UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

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

Defendants.

Docket No.: 1:16-cv-05263-AKH

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

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PRELIMINARY STATEMENT

Plaintiffs' Opposition to Defendants' Motion to Dismiss (ECF No. 451) (the "Opposition" or "Opp.") is a studied effort in obfuscation.[1] The Opposition misstates the procedural history of this action and contorts case law to argue that this Court should overlook the FAC's numerous deficiencies. But scrutiny of the Opposition confirms that the FAC should be dismissed for precisely the reasons set forth in Defendants' Opening Brief.

The Opposition concedes that the FAC does not plead any facts to establish subject matter jurisdiction. (*Compare* Br. at 14-16, *with* Opp. at 38.) Nor could Plaintiffs have taken any other position: whether this Court has subject matter jurisdiction over this action depends entirely upon unpled facts regarding the purported assignment of claims from Sonterra to FLH. (*Id.*) Plaintiffs also concede that the Moon Plaintiffs—the only Plaintiffs still attempting to assert claims—cannot join this litigation unless this Court had subject matter jurisdiction at the outset based on the purported assignment of claims from Sonterra to FLH.[2]

The Opposition, however, fails to put forth any plausible reading of the APA between Sonterra and FLH that shows that the deficient claims previously asserted in this litigation by Sonterra were in fact assigned to FLH. (Opp. at 38-40.) Instead, without citing any legal authority, the Opposition asserts that the plain meaning of the definition in the Sonterra APA limiting the assignment to claims arising out of "debt and/or equity securities" should be ignored so that the assignment can somehow be read to extend to claims relating "generally to

[1] Unless otherwise indicated, all capitalized terms have the same meaning ascribed to them in Defendants' Memorandum of Law in Support of Defendants' Joint Motion to Dismiss the Fourth Amended Class Action Complaint (ECF No. 447) (the "Opening Brief" or "Br."). All internal quotation marks and citations are omitted.

[2] In Section I.C of their Opening Brief, Defendants demonstrated that, because this Court lacked subject matter jurisdiction at the outset of this litigation, the Moon Plaintiffs cannot belatedly join this action and their claims are untimely. (Br. at 22-24.) Plaintiffs concede those arguments by failing to respond to any of them. *See Fair Hous. Just. Ctr., Inc.* v. *Cuomo*, 2019 WL 4805550, at *16 (S.D.N.Y. Sept. 30, 2019) (because plaintiffs "d[id] not address [certain] arguments in their opposition" to defendants' motion to dismiss, plaintiffs "concede[d]" those points).

any financial product," including FX forwards. (*Id.* at 39.) This argument defies basic principles of contract interpretation. And Plaintiffs know it because Judge Daniels already told them so. *See Fund Liquidation Holdings LLC* v. *UBS AG* (*FLH Yen LIBOR*), 2021 WL 4482826, at *4-5 (S.D.N.Y. Sept. 30, 2021).

As a result, Plaintiffs devote much of the Opposition to making counterfactual and legally unfounded arguments about how this Court is barred from considering the terms of the Sonterra APA because it supposedly previously held that Sonterra assigned relevant claims to FLH, and the Second Circuit "summarized and endorsed" that supposed ruling. (Opp. at 31-37.) But this Court rejected almost identical "law of the case" arguments from Plaintiffs when addressing the purported assignment of claims from FrontPoint to FLH. *Fund Liquidation Holdings LLC* v. *Citibank, N.A.* (*SIBOR III*), 399 F. Supp. 3d 94, 99-100, 102 (S.D.N.Y. 2019). Those arguments should be rejected again, because neither this Court nor the Second Circuit decided whether Sonterra assigned relevant claims to FLH. *FLH Yen LIBOR*, 2021 WL 4482826, at *4 n.5. Because the Sonterra APA did not assign relevant claims to FLH, this action should be dismissed for lack of subject matter jurisdiction.

Although this Court need not consider the merits of the Moon Plaintiffs' antitrust claims, the Opposition also confirms that those claims are meritless. *First*, the Opposition does not point to any well-pled facts in the FAC connecting losses on the Moon Plaintiffs' alleged trading positions to Defendants' alleged conduct. (Opp. at 18-23.) The Opposition, therefore, demonstrates that the Moon Plaintiffs fail to plead the actual harm required to establish antitrust injury in accordance with the Second Circuit's guidance in *Harry* v. *Total Gas & Power North America, Inc.*, 889 F.3d 104 (2d Cir. 2018). *Second*, the Opposition establishes that the Moon Plaintiffs are not efficient enforcers of the antitrust laws because USD SIBOR and SOR are not

referenced in the contractual terms of the FX forwards that the Moon Plaintiffs traded, and Plaintiffs' own alleged formula shows that those rates were not a component of the price of the Moon Plaintiffs' FX forwards. (Opp. at 11-14.) Indeed, very recent Second Circuit authority confirms that the Moon Plaintiffs are not efficient enforcers. At most, the obtuse charts and formulas in the FAC might support a theory that USD SIBOR and SOR "exerted a kind of gravitational force, influencing" the prices of the Moon Plaintiffs' FX forwards, "[b]ut that is clearly insufficient to establish antitrust standing." *Schwab Short-Term Bond Mkt. Fund* v. *Lloyds Banking Grp. PLC*, --- F.4th ---, 2021 WL 6143556, at *8 n.6 (2d Cir. Dec. 30, 2021) ("*Schwab II*").

ARGUMENT

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

A. The Unambiguous Terms of the Sonterra APA Show that Sonterra Did Not Assign Relevant Claims to FLH.

The Opposition confirms that the key definition in the Sonterra APA determining the scope of the assignment of claims from Sonterra to FLH is the definition of the term "Securities," which is limited to "any *debt and/or equity securities* of any kind, type or nature, including, without limitation, stock, bonds, options, puts, calls, swaps and similar instruments or rights." (*Compare* Br. at 16-20, *with* Opp. at 38-40 (quoting Sonterra APA at 4 (emphasis added)).) This definition is dispositive and compels dismissal of the FAC for lack of subject matter jurisdiction because, as the Opposition concedes, the FX forwards that formed the basis of Sonterra's claims in this action are simply not any type or kind of "debt and/or equity securities." (*Id*.) Thus, Sonterra never assigned relevant claims to FLH, and subject matter jurisdiction was lacking at the outset of this litigation because FLH never stood ready to "be substituted into the action" pursuant to Rule 17 of the Federal Rules of Civil Procedure at the commencement of the

litigation. *Fund Liquidation Holdings LLC* v. *Bank of Am. Corp.* (*SIBOR Appeal*), 991 F.3d 370, 386 (2d Cir. 2021) (an action should "be dismissed for want of subject-matter jurisdiction" if "the real party in interest . . . lacks standing itself").

In the Opposition, Plaintiffs strain to avoid this result by attempting to rewrite the terms of the Sonterra APA. (Opp. at 38-40.) Plaintiffs assert—without citation to any authority whatsoever—that "linguistic cues" and "common-sense explanation[s]" show that the phrase "debt and/or equity securities" should not be given its plain meaning and should instead be read to "refer generally to any financial product." (*Id.* at 38-39.) Judge Daniels already correctly rejected these same arguments, *FLH Yen LIBOR*, 2021 WL 4482826, at *4, and this Court should do the same because black letter New York law requires that "words and phrases" used in a contract "be given their plain meaning," *Ellington* v. *EMI Music, Inc.*, 21 N.E.3d 1000, 1003 (N.Y. 2014).

Plaintiffs protest that the plain meaning of the phrase "debt and/or equity securities" is irrelevant because the definition of the term "Securities" includes "any debt and/or equity securities of any kind, type or nature, including, without limitation, . . . *swaps and similar instruments or rights*," and the terms "swaps and similar instruments or rights"—read in isolation—are somehow broad enough to encompasses "FX forwards." (Opp. at 39.) This argument is untenable as a matter of law.

As an initial matter, it is "axiomatic that courts construing contracts must give specific terms and exact terms greater weight than general language." *Cnty. of Suffolk* v. *Alcorn*, 266 F.3d 131, 139 (2d Cir. 2001) (alteration omitted); *accord Aramony* v. *United Way of Am.*, 254 F.3d 403, 413-14 (2d Cir. 2001) (collecting authorities). The phrase "debt and/or equity securities" is specific because, as dictionary definitions demonstrate, "debt security" and "equity

security" are terms with well-understood definitions that do not encompass FX forwards. (Br. at 19.) Grammatically, the specific phrase "debt and/or equity securities" is the fulcrum of the definition of "Securities," so it cannot be read out of existence by looking to more general language in the definition and viewing that language in isolation. *See, e.g.*, *Aramony*, 254 F.3d at 414 (rejecting an interpretation of a contract based on viewing "general language . . . in isolation"); *United States* v. *Prevezon Holdings, Ltd.*, 289 F. Supp. 3d 446, 453-54 (S.D.N.Y. 2018) ("[C]ontract provisions should not be read in isolation.").

Further, it is well-established that courts "disfavor contract interpretations that render provisions of a contract superfluous." *Int'l Multifoods Corp.* v. *Com. Union Ins. Co.*, 309 F.3d 76, 86 (2d Cir. 2002). Plaintiffs' desired reading of the definition of "Securities" does just that: it strips the phrase "debt and/or equity" of any meaning.

If, as Plaintiffs contend, the Sonterra APA was intended to transfer claims regarding "any financial product" (Opp. at 39), the sophisticated parties that drafted the Sonterra APA surely would have used those broader terms rather than the more limited phrase "debt and/or equity securities." "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Vt. Teddy Bear Co., Inc.* v. *538 Madison Realty Co.*, 807 N.E.2d 876, 879 (N.Y. 2004); *see also Ashwood Cap., Inc.* v. *OTG Mgmt., Inc.*, 948 N.Y.S.2d 292, 297 (1st Dep't 2012) ("[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.").

Moreover, as Judge Daniels held, interpreting the definition of "Securities" in the APA to exclude FX forwards still gives full effect to that definition. *See FLH Yen LIBOR*, 2021 WL 4482826, at *4 ("While Plaintiff is correct, the definition of 'Securities' encompasses a wide

variety of financial instruments, it encompasses *securities and securities-adjacent instruments*." (emphasis added)). Plaintiffs assert that the use of terms like "any" in the definition of "Securities" "demonstrates intent to include." (Opp. at 39.) But, as Judge Daniels determined, such language does not suggest that the parties intended to "include" products like FX forwards that have nothing to do with "debt and/or equity securities." *See FLH Yen LIBOR*, 2021 WL 4482826, at *4. The inclusion of the word "swaps" in the definition of "Securities" does not show otherwise. Securities-based swaps are regulated like securities because they are "based on" securities. *See Parkcentral Glob. Hub Ltd.* v. *Porsche Auto. Holdings SE*, 763 F.3d 198, 205-07 & n.7 (2d Cir. 2014) (explaining that "[s]ecurities-based swap agreements are designed to roughly replicate the economic effect of owning the referenced share of stock for one counterparty, and shorting the referenced share of stock for the other counterparty"). But other types of swaps, such as interest rate swaps, are not securities-based and are not regulated like securities because, like FX forwards, they have nothing to do with securities. *See, e.g.*, *Sch. Dist. of City of Erie* v. *J.P. Morgan Chase Bank*, 2009 WL 234128, at *1 (S.D.N.Y. Jan. 30, 2009) (dismissing securities fraud claims arising from interest rate swap transactions because the swaps referenced "the LIBOR rate, that is, an interest rate" rather than "the price, yield, value, or volatility of any security, or any group, or index of securities"). Thus, the definition of "Securities" could be read to encompass securities-based financial products of "any kind, type or nature," but that does not mean it reaches FX derivatives, like FX forwards, because the "plain meaning" of the term "securities" simply "does not include FX derivatives." *See FLH Yen LIBOR*, 2021 WL 4482826, at *4 (citing *Contant* v. *Bank of Am. Corp.*, 2018 WL 5292126, at *9 (S.D.N.Y. Oct. 25, 2018)).

Plaintiffs cannot avoid this result by resorting to parol evidence because it is "inadmissible to vary the plain meaning of [a] contract's language." (Br. at 17 (quoting *FaceTime Commc'ns, Inc.* v. *Reuters Ltd.*, 2008 WL 2853389, at *5 (S.D.N.Y. July 22, 2008)).) Ignoring this bedrock legal principle, Plaintiffs argue that FX forwards must be included within the definition of "Securities" in the Sonterra APA because certain "Trade Data" provided to FLH after the execution of the APA included "the FX forward transactions underlying Sonterra's claims in this lawsuit." (Opp. at 39.) As Judge Daniels held, "Trade Data" is irrelevant because the definition of "Securities" makes "no reference" to any trade data and provides no indication that it "should be interpreted with reference to any 'Trade Data.'" *FLH Yen LIBOR*, 2021 WL 4482826, at *4. Indeed, the terms of the Sonterra APA make clear that "Trade Data," as defined in the APA, is not a part of the fully integrated agreement that is the APA. (*See* Sonterra APA § 5.1(a) (stating that Sonterra would provide the Trade Data to FLH "subsequent to the date [of the APA]"); *id.* § 6.4 (stating the APA "represents the entire agreement and understanding between [Sonterra and FLH]").) Because "the terms of the APA are unambiguous on their face, it is unnecessary and inappropriate to apply extrinsic evidence here," and the Court should disregard Plaintiffs' arguments about "Trade Data." *SIBOR III*, 399 F. Supp. 3d at 103 (rejecting Plaintiffs' effort to use extrinsic evidence to contradict the terms of the FrontPoint APA).

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

Plaintiffs' Opposition confirms that, even if the Sonterra APA did assign the relevant claims to FLH (and it did not), the agreement would be void as champertous under N.Y. Judiciary Law § 489. Plaintiffs agree that Section 489 prohibits the assignment of a claim where the "primary purpose for . . . entering into the transaction" is the "intent to sue on that claim." (Opp. at 40.) Plaintiffs fail to articulate any other purpose behind the Sonterra APA, and the text

of the agreement indicates none. Plaintiffs respond only by raising rhetorical questions about how Defendants could know whether "FLH has [] taken any other actions" other than bring lawsuits in connection with the purportedly assigned claims. (*Id.* at 42 n.19.) But Plaintiffs have not identified—and do not allege—any "action" that FLH has ever undertaken other than subjecting Defendants to numerous lawsuits in the names of FrontPoint and Sonterra (*see* Br. at 21 n.15). Thus, it is readily apparent that any purported assignment would be void as champertous.

C. Nothing Precludes This Court from Ruling on Whether Sonterra Validly Assigned Relevant Claims to FLH.

Although it is clear that this Court lacks subject matter jurisdiction because Sonterra did not validly assign relevant claims to FLH, Plaintiffs assert that this Court is now powerless to do anything about it because the Second Circuit supposedly "summarized and endorsed a holding reached by this Court" that the Sonterra APA transferred relevant claims to FLH. (Opp. at 31, 34, 37 (arguing it "no longer matters" if this Court "subjectively . . . intended to revisit its Sonterra APA ruling [from *FrontPoint Asian Event Driven Fund, L.P.* v. *Citibank, N.A.* (*SIBOR II*), 2018 WL 4830087 (S.D.N.Y. Oct. 4, 2018)] later").) That is completely wrong. Neither this Court nor the Second Circuit previously decided the issue of whether Sonterra validly assigned relevant claims to FLH, as Judge Daniels recently held. *See FLH Yen LIBOR*, 2021 WL 4482826, at *4 n.5. And nothing in the Second Circuit's limited instructions precludes this Court from considering the assignment memorialized in the Sonterra APA. (Opp. at 32-33, 35 n.15.) Where, as here, a case is remanded for "further proceedings," the "district court d[oes] not violate the mandate rule by addressing on remand an issue that was not decided by [the appellate court] in the original appeal." *Sompo Japan Ins. Co. of Am.* v. *Norfolk S. Ry. Co.*, 762 F.3d 165, 175-76 (2d Cir. 2014). Accordingly, this Court should reject Plaintiffs' strained

procedural arguments and evaluate the terms of the Sonterra APA, which demonstrate that this case must be dismissed for lack of subject matter jurisdiction.

1. This Court Never Decided Whether Sonterra Validly Assigned Relevant Claims to FLH.

Plaintiffs' mandate-rule argument reprises the "law of the case" argument that this Court rejected in *SIBOR III*, when Plaintiffs asserted that this Court's prior ruling in *SIBOR II* prevented it from considering whether the FrontPoint APA assigned relevant claims to FLH. *See SIBOR III*, 399 F. Supp. 3d at 102 (holding that "the law of the case doctrine" did not preclude consideration of the terms of the FrontPoint assignment because the assignment issue "was not previously decided"). In *SIBOR II*, this Court observed that the FrontPoint APA and the Sonterra APA "*appear* to show a full assignment of rights to FLH," but did not rule on the scope or validity of the assignments. 2018 WL 4830087, at *11-12 (emphasis added). The Court merely granted Plaintiffs "leave to amend to substitute the real party in interest and allege the assignments of interest." *Id.* at *12; *see also SIBOR III*, 399 F. Supp. 3d at 100 (explaining this Court's prior rulings in *SIBOR II*). Plaintiffs complied with that instruction as to the FrontPoint assignment by putting that assignment "properly before" the Court—that is, by pleading facts about it "for the first time in the TAC." *SIBOR III*, 399 F. Supp. 3d at 102. But Plaintiffs did not plead anything about the Sonterra assignment in the TAC. (*See* ECF No. 308.) Thus, in *SIBOR III*, this Court considered the FrontPoint assignment and held that it did not assign relevant claims to FLH, but the Court did not consider the unpled issue of whether Sonterra assigned relevant claims to FLH. 399 F. Supp. 3d at 104.

Instead, in the portion of *SIBOR III* concerning Plaintiffs' motion for preliminary approval of settlements involving Citibank N.A. and JPMorgan Chase Bank, N.A., this Court noted that, at the May 2, 2019 hearing on those settlements, "plaintiff raised the argument that"

the Court "may have jurisdiction [to preliminarily approve the settlements] based on the somewhat broader language of the assignment of claims from Sonterra to FLH." *Id.* But the Court dismissed that argument as academic without considering the terms of the Sonterra APA because it had previously dismissed Sonterra's claims for lack of antitrust standing. *Id*. Because the Second Circuit subsequently determined that this Court's prior dismissal of Sonterra's claims was non-jurisdictional, the jurisdictional question of whether Sonterra assigned relevant claims to FLH is now ripe for consideration. *See SIBOR Appeal*, 991 F.3d at 392.

To argue otherwise, Plaintiffs completely disregard *SIBOR III* and try to invent an alternative procedural history for this litigation by cherry-picking quotations from the April 12, 2018 hearing on the motion to dismiss that resulted in *SIBOR II*. (Opp. at 35.) That ignores reality. In *SIBOR III*, this Court clearly explained what Plaintiffs should have taken away from the April 12, 2018 hearing: the Court "instructed [P]laintiffs to 'show how they got their assignment and give me an interpretation of the contract to show that they have the ability to sue. That should be in the pleading.'" *SIBOR III*, 399 F. Supp. 3d at 100 (alteration omitted) (quoting Tr., ECF No. 282, at 48:2-5). Plaintiffs have never complied with that instruction as to the Sonterra APA. As a result, this Court has never ruled on the meaning of any terms in the Sonterra APA.

2. The Second Circuit Never Decided Whether Sonterra Validly Assigned Relevant Claims to FLH.

Second Circuit precedent makes clear that the Circuit did not issue a binding decision about the Sonterra assignment when it mistakenly observed that it was not required "to resolve whether [FLH] received a valid assignment from FrontPoint because *the district court* already concluded that [FLH] received such an assignment from Sonterra." *SIBOR Appeal*, 991 F.3d at 392 (emphasis added). In *Aramony*, the Second Circuit held that a statement by a prior

panel that "the *district court* had found [certain] provisions [of a plan] ambiguous" did not create law of the case because it was not "any conclusion of our own that the plan was ambiguous as a matter of law." 254 F.3d at 411. The same is true here. The Second Circuit did not rule on whether Sonterra assigned relevant claims to FLH merely by reciting its mistaken understanding of the procedural history of this action.[3] Further, there is nothing about the dicta in footnote 15 of the Second Circuit's decision in the *SIBOR Appeal* that changes this analysis. (Opp. at 34, 36.) That footnote is just an explanation of what "caused the *district court* to conclude that FrontPoint's assignment was ineffective," while supposedly holding that Sonterra's assignment was effective. *SIBOR Appeal*, 991 F.3d at 392 n.15 (emphasis added).[4]

3. The Second Circuit's Instructions to This Court on Remand Do Not Preclude Consideration of the Terms of the Sonterra APA.

Recognizing that their other arguments lack merit, Plaintiffs resort to making the remarkable assertion that "it no longer matters" what this Court actually decided because "[t]he 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." (Opp. at 31 (asserting that it is irrelevant if this "Court may have subjectively intended to revisit its Sonterra APA ruling").) Wrong. Although the Second Circuit provided

[3] *See, e.g.*, *United States* v. *Moored*, 38 F.3d 1419, 1422 (6th Cir. 1994) (holding that a district court did not err by revisiting earlier rulings because "the mere repetition of the factual findings of the district court [in an appellate decision] cannot be deemed a decision of the appellate court"); *FIH, LLC* v. *Barr*, 2021 WL 5286659, at *1 (2d Cir. Nov. 15, 2021) (appellate court's "brief discussion" of a prior decision by the district court "did not expressly decide any issue"); *Adams* v. *United States*, 255 F.3d 787, 797 (9th Cir. 2001) (holding that a "misstatement of fact in the introductory section" of an appellate decision was not a ruling on the merits of an issue and plaintiffs' argument to the contrary was "entirely frivolous"). Plaintiffs' attempts to distinguish *Moored* and *Adams* are unavailing. (Opp. at 33-34 n.14.) Plaintiffs recite facts from those cases without coherently explaining how those facts make the cases legally distinguishable. (*Id.*) They are not. So Plaintiffs fall back on their arguments about supposed instructions issued to this Court by the Second Circuit (*Id.* at 34 n.14), which are meritless (*see infra*, Section I.C.3).

[4] Plaintiffs' arguments about the Second Circuit's denial of the Defendants' petition for rehearing are also misguided. (Opp. at 9-10, 37.) Regardless of whether the Second Circuit decided that its mistaken understanding of the procedural history of this action was correct (*Id.* at 10), the fact remains that the Second Circuit never decided whether the Sonterra APA validly assigned relevant claims to FLH. Thus, that issue is open for this Court to now address.

this Court with a limited set of instructions, it also remanded "the case for further proceedings." *SIBOR Appeal*, 991 F.3d at 394. The Second Circuit has made clear that, in such circumstances, a district court "retain[s] its ordinary, and necessary, discretion to manage the remainder of the litigation consistent with the mandate," *Brown* v. *City of N.Y.*, 862 F.3d 182, 185 (2d Cir. 2017), and can "dispose of the case on grounds not dealt with by the remanding appellate court," *Silverman* v. *Teamster Local 210 Affiliated Health & Ins. Fund*, 725 F. App'x 79, 81 (2d Cir. 2018) (summary order) (holding that a remand for further proceedings coupled with instructions to consider whether to exercise supplemental jurisdiction over certain claims did not bar the district court from considering preemption issues and exercising its discretion to permit amendment of a complaint).[5]

Neither this Court nor the Second Circuit has ever decided whether the definition of the term "Securities" in the Sonterra APA limits the scope of the assignment in that APA and therefore deprives this Court of subject matter jurisdiction. Indeed, no portion of the record that the Opposition selectively quotes addresses this issue, including footnote 15 of the Second Circuit's *SIBOR Appeal* decision. (Opp. at 34-35.) Nor would such a ruling by this Court be inconsistent with the mandate. Thus, this Court is free to hold, and should hold, that it lacks subject matter jurisdiction because Sonterra did not validly assign relevant claims to FLH.[6]

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[5] The Second Circuit's general statement "that [this Court's] jurisdiction over the case is clear" does not change this fact and forevermore foreclose all consideration of jurisdictional issues. (Opp. at 32.) That statement must be read in context with the Second Circuit's prior statement about its mistaken understanding of the procedural history of this action and cannot logically be read as an express or implied directive prohibiting this Court from considering the scope of the assignment in the Sonterra APA. *See Brown*, 862 F.3d at 184-85 (holding that "references to 'trial' and 'a jury'" in a Second Circuit decision reversing a grant of summary judgment needed to be read in context and did not "expressly direct the District Court to hold a trial on remand").

[6] *See, e.g.*, *Serby* v. *First Alert, Inc.*, 783 F. App'x 38, 40 (2d Cir. 2019) (holding that the district court did not violate a mandate instructing it to consider extrinsic evidence regarding an ambiguous term in a settlement by considering such evidence as to the relevant term and then also holding that a different portion of the same settlement was unambiguous because the appellate court "did not reach that issue" during the initial appeal); 18 Moore's Federal Practice Civil § 134.23 ("A district court can, after remand, come to the same result as before remand by relying on grounds other than those specified in the appellate court's mandate."). Plaintiffs' reliance on

4. Plaintiffs Cannot Prevent the Court from Scrutinizing the Sonterra APA by Making Baseless Arguments About Waiver.

In a last-ditch effort to shield the Sonterra APA from this Court's scrutiny, Plaintiffs argue that Defendants were somehow obligated to raise issues regarding the Sonterra APA when Plaintiffs filed their appeal following this Court's decision in *SIBOR III*. (Opp. at 36-37 & n.17.) This argument fails as a matter of law and cannot be squared with the actual procedural history of this action.

Because subject matter jurisdiction "involves a court's power to hear a case, [it] can never be forfeited or waived." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002); *see also Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011) ("Objections to subject-matter jurisdiction . . . may be raised at any time."). Thus, Plaintiffs' misguided assertions about waiver should not distract from this Court's "independent obligation to determine whether subject-matter jurisdiction exists." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006).

Further, Plaintiffs' waiver argument is based on a misstatement of the procedural history of this action. In support of their untenable waiver argument, Plaintiffs selectively quote a single footnote in the background section of Defendants' appellate brief (Opp. at 36), which reads:

> Because Sonterra is not a proper party to the appeal, *see infra* Part I, Appellees focus on the language of the FrontPoint APA. The motion to dismiss the SAC, however, dealt with two separate APAs: one for FrontPoint and one for Sonterra. The district court never addressed the specific language of the Sonterra APA, but

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Puricelli v. *Argentina*, 797 F.3d 213 (2d Cir. 2015), is misplaced (Opp. at 32), because the Second Circuit did not "expressly direct" this Court to refrain from considering the terms of the Sonterra APA. *Brown*, 862 F.3d at 187 (distinguishing *Puricelli*). In *Puricelli*, the Second Circuit "specifically directed that 'on remand, the district court shall conduct an evidentiary hearing to resolve' certain specified factual issues pertaining to awards of damages in class action suits," but the district court completely failed to "follow that mandated procedure" and instead "modified the class definitions and granted new class certifications" in an effort to cure defects in its prior damages awards. *Id*. (quoting *Puricelli*, 797 F.3d at 217).

> Appellees respectfully submit that the Sonterra APA also failed to assign an antitrust claim to FLH.

(*Sonterra Appeal*, ECF No. 149 at 11 n.5.) This footnote made clear that Defendants were not briefing issues related to the Sonterra APA because they did not form the basis of this Court's dismissal of the action in *SIBOR III*. As appellees, Defendants were not obligated to do anything with respect to the Sonterra APA. As the Second Circuit held in *Brown*: "The role of the appellee is to defend the decision of the lower court. This Court has not held that an appellee is required, upon pain of subsequent waiver, to raise every possible alternate ground upon which the lower court could have decided an issue." 862 F.3d at 188. Thus, "[t]he Second Circuit has rejected [the] broad conception of waiver" that Plaintiffs advocate for in the Opposition. *In re Aluminum Warehousing Antitrust Litig.*, 520 F. Supp. 3d 455, 485 (S.D.N.Y. 2021).[7]

II. THE MOON PLAINTIFFS LACK ANTITRUST STANDING.

A. The Court Must Dismiss Any Claims Arising from Manipulation of SGD SIBOR.

As an initial matter, Plaintiffs' claims based on alleged manipulation of the SGD SIBOR benchmark must be dismissed. As Defendants explained in their Opening Brief, the Moon Plaintiffs allege that their FX forwards were impacted by SOR and USD SIBOR—but not by SGD SIBOR. (Br. at 26; *see also* FAC ¶ 238.) Plaintiffs' Opposition does not dispute this point, and thus concedes it. *See Fair Hous. Just. Ctr.*, 2019 WL 4805550, at *16. Because the Moon Plaintiffs have not alleged injury from alleged manipulation of SGD SIBOR, they cannot assert any claims arising out of the alleged manipulation of that benchmark. *See SIBOR II*, 2018

[7] Similarly, there is no merit to Plaintiffs' insinuations that the Second Circuit implicitly decided that Sonterra assigned relevant claims to FLH simply because the Second Circuit did not consider the issue and enter an opposite ruling on appeal. *Aluminum*, 520 F. Supp. 3d at 485 ("[P]laintiffs do not cite authority requiring a district court to treat a Circuit's failure to *sua sponte* take up an alternative ground for affirmance as implicitly repudiating it.").

WL 4830087, at *5 (holding that FrontPoint lacked standing to assert claims regarding USD SIBOR and SOR because FrontPoint alleged its swaps were tied only to SGD SIBOR).

B. The Moon Plaintiffs Fail To Plead Antitrust Injury Because They Do Not Allege Facts Showing that They Were Harmed as Opposed to Benefitted.

The Moon Plaintiffs' remaining claims must be dismissed for failure to plead facts sufficient to show the kind of actual injury required to plead antitrust injury. Plaintiffs claim that the Court has already decided this issue. (Opp. at 19.) Not so. The Court has considered two related but separate issues: (i) whether Plaintiffs adequately alleged injury *of the type* the antitrust laws seek to prevent; and (ii) whether Plaintiffs sufficiently pled "actual injury" for purposes of *constitutional standing*. *See FrontPoint Asian Event Driven Fund, L.P.* v. *Citibank, N.A.* (*SIBOR I*), 2017 WL 3600425, at *9, *12 (S.D.N.Y. Aug. 18, 2017); *see also SIBOR II*, 2018 WL 4830087, at *5. Much of Plaintiffs' Opposition is dedicated to these issues (*see, e.g.*, Opp. at 18, 19), but neither is the basis for Defendants' motion (Br. at 28 n.22). Instead, Defendants' motion is based on Plaintiffs' failure to plead the actual injury element of their antitrust cause of action. (Br. at 26.)[8]

The Moon Plaintiffs plead no facts plausibly suggesting that their transactions would have been impacted—let alone negatively—by any artificial prices. While the Moon Plaintiffs contend that they entered into two FX forward transactions with a single defendant on February 16, 2009, they plead no facts indicating that SOR or USD SIBOR were manipulated on that day. Injury may not be inferred where plaintiffs fail to allege "specific transactions that had an artificially unfavorable price that injured them." *In re SSA Bonds Antitrust Litig.*, 2018 WL

[8] The Second Circuit has made clear that pleading Article III injury sufficient to establish "constitutional standing" is not the same as pleading actual injury when it is an "element of a substantive cause of action." *Total Gas*, 889 F.3d at 111-12. To plead claims under statutes (like the Sherman Act and Commodity Exchange Act) that include an element of "actual injury," a plaintiff must meet a higher standard: its allegations of injury must be "plausible," not merely "colorable." *Id.*

4118979, at *6 (S.D.N.Y. Aug. 28, 2018). The Moon Plaintiffs, just like the plaintiffs in *SSA Bonds*, ask the Court to infer injury without pleading any facts showing how the alleged conduct impacted their specific transactions.[9] Their claims should be similarly dismissed.

Moreover, the bi-directional nature of the alleged manipulation in this case renders Plaintiffs' conclusory pleadings particularly deficient. Even if Plaintiffs had transacted at artificial prices (which Plaintiffs have not adequately alleged), nothing in the FAC indicates that Plaintiffs would have been impacted negatively. In contrast to *Gelboim* v. *Bank of America Corp.*, 823 F.3d 759 (2d Cir. 2016), which involved alleged *unidirectional suppression* of the USD LIBOR benchmark,[10] Plaintiffs here allege manipulation that was upwards and downwards. Thus, the general allegations in the FAC that the Moon Plaintiffs traded on one day during the class period are deficient because they "provide[] just as much support for the proposition that [the Moon Plaintiffs] were *benefitted* by" Defendants' alleged conduct "as for the proposition that they were *harmed* by it." *Total Gas*, 889 F.3d at 115 (holding that plaintiffs failed to state a claim "even assuming arguendo that [the defendant's] manipulations impacted [p]laintiffs").[11] The Moon Plaintiffs have presented "no basis for an inference" that they "were harmed as a result of Defendants' alleged manipulation as opposed to having been benefitted." *In re Merrill,*

[9] The FAC's conclusory allegations are readily distinguishable from the detailed allegations held sufficient in *Dennis* v. *JPMorgan Chase & Co.*, 343 F. Supp. 3d 122 (S.D.N.Y. 2018). In *Dennis*, each named plaintiff alleged that specifically identified transactions were impacted adversely by specific acts of alleged manipulation that supposedly moved the market against them, thus causing harm. *Id.* at 146-47. These are precisely the kinds of allegations that are missing here.

[10] *Gelboim*, 823 F.3d at 766 ("Appellants allege that the Banks corrupted the LIBOR-setting process and exerted downward pressure on LIBOR . . . .").

[11] Plaintiffs attempt to distinguish *Total Gas* on its facts (Opp. at 19), but Plaintiffs studiously ignore the Second Circuit's holding that the *Total Gas* plaintiffs' claims failed "even assuming arguendo that [the defendant's] manipulations impacted [p]laintiffs" because plaintiffs failed to plead facts about their positions and defendant's alleged manipulation to show that they were harmed as opposed to helped by defendant's conduct, *Total Gas*, 889 F.3d at 115. Further, *Allianz Global Investors GmbH* v. *Bank of America Corp.* does not assist Plaintiffs. 463 F. Supp. 3d 409 (S.D.N.Y. 2020). In *Allianz*, the court determined that plaintiffs adequately alleged actual injury through "statistical analysis and reports that support[ed] allegations of . . . injur[y]." 463 F. Supp. 3d at 418 n.5.

BofA, & Morgan Stanley Spoofing Litig., 2021 WL 827190, at *12 (S.D.N.Y. Mar. 4, 2021), *appeal pending*, No. 21-00853 (2d Cir. argued Dec. 6, 2021).

Plaintiffs attempt to distinguish cases like *SSA Bonds*, *Merrill*, and *Total Gas* by pointing to *Gelboim* to manufacture a false dichotomy between cases involving alleged benchmark manipulation and cases involving other forms of market conduct. (Opp. at 19.) But, as Judge Buchwald held in the context of the USD LIBOR multidistrict litigation, the relevant distinction is between allegations of conduct that would have consistently moved markets or prices in a direction adverse to plaintiffs' alleged positions and allegations of sporadic conduct that is equally likely to help or harm plaintiffs on any given day.[12] While Judge Buchwald held that plaintiffs could adequately allege injury in general terms when pleading claims regarding the alleged "persistent suppression" of USD LIBOR at issue in *Gelboim*, she further held that plaintiffs seeking to assert claims based on sporadic, upwards and downwards "trader-based" manipulation of USD LIBOR—the kind of alleged conduct at issue here—need to plead specific facts to show "they engaged in a transaction at a time during which prices were artificial as a result of defendants' alleged trader-based manipulative conduct, and that the artificiality was adverse to their position." *LIBOR II*, 962 F. Supp. 2d at 622.

In *Total Gas*, the Second Circuit endorsed precisely this pleading requirement, 889 F.3d at 115, and cited Judge Buchwald's analysis of trader-based claims with approval, *id*. at 111 (citing *LIBOR I*, 962 F. Supp. 2d at 620). This Court should follow *Total Gas* and hold that

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But this Court has already rejected Plaintiffs' alleged "economic evidence" and Plaintiffs' plead no facts in the FAC to fill the void that is left behind. *SIBOR I*, 2017 WL 3600425, at *11.

[12] *See In re LIBOR-Based Fin. Instruments Antitrust Litig.* (*LIBOR II*), 962 F. Supp. 2d 606, 620 (S.D.N.Y. 2013); *see also In re LIBOR-Based Fin. Instruments Antitrust Litig.* (*LIBOR I*), 935 F. Supp. 2d 666, 709-10 (S.D.N.Y. 2013).

the Moon Plaintiffs fail to adequately allege an actual injury sufficient to show antitrust injury and state an antitrust claim.

C. The Moon Plaintiffs' Allegations Confirm They Are Not Efficient Enforcers.

In the Opposition (Opp. at 2, 14), the Moon Plaintiffs concede that, to be efficient enforcers of the antitrust laws and survive dismissal, they must plausibly allege that "the foreign exchange forward contracts that [*they*] *entered into* incorporated SIBOR and SOR as a component of price," *SIBOR I*, 2017 WL 3600425, at *12 (emphasis added). But the Moon Plaintiffs do not allege that USD SIBOR or SOR were actually incorporated into the contractual terms of the FX forwards they traded. Rather, the Moon Plaintiffs attempt to demonstrate antitrust standing by pleading that USD SIBOR and SOR were "plugged into" an "industry standard formula" that "is used to price foreign exchange forwards generally." (*See* Opp. at 11-12; FAC ¶¶ 192-200.)

The fatal problem for the Moon Plaintiffs is that Defendants have demonstrated that applying the "formula" to *the Moon Plaintiffs' own* FX forward transactions, in precisely the manner set forth in the FAC, shows that those transactions were *not* priced directly by reference to USD SIBOR and SOR. (*See* Br. at 31-34.) Specifically, when the February 16, 2009 six-month USD SIBOR and SOR rates are "plugged into" Plaintiffs' formula, the result is *not* the price that the Moon Plaintiffs allege they paid in either of their six-month USD/SGD forward transactions on February 16, 2009. (*See id.* at 33 (showing that "formula"-generated FX forward price using USD SIBOR and SOR would be 1.5121 while the Moon Plaintiffs allege they paid actual prices of 1.5219 and 1.5150).) In fact, using the allegedly manipulated USD SIBOR and SOR rates with Plaintiffs' formula results in far *lower prices* for the Moon Plaintiffs' FX forward transactions than the prices that they allege they paid. (*See id.*) The Moon Plaintiffs do not dispute any of this and offer no substantive response. (Opp. at 11-14.) Instead, Plaintiffs offer

various justifications for the failure of their own methodology to support their claim, but none withstands scrutiny. (*Id.*)

First, the Second Circuit recently held that plaintiffs who purchased financial instruments "that do not reference" a benchmark rate in their contractual terms are clearly *not* efficient enforcers, even if the rate "exerted a kind of gravitational force, influencing" the prices of the instruments they allegedly traded. *Schwab II*, 2021 WL 6143556, at *2, *8 n.6 (rejecting claims regarding the alleged manipulation of USD LIBOR based on fixed-rate bonds even though the interest rates at which fixed rate bonds were issued were allegedly calculated using USD LIBOR and the value of such bonds was allegedly "assessed in terms of their spread relative to" USD LIBOR). This forecloses the Moon Plaintiffs' claims. (*See* FAC ¶¶ 187-200.) Some supposed indirect "link between SIBOR and SOR and the prices of the Singapore dollar foreign exchange forwards they traded" is not sufficient to establish that the Moon Plaintiffs are efficient enforcers. (Opp. at 13.) In order to adequately plead that they are efficient enforcers, the Moon Plaintiffs must allege that their injuries were proximately caused by Defendants' alleged conduct such that they occurred "at the first step following the harmful behavior." *Schwab II*, 2021 WL 6143556, at *6. Their allegations show the opposite.

Plaintiffs' reliance on *Sonterra Capital Master Fund Ltd.* v. *UBS AG* (*Sonterra Yen*), 954 F.3d 529 (2d Cir. 2020), is misplaced. That case does not stand for the proposition that merely alleging an "industry standard formula" that was purportedly used to price FX forwards suffices to establish "the requisite link between SIBOR and SOR and the prices of the Singapore dollar foreign exchange forwards they traded" for the purposes of the efficient enforcer analysis. (Opp. at 11-13.) This Court has already rejected that position, *see SIBOR I*, 2017 WL 3600425 at *12, and nothing in *Sonterra Yen* is to the contrary. Rather, *Sonterra Yen*

addressed merely whether the plaintiffs there had sufficiently alleged injury-in-fact for purposes of the far less demanding Article III standard, and expressly stated that the ruling should not be construed to address whether the plaintiffs there had stated a claim. 954 F.3d at 533 & n.4.[13]

Second, the factual arguments in the Opposition only confirm that the Moon Plaintiffs are not efficient enforcers. Plaintiffs suggest that intraday changes in the USD/SGD spot price could be the reason that the formula they plead does not show that the prices of their FX forwards were even indirectly determined by reference to USD SIBOR and SOR. (Opp. at 13-14 (noting that the alleged "formula also incorporates the spot price for the USD/SGD currency pair, a value that changes constantly throughout the day").)[14] But, as Defendants explained, inputting the Moon Plaintiffs' alleged FX forward price, USD SIBOR, and SOR into the formula alleged in the FAC implies a USD/SGD spot rate of 1.5243, which is 60 pips outside of the 113-pip USD/SGD spot rate range for February 16, 2009 (1.5070 to 1.5183). (Br. at 34 n.28.) This shows that, regardless of intraday changes in the USD/SGD spot price, SIBOR and SOR cannot be direct inputs to the formula to determine the actual price. Plaintiffs do not and cannot address this in their Opposition.[15]

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[13] The Second Circuit has repeatedly emphasized that pleading an Article III injury-in-fact presents a "lower threshold than that for sustaining a valid cause of action" under the antitrust standing inquiry. *Total Gas*, 889 F.3d at 110, 115-16; *accord In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157 (2d Cir. 2016). While "general factual allegations of injury resulting from the defendant's conduct may suffice" to meet the "low threshold" for alleging Article III injury-in-fact "at the pleading stage," *Sonterra Yen*, 954 F.3d at 534, the efficient enforcer analysis requires a plaintiff to plausibly allege the higher standard of "proximate causation," *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127, 139 (2d Cir. 2021); *see also Carter* v. *HealthPort Techs., LLC*, 822 F.3d 47, 55 (2d Cir. 2016) ("'causal connection' element of Article III standing . . . is a standard lower than that of proximate causation").

[14] According to Plaintiffs, "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." (Opp. at 13.) Not so. Rather, in the Opening Brief, Defendants explained that if, as Plaintiffs allege, FX forwards are traded 24 hours a day by reference to spot prices and interest rates and the USD/SGD spot price "changes constantly throughout the day" (*id.* at 13-14), it would defy "'common economic experience'" for "*the interest rate inputs*" to somehow be static for 24 hours as new information entered the market changing interest rate expectations (Br. at 31 (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 565 (2007) (emphasis added))).

[15] To the extent that, by characterizing Defendants' motion as "counterfactual," the Moon Plaintiffs intend to argue that this issue is improper for resolution on a motion to dismiss (Opp. at 13), they are wrong. To the contrary,

Finally, Plaintiffs assert without explanation that their conflicting allegations merely raise questions about "the *extent*" of USD SIBOR's and SOR's impact on the FX forwards "market at large," which they claim should not be resolved at this stage. (Opp. at 14.) In their attempt to recast the relevant inquiry, Plaintiffs rely on portions of *Gelboim* and *Wacker* v. *JP Morgan Chase & Co.*, 678 F. App'x 27 (2d Cir. 2017), which are inapposite. As an initial matter, as noted above, the Second Circuit has now issued its follow-on decision to *Gelboim* and rejected claims of benchmark manipulation based on instruments that do not themselves reference the benchmark but are merely allegedly "influenc[ed]" by it. *Schwab II*, 2021 WL 6143556, at *8 n.6. Further, the relevant part of *Wacker* that Plaintiffs cite concerns the extent to which "the relationship between the benchmark and the market it allegedly tracks" can inform whether the defendants engaged in anticompetitive conduct. *See Wacker*, 678 F. App'x at 30. This misses the point. The relevant efficient enforcer question is whether the Moon Plaintiffs allege facts that plausibly show "the foreign exchange forward contracts that [*they*] *entered into* incorporated SIBOR and SOR as a component of price." *See SIBOR I*, 2017 WL 3600425, at *12 (emphasis added). That showing is precisely what is missing here, which is dispositive of the efficient enforcer inquiry. Because the FAC confirms that the Moon Plaintiffs have not plausibly alleged that they are efficient enforcers of the antitrust laws, their claims must be dismissed.

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

For the reasons set forth in the Reply Memorandum of Law of Foreign Non-Counterparty Defendants and Singapore Banks in Further Support of the Motion to Dismiss the

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Defendants' motion applies the Moon Plaintiffs' own methodology as set forth in the FAC to their own transactions using the same sources of data incorporated by reference into the FAC and of which the Court may take judicial notice. (*See* Br. at 9 n.9 (citing *Roth* v. *CitiMortgage Inc.*, 756 F.3d 178, 180 (2d Cir. 2014)).)

Fourth Amended Complaint for Lack of Personal Jurisdiction, the Court should dismiss all claims by the Moon Plaintiffs predicated on the existence of a conspiracy, including in particular claims as to all Defendants who are not alleged to have transacted with Plaintiffs, because the Moon Plaintiffs do not adequately allege any conspiracy to manipulate USD SIBOR or SOR among the Defendants.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Defendants' Opening Brief, the Court should dismiss the FAC pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, or, in the alternative, dismiss the FAC with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: New York, New York
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