmed the district court's dismissal of the two indirect purchaser class actions. The Court held that the indirect purchasers lacked "antitrust injury" because all of the alleged anticompetitive conduct "took place (if at all) in the LME-warehouse storage market," but the indirect purchaser plaintiffs "do not and cannot allege that they participated in that market." *Id*. at 162.

Aluminum IV and V. Following this Court's ruling in *Aluminum III*, the district court dismissed the claims of the FLPs and IPs for lack of antitrust injury on

the ground that they, too, did not participate in the LME warehouse-storage market. *See In re Aluminum Warehousing Litig.*, 2016 WL 5818585 (S.D.N.Y. Oct. 5, 2016) ("*Aluminum IV*") (FLPs); *Agfa Corp. v. Goldman Sachs Grp. Inc.*, 2016 WL 7009031 (S.D.N.Y. Nov. 30, 2016) ("*Aluminum V*") (IPs). The FLPs and IPs then appealed those rulings to this Court.

Aluminum VI. In *Eastman Kodak Co. v. Henry Bath LLC*, 936 F.3d 86 (2d Cir. 2019) ("*Aluminum VI*"), this Court reversed Judge Forrest's dismissal of the FLP and IP claims for lack of antitrust injury. The Court emphasized that "the *only* issue on appeal is whether the plaintiffs have suffered an antitrust injury." *Id*. at 94 (emphasis added). The Court also noted that it was addressing antitrust injury based "on the sufficiency of the plaintiffs' legal theory, rather than on their evidence." *Id*. at 93 n.3. The Court concluded that the FLPs and IPs had adequately alleged antitrust injury "by pleading that the defendants restrained the market for the sale of primary aluminum, and that the plaintiffs were injured in making purchases in [that] market." *Id*. at 96. No party raised, and this Court did not address, the separate question of whether the FLPs and IPs qualify as efficient enforcers of the antitrust laws. *Id.* at 94 (noting that Plaintiffs' appeal did not address whether plaintiffs are "an 'efficient enforcer' of the antitrust laws").

2. The orders on appeal

On remand from this Court's decision in *Aluminum VI*, these cases were reassigned to Judge Paul A. Engelmayer as a result of Judge Forrest's retirement from the bench. SPA19. Judge Engelmayer subsequently denied the FLPs' motion for class certification and granted summary judgment against the FLPs and IPs on efficient-enforcer grounds.

a. The class certification order

The FLPs moved to certify a class of (i) "first-level" purchasers (*i.e.*, the first purchasers of aluminum from smelters), of (ii) "primary" aluminum (*i.e.* smelted aluminum rather than aluminum recycled from scrap), (iii) whose purchase prices were "based on" the MWP or MWTP. SA31; SA112-17. Following five rounds of expert reports, six rounds of briefing, and a three-hour oral argument, the district court issued a 119-page opinion denying the FLPs' motion on the ground that they failed to satisfy Rule 23(b)(3)'s predominance requirement. SA30-34; SA70-118.

The parties' class certification submissions focused mainly on whether individualized inquiries into issues of injury, causation, application of the class definition, and antitrust standing would be required at trial. The FLPs argued that no such individual inquiries would be necessary because documentary evidence and statistical models prepared by their damages expert, Dr. Christopher Gilbert, would be sufficient to determine these issues for the entire class. *See* SA30; SA70; SA76;

SA112 n.49; SA113-15. Defendants countered that the FLPs' documentary evidence is ambiguous and inconclusive, that Dr. Gilbert's models suffer from a series of fundamental flaws, and that large numbers of individual inquiries would be necessary at trial. *See* SA31; SA62; SA84; SA87.

The district court agreed with Defendants. After carefully analyzing the documentary evidence proffered by the FLPs, the court found that the "broad generalizations" that appear in those documents are "far too imprecise, indiscriminate, and disconnected from reliable factual moorings" to demonstrate injury and causation for the entire class. SA85. The court also identified a "range of significant methodological infirmities afflicting Dr. Gilbert's models" that "precludes the Court from accepting his [models] as reliable common proof of classwide injury." SA111. The court thus held that "individualized inquiries into the effect of queues on different class members who purchased aluminum at different times pursuant to contracts with differing price terms" would be necessary to determine injury and causation at trial. SA102. The court also found that individual inquiries would be necessary to identify the purchases and purchasers that satisfy the class definition and related requirements of efficient-enforcer standing. SA112-18. "For all these reasons," the court concluded, "the FLPs have failed to demonstrate that, at a trial on their § 1 claims, common issues would predominate over individualized ones. The opposite is so." SA118.

b. The summary judgment order

After the district court denied class certification, Defendants moved for summary judgment on the ground that Plaintiffs are not efficient enforcers of the antitrust laws. SPA22-23. Applying the well-settled test for efficient-enforcer standing, the district court held that Plaintiffs "failed to satisfy three of the four efficient-enforcer factors" and thus dismissed their claims "for want of antitrust standing." SPA67.

The district court noted that in the wake of this Court's decision in *Gelboim v. Bank of America Corp.*, 823 F.3d 759 (2d Cir. 2016), courts in this Circuit "have tended to hold that plaintiffs are not efficient enforcers to the extent that they sued entities with whom they had not directly transacted." SPA24. Recognizing that antitrust standing "is highly fact-specific," however, the court concluded that the lack of efficient-enforcer standing is even clearer here because Plaintiffs' claims "involve an unusually indirect chain of causation." SPA25 n.24; SPA47. The court observed that, unlike other cases "in which defendants are alleged to have directly rigged an industry-wide interest rate or benchmark price, plaintiffs here posit a more attenuated link between defendants' actions and the prices ultimately paid." SPA47. Specifically, "Plaintiffs' theory of harm posits that, as a result of steps defendants took to lengthen warehouse queues, spot-market participants adjusted their purchase prices upwards, which ultimately refracted the MWP price at the relevant time,

affecting transactions in which defendants did not participate but which embedded the MWP as a price component." SPA47-48.

Turning to the four efficient-enforcer factors, the district court found that the first factor—the directness of the asserted injury—"decisively favors" summary judgment because Plaintiffs did not transact with an alleged conspirator. SPA47. The court held that "the evidence adduced in discovery, even considered in the light most favorable to plaintiffs, shows that the decision to charge, or not to charge, the MWP was ultimately made by non-conspiring smelters, not defendants, breaking the chain of causation." SPA47. Moreover, "even where the MWP was [charged]," the court found that "the non-conspiring smelter retained latitude to negotiate prices, including by offering offsetting discounts to other portions of the all-in aluminum price." SPA52. According to the court, "the availability of negotiations as to other price components, and their capacity to offset the inflated MWP, reinforces that the price plaintiffs paid to non-defendants were decided by the smelters (and the plaintiffs), not by defendants." SPA52. The court further concluded that "[a]llowing plaintiffs to pursue defendants with whom they did not do business would . . . create the risk of disproportionate liability" because "the transactions in which defendants did not participate and on which they did not profit overwhelm in numbers those to which defendants were parties." SPA52-53.

"As to the second factor," the district court held that "more direct victims" of the alleged collusive conduct are "readily ascertainable." SPA57. The court observed that two plaintiffs in a related action (Reynolds and Southwire) "made a substantial portion of their purchases from defendants." SPA58. The court found that, assuming the truth of Plaintiffs' allegations, those other plaintiffs "were more directly injured" than the FLPs and IPs because "defendants—not third parties—made the decision to charge" the MWP to those plaintiffs. SPA58. The court thus concluded that this factor "also favors dismissal of plaintiffs' claims." SPA59.

The district court determined that the third factor—speculative damages—likewise favors dismissal because the damages inquiry here "would be unavoidably speculative." SPA65. As the court stated, "the summary judgment record reveals" that "the process for determining a plaintiff's damages on an aluminum purchase from a non-defendant is rife with complicating factors," including "intervening pricing and contracting decisions by the nonculpable smelters" and "the challenging inquiry into whether, but for the inflated MWP, other price terms would have been different." SPA60. The court emphasized that the alleged injury here is even more speculative than in other benchmark-price cases: "plaintiffs' theory here is not even that defendants directly manipulated the [benchmark] . . . in question. Rather, plaintiffs' theory is that defendants conspired to take certain actions tending to elongate the queue at certain aluminum warehouses, which in turn tended to cause a

benchmark component of aluminum's price—the MWP—to rise." SPA60 (citation omitted). The court further stressed that a plaintiff "would have to show how much of any defendant-caused *increases* in the MWP were not offset by resulting *decreases* in the LME settlement price" and that this "[u]ncertainty as to the interplay between the MWP and the LME settlement price itself sets this case apart" from other benchmark cases. SPA61-62.

Finally, the district court found that the fourth factor—duplicative damages or difficulty of apportionment—"does not weigh against plaintiffs' status as efficient enforcers," but has little weight here because "the other efficient-enforcer factors disfavor plaintiffs." SPA66. The court thus dismissed Plaintiffs' claims "for want of antitrust standing." SPA67.

SUMMARY OF ARGUMENT

1. **Class Certification**. In a comprehensive 118-page order, the district court denied class certification, reasoning that individual inquiries into injury, causation, application of the class definition, and efficient-enforcer standing would predominate at trial. SA71-118. The FLPs seek reversal on the grounds that the district court allegedly (i) "refus[ed] to consider" the documentary evidence they submitted as purported proof of classwide injury, and (ii) "committed multiple errors in rejecting Dr. Gilbert's models of antitrust impact." FLP Br. 21. Neither argument has merit.

a. The FLPs' documentary evidence. Although in the district court the FLPs relied mainly on Dr. Gilbert's statistical models to try to prove classwide antitrust injury (SA75), their primary argument on appeal is that the documentary evidence they submitted below was sufficient by itself to prove classwide injury. FLP Br. 19, 25-34. According to the FLPs, the district court "refus[ed] to consider [this] evidence at any stage of its analysis" and "applied a *per se* rule that antitrust injury and predominance cannot be established by direct [documentary] evidence alone." FLP Br. 19, 25, 34. But the district court's opinion demonstrates that the court did no such thing. Instead, the court carefully considered the documentary evidence at issue (SA5-26; SA83-85), and concluded that this evidence was far too imprecise and inconclusive to prove injury to the entire class given the complex chain of causation argued by the FLPs (SA74-76; SA83-85).

Although the FLPs disagree with that assessment of their evidence, the record fully supports it. The documentary evidence at issue focuses mainly on the proposition that longer warehouse queues result in a higher MWP. *See* FLP Br. 26-31. To establish classwide injury, however, the FLPs must also show that (i) Defendants' conduct lengthened the queues at the time each class member made its purchases, (ii) each class member's purchase contracts required it to pay higher prices as a result of the alleged increase in the MWP, and (iii) any increases in the MWP were not offset by reductions in other components of each class member's all-

in purchase price. As the district court recognized, individualized evidence and analysis would be necessary on each of these pivotal questions, notwithstanding the "common" evidence submitted by the FLPs. SA84-111. Indeed, relying on the FLPs' evidence alone to resolve these questions would yield "false positives," *i.e.*, it would imply injury where none could exist. *See* SA85; SA110-11.

The district court's ruling is further supported by its finding that the FLPs' evidence would not avoid the need for individual inquiries into which purchases and purchasers satisfy the class definition and related requirements of antitrust standing. The class definition limits the proposed class to (i) "first-level" purchasers of (ii) "primary" aluminum that (iii) paid a purchase price "based on" the MWP or MWTP. SA31. Two of those requirements—paying a price "based on" the MWP or MWTP on a "first-level" purchase—are also requirements of efficient-enforcer standing. *See infra* at 85-88. The district court correctly found that the FLPs lack any "common" evidence capable of resolving these questions, and large numbers of individual inquiries would be necessary to resolve them. SA112-18.

For all these reasons, the district court did not abuse its discretion in determining that the FLPs' documentary evidence—either alone or in combination with their statistical models—fails to satisfy the predominance requirement.

b. The FLPs' statistical models. The FLPs fare no better with their argument that the district court "committed multiple errors in rejecting Dr. Gilbert's models of antitrust impact." FLP Br. 21.

The district court identified five separate "methodological flaws" in Dr. Gilbert's models that "preclude[] the Court from accepting [the models] as reliable common proof of classwide injury." SA71; SA111. First, the models are flawed at the outset because they fail to control for the effects of changes in the LME's load-out rules. SA88-91. Second, the models impermissibly rely on the effects of the Vlissingen queue even though the FLPs' complaint expressly disavows any allegation that the Vlissingen queue raised the MWP. SA91-94. Third, the models "elide salient differences over time" and fail to distinguish "conduct which is [allegedly] conspiratorial and conduct which is not." SA98-99. Fourth, the models rely on an averaging approach that yields false positives and masks the existence of unharmed class members. SA108-11. Fifth, and finally, the models estimate the effects of longer queues on the MWP in isolation and fail to account for offsetting effects on other price components. SA100-08.

The FLPs argue that the district court was wrong about all five of these fatal flaws, but the court's findings on each of these issues are well-supported by the record. The order denying class certification therefore should be affirmed.

2. **Summary Judgment**. Following extensive briefing and oral argument, the district court granted summary judgment for Defendants, holding that the FLPs and IPs are not efficient enforcers of the antitrust laws under the governing four-factor test as applied to the facts of these cases. The court's ruling should be affirmed.

It is undisputed that Plaintiffs did not buy their aluminum from participants in the alleged conspiracy, but bought instead "from unrelated third parties: generally, smelters of aluminum." SPA4. After reviewing a series of recent "benchmark price" cases holding that plaintiffs who made their purchases from non-conspirators are not efficient enforcers, the district court correctly held that the FLP and IP claims present an even weaker case for efficient-enforcer standing. *See* SPA24; SPA40; SPA47-48; SPA62. As the court explained, "[u]nlike benchmark cases in which defendants are alleged to have colluded to directly rig an industry-wide . . . benchmark . . . , plaintiffs here posit a more attenuated link between defendants' actions and the prices plaintiffs ultimately paid." SPA47.

In applying the four-factor efficient-enforcer test to the facts of Plaintiffs' claims, the district court correctly held that the first factor—the indirectness of the asserted injury—"decisively favors" summary judgment because Plaintiffs' theory of injury "involve[s] an unusually indirect chain of causation." SPA47. At one step in the causal chain in particular—inclusion of the MWP in Plaintiffs' purchase contracts—the court found that "the evidence adduced strongly indicates that

charging customers the MWP was an independent pricing decision by smelters, not the inevitable result of defendants' alleged conspiracy." SPA50. Indeed, the evidence showed that Plaintiffs individually negotiated the all-in prices they paid for aluminum, and that not all of their purchase contracts even included the MWP. SPA52. Accordingly, the independent pricing decisions of non-conspiring smelters "break[] the chain of causation between defendants' actions and plaintiffs' injury" (SPA49), and Plaintiffs' alleged injuries did not occur at the "first step" following the allegedly unlawful behavior, *see Amex Anti-Steering*, 2021 WL 5441263, at *6. In addition, allowing Plaintiffs to sue Defendants based on the prices that Plaintiffs agreed to pay to non-conspiring aluminum smelters "would create the risk of disproportionate liability." SPA52. "Were defendants liable for all sales" by non-conspiring smelters, "defendants' potential damages would far outstrip" their purported ill-gotten gains. SPA57.

Regarding the second efficient-enforcer factor, the district court correctly held that "there are more efficient enforcers who could, and indeed have, sued: those who bought primary aluminum from defendants." SPA59. There is no dispute that these other enforcers "were more directly injured" than Plaintiffs because "defendants—not a third party—made the decision to charge the price component which defendants allegedly colluded to inflate." SPA58.

On the third factor, the district court rightly concluded that the damages inquiry here "would unavoidably be speculative." SPA65. As the court explained, "the process of determining a plaintiff's damages on an aluminum purchase from a non-defendant is rife with complicating factors," including "intervening pricing and contracting decisions by nonculpable smelters" and "the challenging inquiry into whether, but for the inflated MWP, other price terms would have been different." SPA60. "[T]here is no genuine dispute that the relationship between longer queues and all-in prices paid by customers is complex and debatable." SPA62. Plaintiffs' promises about future expert analysis are insufficient to render their asserted damages non-speculative.

Plaintiffs' arguments on appeal provide no basis to reverse these findings or the district court's ultimate determination that Plaintiffs are not efficient enforcers. Plaintiffs accuse the district court of applying an improper "bright line rule" that "a plaintiff who does not transact directly with a defendant" can never be an efficient enforcer (IP Br. 2), but that is incorrect. The district court expressly rejected a bright-line rule that would impose an inflexible "privity" requirement and require the dismissal of all so-called "umbrella" claims. SPA25 n.5. The court instead recognized that "a determination of standing in an individual antitrust case is highly fact-specific" (SPA25) and carefully applied the efficient-enforcer factors to the unique facts of Plaintiffs' claims (SPA47-67).

Plaintiffs also argue that efficient-enforcer standing involves a proximate-causation analysis "that is traditionally the province of the jury" (IP Br. 34), but that argument is foreclosed by a long line of decisions of this Court holding that antitrust standing is a threshold legal inquiry to be decided by a court. Indeed, many of this Court's efficient-enforcer decisions would have come out differently under the approach proposed by Plaintiffs. The order granting summary judgment for Defendants should therefore be affirmed.

ARGUMENT

I. THE CLASS CERTIFICATION ORDER SHOULD BE AFFIRMED.

The district court denied class certification on the ground that the FLPs "failed to demonstrate that, at a trial on their §1 claims, common issues would predominate over individualized ones." SA118. This Court reviews that determination for abuse of discretion. *See Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010). "This standard means that the district court is empowered to make a decision—of *its* choosing—that falls within a range of permissible decisions, and we will only find abuse when the district court's decision rests on an error of law or a clearly erroneous factual finding, or its decision cannot be located within the range of permissible decisions." *Id*. (citations and quotations omitted). "Implicit in this 'deferential' standard when applied in the class action context 'is a recognition . . . of the district

court's inherent power to manage and control pending litigation.'" *Id*. (citation omitted).

The FLPs fail to identify any abuse of discretion, error of law, or clearly erroneous factual finding that places the district court's class certification order beyond the range of permissible decisions. To the contrary, the order is amply supported by appellate precedent and by the district court's meticulous analysis of the factual record in this "decidedly idiosyncratic" antitrust case. SA74.

A. The FLPs Bear The Burden Of Proving That Common Questions Would Predominate At Trial.

To satisfy Rule 23(b)(3), a plaintiff must prove by a preponderance of the evidence that common questions would predominate over individual questions at trial. *See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008). Here, as in most antitrust class actions, whether plaintiffs have satisfied that requirement turns mainly on whether they have shown that common evidence alone is capable of proving the existence or absence of antitrust injury on a classwide basis at trial. *See, e.g.*, 1 MCLAUGHLIN ON CLASS ACTIONS § 5:36 (18th ed., Oct. 2021) ("The most fundamental prerequisite to certification of an antitrust class is the identification of a common methodology capable of allowing the trier of fact to determine that each member of the proposed class suffered antitrust injury and damages as a result of the challenged conduct.").

Proof of antitrust injury is an element of liability, not just a damages issue, in a private antitrust action. *See, e.g.*, *Aluminum VI*, 936 F.3d at 94; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008). Accordingly, satisfying the predominance requirement in an antitrust class action requires "more than common evidence that the defendants colluded to raise [prices]. The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) ("*Rail I*"); *see also Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015) (quoting *Rail I* in RICO class action for the proposition that plaintiffs "'must . . . show that they can prove, through common evidence, that all class members were . . . injured by the alleged conspiracy'").

Courts thus reject certification of antitrust classes if common evidence will not enable the finder of fact to determine the existence of antitrust injury on a common basis at trial. *See, e.g.*, SA76-82 (surveying cases); *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 192 (3d Cir. 2020) (plaintiffs must "prove by a preponderance of the evidence that they could establish, through common proof at trial," that "all class members" suffered antitrust injury); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 623 (D.C. Cir. 2019) ("*Rail II*") ("Without common proof of injury and causation, [antitrust] plaintiffs cannot establish

predominance"); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 58 (1st Cir. 2018) (requiring common proof of classwide antitrust injury); *Hydrogen Peroxide*, 552 F.3d at 311 (same); *Blades v. Monsanto Co.*, 400 F.3d 562, 571-72 (8th Cir. 2005) (same); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (same).

To be sure, class certification is not necessarily defeated by the presence of "a very small absolute number of [unharmed] class members [that] might be picked off in a manageable, individualized process at or before trial." *Asacol*, 907 F.3d at 53. But certification of a class cannot "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072(b), and "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring). Thus, if a proposed class potentially includes unharmed class members, the plaintiffs must show that any such class members will be "winnowed away as part of the liability determination." *Rail II*, 934 F.3d at 624. This winnowing process "must be truncated enough to ensure that the common issues predominate, yet robust enough to preserve the defendants' Seventh Amendment and due process rights to contest every element of liability and to present every colorable defense." *Id*. at 625. Even a *de minimis* number of unharmed class members will defeat predominance if large numbers of individual inquiries would be necessary to identify and exclude them. *See id.* at 625-26; *Asacol*, 907 F.3d at 58.

Here, the district court correctly found that the FLPs lacked "common proof" capable of proving classwide antitrust injury and that individualized inquiries into injury and causation therefore would predominate at trial.

B. The FLPs' Documentary Evidence Fails To Satisfy The Predominance Requirement.

In the court below, the FLPs relied primarily on Dr. Gilbert's statistical models to try to demonstrate that the existence or absence of antitrust injury can be decided on a common basis at trial. SA30; SA75; SA89. On appeal, however, the FLPs now rely mainly on the argument that documentary evidence that they variously describe as "factual," "real world," or "direct" will be sufficient to prove antitrust injury to the entire class at trial. FLP Br. 25-34. The FLPs also accuse the district court of "disregarding" their documentary evidence and "invent[ing] an atextual per se rule precluding consideration of real-world evidence." *Id*. at 1, 34.

The district court did nothing of the kind. Instead, the court carefully analyzed the FLPs' documentary evidence and correctly rejected it as far too imprecise and inconclusive to avoid the need for individual inquiries at trial. SA85. Moreover, far from applying some sort of "per se rule," the court held only that the specific documentary evidence proffered below was insufficient given the facts of this "decidedly idiosyncratic" case and "the complexity of the proposition that plaintiffs must establish here." SA74; SA84-85. The court also identified a series of pivotal causation and injury questions that the FLPs' documentary evidence did not (and

cannot) resolve. The FLPs thus fail to identify any reversible error in the district court's consideration of their documentary evidence.

1. The district court correctly rejected the FLPs' documentary evidence as imprecise and inconclusive.

The plain language of the district court's opinion belies the suggestion that the court "ignored" and "disregarded" the FLPs' so-called "direct" documentary evidence of classwide injury. In fact, the court expressly discussed and summarized the "various statements from industry analyses and employees of defendants, smelters, and aluminum purchasers" cited by the FLPs. SA83; *see also* SA19-26; SA83-86. The court also recognized that this documentary evidence provided "an important supplement to Dr. Gilbert's work." SA83. But the court ultimately determined that "the broad generalizations that appear in select industry documents are far too imprecise, indiscriminate, and disconnected from reliable factual moorings" to avoid the need for individual inquiries into injury and causation. SA85. The court explained:

> [B]road generalizations by market participants—whether about queues at Metro or Vlissingen specifically or the aluminum market generally—cannot, in the absence of a proper chain of expert models, serve as common proof that all 250-plus members of the class suffered pricing injury during the six-year class period. Whatever the impressions of these persons, they were not—and do not claim to have been—percipient witnesses to the entirety of the conduct at issue. They simply are not competent to opine on the sweeping, economically complex propositions necessary to support class certification . . . .

> Notably, too, the statements by market participants on which plaintiffs rely are anchored to particular industry circumstances and moments in time. They do not, in terms, profess to opine on the necessary proposition here: that defendants' conspiracy, as alleged in this litigation, unitarily worked antitrust pricing injury on all entities and persons now defined to fall within the putative class.

SA83-84.

At trial, even if the FLPs were to confine their evidence of injury solely to the broad generalizations they pluck from various documents, "*defendants* would have a right to present individualized evidence that these statements are untrue for large numbers of individual purchases and purchasers." SA85 (emphasis added). Defendants' right to present this individualized evidence suffices by itself to show that the district court did not abuse its discretion by denying class certification. *See Rail II*, 934 F.3d at 624-27 (affirming denial of certification of antitrust class where large numbers of causation and injury determinations would be needed at trial); *Asacol*, 907 F.3d at 53-58 (reversing certification of antitrust class where defendant was entitled to present individualized evidence to contest injury and causation for large numbers of class members); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) ("[A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individualized claims."); *Myers*, 624 F.3d at 551 ("courts must consider potential defenses in assessing the predominance requirement").

The FLPs are equally mistaken in claiming that the district court "applied a *per se* rule that antitrust injury and predominance cannot be established by direct evidence alone." FLP Br. 25. The district court recognized that, in a "paradigmatic or 'traditional' price-fixing conspiracy," documentary evidence might be enough to establish classwide antitrust injury. *See* SA75; SA86 n.43. This case, however, is a "decidedly idiosyncratic" antitrust action involving "a more elongated chain of causation" than a typical price-fixing claim. SA74-75. The documentary evidence at issue is therefore "too imprecise, indiscriminate, and disconnected from reliable factual moorings" to establish "that all purchasers at all times throughout the lengthy class period were injured by defendants' alleged queue-lengthening activities." SA85.

The FLPs studiously ignore this reasoning and focus instead on the district court's statement that "reliable expert modeling substantiating this claim is unavoidably necessary" (FLP Br. 25), but the very sentence at issue refers solely to "*this* claim" and rests explicitly on "the complexity of the proposition that plaintiffs must establish *here*." SA85-86 (emphasis added). The FLPs omitted that language from their truncated quotation from the district court's opinion.

At bottom, the FLPs simply disagree with the *weight* that the district court accorded their documentary evidence, but a bare disagreement about the weighing of the evidence falls far short of establishing clear error or abuse of discretion.

2. The district court correctly identified key questions that cannot be resolved by "common" documentary evidence.

The district court identified three specific causation and injury issues that the FLPs' documentary evidence cannot resolve on a classwide basis. The FLPs' documents focus mainly on a single proposition: that longer queues result in a higher MWP. FLP Br. 26-30. To establish causation and injury, however, the FLPs also need proof of at least three additional steps in the causal chain for each individual class member: (i) that the alleged conspiracy lengthened the queues at the time of each class member's purchases, (ii) that each class member's purchase contracts incorporated the MWP, and (iii) that any queue-driven increases in the MWP that affected a given class member were not offset by reductions in other price components. *See* SA83; SA90; SA104; SA113-14.

As shown below, the district court correctly found that individualized evidence would be required at trial on all three of these issues, notwithstanding the "common" evidence offered by the FLPs. Indeed, accepting the FLPs' common evidence alone on these three issues would "yield false positives," *i.e.*, it would imply injuries where none could exist. SA85; SA110.

a. Individual inquiries are necessary to determine whether the alleged conspiracy lengthened queues at the time each class member made its purchases.

"[T]he core of the FLPs' theory has consistently been that defendants took coordinated actions to lengthen queues" at Metro Detroit, "which in turn led to

increases in the Midwest Premium." FLP Br. 49. Accordingly, the threshold fact that the FLPs must establish to demonstrate classwide injury is that the alleged conspiracy lengthened the Metro Detroit queues at the time each class member made its purchases. SA83; SA86-87; SA90. As the district court recognized, however, "the FLPs lack classwide proof that the alleged conspiracy lengthened queues throughout the relevant period." SA90.

The FLPs contend that "large warrant cancellations" are the mechanism Defendants used to lengthen the queues at Metro Detroit. FLP Br. 9-10. Warrant cancellations, however, are "occasional and lumpy" and "waxed and waned during the class period." SA87; SA97. Moreover, the FLPs allege that Defendants agreed "not to destock each other's warehouses," which necessarily implies "an agreement to cancel *fewer* warrants and thus maintain *lower* queues." SA96-97 (emphasis added). Further complicating the picture, there were strong *unilateral* reasons to cancel Metro Detroit warrants during the class period: Metro Detroit charged much higher rent than other warehouses, which gave market participants an incentive to cancel Metro Detroit warrants and either move the metal to cheaper warehouses or sell it to end-users. JA85-86; JA212-14. Indeed, even members of the proposed class repeatedly cancelled Metro Detroit warrants during this period. SA66-67; SJA801-02; SJA935; SJA2875.

The FLPs thus face the complex task of determining whether the alleged conspiracy on balance lengthened, shortened, or had no effect on queues at the time any given class member made its purchases. But nowhere in the FLPs' brief (and nowhere in the district court record) do the FLPs cite any "direct" documentary evidence that purports to answer that critical question. Nor does the FLPs' documentary evidence purport to isolate the effects of any "conspiratorial" warrant cancellations from those of *non*-conspiratorial cancellations; only Dr. Gilbert's statistical models attempted to do so. SA88. And Dr. Gilbert's models estimate that the alleged conspiracy on average had no effect on queue length after accounting for changes in the LME's load-out rules. *See infra* at 62-63; SA88-90. Accordingly, the FLPs "lack classwide proof that the alleged conspiracy lengthened queues throughout the relevant period" and "cannot establish that common issues will predominate over individual issues." SA90-91.

b. Individual inquiries are necessary to identify purchases based on the MWP.

The FLPs' documentary evidence also fails to identify which individual purchases were made at a purchase price based on the MWP. As the district court recognized, large numbers of individual inquiries would be necessary to determine that question at trial. SA85; SA112-14.

Although the FLPs contend that "nearly all" U.S. purchases of primary aluminum are based on the MWP (FLP Br. 28), the discovery record "revealed the

reality of the aluminum market to be far more complex." SA113. [redacted] SJA3382. Moreover, as the FLPs eventually admitted in the court below, [redacted][5] The record thus showed that "many purchase contracts do not reference the MWTP or MWP at all, and those contracts that do reference the MWTP or MWP do so in a variety of ways." SA113.

Thousands of individual inquiries would be necessary to identify and exclude the large numbers of purchases that were made under contracts that did not incorporate the MWP or MWTP. Members of the putative class made hundreds of thousands of aluminum purchases during the relevant period, and for most of these

[5] SPA14; SPA43; SPA50; CA1982-83; SJA3084 [redacted]; SJA3089 (estimating that [redacted]); SJA3102 (four of ten [redacted]; SJA 3121-22 (wide variation in [redacted] contracts). The FLPs speculate that some of these purchases might have been harmed by the alleged conspiracy because on average their expert observed a correlation (confusingly referenced as a "pass-through rate") between the MWP and the prices paid on these purchases. FLP Br. 65. But the FLPs' own expert concluded that these purchases did *not* include the MWP (SA85), the regression analysis cited for this proposition is fundamentally flawed (SA109-11), and aggregated averages fail to demonstrate harm to individual purchasers (SA110).

transactions, there is no transaction data that link specific purchases to specific purchase contracts. SA114 n.50; SJA3089. Furthermore, the contracts themselves are riddled with ambiguities: many are unsigned; many others contain options, collars, or caps that muddy their price terms; and still others "grant considerable discretion as to how much volume would be purchased, with no apparently reliable way to determine the volume actually purchased pursuant to such contracts." SA114 & n.50; SJA3086-87. Accordingly, "[i]ndividualized inquiries would be required to determine whether putative class members purchased aluminum pursuant to a contract based on the MWTP or MWP." SA112. These individual inquiries alone establish that the district court did not abuse its discretion in declining to certify a class. *See Mazzei v. Money Store*, 829 F.3d 260, 272 (2d Cir. 2016) (affirming decertification where "fact-finder would have to look at every class member's loan documents to determine who did and who did not have a valid claim").

The FLPs counter with broad anecdotal statements to the effect that "nearly all" U.S. purchasers pay the MWP. FLP Br. 4, 28. But the district court found that these sweeping statements by individuals in no position to know whether "nearly all" purchasers in fact pay the MWP do not stand up to the evidence that emerged from discovery.[6] SA9-10; SA83-84; SA113. The FLPs do not come close to proving

[6] Although the FLPs assert that "Goldman agrees" that all or nearly all aluminum contracts include the MWP (FLP Br. 66), the document they cite to support that

that this well-supported finding of fact was clearly erroneous. Furthermore, "relying on the FLPs' anecdotal evidence that all or nearly all purchasers pay . . . the Midwest Premium would assuredly yield false positives." SA85. "To choose just one example, the lay statements on which plaintiffs rely imply that even the purchasers in the 32,000 Alcoa transactions that Dr. Gilbert concluded 'do not include the Midwest Premium' were harmed." SA85. Finally, even assuming arguendo that "nearly all" purchases involved payment of the MWP, identifying and excluding the exceptions would still involve an enormous amount of individualized inquiry. SA85; SA114; *see also* SJA785-87; SJA2865-66. That alone suffices to defeat class certification. *See Rail II*, 934 F.3d at 624-25 (rejecting class certification where unharmed class members could not be "winnowed away" without extensive individual inquiry); *Asacol*, 907 F.3d at 51-54 (similar).

The FLPs only succeed in compounding these difficulties by asserting that all or nearly all purchase contracts required payment of the MWP "whether explicitly listed or not." FLP Br. 16, 66. Any attempt to determine whether a purchase contract "implicitly" required payment of the MWP would require individualized discovery and fact-finding that "can hardly be executed on a 'common' basis." SA114. For

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assertion was prepared by a commodities research analyst—not a participant in the aluminum market—and states that Goldman Sachs traders and professionals may have "opinions that are contrary to the opinions expressed in this research." *See* SJA1178; SJA1747.

example, the parties relied on testimony from 25 different witnesses to illuminate the negotiating history of the purchase contracts of the eight individual Plaintiffs involved in the summary judgment portion of these appeals. *See* CA1917-2007. Hundreds if not thousands of witnesses would thus be required to address the negotiation of the contracts of the entire class, and it appears that no appellate court has ever affirmed class certification where individualized testimony from that many witnesses would be needed at trial. *See, e.g.*, *Asacol*, 907 F.3d at 57-58; *Rail II*, 934 F.3d at 627.

c. Individual inquiries are necessary to identify changes in other price components.

The FLPs' documentary evidence fails to avoid the need for individual inquiries into a third injury and causation question: whether changes in other price components offset any queue-driven increases in the MWP.

The FLPs assume that longer queues and a higher MWP *automatically* result in higher all-in prices for class members whose supply contracts incorporate the MWP (FLP Br. 28), but that is incorrect. The MWP is not the purchase price that any class member ultimately pays. At most, it is a relatively small component of an all-in price that also includes other components such as the LME Cash Price, a conversion or fabrication charge, and transportation fees. SA7-8. As a result, any queue-related increases in the MWP potentially can be offset by decreases in other price components. SA84-85; SA104; SA109-10. The district court thus concluded

that "individualized inquiries into the effects of queues on different class members who purchased aluminum at different times pursuant to contracts with differing price terms will be necessary." SA102.

The factual record supports that conclusion. Aluminum contracts are individually negotiated and contain a variety of caps, collars, options, fixed-forward prices, and other means of limiting exposure to the MWP. SA9-10; SA110; SA113; SJA755-58; SJA2865-66. The proposed class thus includes purchasers whose contracts capped the MWP at levels *lower* than those that allegedly would have existed if not for the purported conspiracy (SA110), and purchasers who concluded that "[i]f the Midwest [Premium] goes up, it helps us" (SA9). In addition, class members sometimes negotiated reductions in other price components to counteract increases in the MWP. SJA791-94. Accordingly, when Dr. Gilbert's own regression variables are applied to individual class members, the results indicate that at least 50% of class members did not pay higher prices as a result of longer queues. SA109-10.

As the district court recognized (SA15-16; SA100), one important reason that queues do not necessarily raise aluminum prices is that queues *reduce* the LME Cash Price. The LME Cash Price is determined by the value of the warrants that are used to satisfy LME futures contracts. SA12; SA15; SJA634-36. During the relevant period, almost all LME futures contracts were settled with warrants from the

warehouses with the longest queues, *i.e.*, Metro Detroit and Pacorini Vlissingen warrants. SA12; SA15; SA100. Long queues at those warehouses depressed the value of their warrants—and thereby depressed the LME Cash Price—by raising the cost of retrieving the warranted aluminum. SA15-16; SA100; SJA635. Even the FLPs' expert Dr. Zona agreed with this conclusion (*see* SA16; SA100; SJA187; SJA192), and Dr. Gilbert at times agreed with it as well (*see* SJA94-95; SJA964 (Gilbert Dep. 90-92)).

Many other informed observers similarly concluded that queues generally did not raise all-in aluminum prices, but instead depressed the LME Cash Price relative to all-in spot market prices:

- After gathering the views of "33 market participants (of which several were industry groups, representing a larger number of underlying members)," the LME concluded that "the effect of queues is to create a discount between the free market price of metal, and the value of an LME warrant in a warehouse with queues." JA648.

- The CRU Group—which Dr. Gilbert acknowledged is a "well-respected" aluminum consultant—concluded that "it is well understood by the market" that "the effect of queues is to cause the LME price to trade at a discount to the 'all-in' price of metal, which is observed by the market as a premium to the LME price." JA652; SJA1293-94.

- A recent book edited by Dr. Gilbert acknowledges that "[t]he increase in premiums" attributable to longer queues "may not increase the overall price . . . if it simply reduces the portion of the price represented by the LME quotation." JA670.

- Alcoa opined that "it is not the case that long queues have resulted in higher overall metal prices." JA683.

- Metal Bulletin explained that queues have "caused the LME price to trade at a discount to the so-called 'all-in' price of aluminum." JA692.

The FLPs respond by citing various evidence to the effect that "there is no inverse relationship between the MWP and LME Prices" (FLP Br. 30), but as the district court recognized, "[t]hat argument attacks a straw-man." SA107-08. The relevant question is not whether the MWP and LME *generally* or *always* move in opposite directions, but "whether *queues* cause [them] to move in opposite directions." SA108.[7] None of the evidence cited by the FLPs addresses that critical question. Instead, the FLPs' evidence addresses the separate and irrelevant question of the general historical relationship between the MWP and the LME Cash Price outside the context of queues.[8]

The FLPs are thus reduced to complaining that the district court cited the divergent views among industry participants as an additional reason to "hesitate before permitting either side of the lay divide to be treated as authoritative as to

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[7] For instance, as the district court noted, certain economic events, like the closure of a smelter in the United States, would tend to raise both the MWP and the LME price. SA108; JA583-84.

[8] The FLPs rely on anecdotal statements of the general historical relationship between the MWP and LME prices and a chart prepared by Harbor Aluminum depicting that relationship. FLP Br. 29-30. The Harbor Aluminum analysis cited by the FLPs is not part of the expert evidence in this action; rather, it is a hearsay document that was submitted to a Senate subcommittee outside the context of the litigation. The FLPs at one point served an expert report from Harbor's principal, Jorge Vazquez Serna, but they voluntarily withdrew that report because the expert had not been timely disclosed. SA33 n.26.

whether lengthening queues at the Metro Detroit warehouse unitarily worked price injury on first-level purchasers." SA84; FLP Br. 32. When read in context, however, all this statement means is that the FLPs' documentary evidence is "far too imprecise, indiscriminate, and disconnected from reliable factual moorings to reliably establish . . . that all purchasers at all times throughout the lengthy class period were injured by defendants' alleged queue-lengthening activities." SA85. In other words, the "broad generalizations" that appear in the documents cited by the FLPs are not so "authoritative" that they would preclude Defendants from "present[ing] individualized evidence [at trial] that these statements are untrue for large numbers of individual purchases and purchasers." SA84-85. Courts in similar cases have reached the same conclusion. *See, e.g.*, *Rail II*, 934 F.3d at 626 (rejecting argument that "documentary evidence" was sufficient to prove classwide antitrust injury); *Asacol*, 907 F.3d at 54 (rejecting attempt to rely on "defendants' own documents and admissions" to prove classwide antitrust injury); *Myers*, 624 F.3d at 550 (affirming denial of class certification where purported common evidence was "general and largely inconclusive").

3. Large numbers of additional individual inquiries into class eligibility and antitrust standing would be required.

The district court also identified three issues relating to class eligibility and antitrust standing that cannot be resolved by the "common" documentary evidence proffered by the FLPs. SA112-18.

The class definition limits the proposed class to (i) "first-level" purchases (*i.e.*, the first purchase of aluminum after smelting) of (ii) "primary" aluminum (as opposed to "secondary" aluminum made from scrap), (iii) for which the purchase price was "based in any part" on the MWP or MWTP. SA31. As the district court recognized (SA115), satisfaction of these criteria is required not just by the class definition, but also by the antitrust standing requirement and the limited scope of the FLPs' complaint. *See Aluminum I*, 2014 WL 4277510, at *39 (dismissing second-level purchasers for lack of antitrust standing); *In re Aluminum Warehousing Antitrust Litig*, 2016 WL 1629350, at *6 (S.D.N.Y. Apr. 25, 2016) (denying leave to amend the FLPs' complaint to include "secondary" aluminum); *7 West 57th St. Realty Co. v. Citigroup, LLC*, 771 F. App'x 498, 502-03 (2d Cir. 2019) (holding that the plaintiff lacked antitrust standing as to purchases made under contracts that did not incorporate the allegedly-manipulated benchmark price). Large numbers of individualized inquiries would be necessary to identify the purchases and purchasers that satisfy these three requirements, *see* SA112-18, and those individual inquiries provide an independent basis for affirming the district court's determination that individual inquiries would predominate at trial.

As to the first-level purchaser requirement, the FLPs assert that only 2% of aluminum purchases from smelters were "second-level purchases" of aluminum that the smelters had acquired externally. FLP Br. 68. This 2% figure, however, is

greatly understated because it ignores most of the aluminum that smelters obtained externally before reselling it to purchasers. *See* SA116; SJA2841-46. The FLPs further assert that "it is nearly mathematically impossible that anyone who purchased from a smelter would not have made a single first-level purchase" (FLP Br. 68), but that assertion is mistaken because it (i) relies on the FLPs' greatly-understated tally of the volume of second-level purchases and (ii) incorrectly assumes that purchases of second-level aluminum are randomly distributed. SA116; SJA2841-54. Identification and exclusion of these second-level purchases are essential to prevent class members from obtaining recoveries based on purchases for which they lack antitrust standing. *See Rail II*, 934 F.3d at 624, 626 (meritless claims "must be winnowed away as part of the liability determination" even if they account for only a "de minimis" portion of overall claims).

As to the "primary" aluminum requirement, the FLPs argue that primary aluminum is the only type of aluminum that smelters sell (FLP Br. 69), but their own expert contradicted that assertion by identifying 1,272 sales of "scrap aluminum" by Alcoa. SA117. Individual inquiry would be necessary to identify and exclude such sales of secondary aluminum because "[t]he FLPs have not come forward with a methodology, not involving individual inquiries, for reliably distinguishing between primary and secondary aluminum purchasers from other smelters." SA117.

Finally, as to the requirement of a price "based in any part" on the MWP or MWTP, the FLPs contend that no difficulties will arise because the class definition "includes those paying the MWP regardless of a specific term" and regardless of whether the MWP is "explicitly listed." FLP Br. 66. But large numbers of individual inquiries would be necessary to determine which purchasers "implicitly" paid the MWP or MWTP. SA114. Worse, defining the class to include purchasers that did not "explicitly" pay the MWP would create a fatally indeterminate class in which no one could be certain which purchases were and were not covered by a final judgment. *See In re Petrobras Sec. Litig.*, 862 F.3d 250, 269 (2d Cir. 2017); *Brecher v. Republic of Argentina*, 806 F.3d 22, 24-25 (2d Cir. 2015); *see also Mazzei*, 829 F.3d at 272 (common issues did not predominate where examination of each class member's loan documents would be required); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 44-45 (2d Cir. 2006) ("[T]he need for numerous individualized determinations of class membership," including inquiries into "each purchaser's intent," provided "further support" for conclusion that individual issues would predominate).

For all these reasons, the district court correctly held that the FLPs' "direct" documentary evidence fails to satisfy Rule 23(3)(b)(3)'s predominance requirement. SA83-86; SA118.

C. Dr. Gilbert's Models Fail To Satisfy The Predominance Requirement.

The FLPs also argue that the district court erred by declining to accept Dr. Gilbert's statistical models as reliable common proof of classwide injury. FLP Br. 34. Dr. Gilbert submitted a chain of statistical models that purport to show that (i) Defendants loaded excessive amounts of aluminum out of Metro Detroit and Pacorini Vlissingen, thus lengthening the queues at those warehouses, (ii) longer queues at those warehouses increased the MWP without reducing the LME Cash Price, and (iii) a higher MWP resulted in higher all-in purchase prices for all class members. SA75-76; SA86. The district court found, however, that Dr. Gilbert's models suffer from a "range of significant methodological infirmities" that "preclude[] the Court from accepting [the models] as reliable common proof of classwide injury caused by the unusual, complex, and lengthy §1 conspiracy alleged in this case." SA111. The court thus concluded that injury and causation would be "provable only via individualized inquiries keyed to each particular purchaser" and that "individual determinations of injury will predominate over the common issues in this litigation." *Id*. The FLPs fail to identify any abuse of discretion, error of law, or clearly erroneous finding of fact underlying that ruling.

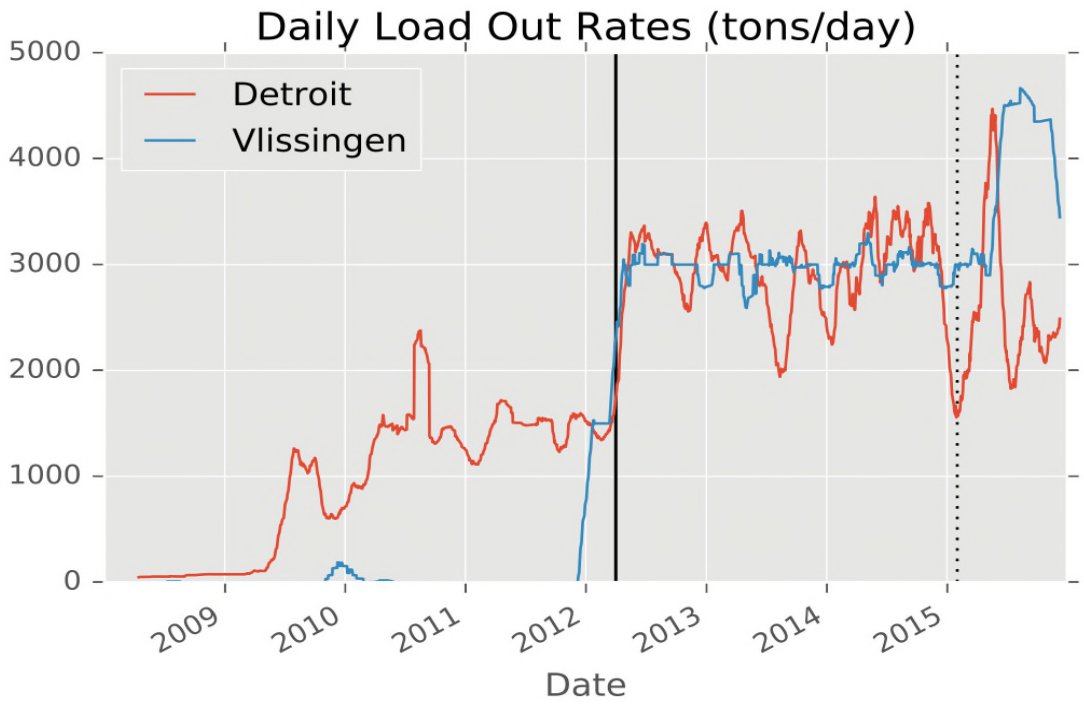
1. Dr. Gilbert's models fail to show that the alleged conspiracy lengthened queues throughout the class period.

At the first step of his modeling analysis, Dr. Gilbert attempted to show that Defendants' conduct lengthened the queues at the time all class members made their purchases. FLP Br. 35; SA87. The district court correctly held that Dr. Gilbert failed to make that showing: when his models are corrected to account for the doubling of the LME's minimum load-out rule in April 2012, the models estimate that the alleged conspiracy had no effect on the average length of the queues. SA87-91.

Dr. Gilbert used a regression model of "excess load-outs" to compare the level of load-outs before and after the date a conspiracy allegedly began. SA88. Based on this regression model, Dr. Gilbert purports to identify "excess" load-outs during the alleged conspiracy period and then converts the resulting tally of excess load-outs into an alleged effect on the length of the queues. SA87-88. In conducting this analysis, however, "Dr. Gilbert failed to control for the doubling of the LME load-out rule in April 2012." SA89; SJA664.

In April 2012, the LME doubled the minimum load-out rate applicable to Metro Detroit and Pacorini Vlissingen from 1,500 metric tons per day to 3,000 metric tons per day. *Id.* As shown in the table below, that rule change had a dramatic effect on the level of load-outs in Detroit and Vlissingen. The blue and red lines in

the table represent the amount of aluminum loaded out of Detroit and Vlissingen warehouses, and the solid black vertical line identifies April 2012.[9]



SJA664-65; *see also* JA183-84 (chart showing abrupt jump in Detroit load-outs before and after April 2012 rule change).

As shown in the table, warehouse load-outs jumped up sharply in April 2012, when the LME doubled the minimum load-out rate applicable to Metro Detroit and Pacorini Vlissingen. SJA664-65; SA88-89; JA183-84. When Defendants' expert,

[9] The dotted black line represents a new LME rule that took effect in February 2015, namely, the "Load-In/Load-Out" ("LILO") rule that linked a warehouse's minimum load-out rate to the volume of aluminum it loaded in if the warehouse had a substantial queue. SJA664. Metro began complying with the LILO rule when it was first proposed in 2014, but the rule's effective date was delayed until February 2015 because of a legal challenge in London. SJA730-31.

Dr. Jerry Hausman of MIT, took the obvious step of controlling for the April 2012 rule change, the corrected model showed that the alleged conspiracy had no effect on the average length of the queues. SA89; SJA664-67. Dr. Gilbert's model thus "suffers from a classic *Comcast* infirmity" in that it "mistakenly attributes to the alleged conspiracy an increase in Detroit load-outs actually attributable to the LME rule change." SA89 (internal quotation marks omitted) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 37 (2013)). As a result, "the FLPs lack classwide proof that the alleged conspiracy lengthened queues throughout the relevant period." SA90.

The FLPs argue that Dr. Gilbert was correct to ignore the April 2012 rule change because the LME minimum load-out rule allegedly had no effect on load-outs before the alleged conspiracy began (FLP Br. 36-37), but Dr. Gilbert admitted just the opposite at his deposition:

> Q. And is it reasonable to assume that absent the alleged conspiracy aluminum would have been loaded out of LME warehouses no faster than the LME's minimum load-out rate?
>
> A. If—it's reasonable if warehouse operators regard, as they did historically, the minimum load-out rate as effectively a maximum load-out rate. I have not altered that aspect of their behavior in the counterfactual.
>
> * * *
>
> Q. From 2005 up to January 2010, did LME warehouses typically load out no faster than the LME's minimum load-out rate?
>
> A. Yes.

SJA958. Dr. Gilbert further admitted that the doubling of the load-out rule in April 2012 had a marked effect on load-outs for which he should have controlled. SA90 (quoting SJA987-88 (Gilbert Dep. 185-86, 188)).[10] Consistent with these admissions, warehouse data confirm that load-out rates in Detroit and Vlissingen closely approximated the LME's minimum rate of 1,500 tons per day until April 2012 and 3,000 tons per day thereafter. *See* SJA664-65; JA183-84; *see also* SA14 (finding that the "minimum rate generally operated as a *de facto* maximum rate, because warehouse operators loaded out no more metal than required"); SA88 ("both sides' experts acknowledge that 'warehouses historically did not load out at rates higher than the minimum"); SJA626 ("[I]t is generally unilaterally profit maximizing for the operator to load-out the metal at the minimum rate required by the LME.").

The FLPs fare no better with their counterintuitive assertion that failing to control for the LME rule change yields "conservative" damages estimates. FLP Br. 38-39. If the FLPs were correct, then controlling for the rule change would

[10] Dr. Gilbert admitted at his deposition that "Metro Detroit and Pacorini Vlissingen increased their load-outs" as a result of the LME rule change and that he failed to control for those effects in his model. SJA987-88. The FLPs' assertion that Dr. Gilbert simply "misspoke" at his deposition (FLP Br. 37 n.16) is incorrect and unsubstantiated. Dr. Gilbert "misspoke" only in the sense that he truthfully admitted a defect in his model—its failure to control for the LME rule change. SJA664; JA616.

increase the amount of damages estimated by Dr. Gilbert's models, but the district court found—and Dr. Gilbert does not dispute—that controlling for the rule change has precisely the opposite effect. SA89 (citing SJA664). Finally, the FLPs waived this newly-minted argument by failing to raise it in the district court. *See Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994).[11]

2. Dr. Gilbert impermissibly relied on the Vlissingen queue.

The district court identified a second fatal flaw in Dr. Gilbert's models: they "rely on the combined impact of the Detroit and Vlissingen queues, despite [the FLPs'] unambiguous disavowal of any link between the Vlissingen queue and increases in the Midwest Premium." SA91.

The FLPs' complaint expressly rejects any relationship between the Vlissingen queue and the MWP: it alleges that the Vlissingen queue "ha[s] virtually no explanatory power for the increases in the Midwest Premium," that "[t]he length of the queues in the Vlissingen warehouses held by Glencore/Pacorini does not Granger-cause the Midwest [P]remium," and that the queues in Detroit alone

[11] The FLPs also assert that Dr. Gilbert ignored the April 2012 rule change because the rule change "had come into effect because of Defendants' queue-building activity." FLP Br. 37. The district court correctly rejected this argument, holding that it "cuts the wrong way for the FLPs." SA90. If it were true that the alleged conspiracy caused the doubling of the speed of load-outs from LME warehouses, that would imply that the conspiracy "did more to shrink the queue than the alleged excess load-outs Dr. Gilbert estimates did to lengthen the queue." SA90.

"explain 92% of the increases in the Midwest Premium." SA91-92 (alteration in original); JA19-20. Moreover, when the FLPs belatedly sought leave to reverse those allegations and expand their claims to include the alleged effects of the Vlissingen queue on the MWP, the district court denied that motion as untimely and prejudicial to Defendants. SA28-29; *In re Aluminum*, 2016 WL 1629350, at *6, *8 (denying leave to add claims based on the Vlissingen queue because the FLPs "have long been aware of the aluminum queues at warehouses in Vlissingen," but "tactically chose not to" assert such claims).

Dr. Gilbert nevertheless relied throughout his models on the impermissible premise that the Vlissingen queue raised the MWP. SA92. His models thus suffer from a second fatal *Comcast* problem: they rely on a theory of injury that the FLPs disavowed in their complaint and were denied leave to add to the case. SA91; *see also Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015) ("*Comcast* held that a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury. . . .").[12] And without a viable model to establish common proof of

[12] Plaintiffs cite *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), for the contention that *Comcast* is limited to situations where an expert relies on theories of liability that are not subject to class-wide proof. FLP Br. 42. That is incorrect. In *Waggoner*, the Court made clear that class certification should be denied in "a case where a plaintiff's damages model does not track his theory of liability." 875 F.3d at 106. That is the case here: Dr. Gilbert's models do not "track" the FLPs' theory

classwide impact, the FLPs "lack common proof of antitrust injury caused by the alleged conspiracy." SA111.

Although the FLPs now assert that the operative complaint "unambiguously embraces" the Vlissingen queue (FLP Br. 43-44), that assertion is unavailing. According to the FLPs, paragraph 553 of their complaint supposedly put Defendants on notice of the Vlissingen queue because it alleges that "incentive payments have . . . been paid by the strategic chokepoint warehouses, *e.g.*, Metro in Detroit and Pacorini in Vlissingen." *Id.* at 43 (omission in original) (internal quotation marks omitted). But a fleeting reference to incentive payments in Vlissingen is a far cry from a claim that the Vlissingen queue *harmed class members by raising the MWP*. On that issue, the complaint is unequivocal: it alleges that "increases in the aluminum stored in Vlissingen have virtually no explanatory for the increases in the Midwest Premium" and that "[t]he length of the queues in the Vlissingen warehouses held by Glencore/Pacorini does not Granger-cause the Midwest premium." JA20-21; JA75.

The FLPs try to distance themselves from those allegations by arguing that (i) they relate solely to a dismissed Section 2 monopolization claim against Metro and (ii) Rule 8 permits the pleading of "inconsistent" factual allegations in support

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of liability because they rely on a supposed relationship between the Vlissingen queue and the MWP that the FLPs' complaint expressly disavows. *See Roach*, 778 F.3d at 407.

of different claims. FLP Br. 45-46. But the rule allowing a plaintiff to plead "inconsistent facts in alternative pleadings" does not apply when factual allegations are "expressly incorporated" into each cause of action. *Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co.*, 976 F.2d 58, 61-62 (1st Cir. 1992). That is the case here: the FLPs' Section 1 claim explicitly "incorporate[s] by reference and reallege[s] the preceding allegations as though fully set forth herein," including the allegations that disavow any link between the Vlissingen queue and the MWP. JA150-51. Accordingly, these allegations are "expressly incorporated into each cause of action," and they "constitute judicial admissions, binding on both the trial court and on appeal." *Maloney v. Scottsdale Ins. Co.*, 256 F. App'x 29, 31 (9th Cir. 2007); *see also Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528 (2d Cir. 1985) ("A party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding"); *Jackson v. Marion Cnty.*, 66 F.3d 151, 153-54 (7th Cir. 1995) ("Allegations in a complaint are binding admissions, and admissions can of course admit the admitter to the exit from the federal courthouse." (citations omitted)).

The FLPs also assert that the district court should have ignored their allegations disavowing any link between the Vlissingen queue and the MWP because they would have been permitted to amend those allegations "at trial" absent

a finding of "prejudice" to Defendants. FLP Br. 46-47.[13] But the district court denied leave to amend precisely because adding claims based on the Vlissingen queue would "fundamentally shift the scope and theory of the case *in a way that prejudices defendants*." *In re Aluminum*, 2016 WL 1629350, at *8 (emphasis added); *see also id.* at *1 (denying leave to amend because "allowing the amendments [would] seriously prejudice defendants" and the FLPs "did not exercise reasonable diligence"). That order is controlling because the FLPs have not appealed it. *See* No. 21-954, Dkt. 1-2 at 2 (FLPs' Notice of Appeal); No. 21-954, Dkt. 18 at 6-7, 510 (FLPs' Form C); *Adamou v. Doyle*, 674 F. App'x 50, 51 (2d Cir. 2017) (no jurisdiction over orders that are not identified in notice of appeal).

Finally, the FLPs argue that the district court erred because Dr. Gilbert "performed alternate calculations that removed Vlissingen's impact." FLP Br. 48. The district court correctly rejected this argument, finding that Dr. Gilbert "relied throughout his work on the premise disavowed by his clients that the Detroit and

[13] Plaintiffs cite Rule 15's liberal standard for amended pleadings (FLP Br. 46-47), but "[w]here, as here, a scheduling order governs amendments to the complaint," Rule 15 must be interpreted against the provisions of Rule 16(b), which states that a scheduling order "shall not be modified except upon a showing of good cause." *Holmes v. Grubman*, 568 F.3d 329, 334-35 (2d Cir. 2009) (citation and quotations omitted). In assessing whether good cause exists, "the primary consideration is whether the moving party can demonstrate diligence." *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 244 (2d Cir. 2007). The district court properly found that the FLPs "did not exercise reasonable diligence" in seeking to amend their complaint. *In re Aluminum*, 2016 WL 1629350, at *1, *7.

Vlissingen queues, in tandem, raised the Midwest Premium." SA92 (citing various ways that Dr. Gilbert's "reliance on Vlissingen data permeates [his] chain of analysis"); *see also* SJA668-69; SJA739-41; JA619-20; SJA2875-76. Moreover, "[h]aving not attempted to strip the Vlissingen queue out of his analysis, Dr. Gilbert cannot provide assurance that a yet-to-be-developed Detroit-only model would reliably demonstrate injury on a classwide basis." SA94. The district court thus correctly held that Dr. Gilbert's models cannot supply any common proof of classwide impact. SA95.

3. Dr. Gilbert's models average away variation within the class.

A third methodological flaw that the district court identified in Dr. Gilbert's models is that they "elide salient differences over time" and "are repeatedly insensitive to conduct which is conspiratorial and conduct which is not." SA98-99. As a result, the models provide no "common proof that conspiratorial conduct caused pricing injury to all purchasers during the more than six-year class period." SA98.

As noted above, the models begin by estimating the "excess" warrant cancellations allegedly caused by the challenged conduct and converting those excess cancellations into an alleged effect on the length of the queues. SA87; SA95. But the models wholly ignore that warrant cancellations are "lumpy," that the challenged conduct "waxed and waned" over time, and that Defendants at times

allegedly agreed "to cancel *fewer warrants* and thus maintain *lower* queues." SA97 (emphasis added). Instead of accounting for this variation in the alleged conduct over time, the models simply calculate the "average" monthly rate of excess load-outs and apply that average rate to the entire six-year class period. SA97. As the district court recognized, this indiscriminate averaging approach ignores the "significant variation in the level of purported conspiratorial activity at any given moment during the class period." SA98. "With the improper averaging mechanism excised, Dr. Gilbert's model is devoid of common proof that conspiratorial conduct caused pricing injury to all purchasers during the more than six-year class period." SA98.

The FLPs argue that this analysis overlooks the so-called "merry-go-round transactions" (FLP Br. 50), but they never explain how those transactions purportedly excuse Dr. Gilbert's improper reliance on averaging. Instead, the FLPs appear to be making an entirely different point: that the merry-go-round transactions supposedly show that the net effect of the alleged conspiracy was to increase the amount of aluminum allegedly "trapped" in Metro Detroit. *See id*. at 4, 50-51. But Dr. Gilbert's models estimate precisely the opposite, *i.e*., the models estimate that even after accounting for the so-called merry-go-round transactions, the net effect of the purported "excess warrant cancellations" was to *reduce* the amount of metal stored in Metro Detroit and Pacorini Vlissingen by over a million tons. SJA636-37;

JA577; JA605-08; SJA2871-74. Dr. Gilbert expressly acknowledged the point at his deposition:

> Q. You conclude here that if not for the alleged conspiracy, the Metro Detroit warehouse would have loaded out less aluminum during the 2010 through 2015 period; correct?
>
> A. Correct.
>
> * * *
>
> Q. And you also conclude that if not for the alleged conspiracy, the Pacorini Vlissingen warehouse would have loaded out less aluminum during the 2012 to 2015 period; correct?
>
> A. Correct.
>
> * * *
>
> Q. And you assumed for purposes of your work in Exhibit G3 that the same amount of aluminum would have been loaded into Pacorini Vlissingen and Metro Detroit during the class period?
>
> A. Correct.
>
> * * *
>
> Q. So according to your work in Exhibit G3 of your report, if not for the alleged conspiracy, more aluminum would have stayed in the Metro Detroit warehouse for a longer period of time; correct?
>
> A. Correct.
>
> Q. And if not for the alleged conspiracy, you conclude that more aluminum would have stayed in the Pacorini Vlissingen warehouse for a longer period of time; correct?
>
> A. Correct.

* * *

> Q. And so according to your work in Exhibit G3, the effect of the alleged conspiracy was to reduce the amount of aluminum inventory in the Vlissingen and Detroit warehouses during the class period; correct? . . .
>
> A. Correct.

SJA967-68 (Gilbert Dep. 103-07); *see also* SJA636-37; JA605-08; SJA736-39, SJA798-801; SJA2871-74. In any event, whatever point the FLPs are trying to make about the merry-go-round transactions, it fails to rehabilitate Dr. Gilbert's reliance on averaging. *See* SA95-99.

4. Dr. Gilbert's models fail to demonstrate that queues raised all-in prices for individual class members.

A fourth methodological flaw in Dr. Gilbert's models is that they mask uninjured class members by modeling indirectly what Dr. Gilbert could have modeled directly. SA108-09.

"Rather than directly modeling the effects of queues on prices paid by individual class members," Dr. Gilbert modeled those effects indirectly by using a so-called "pass-through analysis" that "(i) estimates the effects of queues on the Midwest Premium; (ii) estimates the average effect of general increases on the MWP on all-in prices rather than estimating the specific effects of queue-related increases in the MWP on all-in prices; and (iii) assumes that each individual class member's experience conformed to the estimated averages." SA109. Dr. Gilbert failed to

identify a valid reason for modeling indirectly what he could have modeled directly. SA109-10.

When defense expert Dr. Hausman used Dr. Gilbert's own regression variables to model directly what Dr. Gilbert modeled indirectly, the results showed that over 50% of class members did not pay higher prices as a result of longer queues. SA109. Dr. Gilbert's indirect approach, by contrast, averages away unharmed class members and generates "false positives" by attributing damage even to contracts that did not include the MWP or that capped the MWP at levels lower than Dr. Gilbert's estimated but-for MWP. SA110; SJA3101; SJA3325-27. As a result of these fatal flaws, Dr. Gilbert's models provide no common proof of classwide injury. *See Lamictal*, 957 F.3d at 194 (vacating class certification where expert's reliance on averaging potentially "mask[ed]" uninjured class members); *Rail I*, 725 F.3d at 252-55 (reversing class certification where proposed proof of classwide injury generated "false positives"); *Bell Atl.*, 339 F.3d at 307 (denying class certification where methodology was "based on nationwide averages" that did not "adjust for the variegated nature of the businesses included in the classes").

The FLPs counter that "there is no *per se* rule prohibiting reliance on averaging" (FLP Br. 64), but they fail to cite a single decision that accepted averaging where, as here, it yields false positives and masks the existence of unharmed class members. The FLPs also make a passing assertion that averaging is

reasonable here (*id*.), but, as the district court recognized, that assertion does not alter the fact that Dr. Gilbert's reliance on averaging masks the existence of unharmed class members. SA110. The FLPs fail to identify any "clear error" in that finding, which is well supported by the record. *See* SJA657-60; SJA3101; SJA3325-27.

The FLPs finally argue that they are "only seeking certification of a class of contracts containing the MWP" (FLP Br. 65), but that argument contradicts their position that the class definition includes aluminum purchasers "regardless" of whether their purchase contract "explicitly" contains the MWP (*id*. at 66). In any event, the FLPs ignore the potential for variation in the *way* the MWP is incorporated into contracts and for negotiations over other price terms to offset any queue-related increases in the MWP. Abundant evidence establishes that this is exactly what occurred for large numbers of class members. *See* SA109-10; SJA657-59; SJA755-58.

5. Dr. Gilbert's models fail to account for the effects of queues on the LME Cash Price.

A fifth and final flaw in Dr. Gilbert's models is that they wholly ignore the tendency of queue-driven *decreases* in the LME Cash Price to offset queue-driven *increases* in the MWP. *See* SA99-108. When these effects are taken into account, "Dr. Gilbert's modeling falls short of reliable classwide proof that the alleged

conspiracy resulted in higher purchase prices paid by members of the putative class." SA99.

As noted above, instead of modeling the effects of queues on all-in purchase prices, Dr. Gilbert modeled the effect of queues on the MWP alone. SA75-76; SA86; SA108. He tried to justify that decision by using a regression analysis to show that queues had no "persistent impact" on the LME Cash Price. SA105 (internal quotation marks omitted). But the district court correctly found that this regression suffered from a fatal "methodological lapse": it failed to control for the effects of the market contango on aluminum prices. SA105-07; SJA641-44. When the contango is taken into account, Dr. Gilbert's regression shows that queues *do* depress the LME Cash Price. SA105-06; SJA644-46. The FLPs assert in passing that there was no need to account for the contango (FLP Br. 61), but they fail to identify any "clear error" in the district court's contrary conclusion, which is well-supported by the record. SA105-07; SJA641-45; JA585-93. Indeed, even Dr. Gilbert recognized the need to account for the contango when modeling the effects of queues on the MWP. SA105. Dr. Gilbert's models are thus incapable of proving classwide antitrust injury because they "assume that queues had no effect on LME prices *at any time* and gauge the impact of the alleged conspiracy by modeling changes in the MWP alone." SA108.

The FLPs counter with the incorrect assertion that Defendants' "trading models" ignore any alleged relationship between queues and the LME Cash Price. FLP Br. 30, 56. The cited documents, however, are not "trading models" and do not purport to address the relationship between queues, the LME Cash Price, and the MWP. Instead, they are one-off emails and elementary spreadsheets discussing the potential benefits of specific transactions. JA1191-213; SJA1970-79; SJA2102-05; SJA2165-68. The FLPs contend that these one-off documents ignore the possibility of fluctuations in LME prices, but if that is true (which is far from clear), it is presumably because Defendants hedged the relevant LME price exposure on the LME. *See* FLP Br. 7 (noting that Defendants typically hedge LME price exposure).

The FLPs also argue that the effect of queues on the LME Cash Price is irrelevant because fixing a "component" of a price is a violation of the antitrust laws under this Court's decision in *Gelboim*. *Id.* at 57. But even if Plaintiffs were able to prove an antitrust violation here (which they cannot), proof of a *violation* is not synonymous with proof of *injury*. *See* SA71-73; *Aluminum III*, 833 F.3d at 157-58 (assuming violation of antitrust laws, but affirming dismissal of claims of indirect purchasers for lack of antitrust injury); *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 437 (2d Cir. 2005) (allegation of per se violation "does not absolve [plaintiffs] of the obligation to demonstrate [antitrust] standing"). Furthermore, the district court correctly distinguished *Gelboim* on the ground that Defendants are not

accused of "fixing" the MWP. SA103. "Instead, defendants, by multiple mechanisms, allegedly increased queue lengths, expecting this to elevate the MWP." SA103. Thus, if queues had mixed effects on the MWP and the LME Cash Price and did not raise all-in aluminum prices, there would be no injury to class members. *See id.*

The FLPs fare no better with their suggestion that Dr. Gilbert's failure to account for the effects of queues on the LME Cash Price is a "merits debate" for the jury to decide. FLP Br. 62. As the district court explained, "Dr. Gilbert's models themselves are the FLPs' central basis for establishing classwide injury." SA82. In deciding class certification, the district court was required to decide, under a preponderance of the evidence standard, whether Dr. Gilbert's models are defective because they rely on an incorrect premise that queues did not depress the LME Cash Price at any time during the class period. If Dr. Gilbert is wrong—and queues *did* affect the LME Cash Price during some or all of the class period—then the FLPs' proposed common proof collapses, rendering class certification inappropriate. *See* SA81 ("[T]he reliability of Dr. Gilbert's chain of models may not be deferred or deflected to a trial on the merits."); *Rail I*, 725 F.3d at 255 ("Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it."); *Lamictal*, 957 F.3d at 192-93 (district court must conduct "rigorous analysis of the competing expert reports and resolv[e] the

competing factual disputes on which the reports rely"); 1 MCLAUGHLIN ON CLASS ACTIONS § 3:14 ("[The Second Circuit] unmistakably require[s] a direct weighing on class certification of competing expert analyses under a preponderance of evidence standard.").

Finally, citing *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015), and *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons*, 502 F.3d 91 (2d Cir. 2007), the FLPs argue that the presence of a "de minimis" number of unharmed class members would not necessarily defeat class certification. *See* FLP Br. 52-53, 60. But those decisions stand only for the proposition that the presence of a few unharmed class members is not fatal if the unharmed class members can be "picked off in a manageable, individualized process at or before trial." *See Asacol*, 907 F.3d at 53-54 (distinguishing *Nexium*). As the district court recognized, any such "winnowing mechanism" would have to be "truncated enough to ensure that common issues predominate, yet robust enough to preserve the defendants' . . . due process rights to contest every element of liability and to present every colorable defense." SA80 (quoting *Rail II*, 934 F.3d at 624-25). No such winnowing mechanism exists here, and the FLPs have never suggested otherwise. Instead, the FLPs rely entirely on indiscriminate "common evidence" that generates "false positives" and ignores or averages away all unharmed class members. *See* SA85,

97-98, 100, 108, 110. The district court thus correctly held that individual inquiries into injury and causation would predominate at trial. SA111.

II. THE SUMMARY JUDGMENT ORDER SHOULD BE AFFIRMED.

The district court's decision granting summary judgment to Defendants likewise should be affirmed. Applying the well-established test for efficient-enforcer standing to the unique facts of these cases, the district court held that Plaintiffs "failed to satisfy three of the four efficient-enforcer factors" and thus dismissed their claims "for want of antitrust standing." SPA67. Plaintiffs identify no basis for reversing that decision.

As the district court recognized, Plaintiffs' claims present an even weaker case for efficient-enforcer standing than many other benchmark-manipulation claims that have been dismissed on efficient-enforcer grounds following this Court's decision in *Gelboim*. *See* SPA24; SPA40; SPA47-48; SPA62. Similar to those other benchmark cases, Plaintiffs here "did not buy aluminum from defendants or their co-conspirators," but instead bought "from unrelated third parties: generally, smelters of aluminum." SPA4. But unlike those other cases, this is not a case "in which defendants are alleged to have colluded to directly rig an industry-wide . . . benchmark price through false submissions about transactions or similar subterfuges." SPA47. Instead, "plaintiffs here posit a more attenuated link between defendants' actions and the prices plaintiffs ultimately paid." *Id*. In particular,

"Plaintiffs' theory of harm posits that, as a result of steps defendants took to lengthen warehouse queues, spot-market participants adjusted their purchase prices upward, which ultimately refracted the MWP price at the relevant time, affecting transactions in which defendants did not participate but which embedded the MWP as a price component." SPA47-48. The district court correctly held that this attenuated theory of causation deprives Plaintiffs of efficient-enforcer standing.

A. The Clayton Act Limits The Range Of Private Plaintiffs With Standing To Assert Antitrust Claims.

To assert a claim for damages under Section 4 of the Clayton Act, "private plaintiffs must demonstrate antitrust standing." *Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc.*, 467 F.3d 283, 290 (2d Cir. 2006). "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 62 (2d Cir. 2019) (quotation omitted). Instead, Congress adopted Section 4 with the understanding "that antitrust damages litigation would be subject to constraints" that limit private parties' standing to sue for damages. *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 533 (1983) ("*AGC*").

As this Court explained, "[t]he doctrine of antitrust standing prevents private plaintiffs from recovering damages under § 4 merely by showing injury causally linked to an illegal presence in the market." *Gatt Commc'ns, Inc. v. PMC Assocs.,*

L.L.C., 711 F.3d 68, 76 (2d Cir. 2013) (quotation and alterations omitted). "[A]ntitrust standing for a private plaintiff requires [i] a showing of a special kind of 'antitrust injury,' as well as [ii] a showing that the plaintiff is an 'efficient enforcer' to assert a private antitrust claim." *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121 (2d Cir. 2007). As a result, even if a plaintiff can show antitrust injury, that does not "necessarily establish [its] standing to sue." *Daniel*, 428 F.3d at 443. The plaintiff also must satisfy what are known as the "efficient enforcer factors." *Gelboim*, 823 F.3d at 777.

The efficient-enforcer factors reflect "a concern about whether the putative plaintiff is a proper party to 'perform the office of a private attorney general' and thereby 'vindicate the public interest in antitrust enforcement.'" *Gatt*, 711 F.3d at 80 (quoting *AGC*, 459 U.S. at 542). They require courts "to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *AGC*, 459 U.S. at 535. "Built into the analysis is an assessment of the 'chain of causation' between the violation and the injury." *Gelboim*, 823 F.3d at 772 (quoting *AGC*, 459 U.S. at 540). A plaintiff that is not an efficient enforcer lacks antitrust standing, and its claims should be dismissed. *Daniel*, 428 F.3d at 443.

B. Plaintiffs Lack Efficient-Enforcer Standing Under The Governing Four-Factor Test.

A four-factor test is employed to determine whether an antitrust plaintiff is an efficient enforcer: (i) "the directness or indirectness of the asserted injury," (ii) the

"existence of more direct victims of the alleged conspiracy," (iii) "the speculativeness of the alleged injury," and (iv) "the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other." *See AGC*, 459 U.S. at 540-45; *Amex Anti-Steering*, 2021 WL 5441263, at *4; *IQ Dental*, 924 F.3d at 65; *Gelboim*, 823 F.3d at 778; *Daniel*, 428 F.3d at 443. "The weight to be given the various factors will necessarily vary with the circumstances of particular cases." *Amex Anti-Steering*, 2021 WL 5441263, at *4 (citation and quotation marks omitted). The district court correctly granted summary judgment here because Plaintiffs cannot satisfy three of the four efficient-enforcer factors. SPA67.

1. Plaintiffs' asserted injuries are fatally indirect.

"The first efficient-enforcer factor asks whether 'the violation was a direct or remote cause of the injury.'" *Amex Anti-Steering*, 2021 WL 5441263, at *5 (quoting *Gelboim*, 823 F.3d at 772). "This factor turns on 'familiar principles of proximate causation.'" *Id.* (quoting *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 412 (2d Cir. 2014)).

In applying the directness factor, courts evaluate the "chain of causation" linking the asserted injury to the alleged wrongdoing and also consider whether the plaintiff's theory of injury raises the specter of "damages disproportionate to wrongdoing." *Gelboim*, 823 F.3d at 778-79. "In the context of antitrust standing,

proximate cause generally follows the first-step rule." *Amex Anti-Steering*, 2021 WL 5441263, at *5 (quoting *Lotes*, 753 F.3d at 412). "Under the rule, injuries that happen at the first step following the harmful behavior are considered proximately caused by that behavior." *Id*. The district court correctly found that this factor "decisively favors" dismissal of Plaintiffs' claims. SPA47.

a. Plaintiffs' claims rely on an unusually complex and attenuated chain of causation.

As the district court stated, Plaintiffs' claims "involve an unusually indirect chain of causation" that distinguishes this case from others in which the defendants allegedly "directly rig[g]ed" a benchmark price. SPA47. This chain of causation involves at least five separate steps: (i) Defendants' conduct allegedly lengthened the aluminum queue at warehouses in Detroit and Vlissingen (SA19-26; A398-420; A507-35); (ii) longer queues at those warehouses allegedly caused participants in the spot market to enter into spot transactions at higher prices (SA8; JA72; SJA163-64; SJA630; CA590); (iii) those spot transactions allegedly were reported to Platts surveyors and supposedly caused Platts to raise its assessment of the MWP (SA8-9; A374-75; A484-85; JA71-72); (iv) longer queues allegedly did *not* cause participants in the LME futures market to reduce the prices at which they bought and sold LME futures contracts (SA84; A439; A555; SJA192; SJA624-30); and (v) the higher MWP reported by Platts allegedly caused Plaintiffs to pay higher all-in prices to aluminum smelters because Plaintiffs and the smelters (a) agreed to incorporate

the MWP as a price component in some of their contracts, and (b) did not negotiate any discounts or adjustments to other price components that offset any queue-driven increases in the MWP (SA9-10; A374-76; A484-86).

Plaintiffs' multi-step theory of causation renders their claims "indirect" under the "first-step rule," which holds that the injuries "proximately caused" by an antitrust violation are those "that happen at the first step following the harmful behavior." *See Amex Anti-Steering*, 2021 WL 5441263, at *5; *see also AGC*, 459 U.S. at 534 ("The general tendency of the law, in regard to damages at least, is not to go beyond the first step" (quotation omitted).) It can hardly be said that Plaintiffs' asserted injuries "happened at the first step following" the challenged conduct. *Amex Anti-Steering*, 2021 WL 5441263, at *5. Plaintiffs' theory of harm instead "depends upon a complicated series of market interactions" and "the actions of innumerable individual decision-makers." *Reading Indus., Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 13 (2d Cir. 1980). In fact, Plaintiffs' alleged injuries depend on the decisions of at least three sets of independent third parties: (i) unknown participants in the spot market that allegedly negotiated higher spot prices because of warehouse queues and reported those higher spot prices to Platts, (ii) unknown traders on the LME futures market that allegedly did not discount the prices at which they bought and sold LME futures contracts because of the queues, and (iii) aluminum smelters that allegedly decided to incorporate the MWP as a

component of the all-in price of aluminum and not to discount any other component of that price in their negotiations with Plaintiffs. *See* SPA 47-48; *supra* at 84-85.

Plaintiffs insist that their alleged injuries are direct because "they purchased aluminum in the market restrained by Defendants' conduct." IP Br. 37. As an initial matter, just because Plaintiffs and Defendants "are participants in the same market" (*id*. at 42) does not make Plaintiffs' alleged causal chain any less attenuated or their alleged injuries any less indirect. Plaintiffs' contention is also contrary to multiple decisions of this Court holding that the plaintiffs were inefficient enforcers even though they participated in the market allegedly restrained by the defendants. *See, e.g.*, *Amex Anti-Steering*, 2021 WL 5441263, at *1 (holding that merchants are not efficient enforcers despite claim that Amex's anti-steering rules restrained competition "throughout the relevant market" (quotation omitted)); *IQ Dental*, 924 F.3d at 61, 65-67 (holding that competing distributor of dental supplies is not efficient enforcer on boycott claim); *Paycom*, 467 F.3d at 293 ("Even though we recognize that Paycom, as a consumer of payment card network services, is a participant in the relevant market, we find that Paycom is not an 'efficient enforcer' and thus lacks standing to seek damages . . . ." (citations omitted)).

In addition, Plaintiffs' suggestion that they possess efficient-enforcer standing merely because they participated in the allegedly-restrained market conflates the efficient-enforcer requirement with the separate requirement of antitrust injury. As

this Court held *Aluminum III*, "to suffer *antitrust injury*, the putative plaintiff must be a participant in the very market that is directly restrained." 833 F.3d at 161 (emphasis added). Although "*antitrust injury* is suffered by participants in the restrained market," *id*. (emphasis added), a plaintiff is not an efficient enforcer simply because it participated in the relevant market. *See, e.g.*, *Amex Anti-Steering*, 2021 WL 5441263, at *1, *5, *8; *Paycom*, 467 F.3d at 293 & n.9. Plaintiffs' contrary assertion would collapse the requirements for antitrust injury and efficient-enforcer standing into a single inquiry—whether the plaintiff participated in the restrained market—and would mean that any plaintiff that adequately pleads antitrust injury also qualifies as an efficient enforcer. The law is otherwise. *See, e.g.*, *Daniel*, 428 F.3d at 443 ("Even if we were to conclude that the plaintiffs had adequately stated an antitrust injury, that would not necessarily establish standing to sue in this case.").

Plaintiffs further argue that their alleged injuries are direct because Defendants had a "motive" (IP Br. 43) to inflate the MWP. *See also* FLP Br. 23 n.13. But Plaintiffs do not contend that any Defendant had a motive to inflate the all-in price of aluminum paid by Plaintiffs. They instead assert that "Defendants' motivation . . . was to make more money from inflated *premiums*." IP Br. 15 (emphasis added). Moreover, the Supreme Court has held that "[t]he availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 479

(1982). "[A]n allegation of improper motive" thus is "not a panacea" that alone confers antitrust standing by rendering the plaintiff's alleged injury direct. *AGC*, 459 U.S. at 537. Nor are allegations that injuries were "foreseeable" sufficient to convert indirect injuries into direct ones. *See, e.g., Amex Anti-Steering*, 2021 WL 5441263, at *7 ("The appellants' injury may have been foreseeable, predictable, and even calculable, but proximate cause—especially in the economic harm context—requires more than foreseeability.").

b. Smelters' independent pricing decisions break the chain of causation.

The district court further determined that, "even assuming in plaintiffs' favor all prior steps in the chain of causation . . . , the fifth step alone—the independent decision by non-defendant sellers to charge plaintiffs a price containing the allegedly inflated MWP—breaks the chain of causation between defendants' actions and plaintiffs' injury." SPA49 (quotation omitted). As the court observed, "the evidence adduced strongly indicates that charging customers the MWP was an independent pricing decision by smelters, not the inevitable result of defendants' alleged conspiracy." SPA50. "As a result, plaintiffs' alleged harms from paying an inflated MWP, even assuming that that price term was inflated due to defendants' machinations, are most proximately attributable to the pricing decisions of third parties to the alleged conspiracy, not to defendants' conduct." SPA50.

Plaintiffs have acknowledged that [redacted] *See* SPA50; CA1982-83; SJA3088-89; *see also* SJA755-58. In addition, at least six of the eight Plaintiffs entered into contracts that did not incorporate either of those reference prices. *See* CA115-28; CA174-75; CA185-91; CA207-13; CA540-41; CA558-59; CA571-73. As the district court observed, "the fact that so many such transactions took place reveals that it was readily possible for sellers of primary aluminum to decide *not* to charge" either the MWP or the MWTP. SPA50.

Despite this evidence, Plaintiffs assert that it was "industry convention" for sellers of aluminum to charge a regional premium as part of the all-in price. IP Br. 3, 5, 8, 30, 37; *see also id*. at 39 n.15. "But that fact, even if assumed true, does not make plaintiffs' claims direct" because the decision to follow that supposed convention and incorporate a regional premium into particular transactions "remained up to the seller." SPA50-51. "Plaintiffs do not argue that an enterprising smelter or producer could not have chosen to charge a lower (or no) premium, perhaps to undercut competitors and grow their own market share." SPA51.

Plaintiffs also had the ability to—and did—negotiate the all-in price they paid for aluminum. *See* SPA18-19; CA50-51; CA60-63; CA87; CA172-73; CA193-94; CA198-200; CA223-37; CA248; CA252; CA506-08; CA552-54; CA565-67.

Although Plaintiffs insist that they could not negotiate the amount of regional premiums, they concede that they could and did negotiate other components of the all-in price such as conversion fees, transportation costs, and volume discounts. IP Br. 10-14; FLP Br. 16-17; SPA18. Given that the regional premium was a relatively small component of all-in aluminum prices, these negotiations gave Plaintiffs an opportunity to offset any alleged increase in the premium caused by warehouse queues and to reduce their "total net cost." CA1721.[14]

In short, "even where the MWP was paid, the non-conspiring smelters retained latitude to negotiate prices, including by offering offsetting discounts on other portions of the all-in aluminum price." SPA52. As one Plaintiff stated, [redacted] CA194. Another Plaintiff acknowledged that [redacted] CA198; *see also* CA252; CA283; CA557. And one Plaintiff admitted that [redacted] *See* CA1716; CA1721. That Plaintiff testified: [redacted]

[14] Between January 1, 2010 and March 25, 2016, the MWP ranged between a low of about 5% and a high of about 23% of all-in aluminum prices. CA14.

[redacted] CA1721. The district court thus concluded that "the availability of negotiations as to other price components, and their capacity to offset the inflated MWP, reinforces that the prices plaintiffs paid to non-defendants were decided by the smelters (and the plaintiffs), not by defendants." SPA52.[15]

The undisputed facts thus firmly establish that Plaintiffs' alleged injuries are "indirect" under the first-step rule that governs the directness factor. *See, e.g.*, *Amex Anti-Steering*, 2021 WL 5441263, at *4-6. In *Amex Anti-Steering*, this Court held that the plaintiffs—a group of merchants that did not accept American Express cards—lacked antitrust standing to sue for injuries allegedly arising from the Amex rules that prohibited merchants from steering customers to use other forms of payment. *See id*. The Court observed that "[a]t the first step" of the plaintiffs' claims, "Amex raised the price for Amex-accepting merchants through the Anti-Steering Rules," but "did not raise the [plaintiffs'] fees" because the plaintiffs did not accept American Express cards. *Id*. at *6. The Court thus recognized that, "if

[15] Plaintiffs' only response to this evidence is the following cryptic assertion in a footnote: "[I]f the price of one of the component prices is artificially inflated, then even if negotiated in relation to that component, the entire negotiation starts at an artificially high point . . . ." IP Br. 41 n.17. Even if true, that assertion would not diminish the central role of non-conspiring smelters in determining the all-in aluminum prices paid by Plaintiffs, breaking the chain of causation and rendering Plaintiffs' alleged injuries indirect.

there are 'direct victims,' those victims are the merchants to which Amex's Anti-Steering Rules applied." *Id*. The plaintiffs, by contrast, "were allegedly injured when Amex's competitors, covered by Amex's price umbrella, raised their own prices," or in other words, the plaintiffs were injured when "Amex's imposition of increased merchant fees 'enabled' the competitor companies 'to increase their own merchant fees.'" *Id*. at *6 (citation omitted). Although the plaintiffs' allegations "present[ed] a compelling prima facie case of foreseeable damages," *id*. at *7, this Court nonetheless held that the alleged injuries were indirect, reasoning that "'enabling other companies to raise the [plaintiffs'] fees does not establish the 'direct relation' between injury and antitrust violation that the first-step rule requires," *id*. at *6 (citation omitted).

Likewise here, Plaintiffs' alleged injuries are indirect under the first-step rule. Plaintiffs allege that Defendants lengthened warehouse queues in Detroit and Vlissingen in order to inflate the prices that Defendants charged for aluminum they sold to consumers. *See* IP Br. 43; FLP Br. 23. Thus, as this Court put it in *Amex Anti-Steering*, if there are "direct victims" of Defendants' purported conduct, those direct victims are the consumers that purchased aluminum from Defendants. *See* 2021 WL 5441263, at *6. Plaintiffs' claims, by contrast, arose indirectly when Defendants' conduct allegedly "enabled" third-party smelters to charge higher prices for aluminum by including the MWP in their sales contracts and refusing to discount

other components of all-in prices. Put simply, "[Defendants] did not raise the appellants' [prices]. Nor could [they] have," as Defendants had no role in the price negotiations between Plaintiffs and their suppliers. *See id.* Plaintiffs therefore fail to satisfy the first efficient-enforcer factor: their assertion that Defendants "enabled" other companies to charge higher prices "does not establish the 'direct relation' between injury and antitrust violation that the first-step rule requires." *Id.*

c. There is a clear risk of disproportionate liability.

In discussing the first efficient-enforcer factor in *Gelboim*, this Court stated that if the defendants "control only a small percentage of the ultimate identified market, th[e] case may raise the very concern of damages disproportionate to wrongdoing noted in *Mid-West Paper*." 823 F.3d at 779 (citation omitted).

In *Mid-West Paper*, the Third Circuit held that a plaintiff that did not deal directly with an alleged conspirator lacked antitrust standing. 596 F.2d at 587. The court stressed that the plaintiff was "not in a direct or immediate relationship to the antitrust violators: The defendants secured no illegal benefit at [the plaintiff's] expense; their tainted gains were reaped from those . . . to which they actually sold their products; and [the plaintiff's] added costs, if any, were pocketed by [non-conspiring third parties], who presumably were free to charge a lower price if they so desired." *Id.* at 583. In so ruling, the Third Circuit expressed concern that a

contrary standing rule would result in damages disproportionate to the alleged wrongdoing:

> Allowing recovery for injuries whose causal link to defendants' activities is as tenuous as it is here could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits, because under the theory propounded by [the plaintiff], price fixers would be held accountable for higher prices that arguably ensued in the entire industry.

Id. at 586.

The same concerns of "damages disproportionate to wrongdoing" raised in *Gelboim* and *Mid-West Paper* apply to Plaintiffs' claims. The district court correctly concluded that "[a]llowing plaintiffs to pursue defendants with whom they did not do business would . . . create the risk of disproportionate liability." SPA52. As the court explained, "plaintiffs have not adduced any evidence that defendants' sales of primary aluminum approach the [amount] that smelters sold during the relevant period." SPA56. "Were defendants liable for all sales by those non-conspiring parties," the court stated, "defendants' potential damages would far outstrip their ill-gained profits." SPA57.[16]

[16] The district court stated that "the possibility of outsized damages reinforces the Court's holding" but "is not dispositive." SPA30 n.26. The court made clear that given the indirectness of Plaintiffs' alleged injuries, it "would reach the same result absent that consideration[.]" *Id.*

It is undisputed that smelters sold vastly larger quantities of aluminum than Defendants during the relevant period. Plaintiffs have acknowledged that the "vast majority" of primary aluminum was sold by smelters directly to users under long-term supply contracts. JA68; A368-69; A479. Indeed, Plaintiffs conceded that purchases from Defendants were "dwarfed by the purchases from the smelters." A879. [redacted] CA14. [redacted] CA1985. And Plaintiffs agree that 125 million metric tons of aluminum were purchased directly from smelters worldwide (excluding China) during the relevant period. A879. Thus, "based on the record here, the transactions in which defendants did not participate and on which they did not profit overwhelm in numbers those to which defendants were parties." SPA53.

To an even greater degree than in other benchmark cases, allowing Plaintiffs' claims to proceed here would create the prospect of "overdeterrence" and could easily "chill[] economically efficient competitive behavior." *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 394 (7th Cir. 1993) (quotation omitted). *Gelboim* and other benchmark cases generally involved allegations of *per se* unlawful price-fixing conduct. *See, e.g.*, *Gelboim*, 823 F.3d at 771. Here, by contrast, the challenged conduct is potentially procompetitive rule-of-reason

conduct. *See Aluminum II*, 95 F. Supp. 3d at 434, 449 (noting that this case does not involve "a traditional 'price fix'" and that, "[i]n the absence of familiarity with a type of business conduct and competitive impact, courts apply the rule of reason analysis"). For example, although Plaintiffs challenge Metro Detroit's practice of paying incentives to attract aluminum, those payments provided an up-front discount on warehouse rent, and discounts ordinarily are viewed as procompetitive. *See Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 269 (2d Cir. 2001) ("low prices"—including "incentives"—"are a positive aspect of a competitive marketplace and are encouraged by the antitrust laws"). Similarly, although Plaintiffs allege that Defendants engaged in excessive cancellations of Metro Detroit warrants, cancelling those warrants was the only way to remove aluminum from Metro Detroit and make it more available to users. *See* SJA933 [redacted] SJA636 & n.30 [redacted]

Rational market participants are unlikely to come anywhere near this procompetitive conduct in the future if there is a possibility that such conduct could expose them to "ruinous" liability vastly disproportionate to the potential gains from the conduct. *See Mid-West Paper*, 596 F.2d at 586. Denying standing to assert such

disproportionate claims would thus avoid the danger of overdeterrence and ensure that "persons operating in the market do not restrict procompetitive behavior because of a fear of antitrust liability." *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 10 (1st Cir. 1999) (quotation omitted); *see also McCready*, 457 U.S. at 477 ("[T]he potency of [the treble-damages] remedy implies the need for some care in its application."); *Mid-West Paper*, 596 F.2d at 587 (umbrella claims risk "overkill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress" (quoting *Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971)); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 16 & n.32 (1984) (observing that antitrust law can deter more procompetitive than anticompetitive conduct if it "errs even a few percent of the time" and that the "rate of error may be quite high").

The IPs attempt to address the risk of overdeterrence by limiting this Court's focus to *their* individual claims, stating that the IPs' claims are "hardly excessive"—[redacted] IP Br. 45, 47, 49 n.19. They thus criticize the district court for considering Defendants' potential exposure to "every aluminum market purchaser." *Id*. at 49 n.19. That criticism is unfounded. To begin, the FLPs seek to represent a putative class of *all* aluminum purchasers over the six-year period between February 2010 and March 2016. FLP Br. 14. Although the IPs

state that they themselves seek [redacted] (IP Br. 47), the FLPs are notably silent on this issue.

More fundamentally, the efficient-enforcer inquiry is not limited to the damages sought by the individual plaintiffs in an action, but rather considers the defendants' potential liability in the event that the plaintiffs are found to have antitrust standing and every similarly situated plaintiff then can seek treble damages. For example, in raising the prospect of "damages disproportionate to wrongdoing" in *Gelboim*, this Court was not concerned about the potential recoveries of the individual plaintiffs before it. *See* 823 F.3d at 767-68 & nn.6-7, 779. Rather, the Court noted that if those plaintiffs were found to be efficient enforcers, then the defendants might be exposed to "treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative swap." *Id*. at 779.

Likewise, the Third Circuit in *Mid-West Paper* was not concerned about the damages sought by the individual plaintiff in that case, a grocery store and delicatessen named Murray's. 596 F.2d at 575-76, 580. The Third Circuit instead considered the defendants' potential liability if all similarly situated plaintiffs were found to have antitrust standing and the defendants thus could "be held accountable for higher prices that arguably ensued in the entire industry." *Id*. at 585-86. In rejecting such "open-ended liability," the court focused on the possibility of a "treble

damages recovery that is based upon profits obtained by the rest of the industry." *Id*. at 586 n.51.

Plaintiffs also exaggerate the extent to which Defendants allegedly profited from an increase in the MWP by overstating Defendants' sales of aluminum between 2010 and 2015. According to Plaintiffs, [redacted] IP Br. 45 (citing CA2002 (¶84); CA595; A574 (at 80:19-21)). The cited evidence, however, does not support that assertion. For example, Plaintiffs' "sales" figures include trades on the LME involving LME warrants that were delivered back to the LME to satisfy short contracts. *See* CA2003; JA394-96. When a trader delivers warrants to the LME to close out a short position, the trader receives no premium, and no physical aluminum is delivered to customers. *See* CA2003. More generally, Plaintiffs' figures appear to refer to Defendants' worldwide aluminum *holdings* at various points in time (both warranted aluminum in LME warehouses and physical aluminum stored elsewhere), not to their *sales* of aluminum to U.S. customers on which Defendants allegedly obtained the MWP. *See* CA2002-03; SJA180; JA394-96; A574. Plaintiffs thus offer no evidence of Defendants' purported "ill-gotten gains" (SPA57) that could be compared with Defendants' potential exposure if all purchasers of aluminum from smelters were granted standing to seek treble damages from Defendants.

Lastly, Plaintiffs contend that Defendants' potential damages are neither "benumbing" nor "truly astronomical." IP Br. 47. But that is not the relevant legal standard. The efficient-enforcer inquiry instead asks whether the defendants would be "subject to liability that is *disproportionate* to their allegedly ill-gotten gains." *In re Platinum & Palladium Antitrust Litig.*, 449 F. Supp. 3d 290, 310 n.14 (S.D.N.Y. 2020). That undoubtedly would be the case here under Plaintiffs' expansive view of antitrust standing.

2. More direct "victims" of the alleged conspiracy exist.

The second efficient-enforcer factor asks "whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation." *Gelboim*, 823 F.3d at 772. The existence of such other persons "diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general" because denying a remedy to such a remote party "is not likely to leave a significant antitrust violation undetected or unremedied." *AGC*, 459 U.S. at 542. "Implicit in the inquiry is recognition that not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced." *Gelboim*, 823 F.3d

at 779. The goal is to "find[] the plaintiffs best suited to serve as 'private attorney[s] general.'" *IQ Dental*, 924 F.3d at 67 (quoting *AGC*, 459 U.S. at 542).[17]

Here, "[t]here are more efficient enforcers who could and, indeed have, sued: those who bought primary aluminum directly from defendants." SPA59. For example, two large aluminum purchasers that are still litigating their claims in the district court—Reynolds and Southwire—allegedly purchased large amounts of aluminum directly from Defendants. SPA57-58. Assuming *arguendo* that their claims have merit, Reynolds and Southwire and others like them "were more directly injured" than Plaintiffs because "defendants—not a third party—made the decision to charge the price component [the MWP] which defendants allegedly colluded to inflate." SPA58. "As to those purchasers," unlike Plaintiffs here, "the pricing decisions can fairly be attributed most proximately to defendants' conduct." SPA59. Given the existence of an identifiable class of persons who were more directly injured by Defendants' alleged misconduct, "the second efficient-enforcer factor weighs against [Plaintiffs'] antitrust standing." *IQ Dental*, 924 F.3d at 66; *see also Amex Anti-Steering*, 2021 WL 5441263, at *6 ("[T]he merchants who have a

[17] This is true even if "external or practical considerations (such as the statute of limitations) may eliminate" other potential plaintiffs. *IQ Dental*, 924 F.3d at 67. As this Court commented, "it would be strange and unworkable if new efficient enforcers sprang up simply by operation of the statute of limitations on other enforcers." *Id.*; *see also Gatt*, 711 F.3d at 79 (the second efficient-enforcer factor still "works against" plaintiff even if "future actions may well be time-barred").

relationship with Amex *were* harmed at the first step by Amex's Anti-Steering Rules. And those merchants have already sued Amex.").

Plaintiffs do not dispute that more directly injured plaintiffs like Reynolds and Southwire exist. They instead argue that the existence of those other plaintiffs "is not alone sufficient to deny efficient enforcer status." IP Br. 50. But the district court never suggested otherwise. "Although the existence of more-motivated plaintiffs is not dispositive," that fact still "weighs against" antitrust standing, as the district court correctly held. *IQ Dental*, 924 F.3d at 66; *see also Daniel*, 428 F.3d at 443-44 ("[O]ne factor raises particular standing concerns: the presence of other efficient enforcers 'whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement.'" (quoting *AGC*, 459 U.S. at 542)).

3. Plaintiffs' alleged damages are highly speculative.

Under the third efficient-enforcer factor, courts consider whether the asserted damages are speculative. *See AGC*, 459 U.S. at 542; *IQ Dental*, 924 F.3d at 66; *Gatt*, 711 F.3d at 76, 79. "[H]ighly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement." *Gelboim*, 823 F.3d at 779. This factor, too, weighs against antitrust standing here.

As the district court concluded, "the process of determining a plaintiff's damages on an aluminum purchase from a non-defendant is rife with complicating factors," including "intervening pricing and contracting decisions by nonculpable

smelters" and "the challenging inquiry into whether, but for the inflated MWP, other price terms would have been different." SPA60. Furthermore, Plaintiffs' theory "is not even that defendants directly manipulated the benchmark price of the good in question," but rather that "defendants conspired to take certain actions tending to elongate the queue at certain aluminum warehouses, which in turn tended to cause a benchmark component of aluminum's price—the MWP—to rise." SPA60. The district court thus properly held that the damages inquiry here "would unavoidably be speculative." SPA65.

Dismissing these "complicating factors" (SPA60) as "a parade of horribles," Plaintiffs insist that their damages are "straightforward" and "anything but speculative" (IP Br. 53). But these assurances do not survive scrutiny. For example, under Plaintiffs' theory, an aluminum purchaser "would have to show how much of any defendant-caused *increases* in the MWP were not offset by resulting *decreases* in the LME settlement price." SPA61; *see also supra* at 52-56. This "[u]ncertainty as to the interplay between the MWP and LME settlement price itself sets this case apart from others." SPA62. A purchaser also would have "to isolate the impact of the alleged conspiracy on the MWP" (SPA61) and then show that any increase in the MWP led to higher all-in prices. "[T]here is no genuine dispute that the relationship between longer queues and the all-in prices paid by customers is complex and debatable." SPA62 n.39. And "the analysis of the market impact, if

any," from Defendants' alleged conduct "unavoidably must be evaluated based on conditions and conduct at the particular moment in time of each transaction." SPA60. Plaintiffs do not address any of these complexities.

Plaintiffs instead argue unconvincingly that "the fact that the district court could identify such factors demonstrates the inquiry is not speculative." IP Br. 54. Plaintiffs suggest that "economic experts will model the impact" of the challenged conduct using "economic principles and statistical techniques" (IP Br. 54 n.21, 55), but the FLPs' attempt to model these issues failed miserably, and "it is difficult to see how [Plaintiffs] would arrive at" reliable damages estimates "even with the aid of expert testimony." *Gelboim*, 823 F.3d at 779.

As in *IQ Dental*, Plaintiffs' unexplained "damages calculation rests on multiple layers of speculation." 924 F.3d at 67. These range from determining how much the lengthening of warehouse queues was attributable to Defendants' alleged conduct as opposed to other market forces, to disentangling the alleged effects of Defendants' conduct on the MWP from the many other factors that affected that reference price, to ascertaining the extent to which any increase in the MWP was offset by a negotiated reduction of other price terms or by an accompanying decrease in the LME Cash Price, all of which combine to make Plaintiffs' asserted damages highly speculative. It is well-settled that "there are inherent limitations in the substantive protection afforded by the antitrust laws: they exclude claims based on

. . . attenuated economic causality that would mire the courts in intricate efforts to recreate the possible permutations in the causes and effects of a price change." *Reading Indus.*, 631 F.2d at 14; *see also id.* at 13-14 ("[T]o find antitrust damages in this case would engage the court in hopeless speculation concerning the relative effect of an alleged conspiracy in the market for refined copper on the price of copper scrap, where countless other market variables could have intervened to affect those pricing decisions."). As this Court stated in *IQ Dental*, "[n]o amount of expert testimony can adequately ameliorate the highly speculative nature of [Plaintiffs'] alleged losses." 924 F.3d at 67.

The speculativeness of Plaintiffs' claims is heightened by the variety of contracting arrangements between smelters and their customers. As the district court observed, "plaintiffs could lock in long-term aluminum contracts that provided a stable all-in price—including the MWP." SPA63. For instance, one [redacted] SJA3408. Another large aluminum purchaser [redacted] SJA792-94. Because "any damages estimate would have to account for the nuances of the particular contracts" (SPA63), Plaintiffs' damages analysis would necessarily be complex and highly

speculative—and much more so than plaintiffs like Reynolds and Southwire that negotiated purchases of aluminum directly from a Defendant.

4. The potential for duplicative recoveries is of lesser concern here.

The fourth efficient-enforcer factor—the risk of duplicative recoveries—does not weigh heavily in either direction and thus is "not of primary concern here." *Gatt*, 711 F.3d at 79. Although there is no obvious risk of duplicative recoveries in the market for physical aluminum (SPA66), granting efficient-enforcer standing to Plaintiffs may imply that traders of futures, options, and other derivatives that were linked to the LME Cash Price or the MWP likewise would have antitrust standing to sue based on trades with non-conspiring third parties, which could present a risk of duplicative recovery or complex apportionment. *See* A829.

In any event, Plaintiffs do not contend that this factor alone gives them antitrust standing. IP Br. 56. Nor could they. *See Amex Anti-Steering*, 2021 WL 5441263, at *8 (holding that plaintiffs were not efficient enforcers even though "[t]here is no risk of duplicate recoveries or complex reapportionment of damages here"); *7 W. 57th St.*, 771 F. App'x at 503 (holding that plaintiff "is not an efficient enforcer" even though defendants did "not offer any serious argument why allowing [plaintiff] to assert antitrust standing would require any sort of complex apportionment of damages or run the risk of duplicative recovery"). The district court thus correctly held that this fourth factor does not change the analysis given

that "the other efficient-enforcer factors disfavor plaintiffs." SPA66. Because Plaintiff cannot "satisfy three of the four efficient-enforcer factors," the district court properly dismissed their claims "for want of antitrust standing." SPA67.

5. Plaintiffs are not efficient enforcers as to aluminum purchases that did not include the MWP.

For the reasons set forth above, Plaintiffs are not efficient enforcers as to *any* of the purchases at issue here. Even under their own theory of antitrust standing, however, Plaintiffs are not efficient enforcers for purchases of aluminum that did not include the allegedly-manipulated reference price—the MWP. *See 7 W. 57th St.*, 771 F. App'x at 502.

In *7 West 57th Street*, this Court held that a plaintiff alleging manipulation of LIBOR lacked antitrust standing to assert claims based on its ownership of bonds that were "not actually tied to LIBOR." *Id.* Applying the four efficient-enforcer factors, this Court concluded that the plaintiff's allegation that the manipulation of LIBOR "affect[ed] the value of [its] bonds" did not plead a direct injury. *Id.* Because the plaintiff's "bonds were not actually LIBOR denominated," this Court stated that "any diminution in value was necessarily directly caused by the independent judgments of participants in the secondary . . . bond market." *Id.* The Court also found that "there are indisputably more direct victims" of defendants' alleged manipulation of LIBOR—plaintiffs whose loans were expressly tied to LIBOR. *Id.* And the Court determined that the plaintiff's alleged damages "would

be highly speculative" because "a jury would need to know what LIBOR hypothetically would have been had Defendants not manipulated it, and how this would have affected the value of [the plaintiff's] bonds." *Id*. at 503. The Court thus ruled that the plaintiff was "not an efficient enforcer of the antitrust laws." *Id*.

The same reasoning applies to Plaintiffs' purchases of aluminum under contracts that did not incorporate the MWP. It is undisputed that at least some of Plaintiffs' contracts did not contain either the MWP or the analogous reference price in Europe (the Rotterdam Premium). Although the IPs assert that "[a]ll but one of IPs' contracts expressly specify the MWP (or Rotterdam) as a price term" (IP Br. 55), many of the IPs' contracts, in fact, contain a different reference price—the MWTP. *See, e.g.*, CA697; CA728; CA742; CA757; CA787; CA1605; CA1618-19; CA1683; CA1687; CA1690; CA1803; CA1806; CA1811. The same is true of many of the FLPs' aluminum contracts. *See, e.g.*, CA166; CA205; CA208; CA212; CA676; CA685; CA689; CA691. And a significant number of Plaintiffs' contracts incorporate *neither* the MWP nor the MWTP. *See, e.g.*, CA117; CA126; CA132; CA134; CA143; CA145; CA147; CA155; CA157; CA159; CA161; CA173; CA175; CA186-87; CA189-91; CA540-41.

Contrary to Plaintiffs' suggestion, purchase contracts that incorporate the MWTP but not the MWP do not qualify as contracts that incorporate the allegedly manipulated reference price and thus do not support antitrust standing. Plaintiffs

appear to assume that the MWTP automatically rises whenever the MWP rises, but that is incorrect. The MWTP is derived from all-in spot market prices, not from the MWP. Specifically, the MWTP is Platts' estimate of the all-in price of aluminum in the spot market for immediate delivery to the Midwest. *See* SA8-9; SPA9; CA13; CA590; CA1973; SJA163. Platts arrives at that estimate based on periodic surveys of the prices paid by market participants in spot transactions. SPA9; CA13; CA1973; SJA163. Plaintiffs have never attempted to show that LME warehouse queues had any direct effect on the negotiation of the all-in spot-market transactions used by Platts surveyors to set the MWTP. To the contrary, all of their evidence of purported "benchmark manipulation" relates to regional premiums such as the MWP. Accordingly, any alleged increase in the MWTP "was necessarily directly caused by the independent judgments of the participants" in the spot market, rendering Plaintiffs' alleged injuries indirect and their alleged damages "highly speculative." *7 West 57th Street*, 771 F. App'x at 502-03.

C. Plaintiffs' Contrary Arguments Lack Merit.

Faced with the district court's meticulous application of each of the four efficient-enforcer factors to the specific facts of these cases, Plaintiffs advance four arguments, repeated throughout their brief, that do not withstand scrutiny.

1. This Court did not decide efficient-enforcer standing in *Aluminum VI*.

Citing *Aluminum VI*, Plaintiffs assert that "this Court has already determined that 'plaintiffs' injuries were a *direct result* of the defendants' anticompetitive conduct.'" IP Br. 36 (quoting 936 F.3d at 95-96). Plaintiffs refer to this phrase from *Aluminum VI* time and again throughout their brief (*id*. at 1, 27, 29, 30, 33, 36, 44, 56), arguing that the district court's application of the first efficient-enforcer factor was contrary to this Court's ruling. *See*, *e.g.*, *id*. at 1 ("Notwithstanding the Second Circuit's conclusion . . . that IPs' claimed injuries 'were a direct result of the defendants' anticompetitive conduct,' the district court this time inexplicably described IPs' injuries as too 'indirect' to support standing . . . .").

Plaintiffs' argument misreads this Court's decision. In *Aluminum VI*, "the only issue on appeal [was] whether the plaintiffs have suffered an antitrust injury." 936 F.3d at 94. This Court did not consider the separate question of efficient-enforcer standing, much less decide that Plaintiffs' asserted injuries are "direct" under the first-step rule for purposes of the first efficient-enforcer factor.[18] "[F]ocus[ing] on the sufficiency of the plaintiffs' legal theory, rather than on their evidence," *id*. at 93 n.3, the Court instead held only that Plaintiffs "have adequately

[18] In fact, "defendants made clear that, although the efficient-enforcer question was not at issue on appeal, they intended to pursue that issue *in the district court* if the Second Circuit reversed on antitrust injury." SPA46 n.29.

pleaded antitrust injury," *id*. at 91. Defendants had argued in *Aluminum VI* that Plaintiffs had failed to plead antitrust injury because the alleged restraint of trade "occurred in the *warehousing* market, which was not the market in which the plaintiffs [allegedly] suffered injury," *i.e*., the primary aluminum market. *Id*. at 96 (emphasis added). This Court disagreed, reasoning that Plaintiffs had adequately alleged antitrust injury "by pleading that the defendants restrained the market for the sale of primary aluminum, and that plaintiffs were injured in making purchases in [that same] market." *Id*. The phrase that Plaintiffs quote from the next sentence of this Court's opinion simply states: "Unlike the plaintiffs in *Aluminum III*, whose injury was an 'incidental byproduct' of the defendants' alleged violation, these plaintiffs' injuries were a direct result of the defendants' anticompetitive conduct." *Id*. (citation omitted). Read in context, that sentence simply indicates that Plaintiffs' alleged injuries were "direct" in the sense that they occurred in the same market that Defendants allegedly restrained—the primary aluminum market. The sentence says nothing about efficient-enforcer standing or about any of the evidence discussed by the district court in granting summary judgment.

As the district court stated, "[n]o party raised the efficient-enforcer issue on appeal in *Aluminum VI*," and this Court "did not consider, let alone decide, that question." SPA46. "*Aluminum VI* thus le[ft] defendants free, with fact discovery now complete, to argue that the evidence adduced is incompatible with efficient-

enforcer status." SPA46. The district court's conclusion that Plaintiffs "failed to satisfy three of the four efficient-enforcer factors," including the "directness" factor (SPA47-52; SPA67), is in no way inconsistent with *Aluminum VI*.

2. The district court did not reverse itself on efficient-enforcer standing.

Plaintiffs further contend that "the district court reversed course from its earlier 2015 decision [in *Aluminum II*] which specifically found IPs' efficient enforcer allegations sufficient." IP Br. 2. The theme that the district court "reversed itself" appears throughout the IPs' brief (*see id*. at 2, 28, 29, 32, 36 n.13, 44, 51, 56), but the IPs once again misread the decision at issue.

In *Aluminum II*, "defendants argued that plaintiffs are not efficient enforcers of the antitrust laws because another group of potential plaintiffs is better positioned to prosecute the alleged antitrust violations: *users of defendants' warehouse services*." 95 F. Supp. 3d at 444 (emphasis added). The district court rejected this argument because any injury to warehouse customers "would concern inflated rents, inflated warehouse fees, or delayed load-outs, and as such would be entirely different from the injury alleged by plaintiffs here, which concern[s] an inflated Midwest Premium." *Id*. In so ruling, the court did not address the further question of whether efficient-enforcer standing to sue based on the allegedly inflated MWP should be limited to plaintiffs that bought aluminum directly from, and paid the MWP directly to, an alleged conspirator.

Nor did the district court have the benefit of a factual record in *Aluminum II*. Contrary to Plaintiffs' *allegation* that all of their aluminum-purchase contracts "contain provisions tying the contract prices to the Midwest Premium," *id*., "the evidence adduced now makes clear that many aluminum contracts lack such a term" (SPA43). The court in *Aluminum II* likewise "did not have occasion to consider the extent to which plaintiffs could negotiate all-in prices with smelters, potentially in order to offset increases in the MWP." SPA43-44. In granting summary judgment, the district court recognized that "important facts here differ from those pled" and considered in *Aluminum II*. SPA44.

3. The district court's summary judgment order was not predicated on an improper bright-line rule.

Plaintiffs repeatedly accuse the district court of applying an improper "bright line rule." IP Br. 2, 44, 50, 56. According to Plaintiffs, the district court "adopted a new bright line rule that a plaintiff who does not transact directly with a defendant cannot be an efficient enforcer." *Id*. at 2. That assertion is incorrect.

The district court expressly rejected both a bright-line rule for so-called "umbrella" claims and "an inflexible 'privity' requirement." SPA25. Citing *AGC*, the court recognized that "a determination of standing in an individual antitrust case is highly fact-specific." SPA25 n.24 (citation omitted). The court thus emphasized that "[t]he use of the umbrella label does not predetermine how the efficient-enforcer factors apply in any particular case, or tacitly impose an inflexible 'privity'

requirement." *Id.* Consistent with its rejection of a bright-line rule and a rigid privity requirement, the district court devoted a full 20 pages of its decision to carefully applying each of the four efficient-enforcer factors to the unique facts of these cases. SPA47-67. The court's meticulous analysis of the evidence belies Plaintiffs' assertion that the court "inappropriately drew a bright legal line." IP Br. 44.

4. The district court did not usurp the role of the jury.

Plaintiffs argue that efficient-enforcer standing involves a proximate-causation inquiry "that is traditionally the province of the jury." *Id*. at 34. Relying on tort cases, Plaintiffs assert that issues like what is a foreseeable consequence of a defendant's conduct and whether an intervening cause exists are inherently factual questions that juries should decide. *Id*. at 30-31, 34, 35-36. Plaintiffs thus accuse the district court of "usurp[ing] the jury's role" (*id*. at 38) in granting summary judgment (*see id*. at 2-4, 30-31, 34, 35-36, 38, 41, 43, 44). In arguing that the efficient-enforcer factors raise questions for the jury, Plaintiffs do not cite a single decision addressing antitrust standing.

If adopted by this Court, Plaintiffs' approach to efficient-enforcer standing would result in a fundamental change in the law of this Circuit. Contrary to Plaintiffs' contention that the efficient-enforcer factors raise issues that by their nature must be resolved by a jury, this Court has repeatedly held that "antitrust standing is a threshold, pleading-stage inquiry." *See, e.g.*, *Amex Anti-Steering*, 2021

WL 5441263, at *4 (citation and quotation omitted).[19] As a result, this Court regularly affirms dismissals of actions under Rule 12(b)(6) for lack of efficient-enforcer standing. *See*, *e.g.*, *Amex Anti-Steering*, 2021 WL 5441263, at *4-8; *7 W. 57th St.*, 771 F. App'x at 501-03; *IQ Dental*, 924 F.3d at 62-67; *Gatt*, 711 F.3d 74-80; *Paycom*, 467 F.3d at 289-94; *Daniel*, 428 F.3d at 436-44. In *AGC*—the decision that first articulated the efficient-enforcer factors—the Supreme Court similarly affirmed the dismissal of a complaint on antitrust-standing grounds. *See* 459 U.S. at 545-46. None of these decisions suggests that the efficient-enforcer factors, by incorporating concepts like proximate cause, directness of injury, and speculativeness of damages, raise issues that generally should be decided by a jury. To the contrary, a rule holding that antitrust standing ordinarily must be decided by a jury would be contrary to this Court's decisions in *Amex Anti-Steering*, *7 W. 57th Street*, *IQ Dental*, *Gatt*, *Paycom*, and *Daniel*.

Plaintiffs fare no better in their attempt to redefine the "directness" inquiry to mean "foreseeability." IP Br. 2, 4, 18, 30, 35-36, 41. This redefinition similarly would require overruling many of this Court's efficient-enforcer decisions, which did not apply a "foreseeability" test. In *Amex Anti-Steering*, this Court held on the

[19] *See also Aluminum III*, 833 F.3d at 157 ("An antitrust plaintiff must show both constitutional standing and antitrust standing at the pleading stage."); *Gelboim*, 823 F.3d at 770 ("antitrust standing is a threshold inquiry resolved at the pleading stage"); *Gatt*, 711 F.3d at 75 ("antitrust standing is a threshold, pleading-stage inquiry" (quotation and alteration omitted)).

pleadings that the plaintiffs were not efficient enforcers even though the complaint "present[ed] a compelling prime face case of foreseeable damages," reasoning that "proximate cause—especially in the economic harm context—requires more than foreseeability." 2021 WL 5441263, at *7. As the Court explained, "the law 'does not attribute remote consequences to a defendant,' even if those consequences are foreseeable," and "[b]arring liability for foreseeable harms is not unusual." *Id*. at *5 n.7 (citation omitted). Similarly, in *Paycom*, MasterCard likely could have foreseen that its challenged policies would injure merchants like Paycom by eliminating competition from competing credit card networks. 467 F.3d at 288-89. Although Paycom's injury may have been "the foreseeable and expected result[]" of MasterCard's policies (IP Br. 4), this Court held on the pleadings that Paycom was not an efficient enforcer. 467 F.3d at 294, 295. The dental-supply distributors that allegedly boycotted an online distribution portal in *IQ Dental* also likely could have foreseen that their boycott would harm competing distributors like IQ that sold their products on the boycotted portal. 924 F.3d at 60. This Court nevertheless held on the pleadings that IQ could not "efficiently enforce" this claim. *Id*. at 67. None of these decisions suggested that efficient-enforcer standing turns on "the foreseeability of the injury and whether Defendants' conduct might be expected to cause plaintiff's harm" (IP Br. 2), or that those questions cannot be resolved on the pleadings.

CONCLUSION

The district court orders should be affirmed.

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Pursuant to Federal Rule of Appellate Procedure 32, the undersigned hereby certifies that this document complies with this court's November 9, 2021 Motion Order (Dkt. No. 166) granting Appellees leave to file a single, oversized brief because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 27,140 words. The undersigned further certifies that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman size 14 font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2021, a true copy of this JOINT BRIEF OF DEFENDANTS-APPELLEES was served on all counsel of record listed on the attached service list in this proceeding via email.

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2d Cir. Nos. 21-643 (L), 21-651-cv (con); 21-660-cv (con);
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