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' SUR-REPLY MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FOURTH AMENDED CLASS ACTION COMPLAINT

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 sur-reply memorandum of law in opposition to Defendants' motion to dismiss the Fourth Amended Class Action Complaint ("FAC").

In between Plaintiffs' filing of their Omnibus Opposition to Defendants' motion to dismiss the FAC, ECF No. 451 ("Opp'n"), and Defendants' filing of their two Reply memoranda, the Second Circuit issued a new, relevant decision, in which it considered bondholder plaintiffs' challenges to two different rulings of the district court overseeing multidistrict litigation concerning the alleged manipulation of U.S. dollar LIBOR. *See Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC*, 22 F.4th 103, 2021 WL 6143556 (2d Cir. Dec. 30, 2021) ("*Schwab II*"). Contrary to Defendants' arguments, *Schwab II* unequivocally forecloses Defendants' attacks on the Moon Plaintiffs' status as efficient enforcers of the antitrust laws and confirms the correctness of this Court's prior holding that all Defendants are subject to personal jurisdiction in this forum.

I. The Moon Plaintiffs Are Efficient Enforcers Under *Schwab II.*

In *Schwab II*, the Second Circuit affirmed the district court's finding that so-called "umbrella plaintiffs," *i.e.*, plaintiffs who only purchased a U.S. dollar LIBOR-based financial instrument from a non-conspirator (as opposed to directly from a member of the cartel), were not efficient enforcers of the antitrust laws. *Id.* at *5. As to the first efficient enforcer factor, directness of the injury, the Second Circuit "dr[ew] a line" (as this Court did in *SIBOR II*) "between those whose injuries resulted from their direct transactions with the Banks and those whose injuries stemmed from their deals with third parties." 2021 WL 6143556, at *7; *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, 2018 WL 4830087, at *6 (S.D.N.Y. Oct. 4, 2018) ("*SIBOR II*") (direct transactions with two Defendants were "sufficient to make FrontPoint an efficient enforcer with respect to its antitrust claims"). The Second Circuit also held that the second efficient enforcer factor weighed in favor of

direct transaction plaintiffs like the Moon Plaintiffs because "those victims' injuries are directly linked to the [b]anks' profit from the conspiracy." *Id.* at *9. Because the Moon Plaintiffs transacted FX forwards priced based on SIBOR and SOR directly with Defendant UBS, the Moon Plaintiffs unquestionably have antitrust standing under *Schwab II*. *See id.*.

Faced with this clear, controlling law, Defendants resort to a counterfactual denial of the FAC, arguing that the FX forwards transacted by the Moon Plaintiffs do not incorporate SIBOR and SOR as a component of price and are therefore no different than the fixed-rate bonds transacted by the *Schwab* plaintiffs that the Second Circuit determined (in a tangential footnote) were insufficient to confer antitrust standing. *See* Merits Reply at 19. This argument fails.

Critically, the *Schwab II* plaintiffs *conceded* that the fixed-rate bonds they transacted did not use U.S. dollar LIBOR as a component of price. *See* Joint Br. for Pls.'-Appellants Regarding Antitrust Standing, *Schwab II*, No. 17-1569, ECF No. 344 at 28 (stating that fixed-rate bonds "do not need a LIBOR term"); *Schwab II*, 2021 WL 6143556, at *8 n.6 ("Schwab bases its federal antitrust claim not only on LIBOR-indexed bonds purchased from third parties, *but also on fixed-rate bonds that do not reference LIBOR at all. Schwab's theory is that LIBOR exerted a kind of gravitational force, influencing fixed-rate bonds.*") (emphasis added)). The Moon Plaintiffs' allegations here are totally different. The Moon Plaintiffs (unlike the *Schwab II* plaintiffs) allege that the FX forwards they transacted directly incorporate SIBOR and SOR as a component of price, including the formula in which SIBOR and SOR are used to mathematically calculate the prices of Singapore dollar FX forwards. *See, e.g.,* FAC ¶¶ 187-200 (explanation and example calculation showing the "direct mathematical relationship between USD SIBOR, SOR and the prices of Singapore dollar foreign exchange forwards"); ¶ 238 ("USD/SGD foreign exchange forwards are priced using a formula that incorporates SOR and USD SIBOR *as components of price.*") (emphasis added). The Second Circuit and multiple other courts in this District have already evaluated and repeatedly *rejected* Defendants' counterfactual attacks regarding

the pricing of FX forwards, and there is certainly nothing in *Schwab II* that changes that conclusion.[1] Defendants' attempts to deny Plaintiffs' well-pled allegations fail, as they have always done before.[2]

II. UBS' FX Forwards Transactions Directly with the Moon Plaintiffs Constituted Overt Acts in Furtherance of the Conspiracy.

Far from supporting Defendants, *Schwab II reversed dismissal* for lack of personal jurisdiction, finding that the court had personal jurisdiction over all defendants under the same conspiracy theory of personal jurisdiction applied by this Court in *SIBOR II*. The Second Circuit clarified that plaintiffs need only plausibly allege the three prongs of the "conspiracy theory of personal jurisdiction": "(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 [forum] to subject that co-conspirator to jurisdiction in that [forum]." *Id.* at *12 (quoting *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 87 (2d Cir. 2018). *Schwab II* also reaffirmed that a court evaluating a motion to dismiss for lack of personal jurisdiction must accept all factual allegations in the complaint as true and draw all reasonable inferences in plaintiffs' favor. *Id.* at *13.

Defendants note that the overt acts alleged in *Schwab II* involved instructions from some defendants' U.S.-based executives to make artificial LIBOR submissions rather than trades in allegedly price-fixed financial instruments, *see* PJ Reply[3] at 14-15, but this distinction is irrelevant. First, the Second Circuit nowhere suggested that the overt acts in *Schwab II* are the *only* types of overt

[1] *See Sonterra Cap. Master Fund Ltd. v. UBS AG*, 954 F.3d 529, 535 (2d Cir. 2020) ("The 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."); *Sullivan v. Barclays PLC,* No. 13-CV-2811 (PKC), 2017 WL 685570, at *9 (S.D.N.Y. Feb. 21, 2017) (same for Euribor); *Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 547 (S.D.N.Y. 2017) (same for Swiss Franc LIBOR); *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 156 (S.D.N.Y. 2018) (same for BBSW); *SIBOR II*, 2018 WL 4830087, at *5 n.7 (noting that plaintiffs amended their complaint to better allege that foreign exchange forwards incorporate SIBOR and SOR into price, and that "district courts have found similar allegations sufficient").

[2] Defendants also incorporate their FX forwards pricing argument into their personal jurisdiction briefing to argue that a trader-based conspiracy to manipulate SIBOR and SOR is implausible, PJ Reply at 5, and that UBS' in-forum transactions were not in furtherance of the alleged conspiracy. *Id.* at 12-13. Because their comparison of the Moon Plaintiffs' FX forwards with the fixed-rate bonds at issue in *Schwab II* is entirely off-base, these arguments fail as well.

[3] "PJ Reply" refers to Defendants' Reply Memorandum of Law of Foreign Non-Counterparty Defendants and Singapore Banks in Further Support of the Motion to Dismiss the FAC for Lack of Personal Jurisdiction, ECF No. 457.

acts that can give rise to personal jurisdiction. Instead, the Second Circuit expressly declined to consider the jurisdictional significance of a defendant's sales of price-fixed financial instruments in the forum. *Schwab II*, 2021 WL 6143556, at *14 n.10. Second, the conspiracy in *Schwab* involved "persistent suppression" of LIBOR to "project financial soundness." *See* PJ Reply at 15. The objective of the conspiracy alleged here, by contrast, was "collectively to profit from the manipulation of SIBOR, including allowing individual members to trade and profit with unknowing victims." *SIBOR II*, 2018 WL 4830087, at *8. *Schwab II* thus reinforces this Court's conclusion that a Defendant's sales of price-fixed SIBOR- and SOR-based financial instruments in the United States are acts in furtherance of the plausibly alleged profit-motivated conspiracy[4] in this case, and therefore give rise to personal jurisdiction over all co-conspirators.

Finally, Defendants suggest that *Schwab II* introduces a separate "foreseeability" element into the conspiracy jurisdiction analysis. *See* PJ Reply at 12. It does not. The test for conspiracy jurisdiction has "three prongs" and no more. *See* 2021 WL 6143556, at *14. Foreseeability comes into play only in the sense that the in-forum overt acts should "be of the sort that a defendant should reasonably anticipate being haled into court in the forum as a result of them," rather than being "altogether blindsided." *Id.* (internal quotation omitted). Here, Defendants' contention that their co-conspirators' trading of SIBOR- and SOR-based financial instruments in the United States was unforeseeable is not credible. *See* PJ Reply at 12. Even if resolving this fact-based question were appropriate at this stage (and *Schwab II* says that it is not),[5] Defendants here are some of the world's largest banking institutions and operated significant SIBOR- and SOR-based financial instrument trading operations worldwide while their conspiracy was ongoing. *See SIBOR II*, 2018 WL 4830087,

[4] *See SIBOR II*, 2018 WL 4830087, at *8 ("where the complaint plausibly alleges a profit-motive, as here, the U.S.-based trading is properly alleged to have been a part of the conspiracy and to be related to the overseas manipulation.").
[5] *Schwab II* reaffirmed the well-settled principle that courts are "not at liberty to draw [] inference[s] against Plaintiffs" in resolving a Rule 12(b)(2) motion to dismiss. 2021 WL 6143556, at *13.

at *1. Moreover, Defendants manipulated SIBOR and SOR for the express *purpose* of benefitting their trading positions, which necessarily includes UBS's U.S. transactions. *See SIBOR II,* 2018 WL 4830087, at *8. Those transactions could not possibly have "blindsided" any Defendant.

III. The Moon Plaintiffs' Claims Are Timely and Plaintiffs Do Not "Concede" Otherwise.

Finally, to maintain clarity in the record, Plaintiffs correct Defendants' mischaracterization of their arguments. Plaintiffs did not concede that a deficiency in the Sonterra assignment (if such a deficiency existed, which it does not) would render the Moon Plaintiffs' claims untimely. *See* Merits Reply[6] at 1. On the contrary, Plaintiffs pointed out that the Second Circuit expressly rejected Defendants' argument that the Moon Plaintiffs' claims are time-barred under *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018). *See* Opp'n at 9. More importantly, Plaintiffs argued that the Second Circuit established definitively that subject matter jurisdiction over this action *exists,* period, and did not leave that holding open to be reevaluated. *See id.* at 31-34.

It would be grossly unfair to class members who legitimately relied on the existence of a pending class action to strip away their claims now on the purported basis that (contrary to all appearances, not to mention the Second Circuit's express holding) the action was never actually "pending" at all. Plaintiffs continue to maintain, as they always have[7], that the Moon Plaintiffs' claims are timely regardless of any purported infirmities in the assignment from Sonterra to FLH.

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[6] "Merits Reply" refers to Defendants' Reply Memorandum of Law in Further Support of Defendants' Joint Motion to Dismiss the FAC, ECF No. 456.

[7] Plaintiffs also raised this argument before the Second Circuit itself, and before the Supreme Court in their opposition to Defendants' petition for certiorari. *See* Br. for Pls.-Appellants, *Fund Liquidation Holdings LLC v. Bank of Am. Corp.*, No. 19-2719 (2d. Cir. Nov. 22, 2019), ECF No. 124, at 53 ("Because the representative plaintiff is merely an avatar for the correctly stated claim brought on behalf of the class, there is no reason to regard the substitution of a different plaintiff *from the putative class* as anything other than a purely technical change designed to protect the innocent class members."); Br. in Opp'n, *Bank of Am. Corp. v. Fund Liquidation Holdings LLC*, No. 21-505 (Dec. 7, 2021), at 31 ("In principle, there is no reason why a jurisdictional problem with a claim brought by one *representative* plaintiff in a class action should foreclose substituting into the named-plaintiff position a different party that is already participating in the case as an unnamed class member. Accordingly, the Second Circuit expressly held that such a move is not foreclosed by this Court's decision in *China Agritech* …. [Defendants] did not seek review of this holding, and acknowledged below that it is 'independent of the Article III question.'") (citations omitted).

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Respectfully submitted,

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