No. 16-1189-cv

United States Court of Appeals
for the Second Circuit

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION,

(*Caption continued on inside cover.*)

Appeal from the United States District Court
for the Southern District of New York

BRIEF IN SUPPORT OF APPELLEES FOR *AMICI CURIAE* THE INSTITUTE OF INTERNATIONAL BANKERS AND THE CLEARING HOUSE ASSOCIATION L.L.C.

Edmund S. Sauer
BRADLEY ARANT BOULT CUMMINGS LLP
Roundabout Plaza
1600 Division Street, Suite 700
Nashville, TN 37203
Telephone: (615) 244-2582
Facsimile: (615) 252-6380
esauer@bradley.com

Kevin C. Newsom
Blair Druhan Bullock
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2119
Telephone: (205) 521-8000
Facsimile:(205) 521-8800
knewsom@bradley.com

CHARLES SCHWAB CORPORATION, CHARLES SCHWAB BANK, N.A., CHARLES SCHWAB & CO., INC., SCHWAB SHORT-TERM BONDMARKET FUND, SCHWAB TOTAL BONDMARKET FUND, SCHWAB U.S. DOLLAR LIQUID ASSETS FUND, SCHWAB MONEYMARKET FUND, SCHWAB VALUE ADVANTAGEMONEY FUND, SCHWAB RETIREMENT ADVANTAGEMONEY FUND, SCHWAB INVESTORMONEY FUND, SCHWAB CASH RESERVES, SCHWAB ADVISOR CASH RESERVES, SCHWAB YIELDPLUS FUND, SCHWAB YIELDPLUS FUND LIQUIDATION TRUST,

Plaintiffs-Appellants,

v.

BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., THE BANK OF TOKYOMITSUBISHI UFJ, LTD., BARCLAYS BANK PLC, CITIBANK, N.A., CITIGROUP INC., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., CREDIT SUISSE GROUP AG, DEUTSCHE BANK AG, HSBC HOLDINGS PLC, HSBC BANK PLC, JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., LLOYDS BANKING GROUP PLC, HBOS PLC, ROYAL BANK OF CANADA, THE NORINCHUKIN BANK, THE ROYAL BANK OF SCOTLAND GROUP PLC, UBS AG, PORTIGON AG (F/K/AWESTLB AG),WESTDEUTSCHE IMMOBILIENBANK AG,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

The Institute of International Bankers ("IIB") is a non-profit corporation organized under the New York Not-For-Profit Corporation Law. IIB does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

The Clearing House Association L.L.C. is not a subsidiary of any other corporation. It is a limited liability company and as such has no shareholders. Rather, each member holds a limited liability company interest in the Clearing House that is equal to each other member's interest, none of which is more than a 10% interest.

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INTERESTS OF THE *AMICI CURIAE*[1]

The Institute of International Bankers ("IIB") is the only national association devoted exclusively to representing, advancing, and protecting the interests of the international banking community in the United States. Its members include internationally headquartered banks and financial institutions from more than 35 countries. U.S. operations of IIB members enhance the depth and liquidity of U.S. financial markets and contribute more than $50 billion to the U.S. economy.

The Clearing House Association L.L.C. is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. It is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system. Its affiliate, the Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly $2 trillion in U.S.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4), *amici curiae* certify that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and its counsel, made any monetary contribution toward the brief's preparation and submission. Pursuant to Rule 29(a)(2), *amici curiae* certify that Schwab's counsel consented to the brief's filing.

dollar payments each day, representing half of all commercial ACH and wire volume.

The IIB and Clearing House regularly appear as *amici curiae* in cases that raise significant legal issues for their member banks. *Amici* have a substantial interest in this action because of the important jurisdictional issues presented. As explained in more detail below, a theory that permits states to exercise personal jurisdiction over an out-of-state defendant based on a subsidiary's actions or an alleged coconspirator's conduct could subject the member banks to suit in virtually every state, regardless of whether the banks personally availed themselves of the benefits and obligations of that state. The IIB and the Clearing House submit this brief to correct several misconceptions in Schwab's brief and to explain why extending personal jurisdiction in the manner Schwab proposes would violate the Fourteenth Amendment.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Due process protects a defendant from being haled into a foreign state court unless the defendant has purposefully and personally, through its own suit-related conduct, availed itself of the benefits and obligations of that state. In this case, Schwab seeks to establish so-called "specific jurisdiction," which requires a defendant to have certain "minimum contacts" with a state before being subject to suit there. The district court correctly held that Schwab failed to satisfy this test.

From Schwab's brief, one would expect the minimum-contacts determination to turn simply—and generally across defendants—on where the harm occurred and that harm's foreseeability. That is not the law. To find specific personal jurisdiction, courts must look at each individual defendant's suit-related conduct and determine that the conduct constitutes a substantial and purposeful connection with the forum state. Schwab's vague and generalized allegations fall well short of satisfying this demanding test.

Because Schwab cannot show that each defendant has suit-related contacts with California, Schwab attempts to establish personal jurisdiction by invoking two vicarious-jurisdiction theories. But due process does not—and should not—permit a state to exercise jurisdiction over a foreign defendant based solely on *others'* conduct within the forum. Schwab asserts that the district court can exercise jurisdiction over defendants whose subsidiaries or other corporate affiliates may have had sufficient contacts in California. This theory, however, violates the fundamental and longstanding corporate-separateness doctrine, which prevents plaintiffs from attributing a subsidiary's actions to a parent company.

Schwab also asserts that the district court can exercise jurisdiction over each defendant because an alleged coconspirator sold financial instruments in California. This sweeping jurisdictional theory is unconstitutional—and flatly inconsistent with the decisive trend in Supreme Court jurisprudence narrowing personal jurisdiction—

and this Court should reject it. But even if it were colorable, Schwab's pleadings do not satisfy the so-called conspiracy-jurisdiction theory. Schwab did not sufficiently allege—as it must if the theory is to have any discernible limits at all—that a coconspirator acted in furtherance of the conspiracy in California, and that the defendant knew about and controlled or directed the coconspirator's engagement in that in-forum conduct.

Both of Schwab's vicarious-liability arguments fail. An in-state actor's forum contacts are not attributable to a foreign defendant for due process purposes unless, at the very least, the defendant specifically directs or controls the challenged forum conduct. Due process requires that the foreign entity itself must independently establish suit-related contacts with the forum state.

ARGUMENT

I. Schwab's Position Ignores That Specific Personal Jurisdiction Exists Only Where The Defendant Personally And Purposefully Engaged In Suit-Related Conduct In The Forum State.

The Due Process Clause of the Fourteenth Amendment constrains a state's authority to bind out-of-state defendants to a judgment. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). It "requir[es] that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). This limitation "protects the defendant against the burdens of litigating in a distant or

inconvenient forum" and "ensure[s] that the States through their courts do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide*, 444 U.S. at 292. Due process "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* at 297. And predictability and certainty are central to international business. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

Because Schwab does not contend that "general" personal jurisdiction is satisfied as to any defendants in the sense that they are "at home" in California, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014), it must establish "specific" personal jurisdiction. Specific jurisdiction reaches only those nonresidents that "have certain minimum contacts [with the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

International Shoe's minimum-contacts test remains the "constitutional touchstone," *Burger King*, 471 U.S. at 474, of the Due Process Clause's specific-

personal-jurisdiction requirement. *Daimler*, 134 S. Ct. at 754. This minimum-contacts inquiry "focuses on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014); *accord Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 335 (2d Cir. 2016).

Schwab misconstrues the governing test in several important respects. *First*, Schwab describes the minimum-contacts test as focused on the foreseeability of harm within the forum state. *See, e.g.*, Schwab Br. at 36 ("That is particularly true where, as here, the soliciting and selling of LIBOR-based instruments to Schwab in California—the world's sixth-largest economy—would plainly have been foreseeable to all of the defendant conspirators."). The Supreme Court, however, has repeatedly and emphatically rejected that view. The Court has "consistently held" that "foreseeability of causing injury in another state" is "not a sufficient benchmark for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474. As this court has observed, "the fact that harm in the forum is foreseeable . . . is insufficient for the purpose of establishing specific personal jurisdiction over a defendant." *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 674 (2d Cir. 2013).

If foreseeability alone were sufficient to establish personal jurisdiction, international corporations, including *amici*'s member banks, could be subject to specific personal jurisdiction in all 50 states simultaneously. That is not the law.

International-banking institutions exchange market information on a worldwide basis. Although it is perhaps in some sense foreseeable that this information might cause harm in the United States under certain circumstances, that dissemination alone does not constitute purposeful availment under *International Shoe*. The Supreme Court has emphasized that extending personal jurisdiction that far would violate due process. *See Rush v. Savchuk*, 444 U.S. 320, 331–32 (1980) (suggesting that a forum contact has "no jurisdictional significance" if it would result in jurisdiction "in all 50 states and the District of Columbia . . . simultaneously"); *see also Adv. Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 801–02 (7th Cir. 2014) ("The creation of such *de facto* universal jurisdiction runs counter to the approach the Court has followed since *International Shoe*, and that it reaffirmed as recently as February 2014 in *Walden*.").

The governing test's true focus is on the defendant's own suit-related conduct, not whether injury in the forum state was in some sense foreseeable. "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden*, 134 S. Ct. at 1121. That "substantial connection" must result from the contacts of the "defendant *himself*" and not the contacts of a third-party or the plaintiff. *Id.* (quoting *Burger King*, 471 U.S. at 475).

Unlike a general choice-of-law analysis, the minimum-contacts test focuses "solely on the defendant's purposeful connection to the forum." *Burger King*, 471 U.S. at 481–82. Accordingly, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Denckla*, 357 U.S. at 253; *accord Burger King*, 471 U.S. at 481.

Second, Schwab repeatedly emphasizes that its alleged injury was suffered in California. *See, e.g.*, Schwab Br. at 38 ("California is *exactly* where defendants would have expected to find a huge bulk of the harmed counterparties."). For example, Schwab argues that jurisdiction is proper under *Calder v. Jones*, 465 U.S. 783, 789 (1984), because the defendants knew the brunt of the alleged injury would be felt by "plaintiffs *like* Schwab in California." Schwab Br. at 37 (emphasis added). Again, however, that is the wrong test. "The proper question is not where the plaintiff experienced a particular injury or effect, but whether the defendant's conduct connects him to the forum in a meaningful way." *Walden*, 134 S. Ct. at 1125. "[T]he mere fact that [a defendant's] conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction." *Id.* The Supreme Court's "precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 883 (2011) (plurality).

Effects-based jurisdiction may be proper if a non-forum defendant's alleged wrongful conduct is "expressly aimed at" the forum state and "intentionally directed at" a resident of that state. *Calder*, 465 U.S. at 789–90. But California is in no sense "the focal point" of the challenged and "untargeted" conduct alleged here. *Id.* at 789; *accord Waldman*, 835 F.3d at 340 (recognizing that the *Calder* "effects test" is limited to conduct of which the foreign state is "*focal point*" of the torts alleged in the litigation). The mere fact that Schwab suffered its alleged injury in California is inadequate to subject foreign defendants to liability in that forum based on untargeted conduct allegedly occurring abroad. If it did, defendants such as *amici*'s member banks could be subject to suit in virtually any state where a purported financial injury ultimately occurs. Again, that is not the law. *See supra*, at 6–7. Nor could it be, as it would impose an unwarranted and overwhelming obligation on the member banks to know and comply with every single state's laws, even without doing business there. *Cf. J. McIntyre*, 564 U.S. at 891 (Breyer, J. concurring).

Third, Schwab tries to sidestep the critical requirements that a defendant's contacts establish a "substantial connection" with the forum, *Burger King*, 471 U.S. at 475 & n. 18; *McGee v. Int'l Life*, 355 U.S. 220, 223 (1957), and that the necessary contacts be related to the suit, *Walden*, 134 S. Ct. at 1121–22. Because Schwab cannot satisfy these requirements, it misstates the causation standard as requiring only that the injury be "related to" defendants' minimum contacts. Schwab Br. at

26. But as this Court has recognized, suit-related conduct is not simply all conduct "related to" the alleged contacts. Rather, it is only the conduct that "could have subjected [the defendants] to liability" in the state. *Waldman*, 835 F.3d at 335. This means that there must be some showing that the relevant conduct proximately caused the alleged harm. *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998). Engaging in conduct that is merely "related to" the alleged forum contacts is not enough.

Finally, Schwab hopes to escape jurisdictional scrutiny by lumping all of the defendants together. Schwab does so by asserting vague and general allegations of California contacts not attributed to any particular defendant. Due process does not permit such a scattershot approach to personal jurisdiction. As the Supreme Court has recognized, it is "plainly unconstitutional" to "consider[] the 'defending parties' together and aggregat[e] their forum contacts in determining whether [a court] ha[s] jurisdiction." *Rush*, 444 U.S. at 331–32. *International Shoe*'s requirements "must be met as to each defendant over whom a state court exercises jurisdiction." *Id.* at 332.

II. Adopting Schwab's Vicarious-Jurisdiction Theories Would Violate Due Process And Could Impermissibly Subject Member Banks To Jurisdiction Everywhere.

Recognizing that its pleadings do not satisfy *International Shoe*'s longstanding minimum-contacts test, Schwab tries to establish personal jurisdiction by advancing two sweeping vicarious-jurisdiction theories. Schwab asks this Court

to treat the jurisdictional contacts of the defendants' subsidiaries and the defendants' alleged coconspirators as the defendants' own contacts. The Court should reject these theories outright as unconstitutional and contrary to Supreme Court precedent. At an absolute minimum, the Court should strictly limit them to situations in which the foreign defendant directs or controls the challenged forum conduct. If Schwab's proposed theories were to prevail, foreign defendants, such as *amici*'s member banks, could be forced—impermissibly—to defend themselves in jurisdictions where they have had no presence or availment at all, based solely on *others'* forum connections.

A. A Corporate Affiliate's Forum Contacts Are Not Automatically Imputable To Its Parent Or Other Corporate Affiliate.

Schwab first attempts to establish personal jurisdiction by imputing the California contacts of non-party broker-dealer affiliates of the defendants to the defendants themselves, who, all seem to agree, never personally availed themselves of the benefits and obligations of that state. This argument ignores the longstanding corporate-separateness doctrine. "It is fundamental that a parent is considered a legally separate entity from its subsidiary." *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 224 (2d Cir. 2014). Because a parent and its subsidiary (or other corporate affiliate) are separate entities, and personal jurisdiction turns on a defendant's own personal and purposeful availment with a state, "jurisdiction over a parent corporation [does not] automatically establish

jurisdiction over a wholly owned subsidiary." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984); *see also Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984) ("It is true that the presence of a local corporation does not create jurisdiction over a related, but independently managed, foreign corporation.").

"Because a principal purpose for organizing a corporation is to permit its owners to limit their liability, there is a presumption of separateness between a corporation and its owners, which is entitled to great weight." *Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988) (citation omitted). With good reason, courts rarely override this strong presumption to attribute liability to a parent company, *see id.*, and courts should be even more cautious when overriding that presumption to establish personal jurisdiction over a foreign defendant.

For a parent company to be liable for a subsidiary's acts, "[t]he parent must exercise complete domination in respect to the transaction attacked so that the subsidiary had at the time no separate will of its own." *Am. Protein*, 844 F.2d at 60. In the jurisdictional context, courts impute a subsidiary's (or any affiliate's) contacts to a corporation *only* if the plaintiff shows the same or greater level of control over the third-party' transaction. For example, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 930 (2011), the Supreme Court emphasized that a plaintiff must plead that the parent and subsidiary are a "unitary business" to override

corporate separateness for jurisdictional purposes. *See also Berkman v. Ann Lewis Shops, Inc.*, 246 F.2d 44, 48 (2d Cir. 1957) (noting that when separate identities were "carefully preserved," the entities did not merge for personal jurisdiction purposes).

This Court also emphasizes corporate control when determining whether it has jurisdiction over a parent corporation under New York's long-arm statute. The Court considers four factors: "(1) common ownership; (2) financial dependency of the subsidiary on the parent; (3) the degree to which the parent interferes in the selection of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the extent of the parent's control over the subsidiary's marketing and operational policies." *Reers v. Deutsche Bahn Ag*, 320 F. Supp. 2d 140, 156 (S.D.N.Y. 2004) (citing *Beech Aircraft*, 751 F.2d at 120–22). Further, this Court has observed that "before an agency relationship will be held to exist under [the statute], a showing must be made that the alleged agent acted in New York for the benefit of, with the knowledge and consent of, and under some control by, the nonresident principal." *Grove Press, Inc. v. Angleton*, 649 F.2d 121, 122 (2d Cir. 1981).

In *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972) (Friendly, J.), this Court suggested that a similar showing is required to exercise vicarious jurisdiction under the Due Process Clause and that such jurisdiction is improper unless, at the very least, the out-of-state defendant affirmatively directed or controlled the in-state actor. The Court should similarly

require a showing of complete control or direction for due-process purposes. Without such a requirement, a corporate entity that has never purposefully availed itself of a foreign state's benefits and obligations could be haled into court for acts that it had no reason to know would occur and no ability to prevent from occurring.[2]

Schwab's complaint indiscriminately asserts that all of the defendants control their affiliated broker-dealers. This general assertion is not directed at any specific defendant and is not supported by any factual allegation. Schwab's vague pleading is an "argumentative inference" that may not be drawn in Schwab's favor. *In re Terrorist Attacks on September 11, 2001*, 714 F.3d at 673. Further, defendants submitted affidavits challenging that assertion, which Schwab did not counter. As a result, the Court should not accept Schwab's loose control allegations. *See id.* Schwab did not plead facts sufficient to show that any affiliate's jurisdictional contacts should be imputed to any defendant bank.

B. The Conspiracy-Jurisdiction Theory Violates Due Process and Should Not Apply Here.

Schwab next argues that the district court has jurisdiction over each defendant because one or more alleged coconspirators sold financial instruments in California.

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[2] Scholars have also recognized the importance of this requirement, concluding that exercising jurisdiction over a parent due to a subsidiary's contacts with a foreign state without showing control or direction would violate due process. *See* Lea Brilmayer and Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1 (1986).

This theory is fundamentally flawed. Scholars and courts have criticized the conspiracy-jurisdiction theory for violating due process, and neither the Supreme Court nor the Second Circuit have ever adopted it. The Court should not do so now—particularly in the face of the decisive trend in Supreme Court jurisprudence to narrow personal jurisdiction. If the Court were to break new ground and adopt some variation of this theory, it should strictly limit it to situations in which a nonresident conspirator-defendant controlled or directed its alleged coconspirator's act in furtherance of the conspiracy in the forum state—something that Schwab does not even come close to pleading.

1. The Second Circuit Should Not Adopt The Conspiracy-Jurisdiction Theory.

The conspiracy-jurisdiction theory purports to attribute a third-party coconspirator's conduct in a foreign state to every other alleged conspirator. The Second Circuit has never adopted this vicarious-jurisdiction theory. To the contrary, this Court's opinion in *Leasco*, which was decided more than 40 years ago, held that "the rule in this circuit is that the mere presence of one conspirator . . . does not confer personal jurisdiction over another alleged conspirator." *Leasco,* 468 F.2d at 1343. Referring to a senior partner's relation to a junior partner, the Court noted that the matter "could be viewed differently when" there is a closer relationship such that one was "delegated the duty of carrying out an assignment over which [another] retains general supervision." *Id.* at 1343–44. Even so, on remand, the district court

again dismissed the case for a lack of personal jurisdiction. *Leasco Data Processing Equip. Corp. v. Maxwell*, 68 F.R.D. 178, 180 (S.D.N.Y. 1974).

The Court should now expressly reject the conspiracy-jurisdiction theory for at least three reasons. *First*, attributing an alleged conspirator's acts to a coconspirator violates the principle that each defendant must purposefully avail itself of the state's benefits and obligations to confer specific personal jurisdiction. *See Walden*, 134 S. Ct. at 1122. This violation would be inconsistent with the Supreme Court's recent trend of limiting a state's authority to bind out-of-state defendants to a judgment. *See id.*; *see also Rush*, 444 U.S. at 332 (refusing to attribute a third-party defendant's conduct to another defendant because "[s]uch a result is plainly unconstitutional").

Courts that have recognized conspiracy jurisdiction incorrectly justify it by applying agency principles founded in tort liability. *See Stauffacher v. Bennett*, 969 F.2d 455, 458–59 (7th Cir. 1992); *In re Arthur Treacher's Franchisee Litig.*, 92 F.R.D. 398, 421 & n.31 (E.D. Pa. 1981); *Pohl, Inc. of Am. v. Webelhuth*, 201 P.3d 944, 954 (Utah 2008) ("The conspiracy theory of personal jurisdiction is based on the time honored notion that the acts of [a] conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy."). This analogy is badly misplaced because it "threatens to confuse the standards applicable to personal

jurisdiction and those applicable to liability." *Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1070 (10th Cir. 2007).

"[C]onspirators are generally *held liable* for the known or reasonably foreseeable acts of all other co-conspirators committed in furtherance of the conspiracy." *United States v. Eisen*, 974 F.2d 246, 268 (2d Cir. 1992) (emphasis added). But unlike with liability, "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide*, 444 U.S. at 295; *see also In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d at 674. For example, in *World-Wide*, it was foreseeable that the defective car sold to plaintiff would be driven into another state and that the defendant could ultimately be *held liable* for that accident. Nevertheless, the Court refused to exercise personal jurisdiction over the defendant that did not sell cars in that state because that defendant did not have sufficient minimum contacts with the forum state. 444 U.S. at 297.

In *Leasco*, this Court recognized the critical distinction between foreseeability for liability purposes and purposeful-availment purposes. There, Judge Friendly emphasized that "attaining the rather low floor of foreseeability necessary to support a finding of tort liability is not enough to support *in personam* jurisdiction." *Leasco*, 468 F.2d at 1341. The only foreseeability inquiry relevant to personal jurisdiction is whether "the defendant's conduct and connection with the forum State are such

that he should reasonably anticipate being haled into court there." *World-Wide*, 444 U.S. at 297; *see also Burger King*, 471 U.S. at 474. Thus, Schwab's assertion that "[i]t would hardly make sense to accord conspiracy less force in civil cases than it has in the criminal context" misses the point. Schwab Br. at 36. The Court cannot justify the conspiracy-jurisdiction theory by analogizing the foreseeability of a coconspirator's acts for liability purposes to that for personal jurisdiction.

Second, the Supreme Court and this Court have both refused to apply the conspiracy-jurisdiction theory in civil federal antitrust suits. *Bankers Life Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953); *Bertha Bldg. Corp v. Nat'l Theatres Corp.*, 248 F.2d 833, 836 (2d Cir. 1957); *see also Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 493–95 (9th Cir. 1979). Under the Clayton Act's venue provision, 15 U.S.C. § 22, venue is proper where the defendant "transacts business" or "has an agent" that transacts business. *See Bankers Life*, 346 U.S. at 382; 15 U.S.C. § 22. In addition, under the federal venue statute, 28 U.S.C. § 1391(b)(2), jurisdiction is proper in a venue where "a substantial part of the events or omissions giving rise to the claim occurred." Courts have refused to accept claims of personal jurisdiction under these provisions based on a coconspirator's acts.

This Court has recognized "that a finding that [the defendant] had no agents in California and acting independently had transacted no business there . . . is not necessarily in conflict with a finding that it conspired with others to cause injury to

the plaintiffs in California." *Bertha Bldg. Corp*, 248 F.2d at 836. Similarly, the Ninth Circuit noted that "[t]he co-conspirator theory would . . . mak[e] the propriety of venue turn on the final decision on the merits in conspiracy cases." *Piedmont Label Co.*, 598 F.2d at 495.

The Court should now similarly reject the conspiracy-jurisdiction theory as a basis for finding "specific" personal jurisdiction. Like the Clayton Act's venue provisions and the federal venue statute, *International Shoe*'s minimum-contacts test focuses on the defendant's own personal contacts, not another's contacts. In *Bankers Life*, the Supreme Court held that coconspirators were not agents conducting business under 15 U.S.C. § 22. 346 U.S. at 384. If an alleged conspirator is not an "agent," a court cannot impute its acts to a coconspirator for personal-jurisdiction purposes. *See Leasco*, 468 F.2d at 1341. The Court should adopt the same approach here and refuse to impute personal jurisdiction based on an alleged coconspirator's acts. *See Yen v. Buchholz*, No. C-08-03535 RMW, 2010 WL 1758623, at *5 (N.D. Cal. Apr. 30, 2010) (rejecting the conspiracy-jurisdiction theory, in part, because "the Ninth Circuit . . . rejected an analogous theory for venue purposes" in *Piedmont Label Co.*).

Finally, the conspiracy-jurisdiction theory violates fundamental due-process principles. For this reason, many courts have expressly rejected the theory. For example, Judge Forrest of the Southern District of New York recently held that

"[t]he rules and doctrines applicable to personal jurisdiction are sufficient without the extension of the law to a separate and certainly nebulous 'conspiracy jurisdiction' doctrine." *In re Aluminum Warehousing Antitrust Litig.*, 90 F. Supp. 3d 219, 227 (S.D.N.Y. 2015). California federal courts have also rejected the conspiracy-jurisdiction theory when enforcing the state's long-arm statute. *Buchholz*, 2010 WL 1758623, at *5; *Murphy v. Am. Gen. Life Ins. Co.*, No. ED CV14–00486 JAK, 2015 WL 4379834, at *9 (C.D. Cal. July 15, 2015); *Kipperman v. McCone*, 422 F. Supp. 860, 873 n.14 (N.D. Cal. 1976) ("[M]uch more frivolous is the contention that personal jurisdiction, the exercise of which is governed by strict constitutional standards, may depend upon the imputed conduct of a co-conspirator.").

Washington state and federal courts have also rejected the theory under Washington's long-arm statute, which like California's, "has been interpreted to be co-extensive with the limits of federal due process." *See Silver Valley Partners, LLC v. De Motte*, 400 F. Supp. 2d 1262, 1268 (W.D. Wash. 2005); *Hewitt v. Hewitt*, 896 P.2d 1312, 1316 (Wash. Ct. App. 1995). And those courts are not alone. *See, e.g.*, *In re Honey Transshipping Litig.*, 87 F. Supp. 3d 855, 873 (N.D. Ill. 2015) ("Illinois courts and the Seventh Circuit have abandoned the conspiracy theory as a basis for personal jurisdiction."); *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 866 F. Supp. 2d 315, 339 (D.N.J. 2011), *vacated on other grounds by*, 716 F.3d 764 (3d

Cir. 2013); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995); *Coopers & Lybrand v. Cocklereece*, 276 S.E.2d 845, 850 (Ga. Ct. App. 1981).

Multiple scholars have also recognized that the conspiracy-jurisdiction theory violates due process. *See* Matt N. Thomson, Jr., *Civil Procedure—The Conspiracy Theory of Personal Jurisdiction—Imputation of Jurisdictional Contacts to Co-Conspirators*, 69 Tenn. L. Rev. 221 (2001); Rhett Traband, *The Case Against Applying the Co-Conspiracy Venue Theory in Private Securities Actions*, 52 Rutgers L. Rev. 227 (1999); Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234 (1983); Riback, *supra* at 17.

This Court should reject the conspiracy-jurisdiction theory and adhere to the Supreme Court's instruction that "[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction." *Rush*, 444 U.S. at 332.

2. At A Minimum, The Court Should Require Plaintiffs To Show That A Particular Defendant Itself Directed or Controlled A Substantial Act In Furtherance of the Conspiracy In The Forum State.

If the Court does not reject conspiracy jurisdiction altogether (as it should), the Court should at least strictly limit the theory's application. The courts that have adopted the conspiracy-jurisdiction theory require the plaintiff to show that (1) a conspiracy existed, (2) the defendant participated in the conspiracy, and, most

importantly here, (3) "a coconspirator's activities in furtherance of the conspiracy had sufficient contacts with [the state] to subject that conspirator to jurisdiction in [that state]." *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013); *see also Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 782 F. Supp. 215, 221 (S.D.N.Y. 1992). Some courts recognize a fourth element of conspiracy jurisdiction requiring that "the out-of-state co-conspirator was or should have been aware" of the coconspirator's act. *Glaros v. Perse*, 628 F.2d 679, 682 (1st Cir. 1980) (acknowledging the theory but not applying it). But these requirements are not sufficient to satisfy due process. The Court must also require plaintiffs to show that the non-forum defendant directed or controlled the coconspirator's forum acts. *See Leasco*, 468 F.2d at 1343–44.

Due process requires at a minimum that the defendant direct or control the coconspirator's act made in furtherance of the conspiracy in the foreign state. Requiring a showing of direction or control is essential to ensure that a foreign defendant has "fair warning," *Burger King*, 471 U.S. at 472, that it is subject to suit in that forum. In *Leasco*, this Court suggested that it would consider imputing an agent's jurisdictional contacts to a nonresident principal only if the principal instructed the forum act and retained supervision over it. *Leasco*, 468 F.2d at 1343–44; *see also Grove Press, Inc.*, 649 F.2d at 122. The Southern District of New York has similarly required that the "co-conspirators . . . acted at the direction or under

the control or at the request of or on behalf of the out-of-state defendant." *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 805 (S.D.N.Y. 2005). This Court should hold that to exercise jurisdiction over a particular non-resident bank, the plaintiffs must show that the bank in question directed the coconspirator to act in furtherance of the conspiracy in the forum state or controlled that act.

In this case, Schwab did not allege that *any* defendant engaged in any act within California in furtherance of the conspiracy. The alleged conspiracy involved a scheme to make artificially low LIBOR submissions to "project[] financial soundness" to the British Bankers' Association in London. Schwab Br. at 6; *Gelboim v. Bank of Am.*, 823 F.3d 759, 781–82 (2d Cir. 2016). No act in furtherance of that conspiracy was even alleged to have taken place in California. Although Schwab tries to change the subject by focusing on the sale of financial instruments in California, that is immaterial; the conspiracy's alleged purpose did not depend on any defendant ever selling any financial instruments in California. And, as explained above, that it might have been foreseeable that someone could be injured in California by purchasing a financial instrument tied to the rate is not enough.

But regardless, even if the sale of financial instruments in California were material, Schwab has not sufficiently alleged that *any* defendant directed or controlled any codefendant to conduct such a transaction in California. Conferring jurisdiction on all of the banks in this action merely because one alleged

coconspirator sold financial instruments based on the LIBOR rate would mean foreign corporations could be haled into virtually any court in any state for an act in which they engaged abroad. That result is inconsistent with personal-jurisdiction principles, *see Rush*, 444 U.S. at 330, and would eliminate any "degree of predictability to the legal system," *World-Wide*, 444 U.S. at 297.

CONCLUSION

For the reasons set forth above and in Appellees' brief, the Court should affirm the district court's dismissal of Schwab's claims for lack of personal jurisdiction.

s/ Kevin C. Newsom
Kevin C. Newsom
One of the Attorneys for *Amici Curiae*
the Institute of International Bankers
and the Clearing House Association
L.L.C.

OF COUNSEL

Kevin C. Newsom
Blair Druhan Bullock
Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2119
Telephone: (205) 521-8000
Facsimile: (205) 521-8800
knewsom@bradley.com

Edmund S. Sauer
Bradley Arant Boult Cummings LLP
Roundabout Plaza

1600 Division Street, Suite 700
Nashville, TN 37203
Telephone: (615) 244-2582
Facsimile: (615) 252-6380
esauer@bradley.com

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, the undersigned counsel certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief contains 5,611 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

s/ Kevin C. Newsom
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to attorneys of record.

s/ Kevin C. Newsom
Of Counsel