APPENDIX

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Second Circuit (Mar. 17, 2021) 1a

Opinion and Order Dismissing Case of the United States District Court for the Southern District of New York (July 26, 2019) 49a

Opinion and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss of the United States District Court for the Southern District of New York (Aug. 18, 2017) 67a

Opinion and Order Granting in Part and Denying in Part Defendants' Motions to Dismiss of the United States District Court for the Southern District of New York (Oct. 4, 2018) 112a

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Panel Rehearing, Or, in the Alternative, for Rehearing En Banc (May 6, 2021) 153a

United States Court of Appeals
For the Second Circuit

August Term 2020

Argued: September 11, 2020
Decided: March 17, 2021

No. 19-2719-cv

FUND LIQUIDATION HOLDINGS LLC, AS ASSIGNEE AND SUCCESSOR-IN-INTEREST TO FRONTPOINT ASIAN EVENT DRIVEN FUND, L.P., ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, SONTERRA CAPITAL MASTER FUND, LTD.,

Plaintiffs-Appellants,

FRONTPOINT ASIAN EVENT DRIVEN FUND, LTD., FRONTPOINT ASIAN EVENT DRIVEN FUND, L.P.,

Plaintiffs,

v.

BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A, ROYAL BANK OF SCOTLAND PLC, THE ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES JAPAN LIMITED, UBS AG, UBS SECURITIES JAPAN CO., LTD., ING GROEP N.V., ING BANK N.V., BNP PARIBAS, S.A., BNP PARIBAS NORTH AMERICA, INC.,

BNP PARIBAS SECURITIES CORP., BNP PARIBAS PRIME BROKERAGE, INC., OVERSEA-CHINESE BANKING CORPORATION LTD., BARCLAYS PLC, BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., DEUTSCHE BANK AG, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK, CREDIT AGRICOLE S.A., CREDIT SUISSE GROUP AG, CREDIT SUISSE AG, STANDARD CHARTERED BANK, STANDARD CHARTERED PLC, DBS BANK LTD., DBS GROUP HOLDINGS LTD., DBS VICKERS SECURITIES (USA) INC., UNITED OVERSEAS BANK LIMITED, AUSTRALIA AND NEW ZEALAND BANKING GROUP, LTD., BANK OF TOKYO-MISUBISHI UFJ, LTD., THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED, HSBC BANK USA, N.A., HSBC HOLDINGS PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC USA INC., MACQUARIE BANK LTD., MACQUARIE GROUP LTD., COMMERZBANK AG, ING CAPITAL MARKETS LLC, CREDIT SUISSE INTERNATIONAL, ANZ SECURITIES, INC., UOB GLOBAL CAPITAL, LLC,

Defendants-Appellees,

CITIBANK, N.A., CITIGROUP INC., JPMORGAN CHASE & CO., JP MORGAN CHASE BANK, N.A., JOHN DOES, NOS. 1–50,

Defendants.[*]

---

[*] The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

Appeal from the United States District Court for the Southern District of New York

No. 16-cv-5263, Alvin K. Hellerstein, *Judge*.

Before: SULLIVAN, PARK, and NARDINI, *Circuit Judges*.

In 2016, two Cayman Islands investment funds filed a class action complaint against numerous banks, alleging that the banks had conspired to manipulate certain benchmark interest rates. It was not until a year later that the banks discovered that the two plaintiff funds had been dissolved years earlier, and that the case was actually being prosecuted by a separate entity, Fund Liquidation Holdings LLC, which maintains that it was assigned the dissolved entities' claims. The district court (Hellerstein, *J.*) dismissed the case with prejudice for lack of subject-matter jurisdiction, reasoning that, because the action was initiated by non-existent parties, the case was a legal nullity and so could not be salvaged through Federal Rule of Civil Procedure 17.

On appeal, we are primarily tasked with deciding two issues: (i) whether the dissolved entities possessed Article III standing when the case was initiated, and, if not, (ii) whether Fund Liquidation is nevertheless able to join the action through Rule 17. We conclude that the dissolved funds lacked standing, but that 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. As a result, we **VACATE** the district court's judgment, and **REMAND** the case for additional proceedings.

VACATED AND REMANDED.

ERIC F. CITRON (Vincent Briganti, Margaret MacLean, Lowey Dannenberg, P.C., White Plains, NY, *on the brief*), Goldstein & Russell, P.C., Bethesda, MD, *for Plaintiffs-Appellants Fund Liquidation Holdings LLC and Sonterra Capital Master Fund, Ltd.*

JOEL KURTZBERG (Herbert S. Washer, Elai Katz, Jason M. Hall, Lauren Perlgut, Adam S. Mintz, *on the brief*), Cahill Gordon & Reindel LLP, New York, NY, *for Defendants-Appellees Credit Suisse Group AG, Credit Suisse AG, and Credit Suisse International*.

Arthur J. Burke, Paul S. Mishkin, Adam G. Mehes, Davis Polk & Wardwell LLP, New York, NY, *for Defendants-Appellees Bank of America Corporation and Bank of America, N.A.*

Penny Shane, Corey Omer, Sullivan & Cromwell LLP, New York, NY, *for Defendants-Appellees Australia and New Zealand Banking Group Limited and ANZ Securities, Inc.*

Christopher M. Viapiano, Elizabeth A. Cassady, Sullivan & Cromwell LLP, Washington, DC, *for Defendant-Appellee The Bank of Tokyo-Mitsubishi UFJ, Ltd., n/k/a MUFG Bank, Ltd.*

Jonathan D. Schiller, Christopher Emmanuel Duffy, Leigh M. Nathanson, Boies Schiller Flexner LLP, New York, NY, *for Defendants-Appellees Barclays PLC, Barclays Bank PLC, and Barclays Capital Inc.*

Jayant W. Tambe, Stephen J. Obie, Kelly A. Carrero, Jones Day, New York, NY, *for Defendants-Appellees BNP Paribas, S.A., BNP Paribas North America, Inc., BNP Paribas Securities Corp., and BNP Paribas Prime Brokerage, Inc.*

David R. Gelfand, Mark D. Villaverde, Milbank LLP, New York, NY, *for Defendant-Appellee Commerzbank AG.*

Andrew Hammon, Kimberly Anne Havlin, White & Case LLP, New York, NY; Darryl S. Lew, White & Case LLP, Washington, DC, *for Defendants-Appellees Crédit Agricole Corporate and Investment Bank and Crédit Agricole S.A.*

Erica S. Weisgerber, Debevoise & Plimpton LLP, New York, NY, *for Defendants-Appellees DBS Bank Ltd., DBS Group Holdings Ltd., and DBS Vickers Securities (USA) Inc.*

Aidan Synnott, Hallie S. Goldblatt, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, *for Defendant-Appellee Deutsche Bank AG.*

Christopher M. Paparella, Steptoe & Johnson LLP, New York, NY, *for Defendants-Appellees Macquarie Bank Ltd. and Macquarie Group Ltd.*

C. Fairley Spillman, Pratik A. Shah, Akin Gump Strauss Hauer & Feld LLP, Washington, DC, *for Defendant-Appellee Oversea-Chinese Banking Corporation Limited.*

David S. Lesser, Jamie S. Dycus, Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY, *for Defendants-Appellees The Royal Bank of Scotland plc, The Royal Bank of Scotland Group plc, and RBS Securities Japan Limited.*

Marc J. Gottridge, Lisa J. Fried, Benjamin A. Fleming, Hogan Lovells US LLP, New York, NY, *for Defendants-Appellees Standard Chartered Bank and Standard Chartered plc.*

Dale C. Christensen, Jr., Noah Czarny, Seward & Kissel LLP, New York, NY, *for Defendants-Appellees United Overseas Bank Limited and UOB Global Capital, LLC.*

Nowell D. Bamberger, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; Charity E. Lee, Cleary Gottlieb Steen & Hamilton LLP, New York, NY, *for Defendants-Appellees The Hongkong and Shanghai Banking Corporation Limited, HSBC Bank USA, N.A., HSBC Holdings* *plc, HSBC North America Holdings Inc., and HSBC USA Inc.*

Mark A. Kirsch, Eric J. Stock, Jefferson E. Bell, Gibson, Dunn & Crutcher LLP, New York, NY, *for Defendants-Appellees UBS AG and UBS Securities Japan Co., Ltd.*

Amanda F. Davidoff, Sullivan & Cromwell LLP, Washington, DC, *for Defendants-Appellees ING Groep N.V., ING Bank N.V., and ING Capital Markets LLC.*

RICHARD J. SULLIVAN, *Circuit Judge:*

In 2016, two Cayman Islands investment funds filed a class action complaint against numerous banks (the "Banks"), alleging that the Banks had conspired to manipulate certain Singapore-based benchmark interest rates. It was not until a year later that the Banks discovered that the two plaintiff funds had been dissolved years earlier, and that the case was actually being prosecuted by a separate entity, Fund Liquidation Holdings LLC, which asserts that it was assigned the dissolved entities' claims. Following that revelation, the district court (Hellerstein, *J.*) dismissed the case with prejudice for lack of subject-matter jurisdiction, reasoning that, because the action was initiated by non-existent parties, the case was a legal nullity and so could not be salvaged through Federal Rule of Civil Procedure 17.

On appeal, we are primarily tasked with deciding two issues: (i) whether the dissolved entities possessed Article III standing when the case was initiated, and, if not, (ii) whether Fund Liquidation is nevertheless able to join the action through Rule 17. We conclude 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. As a result, we **VACATE** the district court's judgment, and **REMAND** the case for further proceedings.

I. Background

The global financial system relies on a series of floating benchmark interest rates, many of which reflect the average cost that a bank incurs when borrowing money from one of its peers.[1] The most well-known example is the London Interbank Offered Rate, more commonly referred to as "LIBOR." In recent years, many of the world's largest financial institutions have been accused of manipulating several of these benchmarks in their favor. The implications of such manipulation can be staggering as these rates are used as reference points in countless financial instruments across the world and affect transactions collectively worth trillions of dollars.

This case concerns an alleged conspiracy by the Banks and others to manipulate two such benchmark rates: the Singapore Interbank Offered Rate (referred

---

[1] Because this appeal arrives before us at the pleading stage, we draw these facts from Fund Liquidation's complaint and accept them to be true. *See Iowa Pub. Emps.' Ret. Sys. v. MF Glob., Ltd.*, 620 F.3d 137, 139 n.1 (2d Cir. 2010).

to as "SIBOR") and the Singapore Swap Offered Rate (referred to as "SOR").[2] The two rates are calculated by a trade group, the Association of Banks in Singapore, which is composed of various banks (including some of the defendant banks in this case). Each day, an agent of that association calculates the two rates based, in part, on interest rate quotes submitted by a panel of banks that, again, include several of the defendants in this case (the "Panel"). Between 2007 and 2011, the Banks allegedly worked together to manipulate those two benchmark rates so that they would shift in directions that favored the Banks' financial positions. "The [alleged] effect of [the Banks'] conspiratorial price-fixing was to necessarily reduce the amount of interest paid to all holders of SIBOR- and SOR-based financial instruments." Fund Liquidation Br. at 8. Eventually, this conspiracy was uncovered in 2013 through an investigation spearheaded by the Monetary Authority of Singapore.

Three years later, on July 5, 2016, an initial class action complaint was filed against the Banks (and others) in the names of FrontPoint Asian Event Driven Fund, L.P. and Sonterra Capital Master Fund, Ltd. (together, the "Dissolved Funds"), two Cayman Islands investment funds that claimed to have held financial instruments that relied on the manipulated benchmark rates. Two critical pieces of information were omitted from this initial complaint. First, the complaint failed to disclose that the Dissolved Funds

---

[2] Technically, Fund Liquidation alleges that the Banks manipulated three rates, the SOR benchmark and two SIBOR benchmarks, one denominated in U.S. dollars and another denominated in Singapore dollars.

had apparently assigned (or, at least, attempted to assign) the rights to their claims to Fund Liquidation, and that it was really Fund Liquidation that was pulling the strings behind the scenes. Second, and perhaps more importantly, the pleadings failed to reflect that the Dissolved Funds were no longer in existence when the case was initiated – FrontPoint had been dissolved nearly five years earlier, in November 2011, and Sonterra had been dissolved shortly thereafter, in December 2012.

On October 31, 2016, a first amended complaint was filed, which added additional claims under the Sherman Act, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and common law. As before, this complaint made no mention of Fund Liquidation and referred to the Dissolved Funds in the present tense as if they were still in existence. *See* J. App'x at 137 ("FrontPoint . . . *is* an investment fund" (emphasis added)); *id.* at 138 ("Sonterra . . . *is* an investment fund" (emphasis added)). About one year later, the district court dismissed most of the asserted claims, finding that the court lacked personal jurisdiction over the subset of defendant banks that were foreign entities, that Sonterra failed to demonstrate that it would be an efficient enforcer of the antitrust laws, and that the plaintiffs had failed to plead plausible antitrust, RICO, or common law claims. *See generally FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, No. 16-cv-5263 (AKH), 2017 WL 3600425 (S.D.N.Y. Aug. 18, 2017). The district court refused, however, to dismiss FrontPoint's antitrust claims against the defendants that were members of the Panel, since those defendants submitted the allegedly fraudulent interest rate data directly to the Association of Banks in Singapore. *Id*. at *11. In addition, the district court permitted the plaintiffs to file an amended pleading to correct the shortcomings in the first amended complaint. *See id*. at *17.

So, on September 18, 2017, a second amended complaint was filed.[3] It was only in this pleading that, for the first time, the plaintiffs clarified that the Dissolved Funds were no longer in operation. J. App'x at 312 ("FrontPoint . . . *was* an investment fund" (emphasis added)); *id*. at 313 ("Sonterra . . . *was* an investment fund" (emphasis added)). The Banks responded by filing a new motion to dismiss, which added a fresh set of grounds for dismissal, including the contention that the Dissolved Funds lacked capacity to sue in light of their dissolution. It was not until briefing and oral argument that the plaintiffs eventually explained that the Dissolved Funds had assigned their claims to Fund Liquidation, and that it was Fund Liquidation which was, and had always been, the real plaintiff behind the case. Fund Liquidation then requested to substitute into the action under Federal Rule of Civil Procedure 17(a)(3) as the real party in interest and asked that it be allowed to continue litigating FrontPoint's and Sonterra's claims in its own name.

Around this time, some of the defendants (who have not appealed) decided to settle with Fund Liquidation. Those parties eventually executed binding term sheets and notified the district court.

[3] A corrected copy of the second amended complaint was filed one month later.

On October 4, 2018, within weeks of those agreements being signed, the district court dismissed with prejudice the RICO claims and the antitrust claims asserted against certain defendants, but again permitted the plaintiffs to proceed on the common law claims and antitrust claims brought against those defendants who were members of the Panel. *See FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, No. 16-cv-5263 (AKH), 2018 WL 4830087, at *11–12 (S.D.N.Y. Oct. 4, 2018). The district court also concluded that Fund Liquidation had received a full assignment of rights from FrontPoint and, as a result, granted leave for Fund Liquidation to submit a Third Amended Complaint under Rule 17(a)(3) so that it could join the action in its own name. *See id*. While the district court found that Sonterra had also assigned its claims to Fund Liquidation, it dismissed Sonterra's remaining claims (all of which were antitrust claims) with prejudice, reasoning that, because Sonterra had not transacted directly with any of the defendants, it was not an efficient enforcer of the antitrust laws. *See id*. at *6, *11–12.

A few weeks later, on October 26, 2018, Fund Liquidation filed a third amended complaint, naming as plaintiff "Fund Liquidation Holdings LLC, as assignee and successor-in-interest to FrontPoint."[4] *See* J. App'x at 603. The substantive allegations in this complaint were effectively identical to those in the

[4] Sonterra's omission from the caption was a result of the district court's prior order, which directed Fund Liquidation "to amend the [case] caption . . . [to] reflect the rulings in th[e] [October 2018] opinion." *FrontPoint Asian Event Driven Fund*, 2018 WL 4830087, at *12.

second amended complaint, with the exception that Fund Liquidation added additional facts concerning the pre-suit assignment it received from FrontPoint.

The following month, the Banks moved to dismiss the new complaint, arguing, among other things, that Fund Liquidation could not substitute into the action under Rule 17(a)(3) because the case was a legal nullity from the outset – having been initiated in the names of dissolved corporate entities – and that, since the statute of limitations had now lapsed, Fund Liquidation's new complaint was untimely. The Banks also argued that FrontPoint did not adequately assign its antitrust claims to Fund Liquidation.

While Fund Liquidation contested both arguments on the merits, it indicated that it would seek to moot the issues by filing a proposed fourth amended complaint. In that proposed complaint, Fund Liquidation sought to join two new class representatives, Moon Capital Partners Master Fund, Ltd. and Moon Capital Master Fund, Ltd. (together, the "Moon Funds"), which had transacted directly with the Banks and claimed to have been injured by the same scheme. According to Fund Liquidation, the Moon Funds would be ideal class representatives as they were not open to the same arguments concerning assignment and capacity that had thus far plagued Fund Liquidation. Separately, Fund Liquidation also sought preliminary approval of the settlement agreements that it had signed with some of the defendants.

On July 26, 2019, the district court adopted the Banks' nullity argument and dismissed the third amended complaint with prejudice on the grounds that the court had lacked subject-matter jurisdiction over the action from its outset, something, the district court concluded, that could not be cured. According to the district court: "[b]ecause [the Dissolved Funds] lacked capacity to sue, there was no real 'case or controversy' before the court and, consequently, no subject-matter jurisdiction." *Fund Liquidation Holdings LLC v. Citibank, N.A.*, 399 F. Supp. 3d 94, 103 (S.D.N.Y. 2019). For similar reasons, the court refused to approve the two settlement agreements that Fund Liquidation had signed with several of the defendants. *Id*. at 104. The district court also walked back its prior determination and concluded that FrontPoint had not effectively assigned its claims to Fund Liquidation, meaning that even if Fund Liquidation could join the case through Rule 17, it would lack standing to assert FrontPoint's claims. *Id*. at 102–03. Lastly, the district court noted that even if it did possess jurisdiction over the case, the Moon Funds could not be named as class representatives as their claims were not subject to equitable tolling and so were untimely. *Id*. at 105.

This appeal followed.

II. Appellate Jurisdiction

As an initial matter, we must decide whether we have jurisdiction over Sonterra's claims. The Banks argue that we do not because, as they see it, Fund Liquidation's notice of appeal was effective only as to FrontPoint's claims. Specifically, the Banks point out that the caption to the notice of appeal identifies only one plaintiff, "Fund Liquidation Holdings LLC, as assignee and successor-in-interest to

FrontPoint," and that the body of the notice states simply that "Plaintiff" is appealing various orders. J. App'x at 926. Taken together, the Banks say that the notice of appeal failed to make clear that Fund Liquidation was appealing the dismissal of Sonterra's claims, which the Banks argue merits dismissal of that portion of the appeal.

Federal Rule of Appellate Procedure 3(c) governs the contents of a notice of appeal. The Rule requires that such notices do three things: (1) "specify the party or parties taking the appeal by naming each one in the caption or body of the notice"; (2) "designate the judgment, order, or part thereof being appealed"; and (3) "name the court to which the appeal is taken." Fed. R. App. P. 3(c)(1). "The requirement that a party seeking to appeal be specified in the notice of appeal is jurisdictional." *Gusler v. City of Long Beach*, 700 F.3d 646, 648 (2d Cir. 2012). Even so, Rule 3 is clear that an appeal should "not be dismissed for informality of form or title of the notice of appeal" if the identities of the parties seeking to appeal are nonetheless clear. Fed. R. App. P. 3(c)(4); *see also In re Motors Liquidation Co.*, 943 F.3d 125, 130 (2d Cir. 2019) (excusing a mistake in the notice of appeal because the identities of the appellants were "sufficiently clear to the parties and ascertainable to the court (with effort)"); *Gusler*, 700 F.3d at 648–49 (focusing Rule 3 inquiry on whether "it is manifest from the notice as a whole that the party wishes to appeal").

Here, Fund Liquidation technically complied with the letter of Rule 3. The notice of appeal identified the only party taking the appeal (Fund Liquidation), the orders that were the subject of the appeal (the order issued on July 26, 2019 and all other orders that were adverse to Fund Liquidation), and the court to which the appeal was being taken (the Second Circuit). That is all that the text of Rule 3(c)(1) requires of a notice of appeal to invoke our jurisdiction.

But even if Fund Liquidation's failure to expressly identify Sonterra in its notice of appeal did run afoul of Rule 3, that deficiency would be excusable since it is sufficiently clear from the body of the notice that Fund Liquidation intended to appeal the dismissal of each of its claims against the Banks, not just those claims that it allegedly received from FrontPoint. For starters, the body of the notice gave no indication that Fund Liquidation was appealing only certain claims. To the contrary, the notice stated that Fund Liquidation was appealing "*all* orders . . . entered in the case that were adverse, either in whole or in part, to [it]." J. App'x at 926 (emphasis added). Given the "liberal[] constru[ction]" that we give to such notices, *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004), the natural inference is that Fund Liquidation intended to appeal the dismissal of each of its claims. That is particularly true here given that it was the district court, not Fund Liquidation, that removed Sonterra from the case caption. *See FrontPoint Asian Event Driven Fund*, 2018 WL 4830087, at *12. Moreover, the notice of appeal pointed specifically to the July 26, 2019 order, which discussed Fund Liquidation's argument that the case was not a nullity precisely *because* of Sonterra's claims. *Fund Liquidation Holdings*, 399 F. Supp. 3d at 104.

Fund Liquidation's notice of appeal therefore not only complied with the text of Rule 3, but also put the Banks on notice that Fund Liquidation intended to appeal the dismissal of the claims originally held by both FrontPoint *and* Sonterra. As a result, we have appellate jurisdiction over all claims raised on appeal.

III. Standard of Review

On appeal following a dismissal of a complaint for either lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) or failure to state a claim under Rule 12(b)(6), we review the district court's decision *de novo*. *See Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56–57 (2d Cir. 2016) (subject-matter jurisdiction); *Krys v. Pigott*, 749 F.3d 117, 128 (2d Cir. 2014) (failure to state a claim). As part of that review, we "accept[] as true all material factual allegations of the complaint[] and draw[] all reasonable inferences in favor of the plaintiff." *Carter*, 822 F.3d at 56–57 (internal citations, quotation marks, and alterations omitted); *Krys*, 749 F.3d at 128 (same).

Separately, we review denials of motions for leave to amend, to substitute into an action under Rule 17(a), or to approve a class action settlement agreement for abuse of discretion. *See Klein ex rel. Qlik Techs., Inc. v. Qlik Techs., Inc.*, 906 F.3d 215, 226 (2d Cir. 2018) (motion to substitute); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Care, L.L.C.*, 504 F.3d 229, 246 (2d Cir. 2007) (approval of class action settlement); *Kropelnicki v. Siegel*, 290 F.3d 118, 130 (2d Cir. 2002) (leave to amend). But where, as here, such denials were based on decisions of pure law, they are functionally reviewed *de novo*, as a decision premised on a legal error is necessarily an abuse of discretion. *See Klein*, 906 F.3d at 226; *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 769 (2d Cir. 2016).

IV. Discussion

This case requires us to engage in a two-step inquiry. First, we must determine whether the Dissolved Funds had Article III standing when the case was initiated in their names. If so, then that would seem to end the matter in Fund Liquidation's favor. *See Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20–21 (2d Cir. 1997) (indicating that courts have the power to permit a real party in interest to join an action under Federal Rule of Civil Procedure 17 where the originally named plaintiff had standing). But if the Dissolved Funds lacked standing at that time, we must decide whether Fund Liquidation can nevertheless substitute into the action in their place.

A. The Dissolved Funds Lacked Article III Standing at the Case's Initiation

The Banks argue that the Dissolved Funds lacked standing when the original complaint was filed because, by that time, the Dissolved Funds had already (i) "disavowed any interest" in the case, having assigned their claims to Fund Liquidation, Banks Br. at 34, and (ii) been dissolved under Cayman Islands law and so had no legal existence. We address each argument in turn.

1. A Pre-Suit Assignment Does Not Extinguish Article III Standing

There is little merit to the Banks' initial argument that the Dissolved Funds' pre-filing assignment of their claims stripped the Dissolved Funds of Article III standing. As several of our sister circuits have explained, there is a distinction between having standing to pursue a claim and being a real party in interest with respect to that claim, only the latter of which is implicated by an assignment. *See First Am. Title Ins. Co. v. Nw. Title Ins. Agency*, 906 F.3d 884, 890 (10th Cir. 2018); *Norris v. Causey*, 869 F.3d 360, 366–67 (5th Cir. 2017); *Cranpark, Inc. v. Rogers Grp., Inc.*, 821 F.3d 723, 730 (6th Cir. 2016) (holding that "one who sells his interest in a cause of action is not deprived of Article III standing, but . . . is [instead] susceptible to a real-party-in-interest challenge"); *Dunn v. Advanced Med. Specialties, Inc.*, 556 F. App'x 785, 789–90 (11th Cir. 2014); *Whelan v. Abell*, 953 F.2d 663, 671–72 (D.C. Cir. 1992); *Apter v. Richardson*, 510 F.2d 351, 353 (7th Cir. 1975); *see also* 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1542 (3d ed.) (hereinafter, "Wright & Miller") (explaining the differences between possessing standing and being a real party in interest); *id.* § 3531 n.10 (same). That distinction makes sense.

Article III standing has three elements: (i) "the plaintiff must have suffered an injury in fact" that is "concrete and particularized" as well as "actual or imminent"; (ii) "there must be a causal connection between the injury and the conduct complained of"; and (iii) "it must be likely . . . that the injury will be redressed by a favorable judicial decision." *Lujan v.*

Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted). An assignment has no bearing on the first two elements. After all, an assignment does not erase an injury – it is simply an exchange of legal entitlement about who can seek to rectify that injury in court. *See Cranpark*, 821 F.3d at 730–31 (reasoning that "it can[not] seriously be contended that [the assignor] has suffered *no* injury in fact" following an assignment). Nor can an assignment sever a pre-existing causal link between that injury and the defendant. So that just leaves redressability. And given the Supreme Court's analysis in *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269 (2008), that too is unimpaired by an assignment.

Redressability, *Sprint* explains, focuses "on whether the *injury* that a plaintiff alleges is likely to be redressed through the litigation," *id*. at 287, not on whether the plaintiff itself is "entitled to the relief sought," *Cranpark*, 821 F.3d at 731 (internal quotation marks omitted). Here, the Dissolved Funds' alleged injury is no less redressable through an award of damages simply because legal title to their claims is now owned by someone else.

To be sure, our Circuit's pronouncements on this issue are a bit of a mixed bag. For instance, both *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank*, 731 F.2d 112, 125 (2d Cir. 1984), and *Valdin Investments Corp. v. Oxbridge Capital Management, LLC*, 651 F. App'x 5, 7 (2d Cir. 2016), held that assignment can result in a loss of standing. But *Aaron Ferer* predates *Sprint*, and *Valdin* is a non-precedential summary order, so neither case is binding on us. *See Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016) (explaining that we are no longer bound by a prior panel's opinion when an intervening Supreme Court decision has "broken the link on which . . . [the] prior decision [was premised] or undermined an assumption of that decision" (internal citations, quotation marks, and alterations omitted)); 2d Cir. R. 32.1.1(a) ("Rulings by summary order [lack] precedential effect.").[5]

A closer question, however, is posed in the wake of *W.R. Huff Asset Management Co. v. Deloitte & Touche LLP*, 549 F.3d 100 (2d Cir. 2008). There, we held that "*Sprint* makes clear that the minimum requirement for an injury-in-fact is that the plaintiff have *legal title to, or a proprietary interest in*, the claim." *Id*. at 108 (emphasis added). Taken at face value, that statement would seem to suggest that retaining legal title to a claim is a constitutional requirement of standing. But there is good reason not to read *W.R. Huff* so literally. First, the case concerned whether a party has standing to assert another entity's claim simply because it holds a power of attorney. *Id*. at 103. Like the Sixth Circuit, we conclude that the statement is best interpreted as

---

[5] Although we are not bound by the unpublished and non-precedential ruling in *Valdin*, we do not break from that panel's decision lightly. *See L.O. v. N.Y.C. Dep't of Educ*., 822 F.3d 95, 123 n.17 (2d Cir. 2016) (cautioning that "[d]enying summary orders precedential effect does not mean that the [C]ourt considers itself free to rule differently in similar cases" (internal quotation marks omitted)). But as this issue presents a purely legal question of some importance, we conclude that *Valdin* does not represent the law of our Circuit on this issue, and so hold in this opinion.

limited to that context, and should not be construed to imply that a "transfer [of a claim] somehow erase[s] the transferor's injury." *Cranpark*, 821 F.3d at 731 (distinguishing *W.R. Huff*). And second, we have made clear that the prohibition on raising another's legal rights is a *prudential* rule of standing and distinct from the requirements found within Article III itself. *See Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.,* 821 F.3d 352, 358 (2d Cir. 2016).

In short, then, we conclude that the Dissolved Funds' pre-suit assignment of their claims does not pose a constitutional roadblock after *Sprint*. So that leaves only their pre-suit dissolution.

2. The Dissolved Funds' Pre-Suit Dissolution Extinguished Both Their Legal Existence and Their Article III Standing

Corporate dissolution implicates two potentially distinct legal concepts: capacity to sue and legal existence. We agree with Fund Liquidation that the former is non-jurisdictional in nature. Capacity to sue addresses only whether a person or company that possesses an enforceable right may act as a litigant. *See Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 19 n.4 (2d Cir. 2018). And although it is "allied with . . . the question of standing," capacity is "conceptually distinct." 59 Am. Jur. 2d Parties § 26; *see also Allan Applestein TTEE FBO D.C.A. v. Province of Buenos Aires*, 415 F.3d 242, 245 (2d Cir. 2005) (demonstrating that a lack of capacity is non-jurisdictional by permitting the defense to be waived); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 935–36 (2d Cir. 1998) (same); *Am. Sports*

Radio Network, Inc. v. Krause (In re Krause), 546 F.3d 1070, 1072 n.2 (9th Cir. 2008) ("[W]e note that it is capacity, not standing, which is at issue.").

The same, however, cannot be said for legal existence. Fund Liquidation disagrees, suggesting that "corporate 'existence' has no valence apart from the . . . issue of corporate capacity to sue." Reply Br. at 13. While there has admittedly been some disagreement among district courts on this issue,[6] we conclude that Fund Liquidation's position is incorrect.

To start, the Federal Rules of Civil Procedure differentiate between corporate existence and capacity. For instance, Rule 17(b)(3)(A) permits courts to imbue unincorporated associations and partnerships with the capacity to sue. But this power does not extend to entities that lack legal existence. *See Brown v. Fifth Jud. Dist. Drug Task Force,* 255 F.3d 475, 477 (8th Cir. 2001) (explaining that "the questions of legal or juridical existence and capacity to sue and be sued are distinct, and that a group of persons working together for a common purpose must

---

[6] *Compare ChinaCast Educ. Corp. v. Chen Zhou Guo*, No. 15-cv-5475 (AB), 2016 WL 10653269, at *1–2 (C.D. Cal. Jan. 8, 2016) (explaining that, "[u]nlike a case where a corporation exists in some form but perhaps lacks a technical capacity to sue in a particular forum, Plaintiff's own allegations indicate that Plaintiff may not legally exist under Delaware law"), *and Catalyst & Chem. Servs., Inc. v. Glob. Ground Support*, 350 F. Supp. 2d 1, 22 (D.D.C. 2004) (concluding that the plaintiff "lacks standing to maintain this action" because its "corporate charter was forfeited" prior to the suit's initiation), *aff'd*, 173 F. App'x 825 (Fed. Cir. 2006), *with XP Vehicles, Inc. v. Dep't of Energy*, 118 F. Supp. 3d 38, 65 (D.D.C. 2015) (holding that dissolved corporate entities still possess Article III standing).

first be found to have legal existence before the question of capacity to sue or be sued can arise"); *see also Roby v. Corp. of Lloyd's*, 796 F. Supp. 103, 110 (S.D.N.Y. 1992) (holding that "[c]apacity to be sued and legal existence are separate and distinct concepts"), *aff'd on other grounds*, 996 F.2d 1353 (2d Cir. 1993). Likewise, Rule 9 lists the two terms independent of one another, indicating that they are "distinct concepts" with distinct meanings.[7] Wright & Miller § 1292.

Fund Liquidation's primary response to this argument is to identify various prior cases in which dissolved corporate entities were not thrown out of court for lack of standing. But a close inspection of those cases reveals that each of the corporate entities

---

[7] Fund Liquidation points out that Rule 9(a)(1)(C) does not require the legal existence of a corporate entity to be pleaded affirmatively in every case, which Fund Liquidation sees as contrary to the notion that corporate existence is a prerequisite to standing. We disagree. We read Rule 9 as embodying the goal of the federal rules to "simplif[y]" pleading requirements. Wright & Miller § 1292. Because questions of legal existence will "rarely [be] in dispute," it is reasonable to require a "specific denial" to raise the issue. *Id*. (internal quotation marks omitted). Indeed, Fund Liquidation's interpretation of Rule 9 would be particularly hard to swallow in cases, unlike this one, where the original plaintiff *never* existed whatsoever. Because one elemental precondition for meeting the case-or-controversy requirement is a claimant with standing, *Lujan*, 504 U.S. at 560–61, it must be that the non-existence of the supposed claimant is a problem of constitutional magnitude, *see In re 2016 Primary Election*, 836 F.3d 584, 587 (6th Cir. 2016) (holding that "[t]here is no plaintiff with standing if there is no plaintiff"); *see also LN Mgmt., LLC v. JPMorgan Chase Bank, N.A.*, 957 F.3d 943, 953 (9th Cir. 2020) (same); *House v. Mitra QSR KNE LLC*, 796 F. App'x 783, 787 (4th Cir. 2019) (same).

in question still had some vestige of legal existence at the action's inception, even if they lacked the capacity to sue.

Take, for example, *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Building Corp.*, 302 U.S. 120 (1937). After finding that the dissolved entity lacked capacity, the Supreme Court reversed the lower court's decision rather than vacate it for want of jurisdiction. *Id.* at 127–30. Under Illinois law, however, the dissolved company still possessed some legal identity when it initiated the reorganization proceedings at issue in the case. Specifically, Illinois law granted corporations the right to wind up business for two years after dissolution, which included the right to prosecute and defend legal claims. *Id.* at 122–24. If a corporation began a lawsuit (or was sued) during those two years, it could see the case through to completion. *Id.* at 130 (Cardozo, *J.*, dissenting). And, sure enough, the dissolved entity in *Chicago Title & Trust* was still litigating a case instituted during that two-year windup period when it filed its petition for reorganization. *Id.* at 130–31. So even though the company lacked capacity, Illinois law still recognized its legal existence – at least, for certain purposes.

The same is true of the other cases that Fund Liquidation cites on this issue. In each case, the courts indicated that state law granted the dissolved entities continued existence even after dissolution so that they could wind up their affairs, which included seeking liquidation under the bankruptcy code. *See Cedar Tide Corp. v. Chandler's Cove Inn, Ltd. (In re Cedar Tide Corp.)*, 859 F.2d 1127, 1131–32 (2d Cir. 1988); *In* *re Superior Boat Works, Inc.*, 438 B.R. 878, 881–83 (Bankr. N.D. Miss. 2010).

Here, by contrast, the record before us indicates that the Dissolved Funds had neither capacity to sue *nor* legal existence following their dissolution. According to the affidavit of John Michael Harris (the Banks' Cayman Islands counsel), following dissolution, Cayman Islands companies and partnerships "no longer ha[ve] any legal personality and cannot take any lawful action," meaning that any "proceedings brought in [their] name[s] . . . are a nullity." J. App'x at 391. And unlike most U.S. jurisdictions, the Cayman Islands do not permit a dissolved entity to "be restored." *Id*. at 390.

While Fund Liquidation submitted its own affidavit on the status of dissolved Cayman Islands entities, *see* ECF No. 250-4, Dkt. No. 16-cv-5263, that affidavit did not contradict the core components of the Harris affidavit that are relevant here – namely, that the Dissolved Funds have no legal existence. Fund Liquidation's affidavit instead focused on the fact that the Dissolved Funds' *assignment* survived their dissolution, and that Fund Liquidation, as assignee, has a right to sue in the Dissolved Funds' names. *Id*. at 11. But whether Cayman Islands law would allow for an assignment and power of attorney to survive dissolution says little about whether the Dissolved Funds have legal existence for purposes of Article III standing. In light of this record, and because Fund Liquidation bears the burden of demonstrating that the district court possesses subject-matter jurisdiction, *Carter*, 822 F.3d at 56, we conclude that the Dissolved Funds did not legally exist when the case was filed.[8]

And without legal existence, the Dissolved Funds lacked standing to sue. After all, "[t]he most elemental requirement of adversary litigation is that there be two or more parties," meaning that "[a]bsent a plaintiff with legal existence, there can be no Article III case or controversy." *House v. Mitra QSR KNE LLC*, 796 F. App'x 783, 787 (4th Cir. 2019) (quoting Wright & Miller § 3530); *see also LN Mgmt., LLC v. JPMorgan Chase Bank, N.A.*, 957 F.3d 943, 953 (9th Cir. 2020) (concluding that it is "obvious" that "the

---

[8] Although the legal existence of a foreign corporate entity is ordinarily "determined by the laws of the country where it has been created," *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 698 (2d Cir. 1970), a slight choice-of-law wrinkle arises here given that FrontPoint (unlike Sonterra) was a partnership, not a corporation. As with corporations, it might seem natural to look to the law of the jurisdiction where the organization was created to determine whether a partnership has legal existence. But Federal Rule of Civil Procedure 17(b)(3) suggests that a partnership's capacity to sue is governed by the law of the state in which the *court* is located (here, New York). And if New York law applies to determinations of capacity, it's possible that the same is true when determining existence. Fortunately, New York law would itself look to Cayman Islands law to resolve this issue, meaning that it makes no difference which law governs. *See* N.Y. Partner Law § 121-901 (stating that "the laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners"); *see also Dennis v. JPMorgan Chase & Co.*, 342 F. Supp. 3d 404, 410 (S.D.N.Y. 2018) (looking to law of the jurisdiction under which the partnership was formed to determine whether the partnership has capacity to sue); *Residential Liquidating Tr. v. Mortg. Invs. Grp., Inc.* (*In re Residential Cap., LLC*), 527 B.R. 590, 595–96 (Bankr. S.D.N.Y. 2015) (same).

dead lack the capacities that litigants must have to allow for a true Article III case or controversy"); *Hernandez v. Smith*, 793 F. App'x 261, 265 (5th Cir. 2019) (plaintiff "did not have standing to sue because she was deceased"); *In re 2016 Primary Election*, 836 F.3d 584, 587 (6th Cir. 2016) ("[O]ne elemental precondition for meeting the case-or-controversy requirement is a claimant with standing. There is no plaintiff with standing if there is no plaintiff." (internal citation omitted)); *cf. Billino v. Citibank, N.A.*, 123 F.3d 723, 725 (2d Cir. 1997) (explaining that it was a jurisdictional error for the appeal to be brought only in the name of a dead party as a "deceased plaintiff simply no longer has a cognizable interest in the outcome of litigation").

Before moving on, one component of this conclusion bears at least some additional discussion. Specifically, Fund Liquidation suggests that, by declaring legal existence under state (or, in this case, foreign) law to be a condition of Article III standing, we are running afoul of the Supreme Court's directive that "standing in federal court is a question of federal law, not state law." *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013); *see also Chicago Title & Tr.*, 302 U.S. at 128 (explaining that a state "cannot keep [a] corporation alive for its own purposes and deny it life for federal purposes"); *Chapman v. Barney*, 129 U.S. 677, 682 (1889) (holding that "although it may be authorized by the laws of the state of New York to bring suit in the name of its president, that fact cannot give the [plaintiff partnership] power, by that name, to sue in a federal court"). Undoubtedly, there are limits on how state law can influence issues of constitutional standing. But, despite those limits, state law is not irrelevant simply because standing is at issue.

Federal law sets the parameters on what is necessary to possess Article III standing, and while state law can neither enlarge nor diminish those requirements, it can supply the answers to certain antecedent questions relevant to whether those federal requirements are satisfied. Indeed, this sort of reliance on state law happens all the time.

For instance, state law often defines the legal relationships between people and things, which are necessary to understanding whether a particular plaintiff has suffered an injury in fact. A simple example of this is property ownership, which is both an issue of state law and often a foundational standing requirement in a federal takings case. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 729 n.10 (2010) (explaining that "the claim here is ripe insofar as Article III standing is concerned, since (accepting petitioner's version of Florida law as true) petitioner has been deprived of property"); *U.S. Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir. 1984) (holding that "[o]nly the owner of an interest in property at the time of the alleged taking has standing to assert that a taking has occurred").

But that's just one example; courts rely on state law in a variety of other contexts to assess whether a plaintiff satisfies Article III. *See, e.g., Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (looking to Virginia state law to determine whether the state legislature had the authority to litigate on the State's behalf); *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1158–60 (2d Cir. 1994) (looking to state law concerning constructive trusts to resolve an issue of standing); *Amrhein v. eClinical Works, LLC*, 954 F.3d 328, 334 (1st Cir. 2020) (recognizing that "Article III can be satisfied solely by virtue of an invasion of a recognized state-law right" (internal quotation marks omitted)); *Scanlan v. Eisenberg*, 669 F.3d 838, 842 (7th Cir. 2012) (explaining that "the nature and extent of [the plaintiff's] interest[,] . . . and therefore[] whether that interest can form the basis of a federal suit, depend[s] on [state] law" (internal citations omitted)); *FMC Corp. v. Boesky*, 852 F.2d 981, 993 (7th Cir. 1988) (holding that "[p]roperly pleaded violations of state-created legal rights . . . must suffice to satisfy Article III's injury requirement").

So, in a case like this one, federal law sets the ground rule that a plaintiff corporation or partnership must have legal existence to have constitutional standing. Whether a particular corporation or partnership satisfies that requirement, however, turns on an examination of state law. And here, Cayman Islands law is clear: the Dissolved Funds had no legal existence when the complaint was filed. As a result, the Dissolved Funds lacked Article III standing when the case was initiated in their names. The next question, then, is what to make of that fact.

B. Fund Liquidation Nonetheless Satisfied Article III

We hold today that Article III is satisfied so long as a party with standing to prosecute the specific claim in question exists at the time the pleading is filed. If that party (the real party in interest) is not named in the complaint, then it must ratify, join, or be substituted into the action within a reasonable time. Only if the real party in interest either fails to materialize or lacks standing itself should the case be dismissed for want of subject-matter jurisdiction.

Admittedly, this is not a view adopted by many courts. The far more common view is the so-called "nullity doctrine" exemplified by *Zurich Insurance Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir. 2002), which says that a case initiated in the name of a plaintiff that lacks standing is an incurable nullity. But, for the reasons explained below, we conclude that neither Article III nor our Court's past precedent requires us to adopt this doctrine. And because "the concerns animating [Article III standing] are absent" where a real party in interest exists and is willing to join an action, *Cortlandt St. Recovery Corp. v. Hellas Telecomms. S.à.r.l.*, 790 F.3d 411, 427 (2d Cir. 2015) (Sack, *J.*, concurring), we conclude that Article III is satisfied in this case.

1. Our Precedent Does Not Require Application of the Nullity Doctrine

Our court has touched on the nullity doctrine in only a few published decisions. The natural starting point is *Cortlandt Street Recovery Corp. v. Hellas Telecommunications S.à.r.l.*, 790 F.3d 411 (2d Cir. 2015). There, the district court determined that an action instituted by a plaintiff that lacked standing was a nullity at inception, and so could not be salvaged through Rule 17. *Id.* at 422–23. Ultimately, we resolved the case without deciding that question, but, in a concurring opinion, Judge Sack (also the author of the unanimous panel opinion) explained that he would reject the nullity doctrine as it is "highly technical

[and] without [a] meaningful purpose." *Id.* at 427 (Sack, *J.*, concurring) (internal quotation marks omitted).

Despite *Cortlandt's* refusal to decide this issue, subsequent panels have twice cited *Cortlandt* in support of dicta suggesting that the nullity doctrine is the law of the Circuit. *See Klein*, 906 F.3d at 227 n.7; *DeKalb Cnty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 412 & n.121 (2d Cir. 2016). The explanation for this strange leap in law is simple: each of those opinions mistakenly quotes language from *Cortlandt* as if it were part of *Cortlandt's* holding, when, in fact, it was merely a summary of the district court's reasoning that the panel in *Cortlandt* expressly refused to adopt. *Compare Klein*, 906 F.3d at 227 n.7, *and DeKalb*, 817 F.3d at 412 n.121, *with Cortlandt*, 790 F.3d at 423, *and id.* at 425–27 (Sack, *J.*, concurring).[9] As a result, none of these cases constitutes binding precedent on the subject.

Interestingly, the closest that we have come to adopting the nullity doctrine appears to have been in *Isthmian Lines, Inc. v. Rosling*, 360 F.2d 926 (2d Cir. 1966), a case that *Cortlandt* (and the parties here) did not address. That case was a wrongful death suit brought in the name of a widow, both in her individual capacity and in her capacity as administrator of her husband's estate. As it turned out, the widow had herself died before the complaint was filed, and it was her daughter who was actually the administrator of the decedent's estate. We ultimately permitted the

---

[9] Our non-precedential summary order in *Valdin Investments* is subject to the same criticism. *See* 651 F. App'x at 7.

daughter to amend the complaint to name herself as administrator, but only because the estate (unlike the widow) was "alive" at the time the complaint was filed:

> [The pleading] was captioned in the alleged name of the Administratrix of the Estate of Charles Richard Washington as well as herself "individually," although this latter status was a nullity because of her prior decease. The respondent thus had notice that the "Estate" was suing and notice of the facts upon which the claim was based. Although "a proceeding begun in the name of a deceased plaintiff is a nullity" (*Karrick v. Wetmore*, 22 App.D.C. 487 [(D.C. Cir. 1903]), the Estate here was not deceased. . . . [T]he situation was that of an Estate suing which did not have a then-appointed administrator.

Id. at 927–28.

To be sure, this opinion offers some support for the nullity doctrine. But it is not binding on us: the nullity point was mere dicta because the estate's standing to bring the claim independently supported the holding. And when assessed on its own terms, *Isthmian Lines* is not particularly persuasive as it effectively begins and ends its nullity analysis with a quote from *Karrick v. Wetmore*, a D.C. Circuit decision from 1903. *Karrick*, in turn, relied primarily on state court and English court opinions, and the Supreme Court's decision in *Harter v. Twohig*, 158 U.S. 448, 454 (1895), which itself focused on Nebraska state law, not the demands of Article III. *See Karrick*, 22 App. D.C. at 493.

Thus, whether to adopt the nullity doctrine is still an open question in our Circuit.

2. Article III Does Not Require the Nullity Doctrine

The central conceit of the nullity doctrine is that an action commenced in the name of a plaintiff who lacks Article III standing is rendered an incurable nullity even where a real party in interest both has standing and is willing to join the suit. That foundational view is immediately suspect given its tension with how pleading requirements have evolved over time.

At early common law, courts of law recognized only those plaintiffs whose *legal* rights had been affected by the act of the defendant, a group into which courts determined assignees did not fall. *See* Charles E. Clark & Robert M. Hutchins, *The Real Party in Interest*, 34 Yale L.J. 259, 259–60 (1925) (hereinafter, "Clark, *Real Party in Interest*"); Wright & Miller § 1545. Perhaps because cases had to be brought in the name of the nominal plaintiff, identifying the party for whose "use" a case was brought was not necessary. *See Clarksons v. Doddridge*, 55 Va. 42, 46 (1857) ("It is usual, when an action is brought in the name of one person for the use of another, to state the fact . . . . But this is not necessary. The statement is no material part of the pleadings."); *see also United States v. Abeel*, 174 F. 12, 19 (5th Cir. 1909) ("[A] suit for the breach can[] be maintained by the United States without a statement that the suit is for the use of some one named in the petition."); *Boston El. Ry. Co. v. Grace &*

Hyde Co., 112 F. 279, 284 (1st Cir. 1901) ("[T]he expression of [] use may be disregarded as surplusage. . . . [S]uch a phrase has no force to make an issue different from what it would have been if the phrase had been left out."); Edson R. Sunderland, *Cases on Procedure, Annotated: Common Law Pleading* 731 n.77 (Callaghan & Co., 1914) (commenting, in reference to the Supreme Court's decision in *Welch v. Mandeville*, 14 U.S. (1 Wheat.) 233 (1816), that the "[r]ecord need not disclose real plaintiff" (italics omitted)).

Eventually, jurisdictions began to abandon this approach in favor of "code pleading." Clark, *Real Party in Interest* at 259. Under this new pleading formulation, cases could "be prosecuted in the name of the real party in interest," which was defined to be the assignee and not the assignor. *Id*. at 259, 264. But jurisdictions split on whether proceeding in the name of the assignor was still permitted. In some, *only* the assignee (that is, the real party interest) could bring suit. *Id*. at 261 (explaining that the "[t]he express language of the [New York] Code was that [nearly] every action must be prosecuted in the name of the real party in interest" (internal quotation marks and footnote omitted)); *id*. at 266 (noting that "[t]he real party in interest provision is . . . properly construed in most states as imperative; the assignee and he alone may sue"). In others, it was up to the real party in interest to choose between suing in its own name or in the name of the assignor. *Id*. at 264–66; *see also Carozza v. Boxley*, 203 F. 673, 677 (4th Cir. 1913) (noting that "suit may be brought in one of three ways – in the name of the original obligee or payee, in his name for the use of the assignee, or in the name of the assignee alone"); Roland F. Johnson, *Equity – Assignment of Choses In Action – Suit In Whose Name*, 17 Tex. L. Rev. 183, 185 (1939) (explaining that in *Merlin v. Manning*, 2 Tex. 351 (1847), the Texas Supreme Court made clear that an "assignee could sue either in his own name or in the name of his assignor" (emphasis added)). In adopting Federal Rule of Civil Procedure 17, Congress sided with the former approach, clarifying that cases *had* to be prosecuted in the name of the real party in interest, not the nominal plaintiff. *See* Fed. R. Civ. P. 17.

This evolution of pleading practices suggests two things. First, the rule concerning which party's name a case must be prosecuted under (either the nominal plaintiff or the real party in interest) is non-jurisdictional. After all, if it were jurisdictional, it's not clear how it could be changed over time without offending the Constitution. Moreover, treating this as a jurisdictional issue would be somewhat inconsistent with the directive in Rule 17(a)(3) that a case cannot be dismissed "until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action."

Second, if we can alter the party in whose name a case must be prosecuted without offending Article III, it stands to reason that failing to initially name the correct party is not itself a constitutional problem. In other words, there appears to be no constitutional magic behind whether the name of a nominal plaintiff or a real party in interest is initially put in the caption of a pleading. Article III would therefore seem to be satisfied so long as the real party in interest is willing to join the case and has had standing since the case's inception. When viewed this way, filing a complaint in the name of a deceased or non-existent nominal plaintiff is akin to an error in the complaint's *allegations* of jurisdiction. And it is well-understood that a plaintiff may cure defective jurisdictional allegations, unlike defective jurisdiction itself, through amended pleadings. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473 (2007) (distinguishing between "[t]he state of things and the originally alleged state of things"); *Pressroom Unions-Printers League Income Sec. Fund. v. Cont'l Assur. Co.*, 700 F.2d 889, 893 (2d Cir. 1983) (explaining that 28 U.S.C. § 1653 "allows amendment only of defective *allegations* of jurisdiction" but "does not provide a remedy for defective jurisdiction itself" (internal quotation marks omitted)).

The thornier question is whether a complaint filed in the name of a non-existent entity, on behalf of an unidentified real party in interest, meets the requirement that "the party invoking jurisdiction ha[ve] the requisite stake in the outcome when the suit [i]s filed." *Davis v. FEC*, 554 U.S. 724, 734 (2008); *see also Lujan*, 504 U.S. at 570 n.5 (explaining that "standing is to be determined as of the commencement of suit"). Although it may not seem immediately intuitive, we conclude that the answer is "yes."

The real party in interest is the party with the legal title to the claim asserted and is the party with the stake in the controversy that is being used to invoke the court's jurisdiction. Why, then, should jurisdiction to hear the controversy turn on whether the *nominal* plaintiff has standing? That would be nonsensical. Indeed, in other jurisdictional contexts, we often ignore nominal plaintiffs and look only to the party with a real interest in the controversy. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply*, 409 F.3d 73, 80–81 (2d Cir. 2005) (recognizing that nominal parties are often ignored for diversity purposes and explaining that this rule has a "rough symmetry" to the real-party-in-interest concept embodied by Rule 17(a) (internal quotation marks omitted)). And since Rule 17(a)(3) is clear that joinder of the real party in interest relates back to the "original[] commence[ment]" of the suit, this approach is consistent with the directive that standing must exist at the case's inception.

Further supporting this view is the fact that joining an assignee does not "substitute a new cause of action over which there is subject-matter jurisdiction for one in which there is not." *Advani Enters., Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 161 (2d Cir. 1998). Rather, a real party in interest who has been assigned a claim is the functional equivalent of the original plaintiff – an assignee "step[s] into the shoes of the assignor." *Fed. Treasury Enter. Sojuzplodoimport v. SPI Spirits Ltd.*, 726 F.3d 62, 75 n.12 (2d. Cir. 2013) (internal quotation marks omitted). So even though Fund Liquidation is replacing the Dissolved Funds as the named party, it is prosecuting the *Dissolved Funds'* claims. *See In re Ace Sec. Corp. RMBS Litig.*, No. 13-cv-1869 (AJN), 2015 WL 1408837, at *7 (S.D.N.Y. Mar. 26, 2015) ("Here, there is neither a new cause of action nor a new party. Nor would the proposed changes . . . cause the amended complaint to have the characteristics of a new lawsuit. The Trustee is the functional equivalent of the Trust for the purpose of conducting this litigation." (internal quotation marks omitted)).[10]

In short, the boundaries of Article III are not as rigid as the Banks suggest. Indeed, while Fund Liquidation's presence and standing ensured that there was a live controversy when the action was initiated, numerous courts have made clear that, in certain instances, subject-matter jurisdiction can even be obtained after a case's initiation and given retroactive effect through procedural rules.

Diversity jurisdiction is one such example. Even if complete diversity – and thus jurisdiction – is lacking at a case's inception, rather than dismiss the case as a nullity, the court may drop any dispensable parties that are obnoxious to its jurisdiction. *See Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 574 (2004); *see also E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 163 (2d Cir. 2001) (explaining that "once subject matter jurisdiction is 'cured' by an amendment [speaking about a diversity defect], courts regularly have treated the defect as having been eliminated from the outset of the action"). Cases involving Federal Rule of Civil Procedure 15(d)

---

[10] In this way, the substitution of an assignee into an action is not like the situation discussed in the Advisory Committee Note to the 1966 amendment to Rule 17, in which a lawyer files an action in the name of a fictitious person "in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period." Fed. R. Civ. P. 17 Advisory Committee's note to 1966 amendment. Likewise, the case before us today differs from a situation like *Zurich Insurance*, in which the originally named plaintiff never possessed a claim against the defendant. *See* 297 F.3d at 532.

provide additional examples. While we have never taken a position on the issue (and do not do so here), other circuits have declared that "events occurring after the filing of a complaint may cure a jurisdictional defect that existed at the time of initial filing." *Saleh v. Sulka Trading Ltd.*, 957 F.3d 348, 354 & n.7 (2d Cir. 2020) (collecting cases). Even the Supreme Court has suggested that Rule 15(d) may be used in this fashion. *See Mathews v. Diaz*, 426 U.S. 67, 75 & n.8 (1976).[11]

Of course, the cases cited above concerned sub-constitutional jurisdictional problems. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829 n.1 (1989) (acknowledging that c*omplete* diversity is a statutory, not constitutional, requirement); *Mathews*, 426 U.S. at 75 (discussing a statutory condition on jurisdiction). And at least one other Circuit has suggested, albeit without explanation, that whether a jurisdictional defect is of constitutional character might be relevant to determining if it can be cured retroactively. *See Yan v. ReWalk Robotics Ltd.*, 973 F.3d 22, 39 n.6 (1st Cir. 2020) (noting that two of the three panel members "limit their joining in this portion of the opinion on the basis that the standing defect in this case may be viewed as a lack of statutory standing"). But there are some examples of true-blue

---

[11] In *Mathews*, a Medicare applicant filed his Part B application only after he was joined as a plaintiff in an amended complaint. Although 42 U.S.C. § 405(g) made filing such an application a "nonwaivable condition of jurisdiction," the Supreme Court stated that it had "little difficulty" in holding that the district court had jurisdiction over the plaintiff's claim. 426 U.S. at 75. Citing Rule 15(d), the Court explained that "[a] supplemental complaint in the [d]istrict [c]ourt would have eliminated this jurisdictional issue." *Id.* at 75 & n.8.

constitutional defects being cured through procedural rules after a complaint was filed.

For instance, in *Northstar Financial Advisors Inc. v. Schwab Investments*, the plaintiff filed a class action lawsuit on behalf of investors without owning any shares in the investment fund that it was suing or having obtained an assignment from those investors, meaning that the plaintiff had not suffered an injury when it filed suit. 779 F.3d 1036, 1043 (9th Cir. 2015). It was not until four months later that the plaintiff secured an assignment. *Id.* at 1043–44. Nevertheless, the district court permitted the plaintiff to file a supplemental pleading under Rule 15(d). *Id.* at 1044–45. The Ninth Circuit affirmed, concluding that requiring the plaintiff to start a new case would be needlessly formal. *Id.* at 1044–48. Other circuits have reached similar conclusions. *See Scahill v. District of Columbia*, 909 F.3d 1177, 1184 (D.C. Cir. 2018) (holding that "a plaintiff may cure a standing defect under Article III through an amended pleading alleging facts that arose after filing the original complaint"); *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008) (concluding that the status of the plaintiff's Article III standing should be decided based on the allegations in the amended complaint, included allegations that concerned events that occurred after the case was initiated).

The Banks' primary authority in favor of the nullity doctrine – the Fourth Circuit's unpublished decision in *House v. Mitra QSR KNE LLC* – brings little to the table. To start, *House* posits that "[o]nly an actual and live plaintiff can assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions." 796 F. App'x at 787 (internal quotation marks and alterations omitted). But that role is filled whenever there is a real party in interest ready and willing to join the action.

Next, *House* points out that Rule 17 permits a real party in interest to substitute into "an action," *id.* at 790 (quoting Fed. R. Civ. P. 17(a)(3)), and reasons that a case instituted by a non-existent party is not an action at all. But what the Federal Rules call an "action" is something that exists independent of subject-matter jurisdiction. In fact, Rule 12(h)(3) states that a court "must dismiss the *action*" if it determines that it lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(h)(3) (emphasis added). And Rule 3 says that "[a] civil action is commenced by filing a complaint with the court," an event that occurs well before any decision over subject-matter jurisdiction is made. Fed. R. Civ. P. 3. *House's* analysis is also in tension with the "wide and flexible content given to the concept of action under the [federal] rules." *Hackner v. Guar. Tr. Co. of N.Y.*, 117 F.2d 95, 98 (2d Cir. 1941) (Clark, *J.*).[12]

It should also be noted that the approach we adopt today will not result in unchecked abusive practices by plaintiffs. Rule 17 permits courts to deny joinder of a real party in interest where the motion is made "in bad faith or in an effort to deceive or

---

[12] Judge Clark "was a principal architect of the Federal Rules of Civil Procedure." *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 297 (1973).

prejudice the defendants," or where granting the motion would "otherwise result in unfairness to defendants." *Klein*, 906 F.3d at 226 (internal quotation marks omitted). Thus, if a court concludes that the original misnaming of the nominal plaintiff was done for nefarious reasons, the court retains discretion to dismiss the suit.

So, because "the concerns animating a constitutional principle are absent" where an assignee with standing seeks to join an action under Rule 17, "practical considerations may ultimately prevail." *Cortlandt*, 790 F.3d at 427 (Sack, *J.*, concurring). And it is plainly the more practical approach to permit parties to circumvent the needless formality and expense of instituting a new action simply to correct a technical error in the original pleading's caption. *See id.; Link Aviation, Inc. v. Downs*, 325 F.2d 613, 615 (D.C. Cir. 1963) ("Any other rule would be highly technical without meaningful purpose."); *cf. Scahill*, 909 F.3d at 1184 (reaching the same conclusion in the context of Rule 15(d)); *Northstar Fin. Advisors* 779 F.3d 1044–48 (same). It is perhaps for precisely this reason that several authorities have either implicitly or explicitly rejected the nullity doctrine. *See Cortlandt*, 790 F.3d at 425–27 (Sack, *J.*, concurring); *Esposito v. United States*, 368 F.3d 1271, 1276–78 (10th Cir. 2004) (permitting an estate to join a case through Rule 17 even though the case was initiated in the name of a deceased plaintiff); *see also* Wright &

Miller § 3531 n.61 (characterizing the nullity doctrine as "particularly troubling").[13]

As a result, we conclude that Article III is satisfied by Fund Liquidation's standing to bring suit and willingness to join the action under Rule 17.[14]

C. The Case on Remand

Having concluded that the Dissolved Funds' lack of standing did not render this action an incurable nullity, we agree with Fund Liquidation that the case should be remanded to the district court for further proceedings. Notably, this does not require us to resolve whether Fund Liquidation received a valid

---

[13] Though the Ninth Circuit recently agreed with the Fourth Circuit that a deceased plaintiff lacks Article III standing, the Ninth Circuit declined to decide whether Article III could nonetheless be satisfied by the existence of a separate real party in interest. *See LN Mgmt.*, 957 F.3d at 955 (declining to "rule on the tricky substitution questions that divided the Fifth Circuit . . . and the Fourth in *House*, on the one hand, from the Tenth in *Esposito*, on the other").

[14] Although it is possible that Fund Liquidation's third amended complaint exceeded the sort of "merely formal" amendment permitted by Rule 17 alone, *see Cortlandt*, 790 F.3d at 424 (internal quotation marks omitted); *Dennis*, 342 F. Supp. 3d at 416–17, the Banks have not raised that point, so we need not consider it. And even if they had, there is precedent for permitting more substantive amendments through a motion made jointly under both Rule 15 *and* Rule 17. *See Cortlandt*, 790 F.3d at 424–25 ("We cannot rule out the possibility that Cortlandt might have avoided these challenging procedural pitfalls through a request for leave to obtain a valid assignment under some other rule of civil procedure. It did not. It has relied upon only Rule 17 in the present appeal."); *see also Nat'l Credit Union Admin. Bd. v. Deutsche Bank Nat'l Tr. Co.*, 410 F. Supp. 3d 662, 676–78 (S.D.N.Y. 2019).

assignment from FrontPoint because the district court already concluded that Fund Liquidation received such an assignment from Sonterra.[15] *See FrontPoint Asian Event Driven Fund*, 2018 WL 4830087, at *11. 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.[16] *See Meijer, Inc. v. Ferring B.V.* (*In re DDAVP Direct Purchaser Antitrust Litig.*), 585 F.3d 677, 688 (2d Cir. 2009) (distinguishing Article III standing from antitrust standing).

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

---

[15] 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*, 399 F. Supp. 3d at 102–03 (distinguishing between securities class actions and antitrust class actions involving securities).

[16] To the extent that Sonterra's status as an efficient antitrust enforcer becomes relevant at some later date in the case, the parties appear to agree that the decision in *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 17-1569 (2d Cir.), will likely resolve the issue.

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. Of course, the district court alternatively held that the Moon Funds' claims were untimely as they were no longer subject to equitable tolling under *American Pipe*. *See Fund Liquidation Holdings*, 399 F. Supp. 3d at 104–05. That conclusion, however, was based on an overly expansive reading of the Supreme Court's decision in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018).

In *China Agritech*, the Supreme Court explained that "*American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails." *Id.* at 1804. "But *American Pipe* does not permit the maintenance of a *follow-on* class action past expiration of the statute of limitations." *Id.* While the district court (and the Banks) see that language as fatal to any amendment that would add the Moon Funds as representative plaintiffs, it says nothing of the sort. The Supreme Court focused its analysis on *follow-on* class actions. *Id.* Nothing in *China Agritech* purports to say that equitable tolling does not apply to new class representatives joined within the *same* class action. Indeed, the Seventh Circuit recently reached this precise conclusion:

> [Defendant] would read *China Agritech* much more broadly to prohibit any addition or substitution of a new class

> representative within the original class action after the statute of limitations period would have run, but for *American Pipe* tolling. We see no hint in the *China Agritech* opinion or its reasoning that would support this proposed extension. *American Pipe* tolling is intended to promote efficiency and economy in litigation. Prohibiting its use within the original class action to add new class representatives, whether because they would be better representatives, because class definitions are modified, because subclasses are needed, or for any other case-management reason, would arbitrarily – even randomly – undermine those goals of efficiency and economy. . . . Plaintiffs here sought only to rearrange the seating chart within a single, ongoing action. What they proposed amounted to an ordinary pleading amendment governed by Federal Rule of Civil Procedure 15.

Carpenters Pension Tr. Fund for N. Cal. v. Allstate Corp. (In re Allstate Corp. Sec. Litig.), 966 F.3d 595, 615–16 (7th Cir. 2020) (internal citations omitted).

Accordingly, so 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.[17]

V. Conclusion

For the foregoing reasons, we **VACATE** the judgment of the district court and **REMAND** the case for further proceedings. Should any future appeal ensue related to whether Fund Liquidation may file its proposed fourth amended complaint, or whether that fourth amended complaint states a claim on which relief can be granted, any party may restore our jurisdiction pursuant to the procedure outlined in *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), in which event the appeal will be referred to this panel

---

[17] 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." Banks Br. at 55–56.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

-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., DEUTSCHE BANK AG, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK, CREDIT SUISSE AG, STANDARD CHARTERED BANK, DBS BANK LTD., UNITED OVERSEAS BANK LIMITED, AUSTRALIA AND

OPINION AND ORDER DISMISSING CASE

16 Civ. 5263 (AKH)

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:

DATE FILED: 7/26/19

NEW ZEALAND BANKING GROUP, LTD., THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED, AND JOHN DOES NOS. 1-50, Defendants.	: : : : : : : : : : X

ALVIN K. HELLERSTEIN, U.S.D.J.:

There are two primary issues raised by defendants' motion to dismiss this antitrust action charging defendants with conspiring to fix interbank rates in the Singapore market, thus affecting prices of derivative securities in New York and other cities in the United States: 1) whether the new plaintiff, Fund Liquidation Holdings LLC ("FLH" or "plaintiff"), has capacity to sue and, if not, whether the court has subject matter jurisdiction, and 2) whether, if there is no subject matter jurisdiction, the court may grant plaintiff's motion to preliminarily approve a settlement with two defendants, or allow a Fourth Amended Complaint.

In a previous October 4, 2018 decision, I found that the original plaintiffs, FrontPoint Asian Event Driven Fund, Ltd. ("FrontPoint") and Sonterra Capital Master Fund, LTD ("Sonterra") had been dissolved prior to filing suit, and dismissed their case, for they had no capacity to sue and, thus, there was no real party in interest. *FrontPoint Asian Event Driven*

Fund, L.P. v. Citibank, N.A., No. 16-cv-5263 (AKH), 2018 WL 4830087, at *11 (S.D.N.Y. Oct. 4, 2018) ("*SIBOR II*"). Plaintiffs then filed, with my permission, a Third Amended Complaint ("TAC") alleging that the two companies had assigned their claims to FLH pursuant to an Asset Purchase Agreement ("APA") executed July 13, 2011. The issue posed by defendants' motion to dismiss is whether the assignment embraces the claims in Plaintiff's complaint for, if the assignment does not, FLH, as well as Frontpoint and Sonterra, is not a real party in interest, lacking capacity to sue, and the TAC must be dismissed.

The TAC alleges a conspiracy to manipulate two interest rate benchmarks, the Singapore Interbank Offered Rate ("SIBOR") and the Singapore Swap Offer Rate ("SOR"). FLH asserts claims of conspiracy to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 *et seq.*, against financial institutions participating in the rate setting process. Plaintiff also alleges a state law claim against two defendants, Deutsche Bank AG and Citibank N.A., for breach of implied covenant of good faith and fair dealing.

The defendants who have not entered into settlement agreements[1] move to dismiss the Third

---

[1] Bank of America, N.A., The Royal Bank of Scotland plc, UBS AG, BNP Paribas, S.A., Oversea-Chinese Banking Corporation Ltd., Deutsche Bank AG, Credit Agricole Corporate and Investment Bank, Credit Suisse AG, Standard Chartered Bank, DBS Bank Ltd., United Overseas Bank Limited, Australia and New Zealand Banking Group, Ltd., The Bank of Tokyo-Mitsubishi UFJ, Ltd., and The Hongkong and Shanghai Banking Corporation Limited.

Amended Complaint ("TAC"), pursuant to Fed. R. Civ. P. 12(b)(1), (b)(2), and (b)(6), for lack of subject matter jurisdiction, for lack of personal jurisdiction as to certain defendants,[2] and for failure to state a claim on which relief can be granted. I grant defendants' motions because I conclude that the Court lacks subject matter jurisdiction.

Plaintiff also moves for preliminary approval of their two settlements and to file a Fourth Amended Complaint. Plaintiff's motions are denied.

Plaintiff's allegations and the procedural background are described in my earlier Opinion and Order, *SIBOR II*, 2018 WL 4830087, at *1–*3, and will not be repeated except as necessary to the issues now at hand.

Basically, the complaint alleges a Sherman Act conspiracy to fix two benchmark interest rates, SIBOR and SOR. The rates reflect daily averages in the Singapore market. Plaintiff alleges that defendants, by agreeing to manipulate SIBOR and SOR, intended to fix prices of derivatives traded in New York.

In *SIBOR II*, I granted in part and denied in part claims raised in plaintiffs' Second Amended

---

Citibank, N.A. and JPMorgan Chase Bank, N.A., having entered into settlement agreements with plaintiff, do not join the motion.

[2] The Royal Bank of Scotland plc, UBS AG, BNP Paribas, S.A., Oversea-Chinese Banking Corporation Ltd., Credit Agricole Corporate and Investment Bank, Credit Suisse AG, Standard Chartered Bank, DBS Bank Ltd., United Overseas Bank Limited, Australia and New Zealand Banking Group, Ltd., The Bank of Tokyo-Mitsubishi UFJ, Ltd., and The Hongkong and Shanghai Banking Corporation Limited.

Complaint (SAC) and granted leave to file the TAC at issue here. In particular, I dismissed the antitrust claims alleged against non-SIBOR Panel Members and all of the claims alleged by Sonterra Capital Master Fund, Ltd. ("Sonterra"). I dismissed all the RICO and RICO conspiracy claims, and I dismissed the claims against foreign defendants not serving on the SIBOR Panel for lack of personal jurisdiction.[3]

The capacity to sue by FrontPoint and Sonterra was addressed in my previous decision. I dismissed the plaintiffs' claims, because they were dissolved entities when the action began, on July 1, 2016. In response, plaintiffs asserted that Sonterra and FrontPoint's claims were assigned to FLH under FrontPoint's Asset Purchase Agreement ("APA"), executed July 13, 2011. ECF 320-1. I granted plaintiff leave to amend and to substitute FLH as the real party in interest, and instructed plaintiffs 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 II*, 2018 WL 4830087, at *12; Tr., ECF 282, at 48:2–5. The TAC now alleges the assignment and substitutes FLH as a party plaintiff. Defendants' motion challenges the adequacy of the assignment.

---

[3] Having allowed plaintiff to file the TAC, and having found the issues raised by defendants' present motion to be the same, I denied as academic motions for reconsideration by The Hongkong and Shanghai Banking Corporation Limited, DBS Bank Ltd, Oversea-Chinese Banking Corporation Limited, and United Overseas Bank Limited. ECF 385–86.

Discussion

A. Legal Standard

"The district courts of the United States . . . are 'courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.'" *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). "A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court "lacks the statutory or constitutional power to adjudicate it." *Cortlandt*, 790 F.3d 411, 416–17. "'The party invoking federal jurisdiction bears the burden of establishing' prudential and constitutional standing . . . ." *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 39 (2d Cir. 2015) (quoting *Rajamin v. Deutsche Bank Nat. Tr. Co.*, 757 F.3d 79, 84 (2d Cir. 2014)). "In assessing the plaintiff's assertion of standing, 'we accept as true all material allegations of the complaint[] and . . . construe the complaint in favor of the complaining party' [and] may also rely on evidence outside the complaint." *Cortlandt*, 790 F.3d at 417 (internal citations omitted).

"In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." *Cortlandt*, 790 F.3d at 417 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "[L]awsuits by assignees . . . are 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Cortlandt*, 790 F.3d at 418 (quoting *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 285 (2008)).

"Although federal antitrust laws do not expressly permit assignment, it has been long acknowledged by federal courts that these claims may be assigned." *DNAML Pty, Ltd. v. Apple Inc.*, 2015 WL 9077075, at *3 (citing *In re Fine Paper Litig. State of Wash.*, 632 F.2d 1081, 1090 (3d Cir. 1980)); *see also Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 100 (2d Cir. 2007).

"To effect a transfer of the right to bring an antitrust claim, the transferee must expressly assign the right to bring that cause of action, either by making specific reference to the antitrust claim or by making an unambiguous assignment of causes of action in a manner that would clearly encompass the antitrust claim." *DNAML Pty, Ltd. v. Apple Inc.*, No. 13-cv-6516 (DLC), 2015 WL 9077075, at *3 (S.D.N.Y. Dec. 16, 2015).

"In determining whether the Agreement has effectively made an assignment of the right to bring an antitrust claim, ordinary principles of contract law will be applied." *DNAML Pty, Ltd. v. Apple Inc.*, 2015 WL 9077075, at *4. "A contract is unambiguous when the contractual language has a definite and precise meaning about which there is no reasonable basis for a difference of opinion." *Keiler v. Harlequin Enters. Ltd.*, 751 F.3d 64, 69 (2d Cir. 2014). "By contrast, ambiguity exists where a contract's term could objectively suggest more than one meaning to one familiar with the customs and terminology of the particular trade or business." *Id.* "A fundamental precept of contract law is that agreements are to be construed in accordance with the parties' intent," and "[t]he best evidence of what the parties intended is what they say in their writing." *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 122 (2d Cir. 2014) (internal quotation marks removed). "The existence of an ambiguity is to be ascertained from the face of an agreement without regard to extrinsic evidence." *Id.*

B. Terms of the APA

In determining whether the APA is effective in assigning the claims from FrontPoint to FLH, I begin with the language of the contract. Section 1.1 of the APA provides that FLH purchases "all of [FrontPoint's] right, title and interest in all of the Assets, including, without limitation, all of [FrontPoint's] right, title and interest in all of the Assets, now or hereafter payable pursuant to any Recovery Rights . . . ."

This initial, general assignment does not end the inquiry, because this general assignment is limited by its very terms: assets are defined as "all of [FrontPoint's] right, title, and interest in and to any and all Recovery Rights and any and all amounts payable in connection with any of the Existing Claims and the Future Claims . . . ." APA Art. II. Recovery Rights are "all monetary, legal and other rights held by or accruing to [FrontPoint] in respect of such Claim, including without limitation, the aggregate amount which [FrontPoint] is, or may become, entitled to receive pursuant to any Settlement and/or Judgment in connection with such Claim." *Id.*

Claims, in turn, are defined as "the Existing Claims and the Future Claims." APA Art. II. Relevant here are Future Claims, which the APA defines as:

> [A]ny and all claims of [Frontpoint] to Recovery Rights related to the ownership of, or any transaction in, any Included Securities, in each case, as to which no Case has been filed as of the date hereof arising out of: (i) any future securities class action lawsuit or any Judgment thereon to the extent related to Seller's ownership of, or any transaction in, any Included Securities; and (ii) any future holdbacks or reserves under any settled securities class action lawsuits or any Judgment thereon, to the extent related to [FrontPoint's] ownership of, or any transaction in, any Included Securities.
>
> Future Claims do not include Recovery Rights in respect of causes of action and interests in any state or federal common law claim, any non-securities related claim, or any claim related to the bankruptcy of Lehman Brothers.

APA Art. II.

"Included Securities" is defined as "all Securities in the Trade Data that were owned, held, acquired, sold or otherwise disposed of by such Seller during the Trade Period." APA Art. II. "Securities" means "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." APA Art. II. The APA refers to both a defined term "Securities" and an undefined "securities," used in the definition of Securities and in other sections, including the definition of Future

Claims. "Trade Data" is defined to mean "all of the relevant information to be provided by each Seller to Buyer pursuant hereto and relating to purchases, sales, ownership and other transactions in all Included Securities by the Sellers during the Trade Period. APA Art. II. Trade Period, in turn, is "the period from and including the date of [FrontPoint's] formation or incorporation to and including the present." APA Art. II.

Exhibit B of the APA, a notice of assignment to "Relevant Filing Agents, Claims Administrators, Brokers, Prime Brokers, [and] Vendors" purports to disclose the transfer and assignment of "all rights, title and interest of in and to or associated with, or any manner to, any and all recovery rights and amounts payable in connection with any securities related claims related to or arising out of the Transferor's ownership of, or any transaction in, 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) . . . ."

C. Motion to Dismiss

1. The APA Does Not Effect an Assignment of Claims from FrontPoint to FLH

First, plaintiff argues that the law of the case doctrine precludes consideration of standing and the propriety of the claims' assignment. As discussed, plaintiff alleged the assignment of claims by FrontPoint to it for the first time in the TAC. The issue was not previously decided and is properly before me now.

Next, plaintiff disputes defendants' standing to challenge the assignment of claims under the APA. Although defendants are not parties to the APA, such a challenge is clearly appropriate, where, as here, defendants face legal liability based on claims asserted pursuant to the assignment. *See, e.g., DNAML Pty, Ltd. v. Apple Inc.*, 2015 WL 9077075, at *5 (after analyzing terms of purported assignment agreement, granting summary judgment for defendants based on a lack of standing).

Plaintiff's claim of breach of the implied covenant of good faith and fair dealing is a "cause[] of action . . . in [a] state . . . common law claim" and thus explicitly excluded from the definition of Future Claims. *See FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, No. 16-cv-5263 (AKH), 2017 WL 3600425, at *1 (S.D.N.Y. Aug. 18, 2017) ("*SIBOR I*"). This claim is dismissed for lack of standing.

In order for the contract to have assigned FrontPoint's antitrust claims arising under the Sherman Act, to FLH, the antitrust claims must be, within the meaning of the contract, "claims . . . arising out of . . . [a] securities class action lawsuit," so as to constitute "unambiguous assignment of causes of action in a manner that would clearly encompass the antitrust claim," *DNAML Pty, Ltd. v. Apple Inc.*, 2015 WL 9077075, at *3, and those claims must not be excepted from transfer as "non-securities related claim[s]." APA Art. II.

The APA lacks express language transferring either "antitrust claims" or "all causes of action." *DNAML Pty, Ltd. v. Apple Inc.*, 2015 WL 9077075, at *5. As the APA's terms and definitions make clear, assets and causes of action to be transferred were not total but subject to important limitations. The APA distinguishes between "security class action[s]," which were subject to transfer, and "any non-security related claim[s]," which were not.

Plaintiff urges a broad, generic reading of the term "security" as employed in the contract. This interpretation of the contract is inconsistent with the contract's terms. By invoking claims arising out of "securities class actions," the parties showed an intention to name and transfer a specific category of causes of action, to the exclusion of others. *See DNAML Pty, Ltd. v. Apple Inc.*, 2015 WL 9077075, at *5 ("Applying the principle *expressio unius est exclusio[] alterius*, the inclusion of these specific transfer provisions confirms that the parties to the Agreement were aware of how to transfer legal claims, chose to transfer specific rights that they delineated, and did not intend a general transfer of all legal claims."). Even if "securities class actions" could be understood to include antitrust actions such as this one, it hardly constitutes an "unambiguous assignment" required by federal law. *DNAML Pty, Ltd. v. Apple Inc.*, 2015 WL 9077075, at *3. This understanding is further enforced by the parties' explicit exception of any "causes of action and interests in . . . any non-securities related claim." APA Art. II.

Securities and antitrust claims are distinct. *See, e.g., Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (distinguishing "antitrust class actions" from "securities class actions"); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 (NRB), 2015 WL

6243526, at *150 (S.D.N.Y. Oct. 20, 2015) (distinguishing "Securities Act claims" from "antitrust . . . claims"). Absent some explicit definition in the APA, a securities class action lawsuit is understood as a suit arising out of the securities laws, mirroring its use by other courts. *See, e.g., Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014) (discussing, *inter alia*, the operation of "securities class actions" in the context of the U.S. securities laws).

As plaintiff points out, the APA defines "Securities" broadly, to encompass a wide array of financial instruments, but the wide scope of securities and securities-adjacent instruments nowhere suggests that "securities class action lawsuit" should also encompass antitrust claims. APA Art. II. While the broadly delimited term "Securities" is explicitly defined by the APA, the lowercase-s "securities class action" and "non-securities related claim" used to define Future Claims are not, making "security" suitable for interpretation in light of common understanding.

In further support of its interpretation of the APA, plaintiff cites the declaration of T. A. McKinney, a former general counsel of FrontPoint. ECF 345. Because I conclude that the terms of the APA are unambiguous on their face, it is unnecessary and inappropriate to apply extrinsic evidence here. *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18, 31 (2d Cir. 2015) ("[c]onsideration of extrinsic evidence is only permissible where the contract at issue is ambiguous"); *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 122; *DNAML Pty, Ltd. v. Apple Inc.*, 2015 WL 9077075, at *6. The APA does not assign the claims at issue in this case, and plaintiff lacks standing to assert them.

2. <u>Plaintiff's Substitution Under Rule 17(a)(3) Is Improper and its Claims are Untimely</u>

There is another reason for dismissing the TAC. Because FrontPoint and Sonterra lacked capacity to sue, there was no real "case or controversy" before the court and, consequently, no subject matter jurisdiction. *See* U.S. Const. Art III; *Cortlandt*, 790 F.3d at 417. The substitution of FLH under Fed. R. Civ. P. 17(a)(3) could not repair the basic deficiency of Frontpoint's and Sonterra's pleading, since Rule 17 allows substitutions to cure mistakes, not repair an absent substance. *Cortland*, 790 F.3d at 424 (substitution of parties allowed where it can cure "a mistake . . . as to the person entitled to bring such suit and such substitution will not alter the substance of the action."). As the Second Circuit observed in dictum, "'[I]n the absence of a plaintiff with standing . . . there [is] no lawsuit for the real party in interest to ratify, join, or be substituted into under Rule 17(a)(3) or otherwise.' Whether the real party in interest [that is, Fund] made a mistake [by not suing originally] does not even enter into consideration." *Klein ex rel. Qlik Techs., Inc. v. Qlik Techs., Inc.*, 906 F.3d 215, 227 n.7 (2d Cir. 2018) (internal citation omitted) (quoting *Cortlandt*, 790 F.3d at 423); *see Dennis v. JPMorgan Chase & Co.*, 342 F. Supp. 3d 404, 416 (S.D.N.Y. 2018). Although I gave leave to Frontpoint and Sonterra to substitute Fund, my order could not confer jurisdiction where it did not originally exist.

FLH, if it were a proper assignee, could file a claim of its own that mirrored the complaint filed by Frontpoint and Sierra. However, its complaint would be a new filing, not capable of relating back in time to Frontpoint's and Sonterra's filing. The four-year statute of limitations, running from no later than June 2013, would bar Fund from now filing such suit (or at the time it filed the TAC, October 26, 2019). 15 U.S.C. § 15b.

D. Motion for Preliminary Settlement Approval

Plaintiff moves, with Citibank, N.A. and JPMorgan Chase Bank, N.A., for preliminary approval of their respective settlement agreements. These motions are denied, for the Court lacks subject matter jurisdiction.

A court's approval of a settlement requires a finding by the court that there is subject matter jurisdiction. *See Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) ("A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing."); *see also Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."); *Zink v. First Niagara Bank, N.A.*, 155 F. Supp. 3d 297, 305 (W.D.N.Y. 2016) ("[U]ncertainty as to subject matter jurisdiction cannot be treated merely as a factor to be weighed in the settlement equation. Unless subject matter jurisdiction is established, I cannot even consider the Uncontested Motion, much less approve it.").

At the May 2, 2019 hearing, plaintiff raised the argument that, even if the Court lacks subject matter jurisdiction over the case because of the infirm assignment of rights from FrontPoint to FLH, it may have jurisdiction based on the somewhat broader language of the assignment of claims from Sonterra to FLH. However, Sonterra's were dismissed because it was not an efficient enforcer. *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, 2018 WL 4830087, at *6. FLH, as assignee, has no greater capacity than its assignor.

E. Motion to File a Fourth Amended Complaint

Plaintiff also moves to file a Fourth Amended Complaint and amend the Third Amended Complaint, adding an additional plaintiff in an attempt to cure the antitrust standing issues identified by the Court in *SIBOR II*, where I found that FrontPoint, was not an efficient enforcer for USD SIBOR or SOR, because it transacted in derivatives incorporating only SGD SIBOR. *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, 2018 WL 4830087, at *5. The Fourth Amended Complaint purports to cure the deficiency by adding new plaintiffs, Moon Capital Partners Master Fund, Ltd. and Moon Capital Master Fund, Ltd (collectively, the "Moon plaintiffs"). Plaintiff alleges that both transacted in SGD FX forwards that incorporated both USD SIBOR and SOR benchmarks.

This motion is denied for the same reasons that the TAC is dismissed: the inadequate assignment of claims to FLH from FrontPoint has deprived the Court of subject matter jurisdiction. In addition, the new claims of the Moon plaintiffs correspond to events that occurred more than eight years ago and are time-barred. Class action tolling under *American Pipe* applies only to the extent that new plaintiffs can join the class individually or file individual claims if the class fails. *See China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1804 (2018). The Moon plaintiffs cannot bring a new class action or otherwise revive an otherwise infirm action. The alternative reading "would allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation." *Id.* at 1808.

Conclusion

Because the APA does not effect the assignment of claims from FrontPoint to FLH, plaintiff lacks standing to bring its antitrust and breach of the implied covenant of good faith and fair dealing claims. Defendants' motion to dismiss the case is granted. Pursuant to my oral order at the May 2, 2019 hearing, Tr. at 5:11–16, plaintiff shall file an unredacted copy of the APA on the docket. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006). The motions for preliminary approval of the class settlements and to file a Fourth Amended Complaint are also denied.

The clerk is instructed to terminate the motions (ECF 318, 314, 347), grant judgment to defendants, and close the case.

SO ORDERED.

Dated: July 26 , 2019 New York, New York	s/Alvin K. Hellerstein Alvin K. Hellerstein

United States District
Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

<table>
<tr><td>FRONTPOINT ASIAN EVENT DRIVEN FUND, L.P., and SONTERRA CAPITAL MASTER FUND, LTD., on behalf of themselves and all others similarly situated,,

Plaintiffs,

v.</td><td><u>OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS</u></td></tr>
<tr><td>CITIBANK, N.A., CITIGROUP INC., BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., THE ROYAL BANK OF SCOTLAND PLC, THE ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES JAPAN LIMITED, UBS AG, UBS SECURITIES JAPAN CO. LTD., ING GROEP N.V., ING BANK N.V., ING CAPITAL MARKETS LLC, BNP PARIBAS, S.A., BNP PARIBAS NORTH AMERICA, INC., BNP</td><td>16 Civ. 5263 (AKH)

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:

DATE FILED: <u>8/18/17</u></td></tr>
</table>

PARIBAS SECURITIES :
CORP., BNP PARIBAS PRIME :
BROKERAGE, INC., :
OVERSEA-CHINESE :
BANKING CORPORATION :
LTD., BARCLAYS PLC, :
BARCLAYS BANK PLC, :
BARCLAYS CAPITAL INC., :
DEUTSCHE BANK AG, :
CREDIT AGRICOLE :
CORPORATE AND :
INVESTMENT BANK, :
CREDIT AGRICOLE S.A., :
CREDIT SUISSE GROUP AG, :
CREDIT SUISSE AG, CREDIT :
SUISSE INTERNATIONAL, :
STANDARD CHARTERED :
BANK, STANDARD :
CHARTERED PLC, DBS BANK:
LTD., DBS GROUP :
HOLDINGS LTD, DBS :
VICKERS SECURITIES (USA) :
INC., UNITED OVERSEAS :
BANK LIMITED, UOB :
GLOBAL CAPITAL, LLC, :
AUSTRALIA AND NEW :
ZEALAND BANKING GROUP, :
LTD., ANZ SECURITIES, INC.,:
THE BANK OF TOKYO- :
MITSUBISHI UFJ, LTD., THE :
HONGKONG AND SHANGHAI:
BANKING CORPORATION :
LIMITED, HSBC BANK USA, :
N.A., HSBC HOLDINGS PLC, :

HSBC NORTH AMERICA	:
HOLDINGS INC., HSBC USA	:
INC., MACQUARIE BANK	:
LTD., MACQUARIE GROUP	:
LTD., COMMERZBANK AG,	:
AND JOHN DOES NOS. 1-50,	:
	:
Defendants.	:
	:
	X

ALVIN K. HELLERSTEIN, U.S.D.J.:

Defendants move to dismiss plaintiffs' First Amended Class Action Complaint ("FAC"). Plaintiffs, FrontPoint Asian Event Driven Fund L.P. ("FrontPoint") and Sonterra Capital Master Fund, Ltd. ("Sonterra"), investment funds, sue defendants, 46 corporate entities representing 20 banking institutions. Plaintiffs allege that defendants conspired to manipulate the price of two related benchmark interest rates: the Singapore Interbank Offered Rate ("SIBOR") and the Singapore Swap Offer Rate ("SOR"). Plaintiffs allege that they entered into transactions involving financial products whose price was impacted by SIBOR and/or SOR, and were economically injured as a result of defendants' alleged manipulation of those benchmarks. Plaintiffs assert claims under the Sherman Act, 15 U.S.C. § 1 *et seq*., and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. Plaintiffs also allege common law claims of unjust enrichment and breach of implied covenants of good faith and fair dealing.

Defendants move to dismiss the FAC for lack of subject matter jurisdiction and for failure to state a legally sufficient and plausible claim. A subset of the defendants ("Foreign Defendants") move also to dismiss for lack of personal jurisdiction over them. After considering the briefs submitted by the parties and their oral arguments, for the reasons discussed in this opinion and order, I hold that defendants' motion is granted in part and denied in part. I grant plaintiffs leave to file a second amended complaint, except with respect to their unjust enrichment claim, which is dismissed with prejudice.

I. The First Amended Complaint

SIBOR and SOR. The Singapore Interbank Offered Rate ("SIBOR") and the Singapore Swap Offer Rate ("SOR") are related benchmark interest rates that are meant to reflect the cost of borrowing funds in the Singapore market. Both SIBOR and SOR are administered by the Association of Banks in Singapore ("ABS"), a trade group made up of many of the defendants in this case. FAC ¶ 1. Each day, Thomson Reuters, as agent of ABS, calculates the daily SIBOR rate, based on interest rate quotes submitted by a panel of banks, including many of the defendants. Thomson Reuters, applying a set formula, calculates an average rate, and publishes that average each day as the SIBOR rate. FAC ¶¶ 101-02. SOR, a related benchmark interest rate that is in part based on the SIBOR rate, is also meant to reflect the cost of borrowing Singapore dollars, but is premised on a foreign exchange swap in which U.S. dollars are to be exchanged for Singapore dollars at a specified future date, using a price that reflects current value of Singapore dollars, *i.e.*, the "spot rate." FAC ¶ 103. Thomas Reuters publishes the SIBOR and SOR rate for four different maturities, which are also known as tenors: one, three, six, and twelve months. FAC ¶ 102.

Defendants' Alleged Conspiracy to Manipulate SIBOR and SOR. Plaintiffs allege that during the class period, trillions of dollars of "SIBOR- and SOR-based derivatives" – that is, financial derivatives that incorporate SIBOR and/or SOR as a component of price – were traded within the United States, including interest rate swaps, forward rate agreements, foreign exchange swaps and foreign exchange forwards. FAC ¶¶ 104, 115-119.

Plaintiffs allege that in June 2013, the Monetary Authority of Singapore ("MAS"), Singapore's central bank and financial regulator, "announced that it had uncovered a massive conspiracy by Defendants to rig the prices of financial derivatives that incorporate SIBOR and/or SOR as a component of price." FAC ¶ 2. Plaintiffs allege that MAS "uncovered rare 'smoking gun' evidence of anticompetitive conduct," FAC ¶ 3, and that "MAS found that" several of the defendants "manipulated SIBOR and SOR." *See, e.g.*, FAC ¶¶ 23, 26, 54. However, the June 13, 2013 MAS press release, upon which plaintiffs base these allegations, contains none of these findings. Rather, MAS stated that "twenty banks were found to have deficiencies in the governance, risk management, internal controls, and surveillance systems for their involvement in benchmark submissions." Porpora Decl., Ex. A. MAS also stated that "a total of 133 traders were found to have engaged in several attempts to inappropriately influence the benchmarks," but noted that "there is no conclusive finding that SIBOR, SOR and FX Benchmarks were successfully manipulated." *Id.* Many of defendants' SIBOR and SOR derivative traders were fired or disciplined in the wake of the MAS investigation. FAC ¶¶ 129-33.

Plaintiffs also allege that "U.S. and U.K. regulators confirmed MAS' findings that Defendants manipulated SIBOR and SOR." FAC ¶ 126. Specifically, plaintiffs allege that the Commodity

Futures Trading Commission ("CFTC") found that defendants Deutsche Bank, RBS, and UBS "all manipulated SIBOR and SOR during the Class Period and engaged in 'similar misconduct' to the methods these Defendants used to manipulate other financial benchmarks." *Id.* These allegations are based on the CFTC's settlements with these three defendants regarding their manipulation of other benchmark interest rates not at issue in this case, such as LIBOR and Euribor. The Deutsche Bank settlement contained a footnote stating that "through its internal investigation, Deutsche Bank identified evidence of similar misconduct with respect to attempts to influence, and at times attempts to manipulate, other interest rate benchmarks," including SIBOR and SOR. Porpora Decl. Ex. I at 3, n.3. The UBS settlement contains a similar footnote stating that "through its internal investigation, UBS identified evidence of similar misconduct involving submissions for" SIBOR and SOR. Porpora Decl. Ex. H at 38, n.21. The RBS settlement likewise contained a footnote stating that "RBS traders engaged in similar misconduct in connection with" SIBOR and SOR. Porpora Decl. Ex. J at 4, n.3.

Plaintiffs also allege that the U.K.'s Financial Services Authority ("FSA"), in its settlement with RBS with respect to LIBOR manipulation, found that RBS traders made at least 34 written requests to manipulate SIBOR and SOR. FAC ¶ 28.

Lastly, plaintiffs allege what they describe as "economic evidence," which they present as proof that SIBOR and SOR were manipulated during the relevant period. Plaintiffs' economic evidence is premised on the assumption that "because SOR and SIBOR both represent the cost of borrowing Singapore dollars, the 'law of one price' dictates that the difference, or 'spread,' between the same tenor of SOR and SIBOR should be very small absent manipulation, since the cost of borrowing Singapore dollars for the same amount of time should be roughly the same." FAC ¶ 134. Put more simply, plaintiffs allege that the SIBOR and SOR rates should generally be the same. Plaintiffs' economic evidence consists of three charts showing that for three different tenors (one-month, three-month, and six-month), the spread between SIBOR and SOR became more pronounced and erratic during the relevant period. FAC ¶¶ 134-141. Prior to the start of the Class Period, for example, SOR's relationship to SIBOR was generally positive; that is, the SOR rate was higher than the SIBOR rate. During the Class Period, however, the SOR's relationship to SIBOR fluctuated, and at times became negative. In addition to this fluctuation, the spread also became more pronounced during the Class Period; that is, the spread became larger. Plaintiffs allege that this fluctuation and variability "indicates that both SIBOR and SOR were manipulated to artificial levels during the Class Period." FAC ¶ 137.

<u>*Allegations of Personal Jurisdiction*</u>. Plaintiffs allege five bases of personal jurisdiction against the Foreign Defendants. First, plaintiffs allege that certain defendants "purposefully availed themselves of the privilege and benefit of trading foreign exchange and/or interest rate derivatives, including SIBOR- and SOR-based derivatives, in the United States." FAC ¶ 13. In support of this allegation, the plaintiffs cite to a survey conducted every three years by the Federal

Reserve Bank of New York, which "measures the 'turnover,' or volume of transactions, in foreign exchange and interest rate derivatives within the United States." *Id.* According to plaintiffs, the fact that some of the defendants participated in this survey is evidence that those defendants engaged in domestic trading of SIBOR- and SOR-based derivatives. Plaintiffs do not explain how this trading, to the extent it occurred, relates to the alleged conspiracy to manipulate SIBOR and SOR.

Second, plaintiffs allege, generally, that defendants purposefully directed their wrongful conduct at the United States. Plaintiffs allege that "through their daily electronic transmission of false SIBOR submissions and confirmations for collusive transactions intended to impact SIBOR and SOR, Defendants themselves transmitted and caused Thomson Reuters to electronically transmit false SIBOR and SOR rates to U.S. market participants who transacted in SIBOR- and SOR-based derivatives." FAC ¶ 14.

Third, plaintiffs allege that defendants' illegal conduct "had direct, substantial, and foreseeable effects on commerce in the United States." FAC ¶ 16.

Fourth, plaintiffs allege that certain defendants consented to general jurisdiction in New York by registering New York branches with the New York State Department of Financial Services pursuant to New York Banking Law Section 200. FAC ¶ 17

Lastly, plaintiffs allege that defendant Deutsche Bank consented to jurisdiction in New York by entering into an ISDA Master Agreement with plaintiff FrontPoint, under which the parties agreed to the jurisdiction of the courts of New York and United States District Courts of the Southern District of New York. FAC ¶ 18.

II. Foreign Defendants' Motion to Dismiss for Lack of Personal Jurisdiction

The Foreign Defendants[1] move pursuant to Rules 12(b)(2) and 12(b)(3) to dismiss the FAC for lack of personal jurisdiction and venue.

a. General Jurisdiction by Consent

Plaintiffs concede that the Foreign Defendants are not subject to general jurisdiction because they are not "essentially at home" in New York or the United States. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014). Plaintiffs argue, however, that certain Foreign Defendants consented to general jurisdiction in New York by registering New York branches with the New York State Department of Financial Services pursuant to New York Banking Law § 200. FAC ¶ 18. This argument fails.

---

[1] The Foreign Defendants are: Australia and New Zealand Banking Group, Ltd.; Barclays plc; Barclays Bank plc; BNP Paribas, S.A.; Crédit Agricole Corporate and Investment Bank; Crédit Agricole S.A.; Credit Suisse Group AG; Credit Suisse AG; Credit Suisse International; Commerzbank AG; DBS Bank Ltd.; DBS Group Holdings Ltd; Deutsche Bank AG; HSBC Holding plc; ING Groep N.V.; ING Bank N.V.; Macquarie Bank Ltd.; Macquarie Group Ltd; The Royal Bank of Scotland plc; The Royal Bank of Scotland Group plc; RBS Securities Japan Limited; Standard Chartered Bank; Standard Chartered PLC; The Bank of Tokyo-Mitsubishi UFJ, Ltd; The Hong Kong and Shanghai Banking Corporation Limited; The Oversea-Chinese Banking Corporation Ltd.; UBS AG, UBS Securities Japan Co. Ltd.; and United States Overseas Bank Limited.

Section 200(3) provides that a foreign banking corporation may not do business in New York:

> unless such corporation shall have ... [f]iled in the office of the superintendent ... a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing the superintendent and his or her successors its true and lawful attorney, upon whom all process in any action or proceeding against it on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches, may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state.

New York Banking Law § 200(3).

By its express terms, this statute limits a foreign bank's consent to suits "arising out of a transaction with its New York agency or agencies or branch or branches," and is thus relevant only to specific jurisdiction, not general jurisdiction. Courts have been virtually unanimous in concluding that this statute does not provide for general jurisdiction. *See, e.g.*, *Sullivan v. Barclays PLC*, 2017 WL 685570, at *39 (S.D.N.Y. Feb. 21, 2017) ("The statute does not establish a consent to jurisdiction by the branch's foreign parent, and courts in this District have uniformly rejected plaintiffs' argument."); *7 W. 57th St. Realty Co., LLC v. Citigroup, Inc.*, 2015 WL 1514539, at *11 (S.D.N.Y. Mar. 31, 2015) ("The plain language of this provision limits any consent to personal jurisdiction by registered banks to *specific* personal jurisdiction."); *In re: LIBOR-Based Fin. Instruments Antitrust Litig*. ("*LIBOR VI*"), 2016 WL 1558504, at *7 (S.D.N.Y. Apr. 15, 2016) ("[T]he most natural reading of the provision *does not* provide general jurisdiction.").

As the Second Circuit recently explained in *Brown v. Lockheed Martin Corp*., 814 F.3d 619 (2d Cir. 2016), which involved the question of whether Connecticut's registration statute could give rise to general jurisdiction, interpreting registration statutes such as New York Banking Law § 200 to confer general jurisdiction would "risk unravelling the jurisdictional structure envisioned in *Daimler* and *Goodyear* based only on a slender inference of consent pulled from routine bureaucratic measures that were largely designed for another purpose entirely." *Brown*, 814 F.3d at 639. A corporation's consent to be sued in a particular jurisdiction for any cause of action must be explicit, not inferential, for if "mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler's* ruling would be robbed of meaning by a back-door thief." *Id*. at 640.

Plaintiffs point to dicta in *Brown*, in which the Second Circuit referred to a New York registration statute as one that "more plainly advise[s] the registrant that enrolling in the state as a foreign corporation and transacting business will vest the local courts with general jurisdiction over the corporation." *Id.* However, it does not appear that the Second Circuit was even referring to New York Banking Law § 200, for the law review article it cited for this proposition contained only a discussion of New York Business Corporation Law § 1301, a different statute. Regardless, under no plausible reading does Section 200 "plainly advise" corporations that complying with the statute will subject them to general jurisdiction in New York, and no court has held as much since the Second Circuit's decision in *Brown*.

My decision in *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561 (S.D.N.Y. 2015) (Hellerstein, J.) is distinguishable. That decision concerned whether a foreign bank with branches registered in New York must identify assets of judgment debtors over which it has custody, regardless of where the particular branches holding those assets might be located. I answered that question in favor of disclosure in order to avoid "a notion of jurisdiction that allows banks to hide information concerning assets connected to terrorism in other countries." 91 F. Supp. 3d at 570–71. The questions and concerns raised in *Vera* are not present here. In any event, the Second Circuit recently reversed my decision in *Vera*, holding that I lacked subject matter jurisdiction over the action. *See Vera v. Republic of Cuba*, No. 16-1227, 2017 WL 3469204 (2d Cir. Aug. 14, 2017).

Plaintiffs may not use New York's registration statute as a basis for asserting general jurisdiction over the Foreign Defendants.

b. Specific Jurisdiction

"For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). The exercise of specific jurisdiction thus "depends on in-state activity that '*gave rise to the episode-in-suit*.'" *Waldman v. Palestine Liberation Org*., 835 F.3d 317, 331 (2d Cir. 2016) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011)). However, the FAC contains no plausible allegations that any conduct related to the conspiracy to manipulate SIBOR and SOR occurred within the United States. Plaintiffs do not allege that the conspiracy originated in the United States, or that Foreign Defendants who served as panel members submitted manipulative rates from within the United States.[2]

---

[2] I assume for purposes of this motion, without expressly holding, that the relevant geographic area is the United States as a whole, and not just New York. *See In re Magnetic Audiotape Antitrust Litig*., 334 F.3d 204, 207 (2d Cir. 2003) (assuming that Section 12 of the Clayton Act permits a minimum contacts analysis that "looks to a corporation's contacts with the United States as a whole to determine if the federal court's exercise of personal jurisdiction comports with due process."); *In re LIBOR-Based Fin. Instruments Antitrust Litigation*, ("*LIBOR IV*"), 2015 WL 6243526, at *23 and n. 39 (noting that "courts in this Circuit commonly hold" that the minimum-contacts test should consider nationwide contacts when the "jurisdictional issue flows from a federal statutory grant that authorizes suit under federal-question jurisdiction and nationwide service of process," and noting further that nothing in recent Supreme Court opinions such as *Daimler* and *Walden* "so much as hints that the national

i. Suit-Related Conduct

Instead of directly alleging facts in their pleading, plaintiffs instead contend that an inference of U.S.-based suit-related conduct can be drawn from a document referenced in the FAC. Specifically, Deutsche Bank's settlement with CFTC, which concerned manipulation of other benchmarks (LIBOR and Euribor), states that Deutsche Bank's manipulative conduct "occurred across multiple trading desks and offices," including New York. A footnote then states that through its internal investigation, Deutsche Bank "identified evidence of similar misconduct" with respect to attempts to manipulate other interest rate benchmarks, including SIBOR and SOR. Porpora Decl. Ex. I at 2-3, n.3. This footnote contains no specific facts regarding U.S.-based attempts to manipulate SIBOR or SOR, and cannot serve as a basis for exercising jurisdiction over the twenty-nine Foreign Defendants. I cannot reasonably infer that suit-related conduct occurred within the United States based on such a generalized, ambiguous statement, or on similar statements made in the CFTC's settlements with UBS and RBS.

Plaintiffs also attempt to connect some of the Foreign Defendants to the United States by alleging that those defendants entered into "manipulative" or "collusive" transactions involving SIBOR- and SOR-based derivatives with counterparties in the United States. FAC ¶¶ 8, 15. Plaintiffs' conclusory allegations are not sufficient to make these transactions "suit-related." *Walden*, 134 S. Ct. at 1121

---

contacts rule might be unconstitutional where it is supported by a federal statute.").

(2014). Plaintiffs fail to allege which defendants entered into which derivative contracts, how these trades were collusive, or how they related to the alleged fixing of the SIBOR and SOR rates. In *In re Platinum & Palladium Antitrust Litig.*, 2017 WL 1169626 (S.D.N.Y. Mar. 28, 2017), for example, one of the foreign defendants was alleged to have traded the commodity at issue within the United States. The court held that this was insufficient to establish jurisdiction over the defendant because that trading had no connection to the wrongful conduct at issue: manipulation of a pricing benchmark that occurred outside of the United States. *Id.* at *45. Similarly, in *Sullivan v. Barclays PLC*, 2017 WL 685570 (S.D.N.Y. Feb. 21, 2017), which involved alleged manipulation of the Euribor benchmark, the court acknowledged that "some of [defendant's] counterparties were located in the United States," but held that absent a United States nexus to the manipulation, "the presence of U.S. victims alone does not make out jurisdiction." *Id.* at *44.

The Supreme Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017) did not ease the standard for pleading personal jurisdiction, as plaintiffs suggest. In that case, the Supreme Court merely applied its "settled principles regarding specific jurisdiction," and held that there "must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'" 137 S. Ct. at 1781 (quoting *Goodyear*, 564 U.S. at 919). But when "there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.* As currently alleged, the relevant conduct giving rise to plaintiffs' alleged injury occurred elsewhere: Singapore. The fact that defendants may have engaged in non-suit related activity in the United States does not change this result.

But even if plaintiffs had adequately alleged that this derivative trading was "suit-related," plaintiffs have failed to allege that the Foreign Defendants actually engaged in such trading. Plaintiffs do not identify *any* specific trades or contracts that are alleged to have been collusive, nor do they identify which Foreign Defendants were party to such transactions. Instead, plaintiffs refer to two surveys conducted by the Federal Reserve Bank of New York ("FRBNY"), which polled participants in the derivatives market, including some of the defendants. The purpose of the surveys was to determine the volume of trading of various derivatives in the United States. In light of certain Foreign Defendants' participation in these surveys, plaintiffs urge the Court to infer that those defendants engaged in collusive trading of SIBOR-based derivatives with U.S. counterparties. But the surveys make no specific mention of SIBOR- or SOR-based derivatives; they merely concern the swaps and derivatives market generally. Nor do the surveys identify the specific corporate entities that participated. For example, the survey identifies "BNP Paribas" as a participant, but it is impossible to know whether this refers to BNP Paribas, S.A., which has moved to dismiss for lack of personal jurisdiction, or to BNP Paribas North America, Inc., which does not object to jurisdiction. For purposes of alleging that there is personal jurisdiction over each Foreign Defendant, plaintiffs may not refer to affiliated defendants by a conclusory collective name unless plaintiffs adequately allege that the conduct of one affiliate is attributable to another.[3]

Plaintiffs must do more than infer that the Foreign Defendants likely were participants in the U.S. derivatives market. They 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.

i. Purposeful Direction

Plaintiffs argue that the Foreign Defendants purposefully directed their wrongdoing at the United States by submitting false interest rates to Thomson Reuters, knowing that Thomson Reuters, as agent for the Association of Banks of Singapore ("ABS"), the trade group that administers SIBOR and SOR, would publish an average of those rates as the daily SIBOR rate throughout the United States and other areas of the world. FAC ¶¶ 15, 102.

---

[3] For this same reason, plaintiffs' allegation that certain Foreign Defendants have offered SIBOR- and SOR-based derivatives using the Bloomberg Terminal cannot serve as a basis for jurisdiction. For example, plaintiffs allege that "Barclays" marketed SIBOR-based derivatives using the Bloomberg Terminal, but do not specify which of the three Barclay defendants did so.

Under the so-called "effects" test, specific jurisdiction may exist where an out-of-forum defendant purposefully directed the wrongful conduct at the forum. "The effects test is a theory of personal jurisdiction typically invoked where ... the conduct that forms the basis for the controversy occurs entirely out-of-forum, and the only relevant jurisdictional contacts with the forum are therefore in-forum effects harmful to the plaintiff. In such circumstances, the exercise of personal jurisdiction may be constitutionally permissible if the defendant expressly aimed its conduct at the forum." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 173 (2d Cir. 2013). Thus, where the alleged conduct took place outside of the forum, as is the case here, the defendant must have "'purposefully directed' his activities at residents of the forum." *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 674 (2d Cir. 2013) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985)).

The FAC contains no non-conclusory allegations that the Foreign Defendants purposefully directed their activities at residents of the United States. The consequences of the Foreign Defendants' conduct were global, and the FAC contains no allegations that the Foreign Defendants singled out the United States as their target. *See 7 W. 57th St. Realty Co.*, 2015 WL 1514539, at *11 ("Because the Amended Complaint does not plead facts demonstrating that the LIBOR manipulation was done with the express aim of causing an effect in New York, the 'effects test' is not satisfied."); *In re Platinum & Palladium Antitrust Litig.*, 2017 WL 1169626, at *44 (absent allegation that defendant's conduct was expressly aimed at the United States, the fact "that Defendants' alleged manipulation of the Fix Price had harmful effects on U.S.-based exchanges is insufficient" to confer personal jurisdiction).

Nor can plaintiffs argue that the Foreign Defendants should have been aware of these effects, for "it is bedrock law that merely foreseeable effects of defendants' conduct do not support personal jurisdiction." *LIBOR IV*, 2015 WL 6243526, at *32 (S.D.N.Y. Oct. 20, 2015); *see also In re Terrorist Attacks*, 714 F.3d at 674 ("The fact that harm in the forum is foreseeable, however, is insufficient for the purpose of establishing specific personal jurisdiction over a defendant."). Moreover, the "fact that electronic communications were routed through U.S.-wires or servers, or that recipients of those communications were located in the United States, is insufficient to establish minimum contacts with the United States." *Laydon v. Bank of Tokyo-Mitsubishi UFJ, Ltd.* ("*Laydon V*"), 2017 WL 1113080, at *3 (S.D.N.Y. Mar. 10, 2017). Finally, to the extent plaintiffs rely on conduct of third-party Thomson Reuters that relates to the United States, such reliance is insufficient, for the relationship with the forum "must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden*, 134 S. Ct. at 1122.

c. Conspiracy Jurisdiction

Plaintiffs also contend that the Foreign Defendants are subject to personal jurisdiction under a theory of conspiracy jurisdiction. "The underlying rationale for exercising personal jurisdiction on the basis of conspiracy is that, 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." *LIBOR IV*, 2015 WL 6243526, at *29.

Federal courts "have been increasingly reluctant to extend this theory of jurisdiction beyond the context of New York's long-arm statute." *Laydon v. Mizuho Bank, Ltd.*, 2015 WL 1515358, at *3 (S.D.N.Y. Mar. 31, 2015); *see also In re Aluminum Warehousing Antitrust Litig.*, 90 F. Supp. 3d 219, 227 (S.D.N.Y. 2015) (rejecting notion that "participation in a conspiracy generally can provide a standalone basis for jurisdiction," for the "rules and doctrines applicable to personal jurisdiction are sufficient without the extension of the law to a separate and certainly nebulous 'conspiracy jurisdiction' doctrine.").

Plaintiffs have failed to allege facts sufficient to support their conspiracy jurisdiction theory. Even assuming that plaintiffs have plausibly alleged the existence of a conspiracy, they have not alleged that any defendant – including those who do not contest jurisdiction – committed any act in furtherance of the conspiracy from within the United States or purposefully directed its misconduct at the United States. If the conspiracy has no connection to the United States, it cannot serve as a basis for jurisdiction, even if some of the alleged members of the conspiracy are subject to general jurisdiction in the United States. *See LIBOR VI*, 2016 WL 7378980, at *3 ("Because plaintiffs have failed to establish that any defendant committed an act in furtherance of the conspiracy in or directed at the United States, this Court has only general personal jurisdiction over certain panel banks as to the antitrust claims, and therefore the conspiracy jurisdiction argument has no purchase."); *In re Platinum & Palladium Antitrust Litig.*, 2017 WL 1169626, at *49 (rejecting theory of conspiracy jurisdiction on grounds that "because Plaintiffs failed to allege that any conduct relevant to the alleged price manipulation took place in New York, they have failed to allege sufficient facts to establish personal jurisdiction on that basis.").[4]

d. Deutsche Bank's Consent to Jurisdiction

Plaintiff FrontPoint alleges that defendant Deutsche Bank consented to jurisdiction in New York because FrontPoint and Deutsche Bank entered into an ISDA [International Swap Dealers Association] Master Agreement containing a forum selection clause that designated New York as the proper forum for any dispute relating to that agreement. FAC ¶ 19. This allegation is insufficient for several reasons. First, FrontPoint does not allege the precise language of the forum selection clause, and the copy of the ISDA Master Agreement submitted to the Court is missing the pages containing the relevant clause. *See* Lefkowitz Decl. Ex. 2. Second, although FrontPoint alleges that it entered into at least 24 swap transactions with Deutsche Bank, including some transactions that involved SIBOR-based derivatives, it does not allege that those transactions were made pursuant to the ISDA Master Agreement. As a result,

---

[4] Because I have held that the Court lacks personal jurisdiction over the Foreign Defendants, I need not reach the issue of whether venue is proper.

the relationship between FrontPoint's trading with Deutsche Bank and the ISDA Master Agreement containing the forum selection clause remains unclear. FrontPoint notes that Deutsche Bank has not submitted a document or declaration proving that trade confirmations did not incorporate the terms of the ISDA Master Agreement, but it is FrontPoint's burden to show jurisdiction, not Deutche Bank's burden to disprove it. Third, even assuming that the forum selection clause applied, it is unclear whether it applies to all of FrontPoint's claims, or only to those sounding in contract and quasi-contract. Because FrontPoint has not supplied the Court with the actual language of the forum selection clause, it is not currently possible to rule on the scope of the clause. For these reasons, I reject FrontPoint's argument that Deutsche Bank consented to jurisdiction in New York.

e. Conclusion

The Foreign Defendants' motion to dismiss for lack of personal jurisdiction is granted in its entirety. The claims against the Foreign Defendants are dismissed without prejudice, and with leave to amend.

III. Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and For Failure to State a Claim

Defendants also move pursuant to Rules 12(b)(1) and 12(b)(6) to dismiss the FAC for lack of standing and for failure to state a claim.

a. Standing

"To meet the Article III standing requirement, a plaintiff must have suffered an 'injury in fact' that is 'distinct and palpable'; the injury must be fairly traceable to the challenged action; and the injury must be likely redressable by a favorable decision." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs have satisfied this standard.

Defendants argue that plaintiffs have failed to plead the existence of an "injury in fact" because they fail to allege that any intended manipulation of SIBOR or SOR was successful. Defendants argue that absent a plausible allegation of successful manipulation, plaintiffs could not have suffered any injury. However, this is a merits argument, and a plaintiff need not prove his case at the pleading stage in order to have constitutional standing. *See Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003) ("[A]t the pleading stage, standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury."). The standing requirement exists to ensure there is a proper case or controversy before the Court, not to dismiss lawsuits on the merits.

Plaintiffs also have sufficiently alleged that they suffered an economic injury as a result of defendants' alleged manipulation. Plaintiffs have alleged that they were "overcharged and/or underpaid" in transactions involving SIBOR-based derivatives. FAC ¶¶ 20-21. This is sufficient. As the Second Circuit recently held in *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759 (2d Cir. 2016), which involved alleged manipulation of LIBOR, "the harm component of constitutional standing is ... easily satisfied by [plaintiffs'] pleading that they were harmed by receiving lower returns on LIBOR-denominated instruments as a result of defendants' manipulation of

LIBOR." 823 F.3d at 770. It is possible that defendants' alleged manipulation, at different times, may have both hurt and helped plaintiffs' trading positions, depending on the day or the particular trade. But that possibility does not mean that plaintiffs lack constitutional standing to bring this lawsuit, for "that sort of 'paid too much' or 'received too little' harm is classic economic injury-in-fact." *Alaska Elec. Pension Fund v. Bank of Am. Corp.* ("*ISDAfix*"), 175 F. Supp. 3d 44, 53 (S.D.N.Y. 2016). As the court in *ISDAfix* explained, "discovery may well show that, for some Plaintiffs on some days, the alleged ISDAfix manipulation actually resulted in a benefit. But the mere fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing." *Id.* (internal quotation marks and citation omitted).

b. Antitrust

i. Antitrust Conspiracy

In antitrust cases, a "plaintiffs' 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." *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). To do this, a plaintiff will typically "present circumstantial facts supporting the *inference* that a conspiracy existed." *Id.* A court "cannot take Plaintiffs' failure to present direct evidence as a sign that no conspiracy existed." *In re London Silver Fixing, Ltd., Antitrust Litig.*. ("*Silver Fix*"), 213 F. Supp. 3d 530, 558 (S.D.N.Y. Oct. 3, 2016). A court may draw an inference based on circumstantial facts where the plaintiff alleges the existence of "conscious parallelism," as well as "plus factors," which may include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Citigroup, Inc.*, 709 F.3d at 136. "[T]hese plus factors are neither exhaustive nor exclusive, but rather illustrative of the type of circumstances which, when combined with parallel behavior, might permit a jury to infer the existence of an agreement." *Id.* at 136 n. 6.

"To survive dismissal, 'the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment, or a trial.'" *Gelboim*, 823 F.3d at 781 (quoting *Anderson News, L.L.C, v. Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012)). "Skepticism of a conspiracy's existence is insufficient to warrant dismissal; 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.''" *Gelboim*, 823 F.3d at 781 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

Plaintiffs have plausibly alleged the existence of a conspiracy to manipulate SIBOR and SOR. It is true that plaintiffs have failed to identify any specific interbank communications between or among defendants regarding the alleged manipulation. However, plaintiffs need not allege this type of "smoking gun" evidence to survive a motion to dismiss. The Monetary Authority of Singapore ("MAS"), Singapore's financial regulator, after conducting a year-long review of the interest rate benchmark submission process employed by various banks, found that several defendants in this case had deficiencies in the "governance, risk management, internal controls, and surveillance systems for their involvement in benchmark submissions," and that over 100 traders from these banks engaged in several attempts to "inappropriately influence" benchmarks such as SIBOR and SOR. Porpora Decl. Ex. A. The CFTC also found that defendants RBS, UBS, and Deutsche Bank engaged in attempts to manipulate these benchmarks, and the Financial Services Authority ("FSA"), the United Kingdom's financial regulator, also found that RBS had done the same. Porpora Decl. Exs. D, H, I, and J.

These investigations and findings, while not direct or conclusive proof that a conspiracy existed, provide circumstantial evidence from which an inference of coordinated conduct may be drawn. In *In re Foreign Exch. Benchmark Rates Antitrust Litig.* ("*FOREX*"), 74 F. Supp. 3d 581 (S.D.N.Y. 2015), for example, the court rejected defendants' argument that "the existence of pending government investigations cannot support the inference of an unlawful conspiracy." The court reasoned that it had "taken judicial notice of penalties and fines levied by regulators in three countries against six Defendants as a result of some of the investigations detailed in the U.S. Complaint and for the very conduct alleged in the Complaint. The penalties provide non-speculative support for the inference of a conspiracy. In addition, while the fact of a single investigation may not be probative, the detailed allegations of investigations into the manipulation of FX benchmark rates by regulators in seemingly every significant financial market in the world lends some credence to the conspiracy allegation." 74 F. Supp. 3d at 592. The investigations discussed above likewise provide non-speculative support for plaintiffs' antitrust conspiracy allegations. *See also Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2010) (finding fact that government "launched two new investigations into whether defendants engaged in collusion and price fixing" relevant to question of whether inference of conspiracy is reasonable).

Plaintiffs have also alleged a "plus factor." Specifically, plaintiffs have alleged a "common motive" to coordinate the manipulation of SIBOR and SOR because these rates are calculated based on submissions from each panel member. As a result, manipulation is not possible absent coordination among the submitting banks. In *ISDAfix*, the court found a common motive to conspire because "the very nature of ISDAfix suggests that any attempt to unilaterally control ISDAfix would be risky and likely futile, as any individual bank's submission to ICAP would be drowned out in the polling process by which ISDAfix was set each day." 175 F. Supp. 3d at 55. The same is true here.

Plaintiffs' so-called "economic evidence," however, does not support an inference of the existence of an antitrust conspiracy. Plaintiffs present charts indicating that the spread between SIBOR and SOR became more erratic and pronounced during the Class Period, and argue that this "indicates that both SIBOR and SOR were manipulated to artificial levels during the Class Period." FAC ¶ 137. But plaintiffs provide no explanation – other than a vague reference to the "law of one price" – as to why the SIBOR and SOR rates should necessarily be the same. As plaintiffs themselves allege, SOR is calculated in part by reference to the U.S. dollar, a variable that is entirely absent from SIBOR. FAC ¶ 103. Plaintiffs' failure to explain why this key difference between SIBOR and SOR does not account for variations between the two benchmarks renders their economic evidence irrelevant. Plaintiffs must allege with specificity why the SIBOR and SOR rate should be the same.

Finally, although I hold that plaintiffs have sufficiently alleged the existence of an antitrust conspiracy, plaintiffs have failed to allege with specificity how *each* individual defendant participated in the conspiracy. "[E]ach defendant is entitled to know how he is alleged to have conspired, with whom and for what purpose. Mere generalizations as to any particular defendant—or even defendants as a group—are insufficient." *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016) (internal citation omitted). Plaintiffs argue that they "named as Defendants the targets specifically identified in multiple government investigations, regulatory settlements, news reports, and disclosures that Defendants made to the Federal Reserve Bank of New York regarding their derivatives dealing, including in SIBOR- and SOR-based derivatives, within the United States." Dkt. No. 178 at 12. But as discussed above in the context of specific jurisdiction, plaintiffs have not shown how defendants' involvement in SIBOR-based derivatives trading – as opposed to involvement in the

SIBOR rate submission process – was part of the conspiracy. Accordingly, the antitrust claim is dismissed as alleged against all defendants other than those who served on the SIBOR panel during the relevant period. *See* FAC ¶ 100.[5]

ii. Antitrust Standing

"To satisfy the antitrust standing requirement, a private antitrust plaintiff must plausibly allege that (i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations." *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157 (2d Cir. 2016). Thus, "[e]ven a plaintiff that has suffered an antitrust injury must also demonstrate that it is a suitable plaintiff, i.e., an 'efficient enforcer' of the antitrust laws. *Id*. at 157–58 (quoting *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 438 (2d Cir. 2005)).

1. Antitrust Injury

"Generally, when consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions, they suffer injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Gelboim*, 823 F.3d at 772 (internal

[5] The defendants alleged to have served on the panel are: Australia and New Zealand Banking Group, Bank of America N.A., The Bank of Tokyo-Mitsubishi UFJ, Ltd., BNP Paribas, Citibank N.A., Credit Suisse AG, DBS Bank Ltd, Deutsche Bank AG, The Hongkong and Shanghai Banking Corporation Ltd., ING Bank N.V., JPMorgan Chase Bank, N.A., Oversea-Chinese Banking Corporation Ltd, The Royal Bank of Scotland PLC, Standard Chartered Bank, UBS AG, and the United Overseas Bank Ltd.

quotation marks and citation omitted). In *Gelboim*, the Second Circuit held that the plaintiffs had sufficiently alleged an antitrust injury because they claimed "violation (and injury in the form of higher prices) flowing from the corruption of the rate-setting process, which (allegedly) turned a process in which the Banks jointly participated into conspiracy." 823 F.3d at 775. Plaintiffs have alleged the same injury here, and numerous courts have held that benchmark price or rate manipulation gives rise to an antitrust injury. *See In re Platinum & Palladium Antitrust Litig.*, 2017 WL 1169626, at *20.

2. Efficient Enforcer

"The efficient enforcer inquiry turns on: (1) whether the violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to recover duplicative damages or that damages would be difficult to apportion among possible victims of the antitrust injury. Built into the analysis is an assessment of the 'chain of causation' between the violation and the injury." *Gelboim*, 823 F.3d at 772 (internal citations omitted).

Plaintiff FrontPoint is an efficient enforcer. FrontPoint alleges that it "engaged in U.S.-based swap transactions that were priced, settled, and benchmarked based on SIBOR during the Class Period," including transactions "based on one-month SGD SIBOR, between January 2010 and May 2010 directly with Defendants Deutsche Bank AG and

Citibank, N.A." FAC ¶ 142. "Evaluating the directness of an injury is essentially a proximate cause analysis that hinges upon 'whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.'" *Silver Fix*, 213 F. Supp. 3d at 552 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014)). FrontPoint alleges that it traded in derivatives whose price was directly impacted by the SIBOR rate. This satisfies a proximate cause inquiry, even if other variables are involved. It is difficult to think of a more direct victim than FrontPoint, given that it entered into transactions directly with two of the defendants. Regarding the speculative nature of damages, it is true that FrontPoint has not alleged any facts regarding the damages it claims to have incurred. The Court has no doubt that should plaintiffs prevail on the merits in this case, calculating damages would be an extremely complex endeavor. However, the potential for this difficulty and uncertainty is not grounds for dismissing plaintiffs' antitrust claim, for "potential difficulty in ascertaining and apportioning damages is not ... an *independent* basis for denying standing where it is adequately alleged that a defendant's conduct has proximately injured an interest of the plaintiff's that the statute protects." *Lexmark*, 134 S. Ct. at 1392.

Plaintiff Sonterra, however, is not an efficient enforcer, and thus lacks antitrust standing. Plaintiff Sonterra alleges that it "engaged in SGD foreign exchange forwards between September 2010 and August 2011." Sonterra alleges that it was damaged "when it paid more for or received less on its foreign exchange forward transactions." FAC ¶ 143. Sonterra does not allege that it traded directly with any of the defendants.

Based on these allegations, Sonterra has failed to establish any connection between defendants' conduct and its alleged injury. Plaintiffs allege that the price paid for a foreign exchange forward contract "is calculated using a formula that incorporates both SGD SOR and USD SIBOR as components of price." FAC ¶ 119. In support of this conclusory statement, plaintiffs refer to a chart which they claim "shows that SIBOR and SOR rates are used to adjust the spot price of the USD-SGD currency pair to account for interest earned over the length ("daycount") of the agreement." *Id*. The Court cannot draw any reasonable inferences from the chart referenced in the FAC. If the foreign exchange forward contracts that Sonterra entered into incorporated SIBOR and SOR as a component of price, Sonterra should allege why this is so in plain, intelligible sentences, rather than refer to an obtuse, ambiguous chart. Since defendants' alleged manipulation of SIBOR and SOR had no impact on the currency exchange forwards that Sonterra traded in, Sonterra is not an efficient enforcer and does not have antitrust standing.

In light of this holding, I need not address whether Sonterra also lacks antitrust standing because it did not enter into transactions directly with any of the defendants. This "umbrella standing" inquiry hinges, at least in part, on how remote Sonterra's injury is from defendants' conduct. The answer to that question cannot be answered without first understanding whether the transactions

Sonterra participated in had any relationship to the benchmarks at issue, and if so, to what extent.

iii. Foreign Trade Antitrust Improvements Act

Plaintiffs' antitrust claim is not barred by the Foreign Trade Antitrust Improvements Act ("FTAIA"). That statute provides that antitrust actions may not be maintained with respect to "conduct involving trade or commerce ... with foreign nations unless -- (1) such conduct has a direct, substantial, and reasonably foreseeable effect-- (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." 15 U.S.C. § 6a. Plaintiffs have sufficiently alleged that defendants' conduct had a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, and in "adopting the FTAIA, Congress expressly endorsed an extraterritorial application of the Sherman Act." *Sullivan*, 2017 WL 685570, at *22.

iv. Statute of Limitations and Fraudulent Concealment

Plaintiffs' antitrust claim is not barred by the Sherman Act's four-year statute of limitations. It is true that the class period ends on December 21, 2011, and that plaintiffs did not file this action until July 5, 2016. However, plaintiffs have appropriately invoked the doctrine of fraudulent concealment, the availability of which is subject to a specific standard in the antitrust context. An "antitrust plaintiff may prove fraudulent concealment sufficient to toll the running of the statute of limitations if he establishes (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part." *State of N.Y. v. Hendrickson Bros.*, 840 F.2d 1065, 1083 (2d Cir. 1988).

Although Circuit courts have adopted different standards with respect to the first prong, the Second Circuit "has adopted the more lenient standard requiring plaintiffs to prove concealment by showing either that the defendants took affirmative steps to prevent plaintiffs' discovery of the conspiracy, or that the conspiracy itself was inherently self-concealing." *In re Nine W. Shoes Antitrust Litig.*, 80 F. Supp. 2d 181, 192 (S.D.N.Y. 2000) (citing *Hendrickson Bros.*, 840 F.2d at 1083). Here, plaintiffs have plausibly alleged that the alleged conspiracy was inherently self-concealing, for by its very nature, the conspiracy could not succeed unless kept a secret. FAC ¶¶ 155-58; *see also ISDAfix*, 175 F. Supp. at 66 (finding antitrust plaintiffs plausibly alleged fraudulent concealment where "the alleged conspiracy in these cases was secretive and covert by its very nature—it was an agreement that was 'designed to endure over a period of time' and, '[i]n order to endure, it [had to] remain concealed' from the market." (quoting *Hendrickson Bros.*, 840 F.2d at 1083)).

With respect to the third prong, defendants argue that plaintiffs have failed to allege specific facts showing that they investigated their claims with "due diligence" during the limitations period. This overstates the standard. Plaintiffs must allege only that their "continuing ignorance was not attributable to lack of diligence" on their part. Here, plaintiffs have alleged that it was defendants' concealment, and not a lack of diligence on their part, that prevented them from knowing of their claim prior to public disclosure of the MAS investigation in 2013. FAC ¶¶ 158-59. Defendants counter that the data used to construct plaintiffs' "economic evidence" was available to plaintiffs during the limitations period, and therefore was not concealed. But if this argument were accepted, fraudulent concealment would never be available to plaintiffs in the antitrust context because data regarding the affected price is always available to the public throughout the duration of the conspiracy. *See In re Foreign Exch. Benchmark Rates Antitrust Litig.* ("*FOREX II*"), 2016 WL 5108131, at *16 (S.D.N.Y. Sept. 20, 2016) (rejecting argument that availability of transaction data put plaintiffs on notice of defendants' alleged price-fixing conspiracy). Accordingly, plaintiffs' antitrust claim is not barred by the statute of limitations.

c. RICO

"RICO recognizes a private right of action when a defendant commits a predicate act that is 'indictable' under specified federal criminal statutes." *Sullivan*, 2017 WL 685570, at *32. Here, plaintiffs' RICO claim is based on defendants' alleged violation of the wire fraud statute. *See* 18 U.S.C. § 1343.

"Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco, Inc. v.*

European Cmty., 136 S. Ct. 2090, 2100 (2016). Plaintiffs' RICO claim fails because it violates this presumption against extraterritoriality. RICO applies extraterritorially "only to the extent that the predicates alleged in a particular case themselves apply extra extraterritorially." *Id.* at 2102. Here, the only predicate offense plaintiffs allege is wire fraud, which does not apply extraterritorially. *See Petroleos Mexicanos v. SK Eng'g & Const. Co.*, 572 F. App'x 60, 61 (2d Cir. 2014) (holding that "wire fraud cannot serve as such an extraterritorial predicate" and that "because [plaintiff] relies exclusively on the wire fraud statute in pleading predicate acts, it has failed to state a claim sufficient to support extraterritorial application of RICO."); *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 141 (2d Cir. 2014), *rev'd and remanded on other grounds*, 136 S. Ct. 2090 (2016) (seeing "no basis for finding a manifestation of congressional intent that the mail fraud statute apply extraterritorially.'").

As a result, to state a RICO claim predicated on wire fraud, plaintiffs must allege "sufficient domestic conduct for the claims involving ... wire fraud ... to sustain the application of RICO." *Laydon*, 2015 WL 1515487, at *8 (quoting *RJR Nabisco*, 764 F.3d at 141). Plaintiffs' only well-pled allegation concerning defendants' use of U.S. wires to manipulate SIBOR and SOR is that defendants submitted rates to Thomson Reuters, which then disseminated the daily rate throughout the United States. FAC ¶ 15. However, "simply alleging that some domestic conduct occurred cannot support a claim of domestic application." *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (dismissing civil

RICO claim because the "slim contacts with the United States alleged by [plaintiff] are insufficient to support extraterritorial application of the RICO statute."). As the Supreme Court has explained, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010).

In other cases involving alleged manipulation of foreign market interest rate benchmarks, courts have declined to allow RICO claims to proceed where the use of domestic wires is incidental, as is the case here. In *Sullivan v. Barclays PLC*, 2017 WL 685570 (S.D.N.Y. Feb. 21, 2017), for example, the complaint made "generalized allegations about the defendants' use of interstate wires to coordinate the Euribor scheme," as well as other allegations that are absent from this case, such as phone calls involving U.S. participants. The court held that the allegations did not "plausibly allege that any acts of wire fraud were primarily domestic in nature," and emphasized that virtually all of the conduct at issue occurred in Europe, not the United States. *Id*. at *33. The same is true here. Even if defendants' allegedly wrongful conduct had an impact on the United States, any act of wire fraud committed in furtherance of the conspiracy was not sufficiently domestic as to overcome the presumption against extraterritoriality.

Plaintiffs' reliance on criminal RICO cases is unfounded, for extraterritorial application of RICO in civil cases presents distinct considerations absent in the criminal context. *See RJR Nabisco*, 136 S. Ct. at

2107 ("Allowing recovery for foreign injuries in a civil RICO action, including treble damages, presents [a] danger of international friction."); *Sullivan*, 2017 WL 685570, at *32 ("A private plaintiff seeking extraterritorial application of RICO is subject to considerations that do not apply to criminal prosecutions under the statute, and must specifically allege a domestic injury.").

Plaintiffs, of course, argue that the scope of defendants' conspiracy was not limited to the submission of manipulated rates, but also included defendants' trading of SIBOR- and SOR-based derivatives with U.S. counterparties. As discussed elsewhere in this opinion, plaintiffs have failed to allege facts sufficient to support this theory.[6]

d. Implied Covenant of Good Faith and Fair Dealing

Plaintiff FrontPoint has failed to state a plausible claim for breach of the implied covenant and good faith and fair dealing against defendants Deutsche Bank and Citibank. FrontPoint alleges that it entered into ISDA Master Agreements with both Deutsche Bank and Citibank, and that it entered into twenty-four transactions with these defendants, some of which involved SIBOR-based derivatives. FAC ¶¶ 19, 142. But, as previously discussed in the context of personal jurisdiction, FrontPoint has failed to allege that any of the transactions involving SIBOR-based derivatives were entered into pursuant to the ISDA

---

[6] Because I have dismissed plaintiffs' RICO claims on extraterritoriality grounds, I need not address whether plaintiffs have adequately pled the elements of a RICO claim.

Master Agreement. Nor does FrontPoint allege a breach of the ISDA Master Agreement. Instead, FrontPoint alleges that it "entered into binding and enforceable contracts with Defendants Deutsche Bank and Citibank in connection with transactions for SIBOR-based derivatives," and that "each contract includes an implied covenant of good faith and fair dealing." FAC ¶¶ 195-96.

"As a matter of law," however, "a contract claim asserting breach of the implied covenants of good faith and fair dealing does not survive a motion to dismiss when it is based only on generalized allegations and grievances." *U.S. ex rel. Smith v. New York Presbyterian Hosp.*, 2007 WL 2142312, at *16 (S.D.N.Y. July 18, 2007). Furthermore, "the implied covenant arises only in connection with the rights or obligations set forth in the terms of the contract." *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR II*"), 962 F. Supp. 2d 606, 632 (S.D.N.Y. 2013) (internal quotation marks and citation omitted). Here, FrontPoint has failed to allege any specific facts regarding the individual contracts it entered into with defendants Deutsche Bank and Citibank to establish a plausible basis for a claim of the implied covenant of good faith and fair dealing. FrontPoint refers to "24 swap transactions," but it does not identify the dates of those transactions, who the counterparties were, the value of the swap, or any of the terms and conditions. Nor has FrontPoint alleged with any degree of specificity the rights it enjoyed under the contracts, or how defendants' conduct had "the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Sec. Plans, Inc. v. CUNA Mut. Ins. Soc.*, 769 F.3d 807, 817 (2d Cir. 2014) (internal quotation marks omitted). Such generalized allegations are insufficient. *See Warren v. John Wiley & Sons, Inc.*, 952 F. Supp. 2d 610, 625 (S.D.N.Y. 2013) (rejecting plaintiff's attempt to "plead over 270 breaches of contract with a handful of sweeping, conclusory allegations.").

e. Unjust Enrichment

Plaintiffs' unjust enrichment claim fails for two reasons. First, because "unjust enrichment is a claim in quasi-contract, it requires some relationship between plaintiff and defendant." *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR I*"), 935 F. Supp. 2d 666, 737 (S.D.N.Y. 2013), *rev'd on other grounds, sub nom. Gelboim v. Bank of Am. Corp.*, 823 F.3d 759 (2d Cir. 2016). "[W]hile 'a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment,' there must exist a relationship or connection between the parties that is not 'too attenuated.'" *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511,516 (N.Y. 2012) (quoting *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215-16 (N.Y. 2007)). Here, with the exception of FrontPoint's transactions with Deutsche Bank and Citibank, neither plaintiff has alleged that it entered into a transaction with any of the defendants, or that it otherwise had a relationship with any of the defendants. The connection is therefore "too attenuated."

Second, FrontPoint has alleged that it entered into transactions with defendants Deutsche Bank and Citibank. Those transactions, however, were governed by a contract (albeit a contract that FrontPoint provides no information about). A claim for unjust enrichment is only actionable "in the absence of an actual agreement between the parties concerned." *IDT Corp. v. Morgan Stanley Dean Witter & Co.,* 12 N.Y.3d 132, 142 (N.Y. 2009); *see also Cox v. NAP Const. Co.*, 10 N.Y.3d 592, 607 (N.Y. 2008) ("[A] party may not recover in ... unjust enrichment where the parties have entered into a contract that governs the subject matter."). Accordingly, defendants' motion to dismiss plaintiffs' unjust enrichment claim is granted. The claim is dismissed with prejudice and without leave to amend.

CONCLUSION

For the reasons stated herein, defendants' motion is granted in part and denied in part, as follows:

- The Foreign Defendants' (Australia and New Zealand Banking Group, Ltd.; Barclays plc; Barclays Bank plc; BNP Paribas, S.A.; Crédit Agricole Corporate and Investment Bank; Crédit Agricole S.A.; Credit Suisse Group AG; Credit Suisse AG; Credit Suisse International; Commerzbank AG; DBS Bank Ltd.; DBS Group Holdings Ltd; Deutsche Bank AG; HSBC Holdings plc; ING Groep N.V.; ING Bank N.V.; Macquarie Bank Ltd.; Macquarie Group Ltd.; The Royal Bank of Scotland plc; The Royal Bank of Scotland Group plc; RBS Securities Japan Limited; Standard Chartered Bank; Standard Chartered PLC; The Bank of Tokyo-Mitsubishi UFJ, Ltd.; The Hong Kong and Shanghai Banking Corporation Limited; The Oversea-Chinese Banking Corporation Ltd.; UBS AG, UBS Securities

Japan Co. Ltd.; and United Overseas Bank Limited) motion to dismiss for lack of personal jurisdiction is granted. All claims against the Foreign Defendants are dismissed without prejudice and with leave to amend to make plausible allegations of personal jurisdiction over the Foreign Defendants.

- Defendants' motion to dismiss the complaint for lack of Article III standing is denied.
- Defendants' motion to dismiss Count I (antitrust) as alleged by plaintiff FrontPoint is denied as alleged against the defendants who served on the SIBOR panel (Australia and New Zealand Banking Group, Bank of America N.A., The Bank of Tokyo-Mitsubishi UFJ, Ltd., BNP Paribas, Citibank N.A., Credit Suisse AG, DBS Bank Ltd, Deutsche Bank AG, The Hongkong and Shanghai Banking Corporation Ltd., ING Bank N.V., JPMorgan Chase Bank, N.A., Oversea-Chinese Banking Corporation Ltd, The Royal Bank of Scotland PLC, Standard Chartered Bank, UBS AG, and the United Overseas Bank Ltd.), but is granted with respect to all other defendants, for failure to sufficiently allege their involvement in the conspiracy. FrontPoint is granted leave to amend to make plausible allegations showing the non-panel defendants' involvement in the alleged antitrust conspiracy.

- Defendants' motion to dismiss Count I (antitrust) as alleged by plaintiff Sonterra is granted, for failure to establish any connection between defendants' conduct and its alleged injury. Sonterra's antitrust claim, based on an alleged conspiracy to manipulate SIBOR and/or SOR, is dismissed without prejudice and with leave to amend to make plausible allegations showing that defendants' alleged manipulation of SIBOR and/or SOR impacted the price of the currency exchange forwards that Sonterra traded in. Plausible allegations showing this connection are likely to make Sonterra an efficient enforcer.
- Defendants' motion to dismiss Counts II and III (RICO and RICO conspiracy) is granted. Counts II and III are dismissed without prejudice and with leave to amend to make plausible allegations showing sufficient domestic conduct to support an extraterritorial application of RICO.
- Defendants Deutsche Bank and Citibank's motion to dismiss Count IV (Frontpoint's claim for breach of the covenant of good faith and fair dealing) is granted. Count IV is dismissed without prejudice and with leave to amend to make plausible allegations supporting the claim.
- Defendants' motion to dismiss Count V (unjust enrichment) is granted as a matter of law. Count V is dismissed with prejudice and without leave to amend.

The clerk shall terminate the motion (Dkt. No. 144). Plaintiffs shall file a second amended complaint by September 18, 2017. Defendants shall answer or move by October 18, 2017.

SO ORDERED.

Dated: August 18, 2017
New York, New York

s/Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

<table>
<tr>
<td>FRONTPOINT ASIAN EVENT DRIVEN FUND, L.P., and SONTERRA CAPITAL MASTER FUND, LTD., on behalf of themselves and all others similarly situated,,

Plaintiffs,

v.

CITIBANK, N.A., CITIGROUP INC., BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., THE ROYAL BANK OF SCOTLAND PLC, THE ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES JAPAN LIMITED, UBS AG, UBS SECURITIES JAPAN CO. LTD., ING GROEP N.V., ING BANK N.V., ING CAPITAL MARKETS LLC, BNP PARIBAS, S.A., BNP PARIBAS NORTH AMERICA, INC., BNP</td>
<td><u>OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS</u>

16 Civ. 5263 (AKH)

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:

DATE FILED: <u>10/4/18</u></td>
</tr>
</table>

PARIBAS SECURITIES :
CORP., BNP PARIBAS PRIME :
BROKERAGE, INC., :
OVERSEA-CHINESE :
BANKING CORPORATION :
LTD., BARCLAYS PLC, :
BARCLAYS BANK PLC, :
BARCLAYS CAPITAL INC., :
DEUTSCHE BANK AG, :
CREDIT AGRICOLE :
CORPORATE AND :
INVESTMENT BANK, :
CREDIT AGRICOLE S.A., :
CREDIT SUISSE GROUP AG, :
CREDIT SUISSE AG, CREDIT :
SUISSE INTERNATIONAL, :
STANDARD CHARTERED :
BANK, STANDARD :
CHARTERED PLC, DBS BANK:
LTD., DBS GROUP :
HOLDINGS LTD, DBS :
VICKERS SECURITIES (USA) :
INC., UNITED OVERSEAS :
BANK LIMITED, UOB :
GLOBAL CAPITAL, LLC, :
AUSTRALIA AND NEW :
ZEALAND BANKING GROUP, :
LTD., ANZ SECURITIES, INC.,:
THE BANK OF TOKYO- :
MITSUBISHI UFJ, LTD., THE :
HONGKONG AND SHANGHAI:
BANKING CORPORATION :
LIMITED, HSBC BANK USA, :
N.A., HSBC HOLDINGS PLC, :

HSBC NORTH AMERICA	:
HOLDINGS INC., HSBC USA	:
INC., MACQUARIE BANK	:
LTD., MACQUARIE GROUP	:
LTD., COMMERZBANK AG,	:
AND JOHN DOES NOS. 1-50,	:
	:
Defendants.	:
	:
	X

ALVIN K. HELLERSTEIN, U.S.D.J.:

FrontPoint Asian Event Driven Fund, Ltd. ("FrontPoint") and Sonterra Capital Master Fund, Ltd. ("Sonterra"), filed this action on August 1, 2016, and the First Amended Complaint ("FAC") on October 31, 2016, *see* Dkt. No. 119, against 46 corporate defendants. The FAC alleges that the defendants conspired to manipulate two interest rate benchmarks, Singapore Interbank Offered Rate ("SIBOR") and the Singapore Swap Offer Rate ("SOR"), in violation of the Sherman Act, *see* 15 U.S.C. § 1, *et seq*. (Count I), the Racketeer Influenced and Corrupt Organizations Act, *see* 18 U.S.C. § 1961, *et. seq* (Count II, III), and in breach of the implied covenant of good faith and fair dealing (Count IV).[1]

Defendants moved to dismiss the FAC pursuant to Fed. R. Civ. P. 12(b)(1), (6), *see* Dkt. No. 144, identifying a range of jurisdictional and substantive deficiencies, including failure to make plausible allegations of personal jurisdiction over the foreign defendants and failure to state plausible claims for relief. On August 18, 2017, I issued an Opinion and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *see* Dkt. No. 225; *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, 2017 WL 3600425 (S.D.N.Y. Aug. 18, 2017) ("*SIBOR I*"), ruling on the issues raised by defendants and providing Plaintiffs with leave to amend with instructions to cure the deficiencies. Plaintiffs filed

---

[1] Count V (Unjust Enrichment) was dismissed in *SIBOR I*. *See infra*.

their Second Amended Complaint ("SAC") on September 18, 2017. *See* Dkt. No. 230.

Pending now before the Court is defendants' motion to dismiss the SAC, *see* Dkt. No. 238, which identifies a range of jurisdictional and substantive deficiencies that defendants argue were not cured by the SAC. I heard oral argument on the motions on April 12, 2018. *See* Dkt. No. 282.

SECOND AMENDED COMPLAINT

This is an action against 46 corporate defendants, comprising parents, subsidiaries, and affiliates of 20 international banking institutions who participated in the rate-setting process of three interest rate benchmarks, USD SIBOR, SGD SIBOR, and SOR. The SIBOR benchmark rate represents "the cost of borrowing funds in the Singapore market and reflects the average competitive rate of interest charged on interbank loans denominated in U.S. Dollars ("USD SIBOR") and Singapore dollars ("SGD SIBOR")" (together "SIBOR"). SAC at ¶ 163. These rates are collected and calculated daily by a trade group, Association of Banks in Singapore ("ABS"), comprising banks that submit to a panel each day "the interest rate at which it could borrow U.S. and Singapore dollars in the interbanks market" (collectively "Panel Members"). ¶ 164. Thomson Reuters, alleged to be an agent of ABS, gathers the quotes submitted by the Panel Members, applies a set formula, dropping a number of the highest and lowest quotes and averaging the remainder, and disseminates daily the resulting average rate to subscribers in the United States and other countries. SOR, the third benchmark rate, also represents the cost of borrowing Singapore dollars, but is calculated differently; it is based on the prices of foreign exchange swaps, transactions where parties agree to exchange Singapore dollars for U.S. dollars on a future date. ¶165. For at least part of the Class Period, SOR was calculated based on the volume-weighted average price of such swap transactions. *Id.* In total, 19 defendants are alleged to have been Panel Members, 17 defendants on the SIBOR Panel[2] and 15 (largely overlapping) defendants on the SOR Panel.[3] *See* Appendix A. Two defendants (Barclays Bank PLC and Commerzbank AG) are alleged to be members of the SOR Panel but not the SIBOR panel.

Manipulation of these rate-setting processes is central to the claims of this complaint. SIBOR and

---

[2] The defendants alleged to be on the SIBOR panel are: Australia and New Zealand Banking Group, Bank of America N.A., The Bank of Tokyo-Mitsubishi UFJ, Ltd., BNP Paribas, Citibank N.A., Credit Suisse AG, DBS Bank Ltd, Deutsche Bank AG, The Hongkong and Shanghai Banking Corporation Ltd., ING Bank N.V., JPMorgan Chase Bank N.A., Oversea-Chinese Banking Corporation Ltd, The Royal Bank of Scotland PLC, Standard Chartered Bank, UBS AG, United Overseas Bank Ltd., and Credit Agricole CIB *See* ¶ 161. Defendant ING Bank N.V. submitted a declaration stating that neither it nor its subsidiary made rate submissions to the ABS. *See* Dkt. No. 161 ¶ 6. On a motion to dismiss, I accept as true all well pleaded facts.

[3] The defendants alleged to be on the SOR panel are: Bank of America N.A., Citibank N.A., JPMorgan Chase Bank, N.A., Barclays Bank PLC, The Royal Bank of Scotland PLC, The Bank of Tokyo-Mitsubishi UFJ, Ltd., Commerzbank, Credit Agricole CIB, Credit Suisse AG, Deutsche Bank AG, The Hongkong and Shanghai Banking Corporation Ltd., Oversea-Chinese Banking Corporation Ltd., Standard Chartered Bank, UBS AG, and DBS Bank Ltd. *See* ¶ 162.

SOR are often used to price various types of derivatives, or financial products whose value is derived from a different asset, and changes in the SIBOR and SOR rates can, therefore, be to the detriment or benefit of those engaged in such derivative transactions. According to the SAC, between 2007 and 2011, defendants conspired to manipulate SIBOR and SOR, or to submit to the panel rate quotes not reflecting the true cost of borrowing, with the purpose of profiting from this manipulation. ¶¶ 3–5. Plaintiffs allege that defendants submitted artificially high or low SIBOR and SOR rates so that the "derivative positions" of their traders, long (*i.e.* betting on an increase in price) or short (*i.e.*, betting on a decrease in price), would be benefited. ¶¶ 21–24. The traders, located worldwide, would request that Panel Members submit rates favorable to their positions, ¶¶ 207–216, and the Panel Members are alleged to have obliged these requests, conspiring with fellow Panel Members to push the rates for their "collective financial benefit." ¶ 167.

The SAC identifies at least four types of derivatives that incorporate either USD SIBOR, SGD SIBOR, or SOR—interest rate swaps, forward rate agreements, foreign exchange forwards, and foreign exchange swaps, ¶¶ 177–198—and Plaintiffs allege that they traded some of these derivatives during the period when defendants distorted the rates. ¶ 8. First, Plaintiff FrontPoint alleges that it engaged in "U.S.-based swap transactions that were priced, settled, and benchmarked based on SIBOR," specifically "at least 24 swap transactions, including based on one-month SGD SIBOR, between January 2010 and May 2010 directly with Defendants Deutsche Bank AG and

Citibank, N.A." ¶ 229. A "swap transaction" allows two parties to exchange interest rate payment obligations on a principal amount. ¶ 177. Second, Plaintiff Sonterra alleges that it "engaged in U.S.-based transactions for SIBOR-based derivatives during the Class Period" with third-parties, specifically "USD/SGD foreign exchange forward transactions between September 2010 and August 2011." ¶ 230. A foreign exchange forward is an agreement to exchange one currency for another, ¶¶ 180–193, and USD/SGD foreign exchange forwards are alleged to be "priced using a formula that incorporates SOR and USD SIBOR as components of price." ¶ 231. The conduct forming the basis of Plaintiffs' claims thus occurred in two locations, in Singapore where Panel Members allegedly conspired and submitted manipulated rates, and in the United States where Plaintiffs allegedly traded U.S.-based SIBOR- and SOR-based derivatives that were priced on the manipulated rates.

According to the SAC, defendants also had substantial presence in the U.S., establishing trading operations for transacting derivatives, including SIBOR- and SOR-based derivatives. For example, the SAC alleges that 14 of the defendants had trading "hubs" in New York or Connecticut, ¶¶ 25–28, and that, according to a Federal Reserve Bank of New York survey, 13 "dealer defendants" traded SIBOR- and SOR-based derivatives in the U.S. ¶¶ 70–71. The SAC also alleges, attaching screenshots from "Bloomberg" terminals, that 13 defendants offered for sale SIBOR- and SOR-based derivatives in the United States. ¶¶ 73–75. These allegations do not specify which defendants engaged in such trading or offerings. The

46 corporate defendants comprise 20 banking institutions, as mentioned, and the SAC refers to defendants by their institutional names without specifying which affiliate or subsidiary engaged in the activity. For example, the SAC refers to "Barclays," instead of to one of the three individual Barclays defendants (Barclays Bank PLC, Barclays Capital Inc., Barclays PLC), in alleging that Barclays offered SIBOR-based derivatives on its Bloomberg Terminal. ¶ 74.

DISCUSSION

I. Antitrust Claims

1. Antitrust Conspiracy

SIBOR I held that the FAC plausibly alleged an antitrust conspiracy against the Panel Members, noting that while "plaintiffs have failed to identify any specific interbank communications between or among defendants regarding the alleged manipulation . . . . plaintiffs need not allege this type of 'smoking gun' evidence to survive a motion to dismiss." *SIBOR I*, WL 3600425, at *10. Defendants request that I reconsider this holding with respect to the SAC. I decline to do so.

As I noted in *SIBOR I*, as a basis for finding the conspiracy allegations plausible against the Panel Members, various governmental "investigations and findings, while not direct or conclusive proof that a conspiracy existed, provide circumstantial evidence from which an inference of coordinated conduct may be shown." *Id*. For example, the Monetary Authority of Singapore (MAS), referring to the SIBOR and SOR rates and reviewing the period from 2007 until 2011, found "attempts [by traders] to inappropriately influence benchmark submissions" and failures on the part of senior management of the Panel banks "to institute robust rate submission controls and processes" to prevent such manipulations. *See* SAC at ¶ 10; Ex. F at 2. According to the MAS, "133 traders [participated] in attempts to inappropriately influence the submissions of financial benchmarks," *id.*, three-quarters of whom resigned or were asked to leave their positions over such misconduct, and the rest of which were otherwise disciplined, *see id.* at Ex. E. at 1. "[A]t the pleading stage, in order to overcome a motion to dismiss, [plaintiffs must] allege enough facts to support the inference that a conspiracy actually existed," and a court may draw such an inference from circumstantial facts where the plaintiff alleges "conscious parallelism" and "plus factors," including "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). That 133 traders attempted to manipulate SIBOR and SOR, and were disciplined for their infractions, sufficiently raises the specter of common motive to conspire, and satisfies the "plus-factors" to state a claim for antitrust conspiracy.

The plausibility of the conspiracy allegations is further buttressed by various regulatory settlements referenced in the SAC, which give context to the manipulations alleged to have occurred here. *See* SAC at ¶¶ 9–16, 199–207. The CFTC, in a settlement with the Royal Bank of Scotland[4] ("RBS") regarding a benchmark manipulation scheme, found that RBS traders "often attempted to manipulate the fixings of Yen and Swiss Franc LIBOR" in order "to profit RBS's significant derivatives and money market positions that were indexed to and therefore valued based on Yen and Swiss Franc LIBOR." SAC, Ex. A at 3–4. According to the CFTC, RBS traders engaged in similar misconduct in connection with SIBOR and SOR. *Id.* at 4 n.3; *see also* Ex. B at ¶¶ 48, 54 (Final Notice of English Financial Services Authority to RBS referencing manipulation of SIBOR and SOR rates); Ex. C at 38 n.21 (CFTC settlement with UBS referencing manipulation of SIBOR and SOR rates); Ex. D at 3 n.3 (CFTC settlement with Deutsche Bank referencing manipulation of SIBOR and SOR rates). In light of the MAS findings, read in context of related regulatory settlements, I cannot at this pleadings stage of the litigation find that the allegations do not plausibly allege an antitrust conspiracy.

I recognize that other district courts have reached a contrary conclusion, ruling that a "trader-based" conspiracy is not plausible. Judge Buchwald, for example, distinguishes between a trader-based conspiracy and a "suppression-" or "reputation-based" conspiracy, and finds only the latter plausible. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 (NRB), 2016 WL 7378980, at *2 (S.D.N.Y. Dec. 20, 2016) (*LIBOR VI*). In a suppression- or reputation-based conspiracy, panel banks conspire to suppress (not inflate) rates with the

---

[4] Specifically, Royal Bank of Scotland plc and RBS Securities Japan Limited.

purpose of signaling to the financial markets the banks' collective health, or good reputation, as measured by lower interest rates. This conspiracy is not motivated by profiting from derivative-based trading, and the participants all have the identical motivation to suppress rates. By contrast, in a trader-based conspiracy, where traders request that affiliates submit rates favorable to their derivative positions, the Panel Members submitting the rates have no consistent motivation to manipulate the rates upward or downward. The value of a given manipulation to an individual Panel Member depends on the derivative position held by their affiliate trader, a position likely to be inconsistent with positions held by other Panel Members at any point in time.

According to Judge Buchwald, allegations of a trader-based conspiracy are implausible for two reasons. First, only intra-bank collusion makes sense if traders are alleged to have communicated with rate-submitting affiliate companies within the same banking group. To state a claim for antitrust relief, however, the complaint must allege inter-bank collusion, or collusion between and among independent banking entities. *See LIBOR VI*, 2016 WL 7378980 at *3. Second, Panel Members likely differ in their respective trading positions, some wishing an upward manipulation and some a downward manipulation. Such inconsistent positions, Judge Buchwald reasons, makes an inter-bank trader-based conspiracy difficult to accomplish. *See id.* ("If, as plaintiffs suggest, the conspiracy were profit-motivated, it would have required all of the sixteen panel banks to have made a parallel decision to be net borrowers of money over the suppression period in the

LIBOR-based lending market."). Judge Stein has similarly rejected the plausibility of trader-based conspiracies. *See Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 55 (S.D.N.Y. 2017) ("[T]he simpler explanation is that the banks may have been independently engaging in intra-defendant manipulation by submitting false CHF LIBOR quotes through requests from their own traders to those in the same bank who submit the quote to the BBA.").

Other district courts, however, have found trader-based conspiracies plausible, and I find so as well. In *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44 (S.D.N.Y. 2016), for example, defendants participated in setting a benchmark rate (ISDAfix), and the complaint alleged (as here) that the "the Defendant Banks manipulated daily ISDAfix rates to benefit their own trading positions." 175 F. Supp. 3d 44 at 51. In finding the conspiracy allegations plausible, Judge Furman rejected defendants' argument that a "conspiracy to move ISDAfix 'makes no economic or logical sense' unless the Defendant Banks' positions 'were aligned throughout the putative class period.'" *Id.* at 55 (quoting Defendants' Mem. Law). Judge Furman held that the allegations of the complaint that "[t]here were more profits to be earned for Defendants in maintaining the shared ability to manipulate ISDAfix over the long term than there were to be lost due to a divergence of interest on any particular day," *id.* (quoting the Amended Complaint), were plausible. I hold also that the allegations of a trader-based conspiracy are plausible. 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. A trader-based conspiracy does not preclude the possibility of inter-bank communication, and, to the contrary, while traders may have been motivated by their own profits, they could not accomplish their goals to the extent desired without colluding with traders at other banks.

The scale and breadth of the alleged conspiracy further supports the conclusion that it included inter-bank communications. The MAS implicated traders across Panel Member banks, and the regulatory settlements repeatedly refer to communications among traders at different banks. The MAS, for example, penalized each bank according to "the numbers of traders within the bank who attempted to inappropriately influence benchmarks, whether traders from other banks were involved, and the number of times these attempts occurred." SAC, Ex. E at 1. The CFTC, in the context of the manipulation of the LIBOR benchmark, likewise found that "RBS derivatives traders also colluded with traders at other panel banks and coordinated with interdealers brokers in attempts to manipulate" the benchmark. *See* Ex. A at 4; *see also* Ex. C. at 2 ("UBS, through certain derivatives traders, also colluded with traders at other banks and coordinated with interdealer brokers in its attempts to manipulate Yen LIBOR and

Euroyen TIBOR."). While the SAC does not allege which Panel Members on which dates colluded, I cannot at this stage of the litigation say that the SAC does not sufficiently allege common motive by the Panel Members as well as the existence of plus-factors to state an antitrust conspiracy. I also cannot distinguish between the SIBOR and SOR Panel Members in terms of the sufficiency of the conspiracy allegations against them. While the "Panel Members" in fact comprise two sets of defendants, the SIBOR Panel Members and the SOR Panel Members, the MAS findings refer to attempts to manipulate the submissions of both panels.

Finally, although I have found that the SAC plausibly alleges an antitrust conspiracy against Panel Members, the SAC does not sufficiently allege how non-Panel Members were involved in that conspiracy. There are no allegations that non-Panel Members communicated with Panel Members, or that non-Panel Members contributed to or participated in the conspiracy in some other way.[5] Instead, the allegations against these defendants are only that they traded SIBOR- and SOR-based derivatives in the United States with parties other than plaintiffs. But such trading, even if adequately alleged,[6] is an

---

[5] This is true of Deutsche Bank, RBS, and UBS as well. While the government settlements with these defendants mention generally that SIBOR and SOR manipulation requests were made, they do not describe any details about which affiliates made such requests, or when and how such requests were made.

[6] Defendants raise various issues with the sufficiency of the allegations that defendants traded SIBOR- and SOR-based securities in the U.S., including that the SAC improperly engages

innocent activity if not connected to the Panel Members' conspiracy. With respect to the FAC, *SIBOR I* dismissed non-Panel Members since "plaintiffs have not shown how [non-Panel] defendants' involvement in SIBOR-based derivatives trading – as opposed to involvement in the SIBOR rate submission process – was part of the conspiracy." *SIBOR I*, 2017 WL 3600425, at *11. The SAC, in this regard, fares no better, and fails to connect with non-conclusory allegations the trading by non-Panel Members to the manipulation of rates.

2. Antitrust Standing

"To satisfy the antitrust standing requirement, a private antitrust plaintiff must plausibly allege that (i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations." *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157 (2d Cir. 2016). That is, a plaintiff suffering an antitrust injury "must also demonstrate that it is a suitable plaintiff, i.e., an 'efficient enforcer' of the antitrust laws." *Id.* at 157-58 (quoting *Daniel v. Am. Bd. of Emergency Med*, 428 F.3d 408, 438 (2d Cir. 2005)).

a. Antitrust Injury

In *SIBOR I*, I held, following *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016), that an antitrust injury was sufficiently alleged with respect to the FAC. The SAC is materially no different, and I

---

in group-pleading. Because I find that such U.S.-based trading does not alone implicate non-Panel Members in the conspiracy I do not address these other infirmities.

hold that an antitrust injury has similarly been properly alleged.

b. Efficient Enforcer

"The efficient enforcer inquiry turns on: (1) whether the violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to recover duplicative damages or that damages would be difficult to apportion among possible victims of the antitrust injury. Built into the analysis is an assessment of the 'chain of causation' between the violation and the injury." *Gelboim*, 823 F.3d at 772 (internal citations omitted).

i. Plaintiff FrontPoint

FrontPoint alleges that it engaged in "U.S.-based swap transactions that were priced, settled, and benchmarked based on SIBOR during the Class Period," specifically "at least 24 swap transactions, including based on one-month SGD SIBOR, between January 2010 and May 2010 directly with Defendants Deutsche Bank AG and Citibank, N.A." ¶ 229. Such allegations, as I held in *SIBOR I*, are sufficient to make FrontPoint an efficient enforcer with respect to its antitrust claims.

Defendants seek the Court's clarification, however, noting that there are three benchmark rates at issue in this case—SGD SIBOR, USD SIBOR, and SOR—and that FrontPoint transacted in derivatives that incorporated only one of them, SGD SIBOR.

Defendants argue, and ask the Court to clarify, that FrontPoint is not an efficient enforcer with respect to the two benchmark rates not incorporated into its swap transactions, USD SIBOR and SOR.

I agree with Defendants. The SAC contains no allegations describing an arithmetical relationship among USD SIBOR, SGD SIBOR, and SOR. In fact, to the contrary, the SAC indicates that USD SIBOR and SGD SIBOR represent interest rates for two distinct currencies, and that SGD SIBOR and SOR are calculated by different methods. To be an efficient enforcer with respect to rates not incorporated in the swap transactions it traded in, FrontPoint must allege a relationship between these rates, showing how a conspiracy to manipulate one of these rates affects the others. The SAC has not done so, and I therefore find that FrontPoint has no standing to bring its antitrust claims against the (two) SOR-only Panel Members, or against the SIBOR Panel Members with respect to SOR or USD SIBOR.

c. Plaintiff Sonterra

Plaintiff Sonterra alleges that it transacted "in USD/SGD foreign exchange forward transactions between September 2010 and August 2011," *see* ¶ 230, and that such derivatives incorporate USD SIBOR and SOR rates into their pricing. *See* ¶¶ 180-193. Sonterra, however, did not enter into transactions directly with any of the defendants. It alleges only that it bought and sold derivatives to and from third parties, and that such derivatives incorporated benchmark rates manipulated by defendants. That Sonterra did not trade directly with any defendants is sufficient reason to dismiss Sonterra's antitrust claims.[7]

The issue regarding Sonterra is whether "umbrella standing," or standing for a consumer who deals with non-defendants and alleges injury by virtue of the defendants' conspiracy, *see Gelboim*, 823 F.3d at, 778, is sufficient to confer antitrust conspiracy. Many district courts in this circuit have considered this issue in similar contexts, and held that a plaintiff who trades with non-defendants derivatives incorporating an allegedly manipulated rate is not an efficient enforcer. *See e.g., In re Platinum*, 2017 WL 1169626, at *22 ("Examining the remaining efficient enforcers factors lends additional support to the Court's ultimate conclusion that, as in *LIBOR VI*, it is appropriate to draw a line between persons who transacted directly with Defendants and those who did not."); *Sullivan*, 2017 WL 685570, at *15 (same). I agree, and hold that Sonterra's transactions with third-parties are insufficient to give it antitrust standing to sue the defendant Panel Members. Sonterra's trading decision is an "independent decision" breaking "the chain of causation between defendants' actions and a plaintiff's injury." *LIBOR VI*, 2016 WL 7378980, at *16. Furthermore, "[c]onferring antitrust standing on those plaintiffs

---

[7] *SIBOR I* dismissed Sonterra's antitrust claims since it failed adequately to allege that foreign exchange forwards incorporate USD SIBOR and SOR. The SAC attempts to cure this deficiency, and district courts have found similar allegations sufficient. *See e.g., Sullivan*, 2017 WL 685570, at *9. Whether Sonterra has sufficiently cured this deficiency is a moot question, since I hold that Sonterra lacks antitrust standing because it is not an efficient enforcer.

who did not transact directly with defendants would open the door to highly speculative and difficult to calculate damages that would far exceed the wrongful profit made or harm caused by defendants." *Sonterra*, 277 F. Supp. 3d at 559. The antitrust claims by Sonterra are therefore dismissed.

II. Personal Jurisdiction

Of the 46 defendants, 29 are "Foreign Defendants" not subject to general jurisdiction in the U.S., including most of the Panel Members.[8] These defendants move to dismiss for lack of personal

---

[8] The Foreign Defendants are: Australia and New Zealand Banking Group, Ltd.; Barclays plc; Barclays Bank plc; BNP Paribas, S.A.; Credit Agricole Corporate and Investment Bank; Credit Agricole S.A.; Credit Suisse Group AG; Credit Suisse AG; Credit Suisse International; Commerzbank AG; DBS Bank Ltd.; DBS Group Holdings Ltd; Deutsche Bank AG; HSBC Holdings plc; ING Groep N.V.; ING Bank N.V.; Macquarie Bank Ltd.; Macquarie Group Ltd.; The Royal Bank of Scotland plc; The Royal Bank of Scotland Group plc; RBS Securities Japan Limited; Standard Chartered Bank; Standard Chartered PLC; The Bank of Tokyo-Mitsubishi UFJ, Ltd.; The Hong Kong and Shanghai Banking Corporation Limited; The Oversea-Chinese Banking Corporation Ltd.; UBS AG, UBS Securities Japan Co. Ltd.; and United Overseas Bank Limited.

The following summarizes the completion of the 46 defendants, divided along two axes:

	Panel Member (SIBOR + SOR)	**Non-Panel Member**
Foreign Defendants	16	13
Non-Foreign Defendants	3	14

jurisdiction. I deny the motion with respect to the Foreign Defendants who are also Panel Members, and grant it as to the remaining Foreign Defendants.

a. Applicable Law

"In order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists." *Thomas v. Ashcroft*, 470 F.3d 491, 495 (2d Cir.2006). This prima facie showing "must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158,163 (2d Cir.2010) (brackets omitted). Federal courts must satisfy three requirements in order to exercise personal jurisdiction over an entity: (1) the entity must have been properly served, (2) the court must have a statutory basis for exercising personal jurisdiction, and (3) the exercise of personal jurisdiction must comport with constitutional due process. *See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59-60 (2d Cir. 2012); Fed. R. Civ. P. 4(k).

The Clayton Act provides for nationwide service of process of a corporation for any action under the antitrust laws. *See* 15 U.S.C. § 22. Where a civil action arises under a federal law that provides for nationwide service of process, the relevant geographic area for assessing minimum contacts is the United States as a whole, not just New York. *See In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 207 (2d Cir. 2003) (assuming that Section 12 of the Clayton Act permits a minimum contacts analysis that "looks to a corporation's contacts with the United States as a whole to determine if the federal court's exercise of personal jurisdiction comports with due process."); *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 142 n.21 (2d Cir. 2014); *In re Platinum & Palladium Antitrust Litig.*, No. 1:14-CV-9391-GHW, 2017 WL 1169626, at *40 (S.D.N.Y. Mar. 28, 2017) (collecting cases).

Moreover, under Fed. R. Civ. P. 4(k)(2), "[f]or a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws." "Rule 4(k)(2) now allows the exercise of personal jurisdiction by a federal district court when three requirements are met: (1) the claim must arise under federal law; (2) the defendant must not be 'subject to jurisdiction in any state's courts of general jurisdiction'; and (3) the exercise of jurisdiction must be 'consistent with the United States Constitution and laws.'" *Porina v. Marward Shipping Co.*, 521 F.3d 122,127 (2d Cir. 2008) (quoting Rule 4(k)(2)).

The constitutional analysis under the Due Process Clause consists of two components, minimum contacts and reasonableness. First, courts "evaluate the quality and nature of the defendant's contacts with the forum state under a totality of the circumstances test. Where the claim arises out of, or relates to, the defendant's contacts with the forum—i.e., specific jurisdiction is asserted—minimum contacts necessary to support such jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 170 (2d Cir. 2013) (internal quotations marks and citation omitted). Single acts of commercial activity, when forming the basis of a plaintiff's claims, can satisfy the constitutional requirements of Due Process. *See, e.g., Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 171 (2d Cir. 2010) ("[B]y offering bags for sale to New York consumers on the Queen Bee website and by selling bags—including at least one counterfeit Chloé bag—to New York consumers, Ubaldelli has purposefully avail[ed] [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.") (internal quotation marks omitted).

Second, "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Id.* (internal quotation marks and citations omitted). The Supreme Court has set forth five factors in considering the reasonableness of the forum. "A court must consider [1] the burden on the defendant, [2] the interests of the forum State, and [3] the plaintiff's interest in obtaining relief. It must also weigh in its determination [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and [5] the shared interest of the several States in furthering fundamental substantive social policies." *Asahi Metal Indus. Co. v. Superior*

Court of California, Solano Cty., 480 U.S. 102, 113 (1987).

Finally, 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." *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 87 (2d Cir. 2018).

b. There is Specific Jurisdiction over Panel Members, Foreign or Not

With respect to the FAC, in *SIBOR I*, I granted the Foreign Defendants' motion to dismiss for lack of personal jurisdiction, holding that the Foreign Defendants (a) had not "consented" to jurisdiction by registering branches to do business in New York, and (b) had not engaged in "suit-related conduct" in the United States, *see Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). Merely trading SIBOR- and SOR-based derivatives in the United States, I held, could not be a basis for jurisdiction since "Plaintiffs fail to allege which defendants entered into which derivative contracts, how these trades were collusive, or how they related to the alleged fixing of the SIBOR and SOR rates." *SIBOR I*, 2017 WL 3600425, at *6. I held also that conspiracy jurisdiction was unavailable since the FAC had not alleged that any defendant committed any act from within the United States in furtherance of the conspiracy.

With respect to the SAC, however, I find that FrontPoint has adequately alleged "suit-related conduct" in the United States, namely the trading of SIBOR-based derivatives in the U.S. between FrontPoint and certain Panel Members.[9] "[T]he jurisdictional relevance of an act depends on the goal of the conspiracy," *LIBOR VI*, 2016 WL 7378980, at *4, and here, as discussed, the SAC alleges a trader-based conspiracy where Panel Members conspired to manipulate rates (in Singapore) with the purpose of profiting from trading derivatives (in the United States and elsewhere). The SAC alleges that FrontPoint engaged in "U.S.-based swap transactions" directly with two Panel Members, defendants Deutsche Bank AG and Citibank, N.A, *see* ¶ 229, during the time in which the Panel Members conspired to manipulate SIBOR. Such U.S. based trading—between FrontPoint and a Panel Member—is plausibly alleged to have been collusive and related to the alleged fixing of the rates, and can therefore support the exercise of personal jurisdiction. "Where the goal of the manipulation is to profit wrongfully from transacting in a product, the places where those transactions occur (not just the places where the price manipulation took place) are jurisdictionally relevant." *Sonterra*, 277 F. Supp. 3d at 592. *But see Sullivan v. Barclays PLC*, No. 13-CV-2811 (PKC), 2017 WL 685570, at *44 (S.D.N.Y. Feb. 21, 2017) (finding no personal jurisdiction where defendants

---

[9] At this stage of the proceedings, and for the purposes of personal jurisdiction, I consider only the allegations relevant to Plaintiffs' individual, non-class claims. *See Beach v. Citigroup Alternative Investments LLC*, No. 12 CIV. 7717 PKC, 2014 WL 904650, at *6 (S.D.N.Y. Mar. 7, 2014).

traded with plaintiffs "since the presence of U.S. victims alone does not make out jurisdiction, and plaintiffs' allegations concerning defendants' misconduct does not allege a United States nexus to UBS's Euribor manipulation").

FrontPoint's contacts, furthermore, 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. The Panel's conspiracy was collectively to profit from the manipulation of SIBOR, including allowing individual members to trade and profit with unknowing victims. Deutsche Bank's and Citibank's trading with FrontPoint 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. *Cf.* SAC ¶ 70 n.24.

My holding that Plaintiffs' U.S.-based transactions are sufficient to confer jurisdiction over all Panel Members is also not inconsistent with the Second Circuit's holding in *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68 (2d Cir. 2018). In *Schwab*, plaintiffs purchased billions of dollars in debt securities in California, and alleged that they received lower returns because defendants manipulated the LIBOR rate by submitting artificially low rates in London. The court noted, in holding that there was no personal jurisdiction over defendants with respect to plaintiffs fraud claims, that "sales in California do not alone create personal jurisdiction for claims premised solely on Defendants' false LIBOR submissions in

London." *Schwab*, 883 F.3d at 83. The court reasoned that the "California transactions did not cause Defendants' false LIBOR submissions . . . nor did the transactions in some other way give rise to claims seeking to hold Defendants liable for those submissions." *Id.* Rejecting plaintiffs' argument that that the conspiracy included the purpose "to earn a profit," the court noted that "nowhere in Schwab's complaint are there allegations that Defendants undertook such [California] sales as part of the alleged conspiracy." *Id.* at 87; *see also LIBOR VI*, 2016 WL 7378980, at *9 ("[S]ales and trades of LIBOR-based products to plaintiffs in the United States are not within the scope of the reputation-motivated antitrust conspiracy.").

The deficiencies noted in *Schwab*, however, are absent in the trader-based conspiracy alleged here. *Schwab* and *LIBOR VI* regarded a reputation- or suppression-based conspiracy where defendants' purpose was, not to profit by trading derivatives, but "to project an image of financial stability to investors" by "understating their true borrowing costs." *Schwab*, 883 F.3d. at 78. But 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. Such U.S.-based trading, when alleged to be the object of the conspiracy, can support the exercise of personal jurisdiction. *See e.g., Sonterra*, 277 F. Supp. 3d at, 592; *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 CIV. 7789 (LGS), 2016 WL 1268267, at *6 (S.D.N.Y. Mar. 31, 2016).

Having found that the Panel Members "purposefully availed [themselves] of the privilege of doing business in the forum and could foresee being haled into court there," the second requirement, that the assertion of personal jurisdiction would "comport with fair play and substantial justice," *Licci*, 732 F.3d at 170, is readily met. The Panel Members are some of the world's largest financial institutions, and are alleged to have substantial presence in the U.S. There is little burden in requiring them to answer the allegations that they entered into collusive transactions in the U.S.

Finally, whereas there is jurisdiction over the Foreign Defendants who are Panel Members, there is no jurisdiction over the Foreign Defendants who are not Panel Members. There are no plausible allegations that non-Panel Members, Foreign or not, were involved in the conspiracy, *see supra*, and the mere fact that non-Panel Members traded SIBOR- and SOR-based derivatives in the United States cannot alone support jurisdiction. Such U.S. based trading, as discussed above, is an innocent activity if not connected to the Panel Members' conspiracy.

III. Venue

Under Section 12 of the Clayton Act, antitrust claims may be brought in the judicial district where a corporation is an "inhabitant" or "may be found or transacts business." 15 U.S.C. § 22. The "Venue Defendants"[10] argue that they are neither inhabitants

---

[10] The Venue Defendants are: RBS Group PLC, RBS PLC, RBS Securities Japan Limited, UBS Japan, ING Groep, ING Bank, Barclays PLC, Credit Agricole S.A., Credit Suisse Group AG,

of the Southern District of New York, nor do they transact business in the Southern District of New York, and that venue therefore is not proper. If venue is not proper under the Clayton Act, plaintiffs may not take advantage of the Clayton Act's nationwide service of process. *See Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408,423 (2d Cir. 2005) (holding that the Clayton Act's nationwide service of process applies only where the Clayton Act's venue provision, as opposed to 28 U.S.C. § 1391, is satisfied). Of the 15 Venue Defendants only three are Panel Members.[11] *See* Appendix A. The venue argument is moot as to non-Panel Members.

While venue may be improper under the Clayton Act, as the Venue Defendants' argue, venue is proper under 28 U.S.C. § 1391(c)(3), which provides that "a defendant not resident in the United States may be sued in any judicial district." 28 U.S.C. § 1391(c)(3). The Venue Defendants are all Foreign Defendants, and by defendants' own admission not subject to any state's courts of general jurisdiction. With respect to the Foreign Defendants, thus, Plaintiffs may 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.

Credit Suisse International, Standard Chartered PLC, DBS Holdings Ltd., The Hongkong and Shanghai Banking Corp. Limited, HSBC Holdings plc, and Macquarie Group Ltd.

[11] These are: The Hongkong and Shanghai Banking Co. Ltd., ING Bank N.V., and The Royal Bank of Scotland PLC.

IV. RICO Claims

The SAC alleges two RICO claims, pursuant to 18 U.S.C. § 1962(c) (conducting a RICO enterprise), and § 1962(d) (conspiracy to conduct an enterprise). According to the SAC, defendants engaged in domestic RICO predicate acts, specifically domestic wire fraud, *see* 18 U.S.C. § 1343; SAC at ¶ 265, by, among other things, directing Thomson Reuters to disseminate SIBOR and SOR rates in the U.S., and trading in the U.S. SIBOR- and SOR-based derivatives. Defendants move to dismiss these claims for failing sufficiently to allege domestic conduct to overcome the presumption against extraterritorial application of the RICO statute. *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) ("Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."). *SIBOR I* dismissed the RICO claims on this basis, and I grant the motion here as well.

Like other district courts that have considered substantively similar allegations, I find that the RICO claims are impermissibly extraterritorial as the alleged conspiracy and manipulations occurred almost entirely abroad. *See, e.g., Laydon v. Mizuho Bank, Ltd.*, No. 12 CIV. 3419 GBD, 2015 WL 1515487, at *8 (S.D.N.Y. Mar. 31, 2015) (discounting the fact that Thomson Reuters disseminated rates in the U.S.); *Sullivan*, 2017 WL 685570, at *33 (finding the RICO claims impermissible extraterritorial even where plaintiffs' trading occurred in the U.S.). The SAC plausibly alleges a trader-based conspiracy having the goal of profiting in the U.S. and elsewhere. The scheme however was not based in the U.S., and cannot support a RICO claim. *See Sonterra*, 277 F. Supp. 3d at 582. ("That the alleged goal of the conspiracy was to increase *worldwide* profits, including profits generated in the United States, cannot render 'domestic' a scheme that was otherwise centered abroad.").[12] The RICO claims (Count II and III) are dismissed.[13]

V. Breach of Implied Covenant of Good Faith and Fair Dealing

SIBOR I dismissed Plaintiff FrontPoint's contract claim with leave to amend for failure to plead with sufficient specificity the dates, counterparties, and terms and conditions of the transactions it engaged in. The SAC has cured these deficiencies.

The SAC alleges that:

- Deutsche Bank and Citibank entered into an International Swaps and Derivatives Association ("ISDA") Master Agreement, on January 20, 2010 and August 25, 2009 respectively.

---

[12] There is no issue with the extraterritorial application of the antitrust claims, as discussed in *SIBOR I*. *See* Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a; *Sonterra*, 277 F. Supp. 3d at 568 (rejecting extraterritorial objection with respect to the antitrust claims).

[13] Since I dismiss the RICO claims on extraterritorial grounds, I do not discuss other potential infirmities with the RICO claims, for example whether the wire fraud allegations satisfy the heightened pleading requirements of Fed. R. Civ. P. 9(b). *See Sullivan*, 2017 WL 685570, at *35 (finding the requisite particularity lacking).

- The ISDA Master Agreement provides that "[e]ach party will make each payment or delivery specified in each Confirmation." ¶ 48.
- FrontPoint entered into 22 swaps with Deutsche Bank between February 11, 2010 and May 27, 2010, and these swaps were incorporated into the 2010 ISDA Master Agreement between FrontPoint and Detusche Bank. ¶¶ 53–55.
- "[A]fter executing its ISDA Master Agreement with Citibank, N.A. on August 25, 2009, FrontPoint subsequently entered into swap transactions directly with Citibank, N.S." ¶ 60.
- "FrontPoint entered into at least 24 swap transactions, including based on one-month SGD SIBOR, between January 2010 and May 2010 directly with Defendants Deutsche Bank AG and Citibank, N.A." ¶ 229.

The breach of the implied covenant of good faith claim has been plausibly alleged by Plaintiff FrontPoint.[14] The SAC alleges that FrontPoint entered into an ISDA Master Agreement with Deutsche Bank and Citibank, and that, pursuant to these contracts, FrontPoint engaged in 24 swaps incorporating SGD SIBOR between the four-month period, January 2010 to May 2010. Such contracts,

---

[14] There are no allegations that Plaintiff Sonterra entered into contracts with any defendant.

requiring that "[e]ach party will make each payment or delivery specified in each Confirmation," contain an implied covenant that the rates upon which the trades are premised are non-manipulated rates, or rates that are accurate reflections of market conditions. By alleging that Deutsche Bank and Citibank manipulated SGD SIBOR while engaging in 24 swap transactions, the SAC has sufficiently alleged that these defendants did not in good faith fulfill their obligations under the ISDA Master Agreements. *See ISDAFix*, 175 F. Supp. 3d at 63 (finding plausible claims for breach of the implied covenant of ISDA Master Agreements where defendants were alleged to have manipulated rates incorporated into the transactions).

VI. Capacity to Sue

Defendants argue that neither FrontPoint nor Sonterra have the capacity to sue since they are dissolved entities who were not in existence when this action was filed. FrontPoint was a fund formed on August 5, 2009 under Cayman Islands law and was voluntarily dissolved on November 11, 2011; Sonterra was a fund formed on May 22, 2008 under Cayman Islands law and was voluntarily dissolved on December 28, 2012.

Plaintiffs respond that FrontPoint and Sonterra assigned their interests and right to sue to an entity, Fund Liquidation Holdings ("FLH"), who is willing and able to prosecute this suit. Sonterra argues that it entered into an Asset Purchase Agreement ("APA") with FLH on August 3, 2012, and FrontPoint argues that it did so with FLH on July 13, 2011. The documents appear to show a full assignment of rights to FLH, which therefore has the capacity to sue here. Plaintiffs seek leave to substitute FLH as the plaintiff in a third amended complalint. *See* Fed. R. Civ. P. 17(a)(3). I grant the request.

CONCLUSION

For the reasons state above, defendants' motions are granted in part and denied in part, as follows:

I. Antitrust Claims

a. The antitrust claim (Count I) is dismissed without leave to amend as against the defendants who were not SIBOR Panel Members (ANZ Securities Inc., Bank of America Corporation, Barclays Bank PLC, Barclays Capital Inc., Barclays PLC, BNP Barnibas North America Inc., BNP Barnibas Prime Brokerage Inc., BNP Barnibas Securities Corporation, Citigroup Inc., Commerzbank AG, Credit Agricole A.S., Credit Suisse Group AG, Credit Suisse International, DBS Group Holdings LTD, DBS Vickers Securities (USA) Inc., HSBC Bank USA N.A., HSBC Holdings PLC, HSBC North America Holdings Inc., HSBC USA Inc., ING Capital Markets LLC, ING Groep N.V., JP Morgan Chase & Co., Macquarie Bank LTD, Macquarie LTD, RBS Securities Japan Limited, The Royal Bank of Scotland Group PLC, Standard Chartered PLC, UBS Securities Japan Co. LTD, and UOB Global Capital LLC).

b. The antitrust claims remain as against the SIBOR Panel Members (Australia and New Zealand Banking Group, Bank of America N.A., The Bank of Tokyo-Mitsubishi UFJ Ltd., BNP Paribas, Citibank N.A., Credit Suisse AG, DBS Bank Ltd, Deutsche Bank AG, The Hongkong and Shanghai Banking Corporation Ltd., ING Bank N.V., JPMorgan Chase Bank N.A., Oversea-Chinese Banking Corporation Ltd, The Royal Bank of Scotland PLC, Standard Chartered Bank, UBS AG, United Overseas Bank Ltd., and Credit Agricole CIB).

c. The antitrust claims, as alleged by Plaintiff Sonterra, are dismissed without leave to amend. Since no claims for relief remain as to Sonterra, Sonterra's complaint is dismissed entirely. *See* Dkt. No. Dkt. No. 30.

II. Personal Jurisdiction

a. The Foreign Defendants who did not serve on the SIBOR Panel are dismissed without leave to amend for lack of personal jurisdiction (Barclays Bank PLC, Barclays PLC, Commerzbank AG, Credit Agricole S.A., Credit Suisse Group AG, Credit Suisse International, DBS Group Holdings LTD, HSBC Holdings PLC, ING Groep N.V., Macquarie Bank LTD., Macquarie LTD, RBS Securities Japan Limited, The Royal Bank of

Scotland Group PLC, Standard Chartered PLC, and UBS Securities Japan Co. LTD).

III. RICO Claims

a. Count II (RICO) and Count III (RICO conspiracy) are dismissed without leave to amend.

IV. Breach of Implied Covenant of Good Faith and Fair Dealing

a. The motion to dismiss Count IV (breach of the covenant of good faith and fair dealing) for failure to state a claim is denied.

V. Real Party in Interest

a. Plaintiffs are granted leave to amend to substitute the real party in interest and allege the assignments of interest.

The clerk shall terminate the motion (Dkt. No. 238). Plaintiffs shall file a third amended complaint to amend the caption, and reflect the rulings in this opinion, by October 25, 2018. Defendants remaining in this case shall file their answers or otherwise respond by November 15, 2018. The parties shall appear for a status conference on November 28, 2018, at 2:30 P.M.

SO ORDERED.

Dated: October 4, 2018
New York, New York

s/Alvin K. Hellerstein
ALVIN K. HELLERSTEIN

____

United States District Judge

Appendix A: Summary of Defendants[15]

	Banking Groups	**46 Corporate Defendants**
1	**Australia and New Zealand Banking Group**	ANZ Securities, Inc. Australia and New Zealand Banking Group LTD (**SIBOR**) (**FD**)
2	**Bank of America**	Bank of America Corporation Bank of America N.A. (**SIBOR/SOR**)
3	**Barclays**	Barclays Bank PLC (**SOR**) (**FD**) Barclays Capital Inc. Barclays PLC (**FD**) (**V**)
4	**BNP Paribas**	BNP Barnibas North America Inc. BNP Barnibas Prime Brokerage Inc. BNP Barnibas Securities Corporation BNP Barnibas S.A. (**SIBOR**) (**FD**)

[15] Key: "SIBOR"= SIBOR Panel Member; "SOR" = SOR Panel Member; "FD" = Foreign Defendant; "V" = Venue Defendant.

5	**Citibank**	Citibank, N.A. (**SIBOR/SOR**) Citigroup Inc.
6	**Commerzbank**	Commerzbank AG (**SOR**) (**FD**)
7	**Credit Agricole**	Credit Agricole Corporate and Investment Bank (**SIBOR/SOR**) (**FD**) Credit Agricole S.A. (**FD**) (**V**)
8	**Credit Suisse**	Credit Suisse AG (**SIBOR/SOR**) (**FD**) Credit Suisse Group AG (**FD**) (**V**) Credit Suisse International (**FD**) (**V**)
9	**DBS**	DBS Bank LTD. (**SIBOR/SOR**) (**FD**) DBS Group Holdings LTD. (**FD**) (**V**) DBS Vickers Securities (USA) Inc.
10	**Deutsche Bank**	Deutsche Bank AG (**SIBOR/SOR**) (**FD**)
11	**HSBC**	HSBC Bank USA N.A. HSBC Holdings PLC (**FD**) (**V**) HSBC North America

		Holdings Inc. HSBC USA Inc. The Hongkong and Shanghai Banking Co. Ltd. (**SIBOR/SOR**) (**FD**) (**V**)
12	**ING Bank**	ING Bank N.V. (**SIBOR**) (**FD**) (**V**) ING Capital Markets LLC ING Groep N.V. (**FD**) (**V**)
13	**JPMorgan Chase**	JP Morgan Chase & Co. JPMorgan Chase Bank N.A. (**SIBOR/SOR**)
14	**Macquarie**	Macquarie Bank LTD. (**FD**) Macquarie Group LTD. (**FD**) (**V**)
15	**Oversea-Chinese Banking Corporation**	Oversea-Chinese Banking Corporation LTD. (**SIBOR**) (**FD**)
16	**The Royal Bank of Scotland**	RBS Securities Japan Limited (**FD**) (**V**) The Royal Bank of Scotland Group PLC (**FD**) (**V**) The Royal Bank of Scotland PLC (**SIBOR/SOR**) (**FD**) (**V**)

17	**Standard Chartered Bank**	Standard Chartered Bank (**SIBOR/SOR**) (**FD**) Standard Chartered PLC (**FD**) (**V**)
18	**The Bank of Tokyo-Mitsubishi UFJ**	The Bank of Tokyo Mitsubishi UFJ LTD. (**SIBOR/SOR**) (**FD**)
19	**UBS**	UBS AG (**SIBOR/SOR**) (**FD**) UBS Securities Japan Co. LTD. (**FD**) (**V**)
20	**United Overseas Bank**	United Overseas Bank Limited (**SIBOR/SOR**) (**FD**) UOB Global Capital LLC

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of May, two thousand twenty-one.

Fund Liquidation Holdings LLC, et al., Plaintiffs - Appellants, FrontPoint Asian Event Driven Fund, Ltd., et al., Plaintiffs, v. Bank of America Corporation, et al., Defendants - Appellees, Citibank, N.A., Citigroup Inc., et al., Defendants.	**ORDER** Docket No: 19-2719

Appellees, Credit Suisse Group AG, Credit Suisse AG, and Credit Suisse International, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

s/Catherine O'Hagan Wolfe