

25-2756(L), 25-2792(CON), 25-2824(CON), 25-3055(CON)

United States Court of Appeals *for the* Second Circuit

FEDERAL NATIONAL MORTGAGE ASSOCIATION, PRINCIPAL
FINANCIAL GROUP, INC., PRINCIPAL FINANCIAL SERVICES, INC.,
PRINCIPAL LIFE INSURANCE COMPANY, PFI BOND & MORTGAGE
SECURITIES FUND, PFI BOND MARKET INDEX FUND, PFI CORE PLUS
BOND I FUND, PFI DIVERSIFIED REAL ASSET FUND, PFI EQUITY
INCOME FUND, PFI GLOBAL DIVERSIFIED INCOME FUND,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR AMICUS CURIAE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

SCOTT A. EISMAN
AXINN LLP
45 Rockefeller Plaza
630 Fifth Avenue
New York, NY 10111
(212) 728-2200

KEVIN CARROLL
SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION
1099 New York Avenue NW
Washington, DC 20005

MARY HELEN WIMBERLY
JAMES W. ATTRIDGE
GEORGE F.K. WERNER
AXINN LLP
1901 L Street NW
Washington, DC 20036
(202) 912-4700

*Attorneys for Amicus Curiae
Securities Industry and Financial Markets Association*

PFI GOVERNMENT & HIGH QUALITY BOND FUND, PFI HIGH YIELD FUND, PFI HIGH YIELD FUND I, PFI INFLATION PROTECTION FUND, PFI MONEY MARKET FUND, PFI PREFERRED SECURITIES FUND, PFI SHORT-TERM INCOME FUND, PRINCIPAL VARIABLE CONTRACTS FUND, INC., PVC ASSET ALLOCATION ACCOUNT, PVC BALANCED ACCOUNT, PVC BOND & MORTGAGE SECURITIES ACCOUNT, PVC EQUITY INCOME ACCOUNT, PVC GOVERNMENT & HIGH QUALITY BOND ACCOUNT, PVC INCOME ACCOUNT, PVC MONEY MARKET ACCOUNT, PVC SHORT-TERM INCOME ACCOUNT, PRINCIPAL FUNDS, INC., MAYOR AND CITY COUNCIL OF BALTIMORE, on behalf of itself and all others similarly situated, CITY OF NEW BRITAIN, JENNIE STUART MEDICAL CENTER, INC., VISTRA ENERGY CORP., YALE UNIVERSITY, PFI INCOME FUND, THE FEDERAL HOME LOAN MORTGAGE CORPORATION, THE FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Amcore Bank, N.A., AMTRUST BANK, COLONIAL BANK, CALIFORNIA NATIONAL BANK, CORUS BANK, N.A., GUARANTY BANK, IMPERIAL CAPITAL BANK, INDYMAC BANK, F.S.B., INTEGRA BANK, N.A., LYDIAN PRIVATE BANK, PACIFIC NATIONAL BANK, PARK NATIONAL BANK, R-G PREMIER BANK OF PUERTO RICO, SAN DIEGO NATIONAL BANK, SILVERTON BANK, N.A., SUPERIOR BANK, UNITED COMMERCIAL BANK, UNITED WESTERN BANK, WASHINGTON MUTUAL BANK, WESTERNBANK PUERTO RICO,

Plaintiffs-Appellants,

— v. —

THE ROYAL BANK OF SCOTLAND PLC, UBS AG, CREDIT SUISSE AG, CREDIT SUISSE INTERNATIONAL, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., MERRILL LYNCH CAPITAL SERVICES, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BANK OF SCOTLAND PLC, THE ROYAL BANK OF SCOTLAND GROUP PLC, NATWEST MARKETS PLC, FKA The Royal Bank of Scotland PLC, BRITISH BANKERS' ASSOCIATION, BBA ENTERPRISES, LTD., BBA LIBOR, LTD., CHASE BANK USA, N.A., COOPERATIEVE CENTRALE RAIFFEISEN - BOERENLEENBANK B.A., NKA Cooperatieve Rabobank U.A., DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES INC., HBOS PLC, J.P. MORGAN BANK DUBLIN PLC, FKA Bear Stearns Bank PLC, JPMORGAN CHASE BANK, N.A., JPMORGAN CHASE & CO., J.P. MORGAN SECURITIES LLC, LLOYDS BANKING GROUP PLC, LLOYDS BANK PLC, ROYAL BANK OF CANADA, RBS SECURITIES INC., UBS SECURITIES LLC, BARCLAYS BANK PLC, BBA TRENT LTD., FKA BBA Libor, Ltd., COOPERATIEVE RABOBANK UA, FKA Cooperative Centrale Raiffeisen-Boerenleenbank, B.A., HSBC BANK PLC, HSBC BANK USA, N.A., WESTLB AG, PORTIGON AG, FKA WestLB AG, MERRILL LYNCH INTERNATIONAL BANK, LTD., THE HONGKONG AND SHANGHAI BANKING CORPORATION, LTD., BEAR STEARNS CAPITAL MARKETS, INC., J.P. MORGAN MARKETS LTD., FKA Bear Stearns International, Ltd., MERRILL LYNCH & CO.,

Defendants-Appellees,

MERRILL LYNCH INTERNATIONAL,

Defendant-Interested-Party-Appellee,

JPMORGAN CHASE BANK, N.A.,

Defendant-ADR Provider-Appellee,

CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC,

Defendants.

CORPORATE DISCLOSURE STATEMENT

The Securities Industry and Financial Markets Association is a nonprofit organization that has no parent corporation. No publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS CURIAE.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. Communications Facilitating Procompetitive Transactions, Benchmarking, And Standard Setting Are Not Evidence Of Conspiracy.	6
A. Direct Evidence Of Conspiracy Must Show More Than Merely Parallel Or Procompetitive Behavior.....	6
B. Conduct That Enables Competition In Financial Markets Is Not Direct Evidence Of Conspiracy.	8
II. Strong Circumstantial Evidence Beyond The Parallelism Expected In Financial Markets Is Required When The Alleged Conspiracy Is Economically Senseless.	17
A. Parallel Conduct Is Expected In Financial Markets.....	18
B. More Persuasive Evidence Under The Parallel- Plus Framework Is Required When The Alleged Conspiracy Is Economically Senseless.	21
III. Weakening The Legal Standard For Inferring Agreements In Restraint Of Trade Would Chill Legitimate And Procompetitive Behavior In Financial Markets.	24
CONCLUSION.....	29
CERTIFICATE OF COMPLIANCE.....	30

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Alaska Dep’t of Revenue, Treasury Div. v. Manku</i> , No. 20-1759-cv, 2021 WL 3027170 (2d Cir. July 19, 2021).....	25
<i>Anderson News, L.L.C. v. Am. Media, Inc.</i> , 899 F.3d 87 (2d Cir. 2018)	6, 7, 9, 19
<i>In re Baby Food Antitrust Litig.</i> , 166 F.3d 112 (3d Cir. 1999)	8, 25
<i>Bd. of Trade of City of Chi. v. SEC</i> , 187 F.3d 713 (7th Cir. 1999) (Easterbrook, J.)	19
<i>Bell Atl. Co. v. Twombly</i> , 550 U.S. 544 (2007).....	18, 27
<i>Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.</i> , 203 F.3d 1028 (8th Cir. 2000).....	22
<i>In re Chocolate Confectionary Antitrust Litig.</i> , 801 F.3d 383 (3d Cir. 2015)	8, 12
<i>City of Pontiac Police & Fire Ret. Sys. v. BNP Paribas Sec. Corp.</i> , 92 F.4th 381 (2d Cir. 2024).....	25
<i>In re Commodity Exch., Inc. Gold Futures & Options Trading Litig.</i> , 328 F. Supp. 3d 217 (S.D.N.Y. 2018).....	18
<i>E.I. du Pont de Nemours & Co. v. FTC</i> , 729 F.2d 128 (2d Cir. 1984)	28
<i>Eastman Kodak Co. v. Image Technical Services, Inc.</i> , 504 U.S. 451 (1992).....	23, 24
<i>Franchise Realty Interstate Corp. v. S.F. Joint Exec. Bd. of Culinary Workers</i> , 542 F.2d 1076 (9th Cir. 1976).....	28

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Freedom Holdings, Inc. v. Cuomo</i> , 624 F.3d 38 (2d Cir. 2010)	18
<i>In re Interest Rate Swaps Antitrust Litig.</i> , No. 16-MD-2704 (JPO), 2023 WL 8675625 (S.D.N.Y. Dec. 15, 2023)	25
<i>InterVest, Inc. v. Bloomberg, L.P.</i> , 340 F.3d 144 (3d Cir. 2003)	8
<i>In re LIBOR-Based Fin. Instruments Antitrust Litig. (LIBOR IX)</i> , 801 F. Supp. 3d 330 (S.D.N.Y. 2025)	<i>passim</i>
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	<i>passim</i>
<i>Mayor & City Council of Balt. v. Citigroup, Inc.</i> , 709 F.3d 129 (2d Cir. 2013)	7, 9, 27
<i>N. Am. Soccer League, LLC v. U.S. Soccer Fed., Inc.</i> , 883 F.3d 32 (2d Cir. 2018)	8
<i>Proctor v. State Farm Mut. Auto. Ins. Co.</i> , 675 F.2d 308 (D.C. Cir. 1982)	8
<i>Ramsey v. United Mine Workers of Am.</i> , 481 F.2d 742 (6th Cir. 1973)	8
<i>Pension Benefit Guar. Corp. ex rel. Saint Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.</i> , 712 F.3d 705 (2d Cir. 2013)	27
<i>Stanislaus Food Prods. Co. v. USS-POSCO Indus.</i> , 803 F.3d 1084 (9th Cir. 2015)	22
<i>Tops Mkts., Inc. v. Quality Mkts., Inc.</i> , 142 F.3d 90 (2d Cir. 1998)	26

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>United States v. U.S. Gypsum Co.</i> , 438 U.S. 422 (1978).....	25
<i>Verthelyi v. PennyMac Mortg. Inv. Tr.</i> , 187 F.4th 1217 (9th Cir. 2026)	12
<i>Wilcox v. First Interstate Bank of Or., N.A.</i> , 815 F.2d 522 (9th Cir. 1987).....	18
<i>Williamson Oil Co. v. Philip Morris USA</i> , 346 F.3d 1287 (11th Cir. 2003).....	22
Statutes	
15 U.S.C. § 1	<i>passim</i>
Other Authorities	
Basel Comm. on Banking Supervision, Basel Framework (Mar. 27, 2020), https://www.bis.org/committees/bcbs/basel-framework	19
Ben S. Bernanke, <i>Credit in the Macroeconomy</i> , FRBNY Qtr. Rev., Spring 1992–93, at 50.....	20
Darrell Duffie et al., <i>Benchmarks in Search Markets</i> , 72 J. Fin. 1983 (2017).....	13
Extension of Compliance Dates for Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule with Respect to U.S. Treasury Securities, 90 Fed. Reg. 11134 (Mar. 4, 2025).....	15
James Vickery & Joshua Wright, <i>TBA Trading and Liquidity in the Agency MBS Market</i> , FRBNY Econ. Pol’y Rev., May 2013, at 1	16
Marcel Kahan & Michael Klausner, <i>Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”)</i> , 83 Va. L. Rev. 713 (1997)	14, 15

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Marvin B. Lieberman & Shigeru Asaba, <i>Why Do Firms Imitate Each Other?</i> , 31 Acad. Mgmt. Rev. 366 (2006).....	19
<i>Municipal Swap Index</i> , SIFMA (Aug. 18, 2014), https://www.sifma.org/resources/guides-playbooks/about-the-municipal-swap-index	13
Pavan Wadhwa et al., <i>A Primer on Trading SIFMA Swaps</i> , J. of Trading, Fall 2013, at 26	14
Schuyler K. Henderson, <i>An Analysis of Interest Rate and Currency Swaps</i> , 11 N.C. J. Int’l L. & Com. Reg. 497 (1986)	11
SIFMA, <i>U.S. Treasury Central Clearing: Industry Considerations Report</i> (2024).....	16
Steven L. Schwarcz, <i>Central Clearing of Financial Contracts: Theory and Regulatory Implications</i> , 167 U. Pa. L. Rev. 1327 (2019).....	20
Steven L. Schwarcz, <i>Information Asymmetry and Information Failure: Disclosure Problems in Complex Financial Markets, in Corporate Governance and the Global Financial Crisis: International Perspectives</i> 95 (William Sun et al. eds., 2011)	25
<i>Treasury Clearing Documentation</i> , SIFMA (July 30, 2026), https://www.sifma.org/resources/market-practices-model-documentation/treasury-clearing-documentation	15
Xavier Freixas et al., <i>Bank Liquidity, Interbank Markets, and Monetary Policy</i> , 24 Rev. Fin. Stud. 2656 (2011)	10

INTEREST OF AMICUS CURIAE¹

The Securities Industry and Financial Markets Association (SIFMA) represents the interests of hundreds of securities firms, banks, and financial asset managers across the United States. Its member firms' clients include businesses and corporations, governments and municipalities, individual investors, public and private pension funds, endowments, foundations, private funds, and more. SIFMA's mission is to support a strong financial sector while promoting investor opportunity, capital formation, job creation, economic growth, and the cultivation of public trust and confidence in the financial markets.

SIFMA has a strong interest in the aspects of this appeal involving the evidence required under Section 1 of the Sherman Act, 15 U.S.C. § 1, to demonstrate that an anticompetitive agreement existed among banking institutions in the financial industry. This industry is

¹ All parties consent to this brief's filing. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than SIFMA, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. Some Plaintiffs and Defendants are members of SIFMA, but none contributed money intended to fund preparing or submitting the brief.

one in which key players—many of whom are SIFMA members—must closely follow market signals to anticipate and mitigate risk. It is one in which benchmarking collaborations are essential to determining the interest rates that allow capital to move smoothly from investors to issuers. And it is one in which banks must communicate with one another for financial transactions to take place. SIFMA thus has a strong interest in ensuring that Section 1 is correctly interpreted to reject inferences of collusion based on the very behaviors and communications that enable the industry to exist.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal concerns whether the mere fact of communication that is part and parcel of competing and transacting in the financial services arena constitutes evidence of an unlawful agreement in violation of Section 1. This issue is critically important to participants in financial markets, who transact with one another in the ordinary course of their businesses and collaborate in legitimate, procompetitive benchmarking and standard-setting processes that enhance the efficiency, transparency, and stability of the markets.

In the decision on appeal, the district court concluded that Plaintiffs failed to produce evidence sufficient to raise a genuine dispute of material fact that sixteen major “Panel Banks” conspired to suppress the London Interbank Offered Rate (LIBOR), an interest-rate benchmark. The court held that Plaintiffs had failed to offer either direct or circumstantial evidence of the existence of any such conspiracy. In reaching its decision, the court applied the parallel-plus framework for evaluating circumstantial evidence, recognizing that strong circumstantial evidence is required for plaintiffs to survive summary judgment when—as here—the conspiracy is economically senseless. *See In re LIBOR-Based Fin. Instruments Antitrust Litig. (LIBOR IX)*, 801 F. Supp. 3d 330 (S.D.N.Y. 2025).

I. The district court applied the correct legal standards to the unique characteristics of financial markets. And the starting point was its proper rejection of Panel Banks’ communications (really, intermediary brokers’ communications) as direct or indirect evidence of the alleged conspiracy. In financial markets, banks must communicate to facilitate transactions and procompetitive collaborations such as benchmarking and standard setting. Allowing these communications to

support an inference of conspiracy would condemn the very behaviors that allow competition in the industry to take place. Plaintiffs and their amici say otherwise. But their analysis erodes the caselaw's established divide between direct, unambiguous evidence and ambiguous, circumstantial evidence. Such erosion would yield an imprecise and unpredictable system in which trading partners would risk being sued for taking the very steps necessary for them to do business together in the first place.

II. The district court rightly applied the parallel-plus framework to Plaintiffs' ambiguous, circumstantial evidence, demanding strong proof in light of the economic senselessness of the alleged conspiracy. The need to show more than mere parallelism for an inference of conspiracy is acute in financial markets, where sophisticated banks closely monitor market conditions and react to market signals as a fundamental aspect of their business. That these banks independently respond in a similar fashion to similar stimuli is not evidence of conspiracy; it is the expected and rational result of unilateral, self-interested behavior. Some of Plaintiffs' supporting amici suggest that an inference of conspiracy should be permitted in these circumstances,

even when the conspiracy makes no economic sense. This Court should repudiate the suggestion, as allowing that inference would expose lawful (and inevitable) market-making and market-following behavior in the financial industry to antitrust liability.

III. The contrary standards advocated by Plaintiffs and their amici would turn expected, legitimate, and procompetitive conduct into evidence of an unlawful antitrust conspiracy. This case shows precisely what can happen as a result: over a decade of protracted litigation at substantial cost to all involved. Adopting the Plaintiffs' unworkably low standards for conspiracy would have broad, wide-ranging negative effects throughout the financial industry. These standards would chill legitimate information gathering, deter benchmarking and standardization efforts, and create uncertainty over whether independent decisions based on best practices will be condemned as collusive. The Court should reject such standards.

ARGUMENT

I. COMMUNICATIONS FACILITATING PROCOMPETITIVE TRANSACTIONS, BENCHMARKING, AND STANDARD SETTING ARE NOT EVIDENCE OF CONSPIRACY.

A plaintiff claiming that defendants agreed to restrain trade in violation of Section 1 must offer something more than “evidence that is equally consistent with independent conduct as with illegal conspiracy” because any lower standard “would deter or penalize perfectly legitimate and procompetitive conduct.” *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 98 (2d Cir. 2018) (citation omitted). The context here shows why: the conduct that Plaintiffs claim (Opening Br. 45, 93) should prove conspiracy—communications facilitating transactions, benchmarking, and standard setting—is what would naturally occur in financial markets in the absence of conspiracy *and* what allows competition in these markets to exist in the first place.

A. Direct Evidence Of Conspiracy Must Show More Than Merely Parallel Or Procompetitive Behavior.

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Supreme Court struck a delicate balance. The Court recognized that Section 1 plaintiffs often accuse defendants of agreeing to restrain trade based on allegations of parallel conduct, such

as simultaneous “price-cutting activities.” *Id.* at 594. But because “cutting prices in order to increase business often is the very essence of competition,” the Court observed, “mistaken[ly] infer[ring]” that such parallel conduct reflects an agreement to restrain trade would risk “chill[ing] the very conduct the antitrust laws are designed to protect.” *Id.* The Court thus required more than parallel conduct to prove an agreement to restrain trade—either direct evidence of such an agreement or circumstantial evidence (parallel conduct *plus* evidence that the agreement in question existed).

In the four decades since, this Court has taken *Matsushita* at its word by requiring that direct evidence reflect more than parallel conduct or procompetitive collaboration. Under this Court’s caselaw, evidence is “direct” only when it provides immediate support for the existence of an agreement to restrain trade. This includes evidence “such as an admission by one of the defendants,” *Anderson News*, 899 F.3d at 103, or “a recorded phone call in which two competitors agreed to fix prices at a certain level.” *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). These kinds of “smoking gun[s]” are direct evidence because they do not require “the

inference that a conspiracy existed.” *Id.* In so limiting direct evidence, this Court has provided a predictable rule: if market participants’ conduct does not on its face show an agreement, then it is not direct evidence of one.²

B. Conduct That Enables Competition In Financial Markets Is Not Direct Evidence Of Conspiracy.

Plaintiffs’ amicus the American Antitrust Institute (AAI) seeks to topple that clear and well-settled rule. AAI claims that the line between direct and circumstantial evidence is “illusory” because “all evidence

² “[D]irect evidence, the proverbial ‘smoking gun,’ is difficult to come by” *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159 (3d Cir. 2003). It most commonly takes the form of an oral statement or writing that itself constitutes the challenged agreement, or testimony of a cooperating witness admitting the agreement existed. *See, e.g., N. Am. Soccer League, LLC v. U.S. Soccer Fed., Inc.*, 883 F.3d 32, 40–41 (2d Cir. 2018) (“an association’s express regulation of its members’ market”); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 396 (3d Cir. 2015) (“an explicit admission from a participant that an antitrust conspiracy existed”); *Ramsey v. United Mine Workers of Am.*, 481 F.2d 742, 760–61 (6th Cir. 1973) (written contract).

The caselaw, moreover, abounds with examples of what is *not* direct evidence. For instance, documents showing that competitors had advance knowledge of each other’s price increases and that there was a “truce” between them are not direct evidence of an agreement. *E.g., In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118–21 (3d Cir. 1999). Nor are conversations between competitors that do not discuss the subject of the alleged collusion. *E.g., Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 334 (D.C. Cir. 1982).

depends upon some inferences,” and thus urges the Court to disregard the distinction between direct and circumstantial evidence. AAI Br. 14–16 (citation omitted).

But the line is hardly as blurry as AAI makes it seem. AAI homes in (*id.* at 17) on the district court’s refusal to treat deposition testimony that there was a “market consensus” about where LIBOR would be set each day as direct evidence. *LIBOR IX*, 801 F. Supp. 3d at 377. The district court explained why: the deponents may well have used the term “consensus” to mean that “LIBOR submitter[s] maintain[ed] a view, perhaps informed by broker estimates, research, and the bank’s financial metrics at any given point, as to where the market was trending that was similar to that of [their] peers.” *Id.* In other words, the meaning of “consensus” is ambiguous rather than clear and direct. At best, it may be consistent with conspiracy, but that does not exclude the possibility that the statement is an example of ordinary market conduct. Ambiguous statements of this nature are a world away from the sorts of smoking guns—tape-recorded calls and admissions of wrongdoing—that this Court has characterized as direct evidence in the past. *E.g.*, *Citigroup*, 709 F.3d at 136; *Anderson News*, 899 F.3d at 103.

AAI's view would make illegal procompetitive conduct that is essential for financial markets to operate, including the acts of obtaining broker estimates, conducting research, and scrutinizing internal financial metrics. *LIBOR IX*, 801 F. Supp. 3d at 377. Taken to its logical endpoint, AAI's view would put banks' routine practices in the direct-evidence crosshairs.

Communication. Communications within and among participants in financial markets are essential to competition in those markets, but AAI's approach would render them direct evidence of anticompetitive agreements.³

Unlike markets for physical goods, where manufacturers rarely need to buy goods or services from their competitors, banks constantly borrow from and lend to each other. This has resulted in a robust "interbank" market. *See generally* Xavier Freixas et al., *Bank Liquidity, Interbank Markets, and Monetary Policy*, 24 Rev. Fin. Stud. 2656 (2011) (discussing the role of interbank lending in managing risk). The

³ To be clear, Plaintiffs rely primarily on evidence of communications among *third party* brokers, rather than communications directly between banks. *LIBOR IX*, 801 F. Supp. 3d at 407.

interbank market could not operate unless financial institutions could communicate with one another. Communication, after all, is the only way for them to adequately assess the risk associated with each transaction and to agree on terms. Of course, communications to facilitate the interbank market could cause banks to reach similar conclusions, but only because those communications give banks the information they need to compete optimally with each other.

Consider interest-rate swaps. In an interest-rate swap, one bank trades the revenue stream from fixed-rate securities for another's revenue stream from variable-rate securities. *See* Schuyler K. Henderson, *An Analysis of Interest Rate and Currency Swaps*, 11 N.C. J. Int'l L. & Com. Reg. 497, 497–98 (1986). Traders on banks' interest-rate desks—whose job is to research and negotiate interest-rate swaps—may well understand there to be consensus on what the interest rates or the pricing of such swaps *are* at a given moment, even though no one has agreed on what prices *should* be. Under AAI's view, an interest-rate trader's testimony about that “consensus” would be direct evidence of a conspiracy to fix rates or prices, even though it is consistent with procompetitive trading activity and independent

decision making. The way for banks to avoid such consensus would be to bypass the activities that allow some interest-rate traders to outcompete others, including research and negotiation. Yet *Matsushita* drew a line between direct and circumstantial evidence precisely to “avoid mistaken inferences that could impose liability” on conduct that is both “lawful” and competitive. *Chocolate Confectionary*, 801 F.3d at 396.

Benchmarking and standardization. AAI’s theory likewise imperils benchmarking and standardization, two related and important financial-market activities.

Benchmarking underlies millions of financial transactions. Benchmarks allow interest rates to adjust dynamically based on market conditions such as perceived risk, avoiding the need for constant renegotiation of short-term debts. LIBOR was just one such benchmark, and though it is now defunct, others continue to be used every day in financial transactions. *See Verthelyi v. PennyMac Mortg. Inv. Tr.*, 187 F.4th 1217, 1222 (9th Cir. 2026) (discussing the replacement of LIBOR with alternative benchmarks).

By providing a metric that is clear to everyone in the market (including consumers), benchmarks allow for transparency in lending. Benchmarks solve the problems associated with having to gauge market performance along multiple dimensions, protecting market participants from having to guess at each other's own idiosyncratic weighing of those factors. *See* Darrell Duffie et al., *Benchmarks in Search Markets*, 72 J. Fin. 1983, 1983 (2017) (“An enormous quantity of . . . trades are negotiated by counterparties who rely on the observation of benchmark prices. . . . [B]enchmarks affect pricing and trading behavior by reducing market opacity”). The use of any specific benchmark has been voluntary, which means that a benchmark like LIBOR succeeds because lenders and borrowers decide that it best captures their sense of what a fair transaction would be.

Developing a benchmark requires collaboration, highlighting the risks of inferring conspiracy from routine benchmarking activity. For instance, the SIFMA Municipal Swap Index, which reflects changes in the value of certain obligations owed by local governments, is used as a benchmark for many financial transactions. *See About the Municipal Swap Index*, SIFMA (Aug. 18, 2014), <https://www.sifma.org/resources/>

guides-playbooks/about-the-municipal-swap-index. Because those obligations are effectively guaranteed by banks, the performance of SIFMA's index accounts for the perceived stability of both government and market institutions. Pavan Wadhwa et al., *A Primer on Trading SIFMA Swaps*, J. of Trading, Fall 2013, at 26, 33–34. Fundamentally, SIFMA's index is similar to LIBOR—it is a statistical average determined through a structured process, though SIFMA's index relies on metrics other than submissions by a panel. But the criteria according to which those metrics are evaluated have required periodic reassessment, most notably in 2014. AAI's approach could threaten this reassessment process by treating discussions through which competitors reach an industry consensus as though they were direct evidence of a conspiracy to “fix” the index rate.

Another way that financial-market participants collaborate is standardization, which likewise benefits those markets. Because financial transactions are often complex, it is important to ensure that they occur on terms known to all participants. See Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”)*, 83 Va. L. Rev. 713,

761–63 (1997) (describing the utility—and ubiquity—of standard setting in financial markets). To draw an analogy, standardization is desirable for the same reasons as the American Law Institute’s Restatements of the Law: each promotes clarity about existing practices and offers a forum for debating improvements. *See id.* at 763 (noting the “potential to improve contracts through standard-setting” related to financial transactions).

The competitive benefits of standardization can be seen in SIFMA’s recent efforts to develop market standards for treasury clearing. *Treasury Clearing Documentation*, SIFMA (July 30, 2026), <https://www.sifma.org/resources/market-practices-model-documentation/treasury-clearing-documentation>. In 2023, the Securities and Exchange Commission adopted a rule change requiring many treasury trades to be centrally cleared. In addition to being new to many traders, this process has raised concerns about the liquidity effects of transacting through intermediaries instead of directly. Extension of Compliance Dates for Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule with Respect to U.S. Treasury

Securities, 90 Fed. Reg. 11134, 11135–37 (Mar. 4, 2025). In response, SIFMA provided a forum for financial institutions and other stakeholders to develop standards for, among other things, the handling of failed transactions under the new system and guidelines for disclosing client data to counterparties. SIFMA, *U.S. Treasury Central Clearing: Industry Considerations Report* 52, 85 (2024). While these solutions are obviously procompetitive, they rely on a stakeholder process through which firms, including competitors, necessarily must share their views of how best to approach future transactions.

Treating statements made in similar contexts as direct evidence of “collusion” just because they reflect a shared perception as to how best to structure transactions, as AAI suggests, would stifle these efforts through lengthy and needless litigation. The costs are potentially immense. One of SIFMA’s other standardization efforts has been found to reduce the interest rates paid by homebuyers with mortgages by 0.25% or more, producing millions of dollars in consumer savings. James Vickery & Joshua Wright, *TBA Trading and Liquidity in the Agency MBS Market*, FRBNY Econ. Pol’y Rev., May 2013, at 1, 2.

Endorsing the overzealous approach that Plaintiffs and AAI urge, in turn, would cause immediate harm to consumers.

II. STRONG CIRCUMSTANTIAL EVIDENCE BEYOND THE PARALLELISM EXPECTED IN FINANCIAL MARKETS IS REQUIRED WHEN THE ALLEGED CONSPIRACY IS ECONOMICALLY SENSELESS.

The district court was also correct when it applied the parallel-plus framework to Plaintiffs' evidence of conspiracy, requiring strong circumstantial evidence to survive summary judgment due to the economic senselessness of their allegations. *See LIBOR IX*, 801 F. Supp. 3d at 371–76, 378–79. Parallelism is expected among sophisticated banks that are closely monitoring and reacting to the same market conditions. *Matsushita*, in turn, plays a vital role in preventing mistaken condemnations. Allowing Section 1 plaintiffs to prove their claims with anything less than strong circumstantial evidence under the parallel-plus framework would turn lawful market-following behavior into evidence of unlawful conspiracy—particularly when the alleged agreement to restrain trade makes no economic sense. That result is at odds with common sense and precedent on the plaintiff's burden at summary judgment when bringing a Section 1 claim.

A. Parallel Conduct Is Expected In Financial Markets.

Parallelism is more common in industries where competitors face similar market stimuli, which means that it is less likely to be the result of a conspiracy. “That competitors respond in similar ways” to, for instance, a shared cost “they must all pay does not, by itself, manifest an agreement proscribed by the Sherman Act.” *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 56 (2d Cir. 2010). Economically, “parallel conduct . . . , without more,” is frequently the result of “a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.” *Bell Atl. Co. v. Twombly*, 550 U.S. 544, 554 (2007). A competitor’s “status as a major market-maker” or market-follower, in turn, does not indicate that it has engaged in collusion. *In re Commodity Exch., Inc. Gold Futures & Options Trading Litig.*, 328 F. Supp. 3d 217, 227 (S.D.N.Y. 2018).

Such is the case in the financial markets, where the failure to “follow[] the lead of other major banks” is often “against [an individual bank’s] self-interest.” *Wilcox v. First Interstate Bank of Or., N.A.*, 815 F.2d 522, 526 (9th Cir. 1987). “Reliance on other banks’ . . . rate changes is a convenient and accurate way” for a bank to ensure that its business

strategy is competitive and “does not establish any suppression of competition or show any sinister domination.” *Id.* (quoting *United States v. Int’l Harvester Co.*, 274 U.S. 693, 708–09 (1927)); see *Anderson News*, 899 F.3d at 106 (“[L]egitimate industry monitoring behavior . . . is not evidence (much less persuasive evidence) of conspiracy.”); Marvin B. Lieberman & Shigeru Asaba, *Why Do Firms Imitate Each Other?*, 31 *Acad. Mgmt. Rev.* 366, 368–71 (2006) (explaining that competitors are more likely to imitate each other when market conditions are uncertain).

It is unsurprising that highly capitalized financial institutions employing traditional banking practices engage in similar behavior in response to similar market signals. See Basel Comm. on Banking Supervision, Basel Framework (Mar. 27, 2020), <https://www.bis.org/committees/bcbs/basel-framework> (establishing international guidelines for sound banking). To keep their balance sheets stable, banks must manage the ratio of assets to liabilities they bear and assign the “the inevitable risks of markets to those best able to bear them.” *Bd. of Trade of City of Chi. v. SEC*, 187 F.3d 713, 716–17 (7th Cir. 1999) (Easterbrook, J.). This is a task that requires collecting information

about the broader market, since the respective values of assets and liabilities are determined by large-scale trends that go beyond any single institution. *See, e.g.,* Ben S. Bernanke, *Credit in the Macroeconomy*, FRBNY Qtr. Rev., Spring 1992–93, at 50, 54–55, 65 (discussing the role of monetary policy in influencing a firm’s financial strategy). It is also a task that requires banks to draw from their experience and past trends to assess the future downsides of financial instruments. *See* Steven L. Schwarcz, *Central Clearing of Financial Contracts: Theory and Regulatory Implications*, 167 U. Pa. L. Rev. 1327, 1337 (2019) (explaining that financial institutions “know from market experience . . . the likely maximum range” of changes in the value of financial instruments).

Thus, banks employing the same traditional banking practices, monitoring the same markets, and drawing from the same past trends, will inevitably make similar risk-management decisions despite exercising their own independent judgment. This is expected, independent behavior—not evidence of unlawful conspiracy. Under such circumstances, parallelism alone proves nothing.

B. More Persuasive Evidence Under The Parallel-Plus Framework Is Required When The Alleged Conspiracy Is Economically Senseless.

Given these industry dynamics and the expectation of some degree of parallel conduct in financial markets, the district court correctly concluded under *Matsushita* that Plaintiffs had to offer more than mere evidence of parallel conduct; they had to show “plus factors’ that lead to an inference of collusion.” *LIBOR IX*, 801 F. Supp. 3d at 399. Not only that, Plaintiffs had to offer *strong* circumstantial evidence of the asserted conspiracy because the alleged conspiracy made no economic sense (something the district court also recognized). *Id.* at 378–39. Among other reasons, the court held that the alleged LIBOR-suppression conspiracy lacked rationality “in dollars and cents” because it would have benefited Panel Banks’ borrowing positions only at the expense of their profits from lending. *Id.* at 373.

In an effort to undermine this analysis, Plaintiffs’ supporting amici try to unduly cabin *Matsushita* in two ways that are unsupported by precedent. This Court should reject both.

First, AAI argues that *Matsushita* applies only when the evidence at issue is “conduct” evidence, rather than “noneconomic” evidence of

“statements.” AAI Br. 9–14. This reading is novel; AAI does not cite a single decision that has made that distinction.⁴ *See id.* It also is contradicted by *Matsushita* itself. There, the Court held that it was *unreasonable* to infer conspiracy from exactly the type of noneconomic statements that AAI claims fall beyond *Matsushita*’s reach. That evidence included “formal agreements arranged in cooperation with Japan’s Ministry of International Trade and Industry” and another agreement among defendants “to distribute their products in the United States according to a ‘five company rule.’” 475 U.S. at 580–81, 584. The Court cited this “evidence of other combinations” as precisely the type of indirect evidence of the challenged price-cutting conspiracy that was

⁴ In fact, several appellate decisions have applied *Matsushita* where much of the circumstantial evidence was “noneconomic.” *See, e.g., Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 803 F.3d 1084, 1092–93 (9th Cir. 2015) (applying *Matsushita* to e-mail exchanges between competitors that expressed shared perceptions of market conditions); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1306–10 (11th Cir. 2003) (applying *Matsushita* to evidence of price-related “signaling” through press releases); *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1034–37 (8th Cir. 2000) (applying *Matsushita* in the presence of price-verification communications between competitors).

inadequate and, if accepted, could result in a “mistaken” and “costly” inference of conspiracy. *Id.* at 594.

Second, certain law professor amici incorrectly suggest that the Supreme Court’s decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), stands for the proposition that *Matsushita*’s language that “more persuasive evidence” is required for economically senseless conspiracies does not, in fact, mean what it says. Antitrust & Evid. Professors Br. 8–9. These amici describe “*Matsushita*’s ‘economic sense’ inquiry [as] the familiar reasonable-inference test, nothing more.” *Id.* at 9. But it is unclear how that description advances amici’s view. *Matsushita* applied the reasonable-inference test *with special consideration* to the ways that “antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.” 475 U.S. at 588. One of those limitations is that “courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.” *Id.* at 593. And a claim of conspiracy is “implausible” if it “simply makes no economic sense.” *Id.* at 587.

Eastman Kodak is not to the contrary. There, the Court recognized that “[i]f the plaintiff’s theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.” 504 U.S. at 468–69. The law professor amici thus offer a distinction without a difference, and they show no error in the district court’s analysis.⁵ This Court should confirm what the district court recognized in its decision—that strong circumstantial evidence beyond mere parallelism is required when the alleged conspiracy makes no economic sense.

III. WEAKENING THE LEGAL STANDARD FOR INFERRING AGREEMENTS IN RESTRAINT OF TRADE WOULD CHILL LEGITIMATE AND PROCOMPETITIVE BEHAVIOR IN FINANCIAL MARKETS.

This Court should take the positions set out by amici on the other side for what they are: invitations to redo *Matsushita*’s framework based on a preference for taking dubious cases to trial. This Court

⁵ In a similar vein, other amici suggest that *Matsushita* does not apply when a plaintiff alleges price fixing. Antitrust & Evid. Professors Br. 7. The assertion is puzzling, as *Matsushita* *did* allege price fixing—the reason the theory of collusion there made no economic sense was that it (like the one advanced here) would have necessarily required the defendants to take a loss during its duration. 475 U.S. at 590.

should decline the invitation, not only because doing so would be contrary to precedent, but because the effects of loosening *Matsushita* would fall disproportionately on financial markets, imperiling their ability to manage risk through procompetitive collaboration.⁶

Financial institutions gain a competitive advantage by understanding the market and the positions of their competitors, something that undermining *Matsushita* would prevent. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (explaining how even an “exchange of price data and other information” can “increase economic efficiency and render markets more, rather than less, competitive”); *Baby Food*, 166 F.3d at 126 (suggesting that possessing information about competitors’ future plans can be procompetitive in an industry where business strategies are mutually dependent); *see also* Steven L. Schwarcz, *Information Asymmetry and*

⁶ The explosion of Section 1 litigation related to financial markets over the past decade, mostly within this circuit, amplifies these concerns. *See, e.g., City of Pontiac Police & Fire Ret. Sys. v. BNP Paribas Sec. Corp.*, 92 F.4th 381 (2d Cir. 2024) (auctions of Treasuries); *Alaska Dep’t of Revenue, Treasury Div. v. Manku*, No. 20-1759-cv, 2021 WL 3027170 (2d Cir. July 19, 2021) (supranational, sovereign, and agency bonds); *In re Interest Rate Swaps Antitrust Litig.*, No. 16-MD-2704 (JPO), 2023 WL 8675625 (S.D.N.Y. Dec. 15, 2023) (trading platforms for interest-rate swaps).

Information Failure: Disclosure Problems in Complex Financial Markets, in Corporate Governance and the Global Financial Crisis: International Perspectives 95, 98–100 (William Sun et al. eds., 2011) (discussing the importance of information to the health of financial markets). The rule that Plaintiffs’ and their amici urge inhibits that competition.

Equally problematic, watering down *Matsushita*’s framework will impose needless litigation costs in the financial industry and interfere with its role as the national economy’s backbone. Summary judgment—especially “in the area of antitrust law”—conserves resources “[b]y avoiding wasteful trials and preventing lengthy litigation that may have a chilling effect on pro-competitive market forces.” *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1998). Prolonging this sprawling, decade-and-a-half-long litigation based on razor-thin evidence of parallel conduct is at odds with that purpose.

And the impacts hardly end at summary judgment. The line between direct and circumstantial evidence and the need for the parallel-plus framework both exist at the pleading stage too. As this Court has held, a plaintiff can plead a Section 1 claim either by alleging

“direct evidence that the defendants entered into an agreement in violation of the antitrust laws” or by alleging parallel conduct and “plus factors.” *Citigroup*, 709 F.3d at 136. If the Court were to hold, for instance, that a simple market consensus qualifies as direct evidence of an anticompetitive agreement, *see supra* Point I, it would also lower the bar for pleading Section 1 violations. Doing so would reopen the door to the very “discovery abuse” the Supreme Court has sought to curb, *Twombly*, 550 U.S. at 559, and allow for “settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of the suit,” *Pension Benefit Guar. Corp. ex rel. Saint Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) (citation omitted).

This case shows just how costly discovery can be. Discovery here spanned roughly a decade. *See LIBOR IX*, 801 F. Supp. 3d at 361. Panel Banks responded to almost 1,000 written-discovery requests, produced nearly *four million* documents (in addition to 93,000 audio files), and had 59 of their current and former employees deposed. *Id.* at 362–63. As is often the case for antitrust litigation, “the long drawn out process of

discovery” was “expensive” and a costly distraction to the scores of employees whose daily management of the financial institutions they serve was disrupted. *See Franchise Realty Interstate Corp. v. S.F. Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1082 (9th Cir. 1976).

It is thus entirely rational for banks to take pains to avoid conduct that could land them in discovery in a complex case like this one. And if antitrust liability hinges on such “fine distinction[s]” that banks are left in “doubt as to the types of otherwise legitimate conduct that are lawful and those that are not,” *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984), they will cautiously avoid the sorts of procompetitive communication, collaboration, and research that Plaintiffs and their amici wish to treat as evidence of an antitrust conspiracy. Chilling such activity is precisely what *Matsushita* sought to avoid. This Court should avoid it too.

CONCLUSION

For the foregoing reasons, SIFMA as amicus curiae asks that this Court affirm the district court's grant of summary judgment against Plaintiffs on their claims of alleged collusion.

October 21, 2026

Respectfully submitted,

/s/ Mary Helen Wimberly

SCOTT A. EISMAN
AXINN LLP
45 Rockefeller Plaza
630 Fifth Avenue
New York, NY 10111
(212) 728-2200
seisman@axinn.com

MARY HELEN WIMBERLY
JAMES W. ATTRIDGE
GEORGE F. K. WERNER
AXINN LLP
1901 L Street NW
Washington, DC 20036
(202) 912-4700
mhwimberly@axinn.com
jattridge@axinn.com
gwerner@axinn.com

*Counsel for Amicus
Curiae Securities Industry
and Financial Markets Association*

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Fed. R. App. P. 29(5) and Fed. R. App. P. 32(a)(7)(B) because, excluding the exempt portions, this document contains 5,341 words.

This document also complies with the typeface and type-style requirements of Fed. R. App. P. 32(a) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using the most up-to-date version of Word for Microsoft 365.

October 21, 2026

/s/ Mary Helen Wimberly

*Counsel for Amicus
Curiae Securities Industry
and Financial Markets Association*