UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPUBLIC OF KAZAKHSTAN and OUTRIDER MANAGEMENT, L.L.C., Plaintiffs, v. DANIEL CHAPMAN; ARGENTEM CREEK HOLDINGS LLC; ARGENTEM CREEK PARTNERS LP; PATHFINDER ARGENTEM CREEK GP LLC; and ACP I TRADING LLC, Defendants.	**Civil Action No. 1:21-cv-03507-JGK** *Removed from:* Supreme Court of New York, County of New York State Court Index No. 652522/2020 **ORAL ARGUMENT REQUESTED**

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS REPUBLIC OF KAZAKHSTAN'S CLAIMS

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Defendants Argentem Creek Holdings LLC; Argentem Creek Partners LP; Pathfinder Argentem Creek GP LLC; ACP I Trading LLC; and Daniel Chapman (collectively, "Argentem"), by their attorneys, respectfully submit this Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff Republic of Kazakhstan's claims in the Second Amended Complaint under Federal Rules of Civil Procedure 8(a), 9(b) and 12(b)(6).

PRELIMINARY STATEMENT

Plaintiffs' Second Amended Complaint fails to correct the many infirmities that existed in its original and first amended complaint and instead, highlights the very reasons why Kazakhstan cannot state a viable claim against Argentem. Despite adding sixty-seven new paragraphs and twenty-two new exhibits (together totaling more than 700 pages), Kazakhstan's Second Amended Complaint does not allege a single new fact substantiating its claims against the defendants in this matter. Instead, Kazakhstan devotes its additional pages attempting to shore up its case against non-parties Anatole Stati and Gabriel Stati (together, with their various companies, the "Statis") and challenge the confirmed arbitration award rendered against Kazakhstan in the Statis' favor over seven years ago. Indeed, Kazakhstan spends the first 75 pages of its second amendment reciting the history of the facts underlying the award. Only then does Kazakhstan lay out its case against Argentem, which (as with Kazakhstan's prior pleadings) consists principally of unsubstantiated allegations that do not add up to any actionable claim.

Kazakhstan's focus on the Statis is not surprising, of course, once one understands the background of this action. In December 2013, the Stockholm Chamber of Commerce (the "SCC") ruled that the Kazakhstan was required to pay $497,685,101 (the "SCC Award" or the "Award")

to the Statis[1] in relation to two companies that had been developing oil fields in Kazakhstan and other Kazakh energy assets. The arbitral panel found that Kazakhstan systematically harassed the Statis in hopes of forcing a sale of the Statis' business and, when that didn't work, expropriated the Statis' assets. Kazakhstan has not paid a dime on the Award since it was issued. Instead, drawing on what appears to be an unlimited litigation budget, it unleashed a barrage of proceedings and defenses alleging fraud by the Statis in jurisdictions across the globe.

To date, Kazakhstan's efforts have almost universally failed: Courts in the U.S., Belgium, Italy, Netherlands, and Sweden (the only jurisdiction with the authority to vacate the Award) have considered and rejected Kazakhstan's fraud argument and confirmed the Award. In confirming the Award, the District Court for the District of Columbia (the "D.C. Court") correctly noted that the SCC tribunal disavowed any reliance on the allegedly fraudulent evidence Kazakhstan attempts to challenge and, equally important, "the Svea Court of Appeal heard and rejected [Kazakhstan's] fraud claims, and that its ruling was upheld by the Swedish Supreme Court." *Anatolie Stati v. Republic of Kazakhstan*, 302 F. Supp. 3d 187, 201 (D.D.C. 2018). In dismissing Kazakhstan's separately-filed RICO suit, the D.C. Court criticized Kazakhstan for pursuing the "ill-advised" RICO suit, concluding that a RICO suit is "not a vehicle to challenge non-frivolous litigation, or in this case, a valid and final foreign arbitral award." *Republic of Kazakhstan v. Stati*, 380 F. Supp. 3d 55, 57 (D.D.C. 2019). The D.C. Court also concluded that, "[a]t bottom, this suit [was] yet another attempt to relitigate the underlying arbitral award" and was "an improper use of the auspices of th[e] Court to revive and prolong a dispute that is over." *Id*. at 64–65.

[1] The beneficiaries of the SCC Award were Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd. *See Anatolie Stati v. Republic of Kazakhstan*, 302 F. Supp. 3d 187, 191 (D.D.C. 2018).

This case is Kazakhstan's latest attempt to thwart the SCC Award. Instead of suing the Statis, however, Kazakhstan has sued US investors—*i.e.*, Argentem—whose only purported "misdeed" was buying publicly-traded secured-loan notes ("Notes") issued by Tristan Oil Ltd. ("Tristan"), a Statis-affiliated entity, and secured by the SCC Award. As described below, Argentem, and other noteholders who purchased the Notes ("Noteholders"), have a contractual right to a portion of the Award proceeds pursuant to a 2012 agreement entered into by the Noteholders, the Statis, and Tristan. Subsequently, to protect that investment, Argentem financed a portion of the Statis' litigation expenses. According to Kazakhstan, this agreement and funding equates to conspiring to commit fraud, aiding and abetting wrongful conduct, and unlawful means conspiracy under English law. On that basis, Kazakhstan claims that Argentem should pay its litigation expenses and other undefined "damages" arising from the SCC arbitration and the enforcement proceedings.

These claims have no basis in the facts as pled – even on this third attempt – or in the law. Accordingly, all of Kazakhstan's claims should be dismissed, with prejudice, for at least three independent reasons: (1) Kazakhstan fails to sufficiently plead its derivative claims; (2) Argentem cannot be held liable for unlawful means conspiracy under English Law; and (3) even if Kazakhstan's claims could pass muster, Kazakhstan's claims are barred by the *Noerr-Pennington* doctrine.

First, Kazakhstan fails to sufficiently plead its derivative claims for conspiracy to commit fraud and aiding and abetting unlawful conduct. Under New York law, both claims require Kazakhstan to demonstrate an underlying fraud, which Kazakhstan cannot do. The fraud allegations underpinning Kazakhstan's claims are precluded as a collateral attack on the SCC Award. These same fraud allegations are precluded under the collateral estoppel doctrine because

they have been fully and fairly litigated (and rejected) in the Swedish Courts, the D.C. Court, and other courts. And even if the fraud issue here were not barred, Kazakhstan cannot demonstrate an underlying fraud because it cannot show that it relied on any alleged material misrepresentation by the Statis.

Nor can Kazakhstan establish the elements required for aiding-and-abetting or conspiracy liability. For example, to prove a conspiracy claim, Kazakhstan must show that Argentem's actions had no legitimate purpose. But the allegations only show that Argentem entered into an agreement with other noteholders and the Statis for the legitimate purpose of recovering their investment on defaulted notes. Moreover, Kazakhstan's bald allegations of Argentem's knowledge fail to show that Argentem had "actual knowledge" of the Statis' alleged misrepresentations, as required to establish aiding and abetting liability.

Second, Kazakhstan's claim for "Unlawful Means Conspiracy" under English law fails because this Court should not apply English law. A conflict exists between New York and English law because English law allows a freestanding claim for conspiracy and New York law does not. Under New York choice-of-law rules, New York law governs the current dispute because New York, as the location of the alleged tortious acts, has the greater interest in the matter. As such, Kazakhstan's attempt to avail itself of English law fails and the claim should be dismissed.

Finally, all of Kazakhstan's claims are barred by the *Noerr-Pennington* doctrine, which protects defendants from tort claims that arise out of defendants' First Amendment right to petition the government. Because all of Kazakhstan's claims arise out of Argentem's activities relating to its right to petition the Swedish, U.S., and other governments to enforce the Award, Kazakhstan's claims must be dismissed.

Any one of these reasons would be sufficient to warrant dismissal. Together, they mandate it. Accordingly, Argentem respectfully requests that the Court dismiss Kazakhstan's claims with prejudice.

BACKGROUND

I. Argentem Invests In The Development Of Oil And Gas Fields In Kazakhstan

This case arises from the Statis' investment of "more than one billion dollars in the development of" oil and gas fields in Kazakhstan. *Stati*, 302 F. Supp. 3d at 192.[2] In 2006 and 2007, the Statis funded those oilfield operations through the sale to Noteholders of more than $400 million in publicly-traded, secured loan Notes. Compl. ¶ 16.[3]

Between 2008 and 2010, Kazakhstan expropriated the Statis' oilfield facilities, causing hundreds of millions of dollars in damages. *See Stati*, 302 F. Supp. 3d at 192. This led the Statis to file an arbitration claim in July 2010 in the SCC under the Energy Charter Treaty. *Id.* The Statis argued that Kazakhstan had "engaged in a campaign of harassment and illegal acts" that ultimately led to the expropriation of their assets. *Id*.

In December 2012, while the Statis were pursuing the SCC arbitration, the Statis and the Noteholders entered into an agreement to restructure the Statis' repayment obligations on the Notes (the "Sharing Agreement"). The Sharing Agreement was necessary because, once Kazakhstan

[2] This Court may take judicial notice of other litigation in adjudicating this motion to dismiss. *See Kramer v. Time Warner Inc*., 937 F.2d 767, 774 (2d Cir. 1991) ("[C]ourts routinely take judicial notice of documents filed in other courts, again not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings."); *Intellective, Inc. v. Mass. Mut. Life Ins. Co.*, 190 F. Supp. 2d 600, 608 n. 1 (S.D.N.Y. 2002) (finding it "entirely proper for this Court to take judicial notice of the actions taken in . . . related [state court] proceedings 'to establish the fact of such litigation and related filings.'") (internal citations omitted).

[3] Citations to "Compl." refer to Plaintiffs' Second Amended Complaint. *See* ECF No. 47.

took over the oilfield operations, neither the Statis nor any of the obligors of the Notes were able to cover the interest payments, let alone repay the principal. Compl. ¶¶ 28, 260. With the Statis having defaulted, the Sharing Agreement served as a mechanism for Noteholders to improve their likelihood of receiving payment; it also set out certain mechanisms regarding recovery of any award, including that it was the Statis' responsibility to formulate and pay for the legal strategy to recover under the Award. *See id*. In the Sharing Agreement, the parties agreed to "forbear . . . from exercising any and all default-related remedies" against the Statis in exchange for 70 percent of "Proceeds" obtained from Kazakhstan through the SCC Award, until they have been paid in full. *Id.* ¶ 261; Baldini Decl., ¶ 4; Ex. 3, Sharing Agreement § 6(a). In other words, under the Sharing Agreement, the Award is the primary source of recovery on the Notes for all Noteholders, including those associated with Argentem.

II. The Statis Prevail In The SCC Arbitration

On December 19, 2013, the SCC issued the Award, finding, among other things, that Kazakhstan breached its duty to provide fair and equitable treatment as required by the Energy Charter Treaty. *See Stati*, 302 F. Supp. 3d at 193. Having so decided, the arbitral panel also had to determine the value of the seized property. One such property was an unfinished liquefied petroleum gas plant ("LPG Plant"). The SCC tribunal rejected both the Statis' and Kazakhstan's valuations, and instead valued the LPG Plant at $199 million based on an indicative offer for the plant that KazMunaiGas ("KMG")—the state-owned oil and gas company of Kazakhstan—had previously made. Compl. ¶¶ 165–69. The Award to the Statis totaled $497,685,101, plus costs, which included the $199 million LPG Plant valuation, $277.8 million for two oil and gas fields, and $31.3 million for subsoil use contracts. *Id*. ¶ 38.

III. The Statis Prevail In Subsequent Enforcement Proceedings, Despite Kazakhstan's Fraud Allegations

After securing the Award, the Statis sought to confirm the Award in numerous jurisdictions, including Belgium, Luxembourg, the Netherlands, Italy, England, Sweden, and the United States (the "Enforcement Proceedings"). *Id*. ¶ 39. Throughout the Enforcement Proceedings, Kazakhstan has asserted the same underlying theory of fraud that it asserts in the Second Amended Complaint—one that no jurisdiction has finally accepted.[4] Most notably, courts in Sweden and the U.S. have fully rejected Kazakhstan's fraud claims. *See Stati*, 302 F. Supp. 3d at 195.

In Sweden, the only jurisdiction with authority to vacate the Award, Kazakhstan raised its same fraud claims, arguing that the Statis engaged in related-party transactions, that such transactions were not reflected in the Statis' audited financial statements, that bidders relied on false financial statements in evaluating the value of the LPG Plant, and that the SCC tribunal had relied on the allegedly false financial statements in issuing the Award. *See* Judgment at 10, 14, Svea hovrätt [Svea HovR] 2016-12-09 T2675-14 (Swed.) (hereinafter "Svea Court of Appeal

[4] Kazakhstan relies heavily on an English High Court decision, which Kazakhstan alleges ruled on the merits of the Statis' fraudulent scheme. Compl. ¶ 42. Kazakhstan is wrong. The English Court merely held that it was not estopped under English public policy from considering Kazakhstan's fraud allegations by the prior Swedish and D.C. Court decisions and that the fraud claims could be adjudicated in the English tribunal. *Anatolie Stati, et al. v. Republic of Kazakhstan*, [2017] EWHC (Comm) 1348, [87], [92] (Eng.), https://res.cloudinary.com/lbresearch/image/upload/v1496758810/stati_v_kazakhstan_draft_judgment_final_65117_1520.pdf. To contrast, the Amsterdam Court of Appeal, which actually evaluated the merits of Kazakhstan's fraud claims, wholly rejected the fraud claims and confirmed the Award. Hof Amsterdam 14 juli 2020, JOR 2020/299 m.nt. C.L. Schleijpen (Stati / Republiek Kazachstan) (Neth.).

Judgment"). The Svea Court of Appeal rejected these arguments, ruling that: (i) in granting the Award, the arbitration panel did not rely on the Statis' alleged fraudulent misrepresentations; and (ii) any alleged fraud was too remote to establish that the Award was fraudulently obtained. *See Stati*, 302 F. Supp. 3d at 195–96. The Swedish Supreme Court then rejected all of Kazakhstan's appeals. *Id.* at 195–96. In November 2019, Kazakhstan filed another claim in the Swedish courts seeking to invalidate the previously confirmed Award, raising purportedly newly discovered evidence to support the same fraud claims. *See* Declaration of Egishe Dzhazoyan ¶¶ 8–9, *In re Ex Parte Application of Republic of Kazakhstan for an Order to Obtain Discovery for Use in Foreign Proceedings Pursuant to 28 U.S.C. § 1782*, No. 20-mc-00167-JMF (S.D.N.Y. May 15, 2020), ECF No. 18. ("Dzhazoyan Decl."). The Svea Court of Appeal and Swedish Supreme Court again dismissed Kazakhstan's appeals. *Id.* ¶¶ 6–7.

In 2014, the Statis petitioned the D.C. Court to confirm the Award. *Stati*, 302 F. Supp. 3d at 193. In April 2016, after the petition was fully briefed, but before the court had ruled, Kazakhstan moved for leave to submit the same fraud allegations asserted in opposition to the Swedish confirmation. *Id*. The D.C. Court denied Kazakhstan's request because "the arbitrators expressly disavowed any reliance on the allegedly fraudulent material." *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 191 (D.D.C. 2016). Kazakhstan subsequently filed a motion for reconsideration, alleging that the Award was fraudulently obtained. In 2018, the D.C. Court denied Kazakhstan's motion and confirmed the Award, finding that the Award was not "contrary to the public policy of the United States" because "none of the grounds for refusal or deferral of the [Award] set forth in the New York Convention," including fraud, "appl[ied]." *Id*. at 18, 31. The D.C. Circuit affirmed and the U.S. Supreme Court denied certiorari. *Stati*, 773 F. App'x 627; *Stati*, 140 S.Ct. 381. The D.C. Court also rejected a separate, RICO claim Kazakhstan brought based on

the same alleged misconduct and the Statis' efforts to collect on the Award as "yet another attempt to relitigate the underlying arbitral award." *Republic of Kazakhstan*, 380 F. Supp. at 64.

Subsequently, Kazakhstan commenced this suit in New York against Argentem. Argentem moved the D.C. Court for leave to file a motion for preliminary injunction to enjoin Kazakhstan's New York state-court action. The D.C. Court denied Argentem's motion for leave and deferred a decision to the courts in New York, finding that "[w]hile [the Court's decision confirming the award] touched upon Kazakhstan's allegations of fraud, it did not involve the Argentem Parties or consideration of any state claims against those parties." Order at 4, *Stati v. Republic of Kazakhstan*, No. 14-cv-1638 (ABJ) (D.D.C. March 19, 2021), ECF No. 172. The Court concluded that, based on those circumstances, "the state court is better positioned to determine whether Kazakhstan's claims are precluded." *Id.* The D.C. Court did not rule on any substantive arguments raised by Argentem. Argentem then removed the case to this Court.

IV. The Fraud Allegations In The Second Amended Complaint

Kazakhstan's claims against Argentem are entirely predicated on the issue adjudicated before the Swedish, Dutch, D.C. and other Courts: whether the Statis committed fraud in procuring the Award. Having failed in its efforts to vacate the Award in Sweden or block its confirmation in the U.S., Kazakhstan is now relitigating those fraud allegations with a new twist: Kazakhstan is suing Argentem for allegedly "conspiring" with the Statis in connection with the Statis' alleged fraud in procuring the Award and "aiding and abetting" that alleged fraud. Compl. ¶ 14. Specifically, Kazakhstan alleges that Mr. Chapman somehow "discovered the Statis' fraudulent scheme" to steal *the Noteholders' money* "in or about 2011," *id.* ¶ 30, and then "join[ed] and support[ed]" the Statis' scheme. *Id.* ¶ 34. Argentem supposedly manifested this "support" by remaining in contact with the Statis and "work[ing] with the Statis to provide funding and to create [the] legal strategy" for the Enforcement Actions, and thereby "entered into a civil conspiracy to

commit fraud" and "aided and abetted the Statis' wrongful activities." *Id.* ¶ 213. Kazakhstan further alleges that Argentem "knowingly joined a conspiracy" amongst the Statis to "steal monies" from the Noteholders and Kazakhstan through "unlawful means" under English law. *Id.* ¶¶ 326, 360.

Despite having more than three weeks with Argentem's initial motion to dismiss, Kazakhstan's Second Amended Complaint fails to shore up its deficient fraud claims, merely adding additional claims against the Statis. At no point in the Second Amended Complaint's 700 pages does Kazakhstan allege that Argentem committed any fraud or that Argentem played a role in procuring the Award. *Id.* Most notably, Kazakhstan does not allege that Argentem was involved with submitting allegedly false evidence to the SCC tribunal.

STANDARD OF REVIEW

"To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Those factual allegations must demonstrate "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). Furthermore, for claims of aiding and abetting fraud and conspiracy to commit fraud, Rule 9(b) requires that those factual allegations be pleaded "with particularity." Fed. R. Civ. P. 9(b); *Marotte v. City of New York,* 2019 WL 1533304, at *11 n.11 (S.D.N.Y. Feb. 7, 2019); *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292–93 (2d Cir. 2006). A complaint "that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (internal citations omitted). Further, "the tenet that

a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.*

When assessing whether a complaint states a plausible claim, "the Court may consider 'any written instrument attached to the complaint as an exhibit, any statements or documents incorporated in it by reference, and any document upon which the complaint heavily relies.'" *Lefkowitz v. McGraw-Hill Global Educ. Holdings, LLC*, 23 F. Supp. 3d 344, 352 (S.D.N.Y. 2014) (quoting *In re Thelen LLP*, 736 F.3d 213, 219 (2d Cir. 2013)). "The Court may also consider any items of which judicial notice may be taken." *Id.*

ARGUMENT

Kazakhstan's claims must be dismissed because: (1) Kazakhstan fails to state an underlying fraud to sufficiently plead its fraud-based derivative claims, or establish the claims' other elements; (2) New York choice-of-law rules foreclose Kazakhstan's English-based claim for unlawful means; and (3) the *Noerr-Pennington* doctrine bars Kazakhstan's claims, which are based on Argentem's First Amendment activities in being involved in ongoing litigation seeking collection of the SCC Award.

I. Kazakhstan Cannot Sufficiently Plead Its Fraud-Based Derivative Claims

Kazakhstan cannot sufficiently plead allegations to support its claims of civil conspiracy to commit fraud or aiding and abetting wrongful conduct against Argentem, a non-party to the SCC arbitration. First, Kazakhstan cannot assert an actionable underlying fraud because its allegations are barred by collateral doctrines, and because it cannot show that it relied on the Statis' alleged fraudulent representation in an adversarial proceeding. Second, Kazakhstan does not plead the claims' other elements, including not having particular allegations that Argentem intentionally took acts to aid the Statis' alleged fraud on the SCC Tribunal or that it engaged in any conspiracy with the Statis before or after the Award.

A. Kazakhstan Fails To Allege An Underlying Fraud To Sufficiently Plead Its Conspiracy And Aiding And Abetting Claims

New York law does not recognize civil conspiracy or aiding and abetting tort claims as independent causes of action. *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401 (2d Cir. 2006) ("New York does not recognize an independent tort of conspiracy"); *Sado v. Ellis*, 882 F. Supp. 1401, 1408 (S.D.N.Y. 1995) ("[a]n independent tort must form the basis of a claim of civil conspiracy"); *Lerner*, 459 F.3d at 292 (stating that aiding and abetting liability requires "the existence of a fraud" that the defendant provided substantial assistance to committing) (internal citations omitted). Such claims "must be connected to an otherwise actionable tort" and stand or fall with that tort. *In re Stillwater Asset Backed Offshore Fund Ltd.*, 559 B.R. 563, 614, 615 (Bankr. S.D.N.Y. 2016).

Here, there is no tort by which Kazakhstan's civil conspiracy and aiding and abetting claims may stand or fall because: (1) the fraud issues underlying Kazakhstan's claims are an impermissible collateral attack on the SCC Award; (2) the fraud issues are barred by collateral estoppel as they have already been adjudicated and rejected; and (3) Kazakhstan fails to establish an independent fraud claim because it cannot show, with particularity, that it relied on the Statis' alleged fraudulent misrepresentations. Without "the existence of a fraud," Kazakhstan's conspiracy and aiding and abetting claims fail as a matter of law.

1. The Complaint Is An Improper Collateral Attack On the SCC Award

Courts throughout the country, including within this District, have long held that collateral attacks on an arbitration award, whether international or domestic, cannot be entertained. *Gulf Petro Trading Co., Inc. v. Nigerian Nat. Petroleum Corp.*, 512 F.3d 742, 749 (5th Cir. 2008) (Federal Courts do not have jurisdiction to consider collateral attack on arbitration award under New York Convention); *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 910

(6th Cir. 2000) (affirming dismissal of collateral attack on domestic arbitration award for failure to state a claim); *Sander v. Weyerhaeuser Co.*, 966 F.2d 501, 503 (9th Cir. 1992) (granting judgment against collateral attack claiming that arbitration award was procured by fraud); *Searcy v. Smith*, 2020 WL 2198086, *7 (D.D.C. May 6, 2020) (dismissing collateral attack on arbitration award); *Arrowood Indem. Co. v. Equitas Ins. Ltd.*, 2015 WL 4597543, *5 (S.D.N.Y. July 30, 2015) (enjoining second arbitration seeking to collaterally attack prior arbitration award); *Ibarzabal v. Morgan Stanley DW, Inc.*, 2007 WL 9753006, at *3 (S.D.N.Y. Dec. 5, 2007) (dismissing collateral attack on arbitral award). State courts recognize the same rule. *See, e.g., Oppenheimer & Co. Inc. v. Pitch*, 129 A.D.3d 621, 622 (1st Dep't 2015) (claim for sanctions arising from alleged failure to disclose documents in prior arbitration was "an unlawful collateral attack on the award"); *Gulf LNG Energy, LLC v. ENI USA Gas Marketing LLC*, 242 A.3d 575, 581–82 (Del. Nov. 17, 2020) (affirming order enjoining second arbitration claiming negligent misrepresentation in a prior arbitration proceeding). The reason is simple: the Federal Arbitration Act and the New York Convention[5] govern all attempts to vacate an arbitration award based on alleged fraud, and this express scheme precludes any attempt to undermine the award through a separate, plenary action.

The question in assessing an improper collateral attack is not whether the claims "directly challenge the arbitration award" or even whether the claim fits the traditional elements of collateral estoppel. *Decker*, 205 F.3d at 910. Most litigants—Kazakhstan included—are not so foolhardy. Rather, the collateral attack doctrine prevents losing parties in an arbitration from getting around

[5] Under the New York Convention, 9 U.S.C. § 201 et seq., the country in which an arbitration award was made has "primary jurisdiction" over the arbitration award, and only that country may vacate or modify the arbitration award. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007).

the collateral estoppel rules by asserting new legal claims, often against new parties, that purport to raise separate violations of law, but which in effect seek to challenge the underlying arbitral award. To evaluate this question, courts assess the "relationship between the alleged wrongdoing, purported harm, and arbitration award." *Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n, Inc.*, 955 F.3d 482, 488 (5th Cir. 2020). Telltale signs of a collateral attack include: where a claim (i) has as its "true objective . . . to rectify the harm [a party] suffered in receiving [an] unfavorable Final Award," *Gulf Petro*, 512 F.3d at 750; (ii) seeks "damages for an alleged wrongdoing that compromised an arbitration award," *Decker*, 205 F.3d at 910; *see also Ibarzabal*, 2007 WL 9753006, at *3 (alleged injury was "predicated on the impact of [defendant's] alleged conduct on the outcomes of their arbitration proceedings"); (iii) alleges wrongdoing that "would justify vacatur" of the underlying award, *Tex. Brine*, 955 F.3d at 488; or (iv) requests "reimbursement of the costs and fees that it paid in the arbitration," *id.* at 489.

So, for example, a party was blocked from bringing RICO, deceptive trade practices, fraud, and civil conspiracy claims based on allegations that an arbitral award was "procured by fraud, bribery, and corruption." *Gulf Petro*, 512 F.3d at 745. Another party could not assert claims for tortious interference, breach of contract, and breach of the duty of good faith based on alleged bias. *Decker*, 205 F.3d at 910; *see also Corey v. New York Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982) (claim for damages for selecting allegedly biased arbitrators was improper collateral attack). Similarly, claims that a party was "lied to by Defendant concerning the existence of evidence relevant to their respective arbitration proceedings" could not support independent claims for deceptive trade practices, fraud, and breach of contract. *Ibarzabal*, 2007 WL 9753006 at *1–2; *see also Arrowood Indem.*, 2015 WL 4597543, at *4–5 (blocking claim based on alleged "intentional misconduct" in course of prior arbitration by improperly withholding document).

Another court rejected securities-fraud claims based on alleged withholding of evidence related to a valuation decision reached in a previous arbitration. *Sander*, 966 F.2d at 502. These cases recognize that the exclusive means for challenging an arbitration award is to seek vacatur of the original award, not to bring subsequent tort claims in a new action, and that even though the new action may be "cloaked in a variety of federal and state law claims," a "complaint [that] amounts to no more than a collateral attack on the Final Award itself" should be dismissed. *Gulf Petro*, 512 F.3d at 750.

Kazakhstan's claims fall squarely within this rule. To prevail on its conspiracy-based claims, Kazakhstan must prove the predicate act of an underlying fraud. And the underlying fraud alleged in the Complaint indisputably centers around the evidence presented in the arbitration proceedings. Kazakhstan's claim is that the Statis told a "key lie" both to the SCC panel and in later Enforcement Proceedings about whether certain transactions were related-party transactions, *see* Compl. ¶¶ 29, 39, that the Statis "cooked up years of materially false financial statements" to provide to the SCC panel, *id.* ¶ 26, and thus they "obtained the . . . Award by fraud," *id.* ¶ 208. But none of this is a new theory. Rather, by replicating the arguments it made to the SCC panel and to courts it has asked to vacate or refuse to enforce the SCC Award, Kazakhstan is again alleging conduct that "would justify vacatur" of the SCC Award, *see Tex. Brine*, 955 F.3d at 488, and asking this Court to award it "legal fees and other damages and costs that were wasted" from the SCC arbitration and Enforcement Proceedings, Compl. ¶ 41. *See also Tex. Brine*, 955 F.3d at 489; *Gulf Petro*, 512 F.3d at 750 (claim seeking, among other things, "costs, expenses, and consequential damages stemming from the unfavorable award it did receive").

As the Fifth Circuit noted, "Congress identified some potential problems that may arise in arbitration"—including alleged fraud—"and provided a limited remedy" in cases involving an

international arbitration like this one. *Tex. Brine*, 955 F.3d at 490. Kazakhstan is well aware of this "limited remedy": it vigorously resisted enforcement of the SCC Award in the D.C. Court based on the same alleged fraud it raises now. Federal law prohibits Kazakhstan's attempted end run around the FAA, the New York Convention, and the confirmed SCC Award through a collateral attack against a third party. The Complaint should be dismissed in full.

2. Kazakhstan Is Collaterally Estopped From Relitigating Its Underlying Fraud Issues Against The Statis To Assert Its Fraud-Based Claims Here

Kazakhstan's claims also fail because it had a full and fair opportunity to litigate the Statis' alleged fraud before the Swedish courts and the D.C. Court. As such, the collateral estoppel doctrine precludes Kazakhstan from relitigating those fraud issues here.

Collateral estoppel "forecloses successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Lefkowitz*, 23 F. Supp. 3d at 358–59 (internal citations omitted). Under this doctrine, a party is prohibited from "repeatedly litigat[ing] the same issues," by "repackaging the same factual allegations under different causes of action, or by filing identical actions against different defendants." *Zherka v. City of New York*, 459 F. App'x 10, 13 (2d Cir. 2012) (citing *Hickerson v. City of New York*, 146 F.3d 99, 109–10 (2d Cir. 1998)). This doctrine "precludes parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153–54 (1979).

Even when accepting plaintiff's factual allegations as true, collateral estoppel "will nonetheless bar a plaintiff's claim when [a] plaintiff's factual allegations have been decided

otherwise in a previous litigation." *Lefkowitz*, 23 F. Supp. 3d at 360 (internal citations omitted). Previous litigation includes adjudication in foreign tribunals. *Alfadda v. Fenn*, 966 F. Supp. 1317 (S.D.N.Y. 1997) (applying collateral estoppel to proceedings in a foreign tribunal).

Generally, collateral estoppel bars a party from relitigating an issue if: "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Purdy v. Zeldes*, 337 F.3d 253 (2d Cir. 2003) (internal citations omitted). Those elements are easily satisfied here because the fraud allegations underlying Kazakhstan's claims have been fully and fairly litigated before the Swedish courts and the D.C. Court.

a. Kazakhstan's Fraud Issues Here Are Identical To Issues Raised In Other Proceedings

The fraud issues being asserted here are identical to the issues raised in other proceedings. Indeed, the Second Amended Complaint spends the bulk of its time meandering through those various proceedings before turning its attention to Argentem, almost as an afterthought. Specifically, Kazakhstan raises the same four-prong scheme by the Statis in all these proceedings: (1) the Statis created falsified financial statements; (2) the Statis failed to disclose to their auditor that their financial statements were inaccurate; (3) KMG relied on the false financial statements in developing its bid; and (4) the SCC tribunal relied on false information in developing the Award. *See generally*, Respondent Republic of Kazakhstan's Motion for Reconsideration of May 11, 2016 Order, *Stati v. Republic of Kazakhstan*, No. 14-cv-1638-ABJ (D.D.C. May 18, 2016), ECF No. 37 (hereinafter, "Reconsideration Mot."); Svea Court of Appeal Judgment; *Stati*, 302 F. Supp. at 193–94; Compl. ¶¶ 116, 121, 164–69, 209.

A detailed comparison of these four steps shows how Kazakhstan keeps repeating the same refrain:

- First, before both the Svea Court of Appeal and D.C. Court, Kazakhstan alleged that the Statis inflated the cost of the LPG plant through a "sham arrangement" with an entity called Perkwood. *See* Svea Court of Appeal Judgment at 10; Reconsideration Mot. at 3. Here, Kazakhstan claims that "through a series of covert, fraudulent related-party transactions," "the Statis falsely inflated the stated price of the LPG Plant," and that "the Statis used multiple, overlapping schemes to fraudulently inflate the LPG Plant construction costs through . . . Perkwood." Compl. ¶¶ 21, 105, 109.
- Second, before both the Svea Court of Appeal and D.C. Court, Kazakhstan alleged that the Statis failed to inform KPMG that Perkwood was a closely related party, resulting in KPMG's issuance of misleading financial statements. *See* Svea Court of Appeal Judgment at 14; Reconsideration Mot. at 7 ("The next step in the Stati Parties' fraud was to cover[] up the material overstatement of LPG Plant costs by having their financial statements audited and approved," and that "[t]he Stati Parties accomplished this by deceiving their auditors (KPMG) regarding the fact that Perkwood *was* a Stati-related party."). Here, Kazakhstan claims that "[a]nother key step in the Statis' scheme was to legitimize their fraudulent transactions by obtaining the stamp of approval of an international accounting firm," and that "[t]hey accomplished this by misrepresenting to their auditors that the transactions were at arm's length with an independent third party and by falsely representing that Perkwood was not a Stati company." Compl. ¶ 121.

- Third, before both the Svea Court of Appeal and D.C. Court, Kazakhstan alleged that KMG valued the LPG plant based on KPMG's inaccurate financial statements. *See* Svea Court of Appeal Judgment at 14; Reconsideration Mot. at 7, 9 ("The next step in the fraud was the Stati Parties' use of their falsified financial statements in the bidding process that generated the $199 million KMG offer" and that "[i]t was only in reliance upon the falsified information . . . including in particular the falsified LPG Plant construction costs, that KMG issued its September 25, 2008 indicative offer in the amount of $199 million."). Here, Kazakhstan claims that, "[i]n June 2008, the Statis continued the fraudulent scheme by using their falsified 'audited' financial statements to obtain bids for their Kazakh operations from prospective purchasers" and that "[t]he KMG Indicative Offer relied on the false and misleading information provided by the Statis." Compl. ¶¶ 143, 165.
- Fourth, Kazakhstan alleged before both the Svea Court of Appeal and D.C. Court that the "arbitral tribunal's assessment of the LPG plant . . . was based on [KMG's] indicative bid." Svea Court of Appeal Judgment at 14; Reconsideration Mot. at 3 ("the Stati Parties' fraud predated the submissions in the arbitration and equally infected KMG's $199 million bid [for the LPG Plant]."). Here, Kazakhstan claims that the arbitration panel "relied on the amount included in the KMG Indicative Offer on the grounds that in its view, this was 'the relatively best source of information,'" but "this conclusion was based on the Statis' fraud." Compl. ¶ 209.

b. Kazakhstan's Underlying Fraud Issues Here Were Actually Litigated And Decided In Other Proceedings

Both the Swedish Courts and the D.C. Courts heard—and rejected—Kazakhstan's four-pronged fraud scheme, with both tribunals specifically rejecting Kazakhstan's allegation that the Award was tainted by fraud. *See generally*, Svea Court of Appeal Judgment at 44–46; *Stati*, 302 F. Supp. at 197. The Svea Court of Appeal rejected these arguments for two reasons: (i) in granting the Award, the arbitration panel did not rely on the Statis' alleged fraudulent misrepresentations; and (ii) any alleged fraud was too remote to establish that the Award was fraudulently obtained. *See Stati*, 302 F. Supp. 3d at 195–96. The Swedish Supreme Court rejected Kazakhstan's subsequent appeals. *Id*.

The D.C. Court, in turn, rejected Kazakhstan's fraud arguments on two different occasions. First, after Kazakhstan accused the Statis of defrauding the tribunal directly in an initial motion to include additional defenses in confirming the Award, the D.C. Court found that any "alleged fraud had no effect on the outcome of the arbitration." *Id.* at 198. Then, after Kazakhstan attempted to raise additional evidence of the Statis' alleged four-prong fraudulent scheme in its Reconsideration Motion, the D.C. Court found the evidence improper because such evidence could have been raised in its initial motion. *Id.* Because the fraud issues Kazakhstan raises in this suit are identical to those rejected by the D.C. Court, as shown above, they are precluded. *See Hickerson*, 146 at 108 n.6 ("A party…cannot avoid issue preclusion simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first") (internal citations omitted). *See also Yamaha Corp. of America v. United States*, 961 F.2d 245, 248 (D.D.C. 1992) (finding that a party was precluded from litigating an issue previously decided when the prior court rejected the argument in denying a motion for reconsideration.).

Kazakhstan will contend that the D.C. Court did not decide these fraud issues, based on that court's denial of Argentem's motion for leave to file an anti-suit injunction. But that argument is not well-founded. The D.C. Court did not base its decision on whether it had previously rejected Kazakhstan's underlying fraud claims against the Statis. Rather, it acknowledged that its prior rulings "did not involve the Argentem Parties or consideration of any state claims against those parties – much less any claims under English law." Order, *Stati v. Republic of Kazakhstan,* No. 14-1638 (ABJ) (D.D.C. March 19, 2021) at 4. Then, in light of the high bar set by the Supreme Court for a federal injunction against a state judicial proceeding, it determined that "the state court is better positioned to determine whether Kazakhstan's claims are precluded." *Id.* In short, the court expressly deferred judgment on preclusion.

Now that those issues are squarely before the Court, it is clear that Kazakhstan's fraud issues alleged in the Second Amended Complaint were actually litigated and decided in the Swedish courts and the D.C. Court. And the decision by either court is sufficient to bar this action.

c. Kazakhstan Had A Full And Fair Opportunity To Litigate Its Underlying Fraud Issues In The Previous Proceedings

As the D.C. Court noted when it confirmed the Award and rejected the same fraud issues Kazakhstan now asserts, Kazakhstan "had a full and fair opportunity to present its case to the tribunal." *Stati*, 302 F. Supp. 3d at 201.

d. Resolving Kazakhstan's Underlying Fraud Issues Was Necessary To Support Valid And Final Judgments On The Merits In The Previous Proceedings

The Award Confirmation required the D.C. Court and the Swedish courts to resolve Kazakhstan's fraud issues. This is because, if accepted, Kazakhstan's fraud allegations would have provided grounds not to enforce the Award. *See Stati*, 302 F. Supp. 3d at 199 (noting that fraud is a basis for refusing to confirm the Award). Thus, the D.C. Court's confirmation of the

Award necessitated the rejection of those allegations. In addition, the Swedish Courts, which have the sole authority to vacate the Award, rejected the fraud issues and confirmed the Award.

Permitting Kazakhstan to "repackag[e] the same factual allegations" asserted before the Swedish courts and the D.C. Court under different causes of action here directly contravenes Circuit and Supreme Court precedent. *Zherka*, 459 F. App'x at 13; *Montana*, 440 U.S. at 153–54. Indeed, doing so would encourage and validate Kazakhstan's vexatious lawsuits. It would also send a message to unhappy, losing litigants with bottomless pockets that raising the same issues in a different forum against different parties is a viable alternative to following the rule of law. Kazakhstan is collaterally estopped from asserting the fraud issues underlying its fraud-based claims in this action.

3. Kazakhstan Cannot Independently State A Fraud Claim

Even if Kazakhstan is not estopped from asserting the fraud issues underlying its civil conspiracy and aiding and abetting claims, it cannot independently assert an underlying fraud to support these claims. A plaintiff must sufficiently allege all essential fraud elements and satisfy Rule 9(b)'s heightened pleading requirement to state a claim against a third party for conspiracy and aiding and abetting the alleged fraud. *See Alexander & Alexander of N.Y., Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986) ("[A] mere conspiracy to commit a [tort] is never of itself a cause of action.") (internal citations omitted); *Lerner*, 459 F.3d at 292–93 (applying Rule 9(b) to aiding and abetting claim and stating this requires that the defendant provide substantial assistance in the commission of the underlying tort); *Marotte*, 2019 WL 1533304 (finding that plaintiff failed to plausibly allege fraud under Rule 9(b)'s heightened pleading requirement to state a conspiracy claim). To state a fraud claim, plaintiff must show that it "believed and justifiably relied upon,"

and was "induced by," a materially false statement. *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 488 (2007) (internal citations omitted).

Without conceding the other essential fraud elements, any underlying fraud assertion fails because Kazakhstan cannot allege that it "justifiably relied" on any allegedly fraudulent statement because the fraudulent statements at issue are the Statis' financial documents submitted in the SCC arbitration. Compl. ¶¶ 200–04. New York law is clear that a party may not rely on evidence when it actively contested that evidence in litigation. *See Shaffer v. Gilberg*, 125 A.D.3d 632 (2d Dep't 2015) (dismissing fraud claims based on alleged false evidence submitted in divorce proceeding for lack of reliance); *In re Gormally*, 550 B.R. 27, 46–47 (Bankr. S.D.N.Y. 2016) (finding that plaintiffs did not rely on statements relating to legal positions in a related litigation, in part, because plaintiffs had first-hand knowledge of the facts). Kazakhstan acknowledges that it actively disputed the Statis' financial information. *See*, *e.g.*, Compl. ¶¶ 200–04. Based on the foregoing, Kazakhstan cannot show that it "relied" on the Statis' financial representations in the SCC Arbitration and subsequent litigation, and its fraud claims fail as a matter of law.

B. Kazakhstan Fails To State A Civil Conspiracy To Commit Fraud Claim

Along with failing to plead an underlying fraud, Kazakhstan fails to plead the other elements to sufficiently state a claim for civil conspiracy. To state a claim for civil conspiracy to commit fraud, *in addition to* pleading an underlying fraud, a plaintiff must sufficiently allege with Rule 9(b) particularity: (i) an agreement between two or more parties; (ii) an overt act in furtherance of the agreement; (iii) the parties' intentional participation in the furtherance of a plan or purpose; and (iv) resulting damage. *See Uni-World Capital, L.P. v. Preferred Fragrance, Inc.*, 43 F. Supp. 3d 236, 251 (S.D.N.Y. 2014) (internal citations omitted).

To satisfy the first element, a plaintiff must provide "specific factual allegations" that "defendants *knowingly agreed* to cooperate in a fraudulent scheme." *LeFebvre v. New York Life*

Ins. & Annuity Corp., 214 A.D.2d 911, 912 (3d Dep't 1995) (emphasis added). Some showing that defendants' lawful activities potentially "assisted another in pursuit of guileful objectives" does not satisfy this element. *Id.* at 913. (citing *Williams v. Upjohn Health Care Servs., Inc.*, 119 A.D.2d 817, 819–20 (2d Dep't 1986)).

Kazakhstan's allegations utterly fail this element. Kazakhstan baldly alleges that: (1) Argentem learned of the Statis' allegedly fraudulent activities in 2011; and (2) Argentem entered into the Sharing Agreement, which "gave [them] a financial incentive to conspire with, and aid and abet, the Statis." *See* Compl. ¶¶ 30, 33. Bereft of any detail to substantiate these claims, these conclusory allegations merely show that Argentem entered into a valid contract more than a year (in December 2012) after Kazakhstan claims the Statis committed fraud (in 2011), which is insufficient to demonstrate that Argentem "knowingly agreed" to conspire with the Statis. *See LeFebvre*, 214 A.D.2d at 912. Argentem's lawful attempt to recover on its Notes cannot serve as a basis for conspiracy.

To satisfy the second and third elements, "plaintiffs must establish not only the corrupt agreement between two or more persons, but their intentional participation in the furtherance of the plan or purpose and resulting damage." *NCA Holding Corp. v. Ernestus*, 1998 WL 229510, at *2 (S.D.N.Y. 1998) (internal citations omitted). This requires plaintiffs to show defendants' "independent culpable behavior" linking them to their co-conspirators' tortious actions. *Schwartz v. Soc'y of N.Y. Hosp.*, 199 A.D.2d 129, 129–30 (1st Dep't 1993) (dismissing a complaint that failed to allege independent culpable behavior). *See also Perez v. Lopez*, 97 A.D.3d 558, 560 (2d Dep't 2012) (dismissing a conspiracy claim when the complaint did not allege any overt act by a specific defendant).

Plaintiffs must plead these elements with sufficient factual support to show that "something has been done which, absent the conspiracy, would give a right of action." *Gmurzynska v. Hutton*, 355 F.3d 206, 211 (2d Cir. 2004) (quoting *Beck v. Prupis*, 529 U.S. 494, 502 (2000)). General allegations that defendants conspired to do something does not "'sufficiently attribute responsibility for fraud to each individual defendant.'" *Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 460 (S.D.N.Y. 2008) (quoting *Ctr. Cadillac, Inc. v. Bank Leumi Trust Co. of N.Y.*, 808 F. Supp. 213, 230 (S.D.N.Y. 1992), *aff'd*, 99 F.3d 401 (2d Cir. 1995)). Accordingly, conclusory claims of conspiracy devoid of factual support must be dismissed. *Donini Int'l, S.p.A. v. Satec (U.S.A.) LLC*, 2004 WL 1574645, at *3 (S.D.N.Y. July 13, 2004) (internal citations omitted). *See also Meisel v. Grunberg*, 651 F. Supp. 2d 98, 119 (S.D.N.Y. 2009); *Schwartz*, 199 A.D.2d at 130 ("[M]ore than a conclusory allegation of conspiracy or common purpose is required to state a cause of action against" alleged nonactors to a conspiracy).

Kazakhstan also fails to allege facts sufficient to show that Argentem intentionally participated in any fraudulent scheme. Kazakhstan merely alleges that Argentem: (1) "agreed to provide funding to the Statis for the Enforcement Proceedings"; and (2) "regularly consulted with the Statis and/or their counsel and provided guidance regarding the legal strategy." Compl. ¶ 310. There is nothing in these allegations that would create an inference that Argentem engaged in "independent culpable behavior." *Schwartz*, 199 A.D.2d at 129. As well established by New York case law, absent specific allegations of wrongdoing by Argentem, fraudulent intent cannot be inferred from otherwise lawful behavior. *See, e.g., Lefebvre*, 214 A.D.2d at 912–13.

In summary, Kazakhstan has not sufficiently plead an agreement between the Statis and Argentem, or that Argentem intentionally participated in a fraudulent scheme. Indeed, there is little to support Kazakhstan's claims beyond the mere assertion that Argentem, like many other

unnamed parties (including the co-Plaintiff Outrider), purchased the Notes. As a result, Count I for civil conspiracy must be dismissed.

C. Kazakhstan Fails To State An Aiding And Abetting Wrongful Conduct Claim

Kazakhstan's aiding and abetting claim similarly fails to allege the required elements under New York law.[6] To state a claim for aiding and abetting, in addition to asserting an underlying fraud claim, plaintiffs must allege with Rule 9(b)'s particularity requirements that: (i) a party had "actual" knowledge of an underlying tort; and (ii) a party "provided substantial assistance to advance" the commission of the underlying tort. *Fidelity Funding of Cal., Inc. v. Reinhold*, 79 F. Supp. 2d 110, 122 (E.D.N.Y. 1997). To satisfy the first element, a plaintiff must establish "actual knowledge" of the fraud. *Kolbeck v. LIT America, Inc.,* 939 F. Supp. 240, 246 (S.D.N.Y. 1996). Pleading constructive knowledge of a fraud is insufficient to adequately plead a claim. *In re Platinum-Beechwood Litig.*, 427 F. Supp. 3d 395, 441 (S.D.N.Y. 2019). To satisfy the second element, a plaintiff must demonstrate that a defendant "affirmatively assist[ed], help[ed] conceal, or by virtue of failing to act when required to do so enable[d] the fraud to proceed." *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001) (internal citations omitted). This analysis is akin to a proximate cause analysis; however, "but-for" causation is insufficient. *Id.* The injury must also be a "'direct or reasonably foreseeable result' of the complained-of conduct" to impose liability. *Kolbeck*, 939 F. Supp. at 249 (quoting *Morin v. Trupin*, 711 F. Supp. 97, 112 (S.D.N.Y. 1989)).

[6] To the extent that Kazakhstan is relying on English law to satisfy this tort's underlying elements, Kazakhstan cannot "pick and choose [its] favorite causes of action from different legal systems" to satisfy New York causes of action. *City of Almaty v. Sater*, 2020 WL 7027566, *25 (S.D.N.Y. 2020).

Kazakhstan's allegations fail to meet Rule 9(b)'s heightened pleading on these elements. First, Kazakhstan fails to allege that Argentem had actual knowledge of the Statis' allegedly fraudulent scheme. The Second Amended Complaint contains a laundry list of facts allegedly known to Mr. Chapman. Compl. ¶ 250. However, notably absent from this list is any allegation that Argentem learned of the primary allegations that underpin Kazakhstan's fraud claims against the Statis: that the Statis falsely inflated the cost of the LPG Plant through Perkwood; that the Statis failed to disclose these transactions to their auditor; that these financial statements were used to prepare materials that were distributed to the bidders for the LPG Plant. *See id*. Kazakhstan also fails to allege that Argentem had knowledge that the Statis submitted false information to the SCC tribunal with the goal of defrauding Kazakhstan. *See id*. ¶¶ 30, 250, 269, 271. Kazakhstan's skeletal allegation that Mr. Chapman "discovered the Statis' fraudulent scheme" during the course of the SCC Arbitration and alleged subsequent investigation is not sufficient to establish actual knowledge, as required to support a claim for aiding and abetting. *See id* at ¶ 30. Moreover, allegations that Mr. Chapman was "in direct contact" with the Statis are insufficient to establish that Argentem had actual knowledge of the Statis' allegedly fraudulent scheme. *Id*. ¶ 32. *See also In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 471 (S.D.N.Y. 2017) (the "mere opportunity to conspire at legitimate meetings does not support an inference that an illegal combination actually occurred.") (internal citations omitted).

Second, Kazakhstan cannot establish that Argentem provided the Statis with substantial assistance. The Second Amended Complaint alleges that Argentem provided the Statis with substantial assistance by providing the Statis with funding to support recovery on the Award and future payment on the Notes under the Sharing Agreement. *See* Compl. ¶ 278. Kazakhstan further alleges "upon information and belief" that Argentem has communicated and consulted with the

Statis regarding various enforcement proceedings. *See id.* ¶¶ 213, 274, 278. These allegations are insufficient to state a claim for aiding and abetting wrongful conduct because Kazakhstan has not pleaded that its injuries were a direct or reasonably foreseeable result of Argentem's "support" of the Statis, *i.e.* that the SCC tribunal would not have entered a $500 million award in the Statis favor had Argentem not "conspired" with the Statis. Indeed, most of the action occurred after the alleged fraud took place and the Award was made. Kazakhstan has not pleaded this element because it cannot: the SCC tribunal explicitly disavowed any reliance on the allegedly false information submitted to it. *Stati*, 302 F. Supp. 3d at 198. Accordingly, under the proximate cause analysis, Kazakhstan cannot allege that its injuries were a direct or reasonably foreseeable result of Argentem's involvement. Because Kazakhstan cannot state aiding and abetting elements, Count II must be dismissed as a matter of law.

II. New York Law Forecloses Kazakhstan's Unlawful Means Conspiracy Under English Law Claim

Kazakhstan's claim for "Unlawful Means Conspiracy" must be dismissed because there is no basis to apply English law here. Under New York law, the court must first determine whether there is an "'actual conflict'" between New York and English law. *See GlobalNet Financial.Com, Inc. v. Frank Crystal & Co., Inc.*, 449 F.3d 377, 382 (2d Cir. 2006) (quoting *In re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 223 (1993)). If an "actual conflict" exists, the court must apply the "law of [the] jurisdiction with the most significant interest in, or relationship to, the dispute." *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1539 (2d Cir. 1997) (citing *Babcock v. Jackson*, 12 N.Y.2d 473, 481–82 (1963)).

Applying New York choice-of-law rules here, an "actual conflict" exists between New York and English law because under New York Law: (i) parties cannot bring a freestanding conspiracy claim; and (ii) there is no analogous cause of action for "unlawful means conspiracy."

See Alexander, 68 N.Y.2d at 969. Because an actual conflict exists, this Court must apply New York law, and not English law, as New York has the "most significant" relationship to this dispute. Indeed, Kazakhstan alleges in the Second Amended Complaint that Argentem "committed tortious acts within the State [of New York]." Compl. ¶ 12. Further, there is no allegation to support an inference that England has a relationship with this dispute, let alone the "most significant" relationship. As such, Kazakhstan's attempt to avail itself of certain foreign causes of actions to its complaint, in a manner that is inconsistent with New York law, warrants dismissal. *City of Almaty*, 2020 WL 7027566, at *8 (noting that the plaintiff could not "pick and choose [its] favorite causes of action from different legal systems").

Because there is no basis for the Court to apply English law here, Count III must be dismissed.

III. The *Noerr-Pennington* Doctrine Bars Kazakhstan's Claims

Kazakhstan's suit also must be dismissed because it is barred by the *Noerr-Pennington* doctrine (the "Doctrine"), which protects Argentem's First Amendment right "to petition the Government for a redress of grievances." U.S. Const. amend. I. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961).

A. The Doctrine Protects Argentem's Involvement In U.S. And Foreign Litigation

Under the Doctrine, "civil actions are barred where the activity challenged under federal statute or state law consists of petitioning legislatures, administrative bodies, and the courts." *Tuosto v. Philip Morris USA Inc.*, 2007 WL 2398507, at *5 (S.D.N.Y. Aug. 21, 2007) (internal citations omitted); *see also Primetime 24 Joint Venture v. Nat'l Broad. Co., Inc.*, 219 F.3d 92, 99 (2d Cir. 2000) ("[G]ood faith litigation . . . falls within the protection of the [D]octrine."). In this

Circuit, that includes "concerted efforts incident to litigation." *Singh v. NYCTL 2009-A Trust*, 683 F. App'x 76, 78 (2d Cir. 2017) (internal citations omitted).

The Doctrine protects parties involved in the underlying proceedings, like the Statis, *and* non-parties, like Argentem, who consult with or fund a party prosecuting legal claims. *See Balt. Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 401 (4th Cir. 2001) (holding that the doctrine can protect non-parties, who "often provide aid to litigants, whether through financial backing, legal assistance, amicus briefs, or moral support"); *see also Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 937 (9th Cir. 2006) (explaining that the *Noerr-Pennington* doctrine protected an individual who funded litigation "but was not himself a party to the litigation") (citing *Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155, 157–59 (9th Cir. 1993)).

The Doctrine applies to foreign legal proceedings and arbitration proceedings conducted under international governmental treaties. *See Friends of Rockland Shelter Animals, Inc. (FORSA) v. Mullen*, 313 F. Supp. 2d 339, 344 (S.D.N.Y. 2004) (noting the majority view that *Noerr-Pennington* applies to petitions to foreign governments); *see also Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1366 (5th Cir. 1983) (holding *Noerr-Pennington* applies to petitions to foreign governments); *Luxpro Corp. v. Apple Inc.*, 2011 WL 1086027, at *5 (N.D. Cal. Mar. 24, 2011) (applying the Doctrine to foreign lawsuits); *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 189 F. Supp. 2d 385, 392–93 (E.D. Va. 2002) (finding *Noerr-Pennington* applied to an arbitration before the World Intellectual Property Organization ("WIPO") because it was a "quasi-public organization" and "WIPO proceedings, a form of arbitration, are part of the adjudicatory process").

The Doctrine protects Argentem's alleged actions underlying this dispute: namely, Argentem's alleged support to the Statis during the Enforcement Proceedings. Kazakhstan alleges

that Argentem "provide[d] funding" and "guidance regarding the legal strategy to enforce" the SCC Award in the Enforcement Proceedings. Compl. ¶¶ 213, 310. Kazakhstan's allegations merely amount to attacking Argentem's "concerted efforts incident to litigation," which the doctrine protects. *See* Compl. ¶ 278; *Singh*, 683 F. App'x at 77 (internal citations omitted); *Balt. Scrap Corp.*, 237 F.3d at 401 (noting that the doctrine protects non-parties' "financial backing, legal assistance . . . or moral support.")

Accordingly, Kazakhstan's claims must be dismissed under the Doctrine because the claims are based on Argentem's alleged activity of petitioning the courts.

B. The Doctrine's Sham Litigation Exception Does Not Apply Here

The Doctrine contains an exception for "sham litigation," but that exception does not apply here. To prevail on the "sham litigation" exception, plaintiffs must satisfy objective and subjective components, showing that: (i) the claims were "objectively baseless," in the sense that "'no reasonable litigant could realistically expect success on the merits,'" and (ii) the claims were an "'attempt to interfere directly with the business relationships of a competitor'" through the "'use of governmental process.'" *Singh*, 683 F. App'x at 78 (quoting *Prof'l Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993)).

As to the first prong, this Court has held it is "impossible" to describe claims as "objectively baseless" when multiple judges "conclude unanimously that a litigation position has merit." *Ginx, Inc. v. Soho Alliance*, 720 F. Supp. 2d 342, 365 (S.D.N.Y. 2010) (finding a defendant's participation in a proceeding was not objectively baseless after "six judges conclude[d] unanimously that a litigation position ha[d] merit"). In other words, a "winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." *Prof'l Real Estate Invs.*, 508 U.S. at 60 n.5. Courts in this Circuit have held that prior litigation was not objectively baseless even when only *some* claims succeeded on the merits. *See Mosdos*, 701 F.

Supp. 2d at 602–03 (finding the state court's dismissal of some claims did not render prior legal claims objectively basis).

The Court only needs to consider the first prong here since it obviously fails as the Statis' claims have been validated not only by the SCC panel, but also by courts in Sweden, the U.S., the Netherlands, Belgium, and Italy. *See* Compl. ¶¶ 39, 53; Dzhazoyan Decl. ¶¶ 9–13. Indeed, Swedish appellate courts have twice considered and twice rejected the fraud arguments Kazakhstan advances here. *See Stati*, 302 F. Supp. 3d at 195–96. Likewise, Judge Jackson specifically found the Enforcement Proceedings to be "non-frivolous" when dismissing the civil RICO claims Kazakhstan alleged against the Statis. *Stati*, 380 F. Supp. 3d at 61. Multiple judges across multiple jurisdictions—domestic and international—have concluded that the Statis' claims against Kazakhstan have merit, defeating any claim that they were "objectively baseless." Because Kazakhstan cannot show the Statis' claims were objectively baseless, this Court need not consider the Statis' subjective intent.

Nor does the second prong apply, since there is, and can be, no allegation that Kazakhstan is a business competitor of Argentem, or that Argentem is seeking to interfere with any competition by seeking legal redress.

Because Kazakhstan seeks to hold Argentem liable for participating in non-frivolous litigation, all of its claims are barred by the *Noerr-Pennington* doctrine, and Kazakhstan's claims must be dismissed.

IV. Any Further Attempt to Amend The Complaint Would Be Futile

Notwithstanding Rule 15(a)'s mandate for courts to permit leave to amend "when justice so requires," this Court has broad discretion to deny leave for good reason, including futility. Fed. R. Civ. P. 15(a); *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)

(upholding the district court's denial of plaintiffs' leave to amend). A proposed amended pleading "is futile when it fails to state a claim" and cannot survive a 12(b)(6) motion to dismiss. *Douramanis v. Dur-Am. Brokerage Inc.*, 2021 WL 961761, at *2 (S.D.N.Y. Mar. 15, 2021) (internal citations omitted) (finding plaintiff's amendment was futile because it provided only conclusory allegations). When evaluating whether to deny leave, the Court may consider whether plaintiffs have previously filed amended complaints. *See, e.g.*, *Chasman v. JP Morgan Chase Bank, NA*, 2020 WL 207784, at *4 (S.D.N.Y. Jan. 14, 2020), *aff'd sub nom. Chasman v. JPMorgan Chase Bank, N.A.*, 2021 WL 1827455 (2d Cir. May 7, 2021) (denying leave to amend, in part, because it would "constitute plaintiffs' fourth bite of the proverbial apple, which is impermissible"); *In re Am. Express Co. S'holder Litig.*, 39 F.3d 395, 402 (2d Cir. 1994) (affirming decision to deny leave, in part, because plaintiffs had two opportunities to amend their complaint).

Any amendment to the already twice amended complaint would be futile because there are no allegations that would permit the pleading to survive a 12(b)(6) motion. As shown, Kazakhstan cannot state claims for conspiracy and aiding and abetting because New York proscribes freestanding derivative claims and Kazakhstan cannot establish an underlying tort. Kazakhstan also cannot state a claim for unlawful conspiracy under English law because there is no basis to apply English law. Further, all of Kazakhstan's claims are barred by the *Noerr-Pennington* Doctrine because Argentem's alleged conduct is protected by the First Amendment. Accordingly, any request to amend should be denied.

CONCLUSION

For the foregoing reasons, Argentem respectfully requests that the Court dismiss Kazakhstan's claims with prejudice.

Respectfully submitted,

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New York, New York

AKIN GUMP STRAUSS HAUER & FELD LLP

/s/ Stephen M. Baldini
Stephen M. Baldini
Shanna L. Miles (*pro hac vice*)
One Bryant Park
New York, NY 10036
Telephone: (212) 872-1062
Facsimile: (212) 872-1002
sbaldini@akingump.com
smiles@akingump.com

-and-

Paul Butler
Allison S. Thornton (*pro hac vice*)
20001 K Street N.W.
Washington, DC 20006
Telephone: (202) 887-4069
Facsimile: (202) 887-4288
pbutler@akingump.com
athornton@akingump.com

FAEGRE DRINKER BIDDLE & REATH LLP

/s/ Clay J. Pierce
Clay J. Pierce
Andrew L. Van Houter
1177 Avenue of the Americas
New York, NY 10036
(212) 248-3186
clay.pierce@faegredrinker.com
andrew.vanhouter@faegredrinker.com

-and-

Randall E. Kahnke (*pro hac vice*)
Peter C. Magnuson (*pro hac vice*)
Nathaniel J. Zylstra (*pro hac vice*)
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: (612) 766-7000
peter.magnuson@faegredrinker.com
nathaniel.zylstra@faegredrinker.com

Attorneys for Defendants Argentem Creek Holdings LLC, Argentem Creek Partners LP Pathfinder Argentem Creek GP LLC, ACP I Trading LLC, and Daniel Chapman

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the length limits permitted by Your Honor's Order dated July 14, 2021, Dkt # 52. The brief is 10,287 words, excluding the cover page, certificate of compliance, table of contents, and table of authorities per Rule IID. The brief complies with Rule IID's formatting rules.

Dated: 7/15/2021

/s/ Stephen M. Baldini

STEPHEN M. BALDINI
One Bryant Park
New York, NY 10036
Telephone: (212) 872-1000
Facsimile: (212) 872-1002
sbaldini@akingump.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 15, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send a notification of such filing to all attorneys of record.

Dated: 7/15/2021

/s/ Stephen M. Baldini

STEPHEN M. BALDINI
One Bryant Park
New York, NY 10036
Telephone: (212) 872-1000
Facsimile: (212) 872-1002
sbaldini@akingump.com