SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

REPUBLIC OF KAZAKHSTAN, Plaintiff, v. DANIEL CHAPMAN, ARGENTEM CREEK HOLDINGS LLC, ARGENTEM CREEK PARTNERS LP, PATHFINDER ARGENTEM CREEK GP LLC, and ACP I TRADING LLC, Defendants.	Index No. 652522/2020 Motion Sequence No. 002 **ORAL ARGUMENT REQUESTED**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

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Plaintiff Republic of Kazakhstan ("**Plaintiff**" or "**Kazakhstan**") respectfully submits this Memorandum of Law in Opposition to the Motion to Dismiss the Third Amended Complaint (the "**Complaint**") filed by Defendants Daniel Chapman, Argentem Creek Holdings LLC, Argentem Creek Partners LP, Pathfinder Argentem Creek GP LLC, and ACP I Trading LLC ("**Defendants"**).

PRELIMINARY STATEMENT

Defendants' Motion to Dismiss has no merit whatsoever and should be denied in its entirety. It relies on arguments that are contradicted either by the plain allegations of the Complaint or decisions of other courts on precisely these same issues. It also represents Defendants' third attempt to prevent or delay Plaintiff from litigating the merits of its claims and, like the prior two failed attempts in the U.S. District Court for the District of Columbia ("**DDC**") and the U.S. District Court for the Southern District of New York ("**SDNY**"), it too should be summarily rejected.

Defendants' first and primary argument – that this action is a collateral attack on an arbitral award obtained by non-parties Anatolie Stati, Gabriel Stati, and their group of companies (the "**Statis**") – fails for a number of reasons. First, Judge Koeltl of the SDNY already rejected this exact argument when he denied Defendants' motion to dismiss Plaintiff's claims and declined to find subject matter jurisdiction, holding that "*the connection between the litigation and the arbitral award is so tenuous*" and "*Kazakhstan does not seek to vacate or enforce the arbitral award against it or to obtain any relief that would affect the validity of that award.*"[1] Second, Judge Berman Jackson of the DDC rejected this same argument when denying Defendants' request to enjoin this action, finding in pertinent part that Defendants were wrong to

[1] *See infra* at 17.

argue that Plaintiff's present claims would impact her prior judgment confirming the arbitral award. Third, contrary to Defendants' assertions, the gravamen of Plaintiff's allegations is not a collateral attack on the Statis' arbitral award but rather Defendants' ongoing complicity in a years-long series of frauds by the Statis' that existed before, during, and after the arbitration. These fraud schemes have a number of victims including *inter alia* the Statis' investors, their auditors, the arbitral tribunal, various courts in subsequent litigation proceedings, *and* Plaintiff. Defendants cannot avoid litigation of their knowing involvement in these multifaceted fraud schemes merely by pointing to an arbitral award that was but *one* component of the schemes.

Defendants' second argument – that Plaintiff's fraud allegations are precluded by prior court judgments – is also wrong. Indeed, the opposite is true. As alleged, in November 2021, the Brussels Court of Appeal in Belgium ("**Belgium Court of Appeal**") adjudicated virtually the same factual allegations of fraud as appear in the Complaint. This ruling was made *inter partes* and with the Statis fully represented. The Belgium Court of Appeal reviewed all of the evidence presented by Plaintiff, as well as the Statis' counter-arguments, and decisively found that the Statis had in fact engaged in all of the fraud schemes alleged by Plaintiff – before, during, and after the underlying arbitration.

Furthermore, the Belgium Court of Appeal held that the Statis' fraud schemes included deliberately deceiving the Swedish courts in the proceedings previously brought by Plaintiff to annul the arbitral award. Despite this, Defendants now attempt to have this Court rely on exactly these same Swedish court rulings that the Statis obtained by fraud, as well as the rulings of other courts based on these Swedish court rulings. In this respect, Defendants are now parroting the Statis' "new key lie," *i.e.*, that the allegations concerning their fraud schemes have already been

rejected on the merits.[2] In fact, Defendants fail to identify an issue presented here that was previously decided by other courts. And, in any event, in those proceedings where the merits of Plaintiff's fraud allegations were not actually considered and therefore not ruled upon, Plaintiff did not have a full and fair opportunity to present its case. First, as mentioned, the Swedish court decision on which Defendants place so much emphasis was itself obtained by fraud. Furthermore, it did not address the merits of *any* fraud allegation, much less the broad and wide-ranging fraud schemes alleged here. Second, the DDC has confirmed that it too never addressed the merits of any of Plaintiff's fraud allegations, much less the fraud allegations presented in the Complaint.

Defendants' third argument – that the *Noerr-Pennington* doctrine bars Plaintiff's claims – borders on the frivolous. In addition to the alleged fraud extending beyond litigation or arbitration activity, it is well established that neither the First Amendment nor *Noerr-Pennington* protects fraudulent litigation, much less funding and otherwise assisting with such litigation while aware of its fraudulent nature. In arguing to the contrary, Defendants seek not only to contradict the plain factual allegations of the Complaint, but also to establish that the "sham litigation" exception to *Noerr-Pennington* does not apply merely because some of the Statis' prior arbitration and litigation activities were successful. But that ignores that these supposed successes – many of which have now been reversed as further evidence of the Statis' fraud schemes has been discovered – were themselves a direct result of the very frauds alleged in the Complaint. Because neither *Noerr-Pennington* nor the First Amendment protects such fraudulent conduct, Defendants cannot escape liability for participating in it.

[2] Despite this, Defendants concede that "at least some foreign tribunals" have allowed Plaintiff's "fraud claims to go forward." NYSCEF 30 at 5.

Defendants' fourth argument – that Plaintiff has failed to properly allege the underlying fraud and Defendants' complicity – is also a non-starter. First, the only element of the Statis' underlying fraud that Defendants even attempt to contest is Plaintiff's allegations concerning reliance. But the Complaint alleges that Plaintiff relied on the Statis' misrepresentations – made both inside and outside judicial and arbitral proceedings – for many purposes. Second, the assertion that the Complaint does not detail Defendants' involvement in the fraud also cannot withstand scrutiny. The Complaint specifically alleges that Defendants became aware of the Statis' fraud through an investigation (whose findings the Complaint details), and that thereafter Defendants chose to align with the Statis, including funding the Statis' efforts to injure Plaintiff and conceal the fraud. Those allegations easily provide the requisite detail for both Plaintiff's justifiable reliance on the Statis' fraudulent misrepresentations and Defendants' knowing assistance with the Statis' fraud.

Defendants' final argument – that Plaintiff cannot press its unlawful means conspiracy claim under English law – is wrong. Whether or not New York has the "most significant" relationship to much of the wrongdoing alleged here, the elements of an English law claim for unlawful means conspiracy are satisfied because, as alleged, certain of the conduct occurred in England. The claim is therefore within the reach of English law. *See, e.g.*, *City of Almaty v. Sater*, 503 F. Supp. 3d 51, 62–63 (S.D.N.Y. 2020) (law of place where unlawful conduct occurred governs claim). No New York public policy prevents a New York court from recognizing a valid claim under English law merely because Defendants and the Statis undertook additional, or even the most significant, unlawful acts in New York. And, the mere fact that New York does not recognize the exact same claim, with the same elements, that Plaintiff asserts under English law does not mean that the Court cannot adjudicate it. For those reasons, and

because Defendants do not dispute that the elements of the claim are satisfied, there is no basis to dismiss to Count III.

For these reasons, and as further set forth below, the Court should deny the Motion to Dismiss in its entirely.

RELEVANT BACKGROUND

The following facts are taken from the Third Amended Complaint, NYSCEF 23, which on a Motion to Dismiss must be treated as true. *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994). A true and correct copy of the Third Amended Complaint is attached as Exhibit 1 to the Affirmation of Felice Galant ("**Galant Affirmation**") hereto.

Defendant Daniel Chapman ("**Chapman**") controls Defendants Argentem Creek Holdings LLC and Argentem Creek Partners LP (collectively, "**Argentem**"), Defendant Pathfinder Argentem Creek II LP ("**Pathfinder**"), and Defendant ACP I Trading LLC ("**ACP I**"). Before founding Argentem, Chapman was a member of the senior management at Black River Asset Management LLC ("**Black River**"). NYSCEF 23 ¶¶ 12–18.

This case centers on Chapman's continuing actions on behalf of himself and the corporate defendants in conspiring with, and aiding and abetting, complex, long-running fraudulent schemes that the Statis engineered to defraud their investors and multiple other persons, including Plaintiff. Although Defendants now try to frame these fraud schemes as only pertaining to an arbitral award obtained by the Statis between 2010 and 2013, the fraud actually began no later than 2006, when the Statis engaged in a series of covert related-party transactions for the purpose of massively inflating the stated expenses of their business operations in Kazakhstan. *Id.* ¶ 30.

Specifically, in December 2006, for the alleged purpose of financing their operations in Kazakhstan, the Statis raised millions of dollars by selling notes (the "**Tristan Notes**") issued by

their company, Tristan Oil Ltd. ("**Tristan Oil**"), to third-party investors (the "**Noteholders**") including Black River. *Id.* ¶¶ 23–25. The Statis represented to their investors that the invested funds would be used for legitimate business purposes. *Id.* ¶ 26. Instead, the Statis intended to (and ultimately did) embezzle the invested funds through fraudulent transactions. *E.g.*, *id.* ¶¶ 27–31. Among other unlawful acts, between 2006 and 2010, the Statis: (1) falsely represented that various related entities were independent third parties; (2) used those covert related entities to artificially inflate prices for equipment and services for their Kazakh operations; (3) fraudulently skimmed hundreds of millions of dollars from oil and gas sales by "selling" at artificially low prices to related third parties; (4) made material misrepresentations to their auditor, KPMG, in order to obtain audit reports to legitimize their fraudulent financial statements (resulting in KPMG's decision to withdraw all its audit reports in August 2019); and (5) used the falsified financials and falsely acquired audit reports to defraud their investors and obtain inflated bids for their Kazakh operations. *Id.* ¶¶ 102–92.

In 2010, prior to learning of the Statis' scheme to defraud their investors, Plaintiff terminated the contracts of the Statis' Kazakh operations. After the Statis defaulted on the Tristan Notes, the Statis initiated arbitration proceedings against Plaintiff, arguing that Plaintiff caused them to default on the notes by allegedly engaging in a campaign of harassment and expropriating their Kazakh assets. *Id.* ¶ 194. This was knowingly false. *Id.* ¶¶ 195–200. Indeed, the apparent purpose of this arbitration was to conceal the Statis' embezzlement from their investors and unlawfully obtain equivalent amounts from Plaintiff. *Id.* ¶ 220.

Unbeknownst to Plaintiff at the time, the Statis then employed falsified information and misrepresentations throughout the arbitration proceedings. *Id.* Among other things, Plaintiff relied on the Statis' misrepresentations and false evidence in formulating its own arguments (and

for other purposes). *Id.* ¶¶ 207–11. The arbitral tribunal also relied on the Statis' misrepresentations when it issued its 2013 award in the Statis' favor on the basis of their falsified arguments and evidence. *Id.* ¶¶ 212–16. This was confirmed by the Belgium Court of Appeal in November 2021, when it overturned recognition of the Statis' arbitral award in Belgium (the "**Belgium Decision**"). *Id.* ¶ 68 (holding that the arbitral tribunal "relied on evidence that is now known to be inaccurate and tainted by misstatements."). A copy of this judgment is attached as Exhibit 2 to the Galant Affirmation, NYSCEF 44; *see also* NYSCEF 24 (Belgium Decision).

Because the Statis went through great efforts to cover up their fraudulent activity, Plaintiff did not begin to uncover the first, limited evidence of the Statis' fraud until July 2015, more than a year after the arbitration ended. *Id.* ¶ 47. Specifically, Plaintiff discovered certain evidence of fraud related to an unfinished liquefied petroleum plant (the "**LPG Plant**"). *Id.* It is now known that the Statis' fraud is ongoing and includes at least four additional fraud schemes throughout the years, the details and evidence of which are still being uncovered. *Id.* ¶ 28. Plaintiff did not discover the evidence underlying its present fraud allegations until well after the Statis had begun a worldwide campaign to have the arbitral award recognized. *Id.* ¶¶ 219–22.

For example, in 2014, the Statis filed a petition to confirm the award in the DDC. *See Stati v. Republic of Kazakhstan*, 302 F. Supp. 3d 187 (D.D.C. 2018), *aff'd sub nom. Stati v. Republic of Kazakhstan*, 773 F. App'x 627 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 381 (2019). At the time briefing was completed on that petition in May 2015, Plaintiff was not aware of any of the Statis' fraud schemes, and its opposition did not contain any fraud-based argument. *Id.* at 193. As a result, after Plaintiff began to uncover evidence that the Statis had engaged in fictitious transactions with respect to the LPG Plant, it was forced to move for leave of court to add additional grounds regarding the LPG Plant Fraud. *Id.* When DDC denied that motion in

May 2016, *id.* at 194, it made clear it was not ruling on the merits of even the limited fraud allegations that Kazakhstan was able to make at that time. *See* *Stati et al. v. Republic of Kazakhstan*, No. 1:14-cv-01638-ABJ-DAR, ECF 36 at 4 ("**DDC Action**").

This was confirmed by Justice Knowles of the English High Court in his June 2017 decision finding that Plaintiff had established a *prima facie* case that the Statis had obtained the award by fraud with respect to the LPG Plant.[3] *See* NYSCEF 48, Approved Judgment of Justice Knowles, June 6, 2017, ¶¶ 50–55 (finding that the DDC's 2016 decision did not "conclude the question of the consequences of the Tribunal's reliance on the" materials fraudulently obtained by the Statis).[4]

In the DDC proceedings, Plaintiff then moved for reconsideration of the Court's May 2016 decision in order to add additional evidence of the fraud with respect to the LPG Plant. *See* *Stati*, 302 F. Supp. 3d at 194. On March 23, 2018, the Court denied that motion and confirmed the Statis' arbitral award without permitting Plaintiff the opportunity to present its then-existing fraud case. Rather, the court deemed Plaintiff's further allegations with respect to the LPG Plant to be "new facts" that were not properly before it. *Stati*, 773 F. App'x at 629; *see also* *Stati*, 302 F. Supp. 3d at 193. The Court also relied on the Swedish courts' decision not to annul the award – but as is now known, the Swedish annulment proceedings were also tainted by fraud. This has been confirmed by the Belgium Court of Appeal in its November 2021 decision, in which it

[3] Defendants claim that in prior versions of its Complaint, "Kazakhstan falsely alleged that the English High Court was the only court to rule on the merits of the Statis' fraudulent scheme," and that now, Kazakhstan concedes that the English decision was not a full decision on the merits, but that the English court merely found that "there is a sufficient prima facie case" to proceed to trial. NYSCEF 30 at 13. Kazakhstan did not make any false allegations – indeed, the High Court did rule on the merits of Kazakhstan's fraud case after reviewing its then-limited evidence concerning the LPG Plant Fraud.

[4] [Stati et al. v. The Republic of Kazakhstan, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070], copy attached to Galant Affirmation as Exhibit 6, NYSCEF 48; reported at 2017 EWHC 1348 (Comm); and found at http://www.bailii.org/ew/cases/EWHC/Comm/2017/1348.html.

found that the Statis "deliberately misled the Swedish courts…which – purposefully – prevented these jurisdictions from ruling on the matter on the basis of all information and evidence available." NYSCEF 24 (Belgium Decision) at 7–8.

In October 2017, Plaintiff had filed civil RICO claims and various state-law claims against the Statis based on the then-available, limited information it had gathered regarding the LPG Plant Fraud. The DDC dismissed Plaintiff's RICO claims under Rule 12(b)(6) for failing to allege a RICO "pattern" of racketeering activity. *See Republic of Kazakhstan v. Stati*, 801 F. App'x 780, 780–81 (D.C. Cir. 2020). Again, however, the DDC again did not rule on the merits of Plaintiff's fraud allegations (which only consisted of the then-known evidence regarding one of the five fraud schemes alleged here, *see infra* at 22–23), as confirmed when it dismissed Plaintiff's state-law fraud claims ***without prejudice*** after declining to exercise supplemental jurisdiction. *Id.* at 781.

With respect to Sweden, those proceedings to annul the arbitral award were initiated by Plaintiff in 2014, also before any evidence concerning the Statis' fraud was discovered. After the initial LPG Plant Fraud evidence was discovered in July 2015, Plaintiff amended its papers in Sweden to include the evidence then available.[5] NYSCEF 23 ¶ 219. This was limited to the evidence that Plaintiff had managed to discover at the time, meaning that nothing was alleged regarding four of the five frauds alleged here and the allegations regarding the fifth (the LPG Plant Fraud) were severely limited. *Id.* ¶¶ 62–63; *see infra* at 22–24. In December 2016, the Svea Court of Appeal denied Plaintiff's annulment petition but did not rule on the merits of any

[5] Defendants erroneously claim that the Statis' award has been "confirmed" in Sweden. NYSCEF 30 at 10. In fact, the Statis never brought confirmation proceedings in Sweden.

fraud allegations; rather, the court merely held that Plaintiff's then-existing evidence, if accepted as true, would not violate *Swedish public policy*. NYSCEF 23 ¶¶ 59–63.

Even this ruling, as limited as it is, is invalid. This is because, unbeknownst to Plaintiff at the time, the Statis made a number of material assertions that were relied upon by the Swedish court and Plaintiff that are now known to be false. *See, e.g.*, NYSCEF 23 ¶¶ 224, 245, 252. This was confirmed by the Belgium Court of Appeal and by Patrik Schöldström (now a judge on the Svea Court of Appeal), who concluded in an August 2020 expert opinion that the Statis had "violated the duty to tell the truth" during the Swedish annulment proceedings and that, accordingly, the Svea Court "did not have a correct and truthful basis for its 2016 Decision." *See* Expert Report of Patrik Scholdstrom, attached as Exhibit 3 to the Galant Affirmation, NYSCEF 45 ¶¶ 84, 87; *see also* NYSCEF 23 ¶¶ 85–86.

Although Plaintiff began to uncover some evidence of the fraud related to the LPG Plant during the DDC and Swedish proceedings, it continued to investigate after the proceedings concluded. Through this investigation, Plaintiff discovered more evidence of the LPG Plant Fraud and discovered the existence of four ***additional and entirely new*** fraudulent schemes that the Statis engaged in. At present, five fraudulent schemes of the Statis have been uncovered:

1. The "**LPG Plant Fraud**," wherein the Statis fraudulently inflated the construction expenses of an unfinished liquefied petroleum gas plant (the "**LPG Plant**") in Kazakhstan through a series of covert, fraudulent related-party transactions. For example, the principal equipment for this LPG Plant cost the Statis only circa $35 million, but in their financial statements the Statis claimed to have invested $245 million in the construction of the LPG Plant. The Statis diverted into their own pockets the

difference between the amount of their actual costs and the fraudulently inflated $245 million. *Id.* ¶¶ 119-27.

2. The "**Tristan Circular Fraud**," wherein the Statis falsely represented to investors in the Tristan Notes that $70 million of the monies raised from the sale of those notes would be applied to repay amounts that one of the Statis' other companies, Terra Raf, owed to one of the Statis' Kazakh companies (TNG), but instead diverted those monies to their other companies. *Id.* ¶¶ 102–18.

3. The "**Oil Skimming Fraud**," wherein the Statis fraudulently skimmed over $200 million from sales of oil and gas from the Kazakh fields by "selling" the oil and gas at artificially low prices to their own companies, and then re-selling it to a third party at market prices. The Statis then diverted the amount of the price differential into their own pockets rather than returning the full market price to their Kazakh companies (KPM and TNG). *Id.* ¶¶ 128–30.

4. The "**Laren Transaction Fraud**," wherein the Statis made fraudulent misrepresentations concerning Tristan Oil's issuance of an additional $111,110,000 in notes to Laren Holdings Ltd. ("**Laren**") in June 2009. *Id.* ¶¶ 189–92.

5. The "**Cash Collateral Fraud**," wherein the Statis – in violation of the documents governing the issuance of the Tristan Notes – used for their own purposes cash that should have been sequestered as collateral for repayment of the Tristan Notes. *Id.* ¶¶ 260–76.

See, e.g., NYSCEF 23 ¶ 28.

At the time of the proceedings in Sweden and the DDC, Plaintiff was not aware of the entirety of the LPG Plant Fraud and had no knowledge of the other four fraudulent schemes

discussed above. Therefore, none of these courts was confronted with anything close to a full evidentiary picture, as confirmed by the Belgium Court of Appeal. Moreover, none of the courts reached any conclusion regarding the validity of Plaintiff's evidence of the Statis' fraud. Instead, each proceeding was corrupted by false and fraudulent statements made by the Statis. *Id.* ¶¶ 69–70. Indeed, the Statis (with Defendants' substantial assistance) have continued to make material misrepresentations, rely on falsified evidence, and knowingly mislead the courts in the various other proceedings they have brought.

While the courts in Luxembourg, the Netherlands, and Belgium initially were taken in by the Statis' fraud and confirmed the arbitral award, they have since reversed course as further evidence of the fraud has been discovered.[6]

In Luxembourg, in February 2021, the Luxembourg Court of Cassation (the highest court) granted Plaintiff's application and annulled the judgment confirming the Statis' award, on the basis that the Luxembourg Court of Appeal had incorrectly dealt with key evidence of the Statis' fraud. NYSCEF 23 ¶ 64(a). Then, in December 2021, the Luxembourg Court of Appeal ruled in favor of Plaintiff and stayed the Statis' proceedings to enforce the award because of ongoing criminal proceedings against the Statis in Luxembourg for forgery, fraud, and money laundering in connection with their efforts to enforce the award there. *Id.* ¶ 64(c).

In the Netherlands, in December 2021, the Dutch Supreme Court granted Plaintiff's appeal in cassation and reversed the prior judgment granting exequatur to the arbitral award on the basis that the Statis had instituted their proceedings in the wrong court. NYSCEF 23 ¶

[6] In contrast, in June 2017, the High Court of Justice in England found on a *prima facie* basis that the Statis committed fraud with respect to the LPG Plant and ordered a trial on Plaintiff's then-existing allegations with respect to this one fraud. *Id.* ¶ 217. However, to avoid this trial, the Statis discontinued their own enforcement action. The English courts permitted this only on the harsh conditions that the Statis pay Plaintiff's legal fees and expenses and agree to *never again* initiate enforcement proceedings in England. *Id.* ¶ 49, 218. The arbitral award is thus unenforceable in England because of the Statis' fraud. Conspicuously, the Statis were only able to avoid trial in England with Defendants' financial assistance. *Id.* ¶ 219–20.

64(d). It then remanded the case for new proceedings to the correct court, during which Plaintiff will be able to present its full fraud evidence. *Id.* Those Dutch proceedings are now ongoing.

The Belgium Decision

In Belgium, while the court of first instance initially confirmed the award, the timing of the proceedings permitted Plaintiff to present virtually all of the evidence it has collected to date regarding the Statis' five fraud schemes on appeal. NYSCEF 23 ¶ 65. After reviewing this evidence, the Belgium Court of Appeal conclusively determined in November 2021 that the Statis had engaged in long-running fraudulent schemes before, during, and after the arbitration that defrauded not only Plaintiff and the arbitral tribunal, but also the courts in subsequent proceedings concerning the award.[7] *Id.* ¶ 65; NYSCEF 24 (Belgium Decision) at 29.

With respect to the Statis' fraud before the arbitration, the court found *inter alia* that "[t]he Statis had purposefully misled their auditor [KPMG] in order to give credibility to their financial statements in the eyes of third parties," and that they have since "admitted to concealing (Stati-owned company Perkwood from their financial statements…with a view in particular to avoid a review of the transactions between Perkwood and TNG by an independent third party." NYSCEF 23 ¶ 66.

With respect to the Statis' fraud during the arbitration, the court found *inter alia* that:

(1) the Statis legitimized their fraudulent financial statements by relying on audit reports that were later "withdrawn" in August 2019 by KPMG when it learned of the fraud, *id.* ¶ 67(a);

[7] Defendants try to minimize the Belgium Decision by claiming that the decision is by a "mid-level court…which is now on appeal," NYSCEF 30 at 2, but they conspicuously fail to inform the Court that the Statis have not appealed the Belgium Court of Appeal's factual findings of fraud.

(2) the Statis obtained damages from Plaintiff on the basis of an indicative offer they knew to be based on falsified financial statements and fraudulently-obtained audit reports, *id.* ¶ 67(b);

(3) the failure of the Statis to disclose accurate financial information was the result of a purposeful scheme of deceit to manipulate the costs of construction of their Kazakh operations, *id* ¶ 67(c);

(4) the Statis relied on documents that their former CFO confirmed were materially false in April 2019, *id.* ¶ 67(d);

(5) the Statis insisted on the reliability of their financial statements to demonstrate the legality of their investment in Kazakhstan, and that they had been audited by a "Big Four" auditing firm without disclosing that the auditors had been deceived, *id.* ¶ 67(e); and

(6) the "documents and evidence discovered after the notification of the Award would have had a fundamental impact on the Award," and demonstrate "beyond any possible doubt the fraudulent behavior of the Statis," *id.* ¶ 68.

With respect to the Statis' fraud after the arbitration, the court found *inter alia* found that in the Swedish annulment proceedings the Statis "knowingly concealed….the truth" and "deliberately misled the Swedish courts…which – purposefully – prevented these jurisdictions from ruling on the matter on the basis of all the information and evidence available." *Id.* ¶ 69.

Based on these findings, the Belgium Court of Appeal rejected the Statis' (and now Defendants') claim that the prior Swedish judgments were entitled to *res judicata* effect, and further held that the subsequent courts that relied on the Swedish decisions, including the DDC when it confirmed the Statis' award, similarly did not have all the relevant information and

evidence. *Id.* ¶ 70. In this respect, the Belgium Court analyzed the decisions in each jurisdiction and found that no other court had the opportunity to consider Plaintiff's full fraud case on the merits. *Id.*

PROCEDURAL HISTORY

After Plaintiff learned of the Statis' additional fraud schemes, and of Defendants' involvement in the same, Plaintiff brought this suit in this Court in June 2020, seeking redress for Defendants' alleged conspiracy in, and aiding and abetting of, the Statis' various fraudulent schemes. NYSCEF 2. Outrider Management LLC ("**Outrider**"), a former Stati investor and purchaser of the Tristan Notes, joined the action and asserted its own claims based on the same facts in an amended complaint filed on December 31, 2020. NYSCEF 14.

In part, the Complaint alleges that while serving on an ad hoc committee of Noteholders, during the course of the arbitration proceedings, Chapman – then a member of management at Black River which was also a Tristan Noteholder – discovered certain elements of the Statis' fraud schemes, including their use of covert related-party transactions to defraud the investors. NYSCEF 23 ¶¶ 277–87. Rather than taking legal action against the Statis to recover the amounts the Statis defrauded from their Noteholders, however, *see infra* at 34–35, Chapman (and later, the corporate defendants) conspired with and supported the Statis in perpetuating their fraudulent schemes through a number of overt acts. *Id.*[8] The Complaint alleges claims of aiding and abetting fraud and conspiracy to commit fraud under New York law and unlawful means conspiracy under English law. *Id.* ¶¶ 326–361.

[8] For example, in addition to funding the Statis' efforts and repeating the Statis' lies on their website, Defendants caused the delivery of a letter in November 2021 to Kazakhstan's U.S. Ambassador that threatened to communicate false and/or fraudulent information to the U.S. Government unless Kazakhstan agreed to "enforce" the Statis' award (*i.e.* that Kazakhstan make payment on account of the award) and unless the Ambassador meet with counsel for Defendants to discuss the terms of payment. NYSCEF 23 ¶ 318.

Defendants have sought to delay litigating the merits of their participation in the Statis' fraud. They first did so in August 2020, by seeking to have the DDC enjoin this action pursuant to the Anti-Suit Injunction Act, 28 U.S.C. § 2283. *Id.* ¶ 61; *see also* DDC Action, ECF 153. Defendants based their motion on the same arguments they make here: that Plaintiff's predicate for this action is "identical to its theory for contesting confirmation of the . . . Award," that this action is a collateral attack on the Statis' award, and that Plaintiff had raised "identical allegations of fraud" before the DDC. DDC Action, ECF 153-3, at 9, 19. On this erroneous basis, Defendants asserted that Plaintiff should be collaterally estopped from prosecuting this action because the DDC had already decided the issues presented here. *See generally id.* Defendants further asserted, like here, that any decision in this New York action would necessarily attack the DDC's judgment confirming the Statis' award. *Id.* at 22–26.

The DDC squarely rejected those arguments. In an order dated March 19, 2021 denying Defendants' motion (the "**DDC Order**"), the court found that the Complaint in this Court "asserts claims under state law as well as English law, while the [DDC's] decision confirming the arbitration award was based solely on the application of the Federal Arbitration Act and the New York Convention[,]" and that, although it had "*touched upon* Kazakhstan's allegations of fraud, [its decision] did not involve the Argentem Parties or consideration of any state claims against those parties – much less any claims under English law." *See* DDC Order, Exhibit 4 to the Galant Affirmation, NYSCEF 46 at 4 (emphasis added). "Further," the court held, its "decision in the racketeering case was based on the sufficiency of the federal claims in the complaint filed against the Stati Parties on their face, and it expressly *did not* address the validity of any state law claims." *Id.* at 4 (emphasis added).

After the DDC Order was issued, Defendants engaged in their second attempt to delay adjudicating the merits of this case by removing it to the SDNY. NYSCEF 17 (Notice of Removal); *Republic of Kazakhstan et al. v. Chapman et al*, No. 1:21-cv-03507, ECF No. 1 (**"SDNY Action"**). In those proceedings, after Plaintiff and Outrider filed a Second Amended Complaint, Plaintiff moved to remand for lack of subject matter jurisdiction, Defendants moved to dismiss Plaintiff's claims under Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6), and moved to compel arbitration of Outrider's claims (and/or dismiss such claims). Opinion and Order, J. Koeltl, February 11, 2022, attached to the Galant Affirmation as Exhibit 5, NYSCEF 47 at 13.

In response to Plaintiff's motion for remand, Defendants recycled the same arguments that were rejected by the DDC, but that they again make here. Specifically, Defendants argued that the federal court had jurisdiction over Plaintiff's claims under Sections 203 and 205 of the Federal Arbitration Act ("**FAA**") in part because this case was effectively a collateral attack on the Statis' award – and that: (1) Plaintiff's claims here "all turn on whether the Award was fraudulently obtained," and are "all founded on the allegation that Defendants helped perpetrate a fraud on an international arbitration panel;" SDNY Action, ECF 66 at 1, 18; and (2) in order to succeed on its claims, "Kazakhstan must necessarily establish that the Award should not have been entered or enforced [and that] if the award *is* valid and enforceable, then Kazakhstan's claim to have been injured by it must necessarily fail." *Id.* at 18; *see also* Galant Affirmation ¶ 8.

On February 11, 2022, Judge Koeltl rejected these arguments when granting Plaintiff's motion to remand and denying Defendants' motion to dismiss without prejudice. Specifically, Judge Koeltl found that no subject matter jurisdiction existed under the FAA because "*the connection between the litigation and the arbitral award is so tenuous* that Section 203 cannot

confer jurisdiction over the claims by Kazakhstan" and because "Kazakhstan does not seek to vacate or enforce the arbitral award against it or to *obtain any relief that would affect the validity of that award.*" NYSCEF 47 at 13 (emphasis added).[9]

ARGUMENT

LEGAL STANDARD

"On a CPLR 3211 motion to dismiss, the court will 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Nonnon v. City of New York*, 9 N.Y.3d 825, 827 (2007) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994)). In determining whether a claim should be dismissed, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon*, 84 N.Y.2d at 88 (quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977)). Dismissal of a complaint is warranted only "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *See Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017). Where CPLR 3016(b) applies, "the complaint must 'allege the basic facts to establish the elements of the cause of action.'" *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009) (quoting *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 (2008)). This burden does not require "unassailable proof of fraud" and it "may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct." *Pludeman*, 10 N.Y.3d at 492.

[9] In addition to granting Kazakhstan's motion to remand and denying Defendants' motion to dismiss, Judge Koeltl granted Defendants' motion to compel arbitration of Outrider's claims, and stayed such claims. *Id.* at 6.

I. DEFENDANTS' RES JUDICATA ARGUMENTS ARE MERITLESS.

A. Defendants' Assertion That The Complaint Is A "Collateral Attack" On The Statis' Arbitral Award Contradicts Judge Koeltl and the DDC's Orders and the Allegations in the Complaint.

Defendants' main argument – that the litigation with respect to the Statis' arbitral award somehow precludes this action – is erroneous and has been rejected by the judgments and orders of Judge Koeltl and the DDC. NYSCEF 30 at 14–23.

First, Judge Koeltl has already rejected Defendants' argument that this case is simply a "re-telling" of Plaintiff's claims in the arbitration and that the judgment here would necessarily effect the validity of the award. Specifically, Judge Koeltl found that unlike other cases involving the FAA and arbitral awards, the connection between the claims here and the award is "so tenuous" that the court could not even exert *federal jurisdiction* over such claims. NYSCEF 47 at 13. With respect to Defendants' present argument that Plaintiff's fraud claims against Defendants are an "attempted end run around the FAA" and that the resolution of same would "justify vacatur of the Award," NYSCEF 30 at 17, 19, Judge Koeltl already confirmed that "Kazakhstan does not seek…any relief that would affect the validity of that award." NYSCEF 47 at 13. The Court should reject Defendants' attempt to make the same argument here for this reason alone.

Second, the DDC also confirmed that Defendants' collateral attack arguments are meritless by denying Defendants leave to file their motion for an anti-suit injunction. Like here, in their motion for leave and accompanying motion for preliminary and permanent injunctive relief, Defendants argued that "[i]n the New York Action, Kazakhstan is attempting to relitigate, frustrate, and effectively nullify this Court's judgment in this matter confirming the SCC Award." DDC Action, ECF 153 at 2. Had the DDC thought that resolution of this action would attack its judgment confirming the Statis' award or that the claims here were barred by that

judgment, it would have at least allowed Defendants to file their motion for injunctive relief. Instead, it outright refused to interfere with this action.

Third, the Complaint makes clear that Plaintiff's claims and allegations are far broader than the arbitration itself, as evidenced by the fact that Outrider – which had nothing to do with the arbitration Defendants invoke – also pursued relief against Defendants under substantially the same set of facts. Defendants cannot avoid litigation arising from their assistance with a years-long, multifaceted fraud by pointing to an arbitral award that was but ***one*** component of that wrongful scheme, particularly given that the fraud alleged here began well before the award was issued or confirmed, continues to be perpetrated and cause damages to Plaintiff and others to this day, and extends far beyond anything resolved in the arbitration itself. The fact that Plaintiff alleges in part that it suffered damages resulting from the Statis' fraud committed before, during, and after an arbitration does not change this.

The cases Defendants cite do not support their argument. NYSCEF 30 at 14–18. Most pertain to efforts to effectively vacate an earlier award, unlike here (as confirmed by the Judge Koeltl and the DDC), or are entirely inapplicable to the facts of this case. *See, e.g.* *Prime Charter Ltd. v. Kapchan*, 287 A.D.2d 419, 731 N.Y.S.2d 734 (1st Dep't 2015) (involving a claim to void an ongoing arbitration); *Clarke-St. John v. City of N.Y.*, 164 A.D.3d 743, 83 N.Y.S.3d 549 (2d Dep't 2018) (dismissing complaint for failure to state a claim of fraud); *Abrams v. Macy Park Constr. Co.*, 282 A.D. 922, 923, 125 N.Y.S.2d 256, 257 (1st Dep't 1953) (plaintiff discovered fraud claims during the arbitration but failed to bring them in that proceeding); *Grynberg v. Sullivan & Cromwell, LLP*, 47 A.D. 3d 447, 848 N.Y.S.2d 535 (1st Dep't 2008) (finding that the amended complaint precisely replicated the arguments submitted to the arbitrator).

Defendants' reliance on the Fifth Circuit decision in *Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n, Inc.*, 955 F.3d 482, 488–89 (5th Cir. 2020) is also misplaced. There, the court reasoned that the plaintiff's claims could not succeed because the plaintiff alleged "wrongdoing that would justify vacatur" of an arbitral award. Here, by contrast, Plaintiff does not seek relief that would affect the validity of any arbitral award, as confirmed by Judge Koeltl. Rather, Plaintiff seeks damages from Defendants for their participation in a years-long fraudulent scheme. Further, under the Second Circuit's decision in *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1086–87 (2d Cir. 1993), the mere fact that an award has not been vacated "does not prevent [a plaintiff] from seeking to recover damages for alleged . . . violations that occurred during the arbitration proceeding itself." The holding in *Tex. Brine Co.* relies on that of *Gulf Petro Trading Co., Inc. v. Nigerian Nat. Petroleum Corp.*, 512 F.3d 742, 749 (5th Cir. 2008), which was reached only because the Fifth Circuit "*decline*[*d*] . . . *to apply* the reasoning found in *Mian*." *Gulf Petro*, 512 F.3d at 749 n.3 (emphasis added); *see also Prime Charter Ltd. v. Kapchan*, 287 A.D.2d 419, 731 N.Y.S.2d 734 (1st Dep't 2001) (finding that, like here, the *Mian* action "was truly independent of the claims asserted in the original arbitration").

Nor does Plaintiff's reliance on the Belgium Decision "affirm[] that Kazakhstan is seeking relief that would justify vacatur of the Award." NYSCEF 30 at 17. Plaintiff relies on the Belgium Decision for two reasons. First, it confirms the factual allegations regarding the underlying fraud of the Statis in which Defendants are complicit. Second, it expressly contradicts Defendants' repeated canard that the fraud allegations have been "rejected" by the courts. Indeed, the Belgium Court of Appeal found that the Statis not only committed fraud *during* the arbitration, but also before and after it, as alleged in the Complaint.

B. Defendants' Argument That This Action Is Barred By Collateral Estoppel Is Meritless Because Plaintiff's Fraud Claims Are Far Broader Than Fraud In The Arbitration And The Frauds Alleged Here Have Not Been Properly Considered In Prior Proceedings.

Defendants are also wrong to assert that Plaintiff's claims are estopped by Swedish and D.C. proceedings. NYSCEF 30 at 19–23. Indeed, in addition to the five frauds the complaint alleges, the Statis' and Defendants' contention made here and in other courts that the issues here have been fully litigated on their merits amounts to a sixth, new misrepresentation to suppress the truth and further their fraudulent scheme.

First, Defendants' collateral estoppel argument is predicated on Defendants' false factual contention that in each of these proceedings Plaintiff "asserted the same theory of fraud that it asserts in the Complaint" and that the claims here "have been fully and fairly rejected." *Id.* at 14; *see also id.* at 17, 20, 23. Although Defendants inexplicably claim that the "relevant facts are undisputed,"[10] Defendants' factual arguments directly contradict the allegations in the Complaint that the "prior proceedings have considered only one of the Statis' fraud schemes – the LPG Plant Fraud. Now, because of new evidence – including but not limited to the April 2019 Lungu deposition, the August 2019 KPMG withdrawal of its audit reports, the August 2019 discovery of the Statis' Latvian banking records, and the October 2019 discovery of additional KPMG correspondence – four additional Stati fraud schemes have been discovered." NYSCEF 23 ¶ 62.

[10] In fact, Defendants dispute a number of Kazakhstan's factual allegations. For example, Defendants assert that "[a]fter the [Tristan] notes were issued, Kazakhstan expropriated the Statis' oil and gas business, in response to which the Statis commenced an arbitration seeking compensation for that expropriation" and that "Kazakhstan (in all-too-familiar post-Soviet kleptocratic fashion) unlawfully expropriated the Statis' assets by engaging in a 'string of measures of coordinated harassment' against the Statis." NYSCEF 30 at 1, 5. This directly disputes the Complaint's allegation that Defendants learned that "the Statis' claim in the ECT Arbitration that the cash crunch [their Kazakh operations] experienced in 2009 was the result of an alleged harassment campaign by Kazakhstan was false; that in fact the cash crunch was caused by the Statis' asset stripping." NYSCEF 23 ¶ 278(b). Defendants further assert that the Statis invested "more than one billion dollars in the development of oil and gas fields in Kazakhstan," NYSCEF 30 at 5, which disputes the Complaint's allegations detailing the Belgium Court's finding that "'the Statis' investment in Kazakhstan was conducted in bad faith.'" *Id.* ¶ 68.

They also contradict the Complaint's allegation "that such courts did not decide the merits of Kazakhstan's current fraud allegations was confirmed by the Belgium Court of Appeal overturning recognition of the [Statis' award]." *Id.* ¶ 63. Finally, they contradict the allegation that "[i]n these proceedings, and as now confirmed by the Belgium Court, the Statis continued to perpetrate their fraudulent schemes. They did so with the substantial assistance of Defendants, and to the detriment of Kazakhstan." *Id.* ¶ 219. At the motion to dismiss stage, the Complaint's allegations must be accepted as true and Defendants' attempt to argue the facts must be ignored.

Second, neither the Swedish nor the D.C. courts actually adjudicated the merits of Plaintiff's factual allegations regarding the only fraud scheme for which Plaintiff had some evidence at the time – the LPG Plant Fraud – let alone the four other newly discovered frauds or the far broader issues surrounding Defendants' longstanding and ongoing participation in the frauds the Complaint alleges here. The only court to now do so on the basis of the full evidentiary picture is the Belgium Court of Appeal, which adjudicated virtually the same factual allegations of fraud as presented here and found that the Statis had committed all the fraud schemes alleged in the Complaint.

Moreover, as explained above, collateral estoppel would be inappropriate even if the Swedish and D.C. courts had resolved Plaintiff's limited fraud allegations because none of those courts had access to anything close to the full array of evidence Plaintiff has now uncovered. *See supra* at 8–10. This is confirmed by Defendants' Motion, in which they point to a few arguments made by Plaintiff in these proceedings that only concern the *part of* the LPG Plant Fraud. NYSCEF 30 at 21. And Defendants fail to mention that neither the Swedish courts nor the DDC considered even *these* limited allegations.

To begin with, the Swedish court concluded only that, *even if it occurred*, the Statis' fraud *in the arbitration* would not constitute a violation of Swedish public policy. *See generally* Joint Report, DDC Action, ECF 45 (D.D.C. Dec. 30, 2016). Confirming the Swedish proceeding's limited nature, the English High Court later concluded that Plaintiff's factual allegations, and the evidence supporting them, established a *prima facie* case that the Statis obtained the arbitral award by fraud, and that such fraud *would* constitute a violation of *English* public policy. NYSCEF 48 ¶¶ 89–92. As the English court explained, the Swedish court did not make any finding of fact with respect to the extent or materiality of the Statis' fraud in the arbitration, *see id.* ¶ 80 ("*No Court has decided the question whether there has been the fraud alleged.*" (emphasis added)), much less one pertaining to the much broader fraud alleged here.

Nor does any U.S. proceeding have the preclusive effect Defendants assert. With respect to the D.C. proceedings, Defendants' collateral estoppel argument was squarely rejected by Judge Amy Berman Jackson in denying Defendants' motion for leave in March 2021. Relying on arguments that are materially identical to the ones they raise here, Defendants asked the very same district judge who adjudicated the confirmation and RICO proceedings to enjoin this case based on the court's rulings in those proceedings. *See supra* at 15–16. Judge Jackson declined that invitation. In confirming the error of Defendants' argument, Judge Jackson found that:

> *The Court notes that Kazakhstan's complaint against the Argentem Parties asserts claims under state law as well as English law, see NY Compl. ¶¶ 227–59, while the Court's decision confirming the arbitration award was based solely on the application of the Federal Arbitration Act and the New York Convention. See Stati, 302 F. Supp. 3d at 202, 209. While it touched upon Kazakhstan's allegations of fraud, it did not involve the Argentem Parties or consideration of any state claims against those parties – much less any claims under English law. See id. Further, the Court's decision in the racketeering case was based on the sufficiency of the federal claims in the complaint filed against the Stati Parties on their face, and it expressly did not address the validity of any state law claims.*

NYSCEF 46 at 4. For this reason alone, Defendants' argument should be rejected.

A review of those D.C. decisions confirms this point. In the RICO case relied on by Defendants, which excluded consideration of any acts causing injury to Plaintiff outside the United States, *see generally* *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016) (holding that RICO can apply extraterritorially), the D.C. Circuit held only that Plaintiff had "failed to allege a pattern of racketeering, and thus failed to state a claim for violations of RICO or conspiracy to violate RICO." *Republic of Kazakhstan*, 801 F. App'x at 780. RICO's "pattern" and domestic injury requirements are intrinsic to the RICO statute, *see, e.g.*, *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1264–65 (D.C. Cir. 1995), and thus have nothing to do with whether fraud or other wrongful conduct occurred, much less whether it is actionable under New York common law or English law.[11] The pattern requirement, which formed the sole basis of the RICO ruling, therefore has no bearing on Plaintiff's claims under New York or English law. And, more importantly, the court expressly dismissed Plaintiff's state law fraud claims *without prejudice,* thereby leaving the door open for Plaintiff to bring state law claims of fraud against the Statis or anyone else complicit in their fraud schemes, like Defendants. Judge Jackson again underscored this point in her March 2021 order:

> *In March 2019, the Court dismissed the RICO case for failure to state a claim. The Court ruled that Kazakhstan's claims were, "at bottom, . . . entirely predicated on [the Stati Parties'] initiation and prosecution of non-frivolous litigation" and their claimed injures were no more than "the legal costs it incurred in resisting the enforcement of a valid and binding arbitral award," which could not serve as the basis for RICO liability under the law. Having*

[11] Indeed, as is made clear in the precedents that formed the basis of the D.C. courts' resolution of Kazakhstan's RICO claim, the point of the "pattern" requirement is to *exclude* common-law fraud claims, such as those that Kazakhstan presses here, from RICO's ambit. *See, e.g.*, *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238 (1989) (noting that "the mere fact that there are a number of [unlawful actions alleged] is no guarantee that they fall into" an "arrangement or order" that would constitute a "pattern" under the RICO statute and thus give rise to RICO liability).

> *dismissed the federal claims, the Court declined to exercise supplemental jurisdiction over the remaining state law claims of fraud and civil conspiracy.*

NYSCEF 46 at 2 (internal citations omitted).

Defendants' reliance on the District of Columbia proceeding in which the Statis confirmed the arbitral award is equally flawed. That proceeding involved no adjudication or findings whatsoever as to whether the Statis actually engaged in the massive fraud Plaintiff alleges – to the contrary, it dealt with the narrow exceptions to the confirmation of an award under the New York Convention. *See Stati*, 302 F. Supp. 3d at 209; *see also Stati*, 773 F. App'x at 629. Confirming this point again in her March 2021 order, Judge Jackson noted that:

> *In March 2018, the Court decided the original case pursuant to the Federal Arbitration Act. Stati v. Rep. of Kaz., 302 F. Supp. 3d 187, 202 (D.D.C. 2018) (explaining that the Act "affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards" unless specific narrow circumstances apply), citing Belize Soc. Dev. Ltd. v. Gov't of Belize, 668 F.3d 724, 727 (D.C. Cir. 2012), quoting Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 631 (1985). The Court confirmed the arbitral award against Kazakhstan "because none of the grounds for refusal or deferral of the award set forth in the New York Convention apply."*

NYSCEF 46 at 1.

At most, Plaintiff presented its then-limited evidence on the LPG Plant Fraud, which both the district court and the court of appeals openly refused to consider. Specifically, the courts held that "none of the[] facts" relating to the LPG Plant Fraud "were presented to the Court" at the proper time, and thus categorically refused to consider them or even allow evidence of them to be presented. *Stati*, 302 F. Supp. 3d at 198 (expressly refusing to decide whether "the indicative bid the arbitrators did select as a measure of the value [of] the LPG plant . . . was itself the product of fraud"). Defendants notably only cite to Kazakhstan's Motion for Reconsideration in that proceeding to support their argument. NYSCEF 30 at 11–12. Not only does a review of that motion make clear that the fraud schemes alleged here are far broader, but

Defendants ignore the DDC's *refusal* to consider such evidence or rule on it. *See Stati v. Republic of Kazakhstan*, 773 F. App'x at 629 (allegations regarding fraud outside arbitral proceeding that infected award were "new facts" that would not be considered). Given that the Statis successfully persuaded the D.C. courts that allegations regarding fraud outside the arbitration were beyond the confirmation proceeding's scope and constituted an "entirely separate theory of fraud" from any those courts could appropriately consider, *Stati*, 302 F. Supp. 3d at 198, Defendants cannot now have it both ways by telling this Court that the confirmation proceeding resolved those very same issues. And as with the Swedish judgments, the Belgium Court of Appeal has also now confirmed that the DDC relied on the erroneous Swedish decisions and did not have all the relevant information and evidence before it when confirming the award.

Defendants' cases support Plaintiff's – and not Defendants' – position. In *Buechel v. Bain*, the court made clear that the party invoking collateral estoppel first bears the burden of showing an "identity of issue" that was decided in a prior action and that is now "decisive" here. 97 N.Y.2d 295, 303–04 (2001); *see also Lukowsky v. Shalit*, 110 A.D.2d 563, 566 (1st Dep't 1985) (finding that plaintiff's claim could not be dismissed because "even when two successive actions arise from an identical course of dealing, the second may not be barred if the requisite elements of proof and evidence necessary to sustain recovery vary materially"). Defendants have not and cannot meet this burden.

Second, *even if* Defendants could identify an issue that has been decided, which they cannot, collateral estoppel fails where the other party demonstrates "the absence of a full and fair opportunity to contest the prior determination." *Buechel*, 97 N.Y.2d at 304; *Lukowsky*, 110 A.D.2d at 567 ("To invoke collateral estoppel . . . there must have been a full and fair opportunity to contest the decision now said to be controlling.") (citations and quotations

omitted). Here, the Belgium Court of Appeal has found that none of the prior Swedish court judgments were entitled to *res judicata* effect because the Statis defrauded those courts when they "knowingly concealed…the truth" and "deliberately misled the Swedish courts…which – purposefully – prevented these jurisdictions from ruling on the matter on the basis of all available information." NYSCEF 24 at 7–8. This included the Statis' suppression of key evidence of their fraud schemes, such as their material misrepresentations to their auditors that Plaintiff did not uncover until April 2019. NYSCEF 23 ¶ 53. Plaintiff's allegations of (*inter alia*) fraudulent suppression of evidence, the Belgium Decision, and the Schöldström report make clear that the Swedish proceeding did not constitute a "full and fair" opportunity to litigate Plaintiff's claims and therefore foreclose Defendants' argument.

II. THE NOERR-PENNINGTON DOCTRINE DOES NOT BAR PLAINTIFF'S CLAIMS.

The illegal conduct the Complaint alleges is not rendered immune from liability by *Noerr-Pennington* doctrine, as Defendants contend. *Noerr-Pennington* is a doctrine that "provides First Amendment protections for persons petitioning the government for redress[.]" *Singh v. Sukhram*, 56 A.D.3d 187, 188, 866 N.Y.S.2d 267, 270 (2008) (citing cases); *see also Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 707 N.Y.S.2d 647, 652 (2000). The doctrine "initially arose in the antitrust field," but it has since been expanded to claims like "common-law tortious interference with contractual relation." *Alfred Weissman*, 707 N.Y.S.2d at 652. While the filing of litigation *can* fall within the doctrine's protection, the *Noerr Pennington* doctrine does not protect a party for initiating fraudulent litigation or for committing fraud within a proceeding. *See, e.g., People v. N. Leasing Sys., Inc.*, 169 A.D.3d 527, 531, 94 N.Y.S.3d 259, 263 (2019).

As an initial matter, Defendants' arguments are predicated on their incorrect assertions that this lawsuit is based solely on "Argentem's efforts to aid in the enforcement of the Award," that was "properly issued in favor of the Statis." NYSCEF 30 at 3. This assertion is contradicted by the frauds alleged in the Complaint – which stretch far beyond any litigation or arbitration activity. *See, e.g.,* NYSCEF 23 ¶ 28 (detailing five frauds). Furthermore, Defendants again assert that "the Swedish appellate courts have twice considered and rejected the fraud arguments Plaintiff advances in this proceeding," NYSCEF 30 at 26, which similarly contradicts the plain allegations of the Complaint. *See, e.g.,* ¶ 62, 63. Defendants' reliance on disputed facts to argue their motion to dismiss is improper.

Second, the Complaint makes clear that the unlawful conduct engaged in by the Statis, which Defendants assisted and continue to assist, extends far beyond litigation activity. *See, e.g.*, *supra* at 10–12. Defendants cite no precedent suggesting that *Noerr-Pennington* protects funding and otherwise assisting with a wide-ranging unlawful scheme to defraud a number of victims merely because one aspect of that scheme involves arbitration and litigation activities. *See* *Mosdos Chofetz Chaim, Inc. v. Vill. Of Wesley Hills*, 701 F. Supp. 2d 568, 594 (S.D.N.Y. 2010) ("The Second Circuit has yet to decide whether 'the *Noerr–Pennington* doctrine ... must be applied mechanically in cases outside the antitrust area.'") (citations omitted).

Even assuming *arguendo* that the wrongdoing alleged was limited to litigation activity, *Noerr-Pennington* has no application because it does not protect *fraudulent* petitioning. *See, e.g.*, *Alfred Weissman*, 707 N.Y.S.2d 647, 654–55 (a corruption exception applies "where a party has stepped beyond the bounds of zealous advocacy and engages in conduct alleged to be criminal, not just deceptive or unethical.") (citing *Cipollone v. Liggett Group, Inc.*, 668 F. Supp. 408, 410 (D.N.J. 1987) and *Hamilton v. Accu-tek*, 935 F. Supp. 1307, 1317 (E.D.N.Y. 1996));

Concourse Nursing Home v. Engelstein, 692 N.Y.S.2d 888, 892 (Sup. Ct. 1999) (a sham exception applies where a petition was "an abuse of the government process."), aff'd, 717 N.Y.S.2d 154 (2000); *People v. N. Leasing Sys., Inc.*, 169 A.D.3d 527, 531, 94 N.Y.S.3d 259, 263 (2019) ("The allegations sufficiently show a knowing participation in the scheme that justifies holding the . . . Respondents liable[.]"); *see also Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998) ("[L]itigation can be deemed a sham if 'a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.'") (quoting *Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155, 159 (9th Cir. 1993)); *Edmondson*, 48 F.3d at 1267 ("[N]either the *Noerr-Pennington* doctrine nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentation[.]") (describing the holding in *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995)). That is true whether or not the litigation in which the fraud occurred is successful. *E.g.*, *Kottle*, 146 F.3d at 1060; *Edmondson*, 48 F.3d at 1266–67. Accordingly, because the Complaint alleges that the Statis' unlawful conduct included making intentional misrepresentations and omissions to courts and arbitrators, and alleges that Defendants assisted in that scheme while fully aware of that fact, *see supra* at 10–12, neither the First Amendment nor *Noerr-Pennington* shields these claims.

III. PLAINTIFF HAS SUFFICIENTLY PLED ITS CLAIMS.

Defendants' pleading sufficiency-based arguments are equally erroneous. Defendants' incorrect argument that the Complaint fails to allege justifiable reliance on the Statis' fraudulent statements and omissions rests on an unsupported interpretation of New York law. Their mistaken contention that the Complaint does not allege their knowledge of and active participation in the Statis' fraud ignores the detailed and extensive allegations in the Complaint,

which adequately state the elements of each claim asserted, thereby satisfying applicable pleading requirements.

A. The Complaint Sufficiently Pleads An Underlying Fraud.

Defendants do not contest that the Statis committed a series of wide-ranging, long-running, and unlawful frauds, or that the Complaint sufficiently pleads the essential elements of fraud. *Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.,* 17 N.Y.3d 269, 276, 952 N.E.2d 995 (2011) (the elements of fraud include "representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury"). This makes sense given that, as required by CPLR 3016(b), the Complaint alleges in detail the misrepresentations of material fact and material omissions knowingly made by the Statis to Plaintiff and others before, during, and after the arbitration for the purpose of inducing reliance, *see, e.g.*, NYSCEF 23 ¶¶ 102–92; and the injury to Plaintiff caused by these misrepresentations and material omissions. *Id.* ¶ 46. And, the merit of these fraud allegations is supported by voluminous evidence – as also alleged in detail the Complaint, *see, e.g., Id.* ¶¶ 71–89, and has now been confirmed in the Belgium Decision.

Instead, Defendants only argument here is their contention that Plaintiff did not sufficiently allege justifiable reliance on the Statis' fraudulent statements. NYSCEF 30 at 28–31. But that is a non-starter. Specifically, the Complaint alleges at length, the Statis' fraudulent concealment of their falsification of their financial statements and other documents prevented Plaintiff from properly contesting that evidence in the arbitration. And the Statis' subsequent falsehoods in litigation since then necessarily bore on Plaintiff's arguments and legal defenses, which were prepared in response to the Statis' claims and allegations. *E.g.*, NYSCEF 23 ¶¶ 207-10 (noting, *inter alia*, that Plaintiff relied on the Statis' misrepresentations – both inside and

outside litigation – to formulate jurisdictional arguments, liability arguments, and arguments relating to the value of the LPG Plant). If the Statis had made truthful instead of fraudulent representations both inside and outside its proceedings against Plaintiff, Plaintiff would have asserted different defenses and would not have incurred the fees and other costs it did, and the conduct of the proceedings would have been materially different. *See*, *e.g.*, *id.* ¶ 211.

Defendants' contention that a party can *never* rely on evidence it contested in litigation, NYSCEF 30 at 30, is wrong. As an initial matter, although Plaintiff certainly did rely on evidence and arguments the Statis presented in litigation, it also foreseeably relied on fraudulent misstatements and omissions that predated and/or were prepared outside the litigation, such as the Statis' falsified financial statements and fraudulently obtained audit reports.

The Belgium Court of Appeal in its November 2021 decision cited a number of instances in which Plaintiff relied on the Statis' fraud, including that: (1) the Statis failed to disclose during the arbitration the true status of their company Perkwood, which they owned but falsely presented as an independent third party supplier of equipment for the Kazakh operations, NYSCEF 24 at 29; (2) the arbitral tribunal (and thereby Plaintiff) "relied on evidence that has been found to be false", *id.* at 21–22; (3) the Statis insisted in the ECT Arbitration on the supposed "reliability" of their financial statements to demonstrate the existence and legality of their investment in Plaintiff, and that they had been audited by "Big Four" auditing companies, without disclosing that they had been deceived, *id.* at 23; (4) "the Statis…relied on their financial statements to dispute Kazakhstan's contention that the Statis had themselves driven their Kazakh companies into bankruptcy before the start of the alleged Plaintiff harassment campaign, i.e. before mid-October 2008," *id.* at 23 (internal citations omitted); (5) in the Swedish proceedings, the Statis "knowingly concealed…the truth" so that they "deliberately misled" the Swedish

courts and thereby Plaintiff, for example by failing to disclose to the court and to Plaintiff correspondence with KPMG in which it questioned their financial statements, *id.* at 9–10 ("it was only subsequently – in October 2019 – that Plaintiff was able to obtain a copy of the correspondence").

And in any event, the cases Defendants cite do not support their arguments. *See id.* at 28–30. One case states that a party cannot justifiably rely on the "legal opinion or conclusions of his or her adversary's counsel," but that is not Plaintiff's allegation. Rather, it has alleged that it relied on the Statis' *factual* allegations and evidence – not their counsel's legal conclusions. *Aglira v. Julien Schlesinger, P.C.*, 214 A.D.2d 178, 185 (1st Dep't 1995). Another case stands for the unremarkable proposition that a party cannot rely on a fraudulent statement when that party knows the statement is false. *See Shaffer v. Gilberg*, 125 A.D.3d 632, 635 (2d Dep't 2015) (plaintiff could not demonstrate reliance on promissory notes and loans where he "always maintained that he knew the promissory notes and loans were fabricated"). Plaintiff has alleged no awareness of the frauds at the time they occurred. Another case dismissed the fraud claims because the defendants (against whom the direct fraud was alleged) did not themselves make any false representations but rather coerced a third party to do so. *Clarke-St. John*, 164 A.D.3d at 743, 745. This case has no bearing on the allegations here. And two others hold that a party cannot justifiably rely on a misstatement when that party has knowledge of the truth. *In re Gormally*, 550 B.R. 27, 46–47 (Bankr. S.D.N.Y. 2016); *Centro Empresarial*, 17 N.Y.3d at 279. Again, there is no allegation here that Plaintiff had knowledge of the truth – quite the opposite – it has alleged that it was defrauded through fraudulent misstatements and schemes, the true facts of which it was very much unaware.

Because the Complaint alleges at length that Plaintiff *did not* know the true nature of the Statis' fraud when the Statis' misstatements were made – and that Plaintiff is still, even now, unraveling the full extent of the Statis' wrongdoing – the cases Defendants rely on are inapposite.

B. The Complaint Sufficiently Pleads Civil Conspiracy and Aiding and Abetting.

Defendants argument argue that Plaintiff has failed to plead civil conspiracy, NYSCEF 30 at 31–33, and aiding and abetting, *id.* at 34–36, because it has not alleged that Defendants knowingly agreed to conspire with the Statis and intentionally participated in their scheme is belied by the Complaint's allegations. Plaintiff has alleged, in detail, both when and how Defendants became aware of the Statis' years-long fraud and that, instead of putting a stop to it, Defendants knowingly joined the Statis in their efforts to pursue a wrongful recovery from Plaintiff. NYSCEF 23 ¶¶ 277–87. The operative allegations are not merely that one Defendant "purchased the Notes," as Defendants misleadingly suggest, NYSCEF 30 at 33, but that Defendants took numerous actions in furtherance of the Statis' fraud, such as funding and advising on fraudulent litigation activity and truth suppression, with full knowledge that they were assisting the Statis' fraudulent and unlawful schemes. The Complaint also alleges that Defendants themselves have taken overt actions in support of the fraud, such as their recent attempts to coerce a Kazakh official into paying on the Statis' fraudulent award. NYSCEF 23 ¶ 318.

The Complaint lists the facts of the fraud that Chapman uncovered, *see id*. ¶ 278 (specifically alleging detailed facts of which Chapman became aware, including, *inter alia*, that "the Statis were systematically stripping their assets in Kazakhstan, partly through the scheme of shipping oil to related parties that was never paid for and also by paying a large dividend to a

related company, in violation of the Indenture"), the manner in which he uncovered them, *id.* ¶ 280 (alleging, *inter alia*, that the Statis *directly apprise* Chapman of their fraudulent acts), and the overt acts he and the other Defendants have taken to assist the Statis' fraudulent scheme, *id.* ¶¶ 298–317 (alleging, *inter alia*, that Defendants provide specific advice and funding, and operate a website riddled with falsehoods, all for the purpose of assisting the Statis in concealing their frauds). Defendants' cookie-cutter analysis of the elements of each offense ignores these detailed and specific allegations, which undeniably state a plausible claim as to the Statis' wrongdoing and Defendants' knowledge and assistance thereof. And, under the cases relied on by Defendants, Plaintiff need only allege "specific factual allegations *that could support an inference*[12] that defendants knowingly agreed to cooperate in a fraudulent scheme, or shared a perfidious purpose." *LeFebvre v. New York Life Ins. & Annuity Corp.*, 214 A.D.2d 911, 912 (3d Dep't 1995) (emphasis added).[13] Plaintiff has done so here.

The other cases relied on by Defendants are also inapposite. Put simply, Plaintiff's allegations do not suffer from the insufficiencies that the claims in those cases did. *See Perez v. Lopez*, 97 A.D.3d 558, 560 (2d Dep't 2012) (dismissing conspiracy claim where complaint alleged *no* overt act committed by defendant); *NCA Holding Corp. v. Ernestus*, 1998 WL 229510, at *2 (S.D.N.Y. May 7, 1998) (dismissing complaint where plaintiffs "failed to allege *any* facts from which the Court [could] determine that there was any common plan or scheme" (emphasis added)); *Domini Int'l S.p.A. v. Satec (U.S.A.) LLC*, 2004 WL 1574645, at *4

[12] In their Motion to Dismiss, Defendants conveniently ignore this language.

[13] Defendants further claim that Kazakhstan must show "independent culpable behavior" linking them to their co-conspirators' tortious actions. NYSCEF 30 at 31. Not only has Kazakhstan done so here, but the case on which Defendants rely makes clear that there are other types of allegations beyond that of "independent culpable behavior" that can link defendants to the tortious acts of others. *See Schwartz v. Society of N.Y. Hosp.*, 199 A.D.2d 129, 130 (1st Dep't 1993).

(S.D.N.Y. July 13, 2004) (dismissing conspiracy claims where there were no allegations of a "specific agreement," "any specific overt action by [the defendant]," or "sufficient corporate entanglement" to justify an imputation of responsibility); *Meisel v. Grunberg*, 651 F. Supp. 2d 98, 121 (S.D.N.Y. 2009) (dismissing claim where the complaint did not allege any facts "from which it [could] be inferred there was an agreement to engage in a common scheme or plan").

Plaintiff has therefore satisfied the pleading requirements of its claims for civil conspiracy and aiding and abetting by alleging specifically what Defendants knew, when and how they knew it, and when and how they assisted the Statis' fraudulent scheme. *See Goel v. Ramachandran*, 111 A.D.3d 783, 792–93 (2d Dep't 2013) (The pleading standard "may be met when the material facts alleged in the complaint, in light of the surrounding circumstances, are sufficient to permit a reasonable inference of the alleged conduct including the adverse party's knowledge of, or participation in, the fraudulent scheme." (citations and quotations omitted)).

C. The Complaint Sufficiently Pleads Unlawful Means Conspiracy.

Defendants are also wrong that Plaintiff's English-law claim for unlawful means conspiracy is foreclosed by a conflict with New York law. As Defendants' lead case recognizes, every jurisdiction possesses the power to enact laws to regulate conduct that occurs within that jurisdiction and have those laws enforced, whether by that jurisdiction's courts or another's. *See City of Almaty*, 503 F. Supp. 3d at 62–63 (noting each jurisdiction's "interest in regulating conduct within its borders"). The elements of the unlawful means conspiracy claim are satisfied based on conduct that occurred in and targeted England, NYSCEF 23 ¶¶ 282, 287, 295. It is therefore within the reach of English law, which this Court is plainly competent to apply. Defendants do not suggest that any New York public policy prevents a New York (state or federal) court from recognizing a valid claim under English law. And Defendants cite no authority for their apparent view that the mere fact that New York law does not recognize the

exact same claim, with the exact same elements, means that a New York court cannot adjudicate a claim that is validly stated under English law. *See, e.g.*, *In re Nortel Networks, Inc.*, 469 B.R. 478, 512–13, 519 (Bankr. D. Del. 2012) (denying motion to dismiss unlawful means conspiracy claim under English law). For those reasons, Kazakshtan has adequately stated a claim for unlawful means conspiracy under English law.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny the Motion to Dismiss in its entirety and for such other and further relief as the Court deems proper.

Dated: May 16, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2022, I electronically filed this memorandum of law, the accompanying Affirmation of Felice B. Galant dated May 16, 2022, and the exhibits thereto, with the Clerk of the Court using the Court's electronic filing system, which shall send notice to all counsel of record.

Dated: May 16, 2022

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, Felice B. Galant, hereby certify that the foregoing memorandum of law complies with N.Y.C.R.R. 202.70(g), Rule 17, as supplemented by the Order of this Court dated April 20, 2022, which granted the request to exceed Rule 17's word limit for the parties' moving and opposing memoranda of law on this motion up to 12,500 words.

The total number of words in this memorandum of law, inclusive of point headings and exclusive of the caption, table of contents, table of authorities, the signature block and this certificate of compliance, is 11,941 words, according to the word count of the word-processing system used to prepare the document.

Dated: New York, New York
May 16, 2022

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