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

DEFENDANTS' RESPONSE TO PLAINTIFFS' SUR-REPLY

ORAL ARGUMENT REQUESTED

The flawed arguments in Plaintiffs' Sur-Reply (ECF No. 463) merely confirm that *Schwab Short-Term Bond Mkt. Fund* v. *Lloyds Banking Grp. PLC*, 22 F.4th 103 (2d Cir. 2021) ("*Schwab II*") compels dismissal of the Moon Plaintiffs' antitrust claims—both because the Moon Plaintiffs are not efficient enforcers and because their two alleged transactions with UBS do not establish personal jurisdiction over the Foreign Non-Counterparty Defendants.[1] Moreover, the Sur-Reply demonstrates that Plaintiffs have no response to any of Defendants' arguments showing that this action must be dismissed if this Court finds, as it should, that Sonterra did not assign relevant claims to FLH.

I. *SCHWAB II* CONFIRMS THAT THE MOON PLAINTIFFS ARE NOT EFFICIENT ENFORCERS.

The Moon Plaintiffs argue that *Schwab II* shows that they are efficient enforcers because they allegedly "transacted FX forwards priced based on [USD] SIBOR and SOR directly with Defendant UBS." (Sur-Reply at 2.) That is wrong. (ECF No. 456 at 19, 21.) *Schwab II* states that, in an antitrust case involving the alleged manipulation of a benchmark, transacting directly with a defendant is necessary but not sufficient to establish antitrust standing. *See Schwab II*, 22 F.4th at 118 & n.6. Further scrutiny of the financial products allegedly traded by plaintiffs is required to determine if plaintiffs are efficient enforcers. *See id*. An allegation that a financial product "that do[es] not reference [the benchmark] at all" was priced using the benchmark "is clearly insufficient to establish antitrust standing" because a party that transacts in such a product cannot suffer injury "at the first step following the harmful behavior." *Id.* at 116, 118 n.6. As the Moon Plaintiffs allege in the FAC, unlike instruments directly tied to USD SIBOR or SOR, their FX forwards ***did not*** reference USD SIBOR or SOR anywhere in

[1] Unless otherwise indicated, all capitalized terms are as defined in Defendants' opening briefs in support of their motions to dismiss. (ECF Nos. 446, 447.) All internal quotation marks and citations are omitted.

their contractual terms. (*Compare* FAC ¶¶ 184-185 (describing interest-rate swaps), *with* FAC ¶¶ 187-200 (describing FX forwards).) The Moon Plaintiffs do not attempt to argue otherwise. (*See, e.g.*, Sur-Reply at 1-2.) That should end the analysis: it demonstrates that the Moon Plaintiffs are not efficient enforcers under *Schwab II*.

The Moon Plaintiffs, however, attempt to distort the Second Circuit's holding in *Schwab II* by misrepresenting the allegations at issue in that case. (Sur-Reply at 2.) The Moon Plaintiffs assert that their allegations "are totally different" from those at issue in *Schwab II* because the "*Schwab II* plaintiffs *conceded* that the fixed-rate bonds they transacted did not use U.S. dollar LIBOR as a component of price." (*Id.*) Not so. The *Schwab II* plaintiffs conceded only that fixed-rate bonds "d[id] not literally incorporate LIBOR as a *contractual* price term,"[2] just as the Moon Plaintiffs do here. The *Schwab II* plaintiffs also alleged that their fixed-rate bonds were indistinguishable from floating rate bonds that expressly referenced LIBOR because they were "priced in the market relative to LIBOR," which caused interest rates on fixed-rate bonds to "move in lockstep" with LIBOR.[3] The Moon Plaintiffs rely on precisely the same type of allegation (FAC ¶¶ 187-200), and their Complaint should meet the same fate. The Moon Plaintiffs' allegation that FX forwards are priced using an "industry standard formula" involving USD SIBOR and SOR is just an obtuse way of alleging that FX forward prices move in relation to USD SIBOR and SOR because FX forwards are priced in the market relative to those benchmarks. (*See id.*) Those allegations, just like the ones that the Second Circuit recently

[2] Joint Brief for Plaintiffs-Appellants Regarding Antitrust Standing at 27-28, *Schwab Short-Term Bond Mkt. Fund* v. *Lloyds Banking Grp. PLC*, No. 17-1569 (2d Cir.), ECF No. 344 (emphasis added).

[3] *Id.* at 27-28 (arguing "[b]uyers compare the spread-to-LIBOR of a fixed-rate instrument against an issuer's creditworthiness and other market dynamics, *essentially taking LIBOR as a given component of the offered rate*").

rejected, are "clearly insufficient to establish antitrust standing." *Schwab II*, 22 F.4th at 118 n.6.[4]

II. THE MOON PLAINTIFFS' TWO ALLEGED TRANSACTIONS ARE NOT SUFFICIENT TO CONFER PERSONAL JURISDICTION OVER THE FOREIGN NON-COUNTERPARTY DEFENDANTS UNDER *SCHWAB II*.

Plaintiffs' sole basis for asserting conspiracy jurisdiction over the Foreign Non-Counterparty Defendants is two alleged "SGD FX forward transaction[s]" between the Moon Plaintiffs and alleged co-conspirator UBS over a purported five-year class period. (FAC ¶¶ 87-88.) In their Sur-Reply, Plaintiffs concede that their allegations regarding these transactions bear no resemblance to the alleged in-forum manipulative conduct that *Schwab II* deemed sufficient to plead conspiracy jurisdiction. (Sur-Reply at 3.) Yet Plaintiffs argue that, because *Schwab II* did not specify that in-forum manipulative acts are the "*only* types of overt acts that can give rise to personal jurisdiction," the "distinction is irrelevant." (Sur-Reply at 3-4.) Plaintiffs are incorrect. The court must "evaluate the quality and nature of the defendant's contacts with the forum state" when determining whether the exercise of personal jurisdiction would comport with due process. *Charles Schwab Corp.* v. *Bank of Am. Corp.*, 883 F.3d 68, 82 (2d Cir. 2018) ("*Schwab I*"). The Moon Plaintiffs' two alleged derivatives transactions do not approach the in-forum contacts at issue in *Schwab II* and are insufficient to confer personal jurisdiction here.

Plaintiffs attempt to distinguish the conspiracy alleged in *Schwab II* from the one here by asserting that the two conspiracies had different alleged motives. (Sur-Reply at 4.) This

[4] The Moon Plaintiffs' allegations are even more deficient than those the Second Circuit rejected in *Schwab II* because a mechanical application of the Moon Plaintiffs' alleged "industry standard formula" to the Moon Plaintiffs' own FX forwards shows that those transactions were *not* priced by reference to USD SIBOR and SOR. (ECF No. 447 at 31-34; ECF No. 456 at 18-19.) Nothing about that fact, which is apparent from the Moon Plaintiffs' own allegations, is "counterfactual." (Sur-Reply at 2.) It also renders the Moon Plaintiffs' repeated reliance on *Sonterra Capital Master Fund Ltd.* v. *UBS AG* (*Sonterra Yen*), 954 F.3d 529 (2d Cir. 2020), and pre-*Schwab II* district court decisions misplaced to the extent such decisions have continued relevance (and they do not). Further, *Sonterra Yen* only addressed whether the plaintiffs had pled injury-in-fact for purposes of the far less demanding Article III standard—not the allegations sufficient to state a claim as efficient enforcers. (ECF No. 456 at 19-20.) Plaintiffs have no response to this. And *Schwab II* removes any doubt that Plaintiffs are not efficient enforcers. (*Id.*)

effort fails for two reasons. *First*, Plaintiffs do not explain how any supposed distinction between the alleged aims of the two purported conspiracies is relevant to the jurisdictional analysis. The Second Circuit's focus in *Schwab II* was not on the purpose of the alleged conspiracy but on the nature of the "overt acts taken by co-conspirator Banks in the United States in furtherance of" the alleged conspiracy. *Schwab II*, 22 F.4th at 122-24. *Second*, in *Schwab I*, the Second Circuit held that in-forum sales of derivatives were *not* sufficient to establish conspiracy jurisdiction even if the defendants there "conspired not only to manipulate LIBOR, but also to earn profits from that manipulation." *Schwab I*, 883 F.3d at 87. That holding, together with *Schwab II*, disposes of Plaintiffs' allegations here.

Moreover, Plaintiffs cannot cast aside *Schwab II*'s foreseeability requirement. (Sur-Reply at 4.) The Second Circuit was clear that, for conspiracy jurisdiction to comport with due process, overt acts in furtherance of any alleged conspiracy must be "foreseeable to" and able to be "anticipated by Defendants." *Schwab II*, 22 F.4th at 125. The Moon Plaintiffs do not explain how the eleven Foreign Non-Counterparty Defendants, four of which were not even on the SIBOR or SOR panels when the alleged trades occurred, could have foreseen that UBS would execute two FX forwards trades with the Moon Plaintiffs in the United States—let alone anticipated that those trades, which do not reference SIBOR or SOR, could be related to any supposed conspiracies regarding USD SIBOR or SOR. (*See* ECF No. 457 at 11-16.) That the Foreign Non-Counterparty Defendants are "some of the world's largest banking institutions" does not make any and all trading activity anywhere in the world foreseeable to them. (Sur-Reply at 4-5.) The exercise of conspiracy jurisdiction here would not comport with due process because Plaintiffs fail to allege facts showing that any Defendant could have foreseen that two

FX forwards could be seen as furthering a conspiracy to manipulate USD SIBOR or SOR.[5]

III. MISGUIDED AND PROCEDURALLY IMPROPER ARGUMENTS ABOUT "TIMELINESS" CANNOT SALVAGE THE MOON PLAINTIFFS' CLAIMS.

Lastly, Plaintiffs argue that they "did not concede that a deficiency in the Sonterra assignment . . . would render the Moon Plaintiffs' claims untimely." (Sur-Reply at 5.) This argument is not only procedurally improper—it has nothing to do with *Schwab II*—but also confirms that this action must be dismissed if Sonterra did not validly assign relevant claims to FLH (which it did not). Defendants explained in their opening brief that controlling Second Circuit precedent, including *Pressroom Unions-Printers League Income Security Fund* v. *Continental Assurance Co.*, 700 F.2d 889 (2d Cir. 1983), bars the Moon Plaintiffs from joining this action and asserting timely class claims if subject matter jurisdiction was lacking at the outset. (ECF No. 447 at 22-24.) Plaintiffs' Opposition to Defendants' Motion to Dismiss (ECF No. 451) did not dispute this. Even now, in their improper attempt to re-open the issue, Plaintiffs offer no legal authority to show that Defendants' position is wrong. (Sur-Reply at 5.) Instead, Plaintiffs rely on flawed procedural arguments to, once again, incorrectly assert that the Second Circuit's decision bars this Court from considering the jurisdictional implications of Sonterra's failure to assign relevant claims to FLH. (*Id.*) Finally, Plaintiffs only underscore that their Opposition to Defendants' Motion to Dismiss conceded that the Moon Plaintiffs cannot join an action to which subject matter jurisdiction never attached by pointing to arguments in briefs that they previously filed in *other* courts to claim that they have not waived their right to argue otherwise. (Sur-Reply at 5 & n.7.) Such filings, of course, have no effect on this motion.

[5] Further, Plaintiffs do not address the Late Arriving Defendants' arguments that conspiracy jurisdiction premised solely on their eventual panel membership constitutes impermissible group pleading. (ECF No. 457 at 7-9.) And Plaintiffs' allegations fail against all Defendants for lack of an underlying alleged conspiracy and any alleged facts showing the Moon Plaintiffs' trades furthered any conspiracy. (*See* ECF No. 456 at 21-22.)

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