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,

v.

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.: 1:16-cv-05263-AKH

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS THE FOURTH AMENDED CLASS ACTION COMPLAINT

ORAL ARGUMENT REQUESTED

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Defendants[1] respectfully submit this joint memorandum of law in support of their motion to dismiss the Fourth Amended Complaint ("FAC") for lack of subject matter jurisdiction and failure to state a claim pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

The FAC is the fifth attempt in this case to state a viable claim. But it contains the same fatal flaws that repeatedly have warranted dismissal in this and other similar cases. Accordingly, the FAC should be dismissed.

According to the Second Circuit, this Court's subject matter jurisdiction turns on whether, prior to the commencement of this litigation, Plaintiff Fund Liquidation Holdings LLC ("FLH") received an assignment of relevant claims from either of the two dissolved entities that initiated this action without Article III standing: FrontPoint Asian Event Driven Fund L.P. ("FrontPoint") and Sonterra Capital Master Fund, Ltd. ("Sonterra") (together, the "Former Plaintiffs"). *See Fund Liquidation Holdings LLC* v. *Bank of Am. Corp.* (*SIBOR Appeal*), 991 F.3d 370, 386 (2d Cir. 2021). But the FAC, like Plaintiffs' deficient Third Amended Complaint ("TAC" (ECF No. 308)) before it, fails to allege that FLH received any assignment of claims that would authorize it to continue this litigation in place of either FrontPoint or Sonterra. This jurisdictional defect compels dismissal of FLH's claims. It also dooms the claims of two new Plaintiffs that belatedly seek to enter this litigation for the first time through the FAC: Moon

[1] The "Defendants" are Australia and New Zealand Banking Group, Ltd. ("ANZ"), Bank of America, N.A., Barclays Bank PLC, BNP Paribas, S.A., Commerzbank AG, Crédit Agricole Corporate and Investment Bank ("CACIB"), DBS Bank Ltd., MUFG Bank, Ltd. (f/k/a The Bank of Tokyo-Mitsubishi UFJ, Ltd.), Oversea-Chinese Banking Corporation Ltd., The Royal Bank of Scotland plc (n/k/a NatWest Markets plc), Standard Chartered Bank, UBS AG ("UBS"), and United Overseas Bank Ltd. The FAC also names as defendants the following entities that are not party to this motion: Citibank, N.A., JPMorgan Chase Bank, N.A., ING Bank, N.V., Credit Suisse AG, The Hongkong and Shanghai Banking Corporation Ltd., and Deutsche Bank AG.

Capital Partners Master Fund Ltd. and Moon Capital Master Fund Ltd. (together, the "Moon Plaintiffs"). The Court should dismiss this action on this basis alone.

Even if the Court were to look past that issue, however (and it need not), it is apparent that this action should be dismissed because the FAC otherwise fails to state a claim. This Court's past rulings establish that any claim FLH may seek to assert is not viable. And the Moon Plaintiffs' antitrust claims arising solely from alleged transactions in foreign exchange forwards ("FX forwards") are materially similar to the claims the Court rejected when Sonterra asserted them.

Thus, the FAC should be dismissed for multiple independent reasons:

First, the FAC should be dismissed for lack of subject matter jurisdiction because its jurisdictional allegations are facially deficient. Under the Second Circuit's reasoning, this action can proceed only if FLH stood ready to "be substituted into the action" pursuant to Rule 17 when it was commenced.[2] *SIBOR Appeal*, 991 F.3d at 386 (action should "be dismissed for want of subject-matter jurisdiction" if "the real party in interest . . . lacks standing itself").[3] To that end, the FAC asserts that FrontPoint assigned relevant claims to FLH. (FAC ¶¶ 82-86.) But this Court has already held that the "unambiguous" terms of the Asset Purchase Agreement ("APA") governing the FrontPoint assignment show that FrontPoint did *not* assign to FLH the antitrust and state law claims asserted in the FAC. *See Fund Liquidation Holdings LLC* v. *Citibank, N.A.* (*SIBOR III*), 399 F. Supp. 3d 94, 102-04 (S.D.N.Y. 2019). The Second Circuit

[2] Defendants have filed a petition for a writ of certiorari with the Supreme Court to challenge this aspect of the Second Circuit's decision. Even if FLH had been assigned the right to bring the claims at issue here, this action has been a nullity from the outset, and it could not have been salvaged by way of a Rule 17 substitution, because it was initiated by two dissolved entities that lacked Article III standing. *See SIBOR Appeal*, 991 F.3d 370, *petition for cert. filed sub nom. Bank of Am. Corp.* v. *Fund Liquidation Holdings LLC*, No. 21-505.

[3] Unless otherwise stated, all internal citations and internal quotation marks are omitted.

did not disturb that ruling on appeal. *SIBOR Appeal*, 991 F.3d at 392-93 & n.15. Thus, the allegations in the FAC fail to establish subject matter jurisdiction.

Second, any effort Plaintiffs might make to try to salvage this action by relying on facts outside the pleadings regarding the purported assignment of claims from Sonterra to FLH would also fail. As this Court has held, to demonstrate Article III standing on the basis of a purported assignment, FLH must allege facts in the operative complaint "show[ing] how [FLH] got the[] assignment," and how the assignment gave FLH "the ability to sue." *SIBOR III*, 399 F. Supp. 3d at 100 (quoting *FrontPoint Asian Event Driven Fund, L.P.* v. *Citibank, N.A.* (*SIBOR II*), 2018 WL 4830087, at *12 (S.D.N.Y. Oct. 4, 2018)). The FAC does not even reference Sonterra, let alone allege *any* facts regarding the Sonterra assignment. Even if it did, that purported assignment would not save this action for Plaintiffs. In a similar case brought by FLH concerning Yen LIBOR, Judge Daniels interpreted the APA between Sonterra and FLH and held that the APA did not convey to FLH the right to pursue the same kinds of claims that FLH seeks to assert in this action. *See Fund Liquidation Holdings LLC* v. *UBS AG* (*FLH Yen LIBOR*), 2021 WL 4482826, at *4-5 (S.D.N.Y. Sept. 30, 2021). Although FLH argued to Judge Daniels that this Court and the Second Circuit had held that the Sonterra APA assigned relevant claims to FLH, Judge Daniels correctly held that neither this Court nor the Second Circuit had resolved the issue, and that the unambiguous terms of the Sonterra APA show that it did not assign claims regarding foreign exchange derivatives—the instruments that were the basis for Sonterra's claims in this action. *Id*. at 4-5 & n.5. Further, even if the Sonterra APA purported to transfer to FLH the right to bring the claims asserted in this action, the assignment would be invalid because it would violate New York's statutory prohibition on champerty.

Third, the absence of any valid assignment of relevant claims to FLH compels dismissal of the FAC in its entirety because the Moon Plaintiffs cannot join an action over which this Court lacks subject matter jurisdiction. The Second Circuit's opinion makes clear that, without a valid assignment from the Former Plaintiffs, FLH lacks standing and jurisdiction has always been absent. *See SIBOR Appeal*, 991 F.3d at 386. And "[t]he longstanding and clear rule is that if jurisdiction is lacking at the commencement of [a] suit, it cannot be aided by the intervention of a [plaintiff] with a sufficient claim." *Pressroom Unions-Printers League Income Sec. Fund* v. *Cont'l Assurance Co.*, 700 F.2d 889, 893 (2d Cir. 1983) (alterations in original) (affirming denial of a motion for leave to amend to add plaintiffs with standing to an action). Moreover, the Moon Plaintiffs' belatedly asserted claims are untimely because the Moon Plaintiffs cannot claim the benefit of relation back or tolling based on an action over which this Court never had subject matter jurisdiction.

Fourth, even if this Court were to determine that it has subject matter jurisdiction (which it does not), the Moon Plaintiffs' claims should be dismissed because the Moon Plaintiffs lack antitrust standing. The Moon Plaintiffs fail to plead facts to show that they suffered any injury as a result of the alleged manipulation of any of the three benchmark interest rates at issue in this litigation: (i) the Singapore Interbank Offered Rate for Singapore dollars ("SGD SIBOR"), (ii) the Singapore Interbank Offered Rate for United States dollars ("USD SIBOR," and together with Singapore dollar ("SGD") SIBOR, "SIBOR"), and (iii) the Singapore Swap Offered Rate for Singapore dollars ("SOR"). (FAC ¶¶ 87-88, 237-40.) Further, the Moon Plaintiffs fail to plead that they are efficient enforcers of the antitrust laws because they do not adequately allege any connection between SGD SIBOR, USD SIBOR or SOR and the prices of

the FX forwards they allegedly traded. *See FrontPoint Asian Event Driven Fund, L.P.* v. *Citibank, N.A.* (*SIBOR I*), 2017 WL 3600425, at *12 (S.D.N.Y. Aug. 18, 2017).[4]

Finally, for the reasons set forth in the 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 (the "Personal Jurisdiction Memorandum"), the Court should dismiss the Moon Plaintiffs' claims as to all of the Defendants who are not alleged to have transacted with the Moon Plaintiffs because the Moon Plaintiffs do not adequately allege that those Defendants participated in a conspiracy to manipulate USD SIBOR or SOR.[5]

BACKGROUND

A. The Former Plaintiffs That Initiated This Action

Former Plaintiff FrontPoint was an investment fund that dissolved on November 11, 2011, years before this action was commenced. (*See* FAC ¶¶ 83-84.) As the Second Circuit has already held, FrontPoint lacked Article III standing to initiate this action. *SIBOR Appeal*, 991 F.3d at 386. The FAC asserts that FrontPoint entered into "at least 24 swap transactions" with Deutsche Bank AG and Citibank, N.A. during the Class Period[6] and that at least one of these swap transactions was "based on one-month SIBOR." (FAC ¶¶ 86, 236.) The

[4] Further, to the extent that the FAC's stray references to purported RICO violations in the "Class Action Allegations" and "Prayer for Relief" sections of the FAC could be construed as an attempt to resuscitate Plaintiffs' long-dismissed RICO claims (*see* FAC ¶ 249, p. 99), this effort must fail. *See SIBOR II*, 2018 WL 4830087, at *10-11 (dismissing RICO claims with prejudice).

[5] Although Bank of America, N.A. does not move to dismiss for lack of personal jurisdiction, the arguments made in Section 1 of the Personal Jurisdiction Memorandum apply to Bank of America, N.A. for purposes of Defendants' motion to dismiss pursuant to Rule 12(b)(6) because Bank of America, N.A. is not alleged to have transacted with the Moon Plaintiffs either.

[6] The "Class Period" is defined in the FAC as "[be]ginning on at least January 1, 2007 and continuing through at least December 31, 2011." (FAC ¶ 3.)

FAC does not allege that FrontPoint engaged in any relevant transactions with any Defendant, nor does it allege that it ever entered into any USD SIBOR- or SOR-based transactions. (*Id.*)

Former Plaintiff Sonterra was an investment fund that dissolved on December 28, 2012, years before this action was commenced. *SIBOR II*, 2018 WL 4830087, at *11. The Second Circuit has already held that Sonterra, like FrontPoint, lacked Article III standing to initiate this action. *SIBOR Appeal*, 991 F.3d at 386. Although Sonterra is not mentioned in the FAC, it alleged certain transactions in two prior complaints that this Court held failed to state a claim. *See SIBOR I*, 2017 WL 3600425, at *12-13 (dismissing the claims Sonterra asserted in Plaintiffs' First Amended Class Action Complaint (ECF No. 119)); *SIBOR II*, 2018 WL 4830087, at *5-6 (dismissing the claims Sonterra asserted in Plaintiffs' Second Amended Complaint (ECF No. 237)). Sonterra has never alleged that it transacted with any Defendant, or that it ever entered into any transaction that directly referenced USD SIBOR, SGD SIBOR or SOR. Instead, it previously alleged that it traded only "Singapore Dollar foreign exchange forwards" with unidentified counterparties, sometime "between September 2010 and August 2011," on unspecified terms. (SAC ¶¶ 82, 230.)

Like Plaintiffs' prior complaints, the FAC alleges that an FX forward "is a derivative that provides for the purchase or sale of one currency (*e.g.*, SGD) in terms of another (*e.g.*, USD) on some future date (*e.g.*, 90 days from now) at a price agreed upon today." (FAC ¶ 191.) Plaintiffs do not allege that any terms of an FX forward contract use, reference or incorporate SIBOR or SOR. Rather, the FAC asserts that FX forwards are somehow "priced using a formula that incorporates SOR and USD SIBOR." (FAC ¶ 238.) Plaintiffs do not allege that SGD SIBOR has any impact on FX forwards. (*See, e.g.*, *id.*)

B. The Named Plaintiffs in the FAC

Plaintiff FLH is a Delaware limited liability company. (FAC ¶ 82.) Like the TAC, the FAC vaguely alleges that FrontPoint entered into an APA with FLH through which it assigned the claims at issue in this action related to FrontPoint's alleged SGD SIBOR-linked swap transactions. (*Compare* FAC ¶¶ 84-86, *with* TAC ¶¶ 83-85.)

The Moon Plaintiffs, which are new to this action, are investment funds. (FAC ¶¶ 87-88.) They each allegedly entered into a single FX forward transaction with UBS AG that was allegedly "priced based on USD SIBOR and SOR." (*Id.*) Rather than allege any facts showing that any supposed manipulation of USD SIBOR or SOR caused the Moon Plaintiffs any harm, the FAC asserts, in conclusory fashion, that the Moon Plaintiffs transacted at unspecified "artificial price[s]" and somehow were "overcharged and/or underpaid." (*Id.* ¶¶ 87-88.)

C. The Defendants

The Defendants named in the FAC are 13 of the "multinational banks" that were allegedly "responsible for setting SIBOR[7] and/or SOR[8] during the Class Period." (FAC ¶¶ 2, 4, 168-69.) The FAC does not allege which banks served on the panel for SGD SIBOR as opposed

[7] Plaintiffs allege that the following Defendants served on the SIBOR panel: (1) ANZ; (2) Bank of America, N.A.; (3) BNP Paribas, S.A.; (4) Citibank, N.A.; (5) CACIB; (6) Credit Suisse AG; (7) DBS Bank Ltd.; (8) Deutsche Bank AG; (9) The Hongkong and Shanghai Banking Corporation Ltd.; (10) JPMorgan Chase Bank, N.A.; (11) MUFG Bank, Ltd. (f/k/a The Bank of Tokyo-Mitsubishi UFJ, Ltd.); (12) Oversea-Chinese Banking Corporation Ltd.; (13) The Royal Bank of Scotland plc (n/k/a NatWest Markets plc); (14) Standard Chartered Bank; (15) UBS; and (16) United Overseas Bank Ltd. (FAC ¶ 168.) Plaintiffs do not allege that Barclays Bank PLC or Commerzbank AG were ever on the SIBOR panel.

[8] Plaintiffs allege that the following Defendants served on the SOR panel: (1) Bank of America N.A.; (2) Barclays Bank PLC; (3) BNP Paribas, S.A.; (4) Citibank, N.A.; (4) Commerzbank AG; (5) CACIB; (6) Credit Suisse AG; (7) DBS Bank Ltd.; (8) Deutsche Bank AG; (9) The Hongkong and Shanghai Banking Corporation Ltd.; (10) ING Bank, N.V.; (11) JPMorgan Chase Bank, N.A.; (12) MUFG Bank, Ltd. (f/k/a The Bank of Tokyo-Mitsubishi UFJ, Ltd.); (13) Oversea-Chinese Banking Corporation Ltd.; (14) The Royal Bank of Scotland plc (n/k/a NatWest Markets plc); (15) Standard Chartered Bank; and (16) UBS. (FAC ¶ 169.) Plaintiffs do not allege that ANZ or United Overseas Bank Ltd. were ever on the SOR panel.

to USD SIBOR, and the FAC does not allege the time periods during the Class Period when the Non-Settling Defendants supposedly served on either panel.

D. The Three Benchmarks at Issue

USD SIBOR, SGD SIBOR, and SOR are three of the many different benchmarks that were administered by the Association of Banks in Singapore (the "ABS"). (*Id.* ¶¶ 4, 170-171.) During the Class Period, both USD SIBOR and SGD SIBOR were calculated each business day for several maturities (called "tenors") based on submissions made by each member of a panel of banks. (*Id.* ¶ 171.) Each contributor bank's SIBOR submission represented its estimate of the hypothetical rate at which it could borrow unsecured funds (in U.S. dollars for USD SIBOR and Singapore dollars for SGD SIBOR) in the Singapore market, were it to do so by asking for, and then accepting, interbank offers in a reasonable market size, just prior to 11:00 a.m. Singapore time. (*Id.* ¶¶ 170-171.) Thomson Reuters ("Reuters") collected the USD SIBOR and SGD SIBOR submissions and calculated the official rates for each currency and tenor by discarding submissions in the highest and lowest quartiles, and then averaging the remaining submissions. (*Id.*) Reuters published the results as the daily USD SIBOR and SGD SIBOR rates. (*Id.* ¶ 171.)

SOR, on the other hand, is a benchmark that is constructed to reflect the implied cost of borrowing Singapore dollars synthetically by borrowing U.S. dollars for the same maturity, exchanging them into Singapore dollars, and then exchanging them back into U.S. dollars upon maturity of the initial U.S. dollar loan. (*Id.* ¶ 172.) During the Class Period, SOR was calculated based on a formula that included three submission-based variables: (i) USD SIBOR; (ii) the "spot rate," which reflected submissions regarding the midpoint of bids and offers for the sale of Singapore dollars against U.S. dollars; and (iii) the "forward points," which

reflected submissions regarding indicative quotations of forward points on an offer for the future sale of Singapore dollars against U.S. dollars.[9] SOR was calculated daily using the trimmed mean of the spot rate and forward swap points submissions.[10]

E. Procedural History

1. The First Amended Class Action Complaint and *SIBOR I*

This lawsuit was initiated on July 5, 2016, by the filing of an initial complaint in which FrontPoint and Sonterra were the only named Plaintiffs. (ECF No. 4.) That pleading did not disclose that FrontPoint and Sonterra had been dissolved years earlier or plead any facts about any purported assignment of claims to FLH. (*See, e.g.*, ECF No. 4 ¶¶ 18-19.) On October 31, 2016, the initial complaint was supplanted by the First Amended Class Action Complaint (the "Amended Complaint" or "Am. Compl."), which also failed to disclose that FrontPoint and Sonterra had years earlier been dissolved, and did not plead any facts about any purported assignment of claims to FLH. (ECF No. 119 ¶¶ 20-21.)

On August 18, 2017, this Court issued a detailed decision dismissing the Amended Complaint without prejudice on multiple grounds. (ECF No. 225.) As relevant here,

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[9] *See* Ex. CC to the Declaration of Matthew J. Porpora ("Porpora Decl."), dated October 18, 2017 (ECF No. 244-1) at 1, 4 (SFEMC Statement on ABS Financial Benchmarks, Singapore Foreign Exchange Market Committee (June 14, 2013) (hereinafter, "SFEMC Statement")). (Porpora Decl. Ex. DD at 55-56 (2006 ISDA Definitions, International Swaps and Derivatives Association, Inc. (ECF No. 244-2) (describing issues regarding the mechanics of SOR in the context of how to calculate the SOR backup reference rate, "SGD-SOR-Reference Banks").) When evaluating the sufficiency of the Complaint, the Court may consider, among other things, "documents attached to the complaint as an exhibit or incorporated in it by reference," "matters of which judicial notice may be taken," or "documents either in plaintiffs' possession or of [sic] which plaintiffs had knowledge and relied on in bringing suit." *Roth* v. *CitiMortgage Inc.*, 756 F.3d 178, 180 (2d Cir. 2014). Each of Defendants' Exhibits falls into one or more of these categories.

[10] Porpora Decl. Ex. CC (SFEMC Statement) at 1-2. The FAC, like prior pleadings, misstates the SOR calculation process and incorrectly asserts that an entirely transaction-based process was in place during part of the Class Period. (*See* FAC ¶ 174.) As Defendants have previously explained, this is not true and this fact is judicially noticeable. (*See* ECF No. 243 at 5.) Regardless, Plaintiffs' allegations fail for the reasons set forth below regardless of what the Court may assume about the SOR calculation process for the purposes of deciding this motion to dismiss.

the Court dismissed Sonterra's antitrust claims, finding that Sonterra failed to plead that it was an efficient enforcer of the antitrust laws because it failed to adequately allege that defendants' alleged manipulation of SIBOR or SOR had any impact on its FX forwards. *SIBOR I*, 2017 WL 3600425, at *12-13. The Court expressly left open the issue of whether Sonterra's antitrust claims also failed because Sonterra did not trade directly with a defendant. *Id*. at *13.

2. The Second Amended Class Action Complaint and *SIBOR II*

On September 18, 2017, Plaintiffs filed their Second Amended Class Action Complaint ("SAC"). (ECF No. 237.) The SAC once again listed FrontPoint and Sonterra as the only named plaintiffs and pled nothing about any assignment of claims to FLH. But the SAC revealed for the first time that Sonterra and FrontPoint no longer existed. (*See id.* ¶¶ 81, 82.)

Defendants moved to dismiss the SAC on several grounds (ECF Nos. 238, 239, 243), including that Sonterra and FrontPoint lacked capacity to sue because they had been dissolved. (*See* ECF No. 243 at 13-16.) In response, Plaintiffs asserted that FLH—a third-party entity not named in the SAC—had capacity to assert the claims at issue because Sonterra and FrontPoint had each supposedly executed an APA assigning its claims to FLH. (*See* ECF No. 249 at 44-52.)

On October 4, 2018, the Court granted in part Defendants' motion to dismiss. (ECF No. 302.) As relevant here, the Court dismissed with prejudice all of Sonterra's claims and held that Sonterra was not an efficient enforcer of the antitrust laws because it "did not enter into transactions directly with any of the defendants." *SIBOR II*, 2018 WL 4830087, at *5-6. The Court also held that FrontPoint lacked antitrust standing to assert claims regarding USD SIBOR and SOR because it did not allege that it transacted in financial products linked to either rate. *Id*. at *5.

With respect to the issue of capacity, the Court observed that the FrontPoint and Sonterra APAs "*appear* to show a full assignment of rights to FLH, which [would] therefore ha[ve] capacity to sue." *Id.* at *11 (emphasis added). The Court, however, did not rule that the two APAs successfully assigned to FLH the respective rights of Sonterra and FrontPoint to bring the claims asserted in the SAC. Rather, it granted Plaintiffs leave to amend to attempt to substitute FLH "and allege the assignments of interest." *Id.* at *11-12. In so doing, the Court expressly instructed Plaintiffs to explain "how they got their assignment" and give "an interpretation of the contract to show that they have the ability to sue . . . in [their] pleading." Transcript of April 12, 2018 Proceedings (ECF No. 282) ("Apr. 2018 Tr.") at 48:2-5; *see also SIBOR III*, 399 F. Supp. 3d at 99-100, 102 (explaining the Court's rulings and instructions related to the assignments).

3. The Third Amended Complaint, Proposed Fourth Amended Complaint and *SIBOR III*

On October 26, 2018, FLH filed the TAC. (ECF No. 308.) In it, FLH asserted antitrust and breach of the implied covenant claims regarding the alleged manipulation of SGD SIBOR based on conclusory allegations that FrontPoint assigned relevant claims to FLH pursuant to an APA. (ECF No. 308 ¶¶ 83, 84.) But, presumably because the Court dismissed all of Sonterra's claims with prejudice in *SIBOR II*, FLH did not assert any claims purportedly assigned by Sonterra or plead a single fact about any purported Sonterra assignment.

Before the Court could rule on Defendants' motion to dismiss the TAC, FLH moved for leave to amend (ECF No. 348) to file a Proposed Fourth Amended Class Action Complaint ("PFAC") (ECF No. 348-1). In the PFAC, FLH once again asserted the claims regarding SGD SIBOR that purportedly had been assigned by FrontPoint and once again omitted reference to any claims purportedly assigned by Sonterra. (*See, e.g.*, PFAC ¶¶ 82-86.) But the

PFAC also added allegations regarding a new set of Plaintiffs, the Moon Plaintiffs, which asserted claims regarding USD SIBOR and SOR based on two alleged transactions in FX forwards with just one of the defendant banks, UBS AG. (*See, e.g.*, PFAC ¶¶ 87-88.)

On July 26, 2019, the Court granted Defendants' motion to dismiss the TAC and denied FLH's motion for leave to amend. (ECF No. 393.) The Court held that the FrontPoint "APA does not assign the claims at issue in this case, and [FLH] lacks standing to assert them." *SIBOR III*, 399 F. Supp. at 103. Additionally, the Court ruled that it lacked subject matter jurisdiction because "FrontPoint and Sonterra lacked capacity to sue" and "[t]he substitution of FLH under Fed. R. Civ. P. 17(a)(3) could not repair the basic deficiency of FrontPoint's and Sonterra's pleading." *Id.*[11] For this same reason, the Court denied FLH's motion for leave to amend to file the PFAC and add the Moon Plaintiffs to this litigation. *Id*. at 104-05. Accordingly, the Court entered judgment for Defendants. Plaintiffs appealed.

4. The *SIBOR Appeal*

On appeal, the Second Circuit affirmed this Court's determination that FrontPoint and Sonterra lacked Article III standing because they were dissolved years before this action was initiated. *SIBOR Appeal*, 991 F.3d at 386. But the Second Circuit held that those parties' lack of Article III standing did not, in and of itself, render this action a nullity. Instead, the Second Circuit explained that Article III "is satisfied so long as a party with standing to prosecute the specific claim in question exists at the time the pleading is filed," and that party is "substituted into the action within a reasonable time." *Id.*

[11] Although the Court noted that Sonterra lacked capacity to sue, it declined to consider the specifics of the Sonterra APA's purported assignment of rights to FLH. *See SIBOR III*, 399 F. Supp. 3d at 104 (rejecting Plaintiffs' contention that the Court "may have jurisdiction based on the somewhat broader language of the assignment of claims from Sonterra to FLH," as Sonterra's claims were "dismissed because it was not an efficient enforcer" and "FLH, as assignee, has no greater capacity than its assignor").

After articulating this new rule, the Second Circuit applied it to the procedural history of this case, some of which the Second Circuit recited incorrectly. When explaining its understanding of the procedural history of this action at the outset of its decision, the Second Circuit stated that, in *SIBOR II*, the "district court . . . concluded" that FLH received a valid assignment from FrontPoint, but, in *SIBOR III*, the "district court . . . walked back its prior determination and concluded that FrontPoint had not effectively assigned its claims to [FLH], meaning that even if [FLH] could join this case through Rule 17, it would lack standing to assert FrontPoint's claims." *SIBOR Appeal*, 991 F.3d at 377-78. With respect to Sonterra, the Second Circuit stated that, in *SIBOR II*, "[w]hile the district court found that Sonterra had also assigned its claims to [FLH], it dismissed Sonterra's remaining claims (all of which were antitrust claims) with prejudice, reasoning that, because Sonterra had not transacted directly with any of the defendants, it was not an efficient enforcer of the antitrust laws." *Id*. at 377. Later in the decision, the Second Circuit went on to explain that, based on its understanding of the procedural history of the case, it did not need "to resolve whether [FLH] received a valid assignment from FrontPoint because the district court already concluded that [FLH] received such an assignment from Sonterra." *Id.* at 392. In fact, this Court never ruled—in *SIBOR II* or otherwise—that Sonterra had validly assigned its claims to FLH. (*See supra*, Background Section E.2.)

Nonetheless, based on its (incorrect) assumption that this Court had already ruled on the Sonterra assignment and expressly without deciding whether the Sonterra APA validly assigned relevant claims to FLH, the Second Circuit remanded the case to this Court "for further proceedings," noting that this Court should grant FLH's motion for leave to file the PFAC so long as "the amendment to add the Moon [Plaintiffs] as class representatives satisfies the requirements of Federal Rule of Civil Procedure 15(c)(1)(B)," and "so long as the proposed

Fourth Amended Complaint otherwise plausibly states a claim on which relief can be granted." *Id.* at 393.

5. The Fourth Amended Complaint

On October 21, 2021, the Court held a status conference to address how this case should proceed. At the conference, Plaintiffs took the position that the Court should immediately grant FLH's motion for leave to amend to file the PFAC and that Defendants should be required to answer it without any further motion practice. (*See* Transcript of October 21, 2021 Proceedings (ECF No. 438) ("Oct. 2021 Tr.") at 4:12–14:18.) In response, Defendants consented to the filing of the PFAC (while reserving all rights and without waiving any defenses), and explained Defendants' position that, upon the filing of a new operative complaint, Defendants would be entitled to move against it. The Court agreed and entered an appropriate schedule. (ECF No. 436.) On October 25, 2021, FLH filed the PFAC as the FAC (ECF No. 437), which led to this motion.

ARGUMENT

I. THE FAC SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

"The party invoking federal jurisdiction bears the burden of establishing" Article III standing in order to invoke the subject matter jurisdiction of the court. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A plaintiff must have Article III standing "at the commencement of the litigation." *Davis* v. *Fed. Election Comm'n*, 554 U.S. 724, 732 (2008). "While the proof required to establish standing increases as the suit proceeds, the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Id*. at 734.

In this case, under the Second Circuit's ruling, the Court's subject matter jurisdiction turns on whether, prior to the commencement of this litigation, FLH received a valid assignment of relevant claims from either FrontPoint or Sonterra. *See SIBOR Appeal*, 991 F.3d at 386. In *SIBOR III*, this Court made clear that Plaintiffs must plead facts regarding any assignment that they intend to rely on to demonstrate FLH's Article III standing.[12] When this case was remanded by the Second Circuit for further proceedings, Plaintiffs could have sought leave to amend their pleadings to plead the Sonterra assignment. Although any such effort would have been futile because, like the FrontPoint assignment, the Sonterra assignment did not assign to FLH the claims at issue in this action, Plaintiffs chose to rely on the FAC, which fails to plead any facts sufficient to invoke this Court's subject matter jurisdiction.

A. The FAC Fails To Plead Any Facts Sufficient To Establish Subject Matter Jurisdiction.

Since the FAC makes no mention of Sonterra, the only allegations in the FAC that attempt to demonstrate FLH's standing are allegations carried over from the TAC regarding the purported FrontPoint assignment. (*Compare* FAC ¶¶ 84-85, *with* TAC ¶¶ 83-84.) But this Court has already determined that those allegations are deficient. The terms of the FrontPoint APA are "unambiguous on their face" and do "not assign the claims at issue in this case." *SIBOR III*, 399 F. Supp. 3d at 100-03. The FrontPoint APA did not assign the right to pursue any state common law claim and did not contain the requisite "unambiguous assignment" of the right to assert antitrust claims because it conveyed only the right to assert claims "arising out of . . . [a]

[12] *SIBOR III*, 399 F. Supp. 3d at 100 (explaining that, in connection with *SIBOR II*, this Court "granted plaintiff leave to amend and to substitute FLH as the real party in interest, and instructed plaintiffs to show [in the pleading] how they got their assignment and give [the Court] an interpretation of the contract to show that they have the ability to sue"). The Court's directive to FLH to plead any supposed assignment reflects black-letter law establishing that any jurisdictional analysis should begin with the allegations in the operative complaint. *See, e.g.*, *Gale* v. *Chi. Title Ins. Co.*, 929 F.3d 74, 78 (2d Cir. 2019).

securities class action lawsuit." *Id*. Accordingly, the FAC alleges no facts sufficient to plead subject matter jurisdiction. And the allegations in the FAC related to FrontPoint's purported claims arising from SGD SIBOR swaps are irrelevant because FLH lacks standing to assert them. *Id*. Because the jurisdictional allegations in the FAC are facially deficient, the FAC must be dismissed.

B. Reference to the Unpled APA Between Sonterra and FLH Cannot Salvage This Action Because That APA Did Not Assign Relevant Claims.

Even if Plaintiffs had pled facts concerning the purported assignment of claims from Sonterra to FLH, those allegations would not help them. The unambiguous terms of the Sonterra APA[13] make clear that FLH lacks Article III standing for two reasons. *First*, the Sonterra APA assigned to FLH only the right to bring claims related to "debt and/or equity securities," not the FX forwards at issue in this litigation. *Second*, to the extent that the Sonterra APA can be read to convey the claims at issue in this action (and it cannot), that assignment is invalid because it contravenes New York's prohibition on champerty.

1. The Sonterra APA Did Not Assign Rights Regarding Claims Arising Out of the Financial Products at Issue in This Action.

The unpled Sonterra APA includes a series of interlocking definitions, which are discussed at length below, but at bottom, a single phrase unambiguously limits the scope of the assignment of claims from Sonterra to FLH: "debt and/or equity securities." *See FLH Yen*

[13] When opposing Defendants' motion to dismiss the SAC, Plaintiffs filed the Sonterra APA under seal with this Court as Exhibit 34 to the Declaration of Geoffrey M. Horn in Support of Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim. (ECF No. 250.) This very same document was later filed publicly in connection with the *SIBOR Appeal* (ECF No. 126 (JA456-467)), *SIBOR Appeal*, 19-2719 (2d Cir.)), and the *FLH Yen LIBOR* proceedings (ECF No. 527-1, *FLH Yen LIBOR*, 15-cv-05844 (S.D.N.Y.)). The version of the Sonterra APA publicly filed in connection with the *SIBOR Appeal* and the *FLH Yen LIBOR* proceedings is cited herein and attached as Exhibit A to the Declaration of David Lesser in Support of Defendants' Motion to Dismiss the Fourth Amended Class Action Complaint, dated November 24, 2021 and filed contemporaneously herewith (the "Lesser Decl.").

LIBOR, 2021 WL 4482826, at *4-5. The claims that Sonterra sought to assert in this action were based on its alleged transactions in FX forwards, and (as Judge Daniels recently held in another action involving the same APA) those FX derivatives are not "securities" of any sort. *See id*.

Under New York law, which governs interpretation of the Sonterra APA (Sonterra APA § 6.6), "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" because "[t]he best evidence of what parties to a written agreement intend is what they say in their writing." *Ellington* v. *EMI Music, Inc.*, 21 N.E.3d 1000, 1003 (N.Y. 2014). "[P]arol evidence about a contract party's unexpressed intentions is inadmissible to vary the plain meaning of [a] contract's language." *FaceTime Commc'ns, Inc.* v. *Reuters Ltd.*, 2008 WL 2853389, at *5 (S.D.N.Y. July 22, 2008). Accordingly, interpretation of the Sonterra APA begins and ends with an analysis of its unambiguous terms.

Review of the Sonterra APA's interlocking definitions leads to the conclusion that any purported assignment effected by the APA does not extend to the claims that Sonterra sought to assert in this action. The key operative provision of the Sonterra APA transfers to FLH all of Sonterra's "right, title and interest in all of the *Assets*, including, without limitation, all of [Sonterra's] rights to recover and receive any and all amounts now or hereafter payable pursuant to any Recovery Rights." (Sonterra APA § 1.1 (emphasis added).) Thus, the APA purports to convey only "Assets," which are defined as "all of the Sellers' right, title and interest in and to any and all *Recovery Rights* and any and all amounts payable in connection with any of the Existing Claims and the Future Claims." (Sonterra APA, Art. II (emphasis added).)

"Recovery Right" is defined as, "with respect to any *Claim*, all monetary, legal and other rights held by or accruing to [Sonterra] in respect of such *Claim*." (*Id.* at 3 (emphasis

added).) "Claim" is then defined as "any Existing Claim or *Future Claim*." (*Id*. at 2 (emphasis added).) Because the Sonterra APA was executed in 2012, long before this action began, the term "Future Claims" is the next relevant term. "Future Claims" is defined as "any and all claims of [Sonterra] to Recovery Rights related to the ownership of, or any transaction in, any *Traded Securities* . . . ." (*Id.* at 3 (emphasis added).) "Traded Securities" are defined as "all *Securities* that were owned, held, acquired, sold or otherwise disposed of by [Sonterra] during the Trade Period." (*Id.* at 4 (emphasis added).)

This trail of definitions means the Sonterra APA conveyed "Assets" comprised of "Recovery Rights" regarding "Future Claims" arising from "Traded Securities," which are limited to "Securities." Thus, the key definition here is the one for the term "Securities," which is defined in the Sonterra APA as "*any debt and/or equity securities* of any kind, type or nature, including, without limitation, stock, bonds, options, puts, calls, swaps and similar instruments or rights." (*Id.* (emphasis added).) As Judge Daniels held when interpreting this very language in the Sonterra APA in the *FLH Yen LIBOR* litigation, this definition of "Securities" turns on the undefined term "securities," which "does not include FX derivatives" such as Sonterra's FX forwards. 2021 WL 4482826, at *4 (citing *Content* v. *Bank of Am. Corp.*, 2018 WL 5292126, at *9 (S.D.N.Y. Oct. 25, 2018) ("[A]lthough FX instruments are analogous to securities in some respects, Plaintiffs do not have recourse under federal securities . . . laws.")).

To be sure, to give full effect to the definition of "Securities," the definition must be read to "encompass[] securities and securities-adjacent instruments" (*e.g.*, stocks, stock options, puts and calls on stocks, and securities-based swaps). *FLH Yen LIBOR*, 2021 WL 4482826, at *4. But the definition of "Securities" cannot be read to sweep in FX forwards without reading the terms "debt and/or equity securities" out of the APA. This is easily

confirmed by consulting simple dictionary definitions. *See, e.g.*, *Fed. Ins. Co.* v. *Am. Home Assurance Co.*, 639 F.3d 557, 567 (2d Cir. 2011) ("[I]t is common practice for the courts of [New York] State to refer to the dictionary to determine the plain and ordinary meaning of words to a contract." (alterations in original)). For example, Black's Law Dictionary defines a "debt security" as "[a] security representing funds borrowed by the corporation from the holder of the debt obligation; esp., a bond, note, or debenture." Black's Law Dictionary (11th ed. 2019). And it defines "equity security" as "[a] security representing an ownership interest in a corporation (such as a share of stock) rather than a debt interest (such as a bond)." *Id*. Tellingly, these definitions make no reference to any foreign exchange instruments.

Moreover, Plaintiffs have never alleged that FX forwards are "securities." Rather, Plaintiffs have pled that an FX forward "is a derivative that provides for the purchase or sale of one currency (*e.g.*, SGD) in terms of another (*e.g.*, USD) on some future date (*e.g.*, 90 days from now) at a price agreed upon today." (FAC ¶ 191.) Thus, Plaintiffs' own pleadings demonstrate that FLH cannot rely on the supposed assignment of claims it received from Sonterra to establish that it has Article III standing.

As they did in the *Sonterra Yen* case, Plaintiffs may contend that the Second Circuit "up[held]" this Court's "finding" that the Sonterra APA "effectively assigned [relevant] claims from Sonterra to FLH." (ECF No. 555 at 1, *FLH Yen LIBOR*, 15-cv-05844 (S.D.N.Y.).) But this Court never held that Sonterra validly assigned relevant claims to FLH. Nor could it have done so, because Plaintiffs never properly presented the Sonterra APA to this Court by pleading any facts about it. (*See supra*, Background Section E.2.) Further, on appeal, the parties did not brief the issue of the validity of the Sonterra assignment, and the Second Circuit did not decide the issue because it incorrectly assumed—based on a mistaken understanding of the

procedural history of this action—that this Court already had determined that the assignment was valid. (*See supra*, Background Section E.4.) For precisely those reasons, Judge Daniels concluded in *FLH Yen LIBOR* that neither this Court nor the Second Circuit previously determined that the Sonterra APA validly assigned relevant claims to FLH. 2021 WL 4482826, at *4 n.5. "In [the *SIBOR Appeal*], the Second Circuit referenced the district court's preliminary determination regarding Sonterra's assignment to FLH," but "[t]he district court . . . did not fully address whether the APA effectively assigned the claims there because it dismissed Sonterra after finding it was not an efficient enforcer." *Id*.

There is, consequently, no bar to the Court considering the Sonterra APA now because a "district court d[oes] not violate the mandate rule by addressing on remand an issue that was not decided by [the appellate court] in the original appeal." *Sompo Japan Ins. Co. of Am.* v. *Norfolk S. Ry. Co.*, 762 F.3d 165, 175-76 (2d Cir. 2014). Similarly, "the law of the case does not extend to issues an appellate court did not address." *New England Ins. Co.* v. *Healthcare Underwriters Mut. Ins. Co.*, 352 F.3d 599, 606 (2d Cir. 2003). The Second Circuit's mistaken recitation of procedural history in the *SIBOR Appeal* is not a binding decision from the Second Circuit and cannot change the actual scope of this Court's past decisions.[14]

2. Any Purported Assignment of Claims to FLH Would Be Champertous and Void.

Even if Sonterra had assigned to FLH the right to bring the claims it asserted in this action (which it did not), FLH still would lack Article III standing because such assignment

[14] *See, e.g.*, *United States* v. *Moored*, 38 F.3d 1419, 1422 (6th Cir. 1994) (holding that a district court did not err by revisiting earlier rulings because "the mere repetition of the factual findings of the district court [in an appellate decision] cannot be deemed a decision of the appellate court"); *Adams* v. *United States*, 255 F.3d 787, 797 (9th Cir. 2001) (holding that a "misstatement of fact in the introductory section" of an appellate decision was not a ruling on the merits of an issue and plaintiffs' argument to the contrary was "entirely frivolous"); 18B Wright & Miller, Fed. Prac. & Proc. Juris. § 4478.3 (2d ed. Apr. 2021) ("[a] mere recital of matters assumed for purposes of decision and dicta are [sic] not part of the mandate").

would be void as champertous under N.Y. Judiciary Law § 489. Under New York law, which governs the APA (*see* Sonterra APA § 6.6), an assignment of a claim is void if it is made "with the intent and for the purpose of bringing an action or proceeding thereon," N.Y. Judiciary Law § 489; *see also Justinian Cap. SPC* v. *WestLB AG*, 28 N.Y.3d 160, 166 (2016) (concluding that the assignment is champertous where plaintiffs' sole purpose in acquiring the notes at issue was bringing litigation); *Aretakis* v. *Caesars Ent.*, 2018 WL 1069450, at *10 (S.D.N.Y. Feb. 23, 2018) (granting motion to dismiss where the purpose of the assignment at issue was "to allow Plaintiff to prosecute this case to obtain a money judgment").

In this case, the only assets purportedly transferred from Sonterra to FLH are rights to recover on legal claims. (Sonterra APA § 1.1, Art. II.) FLH did not receive the underlying financial instruments, nor has it used the rights transferred to it by the APA to do anything other than bring a series of lawsuits.[15] *See Phoenix Light SF Ltd.* v. *U.S. Bank Nat'l Ass'n*, 2020 WL 1285783, at *13 (S.D.N.Y. Mar. 18, 2020) ("'[R]eceiv[ing] [a] cause of action . . . absent any related obligations or assets,' . . . is evidence of champerty."), *aff'd sub nom. Phoenix Light SF DAC* v. *U.S. Bank Nat'l Ass'n*, 2021 WL 4515256 (2d Cir. Oct. 4, 2021). In addition, the relatively low purchase price listed in the APA—no more than $30,000 (*see* Sonterra APA § 1.2)—strongly suggests that the only purpose of the purported assignment was speculation on litigation and falls well below the champerty statute's safe harbor of $500,000. *See* N.Y. Judiciary Law § 489(2).[16]

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[15] *See Sonterra Capital Master Fund, Ltd.* v. *UBS AG*, No. 15-cv-05844 (S.D.N.Y.); *Dennis* v. *JPMorgan Chase & Co.*, No. 16-cv-06496 (S.D.N.Y.); *Sonterra Capital Master Fund, Ltd.* v. *Barclays Bank PLC*, No. 15-cv-03538 (S.D.N.Y.); *Sonterra Capital Master Fund Ltd.* v. *Credit Suisse Group AG*, No. 15-cv-00871 (S.D.N.Y.); *Sullivan* v. *Barclays PLC*, No. 13-cv-02811 (S.D.N.Y.).

[16] The prohibition on champerty may explain the power of attorney provision in the Sonterra APA, which enumerates only three actions that FLH might take on Sonterra's behalf and does not expressly grant the right to

C. The Moon Plaintiffs Cannot Belatedly Join This Action, and Their Claims Are Untimely.

Because FLH never had standing to assert any of the claims that were brought in the names of FrontPoint and Sonterra at the outset of this litigation, subject matter jurisdiction is absent. In the *SIBOR Appeal*, the Second Circuit held that "Article III is satisfied so long as a party with standing to prosecute the specific claim in question exists at the time the pleading is filed," but an action should "be dismissed for want of subject-matter jurisdiction" if "the real party in interest . . . lacks standing itself." *SIBOR Appeal*, 991 F.3d at 386. Here, the only purported "real party in interest," FLH, lacked standing because FLH never received a valid assignment of relevant claims. (*See supra*, Sections I.A-B.) Thus, the Court has always lacked subject matter jurisdiction over this action, and there is no action for the Moon Plaintiffs—third parties that have never been the "real part[ies] in interest" in the Former Plaintiffs' suit—to enter by means of the FAC.

"The longstanding and clear rule is that if jurisdiction is lacking at the commencement of a suit, it cannot be aided by the intervention of a plaintiff with a sufficient claim." *Pressroom*, 700 F.2d at 893 (affirming denial of motion to amend complaint to substitute ERISA plan participants as plaintiffs where the original plaintiff lacked standing). "[A] plaintiff may not create jurisdiction by amendment when none exists" by adding a new plaintiff with standing to the action. *D.J. ex rel. O.W.* v. *Conn. State Bd. of Educ.*, 2019 WL 1499377, at *2 (D. Conn. Apr. 5, 2019) (collecting cases).[17] In the *SIBOR Appeal*, the panel

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initiate "Cases." (Sonterra APA, Art. V § 5.3.) Rather, it grants "the right . . . (i) to grant releases"; (ii) "to execute and submit proofs of Claim"; and (iii) "to execute and submit any and all other documents necessary, appropriate or helpful to enable [FLH] to maximize its recovery on the Assets." (*Id.*) If the Sonterra APA empowered FLH to initiate litigation, it would be champertous; to the extent it excluded that power, FLH lacks standing.

[17] *See also Police & Fire Ret. Sys. of City of Detroit* v. *IndyMac MBS, Inc.*, 721 F.3d 95, 111 n.21 (2d Cir. 2013).

acknowledged this rule and did not purport to alter it. 991 F.3d at 388-89 ("[I]t is well-understood that a plaintiff may cure defective jurisdictional allegations, *unlike defective jurisdiction itself*, through amended pleadings." (emphasis added) (citing *Pressroom*, 700 F.2d at 893)). Thus, this "Court could not have gained subject matter jurisdiction" when the Moon Plaintiffs "joined the suit" because Rule 15 "cannot 'resurrect litigation.'" *Sonterra Cap. Master Fund Ltd.* v. *Credit Suisse Grp. AG* (*CHF LIBOR*), 409 F. Supp. 3d 261, 270 (S.D.N.Y. 2019) (dismissing an action initiated by Sonterra for lack of subject matter jurisdiction after multiple other entities had entered the litigation through the filing of amended pleadings), *vacated and remanded on other grounds*, 2021 WL 4997939 (2d Cir. Sept. 21, 2021);[18] *accord SIBOR III*, 399 F. Supp. 3d at 105.

Moreover, the Moon Plaintiffs' claims are untimely. *Cf. SIBOR III*, 399 F. Supp. 3d at 105 (holding that the Moon Plaintiffs' claims are untimely if they cannot benefit from tolling based on the pendency of these proceedings).[19] Rule 15(c) relation back cannot be used by absent putative class members "to revive claims that were dismissed from the class complaint

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("Where the named plaintiff's claim is one over which federal jurisdiction never attached, there can be no class action." (quoting *Crosby* v. *Bowater Inc. Ret. Plan for Salaried Emps. of Great N. Paper, Inc.*, 382 F.3d 587, 597 (6th Cir. 2004)); 1 NEWBURG ON CLASS ACTIONS § 2:8 (5th ed.) ("[I]f a case has only one class representative and that party does not have standing, then the court lacks jurisdiction over the case and it must be dismissed; if the case only had this one class representative from the outset, then there is no opportunity for a substitute class representative to take the named plaintiff's place because this means that the court never had jurisdiction over the matter.").

[18] The Second Circuit did not evaluate the merits of the district court's decision in *CHF LIBOR*. Rather, following the *SIBOR Appeal*, the Second Circuit vacated the district court's decision and remanded the case for further proceedings at the joint request of the parties. *See Sonterra Cap. Master Fund Ltd.* v. *Credit Suisse Grp. AG*, 2021 WL 4997939, at *1 (2d Cir. Sept. 21, 2021).

[19] The Sherman Act's four-year limitations period begins to run when the cause of action accrues. 15 U.S.C. § 15b; *see also Johnson* v. *Nyack Hosp.*, 86 F.3d 8, 11 (2d Cir. 1996). Here, the Moon Plaintiffs allege a class period that ends in December 2011 (*see, e.g.*, FAC ¶ 3), and they were admittedly on notice of these potential claims by no later than June 2013, when the Monetary Authority of Singapore announced the results of its investigation (*id.* ¶ 9). Thus, the Moon Plaintiffs' claims were untimely when first asserted in December 2018.

for want of jurisdiction." *IndyMac*, 721 F.3d at 111-12.[20] Further, the Moon Plaintiffs cannot rely on tolling pursuant to *American Pipe & Const. Co.* v. *Utah*, 414 U.S. 538 (1974) because, "[w]here there has been no class action over which a court has jurisdiction, there are no claims that can be tolled." *CHF LIBOR*, 409 F. Supp. 3d at 272; *accord In re Puda Coal Sec. Inc. Litig.*, 2013 WL 5493007, at *11-15 (S.D.N.Y. Oct. 1, 2013) (holding that "*American Pipe* does not provide refuge" from dismissal if a class action is initiated by parties that lack standing).

Given that it is now clear that FLH lacked standing to commence this litigation, the Second Circuit's comments in the *SIBOR Appeal* regarding the applicability of *American Pipe* tolling following the Supreme Court's decision in *China Agritech, Inc.* v. *Resh*, 138 S. Ct. 1800 (2018), have no bearing on whether the Moon Plaintiffs can benefit from *American Pipe* tolling. Those comments were premised on the incorrect assumption that this Court already held that FLH received a valid assignment from Sonterra and thus always possessed Article III standing. (*See supra*, Background Section E.4.) Because FLH was never assigned Sonterra's claims and lacks Article III standing as a result, there has never been a valid complaint to toll the Moon Plaintiffs' claims.

Moreover, permitting the Moon Plaintiffs to belatedly salvage this action would not comport with the requirements of Rule 15 because Plaintiffs' motion for leave to amend to add the Moon Plaintiffs was untimely and prejudicial.[21] Three motions to dismiss for three

[20] Plaintiffs also cannot avail themselves of Rule 15(c) because that rule cannot be used to add new plaintiffs to a case unless the omission of those plaintiffs from the original pleading resulted from a mistake. *See Levy* v. *U.S. Gen. Acct. Off.*, 175 F.3d 254, 255 (2d Cir. 1999) (affirming district court's ruling that claims of added plaintiffs could not relate back under Rule 15(c), as the plaintiff "did not seek to add [the new plaintiffs] because of a mistake"); *see also Julian* v. *Metro. Life Ins. Co.*, 2021 WL 4237047, at *9 (S.D.N.Y. Sept. 1, 2021) (collecting cases).

[21] When Defendants consented to the filing of the FAC, it was expressly "without waiver of, or prejudice to, any defenses." (ECF No. 436.)

different amended complaints were filed and fully briefed before Plaintiffs ever sought leave to add the Moon Plaintiffs—well after the deadline this Court set for the filing of an amended complaint in *SIBOR II*. Accordingly, as set forth in detail in Defendants' opposition to Plaintiffs' motion for leave to file the PFAC, it would be improper under Rule 15 to add the Moon Plaintiffs at this belated stage of the litigation. (ECF No. 359 at 20-22.) Indeed, Plaintiffs should not be permitted to use an unpled purported assignment by Sonterra—a party whose claims were dismissed with prejudice on the merits after it twice misrepresented itself as an existing entity with standing—as a jurisdictional bridge for the Moon Plaintiffs to assert claims in this action. Plaintiffs' repeated failure to disclose Sonterra's dissolution reflects the kind of "effort to deceive or prejudice defendants" that warrants denial of a Rule 17 motion according to the standard set forth by the Second Circuit in the *SIBOR Appeal*. 991 F.3d at 393.

II. THE MOON PLAINTIFFS LACK ANTITRUST STANDING.

Even if the Moon Plaintiffs could be joined to this action (and they cannot), the Moon Plaintiffs' antitrust claims still fail for lack of antitrust standing. To plead statutory standing to assert an antitrust claim, a plaintiff "must plausibly allege that (i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations," meaning that the plaintiff is "an 'efficient enforcer' of the antitrust laws." *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157-58 (2d Cir. 2016). The Moon Plaintiffs' conclusory assertions in the FAC are insufficient to carry either of these pleading burdens. As a result, the Moon Plaintiffs' antitrust claims should be dismissed. *See id.*

A. The Moon Plaintiffs Do Not Plausibly Allege an Antitrust Injury.

"To demonstrate antitrust injury," a plaintiff must adequately allege: "(1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury

contemplated by the statute." *Arista Records LLC* v. *Lime Grp. LLC*, 532 F. Supp. 2d 556, 568 (S.D.N.Y. 2007). While this Court previously determined that the "type" of injury that the Moon Plaintiffs allege—economic harm "flowing from the corruption of the rate-setting process"—is "the type [of injury] the antitrust laws were intended to prevent," *SIBOR I*, 2017 WL 3600425, at *12 (quoting *Gelboim* v. *Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016)); *SIBOR II*, 2018 WL 4830087, at *5 (same), this alone is not sufficient to establish antitrust standing.

The Second Circuit has made clear that, to plead an antitrust injury, a private plaintiff must plausibly allege an "actual injury" by pleading "evidence that they traded at 'artificial prices.'" *Harry* v. *Total Gas & Power N. Am., Inc.*, 889 F.3d 104, 116 (2d Cir. 2018) (dismissing antitrust claims regarding alleged gas market manipulation). "Unlike government agencies, private [antitrust] plaintiffs do not have the right to bring suit against any person they reasonably suspect has committed a certain sort of wrong . . . . Plaintiffs can only recover in a civil action if they can establish that *they themselves* have been harmed by defendants' activities." *In re SSA Bonds Antitrust Litig.*, 2018 WL 4118979, at *6, 7 n.19 (S.D.N.Y. Aug. 28, 2018) (distinguishing *Gelboim* and relying on *Total Gas* to dismiss antitrust claims).

First, the Moon Plaintiffs allege only that their foreign exchange forwards "are priced using a formula that incorporates SOR and USD SIBOR as components of price." (FAC ¶ 238.) The Moon Plaintiffs do not allege that their foreign exchange forwards are "priced" in any way based on SGD SIBOR, and therefore they cannot possibly have suffered any injury as a result of any supposed SGD SIBOR manipulation. Thus, to the extent the Moon Plaintiffs seek to assert claims based on SGD SIBOR, those claims fail.

Second, as to USD SIBOR and SOR, the conclusory assertions in the FAC come nowhere close to plausibly alleging that the Moon Plaintiffs *themselves* transacted at artificial

prices. To begin with, the Moon Plaintiffs make no effort to plead how any supposed manipulation of USD SIBOR or SOR actually impacted their two alleged FX forward transactions. (FAC ¶¶ 56, 87-88.) Nor could they do so now by pointing to the flawed statistical analyses alleged in the FAC, as this Court already rejected as deficient the only alleged "economic evidence" of artificial prices pled in the FAC. *See SIBOR I*, 2017 WL 3600425, at *11 (rejecting as implausible the same analysis pled in Paragraphs 224 to 235 of the FAC).

Moreover, the connection between the Moon Plaintiffs' transactions and the alleged manipulation is even more attenuated given their allegations of conspiracies that supposedly involved the manipulation of two different benchmarks, USD SIBOR and SOR, at different times, and both upwards and downwards to benefit Defendants' various and shifting derivatives trading positions. (*See, e.g.*, FAC ¶¶ 38-45, 215-221, 259.) Indeed, the multi-directional, multi-benchmark nature of the alleged manipulation renders Plaintiffs' allegations of actual injury particularly deficient. Movements in benchmark rates do not have obvious "winners" and "losers" because traders hold different positions on different days relative to the benchmark. Where a benchmark rate is allegedly manipulated, parties can be "*helped* rather than harmed, by the alleged artificiality, depending on their position in the market." *Harry* v. *Total Gas & Power N. Am., Inc.*, 244 F. Supp. 3d 402, 416 (S.D.N.Y. 2017) (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig.* (*LIBOR III*), 27 F. Supp. 3d 447, 461 (S.D.N.Y. 2014)). The Second Circuit held in *Total Gas* that, even if generalized allegations of injury may be sufficient to establish Article III injury, they are *not* sufficient to satisfy the *higher* standard for pleading the "[t]he actual injury" required to establish antitrust standing. 889 F.3d at 116. To

plead an "actual injury" as an element of a substantive cause of action, the allegations of injury must be "plausible," not merely "colorable." *Id.* at 112.[22]

Here, as in *Total Gas*, the Moon Plaintiffs lack antitrust standing because their generalized allegations provide "just as much support for the proposition" that they "benefited" from alleged manipulation of USD SIBOR and SOR as for the proposition that they were "harmed" by it. *Id.* at 115. The Moon Plaintiffs assert in conclusory fashion that they "were injured in their USD/SGD foreign exchange forward transactions" because they "*paid more for or received less* than they should have." (FAC ¶ 240 (emphasis added).) These vague allegations illustrate the multi-directional nature of the purported manipulation—and the Moon Plaintiffs' own trading—and thus betray the speculative nature of the Moon Plaintiffs' claims of injury. *See In re Merrill, BofA, and Morgan Stanley Spoofing Litig.*, 2021 WL 827190, at *11 (S.D.N.Y. Mar. 4, 2021) (holding that general allegations that "a price was manipulated at the time [plaintiff] traded" were insufficient to state a CEA claim in a case involving alleged multi-directional market manipulation because plaintiff needed to "plead additional facts to make it plausible that the impact on her was harmful rather than neutral or beneficial"). Accordingly, the Moon Plaintiffs' alleged injuries, at best, are "merely conceivable," and therefore are "insufficiently plead[ed]." *LIBOR III*, 27 F. Supp. 3d at 461 (rejecting generalized allegations that plaintiffs were injured by alleged upwards and downwards manipulations of a benchmark).

[22] In *SIBOR I*, this Court held that generalized allegations like those the Moon Plaintiffs offer in the FAC made it "possible that defendants' alleged manipulation, at different times, may have both hurt and helped plaintiffs' trading positions, depending on the day or the particular trade," and that such lack of specificity did not "mean that plaintiffs lack[ed] constitutional standing." 2017 WL 3600425 at *9. But the Second Circuit's later decision in *Total Gas* makes clear that such allegations are insufficient to plead antitrust standing. 889 F.3d at 110.

B. The Moon Plaintiffs Are Not Efficient Enforcers.

As this Court previously held, to "satisf[y] the proximate cause inquiry" that is the crux of the efficient enforcer analysis, a plaintiff must "allege[] that it traded in derivatives whose price was *directly impacted* by the [relevant] rate." *SIBOR I*, 2017 WL 3600425, at *12 (emphasis added).[23] The FAC makes no such allegations as to the Moon Plaintiffs; rather it doubles down on the same kind of deficient allegations that this Court rejected when Sonterra made them years ago in the Amended Complaint.

In *SIBOR I*, the Court held that Sonterra "failed to establish any connection between defendants' conduct and [Sonterra's] alleged injury," *id.* at *12, because the Amended Complaint included only a "conclusory statement" about FX forwards being "calculated using a formula that incorporates both SGD SOR and USD SIBOR as components of price" and "an obtuse, ambiguous chart" (the "OCBC Chart") that purported to show "that SIBOR and SOR rates are used to adjust the spot price of the USD-SGD currency pair to account for interest earned over the length ('daycount') of the agreement." *Id.* (quoting Am. Compl. ¶ 119).[24] When it dismissed Sonterra's claims without prejudice, this Court held that, for Sonterra to plead antitrust standing, it would have to explain "in plain, intelligible sentences" how "the foreign exchange forward contracts that [it] entered into incorporated SIBOR and SOR as a component of price." *Id.*

[23] When determining who is an efficient enforcer, courts consider several factors, including: (i) the "directness" of the asserted injury, which "means close in the chain of causation"; (ii) the existence of other, more direct "potential plaintiffs"; and (iii) the "speculativeness" of alleged damages. *In re Am. Express Anti-Steering Rules Antitrust Litig.*, __ F.4th __, 2021 WL 5441263, at *4-5 (2d Cir. Nov. 22, 2021). But courts do not hesitate to dismiss cases for lack of antitrust standing when one or more factors weigh heavily against standing, as they do here. *See id.* at *8. *Daniel* v. *Am. Bd. of Emergency Med.*, 428 F.3d 408, 443-44 (2d Cir. 2005).

[24] The OCBC Chart cited in the Amended Complaint, which was copied from a 2011 OCBC market research report (*see* Porpora Decl. Ex. GG at 1 (OCBC BANK, Negative SOR – OCBC Treasury Research's FAQ, ECF No. 244-5) (Aug. 18, 2011) (hereinafter the "OCBC Report")), now appears at Paragraph 204 of the FAC.

In the FAC, the Moon Plaintiffs seek to assert claims regarding FX forwards that this Court previously rejected when Sonterra asserted them. But the Moon Plaintiffs have failed to comply with this Court's simple instructions on how to plead that they are efficient enforcers. Instead, the Moon Plaintiffs plead variations on Sonterra's conclusory allegations and the same "obtuse, ambiguous" chart that this Court previously rejected, which purports to show the relationship between FX forwards and USD SIBOR and SOR. *Id.* Like Sonterra, the Moon Plaintiffs allude to a "formula" that they claim shows how FX forwards are priced by "traders" and "investors." (FAC ¶ 204.) But this "formula" is nothing more than a repackaged version of the OCBC Chart that this Court previously found insufficient. *See id.* (noting that the new "formula" uses the same "components" as the OCBC Chart).[25] The very same "formula" originally set forth in the OCBC Chart is presented algebraically in Figure 4 of the FAC:

$$\textbf{Future Price} = \textbf{Spot Price} \times \left(\frac{1 + [\text{Rterm} \times (d / 360)]}{1 + [\text{Rbase} \times (d / 360)]} \right)$$

(FAC ¶ 192.) According to the Moon Plaintiffs, the variables in this "formula" are: "(a) 'Rterm,' which represents the rate of interest charged to borrow the term currency; (b) 'Rbase,' which represents the rate of interest earned by depositing the base currency; and (c) the number of days until settlement, which is represented by the variable 'd.'" (*Id.* ¶ 193.) Remarkably, however, the "formula" makes no reference whatsoever to SOR or USD SIBOR. Instead, the FAC refers back to the OCBC Chart as the sole basis for its allegation that "[d]erivatives traders . . . use

[25] Like the Amended Complaint before it, the FAC misrepresents the meaning of the OCBC Chart and the 2011 OCBC Report from which it was lifted. The Report's chart does not purport to show how FX forwards are priced but rather attempts to show mathematically how market forces could turn SOR into a negative interest rate. *See* Porpora Decl. Ex. GG (OCBC Report).

[USD] SIBOR and SOR rates for the 'Rterm' and 'Rbase' components of this formula when pricing a USD/SGD foreign exchange forward." (*Id.* ¶ 194.)

But the OCBC Chart does not purport to show how FX forwards are priced, let alone how the Moon Plaintiffs' *own* FX forwards were priced. As is apparent from the face of the OCBC Report cited in the FAC, the OCBC Chart (and, in turn, the "formula" Plaintiffs derived from it) shows how one can calculate SOR if one already knows the forward rate (*i.e.*, the market price of FX forwards) and the spot price. (*Id.* ¶ 204.) It does not show the opposite (*i.e.*, how to determine the price of an FX forward using SOR), because that would not make sense.

Indeed, the allegations in the FAC contradict the Moon Plaintiffs' proffered "formula." As alleged in the FAC, SGD/USD FX forwards are priced, in part, using interest rates on U.S. dollars and Singapore dollars. (*See id.* ¶ 198.) The Moon Plaintiffs' so-called formula tries to account for this by incorporating USD SIBOR and SOR (*id.* ¶ 194), but that step defies common sense. USD SIBOR and SOR are published only once a day, and so remain static throughout every 24-hour period following publication. If the FAC were correct, then the interest rate inputs that purportedly determine FX forwards pricing would remain unchanged throughout the day, even though, according to the FAC, the FX forwards market is traded "24-hours a day." (*Id.* ¶ 34.) "[C]ommon economic experience," *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 565 (2007), suggests that, like stock prices, interest rate expectations will change throughout a trading day as news enters the market. The purported "formula" offered in the FAC fails to account for this common economic experience and is therefore implausible.

Moreover, the Moon Plaintiffs' attempt to "demonstrate" the "application of this formula" by using a hypothetical transaction (FAC ¶ 195) only underscores that there is no

"mathematical relationship between USD SIBOR, SOR and the prices of Singapore dollar foreign exchange forwards" (*id*. ¶ 200). Relying on "data available from Bloomberg," Plaintiffs purport to "calculate the future price of buying U.S. dollars under a one-month (30 day) Singapore dollar foreign exchange forward using the SIBOR and SOR rates" on a hypothetical FX forward on September 28, 2010. (*Id.* ¶ 195.) According to the Moon Plaintiffs, on that date, the "last spot exchange rate for the USD/SGD currency pair reported by Bloomberg" was "1.3167." (*Id.*) The Moon Plaintiffs further allege that, on that "same day, the one-month SOR rate (the 'Rterm' variable) was 0.25719% and the one-month USD SIBOR rate (the 'Rbase' variable) was 0.26306%," and the "duration of the agreement 'd' is 30 days." (*Id.*) The Moon Plaintiffs then posit that:

> Plugging these values into Figure 4 to solve for the future price of U.S. dollars in a one-month Singapore dollar foreign exchange forward yields 1.3166 Singapore dollars:

$$1.3166 = 1.3167 * \frac{1+[(\frac{0.25719}{100}) * (\frac{30}{360})]}{1+[(\frac{0.26306}{100}) * (\frac{30}{360})]}$$

FIGURE 5

> These results are confirmed by Bloomberg, which also reported 1.3166 as the cost of a one-month Singapore dollar foreign exchange forward on September 28, 2010.

(*Id.* ¶¶ 196-197.)

Tellingly, the Moon Plaintiffs do not allege that this formula was used to price *their own* FX forward transactions or otherwise attempt to demonstrate the "application of this formula" using their own transactions. And for good reason: Using the corresponding inputs to

the formula in Figure 5 demonstrates that prices of the Moon Plaintiffs' FX forwards were *not* mathematically determined by the formula using USD SIBOR and SOR.

The FAC alleges that:

- "[O]n February 16, 2009, Moon Capital Partners entered a USD/SGD foreign exchange forward in which it agreed to sell SGD 3,155,878 on August 19, 2009 for $2,073,642" (*id.* ¶ 191)—*i.e.*, in 184 days (or six months), for a forward price of **1.5219** (3,155,878/2,073,642); and that:

- "Moon Capital Master also entered a USD/SGD foreign exchange forward on February 16, 2009, in which it agreed to sell SGD 12,063,122 for $7,962,352 on August 19, 2009" (*id.*)—*i.e.*, in 184 days (or six months) for a forward price of **1.5150** (12,063,122/7,962,352).

Based on the very same Bloomberg data on which the Moon Plaintiffs rely, the February 16, 2009, six-month SOR was 1.44521% (the "Rterm" variable, according to the Moon Plaintiffs), six-month USD SIBOR was 1.752% (the "Rbase" variable, according to the Moon Plaintiffs), and the last USD/SGD spot rate reported by Bloomberg was 1.5145. (Lesser Decl. Exs. B, C, D.) Using these as inputs to the formula generates a forward price of **1.5121**:

$$1.5121 = 1.5145 * \frac{1+[(\frac{1.44521}{100}) * (\frac{184}{360})]}{1+[(\frac{1.752}{100}) * (\frac{184}{360})]}$$

But of course 1.5121 is *not* the price paid by either of the Moon Plaintiffs, who instead paid *higher* prices of 1.5219 and 1.5150, respectively.[26] And the reported price on Bloomberg for a six-month USD/SGD forward on February 16, 2009 was **1.51335**,[27] again *not* the "formula"-

[26] FX currency pairs are generally quoted to at least four decimal places, with the fourth decimal (.0001) referred to as a "pip." (FAC ¶ 189.) Here, the Moon Plaintiffs' actual prices were 98 pips and 29 pips more than the "formula" price, respectively, which are large differences.

[27] Bloomberg quotes forward prices in terms of forward points, which reflect the difference (in basis points) between the spot rate and the forward rate. On February 16, 2009, Bloomberg reports a last quote of -11.5 forward points for the 6-month USD/SGD forward. (Lesser Decl. Ex. E.) Accordingly, the Bloomberg reported forward price of 1.51335 is calculated as the sum of the Bloomberg quoted USD/SGD spot rate (1.5145) (Lesser Decl. Ex. D), and

generated price of 1.5121 using USD SIBOR and SOR.[28] Accordingly, based on their own allegations, the Moon Plaintiffs fail to plead that "the foreign exchange forward contracts *that [they] entered into* incorporated SIBOR and SOR as a component of price." *SIBOR I*, 2017 WL 3600425, at *12 (emphasis added).[29]

Further, even if the Moon Plaintiffs' "formula" (FAC ¶ 192) showed that movements in USD SIBOR or SOR somehow impacted the price of FX forwards, the FAC still fails to adequately allege the causal chain linking any purported losses of the Moon Plaintiffs to Defendants' alleged conduct. *See, e.g.*, *Associated Gen. Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 540-42 (1983) ("vaguely defined links" are insufficient); *7 W. 57th St. Realty Co.* v. *Citigroup, Inc.*, 771 F. App'x 498, 502 (2d Cir. 2019) (affirming dismissal of antitrust claims about alleged LIBOR manipulation because "[plaintiff's] municipal bonds were not actually LIBOR denominated" so any impact LIBOR allegedly had on their value was too indirect to give rise to antitrust standing). To plead proximate causation, the Moon Plaintiffs must plausibly allege, among other things, that: (i) Defendants' alleged conduct actually impacted the USD SIBOR or SOR rate (even though the rates were calculated based on the trimmed mean of submissions made by multiple member

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the Bloomberg quoted 6-month USD/SGD forward points after conversion to basis points (-.00115) (Lesser Decl. Ex. E).

[28] The Moon Plaintiffs avoid pleading the actual time of day for their February 16, 2009 transactions or the actual intraday spot rate at such time, but it is clear from reported data that doing so would not make the formula "work" using USD SIBOR and SOR. The Moon Capital Partners' forward price of 1.5219, if used as the input to the formula included in the FAC, implies a USD/SDG spot rate of 1.5243, which falls *entirely outside of the USD/SDG spot rate range of 1.5070 to 1.5183 reported by Bloomberg* for February 16, 2009. (Lesser Decl. Exs. F, G.)

[29] The decision in *Sonterra Cap. Master Fund Ltd.* v. *UBS AG*, 954 F.3d 529 (2d Cir. 2020), is not to the contrary. There, the Second Circuit held that Sonterra's allegations "that Yen LIBOR is routinely used to price Yen FX forwards" were sufficient to satisfy the low threshold for pleading "injury in fact for Article III standing." *Id.* at 535. Here, by contrast, the Moon Plaintiffs' allegations demonstrate that USD SIBOR and SOR were *not* used to price *their own* FX forwards, such that they lack antitrust standing.

banks); (ii) the altered submissions moved a relevant tenor of USD SIBOR or SOR in a direction adverse—and not beneficial or neutral—to the Moon Plaintiffs' positions; (iii) the movement of USD SIBOR or SOR had a negative impact on the purchase price of, or return on, one or more of the FX forwards that the Moon Plaintiffs entered into; and (iv) the Moon Plaintiffs' loss on these instruments was not offset by gains on other USD SIBOR- or SOR-linked investments. Attenuating that causal chain even further, SOR was calculated during the class period using a methodology that included several submission-based components, which were then compiled with other data pursuant to a complex formula. (*See supra*, Background Section D.)

The FAC is devoid of any well-pled allegations explaining how this process was purportedly corrupted by Defendants' alleged misconduct, how the alleged manipulation of one component may have influenced or been offset by other components, or how this complex chain of causation is sufficiently direct to give rise to antitrust standing. *See Arista Records*, 532 F. Supp. 2d at 574 (failure to "specifically articulate any of the links in [a] causal chain" is fatal to standing); *Reading Indus., Inc.* v. *Kennecott Copper Corp.*, 631 F.2d 10, 13-14 (2d Cir. 1980) (finding damages too speculative where numerous intervening factors could have affected the market such that the "court's task of tracing [those variables] would be difficult, if not impossible"). Further, these same issues all demonstrate that there are more efficient enforcers of the antitrust laws (*i.e.*, parties that actually traded products indexed to USD SIBOR or SOR), and that the Moon Plaintiffs' damages are entirely speculative.[30]

[30] Further, the FAC pleads no facts whatsoever to support the conclusory allegation that USD SIBOR was ever manipulated at any time. No analysis of USD SIBOR is even included in the Moon Plaintiffs' failed "economic evidence." (*See* FAC ¶¶ 224-35.) And the Moon Plaintiffs do not explain how any supposed actions as a "trading bloc" actually impacted SOR. (*See, e.g.*, FAC ¶ 259.)

Finally, because the Moon Plaintiffs' FX forwards are, at most, alleged to have been influenced by USD SIBOR and SOR (*see, e.g.*, FAC ¶ 195), the Moon Plaintiffs cannot possibly be efficient enforcers with respect to claims of alleged SGD SIBOR manipulation, which involve an entirely different currency and benchmark. *See SIBOR II*, 2018 WL 4830087, at *5 (concluding that the complaint "contain[ed] no allegations describing an arithmetical relationship among USD SIBOR, SGD SIBOR, and SOR," and that "USD SIBOR and SGD SIBOR represent interest rates for two distinct currencies, and that SGD SIBOR and SOR are calculated by different methods").

Thus, the FAC fails to plead facts sufficient to show that the Moon Plaintiffs are efficient enforcers of the antitrust laws, and their claims must be dismissed.

III. THE MOON PLAINTIFFS FAIL TO ADEQUATELY ALLEGE CONSPIRACIES TO MANIPULATE USD SIBOR OR SOR.

Finally, for the reasons set forth in the Personal Jurisdiction Memorandum, the Court should dismiss the Moon Plaintiffs' claims as to all Defendants who are not alleged to have transacted with Plaintiffs because the Moon Plaintiffs do not adequately allege that they participated in conspiracies to manipulate USD SIBOR or SOR. Indeed, as stated in the Personal Jurisdiction Memorandum, the Moon Plaintiffs' claims are even more deficient as to ANZ, CACIB, and Commerzbank because none of them was even on the USD SIBOR or SOR panel when the Moon Plaintiffs were allegedly injured by the manipulation of those benchmarks, and the FAC does not plead these Defendants knew of the alleged conspiracy's prior acts upon becoming panel members or committed an act in furtherance of the alleged conspiracy. As a result, the Moon Plaintiffs fail to adequately allege any conspiracy to manipulate USD SIBOR or SOR among the Defendants.

CONCLUSION

For the foregoing reasons, the Court should dismiss the FAC pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, or, in the alternative, dismiss the FAC with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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