



By Electronic Submission

October 1, 2024

Vanessa A. Countryman  
Secretary  
Securities and Exchange Commission  
Washington, DC 20549-1090

**Re: Proposed Rule: Financial Data Transparency Act Joint Data  
Standards, File No. S7-2024-05 (August 2, 2024)**

Dear Ms. Countryman:

We appreciate the opportunity to provide comments on the proposal<sup>1</sup> by nine federal Agencies<sup>2</sup> to establish regulations implementing the provisions of the Financial Data Transparency Act of 2022 (the “FDTA”).<sup>3</sup> We are the court-appointed co-lead counsel for the named Plaintiffs and a proposed class of CUSIP users in an antitrust action entitled *Dinosaur Financial Group, Inc., et al. v. S&P Global, Inc. et al.*, 22 Civ. 1860 (KPH), pending in the United States District Court for the Southern District of New York since 2022 (the “CUSIP Litigation”). We support the Agencies’ proposal to require the use of FIGI identifiers, a free alternative to CUSIP identifiers, in regulatory filings.

The CUSIP Litigation is the first court challenge to the licensing program by which the American Bankers Association (“ABA”), S&P Global Inc. (“S&P”), and FactSet Research Systems, Inc. (“FactSet”) operating through CUSIP Global Services (“CGS”) (collectively, “Defendants”), require that virtually all financial institutions, including pension and defined-benefit plans, banks, insurance companies, governmental entities, and academic institutions sign restrictive “license agreements” as a condition to using CUSIP numbers.<sup>4</sup> In March 2022, over two months before Senator Mark Warner introduced the FDTA in the United States Senate on May 24, 2022, Plaintiffs Dinosaur Financial Group, Inc., Swiss Life Investment Management Holding AG, and Hildene Capital Management, LLC filed complaints challenging the legality of Defendants’ licensing policies under Section 2 of the Sherman Act and various state statutes. (A copy of the Second Amended Complaint is submitted herewith as Exhibit 1.) United States District Judge Katherine

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<sup>1</sup> Financial Data Transparency Act Joint Data Standards, 89 Fed. Reg. 67,890 (proposed Aug. 22, 2024) (the “Proposed Rule”).

<sup>2</sup> The Agencies include: the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Consumer Financial Protection Bureau, the Federal Housing Finance Agency, the Commodity Futures Trading Commission (“CFTC”), the Securities and Exchange Commission (“SEC”), and the Department of the Treasury.

<sup>3</sup> 12 U.S.C. § 5334(b).

<sup>4</sup> FactSet through CGS currently manages the licensing scheme on behalf of the ABA. S&P previously managed that business before selling CGS to FactSet in 2022.

Polk Failla has denied in large part Defendants' motion to dismiss, and the case is proceeding on the Section 2 and state law claims. (The Opinion and Order is submitted herewith as Exhibit 2.)

The Defendants exploited the status of the CUSIP identifiers as the standard identifying system for United States financial instruments by falsely claiming that the CUSIP identifiers were copyrighted. They backstopped this false claim of copyright with the threat—vigorously enforced—that data vendors would remove the CUSIP identifiers from the data feed of any financial institution that refused to sign a license agreement with CGS. That very real threat was effective because without the CUSIP identifiers linking financial data to a particular financial instrument, the data in the feed would be unusable. At the same time, Defendants have threatened legal action against putative class members that have attempted to “scrape” CUSIP identifiers that are publicly disclosed in SEC reports, claiming an intellectual property right in the identifiers.

The Defendants' decades-long false assertion that the CUSIP identifiers are proprietary and will be made available in machine-readable form only if the CUSIP user agrees to onerous restrictions has imposed substantial harm on CUSIP users and on financial markets. First, it has stifled competition from start-ups and other potential innovators that could use the CUSIP identifiers to deliver value-added products and services to financial institutions. Among other things, the license agreement has historically prohibited and today prohibits licensees from using the CUSIP identifiers (i) in any way that is not specifically authorized by the Defendants or (ii) to compete with the Defendants in data products and services. To ensure that potential competitors do not have access to CUSIP identifiers they could use to compete against the Defendants, the license, among other things, prevents companies with public-facing web pages from displaying CUSIP identifiers in machine-readable form and prevents potential competitors from obtaining CUSIPs outside of Defendants' restrictive licensing scheme by scraping them from public filings. Therefore, the license deprives potential competitors of access to machine-readable CUSIP identifiers that they would need in order to provide value-added products and services to financial markets.

Second, Defendants' false claim of a proprietary interest in the CUSIP numbers has created a transfer of wealth over the years of billions of dollars from the CUSIP users to Defendants in the form of license fees that CUSIP users otherwise could have used for more productive purposes.<sup>5</sup>

The Agencies' proposal to select FIGI numbers as the approved financial identifier for use in regulatory filings will begin to resolve these problems. The proposal is consistent with FDTA's requirement that, if practicable, all identifiers used in the Agencies' adopted data standards be non-proprietary. CUSIP identifiers and associated issuer names as they are today exploited for profit and policed by the Defendants do not satisfy this statutory mandate and therefore cannot be used in regulatory filings consistent with the terms of FDTA.

Requiring an open-source, non-proprietary identifier is an important first step toward a day when financial market participants are no longer burdened by the Defendants' restrictive license agreements and unwarranted financial exploitation of and a tax on the United States financial system. There is much work that still must be done to achieve that goal, including our pending

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<sup>5</sup> By contrast, due to action by the European Commission, financial institutions that operate only in Europe are not forced to pay license fees in Europe for the use of CUSIPs in International Securities Identification Numbers (“ISINs”) that identify financial instruments issued in the United States.

litigation, but we support the Agencies' proposal as an important step toward financial institutions being able to use identifiers without paying unnecessary license fees and facing unlawful restrictions that prohibit them from enhancing efficiency and transparency in financial markets and creating innovative products.

Sincerely,

/s/ Leiv Blad

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## **Exhibit 1**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

DINOSAUR FINANCIAL GROUP LLC )  
470 Park Avenue South, Ninth Floor )  
New York, NY 10016 )

HILDENE CAPITAL MANAGEMENT, LLC )  
333 Ludlow Street, Suite 5 )  
Stamford, Connecticut 06903 )

SWISS LIFE INVESTMENT )  
MANAGEMENT HOLDING AG )  
General-Guisan-Quai 40 )  
P.O. Box. 8022 Zurich, Switzerland )

on behalf of themselves and all others )  
similarly situated, )

Plaintiffs, )

v. )

S&P GLOBAL, INC. )  
55 Water Street )  
New York, NY 10041 )

AMERICAN BANKERS ASSOCIATION )  
1120 Connecticut Ave., NW )  
Washington, DC 20036 )

FACTSET RESEARCH SYSTEMS INC. )  
45 Glover Avenue )  
Norwalk, CT 06850 )

Defendants. )  
)  
)  
)  
)  
)  
)

Civil Action Nos.: 1:22-cv-1860-KPF

1:22-cv-1929-KPF

**SECOND AMENDED**

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

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Plaintiffs Dinosaur Financial Group LLC, Hildene Capital Management, LLC, and Swiss Life Investment Management Holding AG (collectively, “Plaintiffs”), on behalf of themselves and all others similarly situated, by their attorneys, Competition Law Partners PLLC, Kaplan, Fox & Kilsheimer LLP, and Wollmuth Maher & Deutsch LLP, for their Second Amended Complaint (“SAC”) in this action hereby state the following:

## **I. INTRODUCTION**

1. Defendant S&P Global, Inc. (“S&P”) for decades unlawfully maintained a monopoly and conspired with the American Bankers Association (“ABA”) to successfully eliminate competition in the market for using identifiers for United States financial instruments (the “CUSIP Use Market”). The Defendants have employed a variety of exclusionary acts, many of which share a common theme: they are based on the false assertion that CUSIP numbers are protected by copyright. Numbers, including numbers used for identification, are not copyrightable.

2. CUSIP numbers are the standard numbering system for United States financial instruments. Defendants have leveraged the CUSIP numbers’ status as the standard to coerce financial institutions, whose businesses depend on the use of CUSIP numbers, to pay Defendants a “tax” for the use of CUSIP numbers.

3. CUSIP is an acronym that stands for Committee on Uniform Securities Identification Procedures. As its name implies, a CUSIP number is a functional “serial number” to identify a particular financial instrument. CUSIP numbers identify financial instruments just as social security numbers identify persons or Vehicle Identification (VIN) numbers identify cars.

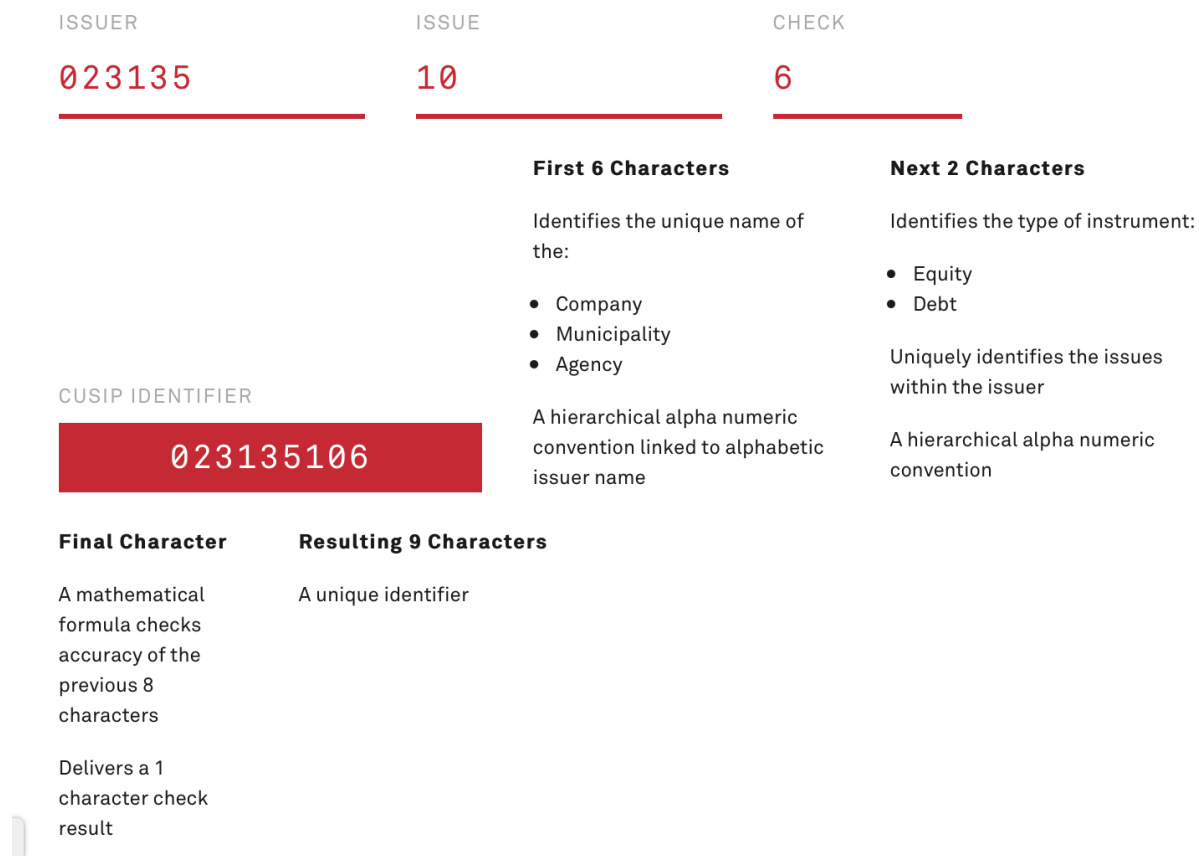
4. Each CUSIP number is merely a nine-digit number that identifies a specific United States financial instrument. A CUSIP number specifies both the name of the issuing entity and the type of issue (*i.e.*, whether the issue is a debt or equity instrument). Each individual CUSIP number



results not from any artistic, literary, or other aesthetic or subjective consideration or authorship or creativity. Instead, a convention established more than 50 years ago strictly determines the set format of each CUSIP number and each digit within it. The following chart describes the rigid, invariable structure of a CUSIP number:

### Structure of a CUSIP

#### Example: Amazon.com Inc - Common Stock



5. The ABA claims to “own” the CUSIP numbering system, and it delegated the management of the CUSIP numbering system to S&P. The ABA claims to own a copyright based on a copyright registration it filed for a “compilation” of data that includes the CUSIP number and data for every financial instrument which has an associated CUSIP number. According to the

Defendants, the data compilation contains more than 60 data elements on more than 26 million financial instruments (the “CUSIP\_DB”).

6. Three of the data elements in the CUSIP\_DB compilation are: (i) the CUSIP numbers, (ii) the issuer name, and (iii) the type of issue. The first element—CUSIP numbers—are not copyrightable as a matter of copyright law because they lack the originality and creativity that is a constitutional and statutory requirement for copyright protection. The second and third elements—the issuer’s full name and the type of issue—are set by the issuer; therefore, Defendants have no claim of authorship or originality or copyright in the issuer’s name and type of issue.

7. Within S&P, the CUSIP Global Services (“CGS”) division was responsible for managing the CUSIP issuance and licensing business (“CGS Business”) on behalf of the ABA until March 1, 2022. On that date, FactSet Research Systems, Inc (“FactSet”) purchased the CGS Business from S&P for \$1.925 billion and assumed its liabilities through an asset purchase agreement. FactSet also entered into an agreement with S&P and the ABA by which FactSet took over from S&P the licensing and administration of the CUSIP numbering system on behalf of the ABA.

8. Decades ago, the ABA established the X9 Standards Committee (“X9”) which appointed the CUSIP numbering system as the standard identifier for U.S. financial instruments. The ABA owned X9 for decades and still controls X9, continually appointing CUSIP as the standard.

9. Banks, investment funds, public employee pension funds, fund managers, and other financial institutions (“CUSIP Users”), both in the United States and abroad, need CUSIP numbers to process, clear, and settle trades and to conduct research and analysis. Thus, CUSIP Users must have in their data feeds the CUSIP numbers, as well as the associated issuer name and the type of

financial instrument, to operate their businesses. Plaintiffs and members of the Class<sup>1</sup> are CUSIP Users. Defendants have leveraged CUSIP numbers' position as the standard to exploit financial institutions whose business depends on the use of CUSIP numbers. Although Defendants have no legal basis for demanding that CUSIP Users take a license as a condition for using CUSIP numbers, the issuer name, and the type of issue, Defendants force CUSIP Users to enter so-called "license" agreements on the threat that they will lose access to the CUSIP numbers, which would cripple the CUSIP Users' businesses. Having no real option, CUSIP Users have entered into license agreements with S&P and FactSet, which extend the grant in the ABA's compilation copyright far beyond its legal boundary.

10. The license agreements preclude any unauthorized use, including any commercial use, of CUSIP numbers. This eliminates potential innovation and competition from CUSIP Users, helping to maintain Defendants' 100% share in the CUSIP Use Market.

11. Defendants attempt to justify their anticompetitive conduct as enforcing the ABA's compilation copyright, but that copyright protects only the compilation itself exactly as it is arranged and maintained on formerly S&P's and now FactSet's servers. The copyright does not protect any of the data in the compilation, and the only way a CUSIP User can violate the copyright is to copy all or substantially all of the entire compilation in the form and arrangement in which it is maintained on Defendants' servers.<sup>2</sup> Yet, CUSIP Users do not want, receive, use, or copy all or substantially all of the compilation.

12. As a result of Defendants' illegal conduct, Plaintiffs, on behalf of themselves and all others similarly situated, assert the following claims:

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<sup>1</sup> "Class" as used herein refers to members of the "CUSIP User Class," defined below.

<sup>2</sup> Each reference to "all or substantially all of the compilation" and to "all or substantially all of CUSIP\_DB compilation" should be understood to include the qualifier "in the form and arrangement in which it is maintained on Defendants' servers."

13. **Declaratory Judgment.** A declaratory judgment that CUSIP numbers are not copyrightable and that the ABA has no valid copyright claim on CUSIP numbers is ripe for decision now since, as described below, Defendants have threatened legal action and other business harm to Plaintiffs based on false copyright claims.

14. **Violations of Section 2 of the Sherman Act.** S&P willfully and unlawfully maintained (and FactSet is maintaining) a monopoly in the CUSIP Use Market through the exercise of its market power and its exclusionary conduct. The ABA and S&P (and now FactSet) conspired to maintain S&P's (and now FactSet's) monopoly power by engaging in exclusionary conduct, including for example through exclusionary contractual agreements, a group boycott, and manipulating the standard-setting process, that prevented competition and innovation in the CUSIP Use Market. As a result of this conduct, CUSIP Users were deprived of the benefits of innovation and robust competition in the CUSIP Use Market and were forced to enter "license agreements" with S&P (and now FactSet) and pay unlawful and unfair fees.

15. **Violations of Section 1 of the Sherman Act.** Defendants conspired to restrain competition in the CUSIP Use Market. Among other conduct, Defendants agreed with Third-Party Data Vendors (defined below) to boycott CUSIP Users that refused to enter into license agreements with S&P (and now FactSet) and implemented that agreement through written agreements prohibiting Third-Party Data Vendors from distributing CUSIP numbers to any CUSIP User that refused to enter a license agreement with S&P (and now FactSet).

16. **Unfair Business Practices.** Defendants have engaged in purposeful, deceitful, and misleading monopolistic conduct to ensure control over the CUSIP Use Market by, among other things, falsely claiming "license agreements" were necessary to use CUSIP numbers and threatening that CUSIP Users will be unable to access essential data from Third-Party Data

Vendors and will be subject to copyright infringement claims unless they enter “license agreements.” This conduct violates Section 349 of the New York General Business Law and Section 42-110b of the Connecticut Unfair Trade Practices Act.

17. **Breach of Contract.** If, contrary to law, CUSIP numbers are found to be copyrightable, then, in the alternative, Defendants breached the ABA’s commitment that, as a condition to X9 designating the CUSIP numbering system as the standard, the ABA would license use of the CUSIP numbering system on fair, reasonable and non-discriminatory (“FRAND”) terms. Plaintiffs and members of the Class are intended third-party beneficiaries of the agreement between the ABA and X9. At a minimum, Defendants breached the ABA’s FRAND agreement by coercing CUSIP Users to pay fees for the use of CUSIP numbers that do not comply with the FRAND commitment.

18. **Additional Injunctive Relief.** Plaintiffs, individually and on behalf of the Injunctive Relief Class (as defined below) also seek injunctive relief to enjoin the ABA’s and FactSet’s continued anticompetitive and unfair conduct alleged herein. This ongoing unlawful conduct threatens to continue to injure Plaintiffs and members of the Injunctive Relief Class through the continued payment of annual fees for existing “license agreements” and demands to renew or enter new exclusionary “license agreements.”

## II. JURISDICTION AND VENUE

19. This is an action: (a) for declaratory judgment under 28 U.S.C. §§ 2201, 2202 arising, in part, under the United States Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (the “Copyright Act”); (b) for injunctive relief and damages under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and section 4 of the Clayton Act, 15 U.S.C. § 15(a); (c) for damages for violations of New York General Business Law § 349(a); (d) for damages for violations of

Connecticut Unfair Trade Practices Act § 42-110b(a); and (e) in the alternative, if the CUSIP numbers are copyrighted (which they are not), for damages for breach of contract. As to monetary relief, this action seeks to recover threefold damages, costs of suit, and reasonable attorneys' fees.

20. This Court has original jurisdiction of these claims under 28 U.S.C. §§ 1331, 1337, and 1338 and Section 4 of the Clayton Act, 15 U.S.C. § 15.

21. This Court has subject matter jurisdiction over this matter pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4, and the Copyright Act.

22. The Court has supplemental jurisdiction over the state law claims asserted herein pursuant to 28 U.S.C. § 1367 because these claims form part of the same case or controversy as the federal claims asserted herein.

23. Defendants' conduct, as described herein, was within the flow of, and was intended to and did have a substantial effect on, the interstate commerce of the United States, including in this District. During the relevant period, each Defendant used the instrumentalities of interstate commerce to join or effectuate their scheme. The Defendants' conduct had a direct, substantial, and reasonably foreseeable effect on interstate commerce.

24. Defendants engaged in conduct in the United States that caused direct, substantial, and reasonably foreseeable and intended anticompetitive effects upon interstate commerce within the United States.

25. This Court has personal jurisdiction over each Defendant because each Defendant has transacted business, maintained substantial contacts, and committed overt acts in furtherance of its illegal scheme throughout the United States, including in this District. The scheme has been directed at, and has had the intended effect of, causing injury to Plaintiffs and persons and entities residing in, located in, or doing business in this District, the United States and its territories, and

the District of Columbia. The license agreements at issue provide that jurisdiction is exclusive to the state and federal courts in New York, New York.

26. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391 and 1400 and Sections 4(a) and 12 of the Clayton Act (15 U.S.C. §§ 15 and 22) because each Defendant resides, transacts business, is found, or has agents within this District, and because a substantial part of the alleged events giving rise to the claims occurred, and a substantial portion of the affected interstate trade and commerce described below was carried out, in this District. As stated above, the license agreements at issue provide that jurisdiction is exclusive to the state and federal courts in New York, New York.

### **III. THE PARTIES**

27. Dinosaur Financial Group LLC (“Dinosaur”) is a financial institution based in New York. It provides investment banking, institutional brokerage, and wealth management services. Dinosaur entered into a license agreement with S&P and paid license fees directly to S&P in New York. The negotiations occurred in New York, the agreement is governed by New York law, and jurisdiction is exclusive to the federal and state courts in New York, New York.

28. Hildene Capital Management, LLC (“Hildene”) is a limited liability company organized under the laws of the State of Delaware with its principal place of business in Connecticut. It is a diversified institutional asset manager specializing in assets based on credit opportunities. Hildene entered into a license agreement with S&P and paid license fees directly to S&P in New York. The negotiations occurred in New York and Connecticut, the agreement is governed by New York law, and jurisdiction is exclusive to the federal and state courts in New York, New York.

29. Swiss Life Investment Management Holding AG (“Swiss Life”) is a Switzerland-based holding company and through its fund and asset management companies is a provider of portfolio management services for institutional investors. Swiss Life entered into a license agreement with S&P and paid license fees directly to S&P in New York. That agreement, and the relationship between Swiss Life and S&P established by the license agreement, is governed by New York law and jurisdiction is exclusive to the federal and state courts in New York, New York.

30. Defendant ABA is a trade association for the United States banking industry organized under Section 501(c)(6) of the Internal Revenue Code. It is headquartered in the District of Columbia.

31. S&P is a provider of financial data and data analytics. It is headquartered in New York, New York.

32. CGS was a division of S&P located in New York, New York until March 1, 2022 when FactSet purchased the CGS Business. Since March 1, 2022, CGS has been owned by FactSet. The CGS Business was operated on behalf of the ABA by S&P and its subsidiaries until March 2022 and is now operated on behalf of the ABA by FactSet.

33. FactSet is a provider of financial data and a financial data analytics company. It is headquartered in Norwalk, Connecticut, and maintains an office in this District. Under the Asset Purchase Agreement (“APA”) between S&P and FactSet, FactSet assumed and agreed to pay, discharge, or perform the liabilities of S&P and its affiliates to the extent related to or arising out of what the APA defined as the “CGS Business.”<sup>3</sup> In addition, under a Novation Agreement entered into among S&P, FactSet, and the ABA, the ABA consented to FactSet’s purchase of the

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<sup>3</sup> The APA defined “CGS Business” as “the CUSIP issuance, data licensing and portfolio services businesses, as currently carried out by CGS, which Seller and its Subsidiaries operate on behalf of the ABA pursuant to the ABA Agreement, the issuance and data licensing of other related identifiers ... as currently carried out by CGS.”



CGS Business from S&P, and FactSet agreed to assume all of S&P's obligations to the ABA under the CGS Business license agreement with the ABA. Thus, upon its acquisition of the CGS Business, FactSet became both the beneficiary of S&P's and the ABA's illegal conduct and liable for it, as well as a participant in that illegal conduct. FactSet is continuing that illegal conduct.

#### **IV. DEVELOPMENT OF THE CUSIP NUMBERING SYSTEM**

34. Electronic trading systems require a standardized method for identifying financial instruments to facilitate the clearing and settlement of trades and other transactions. The standardized method must ensure that each financial instrument has a unique identifier that electronic trading systems can read and process. CUSIP numbers are unique identifiers, constituting the standard numbering system for trading in all United States financial instruments.

35. The CUSIP numbering system was the product of a years-long industry-wide voluntary cooperative effort to develop a standard for identifying United States financial instruments. In the 1960s, government regulators, stock exchanges, and private firms recognized the need for such a standard because the then-new—but already rapidly growing number of—electronic systems managing the clearing and settlement of trades had no efficient way to identify a particular financial instrument. Verbal descriptions could not serve that function because any variation from one party's expression to another's—such as the use by one of abbreviations rather than whole words, or the use of different abbreviations for the same word—would cause the electronic systems (at least at the time and for many years thereafter) to fail to recognize all such descriptions as identifying the same instrument.

36. To remedy this shortcoming, representatives of the Securities and Exchange Commission ("SEC"), the New York Stock Exchange ("NYSE"), the American Stock Exchange, the National Association of Securities Dealers, the Association of Stock Exchange Firms, the

Investment Bankers Association, the ABA, and many financial institutions worked to develop a numbering identification system to speed up the clearing and settlement of securities transactions in a committee formed for that purpose—the Committee on Uniform Security Identification Procedures (the “CUSIP Committee”).

37. Beginning in 1964, the CUSIP Committee coordinated the development of a numbering system and the creation of an entity to manage the real-time listing of CUSIP numbers. The CUSIP Committee completed the development of the CUSIP numbering system in 1966. The numbering system was introduced to the financial markets in 1968 as the *de facto* standard in United States financial markets. Shortly after the ABA announced the development of the CUSIP numbering system, it created the CUSIP Service Bureau (“CSB”), the predecessor to CGS, to administer the CUSIP numbering system. Later that year, the ABA selected S&P to operate and manage CSB/CGS, which became a division of S&P. This arrangement lasted through March 1, 2022, when S&P sold CGS to FactSet.

38. On March 3, 1971, the SEC began using CUSIP numbers in its electronic data processing systems related to certain reporting forms, securities analyses, and the publication of certain directories.

39. In 1971, the SEC required the use of CUSIP numbers on Form 3, the Initial Statement of Beneficial Ownership of Securities, and Form N-1R, a form for filing annual reports by investment management companies. In 1972, all clearing corporations begin using CUSIP numbers, making them the mandatory identifier for all brokerage firms. In 1975, The Federal Reserve Bank’s automated book entry system began using CUSIP numbers to accelerate the transfer of United States Treasury Securities.

40. In 1974, several years after granting an exclusive license to S&P's CSB/CGS, the ABA established X9, which is an Accredited Standards Developer of the American National Standards Institute ("ANSI"). The ABA established X9 to develop and review standards for the United States financial services industry. At the time, there was no alternative numbering system to the CUSIP numbers, and X9 obtained approval from ANSI to adopt formally the CUSIP numbering system as the market standard for identifying financial instruments traded on United States financial markets. In 1976, the ABA-controlled X9 ratified its 1974 adoption of the CUSIP numbering system as the national standard for identifying financial instruments.

41. CUSIP numbers also are an integral element of International Securities Identification Numbers ("ISINs"), which are 12-character numeric codes that identify United States financial instruments traded on markets outside the United States. ISINs are created by adding digits to the CUSIP numbers. Any entity outside the United States that trades the stock of a United States company on a foreign exchange must use CUSIP numbers as a core element of the ISIN that identifies that company's financial instruments.

42. Regardless of any requirements to use CUSIP numbers in regulatory filings or otherwise, no government agency, including the Department of the Treasury and the SEC, regulates the CUSIP Use Market, nor does any government agency regulate the rates and terms charged by CGS for any of its CUSIP-related activities.

**V. S&P ENLISTED THE THIRD-PARTY DATA VENDORS TO JOIN ITS PLOT TO IMPOSE ITS UNLAWFUL LICENSING SCHEME ON CUSIP USERS.**

**A. S&P Changed Its Business Model from Subscription to a Licensing Scheme.**

43. For many years after the CUSIP numbering system was formed in 1968, S&P operated a dependable "utility" business distributing CUSIP numbers in physical books to financial institutions. The books contained a limited amount of information about each financial

instrument that was linked to a CUSIP number: the issuer number, issuer name, issue name, and CUSIP number.

44. S&P sold the books on a subscription model and issued paper updates to the books throughout the year. At the end of each year, S&P required that subscribers return the books and paper updates, after which the subscribers would receive the next year's book and subsequent updates. Under this physical distribution model, S&P was able to control the dissemination of the CUSIP numbers after issuance merely by controlling the physical books, and thereafter the CD-ROMs that later replaced the books.

45. However, in the 1980s, Bloomberg LP ("Bloomberg") began to distribute electronically rich sets of financial market data, including CUSIP numbers, directly to CUSIP Users, on a subscription model. Bloomberg's innovation disintermediated the direct contractual relationship S&P had enjoyed with CUSIP Users in the distribution of CUSIP numbers and threatened the monopoly that S&P had enjoyed for more than a decade. Bloomberg's distribution of CUSIP numbers directly to CUSIP Users meant that the CUSIP Users obtained and could use the CUSIP numbers, the issuers' names, and the types of issues without paying a fee to S&P. Other data companies, including Reuters (which became Thomson Reuters and is now Refinitiv), S&P, and FactSet later followed Bloomberg's lead in distributing their data electronically.

46. S&P and FactSet refer to data vendors such as Bloomberg as "Third-Party Data Vendors," to distinguish them from S&P and FactSet, which also are data vendors and compete with Bloomberg and other Third-Party Data Vendors. S&P's Market Intelligence business generated subscription revenue from the "distribution of data, analytics, third-party research, and credit ratings-related information...." S&P Global, Inc., Annual Report (Form 10-K) at 7 (Feb. 8, 2022). Similarly, FactSet "is a global financial data and analytics company" that "provide[s]

financial data and market intelligence on securities, companies, industries, and people....” FactSet Research Systems, Inc., Annual Report (Form 10-K) at 5 (Oct. 21, 2022).

47. To reassert control over the use of CUSIP numbers, to ensure that it would face no competition in the CUSIP Use Market, and to reap even higher revenue, S&P scrapped the historical subscription model in favor of a “license” model. Because it could not charge subscription fees to CUSIP Users—who received data from Third-Party Data Vendors, not from S&P—S&P demanded that CUSIP Users sign a so-called “license” and pay so-called “license fees” even though CUSIP Users did not receive the CUSIP\_DB compilation. These license agreements restricted CUSIP Users’ use of CUSIP numbers by preventing CUSIP Users from collecting and distributing CUSIPs or using them commercially.

48. S&P leveraged the CUSIP numbers’ status as the standard by claiming that the license related to data maintained in the CUSIP\_DB compilation over which S&P claimed copyright protection. The CUSIP\_DB compilation is not a collection of financial market data relating to financial instruments like that published in *The Wall Street Journal*. Rather, it is a compilation of data about each financial instrument that was relevant to linking the CUSIP number to that specific financial instrument at the time the CUSIP number was issued. According to FactSet, in addition to the CUSIP number, the issuer name, and the type of issue, the CUSIP\_DB compilation includes in a particular arrangement the following data fields for equity issues: “Activity Date, ADR Program Type, Auditor, CFI Codes (ISO and U.S.), Currency, Depository Eligible Indicator, Domicile, Exchange Traded (Multiple Tickers/Exchanges), Financial Advisor, Form, Fund (Open/Closed End, Investment Policy, Income Distrib. Policy – Load/No Load), Initial Public Offering Indicator Issue Status, Ownership Restrictions Payment Status, Ticker

Symbol (Multiple Tickers/Exchanges), Type of Preferred Dividend Income, Underwriter, and Warrant (Type, Underlying Assets, Call/Put Indicator).”

**B. Third-Party Data Vendors Provide CUSIP Users with a Data Feed that Does Not Include the CUSIP\_DB Compilation.**

49. The Third-Party Data Vendors’ data feeds are the means by which they deliver data directly from their servers to the CUSIP Users’ computer systems. It is critical that the data feeds contain the CUSIP numbers, issuer names, and types of issue because the Third-Party Data Vendors use those data elements to link their data to particular financial instruments. If the data feeds did not contain the CUSIP numbers, issuer names, and types of issue, CUSIP Users would receive nothing but a jumble of worthless, unorganized data that their electronic systems could not process.

50. The Third-Party Data Vendors’ data feeds are different and separate from the CUSIP\_DB compilation. The Third-Party Data Vendors’ data feeds contain data about the financial instrument after it is issued. As an example, Bloomberg’s data feed includes: (a) “independent research from more than 1,500 sources, as well as proprietary research on industries, markets, companies and countries from Bloomberg’s research teams;” (b) “breaking headlines, exclusive global coverage, structured financial data, news analytics and global economic indicators;” (c) “real-time market data;” (d) “pricing across every asset class;” and (e) regulatory data sets that help financial institutions satisfy current regulations and prepare for upcoming regulatory requirements.

51. Thus, the Third-Party Data Vendors do not re-route the CUSIP\_DB compilation to CUSIP Users. The Third-Party Data Vendors include only some of the data that is also in the CUSIP\_DB compilation in the customized set of data items they provide to CUSIP Users based

on each CUSIP User's idiosyncratic data needs, due to each CUSIP User's investment strategy, risk profile, and investor client base.

**C. S&P Secured the Third-Party Data Vendors' Agreement to Boycott CUSIP Users Who Refused to Enter License Agreements with S&P.**

52. CUSIP Users who received their data feed from Third-Party Vendors understandably saw no need to enter into license agreements with S&P because they were not receiving CUSIP numbers or any other data from S&P.

53. S&P broke this resistance to the new licensing scheme by agreeing with the Third-Party Data Vendors to a boycott of any CUSIP User that refused to enter a license with S&P—even if the CUSIP User did not receive the entire CUSIP\_DB compilation and merely accessed CUSIP numbers as part of data feeds from Third-Party Data Vendors.

54. S&P and the Third-Party Data Vendors agreed to insert into the Third-Party Data Vendors' contracts with CUSIP Users clauses that required the Third-Party Data Vendors to remove the CUSIP numbers from the Third-Party Data Vendors' data feeds to any CUSIP User that did not enter into a license agreement with S&P. S&P was able to secure this agreement with the Third-Party Data Vendors because S&P controlled and abused CUSIP's position as the *de facto* standard.

55. The agreement between S&P and the Third-Party Data Vendors thus was not designed to protect S&P's copyright-protected data compilation because CUSIP Users do not receive the CUSIP\_DB compilation. Instead, it was an agreement to ensure that S&P could impose a license from S&P on CUSIP Users to collect a toll from the mere use of CUSIP numbers and to preclude CUSIP Users from competing in the CUSIP Use Market. The end result of this group boycott has been that CUSIP Users must pay a license fee to S&P (and now FactSet) even if they do not receive the CUSIP\_DB compilation, or they run the risk of having essential CUSIP numbers stripped from their data feeds from Third-Party Data Vendors.

56. It was widely known in the industry that the Third-Party Data Vendors agreed to boycott CUSIP Users who refused to enter license agreements with S&P. And S&P openly acknowledges that it included these restrictions in its contracts with all Third-Party Data Vendors. For example, in January 2021, S&P informed Hildene that “CGS’s agreements with its ISPs<sup>4</sup> do not allow such ISPs to distribute CGS Data to firms in bulk or downloadable format unless such firms are properly licensed by CGS” and that “CGS has the contractual right to require applicable ISPs to cease distribution of CGS Data in bulk, datafeed or downloadable format to those firms who refuse to sign an appropriate CGS license agreement.” The restriction is not related to copying all or substantially all of a compilation, but rather applies to any access to CUSIP numbers in a data feed or downloadable format from the Third-Party Data Vendors.

57. Thus, the Third-Party Data Vendors knew that all other Third-Party Data Vendors were also agreeing to the group boycott orchestrated by Defendants. Specifically, Third-Party Data Vendors knew that S&P, itself a data vendor, was requiring the other Third-Party Data Vendors, which competed with S&P and with each other, to enter into an agreement containing these restrictions.

58. The threat that a refusal to sign a license with S&P (and now FactSet) would cause the Third-Party Data Vendors to remove the CUSIP numbers, issuer names, and types of issue from the Third-Party Data Vendors’ data feeds has posed an existential threat to the business of any CUSIP User that did not sign the license agreement. Because a functioning data feed is a necessary tool for CUSIP Users’ business, refusing to sign a license agreement would bring a CUSIP User’s business to a halt.

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<sup>4</sup> CGS defined ISPs as “information service providers” such as Bloomberg and/or Thomson Reuters—the equivalent of Third-Party Data Vendors.



59. The result is that CUSIP Users have had no choice but to sign license agreements with S&P (and now FactSet). Thus, the agreement among S&P (and now FactSet) and the Third-Party Data Vendors to require CUSIP Users to enter into license agreements with, and pay so-called “license fees” to, S&P (and now FactSet) under the threat of losing access to CUSIP numbers, issuer names, and types of issues is a group boycott.

**D. S&P’s Unlawful Agreements with Third-Party Data Vendors and with CUSIP Users Excluded All Competition and Innovation from the CUSIP Use Market.**

60. As a result of S&P’s agreements with Third-Party Data Vendors, S&P excluded all potential competitors from, and all competition and innovation in, the CUSIP Use Market. S&P thereby earned hundreds of millions of dollars in monopoly rents disguised as “license fees.”

61. By re-establishing its control over the use of CUSIP numbers in the market after issuance, S&P foreclosed an avenue for potential competition in the CUSIP Use Market and foreclosed the innovation that otherwise would have arisen organically in how CUSIP numbers could be used. As one example of such potential competition, an unlicensed financial institution or fintech company could offer CUSIP Users a value-added service by gathering CUSIP numbers from numerous sources and using the CUSIP numbers to link data and information about financial instruments.

62. One company did just that. Xignite, Inc. is a provider of cloud-based market data distribution and management solutions for financial services and technology companies. It gathered CUSIP numbers from sources independent of S&P, but because it had signed a license agreement, S&P forced Xignite to destroy its inventory of CUSIP numbers because Xignite’s intended use was an unauthorized, commercial use under the license agreement. S&P thereby eliminated Xignite as a competitor in the CUSIP Use Market and denied CUSIP Users of the benefit of a new service.

63. S&P's license forecloses competition and innovation in the CUSIP Use Market because its terms prohibit any commercial use of the CUSIP numbers and all uses not authorized by the Defendants.

**VI. DEFENDANTS' LICENSING SCHEME HAS NO LAWFUL BASIS BECAUSE CUSIP USERS DO NOT COPY ALL OR SUBSTANTIALLY ALL OF THE CUSIP\_DB COMPILATION.**

64. The ABA owns a copyright that purports to protect the CUSIP\_DB compilation. Copyright #TX-614-6660 is titled "CUSIP\_DB," and it claims authorship of "additions and rev. compilation of database material." Copyright #TX-614-6660 does not claim authorship of the CUSIP numbers because the CUSIP numbers are not copyrightable.

65. S&P claimed and FactSet now claims that the CUSIP\_DB compilation contains as many as 60 data elements for each of more than 26 million financial instruments.

66. Copyright #TX-614-6660 is, as its title and claim of authorship make clear, a compilation copyright. Section 103 of the Copyright Act provides that a compilation copyright protects only the selection and arrangement of the data compilation as it resides on a fixed media of expression, here a computer server. A compilation copyright does not protect the data in the compilation, and the only way a user can infringe the compilation copyright is by copying all or substantially all of the compilation exactly as it is arranged on the computer server. A user does not infringe a compilation copyright by accessing, using, or even copying some of the data in the compilation. Nor does a user infringe a compilation copyright by rearranging all of the data in the compilation, combining it with other data, and then exploiting its own rearranged database.

67. CUSIP Users do not want, receive, use, or copy the CUSIP\_DB compilation, which is the only asset the ABA has the right to protect by requiring a license.

68. The “license” is contained in a CUSIP Global Services Subscription Agreement (the “Subscription Agreement”). The standard Subscription Agreement states that S&P, now FactSet, “pursuant to an exclusive agreement with the [ABA], owns or has the right to license all proprietary rights to the CUSIP\* database (‘CUSIP Database’), which contains CUSIP\* standard number, CUSIP\* standard descriptions and other information about financial instruments (‘Data’).”

69. The license states that it grants to the CUSIP User “a non-exclusive, non-transferable, limited license to access and use the proprietary CGS Service (‘the Service’) described in the applicable Service Attachment(s) attached hereto and incorporated herein in accordance with this Agreement.” The “Service” and the scope of the license the CUSIP User takes depends on the particular option the CUSIP User selects from a menu of options set forth in the Services Attachment.

70. The Services Attachment gives the CUSIP User the option to receive the entire CUSIP\_DB compilation. The other options offer only the right to receive and use a subset of the data in the CUSIP\_DB compilation. The number of options increased over time as S&P amended its license agreements, but the basic choice remained the same: the financial institution could receive the entire CUSIP\_DB compilation or just a subset of the compilation.<sup>5</sup>

71. In the unlikely event that a financial institution voluntarily entered into a direct license for the full CUSIP\_DB compilation, that financial institution is not a member of the CUSIP User Class.

72. Every other licensing option in the Services Attachment offers financial institutions a subset of the data in the CUSIP\_DB compilation. CUSIP Users select one of these lesser options.

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<sup>5</sup> While S&P amended its license agreements over time, the key provisions referenced herein remained substantially identical.

Selecting one of these options makes it clear that CUSIP Users do not receive, and therefore cannot copy, all or substantially all of the CUSIP\_DB compilation.

73. Each of the three named Plaintiffs chose one of the lesser options.

74. Because CUSIP Users do not license the CUSIP\_DB compilation, the ABA's compilation copyright gives Defendants no intellectual property right in the data CUSIP Users receive from Third-Party Data Vendors. Defendants therefore have no legal basis to: (a) prohibit CUSIP Users from accessing those data elements or from using them in any manner; (b) demand that CUSIP Users enter the license as a condition to using the CUSIP numbers; or (c) demand that Third-Party Data Vendors remove the CUSIP numbers from the Third-Party Data Vendors' data feeds if a CUSIP User refuses to enter a license.

75. CUSIP Users have been vocal for years about Defendants' tactics and efforts to coerce entry into unlawful license agreements. For example, the Bond Dealers of America ("BDA"), the Investment Adviser Association ("IAA"), and the Government Finance Officers Association of the United States ("GFOA"),<sup>6</sup> noted Defendants' "tactics regarding CUSIP fees" and the "rapidly increasing and non-transparent fee for use and redistribution of CUSIP identifiers." The industry groups explained that CUSIP fees "exert a chilling effect on market transparency and the free flow of information for investing, trading, accounting, risk management, and regulatory reporting." The industry groups described "ongoing efforts by [S&P's CGS] to levy

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<sup>6</sup> These organizations include numerous members, such as McGuireWoods, RBC Capital Markets, Tradeweb, Inc., UBS Wealth Management, U.S. Bank N.A., Wells Fargo Securities, Allianz Global Investors, The Blackstone Group, BNY Mellon Investment Adviser, Inc., Charles Schwab Investment Management, LLC, Fidelity Institutional Asset Management, Franklin Advisers, J.P. Morgan Investment Management, PIMCO, Morgan Stanley Investment Management, Inc., and Vanguard Group.

a toll on the majority of securities transactions, statements, disclosures, and electronic searches that occur daily in the United States.”<sup>7</sup>

**VII. DEFENDANTS FALSELY CLAIMED TO CUSIP USERS AND THE UNITED STATES GOVERNMENT THAT THE LICENSE WAS NECESSARY BECAUSE THE CUSIP NUMBERS ARE COPYRIGHTED.**

76. Defendants could not plausibly claim that a license from S&P was necessary based on an assertion that the Third-Party Data Vendors distributed the CUSIP\_DB compilation to CUSIP Users because the Third-Party Data Vendors do not distribute the compilation to CUSIP Users. So, the Defendants adopted a false narrative that the license was necessary because the CUSIP numbers are copyrighted.

77. The ABA told the SEC explicitly that the CUSIP numbers are copyrighted. It did so for the purpose of influencing the SEC’s rulemaking process.

78. In early 2010, in the wake of the financial crisis of 2007 and 2008, the SEC was considering a rule requiring rating agencies to post additional information about companies paying those agencies for the issuance or maintenance of a credit rating. Each of the agencies’ credit ratings would have to be identified by the CUSIP or ISIN number. In a February 2, 2010, letter to the SEC, the ABA stated its understanding of the purpose of the proposed rule: “The purpose of the proposed rule is to provide users of credit ratings with information to assist them in evaluating the potential risk to the integrity of the credit rating that arises from the conflict inherent when a [rating agency] is paid to determine a credit rating for a specific obligor, security, or money market instrument.”<sup>8</sup>

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<sup>7</sup> See Letter from BDA, IAA & GFOA to Mary Schapiro, Chairman, SEC (Nov. 10, 2010), <https://www.bdamerica.org/wp-content/uploads/2010/12/CUSIP-SEC-Letter-FINAL-IAA-GFOA-BDA-111010.pdf>.

<sup>8</sup> See Letter from ABA to Elizabeth Murphy, Secretary, SEC (Feb. 2, 2010), <https://www.sec.gov/comments/s7-28-09/s72809-9.pdf>.

79. In its February 2010 letter, the ABA represented to the SEC that the SEC could not adopt the proposed rule without the consent of the ABA because the ABA's copyright prevented ratings agencies from posting CUSIP numbers to their websites without a license from the ABA: "ABA retains the copyright in the selection and arrangement of data compiled in the [CUSIP\_DB] data base *as well as in the CUSIP numbers themselves.*" (emphasis added). The ABA pledged to change the terms of its licenses with the ratings agencies to permit the agencies to comply with the proposed regulation without infringing the ABA's copyright.

80. The Defendants have represented to other financial regulators that CUSIP numbers are copyrighted. The Financial Industry Regulatory Authority ("FINRA") is a self-regulatory organization that regulates member broker-dealers. To create greater transparency in the over-the-counter trading of eligible fixed-income securities, FINRA created the Trade Reporting and Compliance Engine ("TRACE"). All FINRA member broker-dealers must report transactions in TRACE-eligible securities. FINRA created a "Trade Entry Screen" for member broker-dealers to report such transactions. The only information about the security on the Trade Entry Screen is the CUSIP number and the symbol.

81. A developer of a software product seeking to integrate fixed-income securities reported in the TRACE system would need the Application Programming Interface ("API") files from FINRA for those securities. The API files contain the CUSIP numbers for each such security. With those API files, a developer could create a value-added software product that linked more data about each trade, thereby creating even more transparency to the over-the-counter trading of fixed-income securities. Yet, no developer can do so because the API files contain CUSIP numbers, and Defendants require a license agreement with S&P or FactSet as a condition to accessing the CUSIP number in the API files. FINRA repeats Defendants' requirement on its

website and will not release the API files unless the developer has a CUSIP license with S&P and now FactSet. And those licenses preclude software developers from using the CUSIPs in any unauthorized way or for commercial purposes.

82. Defendants’ restriction demonstrates conclusively that they require a license for the mere use of the CUSIP numbers, which could be justified only if the CUSIP numbers were copyrighted, which they are not.

83. S&P made assertions and FactSet has asserted to financial institutions that refuse to sign a license that CUSIP numbers are copyrighted. Consistently and repeatedly, S&P informed financial institutions that a license was required for use of the CUSIP numbers, the issuer names, and the types of issues.

84. S&P’s standard Use of Service Statement explicitly states: “A license agreement is required when a user obtains access to an electronic data feed or bulk download of CUSIP, CINS, and CGS ISINs (“CGS Identifiers”) and related descriptive data—either directly from CGS or indirectly through one of CGS’ authorized data vendors/information providers (“Authorized Distributors”), *including when a user’s database that contains CUSIP Identifiers and related descriptive data (including any outsourced databases) is updated, maintained and/or operated by an Authorized Distributor*” (emphasis added). This assertion—and misuse—of copyright makes no attempt to limit the claim to obtaining the entire CUSIP\_DB compilation or to copying all or substantially all of the entire CUSIP\_DB compilation.

85. The misuse by S&P (and now FactSet) of the ABA’s limited compilation copyright by claiming or implying that the ABA’s copyright extends to the CUSIP numbers and to any “access” to or “use” of the CUSIP numbers is illustrated further by the CGS Use of Service Statement imposed by S&P (and now FactSet). The Use of Service Statement requires the

applicant to “describe in detail how [the] firm *uses CUSIP Identifiers* for its operations, and stores/maintains them (including any outsourced databases) (emphasis added).” S&P’s license fees are based on the CUSIP Users’ *use* of the *CUSIP numbers*, not on the Users’ copying of the CUSIP\_DB compilation.

86. S&P has told CUSIP Users that a license is required for the use of the CUSIP numbers, regardless of whether the CUSIP User has copied the CUSIP\_DB compilation. For example, in a January 5, 2021, letter to Hildene, Alison Romeo, a Manager of Licensing at S&P’s CGS, referring to CUSIP numbers and ISINs, stated that “[f]irms *using* these identifiers internally (e.g., to support some of the processes described above), and/or that externally redistribute CGS Data must possess a license from CGS” (emphasis added). Ms. Romeo thus asserted that the mere use of the CUSIP numbers, even if internal to the financial institution, required a license from S&P. Ms. Romero’s assertion was not limited to an assertion that a license was needed to permit Hildene to copy all or substantially all of the CUSIP\_DB compilation.

87. In a February 26, 2018, email to Dinosaur, Paul Mertz of S&P claimed that Dinosaur was required to enter into a license agreement because “proprietary CUSIP data is being *utilized* within your firm” (emphasis added). Dinosaur was receiving all its data from its own Third-Party Data Vendor and receiving no data from S&P, as Mr. Mertz knew. Therefore, any CUSIP numbers Dinosaur was “utilizing” did not come from S&P. Thus, Mr. Mertz could not have been clearer that a license agreement with S&P was required for the mere use of CUSIP data, meaning the CUSIP numbers, issuer names, and types of issue.

88. In a June 5, 2012, letter to Swiss Life, Martin Richter, of S&P Capital IQ, confirmed that Swiss Life could not use the CUSIP numbers in its business if it failed to execute a license agreement. Mr. Richter stated that S&P would direct Swiss Life’s Third-Party Data Vendor to cut



off access to the CUSIP numbers and ISINs: “I confirm that CUSIP Global Services will cease delivery of the CUSIP numbers and CSB ISINs if we do not have a re-filed ‘Statement of Use’ by June 15, 2012 and no signed contract by June 22, 2012.” Mr. Richter made clear that this would apply “to all vendors, including Bloomberg.”

89. Defendants’ pricing of the CUSIP license similarly demonstrates that they are misusing the ABA’s compilation copyright to police and unlawfully profit from the mere use of CUSIP numbers, not the copying of the CUSIP\_DB compilation.

90. S&P calculated (and FactSet now calculates) a CUSIP User’s fee based on the number of CUSIP numbers it “database[s].” The sliding scale starts at “under 500 securities” and ends at “greater than 40,000 securities,” with six gradations in between. If S&P were pricing a license based on its copyright to the CUSIP\_DB compilation, it would calculate the number of times a CUSIP User had copied the compilation, not the number of CUSIP numbers downloaded.

91. A CUSIP User that is databasing 500 CUSIP numbers is not copying all or substantially all of the CUSIP\_DB compilation. In addition, the CUSIP User is not receiving the CUSIP\_DB compilation and therefore cannot be infringing the compilation copyright. Instead, it is using 500 CUSIP numbers it received from its Third-Party Data Vendor, and S&P’s license is imposing an unjustified usage fee on the CUSIP User. Such a usage fee is not a legitimate use of the ABA’s intellectual property rights, but a misuse of the copyright based on the false assertion that the ABA copyright protects CUSIP numbers.

92. The CUSIP numbers are not copyrightable as a matter of copyright law.

93. Numbers used for identification such as parts numbers or CUSIP numbers, stand outside copyright protection because they lack the originality and creativity that is a constitutional and statutory requirement for copyright protection. Indeed, extending copyright protection to such

numbers would unduly interfere with the legitimate use of the numbers in question. If such a copyright were allowed, *any* use of the number would potentially infringe the copyright. Moreover, CUSIP numbers lack originality and creativity by design. Each part of the sequence of characters making up a CUSIP is dictated by the long-standing convention of the numbering system, and the utility of CUSIP numbers depends on Defendants slavishly adhering to that system. CUSIP numbers would lose their utility were Defendants to inject any subjectivity, originality, or creativity into them because electronic systems could not then read and process CUSIP numbers to identify the underlying financial instruments.

94. As stated above, ISINs are the equivalent standard for international financial transactions involving United States financial instruments. The CUSIP number is an element of the ISINs, along with additional digits added by the European numbering agency. Defendants require a license for the use of CUSIP numbers in the ISINs. By contrast to Defendants, none of the administrators of numbering systems in the European Union claim intellectual property rights over those numbering systems, and in the European Union there is no charge for the use of the identifying numbers.

#### **VIII. DEFENDANTS THREATEN LITIGATION AND LOSS OF CUSIP NUMBERS IF A FINANCIAL INSTITUTION REFUSES TO SIGN A LICENSE.**

95. Defendants make two threats against unlicensed financial institutions: litigation including seeking injunctive relief stopping the financial institution from using CUSIP numbers and the removal of CUSIP numbers from the data feed the financial institution receives from its Third-Party Data Vendor.

96. Defendants' process is to send letters to unlicensed financial institutions asserting that CUSIP numbers are copyrighted, and that the financial institution's unlicensed use is infringing or otherwise violative of some "rights" or "property" of Defendants. Those statements

alone are sufficient to put the unlicensed financial institution on notice that it may face litigation over its use of CUSIP numbers, including infringement and injunctive relief litigation. This would trigger the unlicensed financial institution's right to file a declaratory judgment action seeking a ruling that its use does not infringe the copyright.

97. S&P requires that unlicensed CUSIP Users execute an agreement whose purpose, at least in part, is to inform unlicensed CUSIP Users that any unauthorized use of the CUSIP numbers will subject the CUSIP User to litigation. That agreement is the Subscription Agreement, by which the CUSIP User subscribes to the S&P "service." Section 2 of the Subscription Agreement states that the data the CUSIP User receives is protected intellectual property:

Subscriber expressly acknowledges that the Data was compiled, prepared, selected, arranged and published by [CGS] under authority from the ABA through the application of methods and standards of judgment developed and applied through the expenditure of substantial time, effort and money, and that the Data constitutes valuable intellectual property of [CGS] and the ABA and that no proprietary rights are being transferred to Subscriber in such materials or in any of the information contained therein.

98. None of that is true. These statements are relevant to the CUSIP\_DB compilation in its entirety, but not to CUSIP numbers, issuer names, and types of issue a CUSIP User obtains from its Third-Party Data Vendor and agrees under pressure to "license." The CUSIP numbers, the issuer names, and the types of issue do not constitute "valuable intellectual property" of any of the Defendants.

99. Yet, Section 2 of the Subscription Agreement provides that the "Subscriber agrees that misappropriation or misuse *of such materials* will cause serious damage to CGS and ABA; consequently, Subscriber agrees that in the event of any misappropriation or misuse, CGS and the ABA *shall have the right to obtain* injunctive relief" (emphasis added).

100. Because the CUSIP User is forced to agree that the data it is "licensed" to receive is the protected intellectual property of CGS and the ABA, it is exposed to the argument that any

unlicensed use of CUSIP numbers, issuer names, and types of issue is infringing. Thus, Section 2 informs CUSIP Users that CGS will bring an action for injunctive relief and may obtain an injunction for any unlicensed use of CUSIP numbers—meaning any use not specifically permitted by the license—and that the licensee agrees that the licensor is entitled to an injunction. An injunction would pose an existential threat to the CUSIP User’s business.

101. Moreover, the Subscription Agreement allowed S&P and now allows FactSet to terminate the license agreement entirely if “the Subscriber is violating any of CGS’ proprietary rights set out in Section 2.” That threat to terminate is itself not limited to an actual, provable breach by the CUSIP User, but rather is exercisable by Defendants even if they have only “reasonable grounds to believe” that the Subscriber is violating any of the alleged proprietary rights claimed by Defendants under Section 2.

102. Finally, Section 10.1 of the Subscription Agreement provides that in addition to the right to obtain an injunction, CGS is permitted to “pursu[e] any [additional] action or other remedy for any breach or threatened breach of this Agreement, all of which shall be cumulative.”

103. Swiss Life’s negotiations with S&P make clear that CUSIP Users have no choice but to accept the Subscription Agreement, despite S&P’s many false assertions. After S&P sent Swiss Life a form Subscription Agreement, Swiss Life deleted Section 2. Swiss Life informed Bloomberg that the ISINs were not copyrighted and that Swiss Life would sign an agreement asserting that the data was not copyrighted.

104. S&P rejected that edit and informed Swiss Life of the language’s purpose. On June 27, 2012, Martin Richter of S&P forwarded to Swiss Life his internal email exchange with Richard Dartey, an executive in McGraw Hill’s Global Licensing & Contracts department. (McGraw Hill owned S&P Capital IQ at the time). In the June 26, 2012, email, Mr. Dartey asserted that the

language in Section 2 regarding intellectual property gave S&P the right to obtain injunctive relief stopping any unlicensed use of the CUSIP numbers: “The client is failing to acknowledge that CUSIP data is our intellectual property and therefore in the event of misappropriation or misuse we have the right to seek injunctive relief.” Mr. Dartey’s reference to “CUSIP data” referred to CUSIP numbers, issuer names, and types of issue, which is what S&P proposed Swiss Life “license.”

105. Bloomberg also informed Swiss Life that S&P would not accept the agreement without the copyright clauses and that Bloomberg would have to remove the ISINs from Swiss Life’s Bloomberg data feed if Swiss Life did not sign the form agreement. Swiss Life needs ISINs to manage its United States dollar bond portfolio and losing access to the ISINs was an existential threat to its business and thus was not an option. Faced with the threat of litigation and the loss of the CUSIP numbers and, in turn, the ISINs, Swiss Life concluded that it had no reasonable option other than signing the license because the threat of losing access to ISINs was an existential threat to its business. Swiss Life signed the form agreement, which was last renewed in 2019.

106. Hildene is another example of Defendants’ tactics to force CUSIP Users to enter license agreements. Hildene has an agreement with its Third-Party Data Vendor Bloomberg to obtain financial data, a small fraction of which include CUSIP numbers, issuer names, and types of issue. Hildene receives data services from Bloomberg, not from Defendants. Nevertheless, in 2020, S&P demanded that Hildene purchase a license from S&P on the stated premise that Hildene’s data feed from Bloomberg contained CUSIP numbers. S&P demanded that Hildene pay an annual fee and threatened to have Bloomberg strip all CUSIP numbers from Hildene’s data feed if Hildene refused to sign the license agreement.

107. When Hildene balked at paying these licensing fees, S&P sent a series of increasingly hostile letters. On March 19, 2021, Alison Romeo, a CGS Product Manager, sent Hildene's John Scannell a letter warning: "[I]f we do not hear from you or if we do not receive a completed CUSIP Use of Service Statement, we will have no choice but to contact all applicable ISPs [information service providers] that may furnish you with CGS Data in bulk, data feed or downloadable format, and enforce our rights to require such ISPs to discontinue furnishing your firm with this CGS Data." In referring to "CGS Data," Ms. Romeo was referring to CUSIP "Identifiers" and descriptions. In fact, CGS's license agreement with Hildene was expressly limited to: "CUSIP License to 2,500 Identifiers." Further, by stating that they would contact "all applicable ISPs" Ms. Romero was indicating that the boycott agreement included all ISPs (Third-Party Data Vendors). Ms. Romeo instructed Hildene to have its counsel contact Jeffrey Mitnick, an Associate General Counsel at S&P.

108. On June 8, 2021, Mr. Mitnick sent a letter to Hildene threatening: "In the event that a satisfactory solution is not reached by June 25, 2021, we will have no choice but to send final notification to all applicable authorized vendors to cease servicing your firm with CGS Data." The "CGS Data" that Hildene was accessing through Bloomberg was CUSIP numbers, and that is what CGS eventually "licensed" Hildene—*i.e.*, 2,500 CUSIP numbers. And by stating that it would send "final notification to all applicable authorized vendors" Mr. Mitnick was indicating that the boycott agreement included all Third-Party Data Vendors. In plain language, Mr. Mitnick's threat was that S&P would remove the CUSIP numbers from securities data Hildene receives from Bloomberg, rendering that data useless, an existential threat to Hildene's business.

109. When Hildene still refused, Daphne Shephard, a Director at S&P, informed Hildene on August 31, 2021, that failure to enter a license by September 20, 2021, would cause her "to

refer this matter to our legal department for further action which may include *the removal of all CGS data from all sources* into Hildene Capital” (emphasis added). By “CGS data,” Ms. Shepard was referring to the CUSIP numbers, issuer names, and types of issue because that is the only data that Hildene sought to license. The phrase “further action” was not limited to removal of the data and along with the reference to S&P’s legal department was a clear threat that S&P would consider all available legal remedies, inclusive of injunctive relief.

110. Ms. Shepard renewed S&P’s threat to pursue “all available remedies” in an email dated September 9, 2021: “If we do not receive the executed agreements by September 30, 2021, our Licensing Compliance and Legal teams will continue the escalation process. At this juncture in the process, if CGS is unable to reach an agreement with Hildene Capital your firm may lose access to CGS data.” Ms. Shepard’s threat to “continue the escalation process” with her legal team clearly included a threat to pursue litigation.

111. S&P also used its market power of its other offerings to coerce financial institutions to sign CUSIP licenses. S&P is a credit-rating agency that issues ratings for both government debt and company debt (public and private). As one of the three largest credit-rating agencies in the United States, S&P is a principal source of ratings data for CUSIP Users that trade, manage, or research debt offerings. Upon information and belief, S&P used its market power in ratings data to coerce financial institutions into accepting a CUSIP license by refusing to provide its ratings data to them unless they entered into license agreements with S&P for use of the CUSIP numbers.

**IX. DEFENDANTS ALSO MANIPULATED THE STANDARD-SETTING PROCESS TO ELIMINATE THE REMOTE CHANCE THAT X9 WOULD ADOPT ANOTHER NUMBERING SYSTEM AS A STANDARD.**

112. X9, which was created and formally owned by ABA, was and is far from an independent standard-setting committee. Although X9 formally separated from the ABA in 2001,

the ABA has exerted and continues to exert substantial control over the ostensibly independent X9 as evidenced by the significant ties and overlap between the ABA, CGS and X9. For example, both the ABA and S&P's (now FactSet's) CGS division are full voting members of X9. The current Managing Director, and Global Head of CGS is Scott Preiss, who previously chaired X9. Tab Stewart, the Senior Vice President, Financial Services Standards at the ABA is (a) Chair of X9's Policies and Procedures; (b) a representative of X9's CUSIP Working Group, which is the working group responsible for reviewing and approving the CUSIP numbering system as a national standard; and (c) a member of CGS's Board of Trustees. Karin Flynn, Chief Financial Officer of the ABA, is a member of the Board of Trustees of CGS. Nine of the twenty-three members of the CUSIP Working Group were from the ABA and S&P's CGS when CUSIP's X9 accreditation was renewed in December 2020.

113. Bloomberg created and introduced its free alternative Financial Instrument Global Identifier ("FIGI") numbering system in 2010 and repeatedly sought to have it designated as another standard by X9 to no avail until the end of 2021. FIGI was not a viable alternative standard during the years X9 declined to designate it as an alternative standard, and as a new second standard it still is not a viable alternative to CUSIP today because of the required use of CUSIPs in various regulatory filings and the universal use of CUSIPs throughout the United States financial system. Regardless of Bloomberg's chances of FIGIs becoming a meaningful competitor to the long-entrenched CUSIP standard, the ABA and S&P agreed and conspired to use their influence over X9 to help ensure that X9 would not choose FIGIs as an alternative standard.

114. The ABA and S&P abused the standard-setting process to preclude even the chance, however remote, that X9 would adopt an alternative standard because they were intent on ensuring that Defendants could continue to exploit CUSIP's position as the entrenched standard, with no



competition, to force CUSIP Users to enter “license agreements” under the threat of, among other things, having their access to essential CUSIP numbers cut off.

**X. IN THE ALTERNATIVE, IF CUSIP NUMBERS ARE FOUND TO BE PROTECTED BY COPYRIGHT, DEFENDANTS ARE VIOLATING THE ABA’S COMMITMENT TO X9 TO LICENSE ON FRAND TERMS.**

115. Assuming *arguendo* that CUSIP numbers were determined to be copyrightable, which they are not, Defendants have violated the commitment made by the ABA, as the claimed holder of the intellectual property (“IP”), to X9 to offer licenses to CUSIP numbers and the CUSIP numbering system on FRAND terms, including price. While Defendants were not and are not entitled to require CUSIP Users to pay any “license” fees for accessing CUSIP numbers, the fees they coerce from CUSIP Users, at a minimum, violated the ABA’s FRAND commitment.

116. X9’s procedures require that holders of IP essential to a standard either disclaim their proprietary IP or provide licenses to their IP on FRAND terms (the “Assurance”). The Assurance requirement applies to all IP. According to X9’s procedures: “Use of trademarks, copyrighted, or patented materials shall be in accordance with the X-9-approved policies.”

117. The Assurance requirement is consistent with the ANSI Intellectual Property Rights (“IPR”) policy, which requires that entities contributing to a standard disclose if they have or may assert proprietary IP rights as to their contribution to the standard and disclose the terms and conditions under which they will license (or refuse to license) to those whose use of the standard would infringe those IP rights without a license.

118. As required by both X9’s procedures and the ANSI IPR policy, during the standard setting process, the ABA disclosed its intended licensing terms and committed that it would license

the CUSIP numbering system on FRAND<sup>9</sup> terms and conditions, including pricing. CUSIP Users as licensees of S&P (now FactSet) are third-party beneficiaries of those commitments.

119. As an ANSI-Accredited Standards Developer, X9's procedures require each entity that participates in the standard setting process to make an Assurance. As reflected in the CUSIP standard, including both the 2014 and 2020 ANSI X9 CUSIP Standards, the ABA "filed a statement of willingness to grant a license under these rights on reasonable and nondiscriminatory terms and conditions to applicants desiring to obtain such a license." Pursuant to X9's policies, this statement of willingness applies to the use of "trademarks, copyrighted, or patented materials."

120. CGS's website confirms the ABA's FRAND commitment. The CGS website states:

CGS seeks to charge fair, reasonable and non-discriminatory license fees for providing the convenience and functionality of direct or indirect access to and benefit of CGS Data . . . . End User customers are asked to complete a Use of Service Statement that allows CGS to determine the appropriate License fees for that end user customer. CGS's Use of Service Statement helps CGS to achieve its objective of ensuring that end user customers are treated in a fair, reasonable and *[sic]* user customer derives from Usage of CGS Data.<sup>10</sup>

121. The FRAND commitment and obligation, such as the commitment that was voluntarily undertaken by the ABA, are critical tools in preventing monopoly hold up (or providing recourse if monopolists created through the standard setting process, as here, attempt to engage in "hold up") and ensuring that the standard remains accessible on fair, reasonable, and non-discriminatory terms to all who wish to utilize it. Here, however, the FRAND commitment was an empty promise: X9 was influenced and controlled by the ABA, the party making the FRAND

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<sup>9</sup> In some standards setting organizations, particularly in the United States, the commitment is or has been phrased as "reasonable and non-discriminatory" or RAND, and in some organizations, particularly outside the United States, it is defined as "fair, reasonable, and non-discriminatory" or FRAND. The more common usage today is "FRAND" which is the term that will be use throughout this Complaint.

<sup>10</sup> See *CGS Licensing Policies FAQs, How Are CGS License Fees calculated for End User Customers?*, CUSIP GLOBAL SERVICES, <https://www.cusip.com/services/license-fees.html> (last visited Dec. 21, 2022).

commitment, and its co-conspirator S&P (now FactSet), all of which directly benefitted from Defendants' violation of their FRAND obligations. S&P's (now FactSet's) recognition of their obligation to honor that commitment is reflected in CGS's License Fee Policy, pledging that S&P's (now FactSet's) CGS seeks to charge "fair, reasonable and non-discriminatory license fees."

122. Defendants, however, breached that commitment by charging Plaintiffs and members of the Class unfair, unreasonable, and arbitrary fees based on false claims of copyright, which Defendants should not have charged because they had no right to prevent Plaintiffs and other Class members from using CUSIP numbers and thus no right to demand "licenses" or "license fees." The incremental cost of electronic distribution of information to any user is zero. Thus, it is not surprising that in areas outside the United States, such as the European Union, providers of identifying numbers for financial instruments do not charge financial institutions for the use of the identifier numbers. Bloomberg created FIGI, an alternative to the CUSIP numbering system, that it sought to make available entirely free of charge to users.

123. Defendants incur no incremental cost when a CUSIP User "uses" a CUSIP number it has received from its contracted Third-Party Data Vendor rather than from Defendants. Therefore, for the Class members, there is no basis on which Defendants can argue that any charge other than \$0.00 is fair or reasonable. Thus, every dollar of licensing fees that S&P extracted and FactSet extracts from Plaintiffs and other members of the Class is supra-competitive and in breach of the FRAND commitment.

124. S&P (now FactSet), which acts on behalf of the ABA, is bound by the ABA's FRAND commitment, which applies to the licenses CUSIP Users sign. Underscoring its understanding of its requirement to honor that commitment, S&P (now FactSet) represents on its website that it complies with the ABA's licensing commitment as set forth above. A key purpose

of the FRAND commitment is to prevent holders of proprietary rights on technologies that are incorporated into standards from engaging in “hold up,” which is the exercise of the market power conferred by the standard to charge users of the standard supra-competitive prices and other anticompetitive licensing terms.

125. Therefore, in the alternative, if CUSIP numbers are determined to be copyrighted (which they are not), Plaintiffs and members of the Class are entitled to the entirety of their licensing fees as damages.

## **XI. RELEVANT MARKET AND DEFENDANTS’ MARKET POWER**

126. The relevant product market is the market for using identifying numbers after initial issuance (defined *supra* as the “CUSIP Use Market”). Because identifiers of financial instruments are national in scope, identifiers used for non-United States financial instruments are not used or useful to identify United States financial instruments. Thus, only the use of identifiers of United States financial instruments are included in the relevant product market.

127. The relevant geographic market is the United States.

128. S&P has had a 100% share in the CUSIP Use Market, as does FactSet today. At all relevant times S&P had and FactSet has monopoly power in the CUSIP Use Market.

129. Alternative numbering systems have been inadequate substitutes for CUSIP numbers because the CUSIP numbering system is and has been the market standard for decades.

130. The existence of other identifiers or potential identifiers did not and does not constrain S&P’s ability to raise or maintain prices of licenses for use of CUSIP numbers without losing substantial sales and did not and does not constrain FactSet’s ability to do the same now because Defendants successfully excluded other competitors from replacing CUSIP numbers as the market standard.

131. S&P has had and FactSet now has both the power to exclude competition in and the power to maintain supra-competitive prices for licenses for the use of CUSIP numbers paid by CUSIP Users without losing substantial sales to potential rivals. S&P's long history (and FactSet's shorter history) of charging supra-competitive prices and excluding competitors demonstrates this monopoly power.

132. A small but significant, non-transitory price increase in CUSIP licenses would not cause, and has not caused, a significant loss of sales to potential rivals to make such a price increase unprofitable. Indeed, S&P imposed on all three named Plaintiffs price increases of more than \$10,000 on CUSIP numbers (including the CUSIP numbers in ISINs) they had been using for free, and yet Plaintiffs did not switch to an alternative numbering system. Thus, the pricing of licenses for the use of CUSIP numbers does not exhibit significant, positive cross-elasticity of demand with respect to prices charged by any other entity.

133. There are no natural barriers to entry into the CUSIP Use Market. The CGS website acknowledges that collections of CUSIP numbers can be created based on public data. However, Defendants' illegal, exclusionary, and anticompetitive conduct has created substantial unnatural barriers to entry.

## **XII. CLASS ACTION ALLEGATIONS**

134. Pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(2) and 23(b)(3), Plaintiffs bring this action for themselves and on behalf of the following classes.

135. The "CUSIP User Class":

All persons or entities (other than Third-Party Data Vendors) that directly paid a so-called "license fee" to S&P or FactSet pursuant to the Subscription Agreement and the Use of Services Statement at any time beginning March 4, 2018 until the anticompetitive acts end (the "Class Period") and did not license the CUSIP\_DB compilation.

136. The "Injunctive Relief Class" (together with the CUSIP User Class, the "Classes"):

All persons or entities (other than Third-Party Data Vendors) that currently have entered into a Subscription Agreement and are paying a so called “license fee” to FactSet (including to CGS) and did not license the CUSIP\_DB compilation.

137. Plaintiffs also bring this action for themselves and on behalf of the following sub-class (the “New York Unfair Business Practices Sub-Class”):

All persons or entities (other than Third-Party Data Vendors) that directly paid a so-called “license fee” to S&P or FactSet in New York pursuant to a Subscription Agreement and Use of Service Statement at any time beginning March 7, 2019 until the unfair and deceptive business practices end (the “New York Subclass Period”) and did not license the CUSIP\_DB compilation.

138. Additionally, Hildene brings this action on behalf of itself and on behalf of the following sub-class (the “Connecticut Unfair Business Practices Sub-Class,” and together with the “New York Unfair Business Practices Sub-Class,” the “Sub-Classes”):

All persons or entities (other than Third-Party Data Vendors) that reside in Connecticut that directly paid a so-called “license fee” to S&P or FactSet pursuant to a Subscription Agreement and Use of Service Statement at any time beginning March 7, 2019 until the unfair and deceptive business practices end (the “Connecticut Sub-Class Period”) and did not license the CUSIP\_DB compilation.

139. Excluded from the Classes and Sub-Classes are governmental entities, Defendants, any parent, subsidiary, or affiliate thereof, Defendants’ officers, directors, employees, and immediate families thereof, any legal representative, heir, or assign of any Defendant, and any person acting on their behalf, any judicial officer presiding over or assigned to hear any aspect of this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

140. Plaintiffs and the Classes and Sub-Classes are seeking damages and an injunction for Defendants’ violations alleged herein.

141. The Classes and Sub-Classes are readily ascertainable, and the members of the Class and Sub-Classes are readily identifiable from information and records maintained by S&P and FactSet.

142. Members of the Classes and Sub-Classes are so numerous that joinder of all members is impracticable. The members of the Classes and Sub-Classes are numerous and widely dispersed throughout the United States and around the world.

143. Plaintiffs' claims are typical of the claims of the members of the Classes and Sub-Classes. Within the Classes and Sub-Classes, Plaintiffs' interests are not antagonistic to the claims of the other members of the Classes and Sub-Classes, and there are no material conflicts with any other members of the Classes and Sub-Classes that would make class certification inappropriate. Plaintiffs and all members of the Classes and Sub-Classes were damaged by the same wrongful conduct of Defendants.

144. Plaintiffs will fairly and adequately protect and represent the interests of the members of the Classes and Sub-Classes. The interests of the Plaintiffs are coincident with, and not antagonistic to, those of the members of the Classes and Sub-Classes.

145. Plaintiffs are represented by counsel (Competition Law Partners PLLC, Kaplan Fox & Kilsheimer LLP, and Wollmuth Maher & Deutsch LLP) who are experienced and competent in the legal issues involved in this Complaint and in the prosecution of class action litigation, and who have particular experience with class action litigation involving alleged violations of antitrust law in the financial services industry.

146. Questions of law and fact common to the members of the Classes and Sub-Classes predominate over questions that may affect only individual Class and Sub-Class members because Defendants have acted on grounds generally applicable to the entirety of the Classes and Sub-Classes, thereby determining damages with respect to the Classes and Sub-Classes as a whole is appropriate. Such generally applicable conduct is inherent in Defendants' wrongful conduct.

147. There are legal and factual questions common to the Classes and Sub-Classes, which do not vary from Class member to Class member and which may be determined without reference to individual circumstances of any Class or Sub-Class member. These include, but are not limited to, the following:

- (a) Whether CUSIP numbers are copyrighted or copyrightable;
- (b) Whether S&P (and now FactSet) has monopoly power in the CUSIP Use Market;
- (c) Whether S&P (and now FactSet) willfully maintained and enhanced its monopoly power in the CUSIP Use Market;
- (d) Whether the standardized contractual restriction on Third-Party Data Vendors have constituted an unreasonable restraint of trade;
- (e) Whether S&P and the ABA (and now FactSet and the ABA) conspired for S&P (and now FactSet) to willfully acquire, maintain or enhance its monopoly power in the CUSIP Use Market;
- (f) Whether S&P and the ABA (and now FactSet and the ABA) conspired to monopolize the relevant market by engaging in unlawful exclusionary conduct to acquire, maintain or enhance S&P's (and now FactSet's) monopoly power in the CUSIP Use Market;
- (g) Whether, and to what extent, the conduct of Defendants caused injury to Plaintiffs and other members of the Classes and Sub-Classes;
- (h) What is the appropriate measure of damages;
- (i) Whether the conspiracies alleged herein violated Section 1 of the Sherman Act, 15 U.S.C. § 1;
- (j) Whether the alleged monopolization and conspiracy to monopolize violated Section 2 of the Sherman Act, 15 U.S.C. § 2;
- (k) Whether, if the CUSIP numbers were found to be protected by copyright (which they are not), Defendants violated ABA's FRAND agreement in charging Plaintiffs and members of the Class non-FRAND prices for CUSIP "licenses;"
- (l) Whether Defendants' conduct was unfair and had the capacity to and did materially deceive or threaten Plaintiffs and similarly situated members of the New York Unfair Business Practices Sub-Class when transacting business in the State of New York;



- (m) Whether Defendants' conduct was unfair and had the capacity to and did materially deceive or misled Plaintiffs and similarly situated members of the Connecticut Unfair Business Practices Sub-Class members when transacting business in the State of Connecticut; and
- (n) Whether the Classes and Sub-Classes are entitled to the injunctive relief sought.

148. Class action treatment is a superior method to other available methods for the fair and efficient adjudication of the controversy. The prosecution of separate actions by individual members of the Classes and Sub-Classes would impose heavy burdens on the courts and Defendants and would create a risk of inconsistent or varying adjudications of the questions of law and fact common to the Classes and Sub-Classes. Class action treatment will permit a large number of similarly situated persons or entities to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, or expense that numerous individual actions would engender, and would assure uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results. The benefits of proceeding through the class mechanism, including providing injured persons or entities a method for obtaining redress on claims that could not practicably be pursued individually, substantially outweigh any potential difficulties in management of this class action.

149. Plaintiffs know of no special difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

### **XIII. THE ANTICOMPETITIVE EFFECTS OF DEFENDANTS' CONDUCT**

150. Defendants' conduct has produced and continues to produce substantial anticompetitive harm. Their agreements—both the Subscription Agreement with CUSIP users and their agreements with Third-Party Data Vendors—exclude competition in, and competitors from, the CUSIP Use Market and deny CUSIP Users the benefits of robust competition, including the

benefit of innovation that results from and creates robust competition. Defendants' success in stopping actual and potential competitors—such as the Third-Party Data Vendors and other data and fintech companies such as Xignite—from the unlicensed use of CUSIP numbers has prevented potential competitors from using the CUSIP numbers to develop value-added services that would benefit CUSIP Users and would compete with Defendants.

151. Defendants' anticompetitive conduct imposes unnecessary burdens on financial markets, thereby reducing competition, liquidity, and transactional flow. Competitors and other market participants have repeatedly complained about the harmful effects of Defendants' anticompetitive conduct. For example, Bloomberg, a potential competitor in the CUSIP Use Market (but for the restrictive Third-Party Data Vendor agreements and resulting group boycott) and who even created FIGI as an alternative to CUSIP in an unsuccessful attempt to break S&P's (and now FactSet's) control of the market, wrote to the SEC in October 2017 to voice its concern over the anticompetitive effects of Defendants' conduct: "The process of obtaining a CUSIP, and the restrictive licensing imposed on its use imposes unnecessary burdens on firms by interrupting transactional flow and timing. This is evidenced by the assertion that competition would be reduced, liquidity would be negatively affected, and parties would actively seek ways to avoid processes that would require use of a CUSIP." Bloomberg added that by forcing market participants to pay arbitrary fees to use CUSIP numbers, S&P "imposes a significant and restrictive cost on the industry as a whole," which negatively affects liquidity and reduces competition. Bloomberg also expressed concern that restricting the use of CUSIP numbers would disadvantage "new technology and can instead stifle innovation."<sup>11</sup>

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<sup>11</sup> See Letter from Peter Warms, Senior Manager, Bloomberg, to Brent Fields, Secretary, SEC (Oct. 10, 2017), <https://www.sec.gov/comments/sr-msrb-2017-06/msrb201706-2631530-161220.pdf>.

152. Defendants' restrictive licensing practices impede actual and potential competitors from innovating in the financial markets including by raising the costs of potential rivals. Notwithstanding the tremendous advancements in technology over the past decades, Defendants still are charging CUSIP Users unlawful licensing fees whereas there are no charges for the use of financial instrument identifiers in almost every (if not every) market outside the United States for non-United States financial instruments. Moreover, Defendants continue to impose and collect these fees with no lawful justification for requiring a license and with no substantial improvements to the product they are licensing.

153. Defendants' contracts, which allow S&P (and now FactSet) to audit licensees' use of CUSIP numbers, are anticompetitive and create anticompetitive harm. The audit function allows S&P (and now FactSet) to disintermediate the relationships between the Third-Party Data Vendors and their customers by interfering in that relationship and potentially replacing the Third-Party Data Vendors. The audit function also gives S&P (now FactSet) the opportunity to not only understand, but also to track the status and progress of the businesses of its potential rivals who are collecting CUSIP numbers and compiling their own datasets or otherwise combining CUSIP numbers into their own innovative services. This anticompetitive insight also allows Defendants to market and sell more effectively against these emerging rivals based on access to those rivals' proprietary and competitively sensitive information.

154. By imposing unnecessary costs on the use of CUSIP numbers, Defendants' conduct reduces transparency in financial markets and thereby creates inefficiencies that impede actual and potential rivals from creating more efficient and attractive data offerings that use CUSIP numbers. The municipal bond market provides an example of this anticompetitive effect. Marc Joffe, a Senior Policy Analyst at the Reason Foundation, has written that Defendants' restrictive licensing

policies reduce transparency in municipal bond markets.<sup>12</sup> The Municipal Securities Rulemaking Board (“MSRB”) maintains a public information site for municipal bonds known as Electronic Municipal Market Access (“EMMA”). EMMA theoretically should permit data companies that could compete with Defendants to process information about municipalities’ debt practices quickly and efficiently.

155. Yet Defendants require that the MSRB post the following notice on the EMMA site:

You agree that you will not use the CUSIP Numbers and Securities Descriptions contained on the Website for any other purpose. You may not download CUSIP Numbers and Securities Descriptions from the Website. Such information obtained from the Website shall not be re-disseminated other than as provided in these Terms and, to the extent such information is re-disseminated by you to other parties, you will take all necessary and reasonable precautions to ensure that recipients who obtain the information directly or indirectly from you do not use CUSIP Numbers or Securities Descriptions for any other purpose.<sup>13</sup>

156. Mr. Joffe notes the MSRB implements these restrictions by displaying the CUSIP numbers as images (similar to Defendants’ requirement that Third-Party Data Vendors not provide CUSIP numbers in data feed or downloadable format to unlicensed CUSIP Users), thus “rendering them impossible to copy and paste into spreadsheets.” This makes the task of “[c]ompiling lists of all the outstanding bonds issued by any large government entity...tedious and time-consuming.” This raises the costs of processing and analyzing the data on the EMMA site for any data company wishing to compete with Defendants. The result is reduced transparency into municipal debt practices, which “undermin[es] government financial transparency” to the detriment of taxpayers.

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<sup>12</sup> Marc Joffe, *Class action lawsuits against CUSIP could improve government transparency*, REASON FOUNDATION, (Mar. 18, 2022), <https://reason.org/commentary/class-action-lawsuits-against-cusip-could-improve-government-transparency/>.

<sup>13</sup> *Municipal Securities Rulemaking Board’s Website Terms of Use*, MSRB (Apr. 29, 2022), <https://www.msrb.org/form/disclaimer>.

157. No legitimate pro-competitive efficiencies or other pro-competitive arguments justify Defendants' conduct in misusing their copyright, and in abusing S&P's and now FactSet's monopoly power to continue willfully and unreasonably restraining trade to extort fees from CUSIP Users.

158. Absent Defendants' anticompetitive conduct, Plaintiffs and members of the Classes and Sub-Classes would not have had to enter into license agreements and pay Defendants substantial amounts of annual fees and would be free to compete with Defendants and innovate in the use of CUSIPs without fear of threatened litigation and the imposition of injunctions that would threaten the viability of their businesses.

159. S&P (and now FactSet) have extracted from CUSIP Users, on information and belief, at least an estimated \$100 million each year in unlawful charges that they would not have obtained absent Defendants' unlawful course of conduct.

160. Defendants' unlawful conduct harmed and continues to harm competition by stifling innovation and competition in the CUSIP Use Market, thereby depriving CUSIP Users of the benefits of greater variety and increased competitive choices at lower prices that would exist in a competitive market, and by diverting financial resources to the Defendants that would otherwise be used by actual and potential rivals, including Third-Party Data Vendors and CUSIP Users. These anticompetitive effects ultimately result in higher costs and lower returns to CUSIP Users, and therefore to the retirees and future retirees whose pension funds, retirement funds, 401(k)s, and IRAs are the customers and clients of the financial institutions that are the CUSIP Users.

161. There is no cognizable or plausible procompetitive justification for Defendants' unlawful conduct, or one that outweighs its anticompetitive effects. The only purpose for

Defendants' conduct is to prevent competition and generate millions of dollars in revenue a year from CUSIP Users' use of already issued CUSIP numbers.

162. CUSIP Users, including Plaintiffs, will continue to suffer such injury unless the relief sought in this Complaint is granted.

#### **XIV. CLAIMS FOR RELIEF**

##### **First Claim for Relief**

**(Declaratory Judgment Under the Declaratory Judgment Act, 28 U.S.C. § 2201  
and the United States Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*)**

**(On Behalf of the CUSIP User Class Against All Defendants)**

163. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint.

164. During the relevant period, Defendants have asserted (and continue to assert) that CUSIP numbers are copyrighted. The CUSIP numbers are not copyrighted or entitled to copyright under the Copyright Act of 1976, 17 U.S.C. §101 *et seq.*

165. There is an actual case and controversy created by threats of litigation and of the imposition of injunctions concerning whether Defendants have a valid claim of copyright to CUSIP numbers. A judicial determination of the parties' rights and duties is necessary and appropriate at this time and under these circumstances to resolve the controversy between the parties and afford relief from the dispute over the copyrightability of CUSIP numbers giving rise to this proceeding.

166. Declaratory judgment is appropriate under the Declaratory Judgment Act, 28 U.S.C. § 2201 to declare the rights of Plaintiffs by declaring that Defendants had (and have) no valid claim of copyright in and to the CUSIP numbers.

167. Because 28 U.S.C. § 2202 empowers this Court to grant, "necessary or proper relief based on a declaratory judgment or decree . . . after reasonable notice and hearing, against any

adverse party whose rights have been determined by such judgment,” Plaintiffs are entitled to a declaration that the CUSIP numbers are not copyrighted and are not copyrightable.

**Second Claim for Relief**

**(Monopolization in Violation of Section 2 of the Sherman Act,  
Unlawful Maintenance of Monopoly Power)**

**(On Behalf of the CUSIP User Class Against S&P and FactSet)**

168. Plaintiffs hereby incorporate by reference the preceding paragraphs of this Complaint.

169. During the relevant period, S&P and now FactSet has had a monopoly in and each has willfully and unlawfully maintained its monopoly in the United States CUSIP Use Market by engaging in a course of exclusionary conduct that discouraged rather than encouraged and prevented competition or potential competition in the United States CUSIP Use Market.

170. The goal, purpose, and effect of S&P’s and now FactSet’s conduct, was and is to maintain and extend S&P’s and FactSet’s monopoly power. Defendants’ illegal conduct enabled S&P (and now FactSet) to obligate CUSIP Users, including Plaintiffs, to execute the Subscription Agreement and CUSIP Use of Service Supplement (the “Unlawful Agreements”).

171. The course of conduct constitutes unlawful monopolization of the CUSIP Use Market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

172. There is no procompetitive justification for S&P’s and now FactSet’s unlawful conduct in willfully maintaining its monopoly in the CUSIP Use Market. Even if, contrary to fact, there were assumed to be a procompetitive justification, the exclusionary conduct was not necessary to achieve any such procompetitive purpose, which could have been realized by less restrictive alternatives and the anticompetitive effects of S&P’s and now FactSet’s conduct have far outweighed the procompetitive benefits.

173. As a direct, material, and proximate result of S&P's and now FactSet's violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, Plaintiffs and members of the Class have been injured by being deprived of the benefits of a competitive market for the use of CUSIP numbers and have suffered damages in an amount to be proved at trial and without injunctive relief.

174. Plaintiffs and members of the Class will continue to suffer injury as a result of S&P's and now FactSet's ongoing unlawful conduct.

**Third Claim for Relief**

**(Conspiracy to Monopolize in Violation of Section 2 of the Sherman Act)**

**(On Behalf of the CUSIP User Class Against All Defendants)**

175. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint.

176. During the relevant period, Defendants have engaged in a conspiracy to monopolize the CUSIP Use Market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, *et seq.*

177. During the relevant period, Defendants have conspired to willfully and unlawfully maintain S&P's (now FactSet's) monopoly power in the United States CUSIP Use Market by engaging in exclusionary conduct that discouraged rather than encouraged competition on the merits. As explained in detail above, Defendants conspired to exclude other potential competitors from entry into the CUSIP Use Market.

178. The goal, purpose, and effect of Defendants' conspiracy was and is to maintain and extend S&P's and now FactSet's monopoly power.

179. Defendants' conspiracy to monopolize the CUSIP Use Market had a dangerous probability of success as demonstrated by its success in excluding any meaningful competition in that market and preserving S&P's and now FactSet's monopoly.



180. There is no procompetitive justification for Defendants' unlawful conduct in conspiring to maintain S&P's and now FactSet's monopoly over the CUSIP Use Market and charging unlawful licensing fees to CUSIP Users with no connection to the value, if any, of the services provided. Even if, contrary to fact, there were assumed to be a procompetitive justification, the exclusionary conduct was not necessary to achieve the procompetitive purpose, any such procompetitive purpose could have been obtained by less restrictive alternatives, and the anticompetitive effects of Defendants' conduct far outweigh the procompetitive benefits.

181. As a direct, material, and proximate result of Defendants' violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, Plaintiffs and members of the Class have been injured and suffered damages in an amount to be proved at trial.

182. Without injunctive relief, Plaintiffs and members of the Class will continue to suffer injury as a result of Defendants' ongoing unlawful conduct.

#### **Fourth Claim for Relief**

##### **(Group Boycott in Violation of Section 1 of the Sherman Act)**

##### **(On Behalf of the CUSIP User Class Against All Defendants)**

183. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint.

184. S&P, the ABA, FactSet, and the Third-Party Data Vendors agreed to refuse to deal with CUSIP Users, including Plaintiffs, unless CUSIP Users signed a license agreement with S&P, and now FactSet, for CUSIP numbers, issuer names, and types of issue.

185. This group boycott violates of Section 1 of the Sherman Act, 15 U.S.C. § 1.

186. The purpose and effect of this group boycott was to restrain competition in the CUSIP Use Market.

187. There is no procompetitive justification for S&P's (and now FactSet's) unlawful agreement with the Third-Party Data Vendors. Even if, contrary to fact, there were assumed to be a procompetitive justification, the unlawful conduct was not necessary to achieve any such procompetitive purpose, which could have been realized by less restrictive alternatives, and the anticompetitive effects of S&P's (and now FactSet's) unlawful agreement with the Third-Party Data Vendors have far outweighed the procompetitive benefits.

188. CUSIP Users, including Plaintiffs, were harmed and are being harmed by S&P's, the ABA's, and FactSet's conduct because they were deprived and are being deprived of a competitive market in which to obtain CUSIP numbers for use after their initial issuance, and as a result had to pay license fees that were and are unwarranted and unlawful.

189. Defendants' conduct was and is a substantial factor in causing Plaintiffs' harm.

**Fifth Claim for Relief in the Alternative**

**(Breach of Contract)**

**(On Behalf of the CUSIP User Class Against All Defendants)**

190. Plaintiffs repeat and reallege each and every allegation set forth in the preceding paragraphs above as if fully set forth herein. This Claim is relevant if and only if CUSIP numbers were found to be protected by copyright.

191. During the standard selection and approval process, the ABA filed a statement of willingness and entered a binding commitment to X9 that it would offer access to the CUSIP numbering system on FRAND terms. That commitment obligated S&P (and now FactSet) to offer access to the CUSIP database, including the CUSIP numbers, on FRAND terms, as CGS acknowledges on its website.

192. Plaintiffs and other CUSIP Users were and are intended third-party beneficiaries of the ABA's FRAND commitment, which is a contract between X9 and the ABA.

193. S&P (and now FactSet), acting on behalf of ABA, were bound by the ABA's FRAND commitment. CGS's License Fee Policy recognizes S&P's (and now FactSet's) FRAND obligation by pledging that it seeks to charge "fair, reasonable and non-discriminatory license fees."

194. Having chosen to require the CUSIP Users to sign the Unlawful Agreements, the ABA, and S&P (and now FactSet) acting on its behalf, was required by its FRAND commitment to X9 to offer those licenses on FRAND terms.

195. Defendants, however, breached that commitment by charging Plaintiffs and members of the Class unfair, unreasonable, and arbitrary license fees.

196. The incremental cost of electronic distribution of existing information including CUSIP numbers to any user is zero. Defendants incur no incremental cost when a CUSIP User "uses" a CUSIP number it has received from their contracted Data Vendor rather than from Defendants.

197. Therefore, any charge other than \$0.00 for the use of issued CUSIP numbers is not a FRAND price, and every dollar of licensing fees that Defendants extracted from Plaintiffs and other members of the Class is in breach of the FRAND commitment.

### **Sixth Claim for Relief**

**(Violations of New York General Business Law § 349(a))**

**(On Behalf of the New York Unfair Business Practices Sub-Class Against All Defendants)**

198. Plaintiffs incorporate and re-allege all of the foregoing paragraphs.

199. At all times relevant herein, the New York General Business Law (“GBL”) was in effect. GBL § 349(a) makes unlawful the use of purposeful and threatening, unfair, deceptive, or misleading acts or practices in the conduct of any business in the State of New York that cause injury to consumers and business entities, including Plaintiffs and members of the New York Unfair Business Practices Sub-Class.

200. Defendants were and are doing business in the State of New York and thus are subject to New York law for their acts, practices, and conduct described in this action. S&P’s (now FactSet’s) CGS operated out of New York during the relevant period, the threatening, unfair, deceptive and misleading conduct by Defendants emanated from New York and Defendants received payment from the “license agreements” in New York.

201. Defendants’ actions complained of herein were and are consumer-orientated and are threatening, unfair, deceptive and misleading acts and practices in the conduct of Defendants’ business that have the capacity to and did mislead and deceive Plaintiffs, and members of the New York Unfair Business Practices Sub-Class.

202. Defendants have engaged in (a) purposeful, deceitful, unfair and misleading monopolistic conduct to ensure control over the CUSIP Use Market; (b) purposeful, deceitful, unfair, and misleading practices by falsely claiming “license agreements” were necessary to use CUSIP numbers; and (c) threats that CUSIP Users will be unable to access essential data from Third-Party Data Vendors and be subject to copyright infringement claims absent entering “license agreements.”

203. As a result of Defendants’ materially threatening, unfair, deceptive, and/or misleading conduct and practices, Plaintiffs and members of the New York Unfair Business Practices Sub-Class have been injured and have incurred damages by Defendants’ unlawful acts.

204. The foregoing acts and practices directly, foreseeably, and proximately caused Plaintiffs and members of the Sub-Class to suffer an ascertainable loss in the form of payment of unlawful and unfair licensing fees to access CUSIP numbers, and Plaintiffs and members of the New York Unfair Business Practices Sub-Class are entitled to recover such damages, together with appropriate penalties, including punitive damages, attorneys' fees and costs of suit.

**Seventh Claim for Relief**

**(Violations of Connecticut Unfair Trade Practices Act § 42-110b(a))**

**(On Behalf of the Connecticut Unfair Business Practices Sub-Class Against All Defendants)**

205. Plaintiffs incorporate and re-allege all of the foregoing paragraphs.

206. At all times relevant herein, the Connecticut Unfair Trade Practices Act ("CUTPA") was in effect. CUTPA § 42-110b(a) states that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" in Connecticut that cause injury to people or entities doing business or that reside in the State, including Hildene and members of the Connecticut Unfair Business Practices Sub-Class.

207. Defendants were and are doing business in the State of Connecticut and thus are subject to Connecticut law for their acts, practices, and conduct described in this action.

208. Defendants' actions complained of herein were and are threatening, unfair, deceptive, and misleading acts and practices in the conduct of Defendants' business that have the capacity to and did mislead and deceive Hildene, and members of the Connecticut Unfair Business Practices Sub-Class of similarly harmed parties that were injured while residing in Connecticut.

209. Defendants have engaged in (a) purposeful, deceitful, unfair, and misleading monopolistic conduct to ensure control over the CUSIP Use Market; (b) purposeful, deceitful, unfair, and misleading practices by falsely claiming "license agreements" were necessary to use

CUSIP numbers; and (c) threats that CUSIP Users will be unable to access essential data from Third-Party Data Vendors and be subject to copyright infringement claims absent entering “license agreements.”

210. As a result of Defendants’ unfair methods of competition and threatening, unfair, deceptive, and/or misleading business practices occurring within the State, Plaintiff Hildene and other members of the Connecticut Unfair Business Practices Sub-Class have suffered ascertainable losses within the meaning of CUTPA § 42-110g(a) and have been damaged by Defendants’ unlawful acts.

211. The foregoing acts and practices directly, foreseeably, and proximately caused Plaintiff Hildene and other members of the Connecticut Unfair Business Practices Sub-Class to suffer an ascertainable loss in the form of payment of unlawful and unfair licensing fees to access CUSIP numbers, and Plaintiff Hildene and other members of the Connecticut Unfair Business Practices Sub-Class are entitled to recover such damages, together with appropriate penalties, including punitive damages, attorneys’ fees and costs of suit.

**Eighth Claim for Relief**

**(Injunctive Relief)**

**(On Behalf of the Injunctive Relief Class Against FactSet and the ABA)**

212. Plaintiffs incorporate the allegations set forth in the foregoing paragraphs as though set forth herein.

213. This is a claim for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26. Plaintiffs and Injunctive Relief Class members seek injunctive relief under 15 U.S.C. § 26 to correct the anticompetitive effect caused by Defendants’ unlawful conduct. As stated above, Defendants are in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

214. Defendants' unlawful conduct threatens to continue to injure Plaintiffs and members of the Injunctive Relief Class. Plaintiffs seek a permanent injunction prohibiting Defendants from continuing their illegal conspiracy to force CUSIP Users to enter the Unlawful Agreements and charge license fees and ordering them to take appropriate remedial action to correct and eliminate any remaining effects of the conspiracy.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs seek the following relief:

- a. An order declaring that CUSIP numbers are not copyrighted or copyrightable and that Defendants had (and have) no valid claim of copyright in and to the CUSIP numbers;
- b. An injunction prohibiting Defendants from claiming that CUSIP numbers are copyrighted or copyrightable;
- c. An order declaring that the CUSIP Global Services Subscription Agreement and CUSIP Use of Service Statement are unenforceable;
- d. An injunction prohibiting enforcement of the CUSIP Global Services Subscription Agreement and CUSIP Use of Service Statement;
- e. An order declaring that Defendants may not impose fees on CUSIP Users, including Plaintiffs, that obtain their data from a Data Vendor and may not alter their agreements to require Plaintiffs to obtain their data from Defendants;
- f. An injunction prohibiting the imposition of fees by Defendants on CUSIP Users, including Plaintiffs, for the use of CUSIP numbers after their initial issuance;
- g. An order declaring that Defendants have engaged in anticompetitive conduct in violation of Sections 1 and 2 of the Sherman Act;

- h. An order declaring that this action may proceed as a class action on behalf of the Classes and Sub-Classes;
- i. An injunction permanently enjoining and restraining Defendants from continuing and maintaining S&P's (now FactSet's) abuse of monopoly power alleged in the Complaint under Section 16 of the Clayton Act, 15 U.S.C. § 26;
- j. A judgment awarding actual damages trebled (*i.e.*, three times the amount of the so-called "license fees") for CUSIP Users, including Plaintiffs, in an amount to be determined at trial;
- k. A judgment awarding attorneys' fees and costs of suit;
- l. An order declaring that Defendants' conduct violates Section 349(a) of the New York General Business Law;
- m. A judgment awarding Plaintiffs and members of the New York Unfair Business Practices Sub-Class damages against Defendants for their violations of New York General Business Law Section 349(a), together with appropriate penalties, including punitive damages, attorneys' fees, and costs of suit;
- n. An order declaring that Defendants' conduct violated Section 42-110b(a) of the Connecticut Unfair Trade Practices Act;
- o. A judgment awarding Hildene and the Connecticut Unfair Business Practices Sub-Class damages against Defendants for their violations of the Connecticut Unfair Trade Practices Act Section 42-110b(a), together with appropriate penalties, including punitive damages, attorneys' fees, and costs of suit;



- p. Solely in the event that the CUSIP numbers are held to be protected by copyright, an order that Defendants' license fees are not FRAND and setting the FRAND rate for CUSIP numbers if after a hearing the current rates are determined to not be FRAND;
- q. A judgment awarding Plaintiffs and the CUSIP User Class damages for breaches of contract;
- r. A judgment awarding all available pre-judgment and post-judgment interest, to the fullest extent available under law or equity; and
- s. An order or judgment awarding such other further relief as allowed by law.

**JURY DEMAND**

Plaintiffs request a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure.

Dated: December 21, 2022

Respectfully submitted,

/s/ Ronald J. Aranoff

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## **Exhibit 2**

2023 WL 4562031

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

DINOSAUR FINANCIAL GROUP LLC, Swiss Life Investment Management Holding AG, and Hildene Capital Management, LLC, on behalf of themselves and all others similarly situated, Plaintiffs,  
v.

S&P GLOBAL, INC., American Bankers Association, and FactSet Research Systems Inc., Defendants.

22 Civ. 1860 (KPF), 22 Civ. 1929 (KPF)

|

Signed July 14, 2023

#### Attorneys and Law Firms

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David H. Wollmuth, Grant Bercari, R. Scott Thompson, Ronald Judah Aranoff, Ryan Anthony Kane, Adam M. Bialek, Wollmuth Maher & Deutsch LLP, New York, NY, for Plaintiff Hildene Capital Management, LLC in No. 1:22-cv-01860.

Alexander H. Southwell, Eric Jonathan Stock, Esther Lifshitz, Gibson, Dunn & Crutcher, LLP, New York, NY, for Defendant S&P Global, Inc. in No. 1:22-cv-01860.

David Kiernan, Craig Stewart, Jones Day, San Francisco, CA, Alexander Virgil Maugeri, Amanda Leigh Dollinger, Jones Day, New York, NY, Michelle K. Fischer, Jones Day, Cleveland, OH, for Defendant American Bankers Association in No. 1:22-cv-01860.

Ethan Edward Litwin, Jeffrey I. Shinder, Sarah Bayer, Constantine Cannon LLP, New York, NY, James Joseph Kovacs, Seth Greenstein, William Stephen Cannon, Constantine Cannon LLP, Washington, DC, for Defendant FactSet Research Systems Inc. in No. 1:22-cv-01860.

R. Scott Thompson, Ronald Judah Aranoff, Ryan Anthony Kane, Grant Bercari, David H. Wollmuth, Wollmuth Maher & Deutsch LLP, New York, NY, for Plaintiff Hildene Capital Management, LLC in No. 1:22-cv-01929.

David Kiernan, Craig Stewart, Jones Day, San Francisco, CA, Alexander Virgil Maugeri, Amanda Leigh Dollinger, Jones Day, New York, NY, Michelle K. Fischer, Jones Day, Cleveland, OH, for Defendant American Bankers Association in No. 1:22-cv-01929

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Alexander H. Southwell, Eric Jonathan Stock, Esther Lifshitz, Gibson, Dunn & Crutcher, LLP, New York, NY, for Defendant S&P Global, Inc. in No. 1:22-cv-01929.

### OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

\*1 Is this an antitrust case masquerading as a copyright case? Or is it in fact the inverse? Perhaps, as Plaintiffs claim, this case is both an antitrust case and a copyright case. Plaintiffs Dinosaur Financial Group LLC (“Dinosaur”), Hildene Capital Management, LLC (“Hildene”), and Swiss Life Investment Management Holding AG (“Swiss Life,” and collectively, “Plaintiffs”) brought this double-pronged antitrust and copyright action against Defendants American Bankers Association (“ABA”), S&P Global, Inc. (“S&P”), and S&P’s successor-in-interest for the relevant division, FactSet Research Systems Inc. (“FactSet,” and collectively, “Defendants”). Defendants now move to dismiss the case in its entirety, arguing, *inter alia*, that Plaintiffs have failed to allege a viable antitrust claim and that their putative copyright claim is non-justiciable. For the reasons that follow, the Court grants in part and denies in part Defendants’ motion.

### BACKGROUND<sup>1</sup>

#### A. Factual Background

##### 1. The CUSIP Identifier and the Relevant Market

The advent of electronic systems for securities trading revolutionized the financial industry, but also introduced a problem: The systems “require[d] a standardized method for identifying financial instruments to facilitate the clearing and settlement of trades and other transactions.” (SAC ¶ 34). Accordingly, participants in the industry sought to create a method of assigning each financial instrument a unique identifier that electronic systems could uniformly read and process. (*Id.*).

Enter the CUSIP identifier.<sup>2</sup> Beginning in the 1960s, government regulators and industry participants, including the ABA, began working toward developing a uniform numbering system to facilitate the use of electronic trading systems. (SAC ¶¶ 35-36). Their efforts resulted in the CUSIP identifier — a “functional ‘serial number’ to identify a particular financial instrument” in much the same way that “social security numbers identify persons or Vehicle Identification (VIN) numbers identify cars.” (*Id.* ¶ 3). The CUSIP identifier is a simple solution to a complex problem: a nine-digit number comprised of three parts that identifies a specific U.S. security. (*Id.* ¶ 4). The first six digits of a CUSIP number identify the issuer of the security; the next two identify the issue (*i.e.*, the type of instrument); and the final is a “check” to ensure the accuracy of the first eight numbers. (*Id.*).

\*2 CUSIP identifiers quickly soared in use and popularity. (SAC ¶ 37). Once development was completed in 1966, CUSIP identifiers were rolled out to financial markets as the “*de facto* standard.” (*Id.*). The ABA then created the CUSIP Service Bureau (“CSB”) to administer the numbering system, and selected S&P to operate CSB. (*Id.*).<sup>3</sup> S&P then subsumed CSB as a division within its corporate structure. (*Id.*). By 1971, the SEC began using CUSIP identifiers in electronic data processing systems and requiring their use in certain regulatory filings. (*Id.* ¶¶ 38-39). A year later, all clearing corporations were using CUSIP identifiers, making them the standard across brokerage firms. (*Id.*). Following the SEC’s lead, the Federal Reserve began using CUSIP identifiers to “accelerate the transfer of United States Treasury Securities.” (*Id.* ¶ 39). Though government agencies have adopted the use of CUSIP identifiers, no agencies regulate their use or the rates charged by Defendants. (*Id.* ¶ 42).

On a parallel track, in 1974 the ABA established X9, an Accredited Standards Developer of the American National Standards Institute (“ANSI”). (SAC ¶ 40). Although X9 is not

a government agency, it was established to review standards for the financial services industry. (*Id.*). To that end, X9 obtained approval from ANSI to adopt CUSIP identifiers as the “market standard for identifying financial instruments traded on United States financial markets.” (*Id.*). In 1976, X9 ratified its 1974 adoption of CUSIP identifiers. (*Id.*).

Separately, S&P assumed management of CUSIP identifiers. Beginning in 1968, S&P distributed CUSIP identifiers in physical books to financial institutions. (SAC ¶ 43). Beyond the identifiers themselves, these books also contained information about each financial instrument tied to an identifier, including the issuer number, the issuer name, and the issue name. (*Id.*). The books were distributed as a subscription service; customers paid for a subscription to receive the books (and later, CD-ROMs), and S&P required that the books be returned each year. (*Id.* ¶ 44). Once old books were returned, S&P issued updated books on an annual basis as well as periodic paper updates. (*Id.*).

Just like the innovation that led to the CUSIP identifier, new technology disrupted this subscription model. Specifically, in the late 1980s, Bloomberg LP began distributing “electronically rich sets of financial market data, including CUSIP numbers, directly to CUSIP Users, on a subscription model.” (SAC ¶ 45).<sup>4</sup> What this meant was that S&P no longer had absolute control of the distribution of CUSIP identifiers; rather, “CUSIP Users obtained and could use the CUSIP numbers, the issuers’ names, and the types of issues without paying a fee to S&P.” (*Id.*). Other companies like Reuters, S&P itself, and FactSet followed suit, and began distributing similar data electronically through data feeds. (*Id.*). Though S&P (and now FactSet, after buying S&P’s relevant division) manages distribution of CUSIP numbers to the industry through the successor to CSB, known as CUSIP Global Services (“CGS”), it also competes with entities like Reuters and Bloomberg, known colloquially as “Third-Party Data Vendors.” (*Id.* ¶ 46).<sup>5</sup>

Importantly, in its role managing CGS, S&P does more than simply issue CUSIP identifiers. To review, the ABA delegated management of the CUSIP numbering system to S&P, which runs this function through the CGS division. (SAC ¶¶ 5-7). But the ABA also owns a compilation copyright in a database (“CUSIP\_DB”), which includes all CUSIP numbers as well as additional information about each financial instrument associated with an identifier. (*Id.* ¶ 5). The CUSIP\_DB contains more than 60 data elements for each of the 26 million financial instruments contained in the database. (*Id.*). Three

of these elements are (i) the CUSIP identifier; (ii) the issuer's full name; and (iii) the type of issue. (*Id.* ¶ 6). CUSIP Users do not receive the full CUSIP\_DB compilation in their data feeds from Third-Party Data Vendors. (*Id.* ¶ 50). Rather, “[t]he Third-Party Data Vendors include only some of the data that is also in the CUSIP\_DB compilation in the customized set of data items they provide to CUSIP Users based on each CUSIP User's idiosyncratic data needs, due to each CUSIP User's investment strategy, risk profile, and investor client base.” (*Id.* ¶ 51).

\*3 With this backdrop in mind, “CUSIP Users” — a group that includes banks, investment funds, public employee pension funds, fund managers, and other financial institutions — “must have in their data feeds the CUSIP numbers, as well as the associated issuer name and the type of financial instrument to operate their businesses.” (SAC ¶ 9). This group includes Plaintiffs. (*Id.*). Plaintiffs aver that a relevant product market exists for “using identifying numbers after initial issuance” — *i.e.*, the “CUSIP Use Market.” (*Id.* ¶ 126). Because no alternative numbering system has proven to be an adequate substitute for the CUSIP identifier, Plaintiffs allege that S&P has a one hundred percent market share in this product market. (*Id.* ¶¶ 128-129).

## 2. The Licensing Regime

Eventually, S&P replaced its subscription model for distribution of data with a license model. (SAC ¶ 47). Some background is necessary to understand the license model. Recall that CUSIP Users receive CUSIP identifiers, in addition to other financial data, from Third-Party Data Vendors or S&P itself. (*Id.* ¶¶ 46-47). In other words, although CUSIP Users may purchase access to identifiers from S&P, many entities, like Plaintiffs, receive them indirectly from Third-Party Data Vendors via data feeds. (*Id.*). Still, S&P is involved at every step of both the direct and indirect methods of accessing identifiers.

S&P maintains contractual relationships with Third-Party Data Vendors through which the latter obtain access to part or all of the CUSIP\_DB. (SAC ¶¶ 56-57). But these agreements also contain a unique provision, one that prohibits the Third-Party Data Vendors from providing data in bulk from CGS to CUSIP Users that have not entered into licenses with S&P. (*Id.*). Plaintiffs aver that this “restriction is not related to copying all or substantially all of a compilation, but rather applies to any access to CUSIP numbers in a data feed or downloadable format from the Third-Party Data Vendors.” (*Id.* ¶ 56). And Plaintiffs further claim that

S&P and the Third-Party Data Vendors engaged in collusive conduct in entering into these initial agreements: “Third-Party Data Vendors knew that S&P, itself a data vendor, was requiring the other Third-Party Data Vendors, which competed with S&P and with each other, to enter into an agreement containing these restrictions.” (*Id.* ¶ 57). Put differently, “the agreement among S&P (and now FactSet) and the Third-Party Data Vendors to require CUSIP Users to enter into license agreements with, and pay so-called ‘license fees’ to, S&P (and now FactSet) under the threat of losing access to CUSIP numbers, issuer names, and types of issues is a group boycott.” (*Id.* ¶ 59).

Flowing from this arrangement between S&P and the Third-Party Data Vendors is the license between CUSIP Users and S&P. Again, CUSIP Users do not receive the full CUSIP\_DB compilation from their data feeds from Third-Party Data Vendors. (SAC ¶ 55). Given this fact, “CUSIP Users who received their data feed from Third-Party Vendors understandably saw no need to enter into license agreements with S&P because they were not receiving CUSIP numbers or any other data from S&P.” (*Id.* ¶ 52). But because of the arrangements between S&P and Third-Party Data Vendors, “CUSIP Users must pay a license fee to S&P (and now FactSet) even if they do not receive the CUSIP\_DB compilation, or they run the risk of having essential CUSIP numbers stripped from their data feeds from Third-Party Data Vendors.” (*Id.* ¶ 55). Such is the case for Plaintiffs. All three signed licensing agreements with S&P, despite receiving data feeds from Third-Party Data Vendors. (*Id.* ¶¶ 27-29).

Licenses between S&P and CUSIP Users are contained in a CUSIP Global Services Subscription Agreement (the “Subscription Agreement”). (SAC ¶ 68). The Subscription Agreement states that “pursuant to an exclusive agreement with the [ABA], [S&P/FactSet] owns or has the right to license all proprietary rights to the [CUSIP\_DB], which contains CUSIP\* standard number, CUSIP\* standard descriptions and other information about financial instruments (‘Data’).” (*Id.*). By entering into a Subscription Agreement, CUSIP Users are granted “a non-exclusive, non-transferable, limited license to access and use of the proprietary CGS Service (‘the Service’) described in the applicable Service Attachment(s) attached hereto and incorporated herein in accordance with this Agreement.” (*Id.* ¶ 69). The scope of the license depends on the option the consumer purchases; some may opt to receive full access to the CUSIP\_DB compilation, while others may choose to receive only a subset of such information. (*Id.* ¶ 70).<sup>6</sup>



Each of the named Plaintiffs opted for lesser options. As a result, they “do not receive, and therefore cannot copy, all or substantially all of the CUSIP\_DB compilation.” (*Id.* ¶¶ 72-73). Plaintiffs claim that S&P has no right to make CUSIP Users sign licenses when such Users do not receive the full CUSIP\_DB, nor can S&P make Third-Party Data Vendors remove CUSIP numbers from their data feeds if a User refuses to sign a license, because “the ABA’s compilation copyright gives Defendants no intellectual property right in the data CUSIP Users receive from Third-Party Data Vendors.” (*Id.* ¶ 74).

\*4 The Subscription Agreement incorporates by reference several relevant provisions and forms. For example, the Use of Service Statement requires CUSIP Users to “describe in detail how [the] firm uses CUSIP Identifiers for its operations, and stores/maintains them (including any outsourced databases).” (SAC ¶ 85 (emphasis omitted)). License fees are based on use of CUSIP identifiers, not on CUSIP Users’ copying of the CUSIP\_DB compilation. (*Id.*; *see also id.* ¶ 90 (describing pricing based on a sliding scale between 500 and 40,000 identifiers)). Section 2 of the Subscription Agreement states:

Subscriber expressly acknowledges that the Data was compiled, prepared, selected, arranged and published by [CGS] under authority from the ABA through the application of methods and standards of judgment developed and applied through the expenditure of substantial time, effort and money, and that the Data constitutes valuable intellectual property of [CGS] and the ABA and that no proprietary rights are being transferred to the Subscriber in such materials or in any of the information contained therein.

(*Id.* ¶ 97). Other provisions recite that “misappropriation or misuse of such materials will cause serious damage to CGS and ABA; consequently, Subscriber agrees that in the event of any misappropriation or misuse, CGS and the ABA shall have the right to obtain injunctive relief” and the ability to terminate the Agreement. (*Id.* ¶¶ 99, 101 (emphasis omitted)).

### 3. Defendants’ Representations to the Public and Enforcement Efforts

Plaintiffs contend that Defendants sell licenses to CUSIP Users who do not receive data feeds by means of “a false narrative that the license[s] [were] necessary because the CUSIP numbers are copyrighted.” (SAC ¶ 76). For example, the ABA has represented to regulators, including the SEC, that CUSIP numbers themselves are copyrighted, not just the CUSIP\_DB. (*Id.* ¶¶ 76-80). Separately, the Financial Industry Regulatory Authority (“FINRA”), a self-regulatory organization, maintains a trade reporting system that requires broker-dealers to report transactions for certain securities. (*Id.* ¶ 80). The only information about such securities on this system is the CUSIP number and symbol. (*Id.*). It follows logically that software developers *could* develop programs using API files containing this FINRA information. (*Id.* ¶ 81). However, because FINRA will not release the API files unless the developer has a CUSIP license with S&P, no such developer has done so. (*Id.*). Plaintiffs posit that “Defendants’ restriction demonstrates conclusively that they require a license for the mere use of the CUSIP numbers, which could be justified only if the CUSIP numbers were copyrighted, which they are not.” (*Id.* ¶ 82; *see also id.* ¶ 84 (discussing S&P’s use of service statement, which provides: “A license agreement is required when a user obtains access to an electronic data feed or bulk download ... including when a user’s database that contains CUSIP Identifiers and related descriptive data ... is updated, maintained and/or operated by an Authorized Distributor.” (emphasis omitted))).

S&P has policed compliance with this regime. At times, this has come in the form of “gentle” reminders to CUSIP Users. For instance, in January 2021, S&P corresponded with Hildene that “CGS’s agreements with its [Third-Party Data Vendors] do not allow [them] to distribute CGS Data to firms in bulk or downloadable format unless such firms are properly licensed by CGS.” (SAC ¶ 56; *see also id.* ¶ 86 (S&P email to Hildene stating “[f]irms using these identifiers internally ... and/or that externally redistribute CGS Data must possess a license from CGS” (emphasis omitted))). S&P further noted that it could require Third-Party Data Vendors to cease distribution of such data to unlicensed firms. (*Id.* ¶ 56). Dinosaur and Swiss Life have been similarly contacted by S&P. (*See id.* ¶ 87 (“S&P claimed that Dinosaur was required to enter into a license agreement because ‘proprietary CUSIP data is being utilized within your firm.’ ” (emphasis omitted)); *id.* ¶ 88 (letter to Swiss Life stating “I confirm that CUSIP Global Services will cease delivery of the CUSIP numbers ... and CSB ISINs if we

do not have a re-filed ‘Statement of Use’ by June 15, 2012 and no signed contract by June 22, 2012.”)).<sup>7</sup> According to Plaintiffs, these communications were not one-offs; instead, S&P frequently escalated the rhetoric when Plaintiffs pushed back on the requirement that they purchase licenses. (*See id.* ¶¶ 103-110 (cataloging communications from S&P to Plaintiffs after the latter refused to sign or otherwise modified Subscription Agreements, including that Plaintiffs would lose access to data feeds containing CUSIP identifiers and that “if CGS is unable to reach an agreement ... your firm may lose access to CGS data”)).

\*5 Plaintiffs claim that Defendants’ licensing requirement is essentially a Hobson’s choice: lose access to data critical to Plaintiffs’ operations — namely, CUSIP numbers — or agree to a license with S&P for use of CUSIP numbers despite receiving the numbers through Third-Party Data Vendors’ feeds and despite the numbers themselves not being copyrighted. (*See* SAC ¶¶ 103-110). What is more, Plaintiffs contend that by enforcing the licensing regime and representing to government agencies and the investing public that CUSIP numbers are copyrighted, Defendants have misused their compilation copyright. (*See, e.g., id.* ¶¶ 76-94 (discussing Defendants’ representations to agencies and institutions, including Plaintiffs); *see also id.* ¶ 76 (“Defendants could not plausibly claim that a license from S&P was necessary based on an assertion that the Third-Party Data Vendors distributed the CUSIP\_DB compilation to CUSIP Users because the Third-Party Data Vendors do not distribute the compilation to CUSIP Users. So, the Defendants adopted a false narrative that the license was necessary because the CUSIP numbers are copyrighted.”)).

#### 4. Defendants’ Influence over X9

Separate from taking issue with Defendants’ licensing and copyright conduct, Plaintiffs also raise certain concerns over X9 — the standards-setting committee for securities identifiers. X9 formally separated from the ABA in 2001. (SAC ¶ 112). Still, Plaintiffs claim that “the ABA has exerted and continues to exert substantial control over the ostensibly independent X9 as evidenced by the significant ties and overlap between the ABA, CGS and X9.” (*Id.*). By way of examples, S&P and the ABA are both full voting members of X9; various ABA and CGS executives hold leadership positions in X9; and nine of the twenty-three voting members of the CUSIP Working Group, a subcommittee within X9, were ABA or S&P employees when X9 last renewed the CUSIP accreditation in December 2020. (*Id.*).

Most concretely, Plaintiffs claim that this overlap between Defendants and X9 has precluded the adoption of alternative numbering systems. Bloomberg — in this context, a Third-Party Data Vendor — sought accreditation of its free alternative numbering system, known as the Financial Instrument Global Identifier (“FIGI”). (SAC ¶ 113). However, X9 did not approve FIGI until 2021. (*Id.*). Because of the required use of CUSIP numbers in U.S. regulatory filings, not to mention their ubiquity, FIGI remains a non-viable alternative to the CUSIP number. (*Id.*). Moreover, “the ABA and S&P agreed and conspired to use their influence over X9 to help ensure that X9 would not choose FIGIs as an alternative standard.” (*Id.*).

Moving away from issues of control over X9, Plaintiffs claim in the alternative that Defendants have violated certain commitments they made to X9 in their accreditation application. Specifically, Plaintiffs assert that the ABA committed to license CUSIP numbers on fair, reasonable, and non-discriminatory (“FRAND”) terms. (SAC ¶ 115).<sup>8</sup> This is so because X9 requires holders of essential intellectual property to either disclaim proprietary IP or offer licenses on FRAND terms. (*Id.* ¶ 116). During the standard-setting process, the ABA committed to licensing the CUSIP numbering system on FRAND terms; indeed, the ABA filed a statement of willingness with X9 pertaining to “trademarks, copyrighted, or patented materials.” (*Id.*; *see also id.* ¶¶ 119-121 (further discussing FRAND commitment, including statement of willingness and CGS’s representations on its website)). But Plaintiffs claim that this commitment to third-party beneficiaries like Plaintiffs was “an empty promise”:

Defendants ... breached [the] commitment by charging Plaintiffs and members of the Class unfair, unreasonable, and arbitrary fees based on false claims of copyright, which Defendants should not have charged because they had no right to prevent Plaintiffs and other Class members from using CUSIP numbers and thus no right to demand “licenses” or “license fees.”

(*Id.* ¶¶ 121-122). In essence, because Defendants incur no costs when a CUSIP User uses a CUSIP number received



from sources other than Defendants (like Third-Party Data Vendors), the license fees are *de facto* supracompetitive rates. (*Id.* ¶ 123).

### 5. The Effects of Defendants' Licensing Regime

\*6 At a high level, Plaintiffs claim that Defendants' licensing regime has both (i) allowed Defendants to extract “monopoly rents disguised as ‘license fees’ ”; and (ii) suppressed potential competition in the CUSIP Use Market, despite Defendants having no copyright in the numbers themselves. (SAC ¶¶ 60-61). From this, Plaintiffs discern a number of anticompetitive harms:

- “[Defendants'] agreements — both the Subscription Agreement with CUSIP [U]sers and their agreements with Third-Party Data Vendors — exclude competition in, and competitors from, the CUSIP Use Market and deny CUSIP Users the benefit of robust competition, including the benefit of innovation that results from and creates robust competition.” (*Id.* ¶ 150).
- “Defendants' anticompetitive conduct imposes unnecessary burdens on financial markets, thereby reducing competition, liquidity, and transactional flow.” (*Id.* ¶ 151; *see also id.* (Bloomberg letter to SEC stating that “[t]he process of obtaining a CUSIP, and the restrictive licensing imposed on its use imposes unnecessary burdens on firms”)).
- “Defendants' restrictive licensing practices impede actual and potential competitors from innovating in the financial markets including by raising the costs of potential rivals.” (*Id.* ¶ 152).
- Defendants' practices reduce transparency in markets and grant Defendants insight into emerging rivals' businesses, because, for example, the licenses grant Defendants the right to audit firms' use of CUSIP numbers. (*Id.* ¶¶ 153-158).

One concrete example provided by Plaintiffs of Defendants' anticompetitive conduct concerns Xignite, Inc., a provider of cloud-based market data and management solutions to financial technology (or “fintech”) companies. (SAC ¶ 62). Xignite “gathered CUSIP numbers from sources independent from S&P, but because it had signed a license agreement, S&P forced Xignite to destroy its inventory of CUSIP numbers because Xignite's intended use was an unauthorized, commercial use under the license agreement.” (*Id.*). According to Plaintiffs, S&P's enforcement

of the license's terms and conditions “eliminated Xignite as a competitor in the CUSIP Use Market and denied CUSIP Users of the benefit of a new service.” (*Id.*; *see also id.* ¶ 61 (“As one example of such potential competition, an unlicensed financial institution or fintech company could offer CUSIP Users a value-added service by gathering CUSIP numbers from numerous sources and using the CUSIP numbers to link data and information about financial instruments.”)).

Without the licensing regime, Plaintiffs claim that they would not have entered into licenses with S&P. Indeed, “CUSIP Users do not want, receive, use, or copy the CUSIP\_DB compilation, which is the only asset the ABA has the right to protect by requiring a license.” (SAC ¶ 67; *see also id.* ¶¶ 64-66 (discussing Copyright #TX-614-6660, the ABA's copyright in the CUSIP\_DB compilation)). Instead, CUSIP Users would forgo paying the license fees and “would be free to compete with Defendants and innovate in the use of CUSIP numbers without fear of threatened litigation and the imposition of injunctions that would threaten the viability of their businesses.” (*Id.* ¶ 158). All told, Plaintiffs claim that Defendants' conduct has allowed them to reap an estimated \$100 million in fees each year. (*Id.* ¶ 159).

### B. Procedural Background

Plaintiffs commenced the *Dinosaur* action by filing a complaint on March 4, 2022 (Dkt. #1), and the *Hildene* action on March 7, 2022 (22 Civ. 1929, Dkt. #1). On March 11, 2022, the *Hildene* action was assigned to this Court as related to the *Dinosaur* action. On April 20, 2022, the *Dinosaur* Plaintiffs filed a pre-motion letter, contemplating a motion for partial summary judgment. (Dkt. #36). Specifically, the *Dinosaur* Plaintiffs sought leave to file a motion for partial summary judgment seeking declaratory relief that CUSIP numbers are not copyrightable. (*Id.*). Two days later, Defendants filed a letter, proposing a different sequencing of deadlines in both cases. (Dkt. #40). Rather than proceed to summary judgment practice, Defendants suggested that the *Dinosaur* and *Hildene* actions be consolidated; that the Court designate interim class counsel; and that the Court set a date for a pre-motion conference for Defendants' anticipated motion to dismiss. (*Id.*). The Court then set a pre-motion conference for June 1, 2022, at which conference the parties were directed to discuss the issues raised by Defendants in their letter. (Dkt. #42). This conference was then adjourned to June 28, 2022. (Dkt. #51; 22 Civ. 1929, Dkt. #41).

\*7 On May 6, 2022, Defendants filed a pre-motion letter, seeking consolidation of the *Dinosaur* and *Hildene* actions, and seeking appointment of interim class counsel. (Dkt. #53; 22 Civ. 1929, Dkt. #43). On May 18, 2022, Defendants filed a response to the *Dinosaur* Plaintiffs' pre-motion letter regarding an anticipated motion for partial summary judgment. (Dkt. #55). Defendants opposed the motion as (i) procedurally improper; (ii) against the interests of judicial economy; and (iii) an improper request for an advisory opinion. (*Id.*). On May 27, 2022, the *Dinosaur* Plaintiffs filed a letter response to Defendants' pre-motion letter concerning consolidation, opposing Defendants' request. (Dkt. #58). The *Dinosaur* Plaintiffs contended that consolidation would be inappropriate because "the two cases differ on the core legal issue: whether CUSIP numbers are copyrightable or protected by copyright." (*Id.*). *Hildene*, on the other hand, agreed with Defendants that consolidation and the appointment of interim class counsel were warranted. (22 Civ. 1929, Dkt. #45).

Following the June 28, 2022 pre-motion conference, the Court rendered its decision on how to proceed in the two cases. (Dkt. #61). As relevant here, the Court (i) consolidated the *Dinosaur* and *Hildene* actions; and (ii) denied the *Dinosaur* Plaintiffs' request to move forward with a motion for partial summary judgment. (*Id.*). The Court directed the parties to discuss the submission of a consolidated pleading as well as the appointment of interim class counsel. (*Id.*). In line with this Order, Plaintiffs submitted a letter on July 25, 2022, proposing the appointment of three firms to serve as interim class counsel. (Dkt. #67). On August 1, 2022, the Court held a conference with the parties to discuss Plaintiffs' proposal; thereafter, the Court endorsed interim class counsel's proposal for appointment on August 10, 2022. (Dkt. #71). That same day, Plaintiffs filed a consolidated and amended class action complaint. (Dkt. #70).

On September 6, 2022, Defendants filed a pre-motion letter, contemplating a motion to dismiss the consolidated and amended class action complaint. (Dkt. #74). Thereafter, Plaintiffs filed a responsive letter on September 23, 2022, opposing each of Defendants' arguments. (Dkt. #77). The Court held a pre-motion conference with the parties on November 17, 2022. (*See* November 17, 2022 Minute Entry). In line with this conference as well as subsequent endorsements, Plaintiffs filed the Second Amended Class Action Complaint (the "SAC") on December 21, 2022. (Dkt. #87). On February 14, 2023, Defendants filed their motion to dismiss and supporting papers. (Dkt. #90-93). On April 3, 2023, Plaintiffs filed their memorandum of law in opposition

to Defendants' motion. (Dkt. #102). Finally, on April 27, 2023, Defendants filed their reply memorandum of law. (Dkt. #103).

## DISCUSSION

As suggested by their wide-ranging SAC, Plaintiffs bring a variety of claims premised on both antitrust and copyright law, as well as contract and state law claims. As it relates to copyright, Plaintiffs seek a declaration that CUSIP numbers are not copyrightable as a matter of law. (SAC ¶¶ 163-167). Plaintiffs' antitrust claims are more diverse: Plaintiffs bring claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, premised on Defendants' alleged maintenance of monopoly power and conspiracy to monopolize (*id.* ¶¶ 168-182), as well as a Section 1 claim, 15 U.S.C. § 1, premised on Defendants' alleged group boycott with Third-Party Data Vendors (*id.* ¶¶ 183-189). Finally, Plaintiffs allege that Defendants violated New York General Business Law ("GBL") Section 349(a) and Connecticut Unfair Trade Practice Act ("CUTPA") Section 42-110b(a) by engaging in deceitful and monopolistic conduct. (*Id.* ¶¶ 198-211). As an alternative claim for relief in the case that CUSIP numbers are found to be copyrightable, Plaintiffs bring a breach of contract claim premised on the ABA's FRAND commitment. (*Id.* ¶¶ 190-197). In addition to money damages, Plaintiffs seek injunctive relief for the alleged violations of Sections 1 and 2 of the Sherman Act pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26. (*Id.* ¶¶ 212-214). Defendants have moved to dismiss the entirety of the SAC.

### A. Motions to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)

\*8 When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court should "draw all reasonable inferences in [a] [p]laintiff[s] favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief." *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (internal quotation marks and citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While the plausibility requirement "is not akin to a 'probability requirement' ... it asks for more than a sheer possibility that a defendant has acted

unlawfully.” *Id.* Toward that end, a plaintiff must provide more than “an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* Moreover, “[w]here a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’ ” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557).

## B. The Court Grants in Part and Denies in Part Defendants’ Motion to Dismiss Plaintiffs’ Antitrust Claims

### 1. Applicable Antitrust Law

#### a. Claims Under Sherman Act Section 2

There are two elements to making out a Sherman Act Section 2 claim for monopolization: (i) “the possession of monopoly power in the relevant market” and (ii) “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). Defendants do not, at this time, challenge Plaintiffs’ allegation of monopoly power or market definition; instead, they focus solely on the element of anticompetitive conduct.

The second element of a monopolization claim focuses on the monopolist’s conduct. *See, e.g., Trinko*, 540 U.S. at 407 (“[T]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.” (emphasis omitted)); *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 555 U.S. 438, 447-48 (2009) (“Simply possessing monopoly power and charging monopoly prices does not violate [Section] 2.”). In other words, a plaintiff must not only show that the monopolist indeed has the power to monopolize a market, but also that “it willfully acquired or maintained its power, thereby causing unreasonable exclusionary or anticompetitive effects.” *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 188 (2d Cir. 1992) (internal citations and quotation marks omitted). “The plaintiff must demonstrate exclusionary conduct — as opposed to gloves-off, hard-nosed market competition — aimed at obtaining or enshrining monopoly power, harming the competitive process and thereby harming consumers.” *Shak v. JPMorgan Chase & Co.*, 156 F. Supp. 3d 462, 486 (S.D.N.Y. 2016) (internal quotation marks, citation, and

emphasis omitted and alterations adopted); *see also In re Tether & Bitfinex Crypto Asset Litig.*, 576 F. Supp. 3d 55, 94 (S.D.N.Y. 2021) (collecting cases).

To prove a conspiracy to monopolize under Section 2 of the Sherman Act, a plaintiff must show “[i] proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and [ii] the commission of an overt act in furtherance of the conspiracy.” *AD/SAT, Div. of Skylight, Inc. v. Assoc. Press*, 181 F.3d 216, 233 (2d Cir. 1999) (internal quotation marks and citation omitted). Similar to a monopolization claim, a plaintiff must also show a specific intent to monopolize. *See, e.g., In re Tether*, 576 F. Supp. 3d at 100 (citing, *inter alia*, *Elecs. Commc’ns Corp. v. Toshiba Am. Consumer Prod., Inc.*, 129 F.3d 240, 246 (2d Cir. 1997)).

#### b. Claims Under Sherman Act Section 1

\*9 For its part, Section 1 of the Sherman Act prohibits any “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 1. “A group boycott is one such conspiracy in restraint of trade or commerce.” *PharmacyChecker.com, LLC v. Nat’l Ass’n of Boards of Pharmacy*, 530 F. Supp. 3d 301, 332 (S.D.N.Y. 2021) (citing *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978)). To state a claim under Section 1, a plaintiff must show “[i] a combination or some form of concerted action between at least two legally distinct economic entities that [ii] unreasonably restrains trade.” *United States v. Am. Express Co.*, 838 F.3d 179, 193 (2d Cir. 2016) (internal quotation marks and citation omitted). “[I]n deciding whether there is concerted action, courts routinely apply the same analysis under both Sections 1 and 2.” *In re Inclusive Access Course Materials Antitrust Litig.*, 544 F. Supp. 3d 420, 439 (S.D.N.Y. 2021) (internal quotation marks and citation omitted).

As it relates to the first element, “[t]he crucial question ... is therefore whether the challenged conduct ‘stems from independent decision or from an agreement, tacit or express.’ ” *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 321 (2d Cir. 2010) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)) (alteration adopted). To prove such agreement, it is not sufficient to merely allege “parallel conduct.” *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). Instead, if an agreement is not obvious, a plaintiff must

allege “additional facts or circumstances” referred to as “plus factors,” that support an inference of conspiracy. *Id.* (quoting *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 322 (2d Cir. 2010)); see also *PharmacyChecker.com, LLC*, 530 F. Supp. at 335 (analyzing plus factors); *Iowa Pub. Employees' Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 340 F. Supp. 3d 285, 319 (S.D.N.Y. 2018) (same); *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 373 (S.D.N.Y. 2016) (same).

## 2. Analysis

### a. The Nature of Defendants' Copyright Is Not Dispositive of the Antitrust Claims

Before proceeding to the Court's analysis, it is important to step back and consider, as a threshold matter, whether Plaintiffs present an analytically honest picture of what is at issue in this case. Interspersed throughout the SAC are suggestions that the copyright elements of this case cannot be separated from the antitrust elements, and vice versa. (See, e.g., SAC ¶ 74 (“Because CUSIP Users do not license the CUSIP\_DB compilation, the ABA's compilation copyright gives Defendants no intellectual property right in the data CUSIP Users receive from Third-Party Data Vendors.”); *id.* ¶ 157 (“No legitimate pro-competitive efficiencies or other pro-competitive arguments justify Defendants' conduct in misusing their copyright, and in abusing S&P's and now FactSet's monopoly power to continue willfully and unreasonably restraining trade to extort fees from CUSIP Users.”)).

Likewise, Plaintiffs' briefing blends antitrust and copyright law. (See, e.g., Pl. Opp. 14-15). For example, in support of their arguments that Defendants' conduct is anticompetitive, Plaintiffs contend that “Defendants' assertion that they may exert monopoly control over the use of preexisting data contradicts” Section 103 of the Copyright Act and the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). (Pl. Opp. 14). In *Feist*, the Supreme Court considered whether telephone directory white pages were copyrightable. 499 U.S. at 342. Of course, *Feist* has nothing to do with antitrust law; the case simply stands for the hornbook law proposition “that facts are not copyrightable [while] compilations of facts generally are.” *Id.* at 344; see also *id.* at 364 (holding that “[b]ecause [counterclaim defendant's] white pages lack the requisite originality, [counterclaimant's] use of the listings cannot constitute infringement”). And as Defendants are

quick to point out, the copyright and antitrust elements of *Feist* were analyzed separately; the Supreme Court only considered copyright issues. (Def. Reply 6). Following the Supreme Court's decision finding white page listings non-copyrightable, the Tenth Circuit reversed the district court's decision that the defendant's refusal to license the listings to a competitor was anticompetitive. See *Rural Tel. Serv. Co. v. Feist Publications, Inc.*, 957 F.2d 765, 769 (10th Cir. 1992) (“Assuming [counterclaim defendant's] refusal to deal was motivated by an intent to exclude [counterclaimant] from the yellow pages advertising market, anti-competitive intent alone is insufficient to establish a violation of § 2.”).

\*10 Similarly, Plaintiffs offer no support for the proposition that Defendants violated the antitrust laws by charging fees for use of CGS data, even if CUSIP numbers are not copyrighted. Again, the caselaw shows the opposite. By way of example, in *New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc.*, Judge Koeltl addressed both antitrust and copyright issues stemming from a copyright infringement action concerned with the plaintiff's settlement prices. See *N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 323 F. Supp. 2d 559 (S.D.N.Y. 2004) (“*NYMEX I*”); *N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 389 F. Supp. 2d 527 (S.D.N.Y. 2005) (“*NYMEX II*”), *aff'd*, 497 F.3d 109 (2d Cir. 2007). In *NYMEX I*, Judge Koeltl solely addressed the defendant's counterclaim that the plaintiff violated the Sherman Act through alleged anticompetitive conduct, including, *inter alia*, by refusing to grant access to settlement prices to the counterclaim plaintiff. *NYMEX I*, 323 F. Supp. 2d at 560-61, 571. Judge Koeltl found that the counterclaim defendant was under no duty to aid its competitor, and thus did not run afoul of the antitrust laws when it refused to cooperate with the counterclaim plaintiff. *Id.* at 572. By contrast, *NYMEX II* concerned the plaintiff's copyright infringement claim regarding the settlement prices. *NYMEX II*, 389 F. Supp. 2d at 529-30.

Taken together, the *NYMEX* decisions demonstrate that a party does not necessarily run afoul of the antitrust laws by refusing to deal with a competitor, even where there is no copyright in the underlying data. *NYMEX I*, 323 F. Supp. 2d at 573 (dismissing defendant's antitrust counterclaim on the grounds that the defendant had access to the regulated essential facility and plaintiff otherwise owed no duty to aid defendant); *NYMEX II*, 389 F. Supp. 2d at 544 (finding settlement prices noncopyrightable). More basically, as Defendants point out, the *NYMEX* decisions demonstrate that there is no “database ‘facts’ exception to the bedrock



principle that firms have no duty to lend a helping hand to their competitors.” (Def. Reply 5). Were it otherwise, Judge Koeltl “would have reserved judgment on the antitrust claims [in *NYMEX*] until the copyright questions were adjudicated on summary judgment.” (*Id.*).

### **b. The Court Denies Defendants' Motion to Dismiss Plaintiffs' Section 2 Claims**

At the core of the antitrust claims in this case is whether Defendants are allowed — despite not claiming to hold a copyright in CUSIP numbers themselves — to require Plaintiffs and members of the class to obtain a license to obtain access to this information.<sup>9</sup> This issue distills, in turn, to whether Defendants can require Plaintiffs to obtain these licenses despite Plaintiffs receiving CUSIP numbers and related data from Third-Party Data Vendors. Defendants have not sought dismissal of Plaintiffs' antitrust claims on an incremental or accretive basis. Rather, Defendants have moved in one fell swoop, arguing that Plaintiffs' antitrust claims fail because they plead a quintessential unilateral refusal to deal case. (Def. Br. 10-19). Plaintiffs reject that characterization, and argue that “it is the Defendants who have forced the Plaintiffs into a business relationship that the Plaintiffs neither need nor want,” by requiring them to obtain licenses from Defendant on pain of losing access to CUSIP numbers through Third-Party Data Vendors' data feeds. (Pl. Opp. 9).

It is well-accepted that the antitrust laws do not prevent a private business, or even a monopolist, from deciding with which parties it will deal, save for rare circumstances. *Trinko*, 540 U.S. at 408 (“[A]s a general matter, the Sherman Act ‘does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.’ ” (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919))). As such, courts across the country have dismissed antitrust claims brought by competitors against a purported monopolist where the competitor's claim essentially boiled down to the monopolist's unilateral refusal to deal with that competitor. *See, e.g., NYMEX I*, 323 F. Supp. 2d at 571 (“[Counterclaim defendant] has a legitimate business interest in preventing its competitor, [counterclaim plaintiff], from free-riding on [its] settlement prices. [Counterclaim defendant's] settlement prices have value because they are viewed as proxies for market prices, and [it] has a legitimate interest in preventing rivals from

free-riding on this reputation.”); *MiniFrame Ltd. v. Microsoft Corp.*, No. 11 Civ. 7419 (RJS), 2013 WL 1385704, at \*4 (S.D.N.Y. Mar. 28, 2013) (“Even assuming *arguendo* that intellectual property law provides no defense for [defendant's] actions, [plaintiff's] Sherman Act claim concerning the single-user restriction would still fail because [defendant] had no duty to deal with [plaintiff].”) (“*MiniFrame*”), *aff'd*, 551 F. App'x 1 (2d Cir. 2013) (summary order); *see also, e.g., Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 995 (9th Cir. 2020) (finding that technology firm had no duty to license patents to rival chip suppliers as opposed to licensing technology to phone manufacturers). Stated differently, there “is no duty to aid competitors.” *Trinko*, 540 U.S. at 411.

\*11 Before delving into the relevant legal issues, the Court pauses to note the uniqueness of Defendants' licensing arrangement. At step one, Defendants grant access to the CUSIP\_DB or parts of it to Third-Party Data Vendors. (SAC ¶¶ 56-57). That licensing arrangement dictates with whom Third-Party Data Vendors may share any CGS data, *i.e.*, only those firms that have been licensed by Defendants. (*Id.*). Thus, the further-downstream CUSIP User must obtain a license — in the form of a Subscription Agreement — from Defendants, despite Defendants not directly providing any service to the CUSIP User. (*Id.* ¶ 55). The Subscription Agreements require CUSIP Users to pay fees to Defendants. (*Id.*). But they also restrict CUSIP Users' use of *any* CGS data, not just wholesale reproduction of the CUSIP\_DB (to which they are not given full access in any event), including unauthorized commercial uses of CUSIP numbers. (*See, e.g., id.* ¶¶ 55, 62). In light of the complexity of these arrangements, it is not surprising that neither party has identified cases directly on point.

The thrust of Defendants' motion is that the Court may, based on the above-discussed principle that competitors have no duty to aid their counterparts, dismiss Plaintiffs' antitrust claims as a matter of law. In essence, Defendants contend that “there is nothing anticompetitive about an owner of a valuable database service restricting commercial use or redistribution of data it supplies to potential competitors to prevent free riding on the owner's investment.” (Def. Br. 11). Maybe so. But as Plaintiffs point out, this is not a run-of-the-mill unilateral refusal to deal case. (Pl. Opp. 8-9). In other words, while the Court is guided by cases applying straightforward Sherman Act jurisprudence that firms should not be forced to share the source of their competitive advantage, Defendants' proffered cases are largely inapposite. *See, e.g., Trinko*, 540 U.S. at 407-08 (holding that telecommunications carrier had

no duty to provide rival carriers with interconnection services on favorable terms); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1074, 1080 (10th Cir. 2013) (holding that technology firm was under no duty to share intellectual property with rival software vendor where such property would have facilitated rival company's entrance); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (“Since [defendant] had no duty to encourage the entry of new firms into the equipment market, the law would be perverse if it made [defendant's] encouraging gestures the fulcrum of an antitrust violation.”).

The same is true of the two antitrust cases on which Defendants principally rely, *NYMEX I* and *MiniFrame*. In *NYMEX I*, the court simply found that the incumbent monopolist futures exchange was not required to cooperate with a rival exchange by, for example, sharing its dominant settlement prices with the upstart rival exchange. *NYMEX I*, 323 F. Supp. 2d at 571-72.<sup>10</sup> Likewise, in *MiniFrame*, the defendant made a unilateral change in its licensing agreements with its rivals, thereby harming the plaintiff's ability to compete on price-favorable terms. *MiniFrame*, 2013 WL 1385704, at \*3 (describing Microsoft's shift from a number-of-computers to number-of-users license, which shift harmed plaintiff's business model that relied on PC-sharing software). Again, because the defendant was free to license its software as it saw fit and to engage with only certain customers, the plaintiff failed to state a claim. *Id.* at \*4 (“[Plaintiff's] Sherman Act claim concerning the single-user restriction would still fail because [defendant] had no duty to deal with [plaintiff].”).

\*12 By contrast here, Plaintiffs do not allege that a monopolist firm is being forced to deal with a rival. Defendants paint a simplified picture of the SAC to make it fit this line of cases. It is *Plaintiffs*, regardless of from whom they receive CGS data, who are forced to deal with Defendants. Plaintiffs do not suggest that Defendants cannot protect the copyrighted CUSIP\_DB. (Def. Reply 6-7 (arguing that “CGS only requires Data Users to take a license to download bulk data originating from CGS — thereby preventing free riders from using CGS Data to create a rival database product for the mere cost of a subscription”)). The Court is not concerned, from an antitrust perspective, that Plaintiffs must pay for access to CGS data. *See infra*. Rather, the issue is that Defendants arguably have no legitimate purpose in forcing Plaintiffs to sign Subscription Agreements when (i) Plaintiffs receive bulk CGS data from Third-Party Data Vendors, not Defendants;<sup>11</sup> and (ii) Plaintiffs do not receive access to

the copyrighted CUSIP\_DB from Third-Party Data Vendors, but instead data feeds that include CUSIP numbers that are otherwise non-protectable. (Pl. Opp. 9 (“It was S&P in concert with the [Third-Party Data Vendors] that broke this resistance and forced CUSIP Users to sign license agreements with Defendants as a condition for receiving the CUSIP numbers, issue names, and types of issue from the [Third-Party Data Vendors].”); *id.* at 6 (noting that “[a]bsent [the restrictions imposed by the Subscription Agreements], any entity with access to [CUSIP numbers, issue names, and types of issue] could use them to create innovative new services, such as the management solutions for financial services and technology companies”)).

Thus, Defendants dictate the terms on which distributors — here, Third-Party Data Vendors — can engage with CUSIP Users. (SAC ¶¶ 56-57). And those terms, enshrined upstream, in turn mandate that CUSIP Users sign restrictive Subscription Agreements with Defendants downstream. (*Id.*). As discussed, the terms of the Subscription Agreements circumscribe how CUSIP Users can use *any* CGS data, including mere CUSIP numbers; give Defendants detailed competitive insights into potential rivals' internal use of CUSIP numbers; and grant Defendants the ability to obtain injunctive relief in event of “any misappropriation or misuse” of any CGS data. (*See id.* ¶¶ 85-97). Although Defendants suggest that the Subscription Agreements are necessary to protect their investment in the CUSIP\_DB and to prevent free-riding, this argument should be taken with some skepticism. Indeed, nothing prevents Defendants from bringing copyright infringement actions against any party wrongly copying the CUSIP\_DB. Nor does the law require that Defendants give away access to even non-protectable data for free. (*See* Def. Br. 12 (“CGS has the right to set terms that restrict access to and use of the valuable database service it provides to its customers, and to thereby protect its legitimate business interest in not having others free ride on its decades-long investment in collecting and maintaining that data.”)). But Defendants overstate the case that “[d]atabase owners are entitled to protect their business interests even in non-copyrightable databases” by citing unilateral refusal-to-deal cases, like *NYMEX I* and *MiniFrame*, which this case is not. (Def. Reply 5).

On Defendants' telling, they are simply executing a refusal to deal indirectly. (Def. Br. 15 (“Just as CGS is not required to deal directly with potential competitors on terms that allow free riding, they are not required to deal indirectly with potential rivals that intend to free ride on their

investments.”)). But it is clear that this is *not* a unilateral scheme. Instead, Defendants have organized a multilateral arrangement by requiring that Third-Party Data Vendors enforce the terms of Subscription Agreements containing suspect terms. (SAC ¶ 56 (“CGS's agreements with its [Third-Party Data Vendors] do not allow [them] to distribute CGS Data to firms in bulk or downloadable format unless such firms are properly licensed by CGS.”)). Defendants have offered no compelling reason why CUSIP Users should be required to take licenses dictating how they may use non-protected data from parties from whom CUSIP Users do not receive the data. Cf. *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 234 (S.D.N.Y. 2019) (“The key inquiry under [the] fact-intensive [patent misuse] doctrine is whether, by imposing an express condition on the post-sale use of a patented product, the patentee has impermissibly broadened the physical or temporal scope of the patent grant with anticompetitive effect.” (internal quotation marks and citation omitted and alteration adopted)). The economic reality in the CUSIP Use Market is the result of Defendants' restrictive distributorship model, which vastly expands Defendants' control over the entire market, regardless of with whom Plaintiffs deal.<sup>12</sup>

\*13 The law instructs courts to be wary of prejudging these types of arrangements on a motion to dismiss before engaging in a rule of reason analysis. For example, *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*, discussed by both parties, explains that “[t]he metes and bounds of when such behavior impermissibly crosses the line from competitive to violative of the Sherman Act is a highly contextual analysis.” 383 F. Supp. at 239; see also *id.* at 238 (finding that defendant could “seek to limit how competitors or potential competitors might free-ride on its investments,” but could not “unlawfully restrict other parties in its manufacturing and distribution chain from contracting with competitors”). Defendants' arguments pertaining to *Keurig* rest on a misreading of the SAC. (See Def. Reply 6). Though a case involving intangible property, like this one, differs from *Keurig* on that basis, the setup is basically the same. In *Keurig*, plaintiffs successfully pleaded a Section 2 claim by alleging that the defendant locked up the supply of inputs for competitors through use of exclusive supply and distribution contracts. *Id.* at 238. Though CGS Data originates from Defendants, making it distinguishable to a degree, Defendants have locked up distributors of CUSIP numbers and have guaranteed that competition cannot exist through restrictive license agreements pertaining to how CUSIP Users may use non-protectable data. This is the case,

even as Defendants have no ostensible right to control how CUSIP Users in fact use CUSIP numbers. Cf. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 479 n.29 (1992) (noting, in a type of claim not at issue here, that “[t]he Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next” (internal quotation marks and citation omitted)).

Contrary to the bulk of Defendants' arguments on this point, Plaintiffs' antitrust allegations do not fit the mold of a unilateral refusal to deal. Instead, Plaintiffs allege that Defendants act as a monopolist foreclosing potential competitors through the control of upstream data distributors/suppliers on the one hand in order to expand control over customers and potential competitors on the other. Given the actual allegations in the SAC, Defendants cannot take refuge by simply claiming that CGS data originates from the copyrighted CUSIP\_DB. In *Federal Trade Commission v. Vyera Pharmaceuticals, LLC*, the defendant pharmaceutical company owned the brand name drug in the relevant product market. 479 F. Supp. 3d 31, 47 (S.D.N.Y. 2020). To block generic pharmaceutical companies' entrance into the relevant market, the defendant (i) restricted sales of the brand name via its distribution contracts which, among other things, prevented sales to generic pharmaceutical manufacturers; (ii) entered into exclusive supply contracts for the active pharmaceutical ingredient; and (iii) entered into data-blocking agreements with its distributors. *Id.* at 40-41.

The *Vyera* defendant invoked the same argument as Defendants here: that it need not share its drug monopoly with potential generic competitors. 479 F. Supp. 3d at 49. While this Court recognizes the obvious point that the pharmaceuticals market differs from the fintech market, Judge Cote's rejection of the *Vyera* defendant's argument also has force in this setting. *Id.* at 49-50. She reasoned that by entirely cutting off potential competitors' access to the relevant drug through a constellation of anticompetitive actions, including restrictive distribution arrangements, the *Vyera* defendant ran afoul of the Sherman Act:

The Amended Complaint alleges that Vyera, while holding a monopoly, prohibited any sales of *Daraprim*, directly or indirectly, to generic pharmaceutical competitors and even

re-purchased [Daraprim](#) at above-retail prices to stymie competitors' access to [Daraprim](#). The Amended Complaint further alleges that Vyera did so because access to [Daraprim](#) was, by regulation, necessary for potential competitors to enter the market. These allegations plausibly plead that the defendants blocked competitors from accessing [Daraprim](#) for the purpose of maintaining their monopoly.

*Id.* Defendants have prohibited distribution of CUSIP numbers from their distributors to unlicensed users. The required Subscription Agreements, in turn, allow Defendant to exert vast control over the use of CUSIP numbers, not just the copyrighted CUSIP\_DB. By allowing Third-Party Data Vendors to distribute data only to users who have signed Subscription Agreements, the message is clear: if one tries to compete, they lose access. At this early stage in the litigation, these allegations are sufficient to distinguish this case from the no-duty-to-aid-competitors line of caselaw, and to state a claim under Section 2 of the Sherman Act.

**\*14** Consumers' access (or not) to alternative sources of CUSIP numbers will ultimately lie at the heart of this case. So will other hallmarks of an antitrust action, including market definition. The Court agrees with Defendants that Plaintiffs' allegations pertaining to Xignite do not aid their cause, because the allegations indicate that consumers can in fact access alternative sources of CUSIP identifiers. (Def. Reply 15 (summarizing Plaintiffs' allegations regarding Xignite, including that Xignite was building a competing commercial database through "independent" sources (quoting SAC ¶ 62))). But these issues cannot be resolved on a motion to dismiss concerned solely with Defendants' conduct. They focus on *effects*, which the Court cannot determine at this juncture. (*Compare id.* ¶ 133 ("There are no natural barriers to entry into the CUSIP Use Market. The CGS website acknowledges that collections of CUSIP numbers can be created based on public data."), *with id.* ¶¶ 150-58 (cataloging the anticompetitive effects of the licensing regime)).

For the avoidance of doubt, the mere fact that Plaintiffs and other CUSIP Users are required to pay a fee to Defendants does not necessarily present an antitrust problem. This is true regardless of the existence, or not, of a copyright in CUSIP numbers. *See, e.g., Qualcomm, 969 F.3d at 990* ("Allegations

that conduct 'has the effect of reducing consumers' choices or increasing prices to consumers do[ ] not sufficiently allege an injury to competition ... [because] [b]oth effects are fully consistent with a free, competitive market.' ") (quoting *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012) (citations omitted)).<sup>13</sup> Plaintiffs have not cited to any authority to suggest that Defendants are not allowed to charge them fees for use of CGS data, even if the elements of the data that Plaintiffs receive are not protected intellectual property. And *NYMEX I and II* easily dispose of any such argument. *NYMEX I*, 323 F. Supp. 2d at 571 ("NYMEX has a legitimate business interest in preventing its competitor, ICE, from free-riding on NYMEX's settlement prices. NYMEX's settlement prices have value because they are viewed as proxies for market prices, and NYMEX has a legitimate interest in preventing rivals from free-riding on this reputation."); *NYMEX II*, 389 F. Supp. 2d at 544 ("If a NYMEX settlement price in dollars constituted copyrightable subject matter, public conduct would be limited, regardless of the use of the price and regardless of the context.")).

**\*15** The antitrust concerns of this case instead arise because Defendants, through their restrictive agreements with Third-Party Data Vendors, have created a system designed to prevent any competitive uses of CUSIP numbers. This is far from suggesting that certain of Plaintiffs' contentions "would turn every distribution model into a concerted refusal to deal." (Def. Reply 4). And Defendants' contention that "Plaintiffs fail to explain how contractual provisions preventing Data Vendors from re-distributing CGS's proprietary data to Data Users who have not contracted with CGS directly excludes *any* otherwise viable competitor from the 'market for using identifying numbers after initial issuance' " is preposterous. (Def. Reply 7-8).<sup>14</sup> The SAC is replete with such allegations. (*See, e.g.,* SAC ¶¶ 80-82) ("[N]o developer [can create a value-added software product utilizing CUSIP numbers] because the API files contain CUSIP numbers, and Defendants require a license agreement with S&P and FactSet as a condition to accessing the CUSIP numbers in the API files"); *id.* ¶ 151 ("The process of obtaining a CUSIP, and the restrictive licensing imposed on its use imposes unnecessary burdens on firms by interrupting transactional flow and timing.... [R]estricting the use of CUSIP numbers would disadvantage new technology and can instead stifle innovation." (internal quotation marks omitted)). Because Defendants have not moved to dismiss Plaintiffs' [Section 2](#) claims on any other grounds, the Court denies Defendants' motion to dismiss these counts.<sup>15</sup>



**c. The Court Grants Defendants' Motion to Dismiss Plaintiffs' Section 1 Claim**

\*16 Defendants seek dismissal of Plaintiffs' Section 1 group boycott claim on two grounds: (i) Plaintiffs fail to allege any anticompetitive conduct; and (ii) Plaintiffs indisputably allege *vertical*, not horizontal, restraints, such that any argument for *per se* illegality fails. (Def. Opp. 22-25). Plaintiffs contend that the allegations in the SAC pertaining to Defendants' agreements with Third-Party Data Vendors depict a classic group boycott that is *per se* illegal. (Pl. Opp. 17).

A foray into the two standards governing assessment of anticompetitive conduct is needed before proceeding with the parties' contentions. Those standards are the rule of reason and *per se* illegality. See PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 1500 (2023) ("A monopolist acting reasonably does not violate Sherman Act § 2. Reasonable collaboration among competitors does not violate Sherman Act § 1. Although reasonableness is usually judged case by case, it is sometimes made for a class of conduct, such as price fixing, which is then said to be intrinsically or 'per se' unlawful."). Section 1 claims can fall at the motion to dismiss stage under either standard. See, e.g., *Cont'l T.V. v. GTE Sylvania*, 433 U.S. 36, 59 (1977) ("When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under [Section] 1 of the Act."); *Copy-Data Sys., Inc. v. Toshiba Am., Inc.*, 663 F.2d 405, 408 (2d Cir. 1981) ("While restrictive agreements among independent business entities at the same level of the market, so-called 'horizontal' agreements, are illegal *per se*, restraints imposed by a manufacturer or supplier upon its distributor retailer-customers, so-called 'vertical' restraints, can significantly benefit competition and are permissible unless they violate the rule of reason." (internal citations omitted)).

The SAC is perhaps deliberately cagey with respect to the type of violation it presses. Yet in their opposition, Plaintiffs appear to clarify that they are asserting a *per se* Section 1 claim. (Pl. Opp. 17-21 (analyzing cases discussing *per se* group boycotts, and contending that "[t]he reasoning in those cases make clear that the SAC adequately alleges a group boycott")). Thus, the Court understands from both the SAC

and Plaintiffs' opposition that Plaintiffs are not proceeding with a violation assessed under the rule of reason.

Now properly understood, the Court finds that Plaintiffs' Section 1 claim fails as a matter of law. As an initial matter, Plaintiffs' allegations address *vertical*, not horizontal, restraints. For example, Plaintiffs claim that Defendants have a one hundred percent market share in the relevant CUSIP Use Market; in other words, there are no other competitors in the market. But antitrust law has undergone a sea change since cases like *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), cited by Plaintiffs in support of their group boycott theory. (See Pl. Opp. 20). See also, e.g., *O.E.M. Glass Network, Inc. v. Mygrant Glass Co., Inc.*, No. 19 Civ. 742 (NGG) (LB), 2023 WL 2563689, at \*7 (E.D.N.Y. Mar. 17, 2023) ("The *per se* treatment prescribed in *Klor's* has since been cabined to group boycotts that have a horizontal component.") (collecting cases). As relevant here, a group boycott meriting *per se* treatment requires horizontal agreement among direct competitors. See, e.g., *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) ("[P]recedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors.").

\*17 Although, per the SAC, Third-Party Data Vendors could be seen as horizontal competitors to Defendants in the distribution of CUSIP numbers, Plaintiffs' concerns do not home in on such horizontal relationships. Rather, Plaintiffs take issue with the vertical relationship between Defendants and each Third-Party Data Vendor — a supplier/distributor relationship — and with the further-downstream vertical relationship between Defendants and CUSIP Users. Even if Defendants and Third-Party Data Vendors compete on one dimension, the at-issue relationships are indisputably vertical. See, e.g., *Elecs. Commc'ns Corp.*, 129 F.3d at 243 (holding that the *per se* rule is inapplicable "even if the distributor and manufacturer also compete at the distribution level, where, as here, the manufacturer distributes its products through a distributor and independently") (collecting cases).

A quick review of Plaintiffs' cited authority underscores the point that the rule of *Klor's* has been clarified to require *horizontal* restraints of trade in order for the *per se* rule to be applicable. See *supra*. In any event, in *Klor's*, a group of horizontal competitors — manufacturers and distributors of various electronics goods and appliances — conspired among each other to boycott the retail plaintiff through either a concerted refusal to deal or horizontal price-fixing. *Klor's, Inc.*, 359 U.S. at 209. Likewise, in *PLS.Com, LLC*

v. *National Association of Realtors*, the plaintiff alleged that *horizontal* competitors in the market for sellers' listings — known as “MLSs” — agreed among themselves to restrain competition in the relevant market. 32 F.4th 824, 836 (9th Cir. 2022), cert. denied sub nom. *The Nat'l Ass'n of Realtors v. The PLS.com, LLC*, 143 S. Ct. 567 (2023). These competitors agreed to sanction real estate agents who posted listings on the plaintiff's upstart website without also posting listings on MLSs. *Id.* In sum, “[r]egardless of what [plaintiff] does — whether it charges less to list properties, provides a nationwide network, or develops a better interface — agents who belong to a NAR-affiliated MLS may not list on [plaintiff's service] without also listing on an MLS. Thus, the [boycott] essentially eliminates competition for most sellers' agents' listings between NAR-affiliated MLSs and rival services.” *Id.* (emphasis omitted). The requisite horizontal agreement among direct competitors is also present in *PharmacyChecker.com, LLC v. National Association of Boards of Pharmacy*, 530 F. Supp. 3d 301, 318 (S.D.N.Y. 2021) (alleging agreements between direct competitors in online pharmacy verification and comparative drug-pricing information); see also *id.* at 332-37 (examining plus factors showing conspiracy).

Plaintiffs contend that these cases stand for the principle that group boycotts may have both horizontal and vertical elements. (Pl. Opp. 19). So stipulated: Group boycotts may be executed by *horizontal* competitors collectively working to deny a competitor an input, which of course involves a vertical component, and they may also involve a vertical player. But in all cases a *horizontal* agreement is present, and that is lacking here. Again, Plaintiffs' allegations focus solely on the agreements between Defendants and their distributors, the Third-Party Data Vendors. (See, e.g., Def. Br. 23 (“Plaintiffs allege a chain of distribution in which CGS enters agreements with Data Vendors to provide them with CGS Data, and the Data Vendors in turn ‘distribute’ that data to Data Users.” (quoting SAC ¶¶ 45-47))). Plaintiffs entirely fail to respond to this argument, other than to suggest in conclusory fashion that group boycotts may have both vertical and horizontal aspects. (See Pl. Opp. 19). But as the preceding analysis makes clear, such an argument does not address the fact that regardless of the existence of a vertical component, the putative boycott *must* have a horizontal component, which is lacking here.

\*18 Perhaps recognizing this deficiency, Plaintiffs try to confuse the issue by transforming, in conclusory fashion, the series of vertical agreements between Defendants and Third-

Party Data Vendors into horizontal collusion. The SAC avers that

the Third-Party Data Vendors knew that all other Third-Party Data Vendors were also agreeing to the group boycott orchestrated by Defendants. Specifically, Third-Party Data Vendors knew that S&P, itself a data vendor, was requiring the other Third-Party Data Vendors, which competed with S&P and with each other, to enter into an agreement containing these restrictions.

(SAC ¶ 57). In essence, then, Plaintiffs would be alleging a hub-and-spoke conspiracy.<sup>16</sup> Still, Plaintiffs allege no horizontal agreement between and among the spokes of such arrangement, *i.e.*, the Third-Party Data Vendors. See, e.g., *In re Inclusive Access Course Materials Antitrust Litig.*, 544 F. Supp. 3d 420, 437 (S.D.N.Y. 2021) (“The SAC fails to plead that the Retailer Defendants and the Institutions, the ‘spokes’ in the alleged hub-and-spoke conspiracy, entered into a horizontal agreement with each other. This alone is fatal to the plaintiffs' claim.”); *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 376 (S.D.N.Y. 2016) (“Existing case law makes clear that a hub-and-spoke theory is cognizable under Section 1 only if there are both vertical agreements between the hub and each spoke, and also a horizontal agreement among the various spokes with each other.”).

Instead, Plaintiffs suggest that because each of the Third-Party Data Vendors knew that their colleagues had also signed vertical agreements with Defendants, a horizontal agreement exists. (See Pl. Opp. 20-21). For starters, Plaintiffs' allegations of such knowledge are entirely conclusory; for example, Plaintiffs plead that S&P told Hildene that S&P maintains vertical agreements with all Third-Party Data Vendors, which does not show that *Third-Party Data Vendors* knew that contracts were the same among each other. See, e.g., *Howard Hess Dental Lab's Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010) (“Instead of underscoring factual allegations plausibly suggesting the existence of an agreement, the Plaintiffs invite us to infer that the Dealers were aware of each other's involvement in the conspiracy because, as market participants, they all knew that Dentsply was the dominant player in the artificial tooth market and

because they all had an economic incentive to create and maintain a regime in which Dentsply reigned and the Dealers did its bidding.”); *cf. Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465, 486-87 (S.D.N.Y. 2012) (“Moreover, where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and *their participation is contingent upon that knowledge*, they may be considered participants in a horizontal agreement in restraint of trade.” (emphasis added)).

More to the point, Plaintiffs do not suggest that the Third-Party Data Vendors agreed to enter into the alleged group boycott *because of* any knowledge that other vendors signed similar agreements, nor any of the requisite plus factors to infer a horizontal agreement. Knowledge alone is insufficient to infer horizontal agreements between competitors, a point to which Plaintiffs never respond. *See, e.g., PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 110 (2d Cir. 2002) (“The district court correctly rejected PepsiCo's [Section 1](#) claim on the ground that it failed to proffer sufficient evidence of a horizontal agreement among the IFDs. PepsiCo offered no evidence of direct communications among the IFDs; its ‘offer of proof’ of an agreement was simply that Coca-Cola assured the IFDs that the loyalty policy would be uniformly enforced and encouraged them to report violations.”); *O.E.M. Glass Network, Inc. v. Mygrant Glass Co., Inc.*, 436 F. Supp. 3d 576, 593-94 (E.D.N.Y. 2020) (“Plaintiffs have alleged such circumstantial evidence and plus factors here, including a high level of interfirm communication and that the [m]anufacturer [d]efendants each acted against their apparent economic self-interest by refusing to deal with [plaintiff].” (internal quotation marks and citations omitted)). Plaintiffs do not suggest that any Third-Party Data Vendor's decision to execute the agreement was contingent on another vendor's execution of the same agreement; instead, the most logical conclusion is that Third-Party Data Vendors simply wanted to distribute CGS data. *See Nastasi & Assocs., Inc. v. Bloomberg, L.P.*, No. 20 Civ. 5428 (JMF), 2022 WL 4448621, at \*12 (S.D.N.Y. Sept. 23, 2022) (“The alleged bid-rigging scheme here depended on each subcontractor knowing that the others would be participating.”). For all of these reasons, because Plaintiffs fail to allege a *per se* [Section 1](#) claim and have not suggested that this claim should be analyzed under the rule of reason, this count is dismissed.

### C. The Court Grants Defendants' Motion to Dismiss Plaintiffs' Copyright Claim

\*19 As alluded to, a core component of Plaintiffs' case also concerns copyright law. Specifically, Plaintiffs seek

a declaratory judgment that CUSIP numbers are neither copyrighted nor copyrightable. (SAC ¶ 167). But Defendants counter that the Court cannot reach this issue because Plaintiffs lack Article III standing to bring it. (Def. Opp. 25). On this issue, the Court agrees with Defendants.

The Declaratory Judgment Act states that “[i]n a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a). Of course, as in any case, the Declaratory Judgment Act requires “a case of actual controversy”; in other words, the plaintiff must have Article III standing. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-27 (2007) (“Our [prior] opinion explained that the phrase ‘case of actual controversy’ in the Act refers to the type of ‘Cases’ and ‘Controversies’ that are justiciable under Article III.” (internal citation and quotation marks omitted)). Thus, a threshold requirement for declaratory relief is that a plaintiff show “[i] that he suffered an injury in fact that is concrete, particularized, and actual or imminent; [ii] that the injury was likely caused by the defendant; and [iii] that the injury would likely be redressed by judicial relief.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). “As with any federal action, courts may not entertain actions for declaratory judgment ‘when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is not standing to maintain the action.’ ” *Velvet Underground v. Andy Warhol Found. for the Visual Arts, Inc.*, 890 F. Supp. 2d 398, 403 (S.D.N.Y. 2012) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). “[A] plaintiff must demonstrate standing for each claim and form of relief sought.” *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010) (quoting *Baur v. Veneman*, 352 F.3d 625, 642 n.15 (2d Cir. 2003)).

The first element — injury in fact — is missing here. Defendants do not own a copyright in CUSIP numbers. And Plaintiffs never suggest the contrary. (Def. Br. 26). Though Defendants' alleged attempt to expand their intellectual property holdings through potentially anticompetitive agreements may be relevant to the antitrust issues discussed above, their lack of a copyright in CUSIP numbers vitiates Plaintiffs' effort to drum up standing for the copyright claim. Plaintiffs suggest that the lack of a copyright is irrelevant because (i) the Subscription

Agreement gives Defendants a variety of remedies for misuse of CGS data; and (ii) Defendants could move to register a copyright immediately before filing a litigation. (Pl. Opp. 25-26). As to the former contention, Plaintiffs' argument is self-defeating. Rather than bolster any purported threat of copyright litigation concerned with CUSIP numbers, it reveals that Defendants' remedies would be based on contract and tort law premised on the Subscription Agreements, and not on a statutory copyright claim. (Def. Br. 27).

As to the latter argument, Plaintiffs offer no authority that such a contingent scenario would present an adequately imminent and concrete threat to confer Article III standing. Plaintiffs do suggest that lack of copyright registration is not a jurisdictional bar. (Pl. Opp. 26 (citing *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010))). But this suggestion is irrelevant to the question at hand. Indeed, *Muchnick* says nothing about standing, and only holds that Section 411's registration requirement is a claims-processing rule, not a jurisdictional rule. *Muchnick*, 559 U.S. at 169. *Muchnick* does not suggest that when a question of copyrightability is presented, a plaintiff automatically has standing. To so hold would run contrary to the basic principle that “a plaintiff must demonstrate standing for each claim [s]he seeks to press.” *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 64 (2d Cir. 2012) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006)).

\*20 Federal courts across the country have recognized that plaintiffs lack Article III standing to seek declaratory relief for noninfringement or invalidation of copyrights on similar facts to those presented here. *See, e.g., John Wiley & Sons, Inc. v. DRK Photo*, 998 F. Supp. 2d 262, 291 (S.D.N.Y. 2014) (“The Court's determination that [defendant] lacks standing effectively moots the controversy between the parties. In light of the Court's holding, [plaintiff] is no longer confronted with a reasonable apprehension that it will be subject to liability to [defendant] for the alleged infringement, if it continues to engage in the allegedly infringing conduct.”), *aff'd*, 882 F.3d 394 (2d Cir. 2018); *Velvet Underground*, 890 F. Supp. 2d at 404 (“Accordingly, in intellectual property cases, when a declaratory judgment plaintiff seeks a declaration that an asserted right is invalid or otherwise unenforceable and the declaratory defendant provides the plaintiff with a covenant not to sue for infringement of that right, that covenant can extinguish[ ] any current or future case or controversy between the parties, and divest[ ] the district court of subject matter jurisdiction.” (internal quotation marks and citation omitted)); *Sofiteteers, Inc.*

*v. Regal W. Corp.*, No. 19 Civ. 519 (JWH), 2022 WL 17968835, at \*4 (C.D. Cal. Dec. 22, 2022) (“[Counterclaim defendant] cannot maintain a copyright infringement action with respect to those works unless and until it obtains new registrations pertaining to them from the Copyright Office. That necessity suggests that there is no longer ‘sufficient immediacy’ to warrant declaratory relief [that counterclaim plaintiff owns the relevant copyright].” (quoting *MedImmune*, 549 U.S. at 127 (internal citation omitted))); *cf. Lumetrics, Inc. v. Blalock*, 23 F. Supp. 3d 138, 144 (W.D.N.Y. 2014) (“[Plaintiff] fails to state a copyright infringement claim based upon software that is not registered. Because it is impossible to separate [plaintiff's] claims based upon software with registered copyrights from its claims based upon unregistered copyrights, and because no application was made by [plaintiff] to amend its complaint to properly limit its claims to the registered copyrights, the complaint's one-count cause of action for copyright infringement necessarily fails to state a claim.”).

Simply put, Plaintiffs' declaratory judgment claim premised on CUSIP numbers being non-copyrightable relies on too many contingencies to present an actual case or controversy. This is so even if, as Plaintiffs claim, *MedImmune* “lowered the threshold for establishing the existence of an actual case or controversy in intellectual property-related declaratory judgment cases.” (Pl. Opp. 23 (internal citations and quotation marks omitted)). Regardless, *MedImmune* itself is inapposite. In that case, the Supreme Court was confronted with a situation in which the patent-holder threatened patent infringement litigation and demanded royalty payments owing under a license agreement with the plaintiff. *MedImmune*, 549 U.S. at 121-22. By contrast here, Plaintiffs do *not* point to instances of Defendants threatening copyright infringement litigation if Plaintiffs refused to sign a Subscription Agreement. Instead, they identify (i) instances where Defendants noted that CGS data would be stripped from data feeds absent a valid Subscription Agreement; or (ii) references to *contractual* remedies based on the Subscription Agreements. (*See, e.g., SAC ¶¶ 106-110* (discussing the correspondence between S&P and Hildene, in which S&P stated that “if CGS is unable to reach an agreement with Hildene Capital, your firm may lose access to CGS data”)). Plaintiffs make the conclusory assertion that these threatened actions meant that Defendants threatened copyright infringement litigation. (Pl. Opp. 22). But Plaintiffs point to no instance of Defendants in fact threatening such litigation, even if Defendants' conduct could be seen as anticompetitive. As such, Plaintiffs lack



standing to press their claim for declaratory relief concerning the copyrightability *vel non* of CUSIP numbers, and that claim is dismissed.<sup>17</sup>

## D. The Court Denies Defendants' Motion to Dismiss Plaintiffs' State Law Claims

### 1. Plaintiffs State a Claim Under GBL Section 349

Finally, the Court considers Plaintiffs' claims under New York and Connecticut state law. To make out a claim under New York's [GBL Section 349](#), a plaintiff must show that “a defendant has engaged in [i] consumer-oriented conduct that is [ii] materially misleading and that [iii] [the] plaintiff suffered injury as a result of the allegedly deceptive act or practice.” *Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015) (citation omitted). Although a plaintiff may state a [Section 349](#) claim premised on monopolistic conduct, *see, e.g., Cox v. Microsoft Corp.*, 778 N.Y.S.2d 147, 148 (1st Dep't 2004) (“A cause of action under [General Business Law § 349](#) is stated by plaintiffs' allegations that [defendant] engaged in purposeful, deceptive monopolistic business practices, including entering into secret agreements with computer manufacturers and distributors to inhibit competition and technological development.”), a plaintiff must still plead that the alleged monopolist engaged in deceptive conduct, *see, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1128 (N.D. Cal. 2008).

\*21 Defendants raise several challenges to Plaintiffs' GBL claim, including that Plaintiffs: (i) fail to plead deceptive conduct; (ii) fail to plead a cognizable injury; and (iii) posit a theory that is preempted by the Copyright Act. (Def. Br. 29-31). Defendants' arguments on the first and third issues overlap to some extent. In essence, Defendants suggest that allegations in the SAC pertaining to the proprietary interest Defendants have in CUSIP numbers were not false, and in any event such assertions would be preempted by the Copyright Act. (*Id.*). But these arguments are misplaced, insofar as they rely on re-characterizing the SAC's allegations. Although GBL claims that are “not qualitatively different than the [p]laintiffs' request for a declaration that the [d]efendants have no valid copyright” are indeed preempted by the Copyright Act, *We Shall Overcome Found. v. Richmond Org., Inc. (TRO Inc.)*, 221 F. Supp. 3d 396, 412 (S.D.N.Y. 2016), allegations of “‘intentional deception’ constitute[ ] an extra element not required in a copyright infringement claim,” *Samara Bros. v. Wal-Mart Stores, Inc.*, 165 F.3d 120, 131 (2d Cir. 1998), *rev'd on other grounds*, 529 U.S. 205 (2000).

Plaintiffs at a minimum raise fact issues concerning the alleged anticompetitive scheme and deceptive conduct, based on Defendants' representations concerning their interest in CUSIP numbers. This is quite a different issue than whether Defendants have in fact threatened infringement litigation over use of CUSIP numbers. *See supra*. Instead, the SAC's allegations suggest that Defendants have been intentionally cagey with respect to what proprietary interests they have in CUSIP numbers, and why Plaintiffs must obtain a license. (*See, e.g.,* SAC ¶ 87 (email to Dinosaur, which received CUSIP numbers from Third-Party Data Vendor, claiming that a Subscription Agreement was required because “proprietary CUSIP data is being utilized within your firm” (emphasis omitted)); *id.* ¶ 88 (email to Swiss Life that suggested that “Swiss Life could not use the CUSIP numbers in its business if it failed to execute a license agreement”); *id.* ¶¶ 103-104 (contract negotiations with Swiss Life in which S&P appeared to suggest that CUSIP numbers in ISINs were S&P's intellectual property)). As discussed, Defendants' actions may present a case of antitrust liability, insofar as they are found to have utilized a copyright over the CUSIP\_DB and contractual relationships with Third-Party Data Vendors to suppress competition in the CUSIP Use market. So too do Plaintiffs plead deceptive conduct going above and beyond a mere copyright claim, as Defendants could be seen as misrepresenting their interests in CUSIP numbers.

Defendants' argument about a lack of cognizable injury is likewise misplaced. As a first line of attack, Defendants state that “Plaintiffs do not allege that, absent the purported assertion of a copyright on the CUSIP identifiers, they or any other Data User would not have entered a license agreement.” (Def. Br. 30). But the SAC plainly pleads as much, particularly as it relates to suppression of competition as a result of the licensing regime. (*See, e.g.,* SAC ¶¶ 60-63, 74, 86-91). And Defendants' contention that Plaintiffs do not “allege that the deception caused [them] an injury beyond merely having paid the purchase price for the product” is not serious. (Def. Br. 30). The SAC teems with allegations concerning supracompetitive fees for use of CUSIP numbers due to Defendants' conduct and that Plaintiffs would not have paid license fees to Defendants in the absence of their representations, as well as anticompetitive market effects of such conduct. This is sufficient. *See, e.g., Fishon v. Peloton Interactive, Inc.*, 620 F. Supp. 3d 80, 99-100 (S.D.N.Y. 2022) (explaining two theories of injury under [GBL Section 349](#), including where a plaintiff relies on deception to her detriment or pays a price premium). In other words, Defendants' proffered cases do not control. *See, e.g., Small v. Lorillard*

*Tobacco Co.*, 94 N.Y.2d 43, 56 (1999) (holding that plaintiffs failed to plead a cognizable injury because plaintiffs did not plead “that the cost of cigarettes was affected by the alleged misrepresentation, nor [did] they seek recovery for injury to their health as a result of their ensuing addiction”).

## 2. Plaintiffs State a Claim Under CUTPA

\*22 CUTPA broadly prohibits any “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” *Conn. Gen. Stat. Ann. § 42-110b(a)*. To state a claim under CUTPA, courts consider

[i] whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise — in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; [ii] whether it is immoral, unethical, oppressive, or unscrupulous; [and] [iii] whether it causes substantial injury to consumers, competitors or other businesspersons.

*Pro Music Rts., LLC v. Apple, Inc.*, No. 20 Civ. 309 (JAM), 2020 WL 7406062, at \*11 (D. Conn. Dec. 16, 2020) (quoting *Cenatiempo v. Bank of Am., N.A.*, 333 Conn. 769, 790 (2019) (brackets omitted)). Importantly, “[a]ll three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.” *Ulbrich v. Groth*, 310 Conn. 375, 409 (2013) (internal quotation marks and citation omitted). And as relevant here, “the standards governing an antitrust plaintiff’s CUTPA claim alleging unfair competition largely mirror the standards governing federal claims arising under the Sherman and Clayton Acts and state claims arising under the Connecticut Antitrust Act.” *St. Francis Hosp. & Med. Ctr.*,

*Inc. v. Hartford Healthcare Corp.*, No. 22 Civ. 50 (SVN), 2023 WL 1967133, at \*7 n.5 (D. Conn. Feb. 13, 2023) (citing, *inter alia*, *1-800 Contacts, Inc. v. Fed. Trade Comm’n*, 1 F.4th 102, 114 (2d Cir. 2021)).

As with Plaintiffs’ New York GBL claim, Defendants have moved to dismiss the CUTPA claim. (Def. Br. 31-32). However, unlike the GBL claim, both parties recognize that this claim may survive if Plaintiffs state a valid Sherman Act claim. (*See id.* at 32 (“This claim fails because, as discussed above, far from being anticompetitive or otherwise against public policy, the conduct Plaintiffs allege is legitimate, procompetitive behavior.”); Pl. Opp. 30 (arguing that allegations overlapping with federal antitrust claims “alone are sufficient to state unfair conduct”). As such, Plaintiffs’ CUTPA claim survives, and the Court need not address the parties’ contentions pertaining to “immoral, unethical, oppressive, or unscrupulous” or deceptive conduct. (Def. Br. 32; Pl. Opp. 30-31). Likewise, as the Court has rejected Defendants’ arguments pertaining to injury and preemption, it does the same with respect to the CUTPA claim. (Def. Br. 32).

## CONCLUSION

For the reasons discussed in this Opinion, Defendants’ motion to dismiss the SAC is GRANTED IN PART and DENIED IN PART. The Court grants the motion with respect to Plaintiffs’ Sherman Act [Section 1](#), copyright, and breach of contract claims. The Court denies the motion as to the remainder of Plaintiffs’ claims.

Defendants are directed to file an answer to the remaining claims on or before **August 7, 2023**. The parties are directed to submit a proposed case management plan on or before **August 14, 2023**.

SO ORDERED.

## All Citations

Not Reported in Fed. Supp., 2023 WL 4562031

## Footnotes

1 Unless otherwise noted, citations to the record and briefing in this Opinion are from the docket in *Dinosaur Financial Group LLC v. S&P Global, Inc.*, No. 22 Civ. 1860 (KPF). This Opinion draws its facts primarily from the Second Amended Class Action Complaint (Dkt. #87 (“SAC”)), the well-pleaded allegations of which are taken as true for purposes of this Opinion. The Court sources additional factual material from the Declaration of Alexander V. Maugeri and its attached exhibits. (Dkt. #93 (“Maugeri Decl.”)). Defendants assert, and Plaintiffs do not contest, that the exhibits attached to the Maugeri Declaration are integral to the SAC, such that the Court may consider the contents of those exhibits in connection with this motion. (Def. Br. 8). See *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (“Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.” (internal quotation marks and citation omitted)).

For ease of reference, the Court refers to Defendants' memorandum of law in support of their motion to dismiss as “Def. Br.” (Dkt. #91); to Plaintiffs' memorandum of law in opposition as “Pl. Opp.” (Dkt. #102); and to Defendants' reply memorandum of law as “Def. Reply” (Dkt. #103).

2 “CUSIP” is short for Committee on Uniform Securities Identification Procedures, the group of industry regulators and participants — including the Securities and Exchange Commission (the “SEC”), the New York Stock Exchange, and the ABA, among others — that developed the numbering system. (SAC ¶¶ 3, 36). The parties use the phrases “CUSIP identifier” and “CUSIP number” interchangeably in their papers, and the Court does the same in this Opinion.

3 CSB was a predecessor to CUSIP Global Services (“CGS”), discussed later in this Opinion. (SAC ¶ 37).

4 The relevant class of “CUSIP Users” is discussed *infra*.

5 For purposes of this Opinion, the Court will refer only to S&P. FactSet succeeded to S&P's ownership of CGS on March 1, 2022. (SAC ¶ 7).

6 CUSIP Users who opt to receive a license to the entire CUSIP\_DB are not members of the class. (SAC ¶ 71).

7 Per Plaintiffs, ISINs “are the equivalent standard for international financial transactions involving United States financial instruments. The CUSIP number is an element of the ISINs, along with additional digits added by the European numbering agency. Defendants require a license for the use of CUSIP numbers in the ISINs.” (SAC ¶ 94).

8 The FRAND claim is an alternative claim brought in the case that CUSIP numbers are found to be copyrightable. (SAC ¶ 115). Based on the Court's resolution of the copyright claim, discussed *infra*, the Court only discusses the facts alleged in the SAC, although the Court is aware that Defendants' proffered documents suggest a different set of facts.

9 Whether Defendants' communications with customers suggest that Defendants assert a copyright in CUSIP numbers is discussed *infra*, in the Court's analysis of Plaintiffs' copyright claim. Defendants do not purport to own a copyright in CUSIP numbers in their briefing, and appear to argue, for purposes of the present motion, that they do not.

10 Moreover, *NYMEX I* involved settlement prices that were regulated by the CFTC, whereas here Plaintiffs claim that the government is not involved in regulation of CUSIP numbers. (SAC ¶ 42). *NYMEX I*, 323 F. Supp. 2d at 568 (“So, too, in this case, where access to the alleged ‘essential facility’ is regulated by the CFTC, a federal agency with effective power to compel sharing of NYMEX's settlement prices and regulate the scope and terms of such sharing.”).

- 11 Of course, bulk CGS data comes from Defendants by way of their ownership of the CUSIP\_DB. But whether that mere fact allows Defendants to dictate how Plaintiffs engage with their respective Third-Party Data Vendors and how they use the data is another story.
- 12 Defendants half-heartedly raise the specter of *Noerr-Pennington* immunity with respect to the intersection of copyright and antitrust issues in this case. (Def. Br. 21-22). Such an argument is peculiar in light of Defendants' later contention that they in fact never threatened copyright infringement litigation. (*Id.* at 25-28). Still, Plaintiffs would be correct that such threats pertaining to CUSIP numbers alone would not be immune because they would be a sham. (Pl. Opp. 24-25). In any event, though the SAC at times appears to rely on a theory concerning threats about litigation pertaining to CUSIP numbers, the document as a whole presents the narrative of Defendants' expanding control over the CUSIP Use market through an appeal to proprietary interests they may not otherwise have. Per the SAC, Defendants were able to accomplish this through agreements with Third-Party Data Vendors, despite those vendors not transmitting copyrighted data to CUSIP Users. Defendants do not suggest that *Noerr-Pennington* would be implicated on these grounds.
- 13 *Qualcomm* is the subject of much disagreement between the parties, perhaps because it is at once both analogous to and distinguishable from the case at hand. As Defendants point out, *Qualcomm* did not rely on patent law in any dispositive sense. That said, Defendants understate the importance of the *Qualcomm* defendant's intellectual property in enabling it to engage in the at-issue conduct. *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 1003 (9th Cir. 2020) ("The [no license, no chips] policy only insists that, whatever chip source an OEM chooses, the OEM pay Qualcomm *for the right to practice the patented technologies embodied in the chip*, as well as in other parts of the phone or other cellular device." (emphasis added)). More basically, the antitrust concern in *Qualcomm* concerned the upstream chips market (akin to the level at which Third-Party Data Vendors exist in this case), not the downstream OEM market. *Id.* at 993 ("Moreover, throughout its analysis, the district court failed to distinguish between Qualcomm's *licensing practices* (which primarily impacted OEMs) and its practices relating to *modem chip sales* (the relevant antitrust market)."). Yet here, Plaintiffs contend that Defendants' practices have monopolized the CUSIP Use Market. *Qualcomm* would have been a different case had the defendant instead licensed its patents to chip makers and still required OEMs receive a license from the defendant. Finally, Plaintiffs are correct to note that *Qualcomm* was not concerned with distribution arrangements, but strictly the defendant's licensing practice of only licensing downstream users. (Pl. Opp. 15-16).
- 14 Again, this is Defendants' rhetorical sleight of hand with regard to the SAC, which repeatedly alleges that Defendants have no "proprietary" claim to CUSIP numbers disaggregated from the CUSIP\_DB.
- 15 The Court understands Plaintiffs' allegations pertaining to Defendants' purported manipulation of X9 to bolster their antitrust claims. (See, e.g., Pl. Opp. 33 ("Defendants' manipulation of the standard setting process demonstrates the anticompetitive measures Defendants undertook to ensure CUSIP remained the standard and a profitable product.")). Curiously, however, Plaintiffs clarify in their opposition that these allegations are pleaded in the alternative, apparently in the event that the Court determines that CUSIP numbers are copyrightable. (*Id.* at 31). "[C]onduct that undermines the procompetitive benefits of private standard setting may, at least in some circumstances, be deemed anticompetitive under antitrust law." *Lotes Co. v. Hon Hai Precision Indus. Co.*, No. 12 Civ. 7465 (SAS), 2013 WL 2099227, at \*5 (S.D.N.Y. May 14, 2013) (quoting *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007)), *aff'd on other grounds sub nom. Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395 (2d Cir. 2014); 54 AM. JUR. 2D MONOPOLIES AND RESTRAINTS OF TRADE § 139 ("The immunity doctrine applicable to efforts to influence governmental action is not generally applicable to efforts to influence the standard-setting activities of private associations."); see also, e.g., *In re Int. Rate Swaps Antitrust Litig.*, No. 16 MD 2704 (PAE), 2019 WL 1147149, at \*13 (S.D.N.Y. Mar. 13, 2019) (noting that antitrust claims concerning standard setting are ordinarily subject to rule of reason analysis).



As discussed in this Opinion, Plaintiffs have stated claims under Section 2 of the Sherman Act. Plaintiffs' allegations concerning manipulation of X9 do not appear to be pleaded as a freestanding claim, but instead are designed to support antitrust liability. Still, both parties have addressed standard-setting issues in separate discussions. Because the Court is not dismissing all of Plaintiffs' antitrust claims, arguments pertaining to standard-setting manipulation are largely beside the point. Still, the Court agrees with Defendants' basic point that Plaintiffs' allegations concerning X9 and Defendants' relation to it are conclusory. See, e.g., *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 436 (4th Cir. 2015), as amended on reh'g in part (Oct. 29, 2015) ("The common thread in the few cases finding liability in the private standard-setting context is unique, external pressure applied to achieve an anti-competitive end.") (collecting cases). The SAC contains only three paragraphs of allegations concerning standard-setting manipulation. (SAC ¶¶ 112-114). The first paragraph states in conclusory fashion that "the ABA has exerted and continues to exert substantial control over the ostensibly independent X9 as evidenced by the significant ties and overlap between the ABA, CGS, and X9." (*Id.* ¶ 112). The second asserts that "the ABA and S&P agreed and conspired to use their influence over X9 to help ensure that X9 would not choose FIGIs as an alternative standard." (*Id.* ¶ 113). And the third paragraph merely reiterates the conclusory allegations of the second. (*Id.* ¶ 114). Plaintiffs attempt to buttress these allegations in their opposition. (See, e.g., Pl. Opp. 33) ("[T]he ABA falsely made a FRAND commitment to X9 as part of the standard-setting process, X9 relied upon that promise when it affirmed CUSIP as the standard, and the ABA breached its commitment." (citing SAC ¶ 121)). But that is not what paragraph 121 pleads. (*Id.* ("Here, however, the FRAND commitment was an empty promise: X9 was influenced and controlled by the ABA, the party making the FRAND commitment, and its co-conspirator S&P (now FactSet), all of which directly benefitted from Defendants' violation of their FRAND obligations.")). At bottom, Defendants are correct that Plaintiffs seek to establish antitrust liability based on "infer[ring] malfeasance because some of the defendants' representative[s] served on the relevant standard-setting panel." *SD3, LLC*, 801 F.3d at 436. (See also Def. Br. 19-20). Plaintiffs' opposition cites to "no authority drawing that sort of naked inference." *SD3, LLC*, 801 F.3d at 436.

- 16 Plaintiffs do not actually invoke the hub-and-spoke theory in their opposition.
- 17 Plaintiffs raise their FRAND breach of contract claim in the alternative. (SAC ¶ 190). Specifically, Plaintiffs state that "[t]his Claim is relevant if any only if CUSIP numbers were found to be protected by copyright." (*Id.*). However, the Court has found that Plaintiffs lack standing to bring a declaratory judgment copyright claim. Thus, it agrees with Defendants that "Plaintiffs' breach of contract claim should be dismissed along with their declaratory judgment claim." (Def. Br. 33 n.13). Plaintiffs do not meaningfully respond to this point in Defendants' brief.