No. 23-929

United States Court of Appeals for the Second Circuit

J. SCOTT NICHOLSON, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, DON TRAN, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, MODERN SETTINGS LLC, A NEW YORK LIMITED LIABILITY COMPANY, MODERN SETTINGS LLC, A FLORIDA LIMITED LIABILITY COMPANY, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, LAURENCE HUGHES, STEVEN E. SUMMER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, CHRISTOPHER DEPAOLI, AMERICAN PRECIOUS METALS, LTD., KEVIN MAHER, INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED, JERRY BARRETT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, REBECCA BARRETT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, KPFF INVESTMENT, INC., NORMAN BAILEY, JOHN HAYES, CLASS PLAINTIFFS,

Plaintiffs-Appellants,

(caption continued on inside cover)

Appeal from the United States District Court for the Southern District of New York (No. 1:14-md-02573)

REPLY BRIEF

Vincent Briganti
Margaret C. MacLean
Charles Z. Kopel
LOWEY DANNENBERG, P.C.
44 South Broadway, Suite 1100
White Plains, NY 10601
(914) 997-0500

Robert G. Eisler
GRANT & EISENHOFER P.A.
123 Justison Street
Wilmington, DE 19801
(302) 622-7030

Kevin K. Russell
Daniel Woofter
GOLDSTEIN, RUSSELL & WOOFTER LLC
1701 Pennsylvania Ave., NW, Suite 200
Washington, DC 20006
(202) 240-8433

ERIC NALVEN, ROBERT CERU,

Plaintiffs,

v.

HSBC BANK USA, N.A., HSBC HOLDINGS PLC, HSBC BANK PLC, JOHN DOES 1-50, THE BANK OF NOVA SCOTIA, THE LONDON SILVER MARKET FIXING, LTD., DB U.S. FINANCIAL MARKETS HOLDING CORPORATION, DEUTSCHE BANK SECURITIES INC., DEUTSCHE BANK TRUST CORPORATION, DEUTSCHE BANK AG NEW YORK, HSBC NORTH AMERICA HOLDINGS INC., HSBC USA INC., SCOTIABANC INC., SCOTIA HOLDINGS (US) INC., SCOTIA CAPITAL (USA) INC., THE BANK OF NOVA SCOTIA TRUST COMPANY OF NEW YORK, JANE DOES 1-100, UBS AG, BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL SERVICES LTD., BNP PARIBAS FORTIS S.A./N.V., STANDARD CHARTERED BANK, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., MERRILL LYNCH, PIERECE, FENNER & SMITH INC., DEUTSCHE BANK AMERICAS HOLDING CORPORATION, DEUTSCHE BANK TRUST COMPANY AMERICAS, THE BANK OF NOVA SCOTIA, AKA SCOTIABANK, AKA SCOTIAMOCATTA,

Defendants-Appellees,

DEUTSCHE BANK AG,

Defendant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 5

I. Plaintiffs Pleaded Antitrust Standing. 5

A. Plaintiffs Sufficiently Allege Antitrust Injury Under *Platinum* and *Gelboim*. 5

B. Plaintiffs Sufficiently Allege Antitrust Injury Under *Total Gas* And *Gamma* As Well. 17

C. Plaintiffs Are Efficient Enforcers. 24

II. Plaintiffs Allege Individualized Participation As To Each Non-Fixing Bank In The Fixing Banks' Conspiracy. 33

III. Plaintiffs Allege "Actual Damages" And Domestic Manipulation Sufficient To Plead Their CEA Claims. 36

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Balaklaw v. Lovell,
14 F.3d 793 (2d Cir. 1994) 2, 7

City of Pontiac Police & Fire Ret. Sys. v. BNP Paribas Sec. Corp.,
--- F.4th ----, 2024 WL 368105 (2d Cir. Feb. 1, 2024) 4, 17, 33, 34

Gamma Traders – I LLC v. Merrill Lynch Commodities, Inc.,
41 F.4th 71 (2d Cir. 2022) 2, 3, 4, 5, 11, 12, 14, 15, 16, 17

Gelboim v. Bank of Am. Corp.,
823 F.3d 759 (2d Cir. 2016) .. 3, 5, 8, 9, 10, 11, 12, 13, 15, 16, 17, 22, 23, 34, 37

Harry v. Total Gas & Power N. Am., Inc.,
889 F.3d 104 (2d Cir. 2018) 2, 3, 4, 5, 11, 12, 13, 14, 16, 17, 18, 36

In re Platinum & Palladium Antitrust Litig.,
449 F. Supp. 3d 290 (S.D.N.Y. 2020), *aff'd in part, vacated in part, rev'd in part*, 61 F.4th 242 (2d Cir. 2023) 8

In re Platinum & Palladium Antitrust Litig.,
61 F.4th 242 (2d Cir. 2023) 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 15, 24, 25, 27, 28, 29, 30, 31, 32, 36, 37

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014) 33

Oakley v. Dolan,
980 F.3d 279 (2d Cir. 2020) 27

Prime Int'l Trading, Ltd. v. BP PLC,
937 F.3d 94 (2d Cir. 2019) 37

Tex. Indus., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 33

United States v. Socony-Vacuum Oil Co.,
310 U.S. 150 (1940) 15

Vintero Corp. v. Corporacion Venezolana de Fomento,
675 F.2d 513 (2d Cir. 1982) 23

Statutes

Commodity Exchange Act,
7 U.S.C. § 1, *et seq.* 4, 7, 8, 14, 36, 37, 38

Other Authorities

Brief of Appellee HSBC Bank USA, N.A., *In re Platinum & Palladium Antitrust Litig.*,
No. 20-1458, ECF No. 115 (2d Cir. Nov. 5, 2020) 8

Joint Appendix, *In re Platinum & Palladium Antitrust Litig.*,
No. 20-1458, ECF Nos. 76-77 (2d Cir. Aug. 6, 2020) 28, 29, 30, 31

INTRODUCTION

In their Opening Brief ("Br."), Plaintiffs demonstrated that their antitrust allegations are materially indistinguishable from the allegations this Court found sufficient to establish antitrust standing in *In re Platinum & Palladium Antitrust Litigation*, 61 F.4th 242 (2d Cir. 2023) ("*Platinum*").

Platinum, like this case, concerned an alleged conspiracy by large banks to manipulate a metals price benchmark so they could reap supracompetitive profits in both the spot and futures markets for those commodities. In *Platinum*, as here, the plaintiffs alleged that defendants achieved their benchmark manipulation in part by manipulating the spot and futures markets shortly before and during their benchmark-setting auction. And plaintiffs in both cases alleged that the manipulated benchmark artificially suppressed the price of their derivatives transactions on the same manipulated exchange. Defendants in *Platinum*, like the Fixing Banks here, argued that the plaintiffs failed to plausibly allege *either* antitrust injury *or* that they were efficient enforcers. This Court rejected the argument, "hold[ing] that the Exchange Plaintiffs have antitrust standing." 61 F.4th at 259.

Defendants respond by largely ignoring *Platinum* and insisting this case is controlled by other precedents arising in very different contexts. When the Fixing Banks finally address *Platinum*, they primarily argue that although *Platinum* held that defendants' antitrust violation *proximately* caused plaintiffs' injuries, this Court did not decide if those same violations *actually* injured plaintiffs. Fixing Br.35-39. That is silly. If Plaintiffs sufficiently pleaded that Defendants' antitrust "'violation was a direct ... cause of the[ir] injury,'" Fixing Br.37 (quoting *Platinum*, 61 F.4th at 259), then they also pleaded antitrust injury. Antitrust *injury* is a necessary condition of the harm being sufficiently *direct*. *Balaklaw v. Lovell*, 14 F.3d 793, 797 n.9 (2d Cir. 1994).

The Fixing Banks suggest that *Platinum* should not be applied because it is inconsistent with their preferred authority—*Harry v. Total Gas & Power North America, Inc.*, 889 F.3d 104 (2d Cir. 2018), and *Gamma Traders – I LLC v. Merrill Lynch Commodities, Inc.*, 41 F.4th 71 (2d Cir. 2022)—which, they say, established a standard for pleading injury Plaintiffs cannot meet. That argument fails because *Total Gas* and *Gamma* were not price-fixing cases, like *Platinum*, and like this one. And even setting *Platinum* aside, this Court's decision in *Gelboim v. Bank of*

America Corp., 823 F.3d 759 (2d Cir. 2016), made clear that anyone who trades a financial instrument that references a manipulated benchmark suffers an antitrust injury as a result.

It does not matter that Defendants don't control who references the manipulated benchmark. "[T]o the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces." *Gelboim*, 823 F.3d at 773. Whether "other factors also may have contributed" to the price "is immaterial" for pleading antitrust injury. *Ibid.* All that matters at the pleading stage is that Plaintiffs have plausibly alleged that the collusion "at least contributed" to the price. *Id.* at 773-76.

In arguing otherwise, Defendants press an interpretation of *Total Gas* and *Gamma* that would mean this Court overruled *Gelboim* in those decisions. But those cases *distinguish* antitrust cases—like *Gelboim*, like *Platinum*, and like this one—alleging "price-fixing behavior." *See Gamma*, 41 F.4th at 79; *Total Gas*, 889 F.3d at 113 (same). The more serious question is whether Plaintiffs' injury is direct enough to make them efficient enforcers, but that is the question *Platinum* resolved in the plaintiffs' favor on materially indistinguishable facts.

Even if this were not a price-fixing case, Plaintiffs still met the *Total Gas* and *Gamma* heightened pleading standard. Unlike the complaints in those cases, it is reasonable to infer from Plaintiffs' econometric analyses and allegations that Defendants' manipulation of a once-daily, globally referenced benchmark affected the price of silver and its derivatives until the Fix price was set again. The Fixing Banks admit that on down days "returns" did not even "g[e]t back to where their pre-Fix trajectory shows they were headed" until well into Plaintiffs' normal business hours. *See* Fixing Br.41; *see also id.* at 17-18.

This Court must therefore reverse the district court's dismissal of Plaintiffs' CEA claims as well. The parties agree that if Plaintiffs have alleged antitrust injury, they have alleged CEA injury. *See* Fixing Br.65. And this Court already resolved that parallel allegations sufficiently plead a domestic application of the statute. *Platinum*, 61 F.4th at 267-69.

Finally, Plaintiffs pleaded with particularity each Non-Fixing Bank's individual participation in the conspiracy. JA601-636 ¶¶268-327; *see* Non-Fixing Br.22-27. That is all this Court requires. *See City of Pontiac Police & Fire Ret. Sys. v. BNP Paribas Sec. Corp.*, --- F.4th ----, 2024 WL 368105 (2d Cir. Feb. 1, 2024) ("*Treasuries*").

ARGUMENT

I. Plaintiffs Pleaded Antitrust Standing.

The Fixing Banks' reliance on *Total Gas* and *Gamma* is unfounded. Those cases required the plaintiffs to plead heightened evidence of price artificiality at the specific time of their trades because they did not allege, as here, the manipulation of a price-setting benchmark like the plaintiffs in *Platinum* and *Gelboim*. And even if *Total Gas* and *Gamma* applied, it would make no difference. Defendants merely dispute the well-pleaded factual allegations, which show that their market manipulations persisted throughout the trading day on the days they colluded to suppress the Fix price of Silver.

A. *Plaintiffs Sufficiently Allege Antitrust Injury Under* **Platinum** *and* **Gelboim.**

"Generally, when consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions, they suffer injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Gelboim*, 823 F.3d at 772 (quotation marks omitted). In the context of a price-fixing conspiracy accomplished by manipulating a once-daily financial benchmark, antitrust law provides a private remedy for injuries caused

by "the influence that a conspiracy exerts on the starting point for prices," regardless of the presence of other price inputs. *Id.* at 776.

In *Platinum*, as here, the plaintiffs transacted in exchange-traded derivatives for which the price of the underlying commodities was based, in part, on manipulated metals benchmarks in London. *Compare Platinum*, 61 F.4th at 252-57, *with* JA486-488 ¶¶21-25, 27, 29-30; JA518-519 ¶142. There, as here, the plaintiffs alleged that the Fixing Banks furthered the benchmark conspiracy with trades placed directly on the U.S. exchange in which plaintiffs traded. *Compare Platinum*, 61 F.4th at 263, *with* JA520-524 ¶¶144-50. Based on those allegations, the Court "h[eld] that the Exchange Plaintiffs have antitrust standing." *Platinum*, 61 F.4th at 259.

1. The Fixing Banks seek to evade *Platinum* first by suggesting that although this Court held that the plaintiffs had plausibly alleged their injuries were proximately caused by the Fixing Banks' antitrust violation, the Court nevertheless left open whether the Fixing Banks' antitrust violation harmed the plaintiffs at all. Fixing Br.35-39. Nonsense.

If the antitrust violation caused the *Platinum* plaintiffs harm "at the first step" of the causal chain, 61 F.4th at 263, then the antitrust violation caused them injury. As "a *necessary first step*" to determining whether a plaintiff has antitrust standing, "courts must determine whether the plaintiff suffered an antitrust injury." *See Balaklaw*, 14 F.3d at 797 n.9 (emphasis added). Only "*[i]f the answer to that question is yes*," must the Court then "determine whether any of the other factors, largely relating to the directness and identifiability of the plaintiff's injury, prevent the plaintiff from being an efficient enforcer of the antitrust laws." *Ibid.* (emphasis added). The *Platinum* panel could not "hold that the Exchange Plaintiffs have antitrust standing" without holding that plaintiffs had established antitrust injury. *See Platinum*, 61 F.4th at 258-59 ("To establish antitrust standing, a plaintiff must show ... antitrust injury ..." (quotation marks omitted)).

True, *Platinum* left "open" the question of CEA actual damages on remand. Fixing Br.37-38 (quoting *Platinum*, 61 F.4th at 268). But that was only because the district court had not reached that issue. *See Platinum*, 61 F.4th at 268. The district court *did* consider antitrust injury though, concluding that the plaintiffs had sufficiently alleged it. *See In*

re Platinum & Palladium Antitrust Litig., 449 F. Supp. 3d 290, 303 (S.D.N.Y. 2020). Fixing Bank HSBC expressly challenged that ruling on appeal. *See* Brief of Appellee HSBC Bank USA, N.A., at 45-49, No. 20-1458, ECF No. 115 (2d Cir. Nov. 5, 2020) ("Fixing *Platinum* Br."). This Court necessarily rejected the contention in holding that the plaintiffs had suffered not only an antitrust injury, but one direct enough to make them efficient enforcers.

It was not "illogical," as the Fixing Banks contend, for *Platinum* "to have held that plaintiffs had pleaded antitrust injury while leaving undecided whether they had pleaded CEA injury." *See* Fixing Br.38. Unlike the parties here, *see* Fixing Br.65; Non-Fixing Br.37, the *Platinum* parties did *not* agree that if the plaintiffs sufficiently pleaded antitrust injury, then they also pleaded "actual injury" under the CEA. That is why the *Platinum* panel left open the possibility that while the plaintiffs had established antitrust injury, they might not have pleaded "actual damages" under the CEA.

Even if this Court had never decided *Platinum*, the Fixing Banks' argument that Plaintiffs failed to sufficiently allege any antitrust injury at all would be foreclosed by *Gelboim*. There, as here, the plaintiffs

alleged that they "entered into a variety of financial transactions ... that reference[d]" a benchmark (there, "LIBOR," an interest rate benchmark). 823 F.3d at 765. Those who transacted in financial instruments "at interest rates" for which LIBOR was "a component or benchmark" sued, including "bondholders" who owned "LIBOR-based debt securit[ies]" issued by third parties, and others who "claim[ed] injury from the purchase and trading of contracts based on U.S. dollars deposited in commercial banks abroad (Eurodollar futures contracts)." *Id.* at 765, 768. Since "LIBOR form[ed] a component of the return from [their] various LIBOR-denominated financial instruments, and the fixing of a component of price violates the antitrust laws" *per se*, the bondholder and derivatives-trading plaintiffs alike "plausibly alleged an antitrust violation attributable to the Banks." *Id.* at 771. Because the plaintiffs had alleged that LIBOR was a "part of the price" of their financial transactions, it was "immaterial" whether the benchmark was "itself bought or sold by anyone." *Ibid.*; JA512 (same allegations here).

For the same reason, the *Gelboim* plaintiffs established antitrust injury. *Gelboim*, 823 F.3d at 772. That was so, this Court reasoned, regardless of the degree to which their various financial instruments

were tied to LIBOR, and regardless of whether the defendants had any control over the extent to which the plaintiffs and third parties "remained free to negotiate the interest rates attached to [their] particular financial instruments." *Id.* at 773. "This consideration may well bear upon contested issues of causation" under the efficient-enforcer inquiry, the Court held, "but it does not foreclose antitrust injury." *Ibid.* All that mattered was that the plaintiffs had alleged that the Fixing Banks' manipulation "interfer[ed] with the free play of market forces." *Ibid.*

It thus did not matter whether "the price-fixing conspiracy was ... solely responsible" for the price of the financial instruments. *Gelboim*, 823 F.3d at 773. "That other factors also may have contributed to [the pricing dynamics] of the markets is immaterial." *Ibid.* "Similarly, the fact that sales on the spot markets were still governed by some competition [wa]s of no consequence" either. *Ibid.* (quotation marks omitted). The plaintiffs "sustained their burden of showing injury" based on the same allegations Plaintiffs assert here—that Fixing Banks conspired to

manipulate a benchmark, which negatively impacted the financial instruments they traded. *Id.* at 777.[1]

2. The Fixing Banks next seek to evade *Platinum* by postulating that if the allegations in *Platinum* had established antitrust injury, that case would have impliedly overruled *Total Gas* and *Gamma*. In fact, if Defendants are right about *Total Gas* and *Gamma*, then those cases quietly overruled *Gelboim*. Wrong again.

Total Gas and *Gamma* involved allegations that defendants manipulated the price of derivatives solely by episodically sending false signals into the spot and derivatives market. Such allegations, Defendants admit, are *different* from the Fix-related manipulation Plaintiffs allege here. *See* Non-Fixing Br.21-22, 25-26 (distinguishing between "episodic" manipulation and conspiracy to manipulate Silver Fixing); Fixing Br.16 (aside from allegations of Silver Fix conspiracy, "Plaintiffs also allege other episodic acts of misconduct by Defendants").

---

[1] "Whether" any Fixing "Banks' competitors were *also* injured is not decisive, and possibly not germane." *Id.* at 777; *contra* Fixing Br.1 (highlighting that "Plaintiffs did not participate in the Fix," and "instead allegedly were harmed by trading silver futures on a U.S. exchange").

Neither *Total Gas* nor *Gamma* involved the manipulation of a *benchmark* alleged to be "reference[d]" in "a variety of financial transactions" and "countless business dealings," as in *Gelboim*. *See* 823 F.3d at 765. Yet the Fixing Banks insist that Plaintiffs had to do more—perhaps by pleading that they traded COMEX futures to their detriment shortly after the Silver Fix, or by further establishing that the once-a-day global benchmark for the price of Silver had some effect on its derivatives throughout the day. Fixing Br.27-34. They fail to acknowledge, though—as explained in the Opening Brief (pp.29 n.4, 55-56)—that Fixing Bank HSBC made the same argument to the panel in *Platinum*. *See* Fixing *Platinum* Br.45-49. This Court held that the plaintiffs had antitrust standing despite their supposed failure to allege the timing of their trades or persistence. *Platinum*, 61 F.4th at 259.

In contrast, the plaintiffs in *Total Gas* did not allege, as Plaintiffs allege here, that their financial instruments referenced or incorporated the prices that were being manipulated by defendants. And because the *Total Gas* plaintiffs' theory alleged no such link, this Court held they needed "some other tangible mechanism whereby a defendant's trading affects hers more than marginally." 889 F.3d at 113.

Specifically, the plaintiffs claimed that defendants manipulated the price of gas at four hubs in the Western United States, and that the manipulation influenced the price of gas at the hub in Louisiana to which plaintiffs' own derivative contracts were tied. *Total Gas*, 889 F.3d at 107-09. The *Total Gas* plaintiffs did not trade derivatives in the same market as defendants. *Id.* at 109. They did not even trade in derivatives that referenced the prices of those other, allegedly manipulated derivatives in the western hubs. *Ibid.* Instead, their theory was that they were injured by the "shockwaves" that emanated from price distortion in the west, which then impacted the price of gas traded at a hub in Louisiana to which the plaintiffs' derivatives were benchmarked. *Ibid.* In fact, the plaintiffs' own expert analysis in that case established that the price influence went the other direction—it was the gas prices at the much larger Louisiana hub that impacted the prices at the regional hubs. *Id.* at 115.

Citing *Gelboim*, 823 F.3d at 765-66, the Court acknowledged that setting a derivative's contract price by reference to a manipulated benchmark would be a sufficient "tangible mechanism." *Total Gas*, 889 F.3d at 113. Defendants do not dispute that Plaintiffs allege the direct

link that was missing in *Total Gas*. Defendants merely highlight that they "did not compel anyone else to use the Fix price to price their own transactions." Fixing Br.2. But this Court rejected that argument in *Gelboim*. *See supra* pp.9-10.

Gamma, which concerned only CEA claims, picked up where *Total Gas* left off. In *Gamma*, the question facing the Court was not whether the manipulation of a once-daily global benchmark for the underlying commodity artificially influenced the price of the plaintiffs' futures contracts for that commodity throughout the day. Instead, the plaintiffs alleged that defendants engaged in repeated, bi-directional "spoofing" of futures transactions on COMEX by placing large fake orders to buy or sell that they never intended to finalize, which then moved the prices of those contracts to their benefit in both directions based on the false signals of buy/sell interest. 41 F.4th at 75.

In the absence of unidirectional price-fixing allegations, the *Gamma* plaintiffs sought to plead injury based on statistical probabilities. This Court rejected the pleading method for failing to address directionality or otherwise satisfy the *Total Gas* requirement for "additional facts to make it plausible that the impact on [them] was

harmful rather than neutral or beneficial." *Gamma*, 41 F.4th at 79 (quoting *Total Gas*, 889 F.3d at 113). Like *Total Gas*, *Gamma* recognized that additional facts are unnecessary in cases, like this one, alleging "price-fixing behavior" that "aims to consistently push the market price in a single direction." *Ibid.*

The Fixing Banks propose that this statement in *Gamma* was referring only to a so-called (and undefined) "classic price-fixing cartel." Fixing Br.47. But that is what Plaintiffs allege. "The Banks were indeed engaged in a joint process, and that endeavor was governed by rules put in place to prevent collusion." *See Gelboim*, 823 F.3d at 775. "[T]he crucial allegation is that the Banks circumvented the [benchmark]-setting rules, and that joint process thus turned into collusion." *See ibid.* That is a classic price-fixing cartel; "the machinery employed by a combination for price-fixing is immaterial." *See ibid.* (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)); *id.* at 771 (rejecting banks' argument that benchmark manipulation was not "price-fixing" because benchmark was "not itself ... bought or sold by anyone").

As *Platinum* explained, it is sufficient in a price-fixing case for plaintiffs to allege that defendants corrupted a Fixing process whose

power "extended beyond" the Fixing auction because "[m]arket participants uninvolved in the Fixing frequently incorporated the benchmark prices in contracts." 61 F.4th at 255. Plaintiffs so allege. JA557-559 ¶¶195-98. The Court did not seek "greater detail," *Total Gas*, 889 F.3d at 115, in support of the *Platinum* plaintiffs' injury allegations because the benchmark-setting process meant that the defendants' manipulation directly and necessarily impacted the prices of plaintiffs' trades—thereby establishing the link missing in *Total Gas* and *Gamma*. *Platinum* merely applied *Gelboim*, which remains this Circuit's definitive statement of the law on benchmark price-fixing:

"Appellants have alleged an anticompetitive tendency: the warping of market factors affecting the prices for [benchmark]-based financial instruments. No further showing of actual adverse effect in the marketplace is necessary." *Gelboim*, 823 F.3d at 776. "The net impact of a tainted [benchmark] is an issue of causation reserved for the proof stage; at this stage, it is plausibly alleged on the face of the complaint[] that a manipulation of [the benchmark] exerted some influence on price." *Id.* at 782. "The extent of that influence and the identity of persons who

can sue, among other things, are matters reserved for later." *Id.* at 782-83.[2]

B. Plaintiffs Sufficiently Allege Antitrust Injury Under **Total Gas** *And* **Gamma** *As Well.*

Even under the stricter *Total Gas* and *Gamma* pleading standard, Plaintiffs allege an antitrust injury by demonstrating "price artificiality during the time in which [they were] trading." *Gamma*, 41 F.4th at 80 (quoting *Total Gas*, 889 F.3d at 112 n.3).

Unlike the complaints in those cases, Plaintiffs allege that "Defendants caused silver prices and the prices of silver financial instruments to be artificial throughout the Class Period by manipulating the Fix price." JA518 ¶142. "While the observed drop in silver prices and

---

[2] The Fixing Banks conceded that Plaintiffs plausibly allege an antitrust conspiracy among them to manipulate the Silver Fix. Fixing Br.69. In a last-ditch attempt around *Gelboim*, the Fixing Banks change tack in their Rule 28(j) letter and intimate that this Court's recent decision in *Treasuries* calls into question *Gelboim*'s central holding that the plaintiffs plausibly alleged an antitrust conspiracy. Not so. The Court accepted the conspiracy allegations in *Gelboim*. *See* 823 F.3d at 766-67, 770-71 (holding that the plaintiffs "plausibly alleged an antitrust violation attributable to the Banks"). It should accept the parallel allegations here.

spikes in trading volume and price volatility always occur around the time of the Silver Fix, the impact of this pricing dysfunction" on COMEX futures prices "lasts well beyond the end of the Fixing [Banks'] daily conference call." JA557 ¶195. Plaintiffs supported those allegations with dozens of regression analyses. JA518-559 ¶¶142-198.

The Fixing Banks dispute that Plaintiffs' econometric data—which show a dramatic post-Fix price drop that begins just before the Fixing call and only steadily rises from rock bottom thereafter—can plausibly be interpreted as showing that the manipulation of the Fix persisted throughout the trading day. But they provided no other plausible explanation for why prices did not return even to pre-Fix levels until 11:00 AM (EST)/12:00 PM (EDST). *See* Fixing Br.17-18. Even if they had, "at the pleading stage a tie will go to the plaintiff." *Total Gas*, 889 F.3d at 114.

Plaintiffs' Figure 33 (reproduced below) analyzes cumulative unadjusted returns in the COMEX silver futures market on days in which the Fixing coincided with a large, distinct price drop:

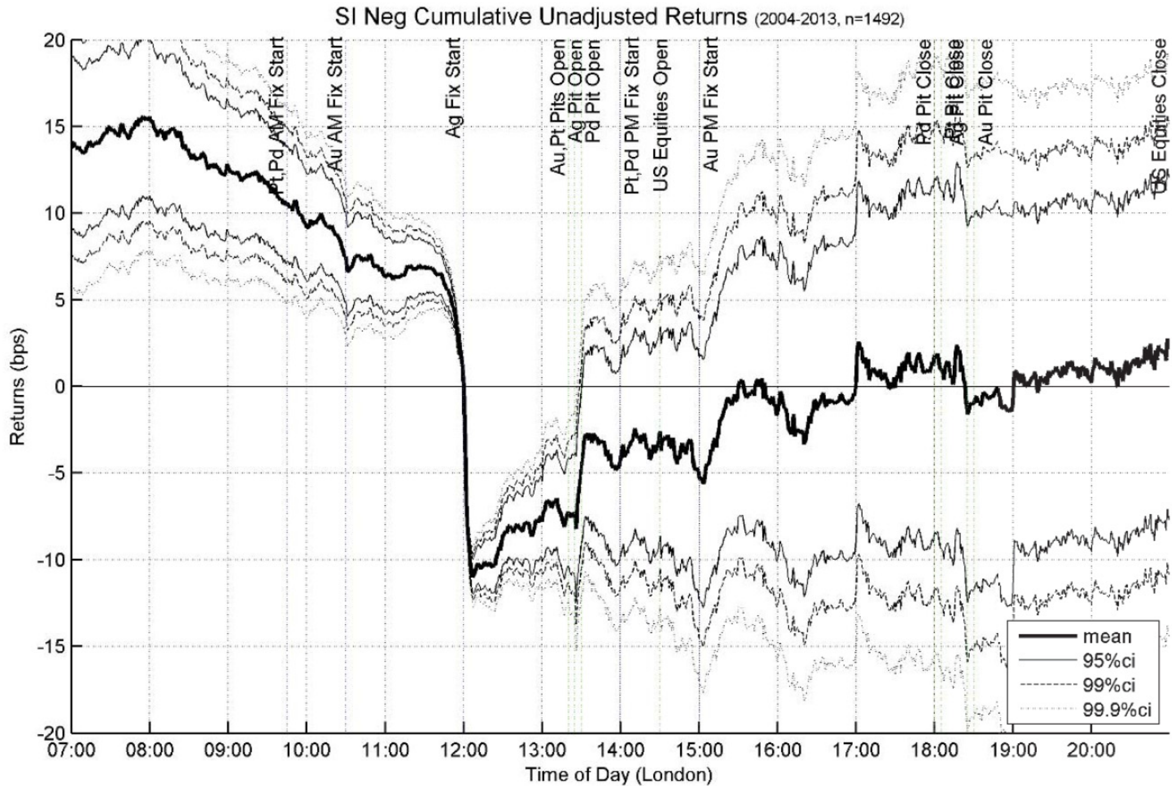

FIGURE 33

As shown, the average impact of the suppressed Fixing price on COMEX silver futures prices extended well beyond the Fixing and never recovered to pre-Fixing levels, meaning that it persisted throughout the day (JA557-558)—just as one should expect from a once-daily price-setting benchmark "globally regarded as the international benchmark" for silver and "globally accepted as the basis for pricing a variety of transactions, including many financial instruments," JA511-512 ¶124. The Fixing Banks' scattershot attacks on these data are unpersuasive and often irrelevant.

First, they note that Figure 33 accounts for only 15 hours of the day. *See* Fixing Br.18 n.12, 40. But the hours that are not represented (5:00 PM (EDST) to 3:00 AM (EDST)) are non-business hours. Indeed, COMEX trading is closed for one of them. *See* Br.9. For this omission to matter, Defendants would have to establish that it is implausible Plaintiffs traded during the normal business hours represented in the chart. Instead, they argue it is implausible that Plaintiffs ever traded *outside* of normal business hours in the United States. *See* Fixing Br.17-18, 50. And Plaintiffs need not show that the effect persisted for every trading hour on days when Defendants manipulated the Silver Fix price (although they have). Plaintiffs only need allege that the effect persisted while they were plausibly trading their own futures contracts to their detriment. Defendants admit the price of Silver and its derivatives did not return to pre-Fix levels until the middle of Plaintiffs' business day. *See* Fixing Br.17-18.

Second, the Fixing Banks propose that Plaintiffs' allegations of "uniquely dysfunctional" pricing dynamics around the time of the daily Silver Fixing contradict allegations of consistent price artificiality. Fixing Br.43. That's backwards. It is precisely *because* the Silver Fix is the only

time of day that the price falls off a cliff that persistence is well pleaded. Because the worldwide price of silver was benchmarked once-per-day by the Fixing Banks, *see* JA511-512 ¶124; JA654 ¶377, all that was necessary to cause artificiality that persisted for that day was a once-a-day manipulation of the reference benchmark.

Third, the Fixing Banks suggest that the allegations that Defendants only manipulated the Fix price downward is inconsistent with silver having a "bull run" during the Class Period. Fixing Br.9, 17. But in markets related to a commodity whose value is trending upward, the only rational (though unlawful) anticompetitive move is to conspire to artificially suppress the Fix-price of the commodity for the day, so they could doubly profit.

Fourth, the Fixing Banks complain that Figure 33 "offer[s] no means of disentangling the 2004-2006 data from the 2007-2013 data." Fixing Br.41. They seem to forget that this is only because the district court previously *narrowed* the initially pleaded 2004-2013 class period to only cover 2007-2013, on the grounds that "most of Plaintiffs' compelling facts, including those based on statistical analyses, are drawn from January 1, 2007 through December 31, 2013." SA31 n.19. The district

court specifically cited as "compelling" Plaintiffs' analyses of the Fixing Banks' outsized market returns and the increased trading volume during the Silver Fixing. *Id.* (citing JA294-303 & Figs. 35-42).[3] Accordingly, Plaintiffs revised the Class Period to cover only 2007-2013. JA651 ¶364. And if the most damning evidence of the Fixing Banks' manipulation comes after January 2007, that is a good indication that including the 2004 through 2006 data in Figure 33 understates the persistence of the artificiality it reveals.

Fifth, the Fixing Banks fault Figure 33 for not controlling for "exogenous factors." Fixing Br.42. That is irrelevant. *Gelboim*, 823 F.3d at 781 (plaintiffs need not "rule out" alternative inferences to establish antitrust injury at the pleading stage). In any event, Plaintiffs' other charts do account for potential outside influences. For instance, Figure 30 (JA554) uses comparator assets to rule out macroeconomic causes for the pricing dysfunctions unique to Silver derivatives, and Figures 31 and 32

---

[3] This refutes the Fixing Banks' suggestion that "Plaintiffs rely primarily on a single chart—out of 51 in the Complaint." Fixing Br.39. Figure 33 confirms that the data revealed in other charts shows that the manipulation persisted in COMEX silver derivatives throughout the day.

(JA555-556) rule out market activity as a factor by demonstrating that the drop *in COMEX prices* and spike *in COMEX trading volume* always correlated with the Fixing. "As with the drop in silver prices, the anomalous spike in trading volume follows the Silver Fix throughout the year." JA556. "Significantly, while trading volume always increases after the start of the Silver Fix, volume does not increase at the same time on days where there is no fixing, indicating that the volume spike is caused by [Defendants'] trading during the Silver Fix." *Ibid.*

Finally, the Fixing Banks suggest that the "pricing dysfunction" around the time of the daily Silver Fix may have been caused in part by their clients, who could "themselves trade silver or silver derivatives before, during, or after the Fix." Fixing Br.14-15 & n.9. This contention was never raised below and is therefore waived. *See Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982). And the Fixing Banks do not even attempt to convince the Court that *only* their clients engaged in such trading in the lead up to and during the Fix. It is thus immaterial. *See Gelboim*, 823 F.3d at 781.

C. Plaintiffs Are Efficient Enforcers.

Plaintiffs are efficient enforcers for the same reasons as the *Platinum* plaintiffs. Plaintiffs allege they were directly injured by Defendants' manipulation of COMEX futures contracts as part of their scheme to manipulate the Silver Fix. *See Platinum*, 61 F.4th at 264. That is also why there are no more direct victims. *See id.* at 264-65. Nor are the damages pleaded under such theory duplicative or too speculative. *See id.* at 265-66.

1. Because the district court believed that the Silver Fixing "necessarily occurred before markets in the United States were open," it was forced to reject Plaintiffs' allegations that Defendants engaged in "manipulative conduct directly in the United States silver derivatives market that might have injured the putative class." SA137. The court was not simply careless with its words. It held that Defendants could not have traded on COMEX, explaining its belief that their trades "could not plausibly have occurred on a market in the United States because no

United States market was open at that time." SA140. It repeated its error *nine times*.[4]

The complaint, though, alleges that "*COMEX silver futures* cumulative unadjusted returns begin to decrease *just before* the start of the Silver Fix." JA520 ¶144 & Fig.2 (emphasis added). That "10 basis point drop in COMEX silver futures prices ... is by far the largest of the day." *Ibid.*

Plaintiffs also pleaded data that show "a local spike in trading volume" *on COMEX* precisely at the time of the Silver Fixing. JA541 ¶176 & Fig.19. "Figure 14," for example, "shows the average volume of COMEX

---

[4] *See* SA126 (Silver Fixing occurred "well before U.S. markets open"); SA132 (Platinum PM Fixing "took place near the opening of U.S. markets"); SA135 n.13 (Silver Fixing occurred "before markets in the United States were open"); SA136 (Platinum PM Fixing occurred "around the time most markets opened in the United States"); SA137 (Fixing Defendants' manipulation "necessarily occurred before markets in the United States were open"); *ibid.* (Platinum PM Fixing "distorted market prices right around the time the markets in the United States opened"); SA140 (Fixing Defendants' manipulation "could not plausibly have occurred on a market in the United States because no United States market was open at that time"); SA142 (Platinum PM Fixing "occurred right around the time that the markets opened in the United States"); SA147 n.18 (Silver Fixing "occurred before the U.S. markets were open").

silver futures contracts traded between 11:30 A.M. and 12:30 P.M. London time" during the Class Period. JA534 ¶164. It "demonstrates that trading volume begins to increase just prior to the start of the Silver Fix and gaps upward at noon London time, reaching its peak at 12:02 P.M. after increasing more than threefold, ... just 2 minutes" in. *Ibid.* These are the facts Plaintiffs pleaded to support their allegation that "Defendants engaged in collusive trades *to create* and profit from artificiality in the price of physical silver and silver financial instruments." JA589-590 ¶249 (emphasis added); *contra* Fixing Br.68.

Those allegations could be rejected as implausible only if it were true, as the district court believed, that COMEX was closed in the lead up to and during the Silver Fixing. But the Fixing Banks agree that "COMEX was open for trading 23 hours a day." Fixing Br.40; *see also id.* at 18 n.12, 32, 48. They suggest the "court's only mistake was describing COMEX trading outside of silver pit hours as 'over-the-counter' trading, a term that refers to trading in physical silver or other trading outside of centralized exchanges rather than silver futures and options." *Id.* at 49-50. That ignores the nine other times the district court repeated its mistake. This error requires reversal. *See Oakley v. Dolan*, 980 F.3d 279,

283 (2d Cir. 2020) (reversing a Rule 12(b)(6) dismissal where "District Court appear[ed] to have somewhat misunderstood [the plaintiff's] allegations").

2. The Fixing Banks repeatedly resist application of the *Platinum* efficient-enforcer analysis on the misguided view that, "unlike the complaint at issue in *Platinum*, the TAC does not allege that Defendants directly engaged in Fix-related manipulation in derivative markets in the United States." SA139-140. That is wrong.

Plaintiffs have shown that Defendants' COMEX trading caused "trading volume [] to increase just prior to the start of the Silver Fix." JA534 ¶164. Their COMEX trades, which come "before the Fix price is released to the public, are highly predictive of the Fix price direction." JA540 ¶174. And they enjoyed a "statistically significant advantage[]" in their manipulative COMEX trading. JA561 ¶202. These allegations are no different from those the *Platinum* Court found sufficient to plausibly allege "'collusive trading'" directly on NYMEX that "'manipulated the futures market to profit from futures market transactions.'" *Contra* Fixing Br.54 (quoting 61 F.4th at 54); SA140. Just compare the allegations.

In *Platinum*, the plaintiffs alleged that the defendants "drove these downward movements first by moving Physical and NYMEX Platinum and Palladium prices in advance of and even during the Fixing." No. 20-1458, ECF Nos. 76-77 ("*Platinum* JA"), at 355 ¶10. Plaintiffs allege that the "first indication that competitive market forces break down around the start of the Silver Fix is the consistent and abnormally large drop in silver prices that begins before the start of the Fixing [Banks'] daily conference call." JA519 ¶143. So too, "COMEX silver futures cumulative unadjusted returns begin to decrease just before the start of the Silver Fix." JA520 ¶144 & Fig.2.

The *Platinum* plaintiffs also alleged that, "[b]ased on the analysis conducted by Plaintiffs, the only credible explanation for the observed price movements is that Defendants shared in advance confidential client order information and information concerning their proprietary positions." *Platinum* JA355 ¶10. Plaintiffs allege that to "further capitalize on their manufactured pricing dysfunction, Defendants exchanged private information about incoming order flow to coordinate their trading activity in advance of the Silver Fix." JA601 ¶268.

In *Platinum*, the plaintiffs alleged that "[e]ach of the Defendants' precious metals traders would also actively trade in Physical and NYMEX Platinum and Palladium before, during, and after the Fixing, including proprietary trading, and including by utilizing real time, non-public information from the participants in the Fixing." *Platinum* JA375 ¶64. Plaintiffs allege that a "spike in volume before the Silver Fix is over, while the Fix price is still private information known only to the Fixing [Banks], shows the Fixing [Banks] and their co-conspirators traded based on private information of the Fix price disclosed from inside the Silver Fix." JA535 ¶167.

The Fixing Banks themselves highlight the *Platinum* plaintiffs' allegations that "Defendants' precious metals traders were in constant communication with the participants in the Fixing and were simultaneously executing trades in Physical and NYMEX Platinum and Palladium," *Platinum* JA376 ¶68. *See* Fixing Br. 68. So too here—Plaintiffs allege that "[i]ncreasing volatility before the Fix price is released indicates trading by the Fixing [Banks] and their co-conspirators based on private information from inside the Silver Fix," JA536 ¶169, and Plaintiffs substantiated those allegations as to both the

spot market for physical silver, JA543-553 ¶¶178-191, as well as the market for silver derivatives on COMEX, JA534-542 ¶¶163-177. "To efficiently share information and coordinate their trading activity," Plaintiffs allege, the Fixing Banks "and other co-conspirator banks[] used electronic chatrooms" to "regularly communicat[e]" with each other "to coordinate manipulative trading activity." JA603-626 ¶¶274-312.

The *Platinum* plaintiffs then allege that, "almost immediately after the start of the Fix, NYMEX futures prices exhibit much stronger predictive power to the ultimate outcome of the Fix. Again," they allege, "this analysis indicates Defendants, who were informed traders, utilizing and trading NYMEX futures based on non-public information related to the Fixing." *Platinum* JA395 ¶100. Here, Plaintiffs allege that "market returns during the Silver Fix predict the direction of the Fix price with an astonishing level of accuracy," "[f]urther demonstrating that the spikes in volume and volatility are the product of the Fixing [Banks] and their co-conspirators trading based on private information from inside the Silver Fix." JA539 ¶172.

In *Platinum*: "Defendants trade in Physical and NYMEX Platinum and Palladium on their own behalf (i.e., proprietary trading for profit),"

and "[t]hese traders were actively trading in Physical and NYMEX Platinum and Palladium before, during, and after the Fixing, including by using nonpublic information from the Fixing in real time." *Platinum* JA457 ¶190. Here: "By creating a dysfunction in silver pricing through the Silver Fix, the Fixing [Banks] and their co-conspirators created an 'arbitrage condition,' capable of generating risk-free returns, for anyone part of their conspiracy," and "[u]sing this manufactured pricing dysfunction to their financial benefit, 'informed traders'" like Defendants "with advance knowledge of the Fix price direction established positions in the market that would increase in value once the Fix price was released to the public." JA560 ¶199.

Finally, the *Platinum* plaintiffs alleged that the "Defendants were also large participants in NYMEX futures and options"; "[t]hese contracts, like those for physical sales of platinum and palladium, directly incorporate or reference the Fix price in order to determine the cash flows between the parties"; and "[s]uppressing the Fix price during the Fixing would thus make one participant profit, at the expense of the other." *Platinum* JA466 ¶207. Plaintiffs allege that "[w]hile an informed silver trader could generate around 25 basis points per day in the

COMEX silver futures market and more than 40 basis points per day in the spot market, an uninformed trader who was long silver between 2000 and 2013, would return about +4 basis points per day." JA562 ¶204. "The potential to generate 5 or even 10 times more than the public market created an [irresistible] incentive for Defendants to coordinate trades and share private information." *Ibid.*

That is it. This Court can scour the *Platinum* complaint, and it will find *no* other allegations about the Fixing Banks' direct manipulation of futures trading on NYMEX. The plaintiffs in *Platinum* had only what Plaintiffs have alleged here. It is thus remarkable that despite all these overlapping allegations, the district court concluded "[t]here are no allegations in the TAC that Defendants' [*sic*] in fact traded on any commodities market on which Plaintiffs also traded." SA140. The Fixing Banks do not outright deny these allegations, instead proposing that the district court meant "restrained" when it said, "in fact traded." Fixing Br.58. But the parallel allegations here were accepted as sufficient to

plead market restraint in *Platinum*, dispelling the Fixing Banks' attempted distinction too.[5]

II. Plaintiffs Allege Individualized Participation As To Each Non-Fixing Bank In The Fixing Banks' Conspiracy.

Most of the Non-Fixing Banks' Brief responds to arguments Plaintiffs never raised. Plaintiffs did not argue that their injuries were caused specifically by any particular Non-Fixing Bank's own manipulation, *contra* Non-Fixing Br.39, 45-50, because each conspirator is jointly and severally liable for all damages caused by the collusion, *see Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981).

This Court's recent decision in *Treasuries* does not require a different outcome. That case held that the plaintiffs' "allegations of collusive information-sharing in online chatrooms largely amount to inconsequential market chatter," and "their statistical analyses lack specificity," such that they failed to plead "the existence of an agreement, whether through direct or indirect evidence," to establish any antitrust

---

[5] Plaintiffs preserve, for potential *en banc* or Supreme Court review, whether the "efficient enforcer" test runs afoul of *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

conspiracy at all. 2024 WL 368105, at *1. *Treasuries*, though, did not even cite *Gelboim*, let alone suggest anything that casts doubt on *Gelboim*'s holding that benchmark-fixing conspiracy allegations like those asserted here are sufficient. *See supra* pp.9-10, 16-17 & n.2. The Court should be especially hesitant to read *Treasuries* as creating unnecessary tension with *Gelboim*, given that both opinions were written by the Honorable Dennis Jacobs.

Thus, unlike in *Treasuries*, we start from the premise that the conspiracy allegations as to the Fixing Banks is sufficiently alleged. *See* Fixing Br.69 (acknowledging that Plaintiffs plausibly allege a conspiracy among "Fixing Banks [to] manipulate[] the 'daily, secret and unregulated meeting known as the London Silver Fixing,'" (citing JA477, 509-510, ¶¶1, 119)). The complaint then ties the Non-Fixing Banks to the conspiracy with specific, individualized allegations as to each. JA601-626 ¶¶268-312; *see* Br.23 (describing allegations involving Standard Chartered); Br.23-24 (same as to Barclays); Br.24 (same as to Fortis); *ibid.* (same as to UBS); Br.25 (same as to Merrill Lynch). That is enough to tie the Non-Fixing Banks to the scheme at the pleading stage.

The sufficiency of the allegations about UBS and Fortis is particularly clear. As Plaintiffs alleged, the Swiss regulator FINMA itself found that UBS had engaged in "serious misconduct" relating to "fixes in the precious metal market." JA499 ¶82. The Non-Fixing Banks' suggestion (pp.36-37 n.7) that this did not conclusively establish that UBS was involved in "serious misconduct" related to the Silver Fixing in particular, as opposed to other "fixes in the precious metals market," JA499 ¶82, does not make the allegation *implausible*. It is surely reasonable to infer that Non-Fixing Bank UBS's collusion with some of the same Fixing Banks here to manipulate the Fix price of other precious metals means UBS also contributed to manipulating the Fix price of silver. The Non-Fixing Banks' spin just presents a dispute of fact that is improper to resolve now.

Indeed, Plaintiffs' econometric analyses confirmed that UBS engaged in supracompetitive bid-ask spread quoting in alignment with the Fixing Banks' manipulative practice as part of the effort to manipulate the Fix price. JA576 ¶228 & Fig.47. The Non-Fixing Banks admit that Plaintiffs specifically allege that UBS, at least, narrowed its "bid-ask spreads before and during the Silver Fixing." *See* Non-Fixing

Br.29-30 (citing JA576 ¶¶228-229). And contrary to the Non-Fixing Banks' representation in their recent Rule 28(j) letter, Plaintiffs included data "tailored to" at least Fortis and UBS. *See, e.g.*, JA549 ¶186 & Fig.26 (Fortis and UBS lowered spot market quotes ahead of the Fixing). Here too, the Non-Fixing Banks admit that Fortis and UBS "submitted lower quotes around the Silver Fixing" on "days during which silver spot market manipulation purportedly occurred." *See* Non-Fixing Br.29.

III. Plaintiffs Allege "Actual Damages" And Domestic Manipulation Sufficient To Plead Their CEA Claims.

1. Unlike the parties in *Platinum*, *cf.* 61 F.4th at 268, the parties here agree that if Plaintiffs sufficiently allege injury for purposes of their antitrust claims, they "plead 'actual injury' sufficient to give them standing to assert CEA claims." Fixing Br.65; Non-Fixing Br.37. Plaintiffs "claims of antitrust and CEA injury rise or fall together." *See* Fixing Br.65; Non-Fixing Br.37 (same).

To plead "actual damages" under the CEA, all Plaintiffs need allege is that they "traded (at a detriment) in a contract the price of which was tied, via explicit agreement or other mutual understanding, to the price of a contract that a defendant was plausibly manipulating." *Total Gas*,

889 F.3d at 113 (citing *Gelboim*, 823 F.3d at 765-66). They did. *Supra* pp.6-8, 17-19, 27.

2. Just like the plaintiffs in *Platinum*, Plaintiffs have sufficiently alleged "'domestic—not extraterritorial—conduct by Defendants that is violative of a substantive provision of the CEA.'" *Platinum*, 61 F.4th at 267 (quoting *Prime Int'l Trading, Ltd. v. BP PLC*, 937 F.3d 94, 105 (2d Cir. 2019)).

The district court's contrary holding (SA143) was based on the same failure to recognize that Defendants' COMEX trading was "Fix-related." *See supra* pp.24-26 & n.4. "Defendants exchanged private information about incoming order flow to coordinate their trading activity in advance of the Silver Fix." JA601 ¶268. This Fix-related coordination and trading manifested in COMEX prices even before the Fixing, leading to a spike in volume, increased volatility, and, of course, an "abnormally large drop" in COMEX prices. JA519-520 ¶¶143-144; JA535 ¶167; JA536 ¶169.

Plaintiffs allege the same kind of COMEX manipulation that the *Platinum* plaintiffs pleaded as to NYMEX (which are both traded on the same, 23-hour-a-day GLOBEX platform). *Supra* pp.27-33. Because Defendants' conduct on this domestic exchange formed part of their

scheme to manipulate the silver derivatives market, Plaintiffs' CEA claims are domestic. *Platinum*, 61 F.4th at 267-69.

CONCLUSION

This Court should reverse and remand.

Dated: February 21, 2024

Respectfully submitted,

/s/ Daniel Woofter

Daniel Woofter
Kevin K. Russell
GOLDSTEIN, RUSSELL & WOOFTER LLC
1701 Pennsylvania Ave. NW
Suite 200
Washington, DC 20006
(202) 240-8433

Robert G. Eisler
GRANT & EISENHOFER P.A.
123 Justison Street
Wilmington, DE 19801
(302) 622-7030

Vincent Briganti
Margaret MacLean
Charles Kopel
LOWEY DANNENBERG P.C.
44 South Broadway
White Plains, NY 10601
(914) 997-0500

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of 2d Cir. R. 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,994 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2016 in 14-point New Century Schoolbook LT Standard font.

Dated: February 21, 2024

/s/ Daniel Woofter
Daniel Woofter

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2024, I caused the above document to be electronically filed with the Clerk of Court of the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered users of that system and that service will be accomplished by that system.

Dated: February 21, 2024

/s/ Daniel Woofter
Daniel Woofter