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-05263 (AKH)

ECF Case

PLAINTIFFS' OMNIBUS MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FOURTH AMENDED CLASS ACTION COMPLAINT

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Plaintiffs Moon Capital Partners Master Fund Ltd. and Moon Capital Master Fund Ltd. (the "Moon Plaintiffs") and Fund Liquidation Holdings LLC ("FLH," and collectively with the Moon Plaintiffs, "Plaintiffs") respectfully submit this omnibus memorandum of law in opposition to Defendants' Motion to Dismiss the Fourth Amended Class Action Complaint, as set forth in (1) the Memorandum of Law in Support of Defendants' Joint Motion to Dismiss the Fourth Amended Class Action Complaint, ECF No. 447 ("Defs.' Br."); (2) 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, ECF No. 446 ("Defs.' PJ Br.") and (3) the Singapore Banks' Supplemental Memorandum of Law in Support of the Motion to Dismiss the Fourth Amended Class Action Complaint for Lack of Personal Jurisdiction, ECF No. 448 ("Singapore Br.").

INTRODUCTION

In the five years that this action has been pending, this Court has put in an enormous amount of work. Two rounds of complaints and motions to dismiss, hundreds of pages of briefing, declarations, and exhibits, and two oral arguments yielded two well-reasoned decisions that resolve virtually all the substantive legal questions needed to move this case into discovery. The Second Circuit has done its part as well. It waded through hundreds of pages of the record of the litigation before this Court, hundreds of pages of briefing, and a lengthy oral argument, to produce a 24-page opinion that definitively establishes that this Court has subject matter jurisdiction. Based on that determination, the Second Circuit issued very clear instructions to this Court upon remand, to answer specific questions and then get this action moving forward.

Unsurprisingly, Defendants are dissatisfied with the results of what this Court and the Second Circuit did, and so they want to turn back the clock to 2016 and start all over again. They offer absolutely no legitimate basis for their request: no new facts, no relevant changes in controlling

law. In fact, the only new controlling law is the Second Circuit's express *rejection* of the subject matter jurisdiction arguments they make.

In particular, this Court has already decided the following issues with respect to Plaintiffs' antitrust claims:

- That Plaintiffs allege a plausible profit-motivated antitrust conspiracy against all Defendant members of the SIBOR and SOR Panels to unlawfully benefit their trading positions by manipulating the SIBOR and SOR benchmark interest rates. (The Court has already decided this issue twice, in fact, after Defendants asked for reconsideration the first time around.) *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, No. 16 CIV. 5263 (AKH), 2017 WL 3600425, at *10 (S.D.N.Y. Aug. 18, 2017) ("*SIBOR I*"); *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, No. 16 CIV. 5263 (AKH), 2018 WL 4830087, at *3 (S.D.N.Y. Oct. 4, 2018) ("*SIBOR II*"), *vacated and remanded sub nom. Fund Liquidation Holdings LLC v. Bank of Am. Corp.*, 991 F.3d 370 (2d Cir. 2021).

- That Plaintiffs properly allege antitrust injury arising from their transactions in allegedly price-fixed derivatives. (This too, the Court has decided twice.) *SIBOR I*, 2017 WL 3600425, at *12; *SIBOR II*, 2018 WL 4830087, at *5.

- That Plaintiffs who transacted allegedly price-fixed derivatives directly with a Defendant (as the Moon Plaintiffs did) are efficient enforcers of the antitrust laws against all members of the conspiracy. (Once again, the Court has found this twice.) *SIBOR I*, 2017 WL 3600425, at *12; *SIBOR II*, 2018 WL 4830087, at *5.

The sole remaining issue that this Court left open on the antitrust front is whether Plaintiffs have plausibly alleged the necessary connection between SIBOR and SOR and the prices of the foreign exchange forwards they traded. But the Court faces an easy task there, because the Second Circuit (as well as multiple other courts in this district) has found identical allegations to be plausible under analogous circumstances. Accordingly, all the elements of Plaintiffs' antitrust claim are satisfied.

With respect to personal jurisdiction, the Court has also found that:

- Defendants' direct trades with Plaintiffs in the United States were "acts in furtherance of the conspiracy." *SIBOR II*, 2018 WL 4830087, at *8.

- These trades "can be the basis for jurisdiction over all members of the conspiracy, whether or not they themselves traded derivatives in the U.S." *Id.*

- The requirement that "the assertion of personal jurisdiction would 'comport with fair play and substantial justice,' . . . is readily met." *Id.* at *9 (citing *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 170 (2d Cir. 2013)).

- Venue is proper because "Plaintiffs may [take] 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." *Id.* at *9.

Nothing at all remains open for decision on personal jurisdiction, and the Court can easily dispose of Defendants' two separate briefs clamoring for reconsideration three years after the fact. The Supreme Court's decision earlier this year in *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021), only further confirms that this Court's finding of specific personal jurisdiction over Defendants based on in-forum trading was correct.

Finally, with respect to subject matter jurisdiction, the Second Circuit could not have been clearer. Over and over, it stated definitively that this Court has subject matter jurisdiction over this action: "Fund Liquidation, the real party in interest, *has had standing at all relevant times*" (991 F.3d at 375, emphasis added); "[W]e conclude that Article III *is satisfied* in this case" (*id.* at 386, emphasis added); "Article III *is satisfied* by Fund Liquidation's standing to bring suit and willingness to join the action under Rule 17" (*id.* at 392, emphasis added); "[N]ow that its *jurisdiction over the case is clear*, the district court should revisit…." (*id.* at 393, emphasis added). It based its holding on this Court's earlier determination that former plaintiff Sonterra Capital Master Fund Ltd. ("Sonterra") had validly assigned its antitrust claims to FLH. And, having conclusively established that this Court has subject matter jurisdiction over this case, it remanded the case with very specific instructions to permit the Moon Plaintiffs to proceed with their complaint so long as it plausibly states a claim. There is not an inch of room in the Second Circuit's remand instructions for re-litigation of subject matter jurisdiction, or of the validity of the assignment that gives rise to that subject matter jurisdiction. Defendants' response to the Second Circuit's crystal-clear order is that the Second Circuit was "mistaken"—an argument Defendants already made to the Second Circuit itself in a petition for

rehearing, which the Second Circuit summarily denied. There is nothing at all that this Court needs to—or can—decide with respect to subject matter jurisdiction.

In sum, Defendants have dumped 67 pages of briefing on this Court raising dozens of arguments, when in reality the Court only needs to address a single very easy, narrow issue, *i.e.* whether the Moon Plaintiffs have standing to assert antitrust claims against Defendants based on their Singapore dollar foreign exchange forward trades directly with Defendant UBS. Defendants should not be permitted to delay this action any further with repeat litigation of resolved issues. Their motions to dismiss should be denied.

To orient the Court in navigating this omnibus brief: First, Plaintiffs provide a full history of the prior proceedings in this action, both in this Court and in the Second Circuit. Second, Plaintiffs walk through the single open issue that this Court needs to decide in order to sustain the Moon Plaintiffs' antitrust standing. Third, Plaintiffs set forth the law of the case doctrine that requires adherence to the Court's prior decisions. Fourth, Plaintiffs walk through what those prior decisions were, why they remain correct, and why Defendants' arguments to the contrary fail: beginning with the Court's finding of a plausible antitrust conspiracy, antitrust injury and antitrust standing; and then moving to the Court's finding of personal jurisdiction over each member of that conspiracy. Fifth, Plaintiffs review the Second Circuit's decision on subject matter jurisdiction and corresponding instructions on remand, including why the mandate rule compels strict compliance with those remand instructions, and why revisiting the question of Sonterra's assignment to FLH, or any issues pertaining to subject matter jurisdiction, is precluded by the Second Circuit's mandate. Plaintiffs conclude by demonstrating that the Court's prior finding that the Sonterra assignment conveyed the antitrust claims in this action to FLH was in fact correct, and why Defendants' arguments to the contrary fail on their merits.

BACKGROUND AND PROCEDURAL HISTORY

The Court's first two opinions in this case resolved Rule 12 motions to dismiss for failure to state a claim and for lack of personal jurisdiction and venue. *See SIBOR II*, 2018 WL 4830087; *SIBOR I*, 2017 WL 3600425.

In *SIBOR I*, the Court held that the First Amended Complaint adequately alleged that the Defendants that served on the SIBOR panel[1] entered into a price-fixing conspiracy to manipulate SIBOR in violation of the antitrust laws. 2017 WL 3600425, at *10-11. It also found that then-plaintiff FrontPoint Asian Event Driven Fund L.P. ("FrontPoint") (which had traded SGD SIBOR swaps) was an efficient enforcer: "[I]t is difficult to think of a more direct victim than FrontPoint, given that it entered into transactions directly with two of the Defendants." *Id.* at *12. However, the Court held that then-plaintiff Sonterra had failed to allege how the foreign exchange ("FX") forwards it traded incorporated SIBOR and SOR as an element of price, and therefore was not an efficient enforcer. The Court also held that the First Amended Complaint did not adequately allege a basis for personal jurisdiction over Defendants that were headquartered and incorporated abroad. *Id.* at *5-6. The Court granted leave to file a Second Amended Class Action Complaint to cure both deficiencies, explaining that Plaintiffs "must allege specific facts that plausibly suggest that the Foreign Defendants entered into SIBOR- and SOR-based transactions with counterparties based in the United States, and that those transactions had a nexus to the benchmark interest rate manipulation at issue in this lawsuit," and that they must allege how SIBOR and SOR impact the price of FX forwards. *Id.* at *7, *13.

[1] These Defendants are: Australia and New Zealand Banking Group ("ANZ"), Bank of America N.A., The Bank of Tokyo-Mitsubishi UFJ, Ltd., BNP Paribas, Citibank N.A. ("Citi"), Credit Suisse AG, DBS Bank Ltd., Deutsche Bank AG ("Deutsche Bank"), The Hongkong and Shanghai Banking Corporation Ltd. ("HSBC"), ING Bank N.V., JPMorgan Chase Bank, N.A., Oversea-Chinese Banking Corporation Ltd., The Royal Bank of Scotland PLC ("RBS PLC"), Standard Chartered Bank, UBS AG, and the United Overseas Bank Ltd.

Following *SIBOR I*, Plaintiffs timely filed a Second Amended Class Action Complaint ("SAC"). ECF No. 237. Following another round of motion to dismiss briefing and oral argument, the Court issued a second opinion resolving these motions. The Court reiterated its holding from *SIBOR I* that Plaintiffs had plausibly alleged that the Panel Members[2] entered into a price-fixing conspiracy in violation of the antitrust laws, with the goal of "collectively…profit[ing] from the manipulation of SIBOR, including allowing individual members to trade and profit with unknowing victims." *See SIBOR II*, 2018 WL 4830087, at *2-4, *8.

The Court further held that Plaintiffs had plausibly alleged a basis for personal jurisdiction and venue as to these Defendants under the Second Circuit's decision in *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68 (2d Cir. 2018) ("*Schwab*"). *See SIBOR II*, 2018 WL 4830087, at *6-9. Specifically, the Court applied the conspiracy theory of personal jurisdiction announced in *Schwab*, which provides for personal jurisdiction where: "(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." *Schwab,* 883 F.3d at 87. In reaching this conclusion, the Court held that "Deutsche Bank's and Citibank's trading with FrontPoint were acts in furtherance of the conspiracy," and that those trades served as "the basis for jurisdiction over all members of the conspiracy, whether or not they themselves traded derivatives in the U.S." 2018 WL 4830087, at *8. It further found that the "fair play and substantial justice" element of personal jurisdiction was "readily met," and that venue was

[2] The Panel Members are alleged to have served on the SIBOR and/or SOR panels. They are the only Defendants named in the Fourth Amended Class Action Complaint ("FAC"). They are Barclays Bank plc, Crédit Agricole Corporate and Investment Bank ("CACIB"), Australia and New Zealand Banking Group, Ltd. ("ANZ"), Bank of America N.A., The Bank of Tokyo-Mitsubishi UFJ Ltd., BNP Paribas S.A., Citibank N.A. ("Citi"), Credit Suisse AG, DBS Bank Ltd., Deutsche Bank AG ("Deutsche Bank"), The Hongkong and Shanghai Banking Corporation Ltd. ("HSBC"), ING Bank N.V., JPMorgan Chase Bank, N.A., Oversea-Chinese Banking Corporation Ltd., The Royal Bank of Scotland PLC ("RBS PLC"), Standard Chartered Bank, UBS AG, The United Overseas Bank Ltd., and Commerzbank AG ("Commerzbank").

proper under "the nationwide service of process of Fed. R. Civ. P. 4(k)(2), and the venue provisions of § 1391." *Id.* at *9.

As to the efficient enforcer question, the Court observed that Plaintiffs had attempted to cure the deficiencies the Court identified in *SIBOR I* about the effect of SIBOR and SOR on the price of FX forwards. *Id.* at n.7. It also noted that "district courts have found similar allegations sufficient." *Id.* But it declined to make a definitive decision about whether Sonterra's allegations were sufficient, because it dismissed Sonterra's claims on the alternative ground that Sonterra was not an efficient enforcer because it did not transact directly with any Defendant. *See id.* at *6 & n.7.

Alongside the substantive issues discussed above regarding antitrust and personal jurisdiction, Defendants' motion to dismiss the Second Amended Complaint also asserted that then-Plaintiffs FrontPoint and Sonterra lacked capacity to sue, because they had dissolved prior to the filing of this action. ECF No. 243 at 13-16. Plaintiffs responded that prior to their dissolution, FrontPoint and Sonterra had assigned their claims to another entity, FLH, and attached the Asset Purchase Agreements ("APAs" or "assignments") for each entity to their briefing. ECF No. 249 at 44-52. Defendants argued in their reply brief that the APAs (which contain mostly identical language, with a few important differences) were ineffective to convey the relevant claims to FLH. ECF No. 255 at 4-10. At oral argument, the Court read aloud from the Sonterra APA, parsing its language clause by clause alongside Defendants' counsel, and ultimately concluded: "I rule that this document, although not entirely clear, is sufficiently clear to show that all assets have been transferred." Apr. 23, 2018 Arg. Tr., ECF No. 282, 11:8-10. In its written opinion in *SIBOR II*, the Court confirmed its oral ruling and held that both APAs "appear to show a full assignment of rights to FLH." 2018 WL 4830087, at *11. It accordingly granted Plaintiffs leave to substitute FLH as assignee and successor-in-interest to FrontPoint (Sonterra's claims having been dismissed on efficient enforcer grounds) in a Third Amended Class Action Complaint ("TAC"). *Id.*

Plaintiffs timely filed the TAC—which retained the identical allegations that the Court considered when reaching its personal jurisdiction holdings in *SIBOR II*. *See* ECF No. 308. The only changes that the TAC made to the SAC were: (1) additional allegations showing the assignment between FrontPoint and FLH; and (2) the removal of the Defendants that were not alleged to have been Panel Members, consistent with the Court's holdings in *SIBOR II*. *See id.* Defendants moved to dismiss the TAC, primarily on the grounds that the action had been a "legal nullity" from its inception, due to its filing by dissolved entities, and therefore that the Court lacked subject matter jurisdiction. *See* ECF No. 319.

Shortly thereafter, while Defendants' motion to dismiss the TAC was still pending, Plaintiffs moved for leave to file a Proposed Fourth Amended Class Action Complaint ("PFAC") adding the Moon Plaintiffs as additional plaintiffs. ECF No. 348-1. Like former plaintiff FrontPoint, the Moon Plaintiffs allege that they traded allegedly price-fixed derivatives linked to SIBOR and SOR directly with a Panel Member within the United States. *Id.* Save for the addition of the Moon Plaintiffs and details concerning their transactions, the PFAC was identical in all respects to the TAC.

In a single opinion, the Court granted Defendants' motion to dismiss the TAC and denied Plaintiffs' motion for leave to file the PFAC. *Fund Liquidation Holdings LLC v. Citibank, N.A.*, 399 F. Supp. 3d 94, 105 (S.D.N.Y. 2019) ("*SIBOR III*"). The Court found the FrontPoint APA did not convey the antitrust claims in this action to FLH, and also agreed with Defendants that, because the action was initially filed in the names of dissolved entities, the Court had never had subject matter jurisdiction. *Id.* at 102-03. And because, in its view, the Court lacked subject matter jurisdiction, the Court also held that the Moon Plaintiffs could not join the action via the PFAC. *Id.* at 105. As an alternative basis for denying leave to file the PFAC, the Court found that the Moon Plaintiffs' claims were time-barred and not subject to *American Pipe* tolling. *Id.* Citing *China Agritech, Inc. v. Resh*, 138

S.Ct. 1800 (2018), it ruled that "[t]he Moon plaintiffs cannot bring a new class action or otherwise revive an otherwise infirm action." *Id.*

The Second Circuit vacated and remanded *SIBOR III*. *See Fund Liquidation Holdings LLC v. Bank of Am. Corp.*, 991 F.3d 370 (2d Cir. 2021) ("*SIBOR Appeal*"). It rejected the notion that an action filed in the names of plaintiffs who lacked standing was an incurable "legal nullity." It held instead that "although the dissolved funds lacked standing at the time the case was commenced, Article III was nonetheless satisfied because Fund Liquidation, the real party in interest, has had standing at all relevant times and may step into the dissolved entities' shoes without initiating a new action from scratch." *Id.* at 375. Accordingly, it remanded the case to this Court for further proceedings, stating that "this does not require us to resolve whether Fund Liquidation received a valid assignment from FrontPoint because the district court already concluded that Fund Liquidation received such an assignment from Sonterra. And although Sonterra's claims were separately dismissed based on the fund not being an efficient enforcer of antitrust laws, that is a non-jurisdictional dismissal and so a valid case or controversy still exists." *Id.* at 392 (citations omitted). The Second Circuit further held that because this action was *not* a "legal nullity" from its inception, the Moon Plaintiffs' claims in the PFAC did not constitute a "new" class action that would be time-barred under *China Agritech*. *See id.* at 393. It therefore instructed this Court on remand:

> [S]o long as the amendment to add the Moon Funds as class representatives satisfies the requirements of Federal Rule of Civil Procedure 15(c)(1)(B), *see id.* at 616, and so long as the proposed fourth amended complaint otherwise plausibly states a claim on which relief can be granted, the district court should grant Fund Liquidation's motion to amend.

Id. (emphasis added).

Defendants petitioned the Second Circuit for rehearing. Most importantly for present purposes, the petition asserted that "[t]he Panel…mistakenly believed…the district court had found

that Sonterra assigned its claims to FLH and, therefore, FLH was the real party in interest….[This] assumption is [not] supported by the appellate record, and the district court should answer these questions on remand." *Fund Liquidation Holdings LLC v. Bank of Am. Corp.,* No. 19-2719 (2d Cir.), ECF. No. 242, Reh'g Pet. at 15. The Second Circuit plainly disagreed with Defendants, because it denied their petition out of hand, without a single judge even calling for a response from Plaintiffs. ECF No. 246. Defendants next moved to stay issuance of the mandate. ECF No. 249. The Second Circuit denied that motion as well, ECF No. 257, and the mandate accordingly issued on May 24, 2021. ECF No. 258.

Back in this Court on remand, Defendants consented to the filing of what had previously been the PFAC as the new operative complaint—the Fourth Amended Class Action Complaint. Though Defendants still vaguely assert that they are somehow "prejudiced" under "Rule 15" by the filing of the FAC (Defs.' Br. at 24-25), they do not dispute that the FAC satisfies the specific provision of Rule 15 that the Second Circuit identified for decision on remand, Rule 15(c)(1)(B). Rule 15(c)(1)(B) asks only whether "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Here, other than: (1) the substitution of FLH; (2) the addition of the Moon Plaintiffs, and (3) the removal of Defendants that were not alleged to have been Panel Members, the FAC is identical in all material respects to the SAC that the Court considered in *SIBOR II*. The SAC, in turn, was essentially the same as the original complaint, just with additional facts following *SIBOR I* to support personal jurisdiction and the price link between SIBOR/SOR and FX forwards. Accordingly, there is no debate (and Defendants raise none) that "the amendment to add the Moon Funds as class representatives satisfies the requirements of Federal Rule of Civil Procedure 15(c)(1)(B)." *SIBOR Appeal*, 991 F.3d at 393.

The Court, then, is left to decide only whether the "fourth amended complaint otherwise plausibly states a claim on which relief can be granted." *Id.* at 393. The FAC includes allegations that the Moon Plaintiffs transacted Singapore dollar foreign exchange forwards—which are alleged to have been priced based on U.S. Dollar SIBOR ("USD SIBOR") and SOR—directly with Defendant UBS AG while Defendants' profit-motivated conspiracy was in effect. FAC ¶¶ 87-88, 237-40. Applying these facts to the Court's existing substantive holdings from *SIBOR II*, the answer to the Second Circuit's question is plainly "yes."

ARGUMENT PART I: DEFENDANTS' RULE 12(B)(6) AND 12(B)(2) CHALLENGES TO THE FAC FAIL

I. The One Open Issue: Plaintiffs Plausibly Allege that the Industry Standard Formula Used to Price Foreign Exchange Forwards Incorporates SIBOR and SOR.

A. The Second Circuit and Other Courts in this District Have Found the Identical Allegations Plausible in Other "IBOR" Benchmark Manipulation Cases.

The Moon Plaintiffs allege that the Singapore dollar foreign exchange forwards they traded are priced using an industry standard formula:

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

FAC ¶ 192. This formula is used to price foreign exchange forwards generally, in any currency pair the parties choose. It uses the relevant interest rate benchmark for the chosen currency to adjust the spot prices of the currency pair to account for the cost of carrying the pair over the duration of the agreement. FAC ¶ 199 (citing CFTC's finding about how the formula is used). As Defendant HSBC's global head of foreign exchange cash trading explained, "[i]nterest rates [*i.e.,* USD SIBOR and SOR, FAC ¶¶ 192-194] are a key driver of the forex [foreign exchange] forward market. The

market needs an interest rate yield curve to be able to value currencies over time." FAC ¶ 198. Here, the relevant interest rates for a Singapore dollar foreign exchange forward are USD SIBOR and SOR, and they are plugged into the Rterm and Rbase variables in the formula. FAC ¶ 194.

In *Sonterra Capital Master Fund Ltd. v. UBS AG*, 954 F.3d 529 (2d Cir. 2020), the plaintiffs alleged a very similar conspiracy to the one at issue here, in which banks (including many of the same Defendant banks here) manipulated the Yen LIBOR benchmark rate in the same way and for the same purpose as Plaintiffs here allege that Defendants manipulated SIBOR and SOR. The plaintiffs there traded Japanese Yen foreign exchange forwards. They alleged that their Yen foreign exchange forwards were priced using the very same pricing formula reproduced above, with Yen LIBOR plugged into either the Rterm or Rbase variable. Am. Class Action Compl., No. 1:15-cv-05844, ECF No. 121 ¶ 199 (S.D.N.Y.). Defendants moved to dismiss, disputing that the Yen FX forwards plaintiffs traded were in fact priced based on Yen LIBOR, such that plaintiffs did not allege Article III injury as a result of the alleged manipulation of Yen LIBOR. The district court agreed, finding that plaintiffs had not pled facts sufficient to support Article III standing because "the sources [the complaint] cited did not 'say that the Yen LIBOR rate is definitively used to price' Yen FX forwards." 954 F.3d at 534 (quoting 2017 WL 1091983, at *2.).

The Second Circuit reversed. It found that the district court had held plaintiffs to too high a standard "at the motion to dismiss stage," noting that the "'fact-specific question" of how interest rates are used to price FX forwards "cannot be resolved on the pleadings.'" 954 F.3d at 534-35 (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 203 (2d Cir. 2001)). It went on to hold that "[t]he complaint adequately alleges that Yen LIBOR is routinely used to price Yen FX forwards, and Plaintiffs provide *detailed supporting allegations*, including an explanation of the role Yen LIBOR plays in the generic pricing formula. *No more is required at this stage*. Plaintiffs have *plausibly pled* that they suffered 'monetary loss' in these transactions as a result of Defendants' alleged manipulation of

interest rates." 954 F.3d at 535 (emphasis added).

This Court may comfortably rely on the Second Circuit's holding to find that the Moon Plaintiffs have similarly alleged at the pleading stage the requisite link between SIBOR and SOR and the prices of the Singapore dollar foreign exchange forwards they traded.

Even before the Second Circuit definitively resolved the question, courts in this district had already found allegations about the pricing of foreign exchange forwards using IBOR interest rates in the industry-standard formula sufficient for Rule 12(b)(6) purposes—as this Court itself recognized in *SIBOR II*. *See SIBOR II*, 2018 WL 4830087, at *5 n.7 ("district courts have found similar allegations sufficient"). One case (which this Court cited in *SIBOR II*) involved manipulation of the Euribor benchmark, another addressed manipulation of the Swiss Franc LIBOR benchmark, and yet another dealt with the BBSW benchmark interest rate for Australian dollars. *See Sullivan v. Barclays PLC,* No. 13-CV-2811 (PKC), 2017 WL 685570, at *9 (S.D.N.Y. Feb. 21, 2017) (Euribor); *Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 547 (S.D.N.Y. 2017) (Swiss Franc LIBOR); *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 156 (S.D.N.Y. 2018) (BBSW). In short, the sufficiency of Plaintiffs' allegations regarding the workings of the formula that prices foreign exchange forwards using benchmark interest rates has been vetted time and again. This Court can simply follow the path that all these other courts have already laid.

B. Defendants' Counterfactual Attacks on Plaintiffs' Well-Pled Allegations Fail.

Defendants' counterfactual attacks on the direct pricing relationship between USD SIBOR, SOR and the Moon Plaintiffs' Singapore dollar foreign exchange forwards are not just inappropriate at the pleading stage, they are wrong on their own terms. *See* Defs.' Br. at 30-34. Defendants argue that because SIBOR and SOR are fixed once a day and remain static for the rest of the 24-hour period, FX forward pricing should also be static for the same period and should exactly match the FX forward price reported by Bloomberg. Defs.' Br. at 31. But the formula also incorporates the

spot price for the USD/SGD currency pair, a value that changes constantly throughout the day. FAC ¶ 192. Therefore, FX forward prices change even if SIBOR and SOR remain static. What Plaintiffs allege, and all the law requires them to allege, is that SIBOR and SOR are "*components*" of the price of FX forwards. FAC ¶ 238 (emphasis added). The Sherman Act allows an "antitrust claim based on the influence that a conspiracy exerts on the starting point for prices." *Gelboim,* 823 F.3d at 776 (citing *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002)). The FAC provides the formula and an illustration of its application to show that Defendants' manipulation of SIBOR and SOR, two inputs of the formula, directly affects the output of the formula, which in turn serves as "the starting point for prices" and the fixing of a "component of price" in violation of the antitrust laws. *Gelboim,* 823 F.3d at 776.

At best, Defendants' arguments could be construed as an attack on the *extent* of the impact that their manipulation had on the SIBOR- and SOR-Based Derivatives market at large, which is already foreclosed by *Gelboim* as an impermissible dive into the merits of issues that must be resolved later. *Id.* at 776-83. ("LIBOR did not 'necessarily correspond to the interest rate charged for any actual interbank loan' . . . This is a disputed factual issue that must be reserved for the proof stage . . . The net impact of a tainted LIBOR in the credit market is an issue of causation reserved for the proof stage; at this stage, it is plausibly alleged on the face of the complaints that a manipulation of LIBOR exerted some influence on price."). As the Second Circuit has repeatedly explained, these types of fact-based challenges are inappropriate on a motion to dismiss. *See, e.g., Wacker v. JP Morgan Chase & Co.*, 678 F. App'x 27, 30 (2d Cir. 2017) ("[O]ur precedents caution against assessing the choice of a benchmark at the pleading stage because it involves an inherently fact-intensive inquiry into the relationship between the benchmark and the market it allegedly tracks.").

II. The Law of the Case Doctrine Requires Adherence to this Court's Prior Rulings.

Now that the one open issue is resolved, Plaintiffs turn to the Court's prior rulings to

dispose of the remainder of Defendants' challenges to the FAC. The law of the case doctrine holds that "when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case." *Novick v. AXA Network, LLC*, 714 F. App'x 22, 24 (2d Cir. 2017). This doctrine is critical because it preserves judicial resources and allows litigants to rely on the court's prior decisions throughout the same litigation. *See Scot. Air Int'l, Inc. v. Brit. Caledonian Grp., PLC.*, 152 F.R.D. 18, 24-25 (S.D.N.Y. 1993) (*citing DiLaura v. Power Auth. of N.Y.,* 982 F.2d 73, 76 (2d Cir. 1992)). The doctrine is strictly applied, and only a limited, narrow set of circumstances justify a departure from the court's prior holdings. Accordingly, courts should adhere to their own rulings absent "compelling circumstances," such as an "intervening change of law, the availability of new evidence, or to correct a clear error." *Scot. Air Int'l, Inc.,* 152 F.R.D. at 24-25; *De Johnson v. Holder,* 564 F.3d 95, 99 (2d Cir. 2009) ("The law of the case doctrine commands that 'when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case' unless 'cogent and compelling reasons militate otherwise.'" (*quoting United States v. Quintieri,* 306 F.3d 1217*,* 1225 (2d Cir. 2002)).

III. Plaintiffs State a Viable Antitrust Claim.

A. This Court's Holding that Plaintiffs Allege a Plausible Antitrust Conspiracy Remains Correct.

As explained above, the Court has already ruled that Plaintiffs have plausibly alleged a price-fixing conspiracy among the Panel Members—the only Defendants named in the FAC. The FAC retains the same allegations that the Court considered in *SIBOR I* and *SIBOR II*, and the mere filing of an amended complaint that retains substantially similar allegations as the previous complaints that the Court has already evaluated is not a valid basis to depart from the Court's prior rulings. *See, e.g., United States v. Cath. Health Sys. of Long Island Inc.,* No. 12-CV-4425 (MKB), 2018 WL 3825906, at *5 (E.D.N.Y. Aug. 10, 2018); *Weslowski v. Zugibe,* 96 F. Supp. 3d 308, 316–17 (S.D.N.Y. 2015) ("The

mere filing of an [a]mended [c]omplaint does not entitle [a party] to relitigate his claims absent new factual allegations.").

Defendants effectively concede there are no new facts that warrant revisiting this holding because they point only to allegations that were already before the Court in *SIBOR I* and *SIBOR II* in arguing—for the *third time*—that the alleged conspiracy is implausible. *See* Defs.' PJ Br., at 7-9. Nor do Defendants identify any purported changes in controlling law, as would be required to depart from the Court's holdings. Instead, Defendants rely on a single district court decision that was issued *before SIBOR II*. *See* Defs.' PJ Br. at 8.[3] These arguments come nowhere close to the strict standard required to depart from law of the case, and instead amount to impermissible attempts to relitigate issues already decided. *See De Johnson,* 564 F.3d at 99.

Having failed to identify any new facts or controlling law, Defendants can only succeed in their attempts to set aside the Court's prior holdings as to the plausibility of the alleged conspiracy if they can identify clear error. *De Johnson,* 564 F.3d at 99. Here, the Court's holdings were supported by substantial factual allegations that are easily sufficient to adequately allege an antitrust conspiracy.

In antitrust cases, a "plaintiff's job at the pleading stage, in order to overcome a motion to dismiss, is to allege enough facts to support *the inference* that a conspiracy actually existed." *SIBOR I*, 2017 WL 3600425, at *10. To do this, a plaintiff will typically "present circumstantial facts," and a court cannot assume that the lack of direct evidence at the pleading stage is "a sign that no conspiracy existed." *Id.* Rather, the plaintiff need only allege enough facts, accepted as true, to provide the court with "plausible grounds to infer an agreement." *Anderson News, L.L.C. v. Am. Media, Inc.,* 680 F.3d 162, 184 (2d Cir. 2012). Plausibility is a standard lower than probability, and

[3] The only case PJ Defendants cite is wholly inapposite. *See* Defs.' PJ Br. at 8 (*citing In re Int. Rate Swaps Antitrust Litig.*, No. 16-md-2704, 2018 WL 2332069 (S.D.N.Y. May 23, 2018) ("*IRS II*"). *IRS II* involved an alleged group boycott which was unsupported by any governmental findings, much less the sort of detailed factual findings against each defendant that are alleged here. *See* Part I.B. *infra*.

"the choice between or among plausible inferences or scenarios is one for the factfinder." *Id.* Ultimately, the plausibility standard "simply calls for enough fact to raise *a reasonable expectation* that *discovery* will reveal evidence of illegal agreement." *Id.* (emphases in original).

Robust factual allegations support the plausibility of the conspiracy alleged here. These allegations include: (1) *133* of Defendants' traders—three-quarters of whom resigned or were asked to leave their employment—were found to have participated in the manipulation of SIBOR and SOR (FAC ¶¶ 10, 207, 217-223); (2) the Monetary Authority of Singapore ("MAS") found that each of the Defendants systematically failed maintain adequate rate submission controls and processes (FAC ¶ 210); and (3) findings by MAS and other regulators that "repeatedly refer to communications among traders at different banks." FAC ¶¶ 10, 209-214. *See SIBOR I*, 2017 WL 3600425, at *10-11; *SIBOR II*, 2018 WL 4830087, at *2-4. Based on the evidence collected during its year-long investigation, MAS sanctioned *every* Defendant for engaging in the manipulation of SIBOR and SOR. FAC ¶ 12.

MAS determined the extent of the sanctions for each Defendant based on the following three factors: (1) the number of traders within the bank who manipulated the rates; (2) the number of other banks with which the traders had colluded; and (3) the frequency of the manipulative conduct. FAC ¶ 13. Specifically, MAS uncovered evidence that "several banks communicated with each other over electronic messaging about what rates they were going to submit . . . aiming to benefit their trading books," which included "traders talking to traders, saying 'I need you to help me today, I need to fix low.'" *Id.* ¶ 10. In announcing the results of the investigation, Singapore's Deputy Prime Minister confirmed that "the investigations found clear evidence of discussions and agreements to influence benchmark submissions" and that "managers were aware" of this misconduct. *Id.* Courts have repeatedly found that similar factual allegations derived from government orders are sufficient to plausibly allege a conspiracy. *See, e.g., Sullivan*, 2017 WL 685570,

at *13. These allegations are more than sufficient to create "a reasonable expectation that discovery will reveal evidence of illegal agreement." *Anderson News*, 680 F.3d at 184.

B. The Moon Plaintiffs Have Antitrust Standing.

1. The Court's Holding that Plaintiffs that Transacted Directly with a Member of the Conspiracy have Antitrust Standing Remains Correct.

A plaintiff has antitrust standing where it alleges: "(i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations." *SIBOR I*, 2017 WL 3600425, at *11. In *SIBOR I* and *SIBOR II*, the Court held that FrontPoint had antitrust standing based on its SIBOR swap trades directly with a Panel Member. *See SIBOR I*, 2017 WL 3600425, at *11-12 , *SIBOR II*, 2018 WL 4830087, at 85-6. Like FrontPoint, the Moon Plaintiffs traded derivatives (in their case, FX forwards) priced based on SIBOR and SOR directly with Defendant Panel Member UBS AG. *See* Part I, above; Accordingly, the Moon Plaintiffs have antitrust standing for the same reasons that former plaintiff FrontPoint did.

2. The Moon Plaintiffs Suffered an Antitrust Injury When They Transacted in SIBOR- and SOR-Based Derivatives at Prices Manipulated by Defendants.

The first prong of the antitrust standing inquiry requires Plaintiffs to allege that they suffered an antitrust injury. *SIBOR I,* 2017 WL 3600425, at *11. An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Daniel v. Am. Bd. of Emergency Med.*, 428 F.2d 408, 438 (2d Cir. 2005) (quoting *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977)). In benchmark manipulation cases, courts within this Circuit find an "antitrust injury" when consumers allege that they "pay prices that no longer reflect ordinary market conditions" as a result of trading products tied to an allegedly manipulated benchmark. *See Gelboim,* 823 F.3d at 772.

This Court has twice considered the same theory of injury and the same counterarguments by Defendants, and both times concluded that Plaintiffs adequately pleaded antitrust injury. *See SIBOR I*, 2017 WL 3600425, at *12 (following "numerous courts [that] have held that benchmark price or rate manipulation gives rise to an antitrust injury"); *SIBOR II*, 2018 WL 4830087, at *5 ("In *SIBOR I*, I held, following [*Gelboim*], that an antitrust injury was sufficiently alleged with respect to the [First Amended Complaint]. The SAC is materially no different, and I hold that an antitrust injury has similarly been properly alleged."). *Compare id.*, *with* FAC ¶¶ 237-40 (alleging that each Moon Plaintiff transacted an SGD foreign exchange forward contract priced based on SOR and USD SIBOR).

Defendants acknowledge that this Court's prior holdings are directly on point but urge reconsideration *again* on the basis of the Second Circuit's decision in *Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104 (2d Cir. 2018), as if *Total Gas* were late-breaking new law. In reality, *Total Gas* came out five months before this Court's *SIBOR II* decision. Defendants immediately alerted the Court to the then-new decision, and the parties put in five pages of letter briefing devoted exclusively to its impact. *See* ECF Nos. 291, 293. As Plaintiffs pointed out then, *Total Gas* concerned allegations that plaintiffs trading at one natural gas hub were somehow injured by "shockwaves" resulting from defendants' manipulation at totally separate regional hubs—a theory *contradicted by plaintiffs' own expert*, who asserted that price cointegration in the natural gas market ran in the opposite direction. 889 F.3d at 115. The Second Circuit made clear in *Total Gas* that these facts differ materially from benchmark manipulation cases like this one, where plaintiffs allege "rule-based" price linkage between the benchmark and the products they trade. *Id.* at 113. The standard for pleading antitrust injury in benchmark cases continues to be that set forth in *Gelboim*, 823 F.3d at 772-75. *See Total Gas*, 889 F.3d at 113 (citing *Gelboim*, 823 F.3d at 765-66).

Accordingly, since *Total Gas*, courts in this District have consistently continued to apply *Gelboim* to find that plaintiffs who trade derivatives priced based on a manipulated benchmark suffer

antitrust injury. *See, e.g.*, *Allianz Global Investors GmbH v. Bank of Am. Corp.*, 463 F. Supp. 3d 409, 418 (S.D.N.Y. 2020) ("Here, the Complaint plausibly alleges that Plaintiffs traded to their detriment in currencies the prices of which were tied to artificially manipulated benchmark rates and bid/ask spreads.") (citing *Total Gas*, 889 F.3d at 113); *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC*, 366 F. Supp. 3d 516, 532 (S.D.N.Y. 2018); *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 163 (S.D.N.Y. 2018) ("*BBSW I*").

It is no wonder, then, that Defendants rely on non-benchmark cases. *See In re SSA Bonds Antitrust Litig.*, No. 16-cv-3711-ER, 2018 WL 4118979 (S.D.N.Y. Aug. 28, 2018); *In re Merrill, BofA, and Morgan Stanley Spoofing Litig.*, 2021 WL 827190 (S.D.N.Y. Mar. 4, 2021) ("*Merrill Spoofing*"). Both cases are also inapposite in other crucial ways. In *SSA Bonds*, the court could not identify an antitrust injury because plaintiffs failed to identify a mechanism that the conspiracy—which allegedly restrained the market for an unspecified number of bonds issued by an unspecified number of different entities located across the world—would have plausibly impacted the products that plaintiffs traded. *See SSA Bonds*, 2018 WL 411879, at *1. Critically, the *SSA Bonds* plaintiffs did not allege that any benchmark was manipulated. *See id.* at *1-2. Rather, they alleged a conspiracy that would have required the defendants to communicate to agree on prices on each individual customer trade. *See id.* at *2. Without an explanation of the "impact of the manipulation on the market" or the "manipulation's scope," the court found that the plaintiffs failed to plead a plausible antitrust injury. *Id.* at *7.

In *Merrill Spoofing*, the court posited that the manner of manipulation alleged by plaintiffs—placement of "spoof" orders—created price artificiality that "lasted only a matter of seconds" in each instance, requiring more particular allegations as to the timing of plaintiffs' transactions. 2021 WL 827190, at *13. *See also id.* at *11 n.3 (noting that a benchmark theory of price manipulation is "not at

issue in this case.").[4] These cases are inapposite here, where the Defendants are alleged to have manipulated three benchmark rates set once per day over which they had exclusive control. *See SIBOR II,* 2018 WL 4830087, at *1-2. Moreover, the Court has already recognized the impressive "scale and breadth of the alleged conspiracy" illustrated by regulatory settlements reached between Defendants, the CFTC, and the MAS. *Id.* at *4.

Finally, Defendants are wrong to suggest that the "multi-directional" nature of the alleged conspiracy requires the Moon Plaintiffs to demonstrate loss causation on specific transactions. Defs.' Br. at 27-28. As this Court has already recognized, Defendants' multi-directional scheme was calibrated to enable each cartel member to consistently extract illicit profits from its respective counterparties:

> While the derivative positions of Panel Members may differ on a given day, a subset of the Panel may benefit from a given manipulation, and the remainder may wait for their winning day to come, being privy to the knowledge of where the rates are heading. In such a conspiracy, where Panel Members communicate with one another, they can plan their trades around the anticipated rates, buying when low, selling when high, and circumventing the market risk confronting those not privy to foreshadowed rates.

SIBOR II, 2018 WL 4830087, at *4 (citing *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44, 55 (S.D.N.Y. 2016)). It is therefore illogical—not to mention far too demanding for the pleading stage—to deny antitrust standing to any Plaintiffs that transacted directly with a member of the very cartel that was actively restraining that market and "circumvent[ing]" its own "market risk." *See BBSW I*, 343 F. Supp. 3d at 163-64 ("Unlike the complaint in *Gelboim*, the allegations in the amended complaint here do not assert that BBSW was consistently moved in the same direction by defendants. But this is of no import with respect to the issue of antitrust standing…Plaintiffs [] each has alleged that it was overcharged and underpaid on its BBSW-Based Derivatives transactions as a result of a *per*

[4] The *Merrill* court's CEA injury holding is also the subject of a pending appeal, for which briefing and argument are complete. *See In re: Merrill, B of A, and Mo*, No. 21-853, ECF No. 47 (2d Cir.).

se violation of the Sherman Act."). For all these reasons, the Court's two prior correct holdings that Plaintiffs have alleged antitrust injury should remain undisturbed.

3. The Moon Plaintiffs Satisfy the Efficient Enforcer Factors.

Whether the Moon Plaintiffs are efficient enforcers of the antitrust laws depends on four factors: (1) the directness or indirectness of the asserted injury; (2) the existence of more direct victims or the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the extent to which the claim is highly speculative; and (4) the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other. *Gelboim*, 823 F.3d at772.

As set forth in Part I above, the Moon Plaintiffs traded FX forwards that incorporated USD SIBOR and SOR as elements of price. Because they traded those FX forwards *directly* with Defendant UBS AG, FAC ¶¶ 87-88 237-40, they are efficient enforcers of the antitrust laws under this Court's decision in *SIBOR I*. 2017 WL 3600425, at *12 (according efficient enforcer status to FrontPoint because it "traded in derivatives whose price was directly impacted by the SIBOR rate" "directly with two of the defendants"). The Court emphasized: "It is difficult to think of a more direct victim than FrontPoint." *Id. SIBOR II* confirmed this holding. 2018 WL 4830087, at *5. Indeed, in *SIBOR II*, the Court distinguished Sonterra's claims from FrontPoint's on the basis that, unlike FrontPoint (or the Moon Plaintiffs in the FAC), Sonterra did not allege that they "enter[ed] into transactions directly with any of the defendants." 2018 WL 4830087, at *5. Accordingly, the Moon Plaintiffs' antitrust standing is established by its direct transactions with Defendant UBS, per this Court's prior rulings.

Defendants cite no authority for their invented four-part test for pleading proximate causation precisely because it directly contradicts case law. *See* Defs.' Br. at 35. For example, as Judge Buchwald has explained, "[although] plaintiffs may ultimately recover only to the extent of their net injury . . . netting in and of itself does not render the damages unduly speculative." *In re LIBOR-Based Fin.*

Instruments Antitrust Litig., No. 11 MDL 2262 (NRB), 2016 WL 7378980, at *18 (S.D.N.Y. Dec. 20, 2016). This holding precludes the fourth element of Defendants' test requiring the Moon Plaintiffs to allege that "[their] loss on these instruments was not offset by gains on other USD SIBOR- or SOR-linked investments." *See* Defs.' Br. at 35.[5] For all the above reasons, Plaintiffs' allegations easily establish the necessary connection between Defendants' manipulation of SIBOR and SOR and their injury.[6]

IV. The Court's Holding that Sales of Price-Fixed SIBOR- and SOR-based Derivatives in the Forum Confer Personal Jurisdiction Over All Panel Members Remains Correct.

A. The Court's Finding of Conspiracy Jurisdiction Applies Squarely to the Moon Plaintiffs' Claims.

In *SIBOR II*, the Court applied *Schwab*'s test for conspiracy jurisdiction. *See* 2018 WL 4830087, at *7. Under *Schwab*, "the forum contacts of a member of a conspiracy may be imputed to co-conspirators where a plaintiff alleges 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.'" *Id.* at *7 (*quoting Schwab*, 883 F.3d at 87).

The Court held that Plaintiffs plausibly alleged a "trader-based conspiracy where Panel Members conspired to manipulate rates (in Singapore) with the purpose of profiting from trading

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[5] Defendants also contend that the OCBC Chart shows only how to calculate SOR if forward rate is known, but not the reverse. *See* Defs.' Br. at 31. Basic algebra principles, however, suggest otherwise: when SOR and forward rate are two variables in the formula, if SOR can be solved for given forward rate, then forward rate can be solved for given SOR.

[6] For the same reason, the Second Circuit's recent decision in *In re Am. Express Anti-Steering Rules Antitrust Litig.*, No. 20-1766, 2021 WL 5441263, at *4 (2d Cir. Nov. 22, 2021) ("*AmEx*") (citations omitted) has no bearing on Plaintiffs' antitrust standing here. The *AmEx* plaintiffs alleged a quintessential "umbrella" theory, contending that defendants' anticompetitive conduct "enabled" other non-defendant companies to overcharge plaintiffs. *Id.* at *6. Here, the Moon Plaintiffs both suffered direct injury as a result of a rule-based price linkage between the manipulated rates and the products they transacted, and they transacted with Defendant UBS AG.

derivatives (in the United States and elsewhere)." *SIBOR II*, 2018 WL 4830087, at *8. Accordingly, sales of allegedly price-fixed SIBOR-based derivatives by Citibank N.A. and Deutsche Bank AG to former Plaintiff FrontPoint were "plausibly alleged to have been collusive and related to the alleged fixing of the rates, and can therefore support the exercise of personal jurisdiction." *Id.* at *8. Moreover, these trades were "acts in furtherance of the conspiracy, and therefore can be the basis for jurisdiction over all members of the conspiracy, whether or not they themselves traded derivatives in the U.S." *Id.*

The only even arguably relevant difference between the allegations that the Court found sufficient to confer personal jurisdiction over all Panel Members in *SIBOR II* and those in the FAC is that the FAC adds the Moon Plaintiffs and details about their Singapore dollar foreign exchange forwards. FAC ¶¶ 87-88, 237-40. This difference is immaterial because, like the products that FrontPoint traded in *SIBOR II*, the products that UBS AG traded with the Moon Plaintiffs in the forum were priced directly based on rates that were manipulated by the alleged conspirators. *See* Part I, above.

Like FrontPoint, the Moon Plaintiffs allege that a conspirator—UBS AG—sold them price-fixed SIBOR- and SOR-based derivatives in the forum as part of Defendants' profit-motivated antitrust conspiracy. FAC ¶¶ 87-88, 237-40. Accordingly, just as Citibank's and Deutsche Bank's in-forum trades were acts in furtherance of Defendants' profit-motivated conspiracy and therefore established conspiracy jurisdiction in *SIBOR II*, UBS AG's in-forum trades confer conspiracy jurisdiction over PJ Defendants here.[7]

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[7] Given that co-conspirator UBS is alleged to have traded price-fixed derivatives based on USD SIBOR and SOR to the Moon Plaintiffs in the forum, the Court need not consider the jurisdictional significance of Citibank's and UBS's in-forum trades to FrontPoint. However, and contrary to PJ Defendants' unsupported contention, *see* Defs.' PJ Br. at 6, Citibank's and Deutsche Bank's SIBOR-based derivatives trades with FrontPoint in the forum (FAC ¶¶ 86, 236) are still acts in furtherance of

B. PJ Defendants' Attacks on *SIBOR II*'s Application of Conspiracy Jurisdiction Fail.

In arguing that the Moon Plaintiffs' transactions do not confer personal jurisdiction under *SIBOR II*, PJ Defendants again fail to identify any new facts or changes in controlling law as would be required to depart from the Court's reasoning in *SIBOR II*. Rather, they attack the Court's reasoning in *SIBOR II* by inventing additional obstacles to the exercise of personal jurisdiction that do not exist. These include two new purported requirements for the exercise of conspiracy jurisdiction that are wholly unsupported by controlling law. The first is a claimed "aiming" requirement for conspiracy jurisdiction that appears nowhere in *Schwab* itself, *see* 883 F.3d at 87, and for which PJ Defendants fail to cite a single case. *See* Defs.' PJ Br. at 10. The lack of support for this requirement is unsurprising given that it erroneously conflates the standard governing the "effects test" theory of personal jurisdiction—which is "typically invoked when the conduct that forms the basis for the controversy occurs entirely out-of-forum . . .," *Schwab*, 883 at 87— with the test for conspiracy jurisdiction. *See id.* (setting forth the test for conspiracy jurisdiction without mentioning any "aiming" requirement). The Court need not rely on the effects test here because the conduct forming the basis for the controversy *did not* occur entirely out-of-forum. Rather, the Moon Plaintiffs allege that a co-conspirator, UBS, sold price-fixed SIBOR- and SOR-based derivatives directly to the Moon Plaintiffs in the United States. FAC ¶¶ 87-88, 237-40. These in-forum acts in furtherance of the alleged conspiracy make any consideration of the effects test superfluous. *See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL,* 732 F.3d 161, 173 (2d Cir. 2013) ("We do not, however,

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the alleged conspiracy and can therefore support personal jurisdiction. Earlier this year, the Supreme Court held that the defendant Ford's marketing, service, and sales of cars to non-party forum residents were sufficiently related to two accident victims' claims to support specific personal jurisdiction in Montana and Minnesota, notwithstanding that the plaintiffs in those cases never bought a car from Ford in the forum states. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021). Here, as in *Ford*, the Defendants' sales of price-fixed derivatives to other investors in the forum are jurisdictionally relevant acts that may be considered in evaluating personal jurisdiction.

understand the existence of in-state effects sufficient to satisfy the 'effects test' to be a prerequisite to the constitutional exercise of personal jurisdiction over a foreign defendant in cases where the conduct on which the alleged personal jurisdiction is based occurs within the forum.").

Defendants also invent a "traditional agency" requirement for the exercise of conspiracy jurisdiction. *See* Defs.' PJ Br. at 13-15. Again, this purported requirement is of PJ Defendants' own making and appears nowhere in *Schwab* itself. *See* 883 F.3d at 87. And courts that have applied *Schwab* have recognized that no such requirement is necessary for the exercise of conspiracy jurisdiction. *See, e.g., In re Platinum & Palladium Antitrust Litig.,* 449 F. Supp. 3d 290, 325 (S.D.N.Y. 2020) (exercising conspiracy jurisdiction under *Schwab* without requiring any "traditional agency" requirement). Moreover, co-conspirators are already deemed to be each other's agents, including for jurisdictional purposes. *See, e.g., Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 597 (S.D.N.Y. 2017) ("because co-conspirators are deemed to be each other's agents, the contacts that one co-conspirator made with a forum while acting in furtherance of the conspiracy may be attributed for jurisdictional purposes to the other co-conspirators.") (*quoting In re Libor–Based Fin. Instruments Antitrust Litig.*, 2015 WL 4634541, at *23 (S.D.N.Y. Aug. 4, 2015)). A further showing of a traditional agency relationship after a conspiracy has been plausibly alleged would therefore be redundant.[8]

[8] The cases that PJ Defendants rely on are inapposite because they either examine conspiracy jurisdiction under the New York long-arm statute (not constitutional due process), *see In re Platinum & Palladium Antitrust Litig.,* 449 F. Supp. 3d 290, 325, were decided before *Schwab*, *see 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), *In re Aluminum Warehousing Antitrust Litig.*, 90 F. Supp. 3d 219, 231 (S.D.N.Y. 2015), or both. *See In re Terrorist Attacks on Sept. 11, 2001,* 349 F. Supp. 2d 765, 805 (S.D.N.Y. 2005).

V. The Court has Personal Jurisdiction Over ANZ, CACIB, Commerzbank, and RBS PLC.

The Court has already found that Plaintiffs adequately allege an antitrust claim against ANZ, CACIB, Commerzbank, and RBS PLC (the "Ratification Defendants") based on the facts included in MAS's order imposing sanctions against these Defendants for engaging in the alleged conspiracy to manipulate SIBOR and SOR. *See SIBOR I*, 2017 WL 3600425, at *10-11; *SIBOR II* 2018 WL 4830087, at *2-4. These are the same facts that the Court twice found sufficient to state a plausible antitrust claim against the other Panel Members. *See* Part III.A., above. Yet these Defendants move for dismissal based on a timing argument that they could have raised years ago,[9] claiming that they cannot be subject to conspiracy jurisdiction because they first joined the SIBOR and/or SOR panels after the Moon Plaintiffs' and FrontPoint's trades directly with co-conspirators in the United States occurred.

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[9] Ratification Defendants' failure to raise this argument in a timely manner is sufficient for the Court to reject it. *See U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143, 155 (2d Cir. 2019) ("*U.S. Bank*") ("A party waives a[ ] defense [of lack of personal jurisdiction] by ... failing to either: (i) make it by motion ... or (ii) include it in a responsive pleading ....") (*quoting* Fed. R. Civ. P. 12(h)(1)). In *U.S. Bank*, the court declined to consider the defendant's argument that the relevant jurisdictional contacts were those of a corporate entity that it acquired afterward, in part because the defendant "never raised this argument in the litigation." *Id.*

For example, even if RBS PLC's assertion that The Royal Bank of Scotland N.V. ("RBS N.V.") was the entity that served on the SIBOR and SOR panels is correct, it waited until *after SIBOR II* to say so. *See* Decl. of W. Gougherty, ECF No. 166 (failing to assert that RBS N.V., rather than RBS plc, was the entity that served on the SIBOR and SOR panels in connection with motion to dismiss the FAC); Decl. of J. Kurtzberg, ECF No. 240 (same in connection with motion to dismiss the SAC); Decl. of W. Gougherty, ECF No. 327 at ¶¶ 9-10 (asserting for the first time that RBS N.V., not RBS PLC, served on the SGD SIBOR panel in connection with motion to dismiss the TAC). Even then, RBS PLC failed to assert that it was not on the USD SIBOR or SOR panels. *Id.* Similarly, ANZ admits that it could have raised this argument in moving to dismiss claims by former plaintiff FrontPoint, *see* Defs.' PJ Br. at 11 n.9, yet it failed to do so. *See* Decl. of B. Maddigan, ECF No. 321 at ¶ 11 (asserting for the first time that ANZ was not on the SGD SIBOR panel at the time of FrontPoint's alleged trades in connection with motion to dismiss the TAC). It would be inappropriate to allow these Defendants to raise arguments for the first time after the Court had resolved two full rounds of motion to dismiss briefing and after Plaintiffs had filed a third amended pleading. *See U.S. Bank*, 916 F.3d at 155 (explaining that a defendant forfeits personal jurisdiction arguments that it fails to timely raise, including those relating to corporate successorship).

The Ratification Defendants' argument is inconsistent with controlling law. It is a longstanding principle of conspiracy law that a defendant joining a conspiracy-in-progress ratifies all acts in furtherance of the conspiracy that were committed before. *See, e.g., United States v. Shepard,* 500 F. App'x 20, 23 (2d Cir. 2012) (quoting *United States v. Blackmon*, 839 F.2d 900, 911 (2d Cir.1988)) ("[A] coconspirator is liable for acts committed in furtherance of the conspiracy prior to his entry into the conspiracy."),[10] *Dixon v. Mack,* 507 F. Supp. 345, 350-51 (S.D.N.Y. 1980) ("it is black letter conspiracy law that one who joins a conspiracy in progress ratifies all that has come before."). This principle applies equally in antitrust cases. *See In re Elec. Books Antitrust Litig.,* 859 F. Supp. 2d 671, 689 (S.D.N.Y. 2012) ("a conspirator may join a conspiracy at any time that it is ongoing; there is no requirement that a conspirator join in a conspiracy from its inception."). Accordingly, even assuming that the Ratification Defendants' counterfactual, self-serving declarations should be considered (and they should not),[11] the Ratification Defendants joined a conspiracy that embraced the objective of engaging in collusive and manipulated trades in the United States. *See SIBOR II*, 2018 WL 4830087, at *8. The Ratification Defendants are thus subject to personal jurisdiction in this forum under *SIBOR II* for the same reasons as the other PJ Defendants.[12]

[10] In *Blackmon*, the Second Circuit cited with approval a discussion of the ratification principle in *United States v. Carrascal-Olivera*. 755 F.2d 1446, 1452 n.8 (11th Cir. 1985). There, the Eleventh Circuit observed that "courts consistently have stated that one who joins a conspiracy in progress with knowledge of the unlawful enterprise is responsible for coconspirators' actions occurring before his or her association." *Id.* (collecting cases). Accordingly, "coconspirators' acts done prior to the defendant's association may be considered in conspiracy prosecutions to establish the scope or object of the conspiracy . . . or to establish venue for a prosecution." *Id.*

[11] For example, CACIB's declaration asserts that it "did not enter into any SGD SIBOR-based derivatives [trades] that are relevant to this litigation. . ." Decl. of K. Zafar, ECF No. 449-9, ¶ 11. The Court should not credit such attempts to couch legally conclusory statements as factual declarations.

[12] RBS PLC argues that it is not subject to personal jurisdiction because its subsidiary, RBS N.V., was the RBS entity that served on the SIBOR and SOR panels. *See* Defs.' PJ Br. at 12. But RBS PLC ignores that it absorbed RBS N.V.'s Singapore business before this lawsuit commenced. *See* Decl. of R. St. Louis, Ex. 1 at 145, 173. Thus, RBS PLC is subject to personal jurisdiction as RBS N.V.'s successor. *See, e.g., Time Warner Cable, Inc. v. Networks Group, LLC,* 2010 WL 3563111, at *5 (S.D.N.Y.

VI. The So-Called "Singapore Banks" Are Subject to Personal Jurisdiction.

A group of so-called "Singapore Banks" erroneously claim to be differently situated because they did not have a "substantial presence" in the United States. *See* Singapore Br. at 11-12. The Court has already rejected this argument, and it should do so again. *See SIBOR II*, 2018 WL 4830087, at *8 (holding that trades by co-conspirators to former plaintiff FrontPoint "can form the basis of specific jurisdiction not only for the two defendants who traded with Plaintiff (*i.e.*, Deutsche Bank and Citibank) but also for all the Panel Member defendants who participated in the conspiracy."). A co-conspirator's presence in the United States is wholly irrelevant because *Schwab* plainly does not require the plaintiff to allege any "presence" in the forum at all to exercise personal jurisdiction over members of a plausibly alleged conspiracy where, as here, a co-conspirator committed acts in furtherance of the conspiracy in the forum. *See Schwab*, 883 F.3d at 87. And for decades, the Supreme Court has held that a supposed lack of physical presence within the forum is not a basis to evade personal jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (explaining that personal jurisdiction "may not be avoided merely because the defendant did not physically enter the forum State."). That principle is well established in this Circuit. *See Schwab*, 883 F.3d at 82-83 (collecting cases and holding that alleged sales of financial instruments in the forum supported personal jurisdiction without regard to physical presence).

Sept. 9, 2010) ("An allegation of successor liability against an entity whose predecessor is subject to personal jurisdiction can provide personal jurisdiction over the successor entity.") (*citing Libutti v. United States,* 178 F.3d 114, 124–25 (2d Cir.1999)).

RBS PLC also erroneously claims that venue is improper because Plaintiffs are purportedly required to satisfy the Clayton Act's venue statute. *See* Defs.' PJ Br. at 12 n.10. The Court has already rejected this argument. *SIBOR II*, 2018 WL 4830087, at *9. So has the Second Circuit. *See Daniel v. Am. Bd. of Emergency Med.,* 428 F.3d 408, 427 (2d Cir. 2005) (explaining that "if 28 U.S.C. § 1391 is the basis for venue," a plaintiff can "look to other service of process provisions, notably those specified in Fed. R. Civ. P. 4 . . .").

As a last-ditch effort, the Singapore Banks raise a "convenience" argument that should be swiftly rejected. *See* Singapore Br. at 11-12. Once a plaintiff has plausibly alleged a constitutionally permissible basis for the exercise of personal jurisdiction, as here, the burden shifts to the defendant to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. This is a high bar that requires the defendant to show that litigating in the forum would be so "gravely difficult and inconvenient that [it] unfairly is at a severe disadvantage in comparison to his opponent." *Alfandary v. Nikko Asset Mgmt. Co.*, 337 F. Supp. 3d 343, 360 (S.D.N.Y. 2018) (*quoting Burger King*, 471 U.S. at 478). Mere "generalized complaints of inconvenience" are wholly insufficient. *See Chloe v. Queen Bee of Beverly Hills, LLC,* 616 F.3d 158, 173 (2d Cir. 2010).

Generalized complaints of inconvenience are exactly what the Singapore Banks offer. *See* Singapore Banks' Br. at 11 (arguing that no "relevant witnesses or documents are located here."). Such generic claims of burden do not render personal jurisdiction constitutionally unreasonable. *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 698 (S.D.N.Y. 2018) ("the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago."). With respect to the Singapore Banks' speculative concerns about Singapore bank secrecy law, *see* Singapore Banks' Br. at 11-12, the parties and the Court are more than capable of addressing any hypothetical concerns that may arise during discovery. *See Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310, 314 (E.D.N.Y. 2006), *aff'd*, No. 04CV2799(NG)(VVP), 2007 WL 812918 (E.D.N.Y. Mar. 14, 2007) (collecting examples of courts in this Circuit that have "decid[ed] issues involving foreign discovery."). Accordingly, the Singapore Banks have failed to carry their burden of presenting a compelling case that exercising personal jurisdiction would be unreasonable.

ARGUMENT PART II: THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS ACTION

Defendants' argument that the FAC should be dismissed for lack of subject matter jurisdiction flies straight in the face of the Second Circuit's express holding that this Court *does* have subject matter jurisdiction. To downplay the outrageousness of their request, they recast the Second Circuit's holding as a conditional one, effectively an advisory opinion on whether there would be subject matter jurisdiction *if* Sonterra assigned its claims to FLH. *See* Defs.' Br. at 1 ("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…"). They then assert that the Court left open that antecedent question of whether Sonterra assigned its claims to FLH, and ask the Court to find now that the Sonterra APA did not convey the antitrust claims in this action in FLH. *Id.* at 13, 16-21.

Every piece of their argument is wrong. This Court did find that the Sonterra APA conveyed antitrust claims to FLH, and that finding was correct. The Second Circuit expressly relied on this Court's correct finding in its own definitive, unconditional, unqualified "conclu[sion] that Article III *is satisfied* in this case." 991 F.3d at 386 (emphasis added); *see also id.* at 375, 392, 393 (same). Even if Defendants are right that the Court may subjectively have intended to revisit its Sonterra APA ruling later, it no longer matters. The Second Circuit has issued a set of specific instructions for this Court on remand that are totally incompatible with reviewing the Sonterra APA or any other aspect of subject matter jurisdiction. The Court is bound to follow those instructions and no more.

VII. The Mandate Rule Bars This Court from Revisiting the Effectiveness of Sonterra's Assignment to FLH.

The mandate rule requires a district court considering an action on remand to strictly comply with the specific parameters of the Court of Appeals' mandate, resolving what the Court of Appeals tells it to resolve and nothing more. *See Ginett v. Computer Task Grp., Inc.*, 11 F.3d 359, 360-61 (2d Cir.

1993) (explaining that "the district court has no discretion in carrying out the mandate") (citing *United States v. E.I. Du Pont De Nemours & Co.*, 366 U.S. 316 (1961)). Accordingly, "[w]here a mandate limits the issues open for consideration on remand, a district court ordinarily cannot consider additional issues." *Puricelli v. Argentina*, 797 F.3d 213, 218 (2d Cir. 2015). Here, where the Second Circuit issued specific, enumerated instructions to this Court on remand in its mandate, this Court is precluded from considering other issues not on the Second Circuit's list—in particular, the effectiveness of the assignment from Sonterra to FLH.

The Second Circuit's remand instructions to this Court were detailed and specific:

> On remand, then, the district court should reconsider two issues in light of our opinion. First, *now that its jurisdiction over the case is clear*, the district court should revisit whether to approve the settlement agreements signed by several of the defendants. Second, the district court should reconsider Fund Liquidation's motion to file its proposed fourth amended complaint, which would add the Moon Funds as new representative plaintiffs. … *[S]o long as the amendment to add the Moon Funds as class representatives satisfies the requirements of Federal Rule of Civil Procedure 15(c)(1)(B),* see id. *at 616, and so long as the proposed fourth amended complaint otherwise plausibly states a claim on which relief can be granted, the district court should grant Fund Liquidation's motion to amend.* …
>
> *The district court may also consider the argument raised by the ING entities* – ING Groep N.V., ING Bank N.V., and ING Capital Markets LLC – that the Moon Funds' SOR-related claims should not relate back against them as "no complaint filed before December 2018 alleged that ING engaged in SOR panel-related conduct or was on the SOR panel."

991 F.3d at 393 & n.17 (emphasis added).

Several aspects of these instructions jump out. First, the Second Circuit begins its instructions by stating that this Court's "jurisdiction over this case is clear." Determining jurisdiction, or issues antecedent to jurisdiction, is therefore expressly *not* part of the mandate. Second, with respect to the motion for leave to file the FAC, the Second Circuit does not simply direct this Court to resolve the motion, leaving the choice of issues or method up to the Court. Instead, it tightly cabins this Court's inquiry to whether the complaint "plausibly states a claim on which relief can be granted" (*i.e.*, satisfies Rule 12(b)(6)), and satisfies the requirements of Federal Rule of Civil Procedure 15(c)(1)(B).

Evaluation of the Sonterra assignment or of subject matter jurisdiction is not on the list. Third, further underscoring the limited and specific scope of the mandate, the Second Circuit dropped a footnote about a defense specific to the ING defendants, and stated that this Court also "may consider" that argument. That inquiry is no longer necessary in light of ING's settlement with Plaintiffs, but the key point is "may consider." Clearly implied in that language is the converse: This Court may *not* consider any other topics.

Defendants attempt to pry this case out from under the expressly limited mandate by citing inapposite cases to characterize what the Second Circuit said about the Sonterra assignment as "a mere recital of matters assumed for purposes of decision,"[13] or a "misstatement of fact in the introductory section," or "the mere repetition of the factual findings of the district court." *See* Defs.' Br. at 20 n.14.[14]

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[13] When the Second Circuit does assume something for purposes of decision, it says so in those words. *See, e.g., Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, 105 (2d Cir. 2019) (Sullivan, J.) ("[W]e assume without deciding that Plaintiffs' trades on NYMEX and ICE Futures Europe constituted 'domestic transactions' under Section 22."); *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 796 (2d Cir. 2014) ("We assume without deciding that all of plaintiffs' ATS claims meet that [international law] standard."); *Keita v. Holder*, 486 F. App'x 951, 952 (2d Cir. 2012) ("We assume, without deciding, that we have jurisdiction in this case of denial of deferral of removal."); *In re United States Dep't of Com.*, No. 18-2652, 2018 WL 6006904, at *1 (2d Cir. Sept. 25, 2018) ("We assume without deciding that Petitioners do not have another 'adequate means to attain the relief' they seek, and that the writ would be 'appropriate under the circumstances' if Petitioners were entitled to it.").

[14] Defendants' own parenthetical summaries cited above make clear that the cases are off point; delving further into the facts of these cases confirms that each one is inapposite. In *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, plaintiffs argued that a Second Circuit mandate to a district court to "address" their state law claims for the first time on remand precluded the district court's consideration of defenses to those claims. 762 F.3d 165, 176 (2d Cir. 2014). On the second appeal, the Second Circuit rejected this "utterly implausible" and "illogical" reading of the mandate to "address" claims. *Id.* at 176. In *New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.*, the Second Circuit had reversed a district court's judgment as a matter of law, reinstating a medical malpractice jury verdict and, in a single footnote, granting plaintiff's request for interest that accumulated since the verdict. 352 F.3d 599, 602 (2d Cir. 2003). After the district court, on remand, granted a request for additional interest that had accumulated since the initiation of an earlier, underlying state court action, the Second Circuit affirmed, explaining that the issue of the earlier interest was entirely outside the scope of its analysis and therefore not included in the mandate. *Id.* at 606. In *United States v. Moored*, a criminal defendant's plea agreement admitted to defrauding a group of lenders and a college, but was only charged and convicted for defrauding the lenders. 38 F.3d 1419, 1420 (6th Cir. 1994). At sentencing, the district court calculated that the lenders suffered no loss but the college did, and took both determinations

But the Second Circuit was doing none of those things. Instead, it summarized and endorsed a holding reached by this Court— even citing directly to the Sonterra and FrontPoint APAs in the parties' Joint Appendix and engaging in an independent legal analysis of the contractual terms:

> Indeed, the agreement between Sonterra and Fund Liquidation stated that Sonterra was assigning "any and all claims ... related to the ownership of, or any transaction in, any [t]raded [s]ecurities," including claims that could be brought in "*any* future class action lawsuit." J. App'x at 459 (emphasis added). By contrast, FrontPoint assigned only those claims arising out of "any future *securities* class action or lawsuit." J. App'x at 480 (emphasis added). And it was this limitation to securities class actions that caused the district court to conclude that FrontPoint's assignment was ineffective. *See* [*Fund Liquidation Holdings LLC v. Citibank, N.A.*, 399 F. Supp. 3d 94, 102–03 (S.D.N.Y. 2019) ("*SIBOR III*")] (distinguishing between securities class actions and antitrust class actions involving securities).

991 F.3d at 392 n.15. And the Second Circuit relied directly on this Court's holding and reasoning *in its remand instructions*, not just in a passing introductory comment or background section, as Defendants would have this Court believe. *See id.* at 392. There is simply no way to understand a mandate that relies on (let alone endorses the reasoning of) a specific holding below as inviting the district court to reconsider that holding on remand.

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into account. *Id.* The Sixth Circuit vacated the sentence, holding only that consideration of the college's loss constituted clear error and remanding for resentencing based only on the lenders' loss. *Id.* at 1421. On remand, the district court reassessed the lenders' loss and reached a nonzero number. *Id.* The Sixth Circuit affirmed, explaining that it had made no pronouncement on the amount of the lenders' loss and that recalculation was permitted under the mandate to resentence. *Id.* at 1422-23. Finally, in *Adams v. United States*, the Ninth Circuit blocked plaintiffs' "entirely frivolous" attempt to take advantage of an obvious mistake in its prior recitation of facts. 255 F.3d 787, 797 (9th Cir. 2001). The earlier Ninth Circuit decision, which focused exclusively on plaintiffs' right to access Road A, erroneously stated that Spring B was on plaintiffs' land, when it was not. *Id.* at 796-97. Plaintiffs quickly commissioned a resurvey of their property based on the misstatement, leading both the district court and the Ninth Circuit to name and reject their bad faith behavior. *Id.* at 797.

When considered properly in that context, none of these cases bears any relationship to the Second Circuit's decision here to: (1) endorse the rationale supporting the validity of the Sonterra APA, *SIBOR Appeal*, 991 F.3d at 392 n.15; (2) instruct this Court that "its jurisdiction over the case is clear," *id.* at 393; and (3) mandate this Court to undertake two inquiries inconsistent with a lack of subject matter jurisdiction. *Id.* at 392-93.

Defendants next claim that the Court could not possibly have "held that Sonterra validly assigned relevant claims to FLH" "because Plaintiffs never properly presented the Sonterra APA to this Court by pleading any facts about it." Defs.' Br. at 19. This argument elevates form over substance. It is true that the terms of the Sonterra assignment were not pleaded in a complaint. But it is also true that Plaintiffs filed a copy of the Sonterra APA on this docket, in response to Defendants' motion to dismiss the SAC. Defendants vigorously argued that the Sonterra APA was ineffective to assign antitrust claims, making all the same points they repeat here. Then at oral argument, the Court read aloud from the Sonterra APA[15] while parsing through its meaning with Defendants' counsel, concluding:

> [A]ny case in which no case has been filed as of the date hereof – that's this -- and including, without limitation, any future class action lawsuit – that's this -- or any judgment thereon -- we're not there yet – or other lawsuits to the extent related to seller's ownership of or any transaction in any traded securities. We have a traded security, the derivative contracts. We have seller's ownership of that and transactions needed. So why were you not covered?

Apr. 12, 2018 Hearing Tr., ECF No. 282, at 10:18-11:1. Then, after Defendants' counsel attempted an explanation, the Court responded:

> *I rule* that this document, although not entirely clear, is sufficiently clear to show that all assets have been transferred, including the asset we're talking about, shows an action, a right to recovery based on a claim yet to be brought can be conveyed, and the definitions we're talking about include the possibility of this lawsuit. So *I rule* against you [Defendants] on the point. *I rule* that if all things go well for the plaintiff, they will have leave to amend to substitute the assignees for FrontPoint and Sonterra.

Id. at 11:8-16 (emphasis added).

[15] We know that it was the Sonterra APA, rather than the FrontPoint APA, because of the specific words the Court read aloud which differ between the two assignments: "any future class action lawsuit" (as opposed to "any securities class action lawsuit" in the FrontPoint assignment), and "traded securities" (as opposed to "included securities" in the FrontPoint assignment.) *Compare* Apr. 12, 2018 Hearing Tr. 10:20-23 *with* Sonterra APA, ECF No. 449-1, at 3 *and* FrontPoint APA, ECF No. 395-1 at 3.

The Second Circuit had this crystal-clear transcript (which was also cited in Plaintiffs' briefs) before it. *FrontPoint Asian Event Driven v. Citibank, N.A.*, No. 19-2719, ECF No. 127 at JA536-JA585 (2d Cir.). It also had, and cited, the Court's *SIBOR II* opinion, where the Court confirmed its oral holding, wrote that the assignment "documents appear to show a full assignment of rights to FLH" and granted "leave to substitute FLH as the plaintiff in a third amended complaint." 2018 WL 4830087, at *11. The Second Circuit referred to the Court's "conclu[sion]," "determination" and "f[inding]," *SIBOR Appeal*, 991 F.3d at 377, 378, 392 n.15, because that is what the Court's words say, regardless of whether the terms of the assignment were actually pleaded in a complaint.[16]

Further, contrary to Defendants' assertion that they "never briefed or argued" this issue to the Second Circuit, their appellate brief did include a footnote stating "Appellants respectfully submit that the Sonterra APA also failed to assign an antitrust claim to FLH," and (incorrectly) asserting that "the district court never addressed the specific language of the Sonterra APA." Defs.' Br. at 11 n.5. That Defendants gave such cursory treatment to this foundational issue speaks volumes about how seriously they took the argument. If they thought they had any chance with it, it should have been front and center, as a much easier way for the Second Circuit to dispose of the case without slogging through hundreds of years of history on common law pleading practices and the legal nullity doctrine. More to the point as far as the mandate rule goes, the Second Circuit *itself* would have latched on to

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[16] This is conceptually the same situation as a motion for leave to amend a complaint where the defendant argues that amendment would be futile because the proposed amended complaint does not state a claim. If the court grants the motion, after hearing all of the defendant's arguments on futility, the defendant is not entitled to make all the identical arguments over again in a motion to dismiss the newly filed complaint. *See, e.g.*, *Hamlen v. Gateway Energy Servs. Corp.*, No. 16 CV 3526 (VB), 2018 WL 1568761, at *2 (S.D.N.Y. Mar. 29, 2018) (denying motion to dismiss where defendant "advance[d] substantially the same arguments" as in the "fully briefed" motion for leave to amend, and "had a full and fair opportunity to litigate whether plaintiff adequately pleaded his [claims]"); *Melito v. Am. Eagle Outfitters, Inc.*, No. 14-CV-2440 (VEC), 2016 WL 6584482, at *2 (S.D.N.Y. Nov. 7, 2016) (same). Here, the Second Circuit correctly perceived that Defendants had (and availed themselves of) a full and fair opportunity to litigate the effectiveness of the Sonterra assignment, and that the Court's decision following that litigation should be adhered to.

the issue immediately if it seemed either that this Court had left the question open, or that the Sonterra APA failed to assign an antitrust claim to FLH (regardless of whether this Court had previously decided the question to the contrary; it is a question of law that the Second Circuit could review de novo). Instead, it reviewed this Court's words for itself, saw that the Court had indeed decided that the Sonterra assignment was effective, and followed the reasoning of the Court's holding. *See* 991 F.3d at 392 n.15 (distinguishing between language of Sonterra and FrontPoint assignments). Then on top of that, the Second Circuit denied Defendants' petition for rehearing on this ground. The inevitable conclusion is that the Second Circuit has considered and rejected Defendants' argument.[17]

The point is this: Defendants have twice argued to the Second Circuit that this Court left the Sonterra assignment question open. The Second Circuit disagrees. The instructions it issued to this Court, enumerating the specific topics on which this Court is to rule, deliberately omitted the Sonterra assignment for that reason. It is impossible to comply with the Second Circuit's mandate while simultaneously questioning the existence of subject matter jurisdiction, which the Second Circuit has already definitively decided and which is necessary in order for this Court to rule on the issues that the Second Circuit *did* tell it to address.[18]

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[17] Further, even if it were true that Defendants did not raise this issue at all to the Second Circuit, they could not now profit from that omission to ask this Court to take up the issue now. *See United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001)("Likewise, where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so."). Defendants had every opportunity and incentive to ask the Second Circuit to rule on the Sonterra assignment or to direct this Court to do so on remand; that they now regret their decision not to focus more heavily on the argument is totally irrelevant.

[18] Defendants rely heavily throughout this portion of their brief on Judge Daniels' recent decision which took the view that the Second Circuit had left the Sonterra assignment question open and decided it himself. *See Fund Liquidation Holdings LLC v. UBS AG*, No. 15 Civ. 5844 (GBD), 2021 WL 4482826, at *3-4 (S.D.N.Y. Sept. 30, 2021). The simplest response is that Judge Daniels was in error: about what this Court actually held, about what the Second Circuit left open in the wake of its opinion, and about the effectiveness of the Sonterra assignment. But there is also an important difference between this Court's situation and Judge Daniels'. Judge Daniels was not facing a mandate directing

VIII. The FAC Need Not Plead Facts About the Sonterra APA.

Defendants' argument that the FAC must be dismissed because it does not plead facts about the Sonterra assignment fails for essentially the same reasons described above with respect to the mandate rule. The Second Circuit specifically instructed this Court to grant Plaintiffs' motion for leave to file the FAC, provided that the FAC states a plausible claim and satisfies the requirements of Fed. R. Civ. P. 15(c)(1)(b). The Second Circuit knew that Plaintiffs had previously removed Sonterra from the caption at this Court's direction (*see* 991 F.3d at 379), yet said nothing about requiring Plaintiffs to put it back in, or to plead the assignment in yet another iteration of the complaint, or to make any changes to the FAC whatsoever. Accordingly, Plaintiffs filed the FAC in precisely the form that it appeared in their motion for leave to amend, not even deleting the no-longer-live claims pertaining to FrontPoint. Given that FLH currently has no live claims in its capacity as assignee of Sonterra, either, due to this Court's efficient enforcer ruling, there would be no purpose to including facts about Sonterra in the operative complaint. Subject matter jurisdiction over this action *exists*, as the Second Circuit has made abundantly clear, and does not need to be called into being by repeating what the Second Circuit has already found.

IX. The Sonterra APA Assigns the Claims in this Action from Sonterra to FLH.

Defendants have now winnowed the various arguments they have made over the years about the supposed ineffectiveness of the APA down to a single point, the definition of "Securities." They urge the Court to follow Judge Daniels in finding that the words "any debt and/or equity securities of any kind, type or nature" unambiguously exclude the FX forwards Sonterra traded. Their artificially rigid reading of "debt and/or equity securities" contradicts the multiple linguistic cues that the parties

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him to take an enumerated list of specific actions, and no others, in the case before him on remand. This Court is. That is reason enough to reach a different conclusion than Judge Daniels did.

intended the definition to be as encompassing as possible; this Court's prior assessment of the language; and, most importantly, the actual Trade Data which is part of the contract itself.

Everything about the APA's definition of "Securities" demonstrates intent to include, not exclude: "*any* debt and/or equity securities *of any kind, type, or nature*, *including, without limitation*, stocks, bonds, options, puts, calls, *swaps and similar instruments or rights*." Sonterra APA at 4. Plainly the parties intended to encompass the widest variety of financial products possible. In particular, "swaps and similar instruments or rights" should necessarily include FX forwards, which are derivatives similar to swaps.

Following Defendants' strict definitions of "debt security" and "equity security" from Black's Law Dictionary, it is difficult to see how "swaps or similar instruments or rights" could fit into either category. The common-sense explanation is that the parties were using the term "security" broadly to refer generally to any financial product, and added in the words "debt and/or equity" to provide examples to *broaden* the types of securities included, not limit them. Indeed, that appears to have been this Court's own reaction when it read from the language of the Sonterra APA and concluded "We have a traded security, the derivative contracts." Apr. 12, 2018 Hearing Tr., ECF No. 282, at 10:23-25.

This explanation is also confirmed by the Trade Data. Upon the execution of the APA, Sonterra provided FLH with a complete list of "Trade Data," defined in the APA as "all of the relevant information to be provided by [Sonterra] to [FLH] pursuant hereto and relating to purchases, sales, ownership and other transactions in all Traded Securities by [Sonterra] during the Trade Period." Sonterra APA at 4. That list of "Traded Securities" includes the FX forward transactions underlying Sonterra's claims in this lawsuit, along with many other FX forward transactions. *See* Pls.' Mem. of Law in Support of Mot. for Leave to File a Sur-Reply, ECF No. 259, at 2; *see also* Reply Decl. of Brendan Kelly, *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC et al.*, No. 1:15-cv-03538, ECF

No. 223 ¶ 6 (S.D.N.Y.) (attesting that the Trade Data in the FrontPoint APA, which uses the same definition of "Securities," "included over 3,000 TX and interest rate financial transactions, including FX futures, FX forwards, interest rate futures and interest rate swaps"). It would make no sense that the parties would intend to definitionally exclude FX forwards, which are derivatives similar to swaps, but yet actually include thousands of FX forwards transactions in the list of Trade Data accompanying the APA.

X. The Sonterra APA Is Not Champertous.

Defendants' last line of defense on the Sonterra APA is to argue that it is "champertous and void." Notably, they did not waste the Second Circuit's time with this argument, even in passing in a footnote, though it would in theory have been equally applicable to the FrontPoint APA. It has no merit whatsoever. This Court clearly already drew that conclusion for itself, not even bothering to engage with this topic when Defendants raised it in their motion to dismiss the TAC. *See* Mem. of Law in Support of Defs.' Joint Mot. to Dismiss the TAC, ECF No. 319 ("TAC MTD") at 20 n.15.

As a general matter, claims are freely assignable. The United States Supreme Court has held, after reviewing hundreds of years of history permitting assignees to bring suit, that "an assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor." *Sprint Comms., Co. L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 271 (2008). New York's prohibition on champerty, N.Y. Judiciary Law § 489, only comes into play where "the foundational intent to sue on that claim [was] at least [] the primary purpose for, if not the sole motivation behind, entering into the transaction." *Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 731 N.E.2d 726, 736 (N.Y. 2000).

Here, the Sonterra APA provides FLH broad powers to "take any steps it deems reasonable and necessary in order to maximize Buyer recovery in respect of the Assets." Sonterra APA ¶ 5.2. The "Assets" include all "right, title and interest in and to any and all Recovery Rights," which in turn

means "*all monetary, legal and other rights* held by or accruing to [Sonterra] *in respect of such Claim*." *Id.* at 3 (emphasis added). "All rights" means exactly what it says: the right to commence a lawsuit, but also the right to sell the claim, to participate as a class member in a lawsuit commenced by another, to pursue remedies outside of litigation, or any other action to maximize the claim's value. *See Promenade v. Schindler Elevator Corp.*, 39 A.D. 3d 221, 223 (1st Dep't 2007) ("The contention that the assignment should be nullified as champertous is belied by the fact that [plaintiff] did not accept the assigned claim for the sole purpose of bringing a claim…but rather for the sole purpose of pursuing…the full value of its settlement of contractual claims").

Indeed, ironically, Defendants have previously taken the position in this and other actions that the APA *only* conveys the right for FLH to submit claims in other lawsuits, not to commence lawsuits of its own. *See, e.g.*, TAC MTD at 19-20 (("[T]he APA transferred only 'Recovery Rights,' or the right to recover proceeds in connection with certain claims pre-dating the transfer or brought by other parties, but *not* the right to initiate or prosecute the claim on behalf of Sonterra."); Mem. of Law in Support of Defs.' Mot. to Dismiss the Second Am. Class Action Compl. for Lack of Subject Matter Jurisdiction and Failure to State a Claim, *Fund Liquidation Holdings LLC v. UBS AG*, No. 1:15-cv-05844 (S.D.N.Y.), ECF No. 525 at 17 ("Yen MTD") (same). Both then and now, they point out that the power of attorney accompanying the APA lists specific actions that FLH may take on Sonterra's behalf, and that those actions do not expressly mention litigation. Before, they used that point to argue that the APA does not convey the right to commence litigation; now, they draw the bizarre conclusion that the power of attorney must be some kind of a smokescreen to obscure the actual champertous intent underlying the APA. *Compare* Defs.' Br. at 21 n.16, *with* Yen MTD at 17 n.18. The obvious answer to these incoherent and contradictory positions is that both are wrong. The much simpler reality is that the APA conveys *both* the right for FLH to commence litigation *and* the right to take

other non-litigation actions to maximize the value of any claims arising out of the transactions in the Trade Data.[19] The APA is thus firmly outside the reach of New York's champerty statute.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the FAC should be denied in its entirety.

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White Plains, New York

Respectfully submitted,

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[19] Defendants' assertion that FLH has not "used the rights transferred to it by the APA to do anything other than bring a series of lawsuits" (Defs.' Br. at 21) has no support whatsoever. That FLH has commenced several lawsuits does not mean that FLH has not taken any other actions as well—how on earth would Defendants know?