SUPREME COURT 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. 1
(Oral Argument Requested)

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS

FAEGRE DRINKER BIDDLE & REATH LLP

Clay J. Pierce
Andrew L. Van Houter
1177 Avenue of the Americas
New York, NY 10036
Telephone: (212) 248-3186
Facsimile: (212) 248-3141
clay.pierce@faegredrinker.com
andrew.vanhouter@faegredrinker.com

AKIN GUMP STRAUSS HAUER & FELD LLP

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

Paul W. Butler
20001 K Street N.W.
Washington, DC 20006
Telephone: (202) 887-4000
Facsimile: (202) 887-4288
pbutler@akingump.com

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

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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 respectfully submit this memorandum of law in support of their motion, pursuant to New York Civil Practice Law and Rules 3211(a)(7), to dismiss the claims brought by Plaintiff Republic of Kazakhstan in its Third Amended Complaint, dated March 18, 2022 (the "Complaint" or "Compl.")

PRELIMINARY STATEMENT

> At bottom, this suit is yet another attempt to ***relitigate the underlying arbitral award***. Whatever fraud Kazakhstan contends occurred before and during the SCC arbitration more than eight years ago, it had a ***full opportunity*** to raise those issues in the appeals process in Sweden and ***its allegations were rejected***. Kazakhstan tried again in the numerous subsequent proceedings where it has resisted the enforcement of the arbitral award ***on the same grounds***.

Republic of Kazakhstan v. Stati, 380 F. Supp. 3d 55, 64–65 (D.D.C. 2019) (emphasis added).

For the last eight years, Kazakhstan, a sovereign state,[1] has done everything in its considerable power to avoid paying a nearly $500 million international arbitration award (the "SCC Award" or the "Award") issued by the Stockholm Chamber of Commerce (the "SCC"). The Award was issued in favor of non-parties Anatolie Stati and Gabriel Stati and two companies owned by them (collectively, with their companies, the "Statis"), which had been developing oil fields and energy assets in Kazakhstan. The SCC issued the Award based on its finding 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, including sham criminal investigations, overnight searches, and the detention of Stati employees.

[1] Although a sovereign state, Kazakhstan, by bringing this compliant, has clearly waived its sovereign immunity with respect to the issues in this dispute. 18 U.S.C. §§ 1605, 1607.

See Ex. A to Baldini Aff., SCC Award, *Stati v. Kazakhstan*, 14-cv-01638-ABJ-DAR, Dkt. 2-1, ¶ 1095.[2]

Eight years after its issuance, Kazakhstan "has not yet paid any of the arbitral award." *Republic of Kazakhstan v. Chapman*, 2022 WL 420357, at *2 (S.D.N.Y. Feb. 10, 2022). Instead, with the unlimited litigation budget and unchecked power of a sovereign autocratic state, it has unleashed a barrage of proceedings and defenses in jurisdictions across the world alleging that the Statis obtained the Award by fraud.

In this action, Kazakhstan has turned its gunsights on Argentem—U.S. investors in notes issued to finance exploration and production of the Statis' Kazakh properties—alleging derivative tort claims of civil conspiracy, aiding and abetting fraud under New York law, and a claim under English law for something called "unlawful means conspiracy." To be clear, Kazakhstan does ***not*** assert that Argentem was somehow involved in submitting fraudulent evidence to the arbitration panel. Instead, Kazakhstan bases its claims on steps supposedly taken by Argentem to facilitate ***enforcement*** of the Award, ***after*** it had been issued. (*See* Compl. ¶¶ 334-335.)

Kazakhstan devotes over 100 pages and 363 paragraphs of the Third Amended Complaint to detailing its various allegations against the Statis and to trumpeting the few foreign court decisions that it claims support its factual assertions (such as a recent decision by a mid-level court in Belgium which is now on appeal). Not surprising, Kazakhstan downplays or ignores the many decisions rejecting its arguments including decisions by courts in Sweden (where the Award was issued), the United States, the Netherlands, and Italy. Enforcement proceedings between

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[2] "Ex." refers to exhibits to the Affidavit of Stephen M. Baldini, dated April 18, 2022 submitted herewith.

Kazakhstan and the Statis continue to grind forward in multiple foreign jurisdictions, and may do so for years.

The good news for this Court is that it need not get sucked into Kazakhstan's worldwide litigation campaign. Indeed, the status of Kazakhstan's global legal battle with the Statis is beside the point here, because of rulings in two key jurisdictions. First, on direct appeal, the SCC Award has been affirmed *twice* by the Supreme Court of Sweden (the jurisdiction where the Award was issued). And second, it has been confirmed by both the United States District Court for the District of Columbia ("D.C. Court") and the United States Court of Appeals for the District of Columbia. Because the U.S. Supreme Court denied Kazakhstan's petition for *certiorari,* the SCC Award is now ***law in the United States and fully enforceable.*** For that reason, Argentem's efforts to aid in the enforcement of the Award—which is the sole basis for all of the claims alleged in this case—cannot give rise to derivative tort claims in the United States courts for allegedly aiding a fraud. Full stop.

Again, this motion does ***not*** require the Court to weigh into innumerable factual disputes Kazakhstan has attempted to raise concerning the Statis' conduct prior to the issuance of the Award. Rather, the motion is based entirely on long-settled legal doctrines that plainly prohibit what Kazakhstan is trying to do here—i.e., attack third parties (Argentem) whose only alleged wrongdoing was to support efforts to enforce a confirmed arbitration award that now constitutes final, binding U.S. law.

First, New York's "collateral attack" prohibits parties from directly or indirectly attacking or trying to undermine a confirmed arbitration award. That is precisely what Kazakhstan is trying to do here, by claiming that any effort to enforce the Award constitutes aiding and abetting a "fraud." If Kazakhstan believes that the Award was issued by fraud, there are direct ways for it to

challenge the Award. Bringing a claim against a non-party to the Award is not one of them, however, and as a result this entire case should be dismissed.

Second, Kazakhstan's claims also are barred by collateral estoppel. Kazakhstan seeks to relitigate issues that were decided in the SCC arbitration, in the appeals of the Award in Sweden and in the enforcement action before the D.C. Court. Even if those issues are still live before other foreign courts, they have been officially "decided" for the purposes of U.S. law.

Third, the First Amendment to the U.S. Constitution bars all of Kazakhstan's claims. Under the *Noerr-Pennington* doctrine, parties cannot be sued for seeking legal relief either directly or through the funding of legal proceedings. Again, that is exactly what Kazakhstan is doing here: suing Argentem because it has supported the Statis efforts to enforce the Award.

Fourth, Kazakhstan fails to state any actionable claim under New York or English law. A party cannot bring a claim for civil conspiracy without alleging an underlying tort. Here, Kazakhstan fails to allege an actionable underlying tort because it cannot under any circumstances show that it relied on—*i.e.*, that it "believed" or was "deceived" by—any alleged misrepresentation by the Statis in the context of ongoing litigation. Kazakhstan also fails to satisfy CPLR 3016(b)'s heighted pleading standard as to the elements of conspiracy and aiding and abetting against Argentem. Finally, New York law prohibits Kazakhstan's claim for unlawful means conspiracy under English law.

The Court should dismiss Kazakhstan's Third Amended Complaint in full, with prejudice.

BACKGROUND

I. Overview.

Kazakhstan's Complaint lays out in copious detail its allegations about how the Statis allegedly used fraud to inflate the SCC arbitration Award. Most of those allegations have nothing to do with Argentem, however, which was not a party to the SCC Arbitration, and whose

investment funds were not even in existence when the Award was issued. For Argentem, the relevant facts are undisputed and can be summarized easily:

The Statis had an oil and gas business in Kazakhstan, and raised money to support that business by selling publicly traded secured notes to international investors. After the 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.

While that arbitration was pending, the Statis negotiated a deal with their noteholders to share the proceeds of any arbitral award with those investors because the underlying business had been expropriated and the Statis could not otherwise repay the notes. Argentem and its investment funds did not exist at this point. Rather, they were formed ***after*** the Statis negotiated the sharing agreement with its noteholders and, furthermore, ***after*** the Award was issued.

The Statis prevailed in the SCC arbitration, and began trying to enforce the Award against whatever Kazakh government assets it could find, in locations around the world. In response, Kazakhstan opted to wage a war of attrition, contesting any attempt to collect based on its claim that the Statis submitted fraudulent evidence in the arbitration concerning the damages calculation. Kazakhstan's results on the merits have been mixed – most notably, it failed to overturn the Award in Sweden, the country where it was issued, and in the United States, where the Award has been confirmed. But it has convinced at least some foreign tribunals to allow its fraud claims to go forward. And Kazakhstan's overall strategy clearly has been successful—it has not paid anything to the Statis, and the Statis' noteholders have received nothing on their bonds.

Unlike all of the prior cases it has filed in the U.S. and abroad, Kazakhstan in this matter sued not the Statis but rather Argentem, based solely on its efforts to help the Statis enforce the Award. By doing so, Kazakhstan apparently believes that it may be able to cut off funding to the

Statis, thereby crippling their enforcement efforts and allowing Kazakhstan to avoid payment on a judgment confirmed by the U.S. courts.

A. Argentem's Investment.

Argentem Creek Partners LP is a U.S.-based SEC registered investment adviser and emerging-market credit specialist that focuses on serving institutional investors, including many U.S.-based private and public pension funds. Argentem Creek Partners LP is the investment manager to various funds that hold an interest in the Notes described below. In this action, Kazakhstan is suing Argentem Creek Partners LP, various related Argentem entities, and Daniel Chapman, the Chief Executive Officer of certain of the Argentem Entities (collectively, the "Argentem Entities" and together with Daniel Chapman, "Argentem").

The investment at issue in this case are notes issued by a non-party to this case, Tristan Oil. Compl. ¶ 24. Tristan Oil was a special-purpose entity ultimately controlled by two individuals, Anatolie Stati and Gabriel Stati. The Statis invested "more than one billion dollars in the development of" oil and gas fields in Kazakhstan. *Stati v. Republic of Kazakhstan*, 302 F. Supp. 3d 187, 192 (D.D.C. 2018).[3] In 2006 and 2007, the Statis funded their Kazakh oilfield operations through the sale to investors (the "Noteholders") of 10 ½% senior secured notes due 2012 with an aggregate principal amount of more than $500 million issued by Tristan Oil. Compl. ¶ 103. These publicly-traded "secured loan notes" (the "Notes") would provide regular interest payments until they matured at the beginning of 2012. *Id*. A variety of international investors purchased the Notes when they were issued in 2006 and 2007. *Id.* ¶ 104.

[3] This Court may take judicial notice of other litigation on this motion to dismiss. *See Carroll ex rel. Pfizer, Inc. v. McKinnell*, 2008 WL 731834, at *10 n.1 (Sup. Ct. N.Y. Cnty. Mar. 17, 2008).

Between 2008 and 2010, Kazakhstan improperly expropriated the Statis' oilfield facilities, causing hundreds of millions of dollars in damages. *See Stati*, 302 F. Supp. 3d at 192; Ex. A to Baldini Aff. ¶ 1095. After Kazakhstan's continued refusal to pay appropriate compensation for the expropriation, in 2010 the Statis filed an arbitration claim in the SCC under the Energy Charter Treaty, an international agreement to which Kazakhstan is a signatory. *See Stati*, 302 F. Supp. 3d at 192. 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*.

While the Statis were pursuing their remedies in the SCC arbitration, the Statis and the Noteholders entered into the Sharing Agreement to address the Statis' repayment obligations on the Notes. Compl. ¶ 38. This Sharing Agreement was necessary because, once Kazakhstan improperly took over the oilfield operations, neither the Statis nor any of the obligors of the Notes were able to cover the interest payment on the Notes, let alone pay back the principal. *Id.* ¶ 35. In the Sharing Agreement, the parties replaced the Statis' obligation to repay the Notes with a promise that any amounts collected by the Statis against Kazakhstan in the SCC Arbitration would be distributed among the Noteholders, along with the Statis. *Id.* ¶ 40. In other words, the Sharing Agreement represented a consensual agreement between the Noteholders, the Statis, and Tristan Oil, for repayment of the Notes based on recovery under the Award. Pursuant to the Sharing Agreement, the Award is the primary source of recovery on the Notes for all Noteholders, including those associated with Argentem.

B. The SCC Arbitration Award.

On December 19, 2013, the SCC issued the Award in favor of the Statis, finding, among other things, that Kazakhstan, by engaging in a "string of measures of coordinated harassment" against the Statis, breached its duty to provide fair and equitable treatment as required by the

Energy Charter Treaty. Compl. ¶ 43. *See also Stati*, 302 F. Supp. 3d at 193; Ex. A to Baldini Aff., ¶ 1095. Specifically, Kazakhstan, through actions directed by its former Prime Minister Karim Massimov[4] and the former President's son-in-law and billionaire owner of oil and gas assets in Kazakhstan Timor Kulibaev,[5] initiated a sham criminal investigation of the Statis that resulted in the unlawful incarceration of one employee, *id.* ¶ 1039, overnight searches of the Statis' offices, *id.* ¶ 1049, seizure of the Statis' assets in Kazakhstan, *id.* ¶¶ 1052, 1071, 1077, and dozens of burdensome and unscheduled inspections by more than seven Kazakh agencies, *id.* ¶ 1079, resulting in Kazakhstan developing a pre-textual and "arbitrary" reason to expropriate the Statis'

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[4] SCC Award, at 209-31. It is noteworthy that during the political unrest in Kazakhstan this past January, former Prime Minister and head of Kazakhstan's National Security Committee ("KNB") Karim Massimov was arrested. In the aftermath of that arrest and search of Massimov's residence, the new leadership of the KNB stated that "numerous signs of acts of corruption were established in Massimov's actions." It added: "The facts of illegal receipt of real estate, expensive gifts, including cultural values, significant funds from representatives of the domestic business community and foreign entities have been documented." According to the KNB, after Massimov was detained in January 2022, "$17.2 million in cash was seized from this guest house, as well as numerous luxury items - luxury watches, gold bars, antiques and much more." The KNB also confirmed that "$5.1 million USD" were confiscated from Massimov's close ties and noted that it seized eleven "expensive business class cars" belonging to Massimov as well as (1) "two elite apartments in the capital;" (2) "two apartments and a mansion in Almaty;" and (3) a "lakeside property in the Shchuchinsko-Borovskaya resort area in Akmola region[.]" KNB PRESS RELEASE, https://www.gov.kz/memleket/entities/knb/press/news/details/338602?lang=ru.

[5] In a speech in the UK Parliament in February 2022, Dame Margaret Dodge specifically called for sanctions to be imposed against Massimov and Kulibayev for a history of corruption. Dame Hodge stated that that Timor Kulibaev has "faced money laundering and bribery investigations in [non-U.K. jurisdictions]," that "[i]n 2020 the Financial Times showed that Kulibayev benefited from a secret scheme to divert profits from a big state pipeline contracts" and that he is "worth $2.9 billion" according to Forbes and "owns at least [$80 million] of real estate. . . in the UK." Similalry, she noted that "Massimov is a former Prime Minister of Kazakhstan who has been subject to bribery allegations…and was implicated in allegations of bribery by Airbus for the purchase of 45 helicopters…[and] implicated in major bribery scandals totally $64 million with the Swedish telecoms company Teli." Ex. D to Baldini Aff., HC Deb (3 Feb. 2022) (708) (Dame Margaret Hodge) (UK), https://hansard.parliament.uk/commons/2022-02-03/debates/41000B02-86AB-499E-8547-0F5AA84611B0/KazakhstanAnti-CorruptionSanctions.

assets, *id.* ¶ 1091, and causing hundreds of millions of dollars in damages. *Stati*, 302 F. Supp. 3d at 192. As the Tribunal concluded: "[b]etween 21 and 22 July 2010, the Prime Minister [Massimov] and the Minister of Oil and Gas publicly declared the takeover and abrogation of the Claimants' Subsoil Use Contracts, seized the assets of KPM and TNG, and caused them, in due course, to be transferred to KMG (the Kazakh state-owned gas company for which Kulibaev is a director)…." SCC Award, at 228, ¶ 1084.

Despites efforts to portray itself as a victim, Kazakhstan does not dispute (and cannot) that the Award was properly issued in favor of the Statis following Kazakhstan's expropriated the Statis' assets.

Having so decided, the arbitral panel also had to determine the value of the seized property. One such piece of property was an unfinished liquefied petroleum gas plant ("LPG Plant"). In the SCC arbitration, the Statis claimed the value of the LPG Plant was in excess of $245 million, while Kazakhstan claimed it only had "scrap" or "salvage" value of, at most, $32 million. Compl. ¶¶ 198, 202(c). The SCC arbitration panel rejected both the Statis' and Kazakhstan's valuations, and awarded $199 million for the value of the LPG Plant. *Id.* ¶ 43. The $199 million valuation was based on an indicative offer that KazMuaniGas ("KMG")—a state-owned oil and gas company of Kazakhstan—had previously made for the LPG Plant. *Id.* ¶ 184. The SCC arbitration also awarded the Statis $277.8 million for the value of two oil and gas fields and $31.3 million for subsoil use contracts. *Id.* ¶ 212. The total award is for $497,685,101, plus costs. *Id.*

C. Appeal of the SCC Award in Sweden

Because the arbitration was held in Sweden, under international law the Swedish courts are the courts of "primary jurisdiction," and the only courts with authority to vacate the Award.[6] Accordingly, Kazakhstan asked the Swedish courts to set aside the Award. In arguing that the Award should be set aside, Kazakhstan alleged the same fraud that Kazakhstan now alleges Argentem aided and abetted: namely, "that the Stati parties had submitted false evidence on the value of the LPG plant in the form of sworn testimony and expert reports during the arbitration" and that, prior to the arbitration, the Stati parties "presented financial statements that falsely inflated the amounts invested in the LPG plant to a third-party company, KMG, and that KMG was fraudulently induced into bidding $199 million for the LPG plant." *Stati*, 302 F. Supp. 3d at 195; *see also* Compl. ¶¶ 28(b), 120, 138, 162, 216. The Svea Court of Appeal rejected these arguments and confirmed the Award, 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. Kazakhstan appealed the Svea Court of Appeal decision to the Swedish Supreme Court, and the Swedish Supreme Court affirmed on October 24, 2017. *Id*.

Undaunted, 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*

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[6] The New York Convention, 9 U.S.C. § 201 *et seq.*, recognizes the country in which an arbitration award was made to have primary jurisdiction over the arbitration award. *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 71 (2d Cir. 2017). That country, or another under the laws of that country, may vacate or modify the arbitration award. *Id.* (internal citation omitted).

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. Thus, the highest court of the only country with jurisdiction to vacate the Award has fully and finally ruled that the Award is final, binding and valid, notwithstanding the very same fraud claims asserted by Kazakhstan in this action.

D. The Enforcement Proceedings in the United States.

After securing the Award, the Statis sought to confirm the Award in numerous jurisdictions, including Sweden, the United States, the United Kingdom, Belgium, Luxembourg, the Netherlands, and Italy (the "Enforcement Proceedings"). Compl. ¶ 44. In each of the Enforcement Proceedings, Kazakhstan has asserted the same theory of fraud that it asserts in the Complaint. These same claims, which had been fully and finally rejected in Sweden, were also rejected in the United States. *See Stati*, 302 F. Supp. 3d at 195.

In 2014, the Statis petitioned the United States District Court for the District of Columbia 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 oppose confirmation of the Award based on the same fraud allegations asserted in opposition to the Swedish confirmation. *Id*. The D.C. Court denied this motion, noting that the SCC "disavowed any reliance on the allegedly fraudulent evidence." *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 191 (D.D.C. 2016). Kazakhstan subsequently moved for reconsideration, alleging the Award was fraudulently procured. *Id*. *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."). While Kazakhstan's motion for reconsideration was pending, the D.C. Court stayed the U.S. confirmation proceedings to allow

the Swedish courts to hear Kazakhstan's fraud claims. *Stati*, 302 F. Supp. 3d at 194–95. The Swedish courts upheld the Award and rejected Kazakhstan's fraud claims. *Id.* at 195. The D.C. Court subsequently denied Kazakhstan's motion for reconsideration, explaining that "the Svea Court of Appeal heard and rejected [Kazakhstan's] fraud claims and, [] its ruling was upheld by the Swedish Supreme Court[.]" *See Stati*, 302 F. Supp. 3d at 201. The U.S. Court of Appeals for the District of Columbia Circuit affirmed both the confirmation and the denial for leave to submit evidence of the supposed fraud. *Stati v. Republic of Kazakhstan*, 773 F. App'x 627 (D.C. Cir. 2019). The U.S. Supreme Court denied certiorari on October 15, 2019. *Republic of Kazakhstan v. Stati*, 140 S. Ct. 381 (2019).

Kazakhstan then repackaged these same fraud allegations and sued the Statis for alleged violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act. *See Republic of Kazakhstan*, 380 F. Supp. 3d at 55-58. The D.C. Court criticized Kazakhstan for pursuing an "ill-advised" RICO suit because it was "not a vehicle to challenge non-frivolous litigation, or in this case, a valid and final foreign arbitral award." *Id.* at 57. The alleged RICO violations were the Statis' "efforts to fraudulently inflate the value of the LPG plant, both prior to and during the SCC Arbitration, and its ongoing litigation activities to enforce and collect on the SCC award." *Id*. at 58. The theory was that the Statis maintained an "elaborate and fraudulent scheme to artificially inflate the construction costs of the LPG plant, conceal that fraud during the SCC Arbitration to obtain the Award, and then attempt to enforce the fraudulently procured Award in multiple jurisdictions, including the United States." *Id*. at 64. This alleged scheme included the purported fraudulently induced KMG bid. *Id*. at 57–58. The D.C. Court dismissed the claims, holding that Kazakhstan's "far-fetched theory" was "entirely predicated on defendants' initiation and prosecution of non-frivolous litigation, and plaintiff's alleged domestic injuries consist of the legal

costs it incurred in resisting the enforcement of a valid and binding arbitral award." *Id*. at 61. Tellingly, 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. In other words, the D.C. Court effectively foreclosed additional litigation by Kazakhstan against the Statis regarding the validity of the Award.

E. Other Foreign Enforcement Proceedings.

Kazakhstan's misplaced reliance on ongoing foreign Enforcement Proceedings exemplifies why this Court should not permit Kazakhstan to relitigate its fraud claims before this Court. For example, 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," *see* Dkt. 2 at ¶ 38. 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. Compl. ¶ 48. In the same way, Kazakhstan devotes three pages of its Complaint to discussing a lower court decision in Belgium that is currently on appeal to argue that "the Statis' fraud is an established fact." *Id.* Section II, ¶¶ 65-70. However, the Belgian decision is clear that it "does not call the Arbitral Award into question" and that the court "does not conduct a review of the merits of the Award." *See* Dkt. 24, Ex. 1 to Compl. at 5. Kazakhstan's reliance on the Belgian proceeding is further inapposite because the relief sought in those proceedings is exequatur – that is, the enforcement of the Award in Belgium. *See id.* at 5-6. Kazakhstan's action in Belgium is therefore a procedurally proper way to challenge enforcement of the Award ***in Belgium***. But the U.S. Courts have a separate forum for the same procedure, and that procedure was completed in the D.C. Court in 2018 when the D.C. Court determined that the Award was enforceable under U.S. law and there

was no nexus between the Award and the alleged fraudulent conduct. *See Stati*, 302 F. Supp. 3d at 199-201. Contrary to basic legal principles, Kazakhstan now argues that this non-final ruling from a foreign court is conclusive evidence of fraud that can somehow be imputed to Argentem, when a D.C. Court has already made the Award conclusively binding under U.S. law.

Notably absent from the Complaint is an acknowledgement that the only country (other than Sweden) whose highest court has considered fully and finally considered Kazakhstan's challenge to the Award, Italy, rejected Kazakhstan's claims and confirmed the Award. *See* Ex. B to Baldini Aff.

Having depleted the Statis' resources through this relentless global litigation strategy, Kazakhstan now seeks to avoid payment of the Award through this attack on investors providing funding to protect their fiduciary interests.

ARGUMENT

I. KAZAKHSTAN IS PRECLUDED FROM ATTEMPTING TO RELITIGATE, AND THEREBY COLLATERALLY ATTACKING, THE AWARD.

Stripped to its essentials, the Complaint is predicated on the same basic allegation rejected in Sweden and precluded by the D.C. Court: that the Statis defrauded the SCC arbitrators by providing false evidence and testimony, causing the arbitrators to issue a fraudulently inflated award. Each of Kazakhstan's claims against Argentem is based entirely on this underlying allegation. Both international and U.S. law provided Kazakhstan procedural paths to fully and fairly litigate the Statis' alleged fraud, including: (1) in the SCC arbitration, (2) in a direct appeal from the Award, (3) in further attacks on the Award in Swedish courts, and (4) in confirmation proceedings in the United States. Rather than stick to these proper paths, in the latest "string of measures of coordinated harassment," Kazakhstan has turned its attention to Argentem for allegedly improperly "supporting" the Award.

Under New York law, two separate legal doctrines now preclude Kazakhstan's claims and require dismissal. The first prevents Kazakhstan from collaterally attacking the Award after (unsuccessfully) directly attacking the Award in the D.C. Court under the FAA's exclusive procedures. The second prevents Kazakhstan from relitigating its fraud allegations that the Swedish and D.C. courts have already considered and rejected.

A. The Complaint Is An Improper Collateral Attack On The Award.

The first basis for preclusion is the well-established body of New York law that prohibits a "collateral attack" against a prior arbitration award—in this case, the Award. In sum, the law provides for parties that are disappointed in the outcome of their arbitrations two direct means to challenge those awards—first through an appeal of the award, and second through attempts to block enforcement and collection by the victorious party. If those ways fail, however, then the arbitral award is considered final.

In order to protect the finality of arbitral awards, New York courts have long held that "collateral attacks" on an arbitration award—i.e., attacks other than an appeal from the award or opposition to its enforcement in a judicial forum—"cannot be entertained." *See Monterey Sportswear Corp. v. Charma Mills, Inc.*, 43 A.D.2d 523, 523 (1st Dep't 1973) (claim for fraud was a collateral attack on an arbitration award); *see also, 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"); *Prime Charter Ltd. v. Kapchan*, 287 A.D.2d 419, 419 (1st Dep't 2001) (claim to void arbitration award was improper collateral attack and Section 10 of the FAA is the exclusive remedy for challenging an arbitration award); *Pena v. Office of Comm'r of Baseball*, 125 A.D.3d 461, 461 (1st Dep't 2015) (putative class action suit was "an improper collateral attack on a prior arbitration decision");

Rutter v. Julien J. Studley, Inc., 244 A.D.2d 239, 239 (1st Dep't 1997) (claims were "impermissible collateral attacks" on prior arbitration and award); *Clarke-St. John v. City of N.Y.*, 164 A.D.3d 743, 745 (2d Dep't 2018) (fraud claims were "an impermissible collateral attack against the subject arbitration award"). The reason is simple: a statute—whether Article 75 of the CPLR or, in this case, the FAA—governs all attempts to vacate an arbitration award based on alleged fraud, and this express statutory scheme precludes any attempt to undermine the award through a separate, plenary action. *See Abrams v. Macy Park Constr. Co.*, 282 A.D. 922, 923 (1st Dep't 1953) (an arbitration award "may not be attacked in a plenary action" because it "is a final determination as to the matters embraced in it, unless it is vacated" under the statutory scheme).

The question in assessing an improper collateral attack is not whether the claims "directly challenge the arbitration award." *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 910 (6th Cir. 2000). Most litigants—Kazakhstan included—are not so foolhardy. Rather, the collateral attack doctrine prevents losing parties in an arbitration from 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) (citation omitted).

Case law reveals several telltale signs of a collateral attack, all of which are present here. First, the claim challenges the subject of the arbitration "simply on a new theory." *Prime Charter Ltd.*, 287 A.D.2d at 419. Here, the claims in the Complaint are simply a re-telling of claims in the underlying arbitration, re-packaged as various fraud-based theories. Kazakhstan claims that the Statis told a "key lie" to the SCC panel about whether certain transactions were related-party transactions, Compl. ¶¶ 30–32, "cooked up years of materially false financial statements" to

provide to the SCC panel, *id.* ¶ 33, and thus "obtained the [SCC] Award by fraud," *id.* ¶ 215. In other words, Kazakhstan is challenging the same transactions that were at the center of the Award proceedings "simply on a new theory." *Prime Charter*, 287 A.D.2d at 419.

The second indication of a collateral attack is where the plaintiff seeks "damages for an alleged wrongdoing that compromised an arbitration award." *Decker*, 205 F.3d at 910 (plaintiffs improperly brought tort and contract claims to collaterally attack an award); *see also Ibarzabal v. Morgan Stanley DW, Inc.*, 2007 WL 9753006, at *3 (S.D.N.Y. Dec. 5, 2007) (same, alleging injury was "predicated on the impact of [defendant's] alleged conduct on the outcomes of their arbitration proceedings"). Kazakhstan expressly contends the same here, claiming that the Statis' underlying fraud compromised the SCC's damage calculations. *See* Compl. ¶ 213 (alleging that the damages awarded for the value of the LPG plaint "was the result of fraud by the Statis . . ."). The claims against Argentem are derived entirely from damages allegedly resulting from this alleged compromise of the underlying Award.

A third indication of a collateral attack is where the plaintiff alleges wrongdoing that "would justify vacatur" of the underlying award. *Tex. Brine*, 955 F.3d at 489. This is undoubtedly the case here, where Kazakhstan is raising the same theory it previously raised twice before the Swedish appellate courts and the D.C. Court when it resisted confirmation of the Award in the United States. Each of these courts have rejected Kazakhstan's arguments and affirmed or enforced the Award. Indeed, Kazakhstan's extensive reliance on another jurisdiction's acceptance of its claims—this time, in Belgium, pending appeal—affirms that Kazakhstan is seeking relief that would justify vacatur of the Award, despite the fact that the courts with direct jurisdiction to evaluate the Award have rejected these arguments. *See Grynberg v. Sullivan & Cromwell, LLP*, 47 A.D. 3d 447 (1st Dep't 2008); *Tex. Brine*, 955 F.3d at 489.

The fourth indication of a collateral attack is where the plaintiff requests "reimbursement of the costs and fees that it paid in the arbitration[.]" *Tex. Brine*, 955 F.3d at 489. That is precisely what Kazakhstan does here, asking this Court to award it "legal fees and costs that were wasted" from the SCC arbitration and Enforcement Proceedings, Compl. ¶ 46.

Each of these telltale signs demonstrates that this case is a classic collateral attack. And Kazakhstan's suit is no less a collateral attack merely because Argentem was not party to the original arbitration. *See Clarke-St. John*, 164 A.D.3d at 743 (affirming dismissal of claim that two third-party employees "committed fraud by coercing false testimony" in the prior arbitration because the claim was an "impermissible collateral attack" on the arbitration); *Davison v. Margolin Winer & Evens LLP*, 14 Misc.3d 1240(A), 2007 WL 703108, at *4 (Sup. Ct., Nassau Cnty. 2007) (finding that claim against third-party expert who prepared a report in arbitration proceedings was "nothing more than a collateral attack on the arbitration award" by a plaintiff who was "dissatisfied with the outcome of the arbitration").

U.S. law permits dissatisfied parties to challenge an arbitral award under the FAA. Kazakhstan did so, challenging the Award in the country with original jurisdiction, Sweden, and also directly challenging confirmation of the Award under the FAA. Its claims were rejected by Swedish and D.C. courts. The D.C. Court upheld the Award under the FAA. Thus, as far as U.S. law is concerned, the Award is final and enforceable. Kazakhstan can challenge enforcement in other jurisdictions to the extent such jurisdictions allow those claims. But resolution of those claims are a question for those courts.[7] As for this action, New York law prohibits Kazakhstan's

[7] For similar reasons, the fact that Kazakhstan's highly compensated expert witnesses have issued opinions supporting its theories are simply not relevant to this case. Kazakhstan is free to submit that evidence to any court that has relevant jurisdiction in an effort to overturn the Award or block its enforcement (or even to try to convince the D.C. Court to reopen its judgment). But

attempted end run around the FAA and the confirmed Award through a collateral attack against a third party. The Complaint should be dismissed in full.

B. The Complaint Is Barred By Collateral Estoppel (Issue Preclusion).

The Complaint is also barred by collateral estoppel because Kazakhstan had a full and fair opportunity to litigate the Statis' alleged fraud before the Swedish and D.C. courts. Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or preceding and decided against that party." *Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001) (noting the doctrine avoids "relitigation of a decided issue and the possibility of an inconsistent result"). Here, the preclusive effect arises from the Award and related proceedings: indeed, under New York law, "[i]t is well settled that prior arbitration awards may be given preclusive effect in a subsequent judicial action." *Bernard v. Proskauer Rose, LLP*, 87 A.D.3d 412, 415 (1st Dep't 2011). "Because mutuality of parties is not required," moreover, Argentem may preclude Kazakhstan from relitigating issues resolved against it in "an earlier arbitration with a different defendant"—*i.e.*, the Statis. *Id.*

The doctrine of collateral estoppel is "grounded in the facts and realities of a particular litigation, rather than rigid rules." *Buechel*, 97 N.Y.2d at 303. The "fundamental inquiry" is whether "relitigation should be permitted in a particular case in light of fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results." *Id.* at 304 (alterations and citation omitted). Applied here, Argentem bears the burden of showing an "identity of issue" that was decided in the prior action and that is now "decisive" in this action. *See id.* at 304-05. If they carry that burden, the burden shifts to

expert witnesses who contend that the Statis committed fraud in the arbitration do not create a new path for litigation against third-party Argentem.

Kazakhstan to show that it did ***not*** have a "full and fair opportunity" to litigate the relevant issues in the prior action. *Id.*; *see also Lukowsky v. Shalit*, 110 A.D.2d 563, 567 (1st Dep't 1985); *Wen Mei Lu v. Wen Ying Gamba*, 158 A.D.3d 1032, 1035 (3d Dep't 2018).

The test is easily satisfied here. As described in detail above, in order to prevail on any of its claims, Kazakhstan must first establish the alleged underlying fraud as the predicate wrongful act. But numerous courts around the world—including, most importantly, the SCC panel, the Swedish appellate courts, and the D.C. Court that confirmed the Award—have rejected the same fraud allegations that Kazakhstan is making now. In confirming the Award and rejecting Kazakhstan's allegations of fraud—which would have provided a statutory basis for refusing to enforce the Award—Judge Jackson noted that Kazakhstan did not "deny that it had an opportunity to litigate the[se] very issues … in the jurisdiction where the arbitration took place," and indeed, "had a full and fair opportunity to present its case to the tribunal." *Stati*, 302 F. Supp. 3d at 201. Then, when Judge Jackson dismissed Kazakhstan's RICO claims against the Statis—which were also based on the same facts and underlying fraud alleged here—she stated:

> At bottom, this suit is yet another attempt to ***relitigate the underlying arbitral award***. Whatever fraud Kazakhstan contends occurred before and during the SCC arbitration more than eight years ago, it had a ***full opportunity*** to raise those issues in the appeals process in Sweden and ***its allegations were rejected***. Kazakhstan tried again in the numerous subsequent proceedings where it has resisted the enforcement of the arbitral award ***on the same grounds***.

Republic of Kazakhstan, 380 F. Supp. 3d at 64–65 (emphasis added).

Kazakhstan will contend that Judge Jackson did not decide the underlying fraud issues, based on her subsequent denial of Argentem's motion for leave to file an antisuit injunction. But any such claim is unfounded. Rather, Judge Jackson expressly deferred the question of whether this action is barred by collateral estopped to New York-based courts. Specifically, she found that because her prior rulings "did not involve Argentem or consideration of any state claims against

those parties," under the high bar for a federal injunction against a state judicial proceeding, "the state court is better positioned to determine whether Kazakhstan's claims are precluded." Order, *Stati v. Republic of Kazakhstan*, No.14-1638 (ABJ) (D.D.C. Mar. 18, 2021) at 4.

This Court is therefore well positioned to consider the New York-law test for collateral estoppel. Such consideration shows that, like the substantive claims against the Statis that Judge Jackson rejected on the merits, this suit is yet another attempt to "relitigate the underlying arbitral award," whatever artful pleading or argument Kazakhstan relies on to the contrary. And it should meet the same fate as Kazakhstan's previous "ill-advised lawsuit." *See Republic of Kazakhstan*, 380 F. Supp. 3d at 57. A detailed comparison of the theory of fraud raised in the Complaint 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 price of the LPG Plant," and that "the Statis used multiple, overlapping schemes to fraudulently inflate the LPG Plant construction costs" through Perkwood. Compl. ¶¶ 28(b), 120, 124.

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 falsely representing to their auditors that the transactions were on arm’s length terms and by falsely representing that Perkwood was an independent third party. . . .” Compl. ¶ 138.

Third, before both the Svea Court of Appeal and D.C. Court, Kazakhstan alleged that KMG valued the LPG plant based on 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 used their fraudulent ‘audited’ financial statements to obtain bids for their Kazakh operations from prospective purchasers” and that “[t]he KMG Indicative Offer relied on the false information provided by the Statis.” Compl. ¶¶ 162, 184.

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 $199 million amount 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. ¶ 216.

In light of this clear overlap, Kazakhstan cannot credibly deny that there is an "identity of issue" in the prior cases with the issue that is "decisive" here. *See Buechel*, 97 N.Y.2d at 303-04. And because Kazakhstan repeatedly raised these issues in prior proceedings, it cannot carry its burden to show that it did not have a full and fair opportunity to litigate those issues. *Id*. Kazakhstan's unsupported claim that it has "new evidence" of the same fraud it has been asserting for years does not allow it to do an end run around those Courts with jurisdiction over these claims by simply naming a different new party and bringing those same claims in a new Court. The Court should apply the doctrine of issue preclusion and dismiss the Complaint in full.

II. KAZAKHSTAN'S CLAIMS ARE BARRED BY THE *NOERR-PENNINGTON* DOCTRINE.

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. Under the Doctrine, "parties may not be subjected to liability for petitioning the government." *I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 A.D.3d 206, 208 (1st Dep't 2005); *see also Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006).

"'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, even if the defendant's actions had an … injurious purpose or effect.'" *Caesars Ent. Operating Co., Inc. v. Appaloosa Inv. Ltd. Partnership I*, 48 Misc.3d 1212(A), 2015 WL 4430268, at *5 (Sup. Ct., N.Y. Cnty. July 10, 2015) (quoting *Tuosto v. Phillip Morris USA Inc.*, 2007 WL 2398507, at *5 (S.D.N.Y. Aug. 21, 2007)). The First Department has "expressly held that the *Noerr-Pennington* doctrine applies to common law tort claims." *Id.* at *5 (citing *Concourse Nursing Home v. Engelstein*, 278 A.D. 35 (1st Dep't 2000)).

The Doctrine applies to foreign legal proceedings and arbitration proceedings conducted under international governmental treaties. *See, e.g., Luxpro Corp. v. Apple Inc.*, 2011 WL 1086027, at *5 (N.D. Cal. Mar. 24, 2011) (applying doctrine to lawsuits in Germany and Taiwan because "a party should not be held liable for conduct that would be legal and protected if it was performed in the United States, but is now illegal because it was performed abroad"); *Carpet Group Int'l v. Oriental Rug Imposters Ass'n, Inc.*, 256 F. Supp. 2d 249, 266 (D.N.J. 2003) ("lobbying of foreign governments, whether performed at home or abroad, is protected … under *Noerr-Pennington*."); *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"); *accord Oneida Tribe of Indians of Wisconsin v. Harms*, 2005 WL 2758038, at *3 (E.D. Wis. Oct. 24, 2005) and *Penn. State Univ. v. Keystone Alternatives LLC*, 2020 WL 4677246, at *3–4 (M.D. Pa. Aug. 12, 2020).

The Doctrine protects not only the parties involved in the underlying proceedings, like the Statis, but also third parties, like Argentem, who consult with and fund a party prosecuting legal claims. *See Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155, 157–59 (9th Cir. 1993) (extending *Noerr-Pennington* immunity to third party that funded litigation); *Sosa*, 437 F.3d at 937 (citing *Liberty Lake* and explaining "we held that *Noerr-Pennington* immunity extended to an individual who funded anticompetitive litigation but was not himself a party to the litigation and was therefore not himself petitioning the courts"). Kazakhstan's allegations merely amount to attacking Argentem's "concerted efforts incident to litigation," which the Doctrine protects. *See* Compl. ¶ 278; *Singh v. NYCTL 2009-A Tr.*, 683 F. App'x 76, 77 (2d Cir. 2017) (internal citations omitted);

Balt. Scrap Corp. v. David J. Joseph Corp., 237 F.3d 394, 401 (4th Cir. 2001) (noting that the doctrine protects non-parties' "financial backing, legal assistance . . . or moral support").

Based on the foregoing, none of Kazakhstan's claims against Argentem are constitutionally permissible. Each claim is based on Argentem's alleged participation in the Enforcement Proceedings. Argentem, which did not exist at the time of the alleged fraud on the arbitrators, plainly was not involved in the Statis' actions within the arbitration. Rather, the "overt acts" that Argentem supposedly committed in furtherance of the alleged conspiracy were "provid[ing] critical funding" and consulting with the Statis on "strategy for enforcing the [SCC] Award in various jurisdictions[.]" Compl. ¶ 298. This same conduct—participating in litigation—is also the basis for Kazakhstan's claim that Argentem aided and abetted fraud. *See* Compl. ¶ 346. Indeed, Kazakhstan repeatedly alleges that Argentem was put on notice of the fraud by various events in the Enforcement Proceedings, such as an English and Gibraltar *prima facie* rulings and the Belgian court's now-appealed ruling. *See* Compl. ¶¶ 292, 296, 297. Kazakhstan goes so far as to claim that its *filing of this suit* constituted notice of the fraud. *Id.* ¶ 295. These allegations underscore that Kazakhstan's claims against Argentem are based on disputed facts in ongoing litigation regarding the SCC Award. Under the *Noerr-Pennington* doctrine, Argentem simply cannot be liable for participation in that litigation by assisting the Statis to collect on a final judgment.

The Doctrine contains an exception for "sham litigation," but that exception clearly 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." *Prof'l Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993) (citations omitted); *accord Singh*, 683 F. App'x at 78.

As to the first prong, the Southern District of New York 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 the United States Court of Appeals for the Second Circuit have held that prior litigation was not objectively baseless even when only *some* claims succeeded on the merits. *See Mosdos Chofetz Chaim, Inc. v. Vill. of Wesley Hills*, 701 F. Supp. 2d 568, 602–03 (S.D.N.Y. 2010) (finding the state court's dismissal of some claims did not render prior legal claims objectively basis).

Here, Kazakhstan cannot meet the "objectively baseless" test because the Statis' claims have been validated not only by the SCC panel, but also by the courts of Sweden, the U.S., and Italy. Indeed, the Swedish appellate courts have twice considered and rejected the fraud arguments Kazakhstan advances in this proceeding. *Stati*, 302 F. Supp. 3d at 195; Dzhazoyan Decl ¶¶ 6–7. Likewise, Judge Jackson specifically found the Enforcement Proceedings to be "non-frivolous" when dismissing Kazakhstan's RICO claims against the Statis. *Republic of Kazakhstan*, 380 F. Supp. 3d at 61. Most recently, Judge Koeltl in the Southern District of New York affirmed that "the validity of th[e] award, [] has been confirmed repeatedly." *Republic of Kazakhstan v. Chapman*, 2022 WL 420357, at *5. Because adjudicative bodies have found the Statis' claims against Kazakhstan to be meritorious—and that the Award is final and enforceable—Kazakhstan

cannot rely on the sham exception to avoid *Noerr-Pennington's* application. *See also Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*, 129 F. Supp. 2d 578, 593 (W.D.N.Y. 2000) (requiring that a representation be materially false to invoke the sham exception).

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 as a matter of law, and Kazakhstan's claims must be dismissed.

III. KAZAKHSTAN FAILS TO ALLEGE AN UNDERLYING FRAUD TO SUFFICIENTLY PLEAD ITS FRAUD-BASED CLAIMS.

Even if Kazakhstan's claims were not precluded by New York law or barred by the First Amendment, Kazakhstan's common law claims for civil conspiracy to commit fraud (Count I) and aiding and abetting fraud (Count II) fail because: (1) New York law does not recognize civil conspiracy or aiding and abetting tort claims as independent causes of action; (2) Kazakhstan cannot show that it was deceived by or otherwise relied on any fraudulent statement made by the Statis in connection with the SCC arbitration or Enforcement Proceedings; and (3) Kazakhstan fails to plead the other elements to sufficiently state a claim for civil conspiracy and for aiding and abetting.

A. Kazakhstan's Derivative-Fraud Claims Cannot Stand Without A Viable Claim Of Fraud.

New York law does not recognize civil conspiracy or aiding and abetting tort claims as independent causes of action. *See El Toro Group, LLC v. Bareburger Group, LLC*, 190 A.D.3d 536, 542 (1st Dep't 2021) ("Absent an underlying fraud, there is no aiding and abetting fraud claim."); *see also 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) ("An independent tort must form the basis of a claim of civil conspiracy"). 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, 614–15 (Bankr. S.D.N.Y. 2016). Because Kazakhstan's fraud claim is a collateral attack on the Award and the D.C. Court's decision confirming the Award, Kazakhstan has failed to state a claim for fraud.

B. Kazakhstan's Derivative-Fraud Claims Fail Because It Fails To Sufficiently Plead An Underlying Fraud.

Kazakhstan's common law claims for civil conspiracy to commit fraud (Count I) and aiding and abetting fraud (Count II) fail on the merits because Kazakhstan cannot show that it was deceived by or otherwise relied on any fraudulent statement made by the Statis in connection with the SCC arbitration or Enforcement Proceedings. To the contrary, it hotly disputed all of the Statis' claims in these proceedings.

A plaintiff must be able to prove all the necessary elements of the underlying fraud in order to sue a third party for conspiring to commit or for aiding and abetting the alleged fraud. *See, e.g.*, *Troung v. AT&T*, 243 A.D.2d 278, 278 (1st Dep't 1997) (when the underlying fraud cannot be proven, there can be no liability for civil conspiracy to commit fraud); *AIG Fin. Prods. Corp. v. ICP Asset Mgmt., LLC*, 108 A.D.3d 444, 446 (1st Dep't 2013) ("ma[king] out a claim for fraud" is a "necessary predicate to the cause of action . . . for aiding and abetting"). Here, in order to prove the fraud allegedly committed by the Statis during the SCC arbitration and Enforcement Proceedings, Kazakhstan must show, in part, that Kazakhstan "***believed*** and justifiably relied upon [a materially false] statement and was induced by it to engage in a certain course of conduct[.]" *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 488 (2007) (emphasis added; internal quotation marks omitted). In other words, "to maintain an action based on fraudulent misrepresentations" the plaintiff must show that "the defendant knowingly uttered a falsehood

intending to deprive the plaintiff of a benefit ***and that the plaintiff was thereby deceived and damaged***." *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 N.Y.2d 403, 406–07 (1958) (emphasis added).

Without conceding the other essential fraud elements, Kazakhstan does not allege that it "believed" or was "deceived" by any of the alleged financial misrepresentations made by the Statis in the SCC arbitration or Enforcement Proceedings.[8] To the contrary, Kazakhstan actively ***disputed*** the financial information put forward by the Statis. A review of the Award confirms this fact, as it describes Kazakhstan's numerous attempts to refute the Statis' damages evidence by arguing that, among other things:

- "Claimants have failed to prove either claim for USD 245 million or USD 408 million for the LPG Plant and they have failed to provide a salvage valuation for the LPG Plant." *See* Ex. A to Baldini Aff. ¶ 1712.
- "Claimants have not provided proof or a position of costs for the completion of the LPG Plant." *Id.* ¶ 1717.
- "[Claimant's witness] tried to hide the LPG Plant cost explosion from the Tribunal and its own auditors." *Id.* ¶ 1718.
- "[Claimant's witness's] testimony regarding the LPG Plant misrepresented all basic parameters of that project. Everyone except FTI agreed that Claimants should never have taken the decision to build the LPG Plant." *Id.* ¶ 1723.

[8] Even if Kazakhstan could argue it was "deceived" by statements made in the SCC arbitration, its claims would still fail because any "reliance" would have been unjustifiable. There can be no justifiable reliance "[w]hen the party to whom a misrepresentation is made has hints of its falsity," because "a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy." *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 279 (2011) (a party cannot justifiably rely on statements made by a counterparty negotiating a deal from an adverse position); *Aglira v. Julien & Schlesinger, P.C.*, 214 A.D.2d 178, 185 (1st Dep't 1995) ("[I]t is a well-settled principle that neither a party nor his attorney may justifiably rely on the legal opinion or conclusions of his or her adversary's counsel."). Because the representations were made in a contested proceeding, and because Kazakhstan already claimed grounds to dispute the Statis' financial evidence, it could not "reasonably rely" on any of the contested statements without further independent investigation.

Likewise, in the U.S. confirmation proceedings, Kazakhstan again argued that the Statis' evidence in the SCC arbitration consisted of "'false testimony and evidence . . .' that 'materially misrepresented the LPG Plant construction costs[.]'" *Stati*, 302 F. Supp. 3d at 193. And, as the D.C. court noted, Kazakhstan made the same arguments to the Swedish courts in an attempt to vacate the Award. *Id*. at 195. The fact that Kazakhstan now claims that it has identified additional evidence that it claims would support the same arguments it made previously does not change this analysis. At no point did Kazakhstan believe what the Statis were saying.

Based on the foregoing, Kazakhstan's argument that it "relied" on financial representations made during the course of its litigation with the Statis is directly contrary to the positions it took in the Enforcement Proceedings and necessarily fails as a matter of law. *See Shaffer v. Gilberg*, 125 A.D.3d 632, 635 (2d Dep't 2015) (dismissing fraud claims based on alleged false evidence submitted in divorce proceeding when plaintiff "always maintained that he knew the promissory notes and loans were fabricated"); *Clarke-St. John*, 164 A.D.3d at 745 (finding no reliance on an allegedly false statement made in an arbitration); *In re Gormally*, 550 B.R. 27, 46–47 (Bankr. S.D.N.Y. 2016) (no justifiable reliance on statements relating to legal positions in a related litigation, in part because plaintiffs had first-hand knowledge of the facts). Kazakhstan actively contested the accuracy of the Statis' arbitration evidence regarding financial matters and thus cannot reasonably claim to have "relied" on that evidence such that it could allege a viable fraud claim. *Id.* Kazakhstan seems to recognize this fatal inconsistency and attempts to plead around it by confusing "reliance" (which, as noted above, would require it having been "deceived") with its obligation to ***respond*** to the contested representations. *See, e.g*., Compl. ¶¶ 208–211. Having to respond to an alleged misrepresentation is the not the same as believing it, however, and absent its actual belief in the alleged misrepresentations, Kazakhstan cannot state a claim for fraud. 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.

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

To state a claim for civil conspiracy to commit fraud, *in addition to* pleading an underlying fraud, a plaintiff must sufficiently allege under CPLR 3016(b)'s heightened pleading requirement: (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. *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 fall short on this element. Kazakhstan baldly alleges "upon information and belief" that: (1) Dan Chapman learned of the Statis' allegedly fraudulent activities in 2011; and (2) noteholders entered into the Sharing Agreement, which "gave [them] a powerful financial incentive to conspire with, and aid and abet, the Statis. . . ." *See* Compl. ¶¶ 37, 40. Argentem, as noted above, did not even exist at this time. Even so, bereft of any substantiating detail, these conclusory allegations merely show that the noteholders entered into a valid, legal contract more than a year (in December 2012) after Kazakhstan claims the Statis committed fraud (in 2011) to help collect on a final and binding Award, which is insufficient to demonstrate that Chapman or Argentem "knowingly agreed" to conspire with the Statis. *See LeFebvre*, 214 A.D.2d

at 912. Kazakhstan's remarkable assertion that the noteholders were somehow beholden to concede its fraud allegations notwithstanding the fact that numerous courts with jurisdiction had fully and finally rejected them 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. May 7, 1998) (internal citations omitted). This requires plaintiffs to show defendants' "independent culpable behavior" linking them to their co-conspirators' tortious actions. *Schwartz v. Society 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, 460–61 (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, provided guidance regarding the legal strategy to enforce the fraudulently obtained [SCC] Award, and sought to frustrate Kazakhstan's attempts to discover information regarding the Statis' fraud." Compl. ¶ 334. These allegations are insufficient to create an inference that Argentem engaged in "independent culpable behavior." *Schwartz*, 199 A.D.2d at 130. 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 nothing to support Kazakhstan's claims beyond the mere assertion that Argentem, like many other unnamed parties, purchased the Notes. As a result, Count I for civil conspiracy must be dismissed.[9]

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[9] Kazakhstan characterizes statements on the Tristangate website as "misleading, false and/or fraudulent" but does not allege that these statements are overt acts in furtherance of the alleged conspiracy. *See* Compl. ¶ 315. For one, Kazakhstan cannot prove these statements' falsity. Rather, the statements highlighted by Kazakhstan are entirely accurate. Kazakhstan has "refused to . . . pay the award," a fact recently confirmed by Judge Koeltl in the Southern District of New York. *Id.*; *see Republic of Kazakhstan v. Chapman*, 2022 WL 420357. Award creditors have "successfully attached and frozen [Kazakh assets] in their efforts to enforce the award," including in Sweden, where a court recently entered a $90 million freeze on Kazakhstan National Fund's assets. *See* THE TRISTANGATE DISPUTE, https://www.tristangate.com/about/ (last visited April 18, 2022). And, the final Award is "final binding and non-appealable yet the Kazakh authorities are continuing a litigation fight they have already lost." *See Republic of Kazakhstan v. Stati*, 380 F. Supp. 3d 55, 57 (D.D.C. 2019) ("A RICO civil suit is not a vehicle to challenge . . . a valid and final foreign arbitral award").

D. 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.[10] To state a claim for aiding and abetting, in addition to asserting an underlying fraud claim, plaintiffs must allege with CPLR 3016(b)'s particularity requirements that: (i) a party had "actual knowledge" of an underlying tort; and (ii) a party provided "substantial assistance" in the commission of the fraud. *Gregor v. Rossi*, 120 A.D.3d 447, 448 (1st Dep't 2014). "Aiding and abetting fraud 'is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud' combined with conclusory allegations that the aider and abettor had actual knowledge of such fraud." *Goel v. Ramachandran*, 111 A.D.3d 783, 792 (2d Dep't 2013) (quoting *Nat'l Westminster Bank v. Weksel*, 124 A.D.2d 144, 149 (1st Dep't 1987)). A plaintiff must demonstrate that a defendant "affirmatively assist[ed], help[ed] conceal[ed] or fail[ed] to act when required to do so." *Kaufman v. Cohen*, 307 A.D.2d 113, 126 (1st Dep't 2003). This analysis is akin to a proximate cause analysis; however, "but-for" causation is insufficient. *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001) (internal citations omitted). The injury must also be a "'direct or reasonably foreseeable result' of the complained-of conduct" to impose liability. *Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 249 (S.D.N.Y. 1996) (quoting *Morin v. Trupin*, 711 F. Supp. 97, 112 (S.D.N.Y. 1989)).

Kazakhstan's allegations fail to meet CPLR 3016(b)'s heightened pleading on these elements. First, Kazakhstan fails to allege that Argentem had actual knowledge of the Statis' allegedly fraudulent scheme. The Complaint contains a laundry list of facts allegedly known to Mr. Chapman. Compl. ¶ 278. However, notably absent from this list is any allegation that

[10] 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*, 503 F. Supp. 3d 51, 63 (S.D.N.Y. 2020).

Argentem knew of the primary allegations that underpin Kazakhstan's fraud claims against the Statis: that the Statis falsely inflated the cost of the LPG Plant; that the Statis failed to disclose these transactions to their auditor; that these financial statements were distributed to the bidders for the LPG Plant; or that the Statis submitted false information to the SCC tribunal. *See id*. ¶¶ 37, 278, 289, 291. 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 to support a claim for aiding and abetting. *See id.* ¶ 37. 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*. ¶ 39.

Second, Kazakhstan cannot establish that Argentem provided the Statis with substantial assistance. The 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. ¶ 298. Kazakhstan further alleges "upon information and belief" that Argentem has communicated and consulted with the Statis regarding various enforcement proceedings. *See id.* ¶¶ 220, 294, 298. These allegations are insufficient to state a claim for aiding and abetting wrongful conduct because these allegations are of "ordinary professional activity, not substantial assistance." *Gregor*, 120 A.D.3d at 449. Moreover, these allegations are insufficient 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 Kazakhstan's allegations against Argentem relate to actions taken long after the alleged fraud took place and the Award was made. Kazakhstan has not plead that

Argentem provided the Statis with substantial assistance in procuring the Award 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.

IV. 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. *In re Allstate Ins. Co. (Stolarz–New Jersey Mfrs. Ins. Co.)*, 81 N.Y.2d 219, 223 (1993). If an "actual conflict" exists, the court must apply the "law of [the] jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Babcock v. Jackson*, 12 N.Y.2d 473, 481 (1963)).

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 & Alexander of N.Y. v. Fritzen*, 68 N.Y.2d 968, 969 (1986). 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 Complaint that Argentem "committed tortious acts within the State [of New York]." Compl. ¶ 19. 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 (while also

availing itself of New York State causes of action) is inconsistent with New York law and warrants dismissal. *City of Almaty*, 503 F. Supp. 3d at 63 (noting that 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.

CONCLUSION

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

Dated: April 18, 2022
New York, New York

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD LLP

/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

-and-

Paul W. Butler
20001 K Street N.W.
Washington, DC 20006
Telephone: (202) 887-4000
Facsimile: (202) 887-4288
pbutler@akingump.com

- and -

FAEGRE DRINKER BIDDLE & REATH LLP
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

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 WITH COMMERCIAL DIVISION RULE 17

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Dated: New York, New York
April 18, 2022

AKIN GUMP STRAUSS HAUER & FELD LLP

/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