UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FUND LIQUIDATION HOLDINGS LLC, as assignee and successor-in-interest to FrontPoint Asian Event Driven Fund L.P., MOON CAPITAL PARTNERS MASTER FUND LTD., and MOON CAPITAL MASTER FUND LTD., on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

CITIBANK, N.A., BANK OF AMERICA, N.A., JPMORGAN CHASE BANK, N.A., THE ROYAL BANK OF SCOTLAND PLC, UBS AG, BNP PARIBAS, S.A., OVERSEA-CHINESE BANKING CORPORATION LTD., BARCLAYS BANK PLC, DEUTSCHE BANK AG, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK, CREDIT SUISSE AG, STANDARD CHARTERED BANK, DBS BANK LTD., ING BANK, N.V., UNITED OVERSEAS BANK LIMITED, AUSTRALIA AND NEW ZEALAND BANKING GROUP, LTD., THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED, COMMERZBANK AG, AND JOHN DOES NOS. 1- 50,

Defendants.

Docket No. 16-cv-5263 (AKH)

FOREIGN NON-COUNTERPARTY DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE FOURTH AMENDED CLASS ACTION COMPLAINT FOR LACK OF PERSONAL JURISDICTION

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Foreign Defendants not alleged to have traded with Plaintiffs[1] submit this memorandum of law in support of their motion to dismiss the Fourth Amended Class Action Complaint (the "FAC") for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2).

PRELIMINARY STATEMENT

The FAC fails to plead a basis for the exercise of personal jurisdiction over the Defendants that are not subject to general jurisdiction in the United States and not alleged to have traded directly with Plaintiffs or Plaintiffs' alleged assignors[2] (the "Foreign Non-Counterparty Defendants"). Plaintiffs' alleged basis for jurisdiction over the Foreign Non-Counterparty Defendants has nothing to do with these Defendants' own relevant forum contacts because there are none. Rather, it is based solely on a conspiracy theory of jurisdiction which in turn relies on a few isolated transactions between Plaintiffs and *other* Defendants. That does not suffice and offends traditional notions of fair play and substantial justice.

First, Plaintiffs have failed to plead that the Foreign Non-Counterparty Defendants participated in any conspiracies to manipulate either SIBOR or SOR. Certain Foreign Non-Counterparty Defendants were not even SIBOR or SOR panel members during the period of

[1] These Defendants are Barclays Bank PLC ("Barclays"), The Royal Bank of Scotland plc ("RBS plc"), BNP Paribas S.A., Oversea-Chinese Banking Corporation Ltd. ("OCBC"), Crédit Agricole Corporate and Investment Bank ("CACIB"), Standard Chartered Bank, DBS Bank Ltd. ("DBS"), United Overseas Bank Limited ("UOB"), Australia and New Zealand Banking Group, Ltd. ("ANZ"), The Bank of Tokyo-Mitsubishi UFJ Ltd. ("MUFG"), and Commerzbank AG ("Commerzbank"). In addition, UBS AG ("UBS") also challenges jurisdiction and joins the arguments set forth in Part C of this brief to the extent set forth infra at n.11. Given the addition of allegations in the FAC that Defendant UBS transacted with the newly added Plaintiffs Moon Capital Partners, Ltd. and Moon Capital Master Fund Ltd. (collectively, the "Moon Plaintiffs"), (FAC ¶¶ 87–88), UBS does not join the remainder of this brief, which focuses on the arguments of those Defendants that are not alleged counterparties to transactions with a named Plaintiff. In addition, the Singapore-based Defendants, OCBC, DBS, and UOB, are not signatories to this memorandum of law given that they have filed their own separate memorandum of law, though their separate memorandum adopts and incorporates in full the arguments herein as applied to them.

[2] "Plaintiffs' alleged assignors" refers to FrontPoint Asian Event Driven Fund L.P. ("FrontPoint") and Sonterra Capital Master Fund, Ltd. ("Sonterra") (together, the "Former Plaintiffs")—both of which purportedly the assigned claims at issue int his action to Plaintiff Fund Liquidation Holdings, LLC ("FLH").

Plaintiffs' alleged trades with other Defendants. Moreover, there can be no conspiracy jurisdiction over any of the Foreign Non-Counterparty Defendants because Plaintiffs have failed to allege that these Defendants participated in any conspiracy directed at the United States.

Second, Plaintiffs cannot establish personal jurisdiction over ANZ, CACIB, Commerzbank, or RBS plc on a conspiracy theory of jurisdiction, because none served on either the SIBOR or SOR panel during the period of Plaintiffs' alleged trades with other Defendants. Fatally, the FAC does not allege (as it must) that when ANZ, CACIB, and Commerzbank joined either the SIBOR and/or SOR panels—which was *after* Plaintiffs' trading with other Defendants had ended—they knowingly and affirmatively embraced the objectives of any alleged conspiracy-in-progress. Moreover, notwithstanding the FAC's factually unsupported allegation otherwise, RBS plc was not on either the SIBOR or SOR panels during the putative class period.

Third, Plaintiffs have not alleged that any Foreign Non-Counterparty Defendant had knowledge, direction, benefit, and control over the in-forum acts of its alleged co-conspirators for conspiracy jurisdiction to comport with due process. Plaintiffs do not allege that the Foreign Non-Counterparty Defendants even *knew* about the limited alleged transactions with Plaintiffs in the United States, let alone allege facts establishing that an agency relationship existed between the Foreign Non-Counterparty Defendants and the Defendants that allegedly entered into transactions with Plaintiffs. Nor can Plaintiffs establish personal jurisdiction over Defendants that lacked a substantial presence in, and did not purposefully avail themselves of, the privilege of doing business in the United States. In short, Plaintiffs have pleaded no suit-related contacts that can be imputed to the Foreign Non-Counterparty Defendants for purposes of establishing personal jurisdiction.

FACTUAL BACKGROUND

A. Procedural History

The Court has already issued two decisions in this action addressing personal jurisdiction. First, in *FrontPoint Asian Event Driven Fund, L.P.* v. *Citibank, N.A.*, No. 16-cv-5263, 2017 WL 3600425 (S.D.N.Y. Aug. 18, 2017) ("*SIBOR I*"), the Court dismissed Plaintiffs' First Amended Complaint for lack of personal jurisdiction as to each Defendant not subject to general jurisdiction in the United States. *Id.* at *9. This Court held that mere allegations of Defendants' trading SIBOR- and SOR-based derivatives in the United States could not establish personal jurisdiction because "Plaintiffs fail to allege which defendants entered into which derivative contracts, how these trades were collusive, or how they related to the alleged fixing of the SIBOR and SOR rates." *Id.* at *6. While the Court expressed skepticism that Plaintiffs could overcome the problems with the First Amended Complaint's jurisdictional allegations, *see* (Oral Argument Tr. at 21:11-14) (Dkt. No. 213) ("Maybe your lawsuit should be brought in Singapore. But unless you improve it with some very good allegations, you're not going to be able to do it in New York."), the Court allowed Plaintiffs to attempt to cure these legal deficiencies in an amended pleading.

Then, in *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, No. 16-cv-5263, 2018 WL 4830087 (S.D.N.Y. Oct. 4, 2018) ("*SIBOR II*"), the Court rejected with one exception all grounds alleged in Plaintiffs' Second Amended Complaint for asserting jurisdiction over the Foreign Non-Counterparty Defendants. *SIBOR II* held that the only jurisdictionally relevant conduct in the case was 24 alleged swap transactions that were purportedly tied to SGD SIBOR between Former Plaintiff FrontPoint—the alleged assignor in the interest of Plaintiff FLH—and Citibank N.A. ("Citibank") and Deutsche Bank AG ("Deutsche Bank"). *Id.* The Court held that those swap transactions sufficed to establish jurisdiction not only over Citibank and Deutsche Bank, but also

over the Foreign Non-Counterparty Defendants that participated in the Singapore Dollar ("SGD") SIBOR panel, on a conspiracy jurisdiction theory. The Court reasoned that for all members of the SGD SIBOR panel, the purpose of the alleged conspiracy was "collectively to profit from the manipulation of SIBOR" through trading of derivatives in the hopes that they would benefit overall or in other jurisdictions. *Id.* at *8. Further, *SIBOR II* dismissed all claims based on the alleged manipulation of USD SIBOR and SOR based on the absence of any allegations that Plaintiff transacted with any Defendant in any USD SIBOR or SOR-based instrument. *Id.* at *5–6.

Importantly, the Court dismissed for failure to state a claim any conspiracy claims against Defendants that were not alleged to have been participants on the SIBOR panel, including Barclays and Commerzbank, holding that "the [Second Amended Complaint] does not sufficiently allege how non-Panel Members were involved in that conspiracy." *Id.* at *4. The Court likewise held that there was no basis for exercising personal jurisdiction over such Defendants, again because "[t]here are no plausible allegations that non-Panel Members, Foreign or not, were involved in the conspiracy." *Id.* at *9. The Court explained: "[T]he mere fact that non-Panel Members traded SIBOR- and SOR-based derivatives in the United States cannot alone support jurisdiction. Such U.S. based trading . . . is an innocent activity if not connected to the Panel Members' conspiracy." *Id.* at *9.

In response to *SIBOR II*, given that all USD SIBOR and SOR-based claims had been dismissed, Plaintiff FLH filed a Third Amended Complaint necessarily limited to SGD SIBOR.[3] Defendants filed a Motion to Dismiss the Third Amended Complaint (Dkt. No. 318), asserting, *inter alia*, that Plaintiffs had failed to allege that the Foreign Non-Counterparty Defendants had

[3] In their Third Amended Complaint, Plaintiffs implicitly acknowledged the insufficiency of their allegations against non-panel member banks by dropping claims against Barclays and Commerzbank in light of their lack of membership on any SIBOR panel. Having added USD SIBOR and SOR claims back into the FAC, Plaintiffs now again include Barclays and Commerzbank as Defendants.

participated in a conspiracy to manipulate SGD SIBOR at all, let alone that they participated in a conspiracy directed at the United States. Because the Court dismissed Plaintiffs' Third Amended Complaint on standing grounds, it did not reach personal jurisdiction issues despite extensive briefing and further motions.[4] *See Fund Liquidation Holdings LLC* v. *Citibank, N.A.*, 399 F. Supp. 3d 94 (S.D.N.Y. 2019) ("*SIBOR III*"). Notably for purposes of personal jurisdiction, the Court also held in *SIBOR III* that Plaintiff FLH lacked standing to assert Former Plaintiff FrontPoint's claims, given that the governing Asset Purchase Agreement (the "APA") did not assign the claims at issue in this case. *Id.* at 103. Without disturbing the Court's finding regarding FLH's lack of standing to assert FrontPoint's claims, the Second Circuit later vacated this Court's judgment and remanded the case to this Court. *Fund Liquidation Holdings LLC* v. *Bank of Am. Corp.*, 991 F.3d 370, 375 (2d Cir. 2021).

Following remand, the Defendants consented to the filing of the Proposed Fourth Amended Complaint (while reserving all rights and without waiving any defenses), and the Court granted Plaintiffs leave to file the FAC on October 22, 2021, and entered a schedule for Defendants' motions to dismiss. Dkt. No. 436. On October 25, 2021, Plaintiffs filed the FAC (Dkt. No. 437), which led to this motion.

B. The Operative Complaint

In the FAC, Plaintiffs attempt to reintroduce USD SIBOR and SOR back into the case by adding the Moon Plaintiffs. (FAC ¶¶ 87–88.) According to the FAC, on February 16, 2009, each

[4] In support of the motion to dismiss the Third Amended Complaint, ANZ and CACIB argued that all remaining claims against them should be dismissed because neither was a member of the relevant SIBOR panel at the relevant time. In addition, Defendants argued that just as for non-panel members, there are no plausible allegations that banks which became panel members after the period in which Plaintiffs allegedly traded played any part in the alleged conspiracy. ANZ, CACIB, and RBS plc also demonstrated that they did not trade in any SGD SIBOR-based derivatives—anywhere—during the putative class period. Together, these facts made it implausible that these banks conspired to manipulate SGD SIBOR generally, let alone that they conspired to target the United States.

Moon Plaintiff entered into one "FX forward" transaction with UBS AG ("UBS") that was allegedly "priced based on USD SIBOR and SOR." (FAC ¶¶ 87–88.) The only other references to the Moon Plaintiffs *in the entire FAC* are restatements of this same allegation. (*See* FAC ¶¶ 172, 191, 200, 237, 240, 268.) Plaintiffs do not allege that the Moon Plaintiffs traded with any Defendant other than UBS.

The FAC does not allege that the Moon Plaintiffs' transactions were entered into within the United States, alleging only that each Moon Plaintiff "has its principal place of business in New York." (FAC ¶¶ 87–88.) Additionally, just as in the Third Amended Complaint, the FAC alleges that FrontPoint entered into 24 alleged swap transactions linked to SGD SIBOR "within the United States" with Deutsche Bank and Citibank. (FAC ¶ 86.) Because the Court has already found that Plaintiff FLH does not have standing to assert Former Plaintiff FrontPoint's claims, however, the only contacts that should be relevant for purposes of the personal jurisdiction inquiry are the *two transactions* between the Moon Plaintiffs and UBS.

ARGUMENT

Plaintiffs "bear[] the burden of demonstrating that the court has personal jurisdiction over *each* defendant." *Friedman* v. *Bloomberg L.P.*, 884 F.3d 83, 90 (2d Cir. 2017) (emphasis added). Here, there are no allegations that any of the Foreign Non-Counterparty Defendants traded any kind of derivatives with Plaintiffs during the alleged class period. Plaintiffs do not attempt to establish personal jurisdiction as to the Foreign Non-Counterparty Defendants based on those Defendants' own forum contacts, but instead rely exclusively on a conspiracy theory of personal jurisdiction.

To establish conspiracy jurisdiction, a plaintiff must allege that "(1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that

state." *Charles Schwab Corp.* v. *Bank of Am. Corp.*, 883 F.3d 68, 87 (2d Cir. 2018). The FAC lacks allegations sufficient to establish conspiracy jurisdiction over the Foreign Non-Counterparty Defendants.

A. THE FAC FAILS TO PLAUSIBLY ALLEGE THAT THE FOREIGN NON-COUNTERPARTY DEFENDANTS WERE PART OF ANY SIBOR OR SOR-RELATED CONSPIRACY TO BENEFIT U.S. TRADING.

The FAC satisfies none of the pleading requirements for conspiracy jurisdiction over the Foreign Non-Counterparty Defendants. To plausibly plead the existence of an antitrust conspiracy, a plaintiff must plead "enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 556 (2007). This requires plausibly alleging "parallel conduct" along with "plus factors" that "lead to an inference of conspiracy." *Mayor & City Council of Balt., Md.* v. *Citigroup, Inc.*, 709 F.3d 129, 136–37 (2d Cir. 2013). The Second Circuit has identified that plus factors may include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Id.* at 136 (quoting *Twombly* v. *Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005)).

1. Plaintiffs Rely on Impermissible Group-Pleading Allegations and the Investigation by the Monetary Authority of Singapore ("MAS"), Which Did Not Make Any Findings of Either Successful Manipulation or the Existence of Any Conspiracy.

The only Defendants alleged with any specificity to have actually traded SIBOR or SOR-based derivatives at all are those which purportedly traded directly with Plaintiffs: Deutsche Bank, Citibank, and UBS.[5] (FAC ¶¶ 86–88.) As to the Foreign Non-Counterparty Defendants, on the other hand, Plaintiffs make only generalized allegations that "Defendants' conspiracy could not have

[5] As stated above, given the Court's ruling in *SIBOR III* that Plaintiff FLH was not validly assigned Former Plaintiff FrontPoint's claims, the only relevant trades for purposes of the personal jurisdiction inquiry should be the transactions between the Moon Plaintiffs and UBS.

achieved its goal of higher profits on derivatives positions without the sale of SIBOR- and SOR-based derivatives" and that "Defendants directly or through their affiliates are dealers offering SIBOR- and SOR-based derivatives for sale in the U.S." (FAC ¶¶ 21, 75 (describing Federal Reserve Survey); *see also* FAC ¶¶ 9–13 (describing the Monetary Authority of Singapore ("MAS") investigation); ¶ 71 & n.25 (inaccurately claiming that some Defendants "conced[e] that they transacted in SIBOR- and SOR-based derivatives in the United States" simply because all 46 Defendants did not submit declarations stating that they did not transact in SIBOR- or SOR-based derivatives earlier in the case), ¶ 75 & Ex. G (relying on screenshots from Bloomberg terminals from years after the relevant period that fail to identify the corporate entity offering the products).)[6]

These impermissible, broad-brush, group-pleading allegations are vague and ambiguous. They muddle which specific Defendants and which benchmark they concern, and do not specify the instruments these Defendants allegedly traded or "offered" to trade. Such generalized allegations are insufficient to sustain Plaintiffs' claims that the Foreign Non-Counterparty Defendants were part of any conspiracy. *See In re Int. Rate Swaps Antitrust Litig.*, No. 16-md-2704, 2018 WL 2332069, at *15, *17 (S.D.N.Y. May 23, 2018) ("*IRS II*") ("[C]laims as to the motivations or actions of 'the Dealer Defendants' as a general collective bloc, or generalized claims of parallel conduct, must also be set aside, . . . as impermissible group pleading."); *see also* Dkt. No. 213 in this Action at 46:12–15, Oral Arg. On Defs.' Mot. To Dismiss First Am. Comp. ("THE COURT: It's a group pleading within a network of banks. It's a group pleading within a particular banking conglomerate. And it's a group pleading among the various conglomerates.").[7]

[6] Plaintiffs did not refile exhibits to FAC that had previously been filed along with the Third Amended Complaint, and so exhibit references herein to the FAC are technically exhibit references to the Third Amended Complaint.

[7] While these allegations are insufficient in their own right, for the avoidance of doubt Defendant ANZ, alleged to have contributed to the SIBOR rate only, has submitted a declaration specifically stating that ANZ did not trade any derivatives that reference SIBOR ("SIBOR-Based Derivatives") with any U.S.-based external counterparties during the

Plaintiffs' reliance on generalized allegations of conspiracy is further demonstrated by their citations to MAS's investigation into alleged manipulation of USD SIBOR, SGD SIBOR, and SOR. The FAC relies on generalities drawn from MAS's investigation into a wide range of alleged trading activities, relating to various currencies and benchmarks. However, as a result of that investigation, MAS did not make any findings of either successful manipulation of any benchmark or the existence of any conspiracy, let alone a conspiracy to manipulate SIBOR or SOR. At most, MAS reportedly uncovered episodic "attempts by traders" at 20 banks "to inappropriately influence financial benchmarks" generally without attributing conduct to specific benchmarks, some of which are not at issue here. (FAC, Ex. E at 1.)

Further, Plaintiffs generally allege that the amounts of additional reserves that MAS required certain Defendants to deposit with Singapore's central bank "depended on the severity of [the Bank's alleged] misconduct." (FAC ¶ 209.) Notably, as to Commerzbank (which was only on the SOR panel), MAS did not require Commerzbank to deposit *any* additional statutory reserves, as Plaintiffs expressly acknowledge. (*See* FAC ¶ 209 n.123.). Moreover, for ANZ and MUFG, MAS required only the lowest levels of statutory reserve deposit to address the unspecified alleged misconduct. (*See* FAC, Ex. E at Annex.) More broadly, the MAS findings lack any allegation whatsoever about any attempts by any Foreign Non-Counterparty Defendant to manipulate SIBOR or SOR, and thus the MAS report is wholly insufficient to show membership in some panel-wide conspiracy with respect to either SIBOR or SOR.

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putative class period. *See* Lesser Decl. Ex. H ¶ 16 (ANZ). And to the extent Plaintiffs try to allege personal jurisdiction based on products that do not actually reference SIBOR or SOR—such as FX forwards—in addition to the complete absence of specific allegations with respect to the Foreign Non-Counterparty Defendants, this argument also fails for the reasons described in the Memorandum of Law in Support of Defendants' Joint Motion to Dismiss the Fourth Amended Class Action Complaint ("Merits Brief"). *See* Merits Br. at Section II.B.

2. Plaintiffs Have Failed to Plausibly Allege that Any Purported Conspiracy Was Aimed at the United States.

Even if Plaintiffs had plausibly alleged that the Foreign Non-Counterparty Defendants entered into any conspiracy to manipulate SIBOR or SOR (which they have not), Plaintiffs still fail to plausibly allege that any purported conspiracy was aimed at the United States. The FAC's failure to plead any specific facts regarding any United States-based trades by the Foreign Non-Counterparty Defendants forecloses any inference that these Defendants would profit from any United States-directed trader-based conspiracy. *See Waldman* v. *Palestine Liberation Org.*, 835 F.3d 317, 340 (2d Cir. 2016) (allegations must have their "nucleus" or "focal point" in the United States to give rise to specific jurisdiction); *Sullivan* v. *Barclays PLC,* No. 13-cv-2811, 2017 WL 685570, at *43-*47 (S.D.N.Y. Feb. 21, 2017) (applying *Waldman* and finding lack of specific jurisdiction where allegations about the "existence, causation or intent to manipulate the Euribor" for a specific defendant did not have their "nucleus" or "focal point" in the United States).

This Court previously held that it was plausible that Defendants could have entered a conspiracy in which they would not profit from every individual trade because they would profit overall. *See SIBOR II*, 2018 WL 4830087, at *4. However, to establish conspiracy jurisdiction, Plaintiffs must allege facts supporting that such an alleged conspiracy was aimed at the United States. The FAC's group-pleaded allegations cannot support an inference that the Foreign Non-Counterparty Defendants undertook to target the United States market, particularly given that the United States is distant from the Singapore market where the alleged conduct occurred, and there are no specific allegations that the Foreign Non-Counterparty Defendants even traded these products in the United States. Therefore, Plaintiffs have not sufficiently pleaded that Defendants would have profited from any efforts to target the market in the United States. *See In re Aluminum Warehousing Antitrust Litig.*, No. 13-md-2481, 2014 WL 4277510, at *30 (S.D.N.Y. Aug. 29, 2014) (finding plaintiffs'

claim of conspiracy implausible because plaintiffs failed to show that defendants "somehow have benefitted," and without such a showing, the claim of conspiracy "does not make sense"). Plaintiffs fail to plausibly allege that any Foreign Non-Counterparty Defendant was part of any alleged conspiracy directed at the United States to manipulate either SIBOR or SOR, and therefore Plaintiffs cannot establish conspiracy jurisdiction based on these claims.

B. PLAINTIFFS CANNOT STATE A CONSPIRACY CLAIM AGAINST OR ESTABLISH PERSONAL JURISDICTION OVER ANZ, CACIB, COMMERZBANK, AND RBS PLC, WHICH WERE NOT ON EITHER THE SIBOR OR SOR PANELS WHEN THE MOON PLAINTIFFS TRADED.

ANZ, CACIB, Commerzbank, and RBS plc were not members of either the SIBOR or SOR panels between February 16, 2009, when the Moon Plaintiffs bought alleged USD SIBOR- and SOR-based SGD FX forwards, and their August 19, 2009 forward contract date ("Moon Plaintiffs' Trading Period").[8] *See* Declaration of David Lesser ("Lesser Decl.") Ex. H ¶ 12 (ANZ); Lesser Decl. Ex. I ¶¶ 9–10 (CACIB); Dkt. No. 151 ¶ 9 (Commerzbank).[9] To the extent that ANZ, CACIB, and Commerzbank (the "Late-Arriving Defendants") did participate on the SIBOR and/or SOR panels, they did not begin doing so until mid-July 2010, nearly a year after the Moon Plaintiffs' alleged trades. *See* Lesser Decl. Ex. H ¶ 11 (ANZ); Lesser Decl. Ex. I ¶¶ 9–10 (CACIB); Dkt. No. 151 ¶ 9 (Commerzbank). The FAC does not allege otherwise, but instead only pleads generally that all

[8] Defendants are using the broadest conceivable time frame for the Moon Plaintiffs' claims, despite the lack of allegations that any post-trade manipulation would have affected Plaintiffs in any way.

[9] Nor was any of these Defendants a SIBOR panel member between January 2010 and May 2010, when Former Plaintiff FrontPoint allegedly traded SGD SIBOR-based derivatives (the "FrontPoint Trading Period"). *See* Lesser Decl. Ex. H ¶ 11 (ANZ); Lesser Decl. Ex. I ¶¶ 9–10 (CACIB); Dkt. No. 151 ¶ 9 (Commerzbank never a SIBOR panel bank). However, because FrontPoint's claims, impermissibly asserted by FLH, have been dismissed for lack of subject matter jurisdiction, and because the FAC is silent about Former Plaintiff Sonterra's trading or assignment of claims to FLH (*see* Merits Br. at I.B), only the Moon Plaintiffs' Trading Period should be considered relevant to the Court's analysis of the sufficiency of the conspiracy allegations for jurisdictional purposes or otherwise. In any case, as argued below, the conspiracy allegations against the Late-Arriving Defendants would remain insufficient even if FLH could pursue claims based on FrontPoint's alleged trading.

Defendants were members of one or both panels at some unspecified time during a proposed multi-year class period. (*See* FAC ¶ 174–75.) The FAC lacks any allegation that ANZ *ever* was on the SOR panel or that Commerzbank was ever on the SIBOR panel, and inaccurately claims that RBS plc was on both. Moreover, the FAC is completely silent as to the scope and nature of CACIB, Commerzbank, and ANZ's alleged participation in the conspiracy beyond mere panel membership.

To be considered a co-conspirator, a defendant must allegedly have "knowingly joined and participated," with knowledge of "the nature and specific object of the conspiracy," *see United States* v. *Lorenzo*, 534 F.3d 153, 159–60 (2d Cir. 2008) (quoting *United States v. Rodriguez*, 392 F.3d 539, 545 (2d Cir. 2004)), or "knowing[ly] engage[d] in the conspiracy with the specific intent that the object of the conspiracy be committed." *United States* v. *Zemlyansky*, 908 F.3d 1, 10 (2d Cir. 2018). The FAC does not allege that when ANZ, CACIB, and Commerzbank joined the SIBOR or SOR panels—which was nearly a year after the Moon Plaintiffs' trading had ended—these Defendants knowingly and affirmatively embraced the objectives of an alleged conspiracy-in-progress, or joined the panels with the knowledge of the alleged conspiracy's prior acts.

Moreover, RBS plc was not a member of either the SIBOR or SOR panels at any time during the class period. As already set forth in Defendants' Motion to Dismiss the Second Amended Complaint—and as evidenced by the Final Notice issued to RBS plc in 2013 by the UK's Financial Services Authority, which Plaintiffs attached to their Second Amended Complaint—all submissions to the SIBOR or SOR panels by an RBS entity during the class period were made by The Royal Bank of Scotland N.V., not RBS plc. *See* Defs.' Joint Mem. of Law at 9 n.16 (Dkt. No. 243). Plaintiffs' affirmative decision to name RBS plc as a Defendant in the FAC should result in dismissal of all claims as against RBS plc.[10]

[10] Plaintiffs also fail to establish venue as to RBS plc because they allege no facts in the FAC sufficient to show that

C. THE EXERCISE OF CONSPIRACY JURISDICTION OVER THE FOREIGN NON-COUNTERPARTY DEFENDANTS WOULD NOT COMPORT WITH DUE PROCESS.

As explained above, to establish conspiracy jurisdiction under *Schwab*, Plaintiffs must allege that "a co-conspirator's overt acts in furtherance of the conspiracy ha[ve] sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state." *Schwab*, 883 F.3d at 87. The Second Circuit noted that "neither this Court nor the Supreme Court has delineated when one conspirator's minimum contacts allow for personal jurisdiction over a co-conspirator" but emphasized that "the mere existence of a conspiracy is not enough." *Id.* at 86.

1. An Alleged Co-Conspirator's In-Forum Conduct May Only Be Imputed to Another If An Agency Relationship Exists Between the Alleged Conspirators.

For an exercise of conspiracy jurisdiction to comport with due process, a plaintiff must establish, consistent with traditional agency principles, that the defendant directed and controlled the alleged co-conspirator's in-forum tortious conduct and knew about and benefitted from those contacts. *See Grove Press, Inc.* v. *Angleton*, 649 F.2d 121, 122 (2d Cir. 1981) ("[A] showing must

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RBS plc transacts business of a substantial character in this District, as required under Section 12 of the Clayton Act. While the Court found in *SIBOR II* that "Plaintiffs may advantage of the nationwide service of process of Fed. R. Civ. P. 4(k)(2), and the venue provisions of § 1391, and need not rely on the Clayton Act," 2018 WL 4830087, at *9, that ruling is not applicable here for multiple reasons. First, Plaintiffs do not allege Rule 4(k)(2) as a basis for personal jurisdiction in the FAC. *See* FAC ¶ 20. Second, since *SIBOR II*, there has been a growing consensus in this District that plaintiffs cannot resort to the general venue statute and Rule 4(k)(2) to circumvent Section 12's requirements. Rather, "'jurisdiction lies only in cases in which the venue provision of Section 12, not the general venue statute, is satisfied.'" *Fund Liquidation Holdings LLC v. UBS AG*, 2021 WL 4482826, at *14 n.15 (S.D.N.Y. Sept. 30, 2021) (quoting *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 198 (S.D.N.Y. 2018)). In antitrust cases, "nationwide service of process is permissible 'only in cases in which [Section 12's] venue provision is satisfied.'" *Dennis*, 343 F. Supp. 3d at 198 (citation omitted); *In re SSA Bonds Antitrust Litig.*, 420 F. Supp. 3d at 230; *see also TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1521 (2017) ("[T]he current version of § 1391 . . . includes a saving clause expressly stating that it does not apply when 'otherwise provided by law.'"). Finally, even if Rule 4(k)(2) were available here, Plaintiffs have failed to satisfy it. It is well-established in this District that when otherwise applicable, among other elements Rule 4(k)(2) requires a plaintiff to "certify that the foreign defendants are not subject to jurisdiction in any other state." *E.g.*, *In re SSA Bonds Antitrust Litig.*, 420 F. Supp. 3d at 240; *Astor Chocolate Corp. v. Elite Gold Ltd.*, 510 F. Supp. 3d 108, 134 (S.D.N.Y. 2020); *7 W. 57th St. Realty Co., LLC v. Citigroup, Inc.*, 2015 WL 1514539, at *13 (S.D.N.Y. Mar. 31, 2015), *aff'd*, 771 F. App'x 498 (2d Cir. 2019); *In re M/V MSC FLAMINIA*, 107 F. Supp. 3d 313, 322–23 (S.D.N.Y. 2015). Plaintiffs have not made that certification here, which would be inconsistent with their jurisdictional allegations as to RBS plc. *See* FAC ¶ 41.

be made that the alleged agent acted in New York for the benefit of, with the knowledge and consent of, and under some control by, the nonresident principal."); *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1341 n.11, 1343 (2d Cir. 1972), *abrogated on other grounds by Morrison* v. *Nat. Austl. Bank Ltd.*, 561 U.S. 247 (2010). Without the direction and control inherent in a traditional agency relationship, the alleged agent's actions are the mere "unilateral activity of . . . a third person," and conferring jurisdiction would violate due process. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 417 (1984); *see also Walden* v. *Fiore*, 571 U.S. 277, 286 (2014) ("Due process requires that a defendant be haled into court in a forum State based on his *own* affiliation with the State . . . .") (emphasis added).

Moreover, several judges in this District have recognized that conspiracy jurisdiction requires a plaintiff to allege the foreign defendant had knowledge, direction, and control over its co-conspirator's in-forum suit-related conduct and would benefit from such conduct. *See, e.g.*, *In re Platinum & Palladium Antitrust Litig.*, 449 F. Supp. 3d 290, 323 n.24 (S.D.N.Y. 2020) (noting that "the third prong of [the *Schwab*] test is designed to capture the traditional indicia of an agency relationship" (internal quotations omitted) (quoting *Contant v. Bank of Am. Corp.*, 385 F. Supp. 3d 284, 292 n.2, 293 (S.D.N.Y. 2019); *In re N. Sea Brent Crude Oil Futures Litig.*, No. 13-md-02475, 2017 WL 2535731, at *9 (S.D.N.Y. June 8, 2017) ("[A]n agency relationship is required to uphold jurisdiction based on a conspiracy theory."). This Court in *SIBOR I* recognized this trend, observing that federal courts "have been increasingly reluctant to extend this theory of [conspiracy] jurisdiction beyond the context of New York's long-arm statute," 2017 WL 3600425, at *8, which itself requires allegations of knowledge, direction, benefit, and control to establish conspiracy jurisdiction. *See In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 805 (S.D.N.Y. 2005) (conspiracy jurisdiction under the New York long-arm statute requires allegations that the defendant "had an

awareness of the effects in New York of [the conspiracy's] activity," that activity "was to [defendant's] benefit," and "the co-conspirators acting in New York acted at the direction or under the control or at the request of or on behalf of the out-of-state defendant"); *In re Aluminum Warehousing Antitrust Litig.*, 90 F. Supp. 3d 219, 227 (S.D.N.Y. 2015) (rejecting conspiracy theory of jurisdiction under Fed. R. Civ. P. 4(k)(1)(C) and 4(k)(2)).

Here, even assuming (counterfactually) that Plaintiffs had sufficiently alleged that the Foreign Non-Counterparty Defendants participated in conspiracies to manipulate SGD SIBOR, USD SIBOR, or SOR, exercising conspiracy jurisdiction over these Defendants would not comport with due process. *See, e.g.*, *Contant*, 385 F. Supp. 3d at 284 (dismissing foreign defendants where the complaint did not "connect these defendants' participation in the conspiracy in New York in some other way – for example by alleging facts to show that they were aware of their co-conspirators' in-forum overt acts"). The only allegations of forum contacts in the FAC concern 26 individual transactions between Plaintiffs and three Defendants, Deutsche Bank, Citibank, and UBS, and *only two* of those transactions are relevant in the wake of *SIBOR III*. (*See* FAC ¶ 86 (alleging that Former Plaintiff FrontPoint entered into 24 swap transactions with Deutsche Bank and Citibank); ¶¶ 87–88 (alleging that the Moon Plaintiffs entered into two SGD forward transactions with UBS).) Critically, there are no allegations whatsoever in the FAC that the Foreign Non-Counterparty Defendants even knew that these alleged direct transactions between Plaintiffs and other Defendants took place, let alone that any sort of agency relationship existed between the Foreign Non-Counterparty Defendants and the Defendants who allegedly traded with Plaintiffs. The FAC nowhere alleges that the Late-Arriving Defendants adopted the objectives of, or indeed had any knowledge of, their alleged co-conspirators' prior trades with Plaintiffs, a prerequisite to exercising personal jurisdiction over them.

2. Case Law Since *SIBOR II* Further Undercuts Personal Jurisdiction.

Defendants acknowledge that this Court held in *SIBOR II* that Deutsche Bank's and Citibank's transactions could serve as the basis of conspiracy jurisdiction "for all the Panel Member defendants who participated in the conspiracy" because Plaintiffs alleged a "profit-motiv[ated]" conspiracy. 2018 WL 4830087, at *8 (distinguishing *Schwab*, 883 F.3d at 87). But more recent case law in this District involving analogous circumstances emphasizes that, under the minimum contacts inquiry, conspiracy jurisdiction requires more than the mere fact that the counterparties to a few transactions happened to be in the forum. *See Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 207 (S.D.N.Y. 2018) ("There are no allegations that the Foreign Defendants expressly aimed their conduct at the forum – just that they expressly aimed their conduct at counterparties to BBSW-Based Derivative transactions around the world, some of whom happened to be in the United States."). As Judge Kaplan explained in *Dennis*, the Second Circuit's *Schwab* decision turned on allegations the "conspiracy was undertaken both because . . . 'Defendants were able to project an image of financial stability . . .' *and* because '[s]uppressing LIBOR . . . had the immediate effect of lowering Defendants' interest payment obligations on financial instruments tied to LIBOR.'" *Id.* at 205 (quoting *Schwab*, 883 F.3d at 78) (emphasis in original). As in *Dennis*, here the limited transactions of alleged co-conspirators that touch the United States "are too 'random, fortuitous, and attenuated' to be a basis for" conspiracy jurisdiction. *Id.* at 207-08 (quoting *Waldman*, 835 F.3d at 337 (brackets omitted)).[11]

[11] UBS joins in the argument set forth in this paragraph, the reasoning of which also applies to foreclose personal jurisdiction over UBS in this action. UBS maintains that all claims against it should be dismissed for lack of personal jurisdiction because (1) as a Swiss bank, it is not subject to general jurisdiction in the United States, and (2) even though the Moon Plaintiffs newly allege in the FAC that UBS is a counterparty, Plaintiffs nevertheless fail to adequately allege that UBS "expressly aimed [its] conduct at the forum," as required to justify the exercise of specific jurisdiction. *Dennis*, 343 F. Supp. 3d at 207. Instead, Plaintiffs merely allege that UBS "expressly aimed [its] conduct

In addition, the Court's ruling in *SIBOR II* that conspiracy jurisdiction comported with due process was based on the Court's determination that each of the Foreign Non-Counterparty Defendants "are alleged to have substantial presence in the U.S." 2018 WL 4830087, at *8–9. The Court explained: "The Panel Members are some of the world's largest financial institutions, and are alleged to have substantial presence in the U.S." *Id.* at 9. However, this determination does not apply to certain Foreign Defendants, including the Late-Arriving Defendants—these Defendants are all foreign entities headquartered abroad with comparatively small (and often very limited) operations in the United States, or with limited U.S. offices that were involved in neither the determination nor submission of SIBOR or SOR rates during the putative class period. *See, e.g.*, Lesser Decl. Ex. H ¶¶ 8, 14–15 (ANZ); Lesser Decl. Ex. I ¶¶ 6–7, 9 (CACIB); Dkt. No. 151 ¶¶ 3–9 (Commerzbank); Dkt. No. 322 ¶¶ 2–6 (MUFG); Dkt. No. 149 ¶¶ 2–7 (BNPP); Dkt. No. 166 ¶¶ 8–9 & Part B above (RBS plc); Dkt. No. 147 ¶¶ 7–23 (Barclays); Dkt. No. 167 ¶¶ 3–5, Dkt No. 328 ¶¶ 4–5 (Standard Chartered); Dkt. No. 170 ¶¶ 3, 5–6, 8–10 (UBS). Given these facts, it is implausible that these Defendants "purposefully availed" themselves of doing business in the United States by participating in an antitrust conspiracy outside of the United States with respect to Singapore-focused financial products.

For all these reasons, specific jurisdiction does not exist over the Foreign Non-Counterparty Defendants based on a theory of conspiracy jurisdiction.

CONCLUSION

For the foregoing reasons, the claims against the Foreign Non-Counterparty Defendants should be dismissed for lack of personal jurisdiction.

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at counterparties to . . . transactions around the world, some of whom happened to be in the United States." *Id.* Such limited allegations of isolated transactions do not establish that UBS participated in a conspiracy that targeted the forum.

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