

Ace Decade Holdings Ltd. v UBS AG

2016 NY Slip Op 32415(U)

December 7, 2016

Supreme Court, New York County

Docket Number: 653316/2015

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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ACE DECADE HOLDINGS LIMITED,

Plaintiff,

-against-

Index No. 653316/2015
Motion Date: 6/2/2016
Motion Seq. No. 001

UBS AG,

Defendant.

-----X

BRANSTEN, J.

In this action, Plaintiff Ace Decade Holdings Limited (“Ace Decade” or “Plaintiff”) alleges that it purchased shares of a Chinese company with money borrowed from UBS, AG (“UBS” or “Defendant”), then lost virtually its entire investment when UBS issued a margin call and sold all of Plaintiff’s shares at a steep discount. Upon UBS’s advice, Plaintiff agreed to make its investment through an intermediary. As a result, the intermediary—not Plaintiff—entered into financing agreements directly with UBS. Since Plaintiff was not a party to these agreements, UBS was able to include onerous margin call provisions and penalty clauses while representing to Ace Decade that the loan agreements did not contain such provisions.

Presently before the Court is Defendant UBS’s motion to dismiss Plaintiff’s Amended Complaint (the “Complaint”) pursuant to CPLR §§ 327, 3211(a)(7)-(8), and

3016(b).¹ Defendant argues that this court lacks personal jurisdiction over UBS, that New York is an inconvenient forum, and that Plaintiff's Complaint fails to state a cause of action.

For the reasons that follow, the Court determines that it lacks jurisdiction over UBS and grants the motion to dismiss. Separately, the Court concludes that even if it could exercise jurisdiction over UBS, the action would be dismissed on *forum non conveniens* grounds.

I. Background²

A. Ace Decade's Relationship with UBS

Ace Decade is a limited liability investment holding vehicle incorporated in the British Virgin Islands. (Compl. ¶ 18.) UBS is a Swiss banking and financial services company. (Compl. ¶ 19.)

¹ Defendant filed the present motion to dismiss Plaintiff's Original Complaint on December 8, 2015. On May 1, 2016, after the motion was fully submitted, Plaintiff filed its Amended Complaint. After conferring, the parties stipulated that the pending motion to dismiss "shall apply against the Amended Complaint" and agreed to submit additional letter briefs regarding this motion. (Dkt. No. 53, Stipulation.) Accordingly, the Court applies the motion to the Amended Complaint and considers the parties' additional letters as part of the record. *See Fownes Bros. & Co. v. JPMorgan Chase & Co.*, 92 A.D.3d 582, 582 (1st Dep't 2012); *see also Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35, 38 (1st Dep't 1998) (amended pleading does not automatically abate a pending motion to dismiss, and the moving party has the option to decide whether its motion should be applied to new pleadings).

² Unless otherwise noted, the facts herein are as described in Plaintiff's Amended Complaint. (Dkt. No. 37, "Compl.")

Ace Decade's agent, Kwok Ho Wan ("Mr. Kwok"), began a relationship with UBS in Hong Kong in 2010. (Compl. ¶¶ 22-24.) Since then, Mr. Kwok depended upon UBS's expertise and guidance and relied upon UBS Managing Director Stephen Wong's investment advice. *Id.*

At all relevant times, Mr. Wong was based out of UBS's Hong Kong office. (Dkt. No. 17, Affirm. of Stephen Wong in Support ("Wong Affirm.") ¶¶ 1, 7.)

Around May 2014, Mr. Kwok and UBS began to discuss an investment opportunity (the "Investment") in an upcoming placement of H-shares³ (the "Shares") of Haitong Securities Co., Ltd. ("Haitong"). (Compl. ¶ 25.) Haitong is a full-service securities firm that has been listed in the Hong Kong Stock Exchange since April 2012. *Id.* Plaintiff alleges that UBS claimed it was knowledgeable and experienced in advising investors in similar placements; Ace Decade therefore agreed to have UBS act as its advisor in connection with the Investment. (Compl. ¶¶ 27-31.) Plaintiff does not allege that there is any written agreement between Ace Decade and UBS with respect to the Investment.

³ H-shares are shares of a company incorporated in the People's Republic of China ("PRC") that are listed on the Hong Kong Stock Exchange. H-shares are regulated by Chinese law but are denominated in Hong Kong dollars. (Compl. ¶ 25.)

B. Ace Decade's Contemplated Investment in Haitong

According to Plaintiff, Mr. Kwok initially sought to invest \$1 billion in Haitong. (Compl. ¶ 39.) UBS advised him to instead invest only \$500 million and obtain a loan to purchase the remaining Shares. *Id.*

UBS also advised Mr. Kwok not to purchase the Shares directly through Ace Decade because the Investment would constitute more than 5% of Haitong's outstanding H-shares and consequently trigger regulatory disclosure requirements. (Compl. ¶ 32.) UBS convinced Mr. Kwok to structure the investment through an intermediary entity, which would hold legal title to the Shares while Ace Decade remained the beneficial owner. (Compl. ¶ 32.)

UBS suggested that Ace Decade make the Investment through an entity known as Haixia Huifu Asset Investment and Fund Management Co., Ltd. ("Haixia"), which unbeknownst to Plaintiff was closely affiliated with UBS. (Compl. ¶ 33.) UBS concealed its ties to Haixia and represented that Haixia was independent and would protect Ace Decade's interests. *Id.*

C. Structuring the Deal

In late 2014, Mr. Wong advised Mr. Kwok regarding Haixia's Know-Your-Customer anti-corruption checks, reviewed the résumés of Mr. Kwok's employees, and suggested that he appoint Ms. Yu Yong ("Ms. Yu") as the Director and sole shareholder of Ace Decade. (Compl. ¶ 36.)

Ace Decade agreed to make the investment through one of Haixia's fully-owned subsidiary funds, Dawn State Limited ("Dawn State"). On December 17, 2014, Ace Decade entered into a "Co-Investment Agreement" with Haixia, and a "Letter Agreement" with Haixia and Dawn State. (Compl. ¶¶ 41-44.) Pursuant to the Co-Investment Agreement, Ace Decade would provide Dawn State \$500 million and Dawn State would obtain an additional \$750 million in financing to purchase the Shares. *Id.* Haixia would receive a fee of up to \$5 million in consideration for permitting Ace Decade to use its special purpose entity for the Investment. (Dkt. No. 38, Compl. Ex. 1 ("Co-Investment Agreement") § 1.1.)

The Co-Investment Agreement provided that Ace Decade would have no management or voting rights with respect to Dawn State. (Co-Investment Agreement § 4.2.) According to Plaintiff, these provisions were included at UBS's advice to avoid regulatory disclosure requirements. (Compl. ¶ 38.) However, Haixia agreed to transfer 100% of Dawn State to Ace Decade upon request at any time after two months following the Investment. (Dkt. No. 39, Compl. Ex. 2 ("Letter Agreement") at 2-4.)

To purchase the Shares, Dawn State separately entered into a Subscription Agreement with Haitong for 569,427,620 Shares at a price of HK \$15.62. (Compl. ¶ 46.) The transaction was conditioned on future shareholder and regulatory approvals. (Compl. Ex. 5 at 5-6.) Ace Decade was not a party to the Subscription Agreement.

D. Haixia's Credit Agreements with UBS

According to Plaintiff, Ace Decade did not pressure Haixia or Dawn State to seek financing from banks other than UBS because UBS represented that it would handle the loan on the most favorable terms. (Compl. ¶ 40.) Moreover, UBS advised Ace Decade that for regulatory reasons Ace Decade should not be a party to UBS's financing agreements with Haixia and Dawn State. (Compl. ¶ 50.)

Plaintiff alleges that throughout 2014, Mr. Wong continuously represented that the terms of the loan would be advantageous to Ace Decade. (Compl. ¶¶ 47-49.) Specifically, during the parties' discussions, Ace Decade demanded that the margin call provisions exclude short-term price fluctuation triggers. *Id.* With regards to any margin call, Ace Decade sought five business days to pay the first 25%, ten business days for the second 25%, and 20 business days for the remaining 50%. (Compl. ¶ 47.) Mr. Kwok also told UBS that Ace Decade would not make the Investment if the margin call provisions were not appropriate. *Id.*

Mr. Wong reassured Ace Decade that the terms of the credit agreements would mirror those of a previous loan issued by UBS to a shareholder of Ping An Insurance Group ("Ping An"). (Compl. ¶ 49.) In that transaction, UBS never sold any of the shares following a margin call. *Id.* Mr. Wong represented to Mr. Kwok that UBS would work with Ace Decade to allow it to meet any margin call, and that UBS would not sell the Shares without giving Ace Decade a reasonable amount of time to pay. (Compl. ¶ 48.)

On December 19, 2014, the final Financing Letter between Haixia and UBS was executed. (Compl. ¶ 50.) Ace Decade's Letter Agreement with Haixia—executed two days earlier on December 17, 2016—states that Ace Decade reviewed the Financing Letter. However, Ace Decade alleges that it could not have reviewed the Financing Letter because it did not even exist at the time the Letter Agreement was signed. (Compl. ¶ 53.)

The Financing Letter contained onerous provisions that allowed UBS to issue a margin call based on short-term price fluctuations, and required that 25% of the total payment be made in less than 24 hours with the remaining 75% due in the next two days. (Compl. ¶ 52.) Dawn State and UBS simultaneously entered into a side-letter agreement (the "UBS Side Letter") that provided that if the loans were prepaid, including pursuant to a margin call, UBS would earn a "make-whole premium." *Id.*

E. Ace Decade's Relocation to New York

In early 2015, Mr. Kwok, Ms. Yu, and Ace Decade relocated to New York. (Compl. ¶ 56.) Ace Decade alleges that Mr. Wong and UBS knew about the relocation and about Ace Decade's intent to seek investors in New York. (Compl. ¶ 57.) Mr. Kwok and Ms. Yu conducted business for Ace Decade out of their offices at 767 Fifth Avenue from April 2015 through February 2016. (Compl. ¶ 60.) For example, Ace Decade entered into an agreement with an entity called China Golden Spring Group (Hong Kong) Ltd., which contemplated the acquisition of the Haitong Shares. (Compl. ¶ 58.) In March 2015, Golden Spring Hong Kong formed an entity called Golden Spring (New York) Ltd., incorporated

in Delaware and registered to do business in New York. (Compl. ¶ 59.) UBS allegedly assisted Mr. Kwok by transferring funds from his personal account at UBS to Golden Spring New York's JPMorgan Chase account in New York, although these are not the same funds Ace Decade used for the Investment. (Compl. ¶ 61.)

Ace Decade asserts that UBS continued to make misrepresentations regarding the terms of the loan throughout 2015—after Ace Decade had moved its operations to New York. (Compl. ¶¶ 65-68.) During numerous telephone calls throughout January, March, April, May, and June, UBS allegedly continued to represent that it would give Ace Decade ample time to meet any margin call, and that Ace Decade would receive the same treatment as the large Ping An shareholder. (Compl. ¶¶ 65-66.)

Significantly, however, Ace Decade's Original Complaint contradicts this narrative: it originally claimed that after moving to New York "Mr. Kwok did not again directly discuss with UBS the margin call provisions in the final Facility Agreement and other associated collateral documents." (Dkt. No. 1, Original Compl. ¶ 39). Mr. Kwok's Affidavit also confirms that after moving to New York, he "did not raise with Mr. Wong again [his] concerns about repayment triggers conditioned on short term price fluctuations of the Shares because Mr. Wong had previously told [him] that there were no such triggers." (Dkt. No. 27, Kwok Aff. ¶ 42.)

F. Funding the Investment

In April 2015, Dawn State—not Ace Decade—entered into a Facility Agreement with UBS that provided approximately \$688.3 Million in loan financing to purchase the Shares. (Compl. ¶ 69.) In May, Haitong announced that the conditions for finalizing Investment had been completed and the closing was expected to occur on May 15, 2015. (Compl. ¶ 70.) Due to an increase in the price of the Shares, Dawn State and UBS amended the Facility Agreement to increase UBS’s loan to approximately \$775.2 million. (Compl. ¶ 71.)

On May 11, 2015, Mr. Kwok spoke with UBS about how to transfer Ace Decade’s funds to make the Investment. (Compl. ¶ 74.) Mr. Wong instructed Mr. Kwok to first exchange the funds from U.S. Dollars to Hong Kong dollars in Mr. Kwok’s Hong Kong UBS account. *Id.* None of the accounts used to fund the Investment are alleged to have been in New York. Instead, Plaintiff alleges that all of UBS’s dollar-denominated wire transfers and exchanges travel through New York. (Compl. ¶ 75.)

According to Plaintiff, Mr. Kwok and Ms. Yu relied upon UBS’s Hong Kong employees and followed their instructions to make the Investment from their offices or residences in New York. (Compl. ¶ 76.) Plaintiff asserts that if Ace Decade had known about UBS’s misrepresentations regarding the margin call, Ace Decade would have rescinded the Co-Investment Agreement and would not have funded the Investment. (Compl. ¶ 81.) Alternatively, it could have arranged to fund the entire Investment without loan financing from UBS. (Compl. ¶ 82.)

On May 15, 2015, Dawn State completed Ace Decade's investment. (Compl. ¶ 77.)

G. The Margin Call

On July 2, 2015, Haitong H-Shares closed at HK \$20.00. (Compl. ¶ 85.) Four days later, the share price had dropped 20% to HK \$16. *Id.* On July 6, 2015 at 5:22 p.m. Hong Kong time, Haixia emailed Ace Decade's Hong Kong counsel, Stevenson, Wong & Co., to notify them that the price drop had triggered a margin call and that UBS demanded 25% of the total loan before 5 p.m. the next day. (Compl. ¶ 86.) By the time Ace Decade learned about the margin call, they had less than 24 hours to transfer \$200 million. (Compl. ¶ 88.) Plaintiff alleges that UBS knew that Mr. Kwok and Ace Decade could make the payments, but that they would need more time to complete the transfer. *Id.*

To stop the falling share price, Haitong announced a \$3.5 billion buyback offer to purchase shares for as much as \$17.18. (Compl. ¶ 101.) On July 7, 2015, UBS began to offer the Shares at between HK \$11.12 and HK \$12.00 per share. (Compl. ¶ 100.) Instead of selling only enough shares to cover the \$200 million payment that UBS demanded within 24 hours, UBS sold Ace Decade's entire position for HK \$11.12 per share—20% less than their closing price on July 7, and 35% less than the price at which Haitong publicly offered to buy them back. (Compl. ¶ 102.) UBS sold over 10% of Ace Decade's Shares to its own entity, UBS Securities LLC, and resold them for a \$45 million profit a few days later. (Compl. ¶ 103-105.) It sold other portions of Ace Decade's Shares to funds with which it was closely affiliated. (Compl. ¶ 106.)

As a result of the sale of the Shares, UBS recouped approximately \$816.2 Million USD out of the total Investment of \$1.25 billion USD. (Compl. ¶ 111.) After deducting UBS's principal amount, interest, costs, and the "make-whole premium," UBS returned only \$4.7 million to Ace Decade. (Compl. ¶ 112.)

Thus, Ace Decade lost nearly its entire \$500 million investment. The Amended Complaint asserts claims for (1) fraud, (2) constructive fraud, (3) breach of fiduciary duty, (4) negligent misrepresentation, and (5) unjust enrichment. Notably, none of the causes of action arise from the agreements covering the transaction.

II. Legal Standard

On a motion to dismiss for lack of personal jurisdiction, *forum non conveniens*, or failure to state a claim, the Court is required to accept as true all the allegations as set forth in the plaintiff's complaint and opposition papers, and accord the plaintiff the benefit of every favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994); *Lawati v. Montague Morgan Slade Ltd.*, 102 A.D.3d 427, 428 (1st Dep't 2013); *Whitcraft v. Runyon*, 123 A.D.3d 811, 812 (2d Dep't 2014). Viewing the allegations in the light most favorable to the non-moving party, the plaintiff need only make a prima facie showing that the defendant is subject to the Court's personal jurisdiction. *Weitz v. Weitz*, 85 A.D.3d 1153, 1153 (2d Dep't 2011).

III. Discussion

A. Personal Jurisdiction

Defendant argues that this Court lacks personal jurisdiction over UBS. Defendant claims that there is no general jurisdiction because UBS—a Swiss company—is not essentially at home in New York. Additionally, Defendant argues that New York’s long-arm statute does not apply to the facts of this case. For the following reasons, the Court agrees.

1. *General Jurisdiction*

UBS is not subject to general jurisdiction in New York. UBS correctly argues that its affiliations with New York are not “so continuous and systematic as to render [it] essentially at home” here. *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014). Since *Daimler*, New York courts have recognized that “doing business” in New York is no longer a constitutionally sufficient basis for the exercise of general jurisdiction over foreign entities. See *Norex Petroleum Ltd. v. Blavatnik*, 48 Misc. 3d 1226(A), at *20 (N.Y. Sup. Ct. N.Y. Cnty. 2015). Federal Courts have similarly found that *Daimler* effectively abolished “doing business” jurisdiction. See *Meyer v. Bd. of Regents of Univ. of Oklahoma*, 2014 WL 2039654, at *3 (S.D.N.Y. May 14, 2014) (“Even if Plaintiff’s allegations were sufficient to establish general jurisdiction under New York law, they would be inadequate to satisfy Due Process requirements [in light of *Daimler*].”).

Defendant also points the Court to recent cases that have applied *Daimler* and concluded that UBS is not subject to general jurisdiction in New York. See, e.g., *Giordano*

v. UBS, AG, 134 F. Supp. 3d 697, 707 (S.D.N.Y. 2015) (UBS AG's contacts with New York are insufficient to establish general jurisdiction here); *see also SPV OSUS Ltd. v. UBS AG*, 114 F. Supp. 3d 161, 168 (S.D.N.Y. 2015) (same). In opposition, Plaintiff points to one post-*Daimler* case that exercised general jurisdiction over a large foreign bank based on its New York contacts. *See* Pl. Opp'n at 18 (citing *In re Hellas Telecommunications (Luxembourg) II SCA.*, 524 B.R. 488, 508 (Bankr. S.D.N.Y. 2015)). But *In re Hellas* has since been disregarded as erroneous, and no other court has followed it. *See In re LIBOR-Based Fin. Instruments Antitrust Litigation*, 2015 WL 6243526, at *27 n.43 (S.D.N.Y. Oct. 20, 2015) ("In light of [*Daimler*] ... we cannot agree with the [*In re Hellas*] bankruptcy court's conclusion that even very substantial corporate operations . . . make a defendant at home in the forum.").

Accordingly, this Court determines that UBS is not subject to general jurisdiction in New York.

2. *Specific Jurisdiction—New York's Long-Arm Statute*

Plaintiff also contends that UBS is subject to specific jurisdiction pursuant to New York's long-arm statute, CPLR § 302. New York's long-arm statute, CPLR 302, provides specific jurisdiction for claims arising out of: (1) business that a defendant "transacts . . . within the state"; (2) "a tortious act" committed "within the state"; or (3) "a tortious act" committed "without the state causing injury to person or property within the state." CPLR 302(a)(1)-(3). Separately, the Court must also find that the exercise of long-arm jurisdiction

would be compatible with due process. *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 216 (2000). The Court will address each subsection of CPLR § 302(a) in turn.

a. CPLR § 302(a)(1)–Transacting Business in New York

Plaintiff argues that UBS is subject to jurisdiction under CPLR § 302(a)(1) because it transacted business in New York. Plaintiff contends that UBS’s communications directed at Ace Decade after it had moved to New York amounted to transacting business here. The Court disagrees.

Under CPLR § 302(a)(1), long-arm jurisdiction exists where (i) the defendant transacted business within the state and (ii) the cause of action arose from that transaction. *Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005). A “substantial relationship” must be established between the plaintiff’s causes of action and the defendant’s transactions in New York. *Id.* (citing *George Reiner & Co. v. Schwartz*, 41 N.Y.2d 648, 653 (1977) (concluding that there was jurisdiction over a Massachusetts resident for breach of an employment agreement executed in New York). However, “jurisdiction is not met where the relationship between the claim and transaction is too attenuated.” *Johnson*, 4 N.Y.3d at 520. Courts also consider whether the defendant has purposefully availed itself of the privilege of conducting activities within New York. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007). It is not the quantity, but the quality of the contacts that matters under the long-arm analysis. *Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 378 (2014).

First, Plaintiff argues that UBS's telephone calls and electronic communications are sufficient to render it subject to jurisdiction pursuant to CPLR § 302(a)(1), because UBS's Hong Kong agents communicated with Ace Decade and induced it to finalize and fund the investment in May 2015. (Pl. Opp'n Br. at 12-14.) Plaintiff relies on *Fischbarg v. Doucet*, where the Court of Appeals held that jurisdiction was proper over a defendant that sought an attorney in New York and established an ongoing relationship with him. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 381 (2007). Plaintiff also cites *Grimaldi v. Guinn*, where the defendant's telephone and electronic communications into New York constituted an attempt to purposefully create a continuing relationship with the plaintiff here. *Grimaldi v. Guinn*, 72 A.D.3d 37, 51 (2d Dep't 2010). Ace Decade further contends that even if UBS's agents were in Hong Kong, jurisdiction can be exercised "over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transaction." See Pl. Opp'n Br. at 14 (citing *Deutsche Bank*, 7 N.Y.3d at 70-71).

Plaintiff's comparisons to *Fischbarg* and *Grimaldi* are unpersuasive, particularly in light of all the circumstances concerning Ace Decade and UBS's interactions and activities within New York. *Wilson v. Dantas*, 128 A.D.3d 176, 184 (1st Dep't 2015) (whether a defendant transacted business in New York must be determined based on "the totality of the circumstances"). *Fischbarg* and *Grimaldi* involved defendants that sought out New York plaintiffs and engaged them in continuing relationships. *Fischbarg*, 9 N.Y.3d at 380; *Grimaldi*, 72 A.D.3d at 45. Yet Ace Decade admits that its relationship with UBS began in

2012, and that the agreements structuring the transaction at issue were executed in 2014 while Plaintiff resided in Hong Kong. There is no allegation that UBS's Hong Kong employees specifically sought out Ace Decade in New York, or that they attempted to conduct a transaction with Ace Decade in New York. Instead, the Complaint describes a purchase by a British Virgin Islands company (Ace Decade) through a Chinese investment fund, of Shares regulated by Chinese law, denominated in Hong Kong Dollars and listed on the Hong Kong Stock Exchange. Based on the "totality of the circumstances," there is simply no basis to conclude that there is a "substantial relationship" between the plaintiff's causes of action and the defendant's transactions in New York. *Wilson*, 128 A.D.3d at 184; *Johnson*, 4 N.Y.3d at 519.

Additionally, Ace Decade cannot manufacture jurisdiction over UBS by moving its operations to New York. In *Pell v. Clarke*, the court considered whether a plaintiff could exercise long-arm jurisdiction over a foreign law firm. *Pell v. Clarke*, 1994 WL 74075, at *1 (S.D.N.Y. 1994) (applying New York law). Noting first that the law firm defendant had "conducted business in New York in the past" but that none of its lawyers had "been physically present in New York *in any matter related to this action*," the court went on to consider whether the law firm's communications directed to New York could subject it to long-arm jurisdiction. *Id.* (emphasis added). Like Ace Decade, the plaintiff in *Pell* had begun its relationship with the defendant while the plaintiff lived outside of New York. He attempted to establish jurisdiction because he "later moved to New York, and the defendants continued to conduct business with him after this time." *Pell*, 1994 WL 74075,

at *6 (S.D.N.Y. 1994). The Court rejected this argument and found that the defendants did not contract to perform acts in New York, and did not perform any acts as part of their agreement with the plaintiff in New York. *Id.* at 5. Here, similarly, none of UBS's alleged acts regarding the Investment were performed in New York. The *Pell* court noted that correspondence between the defendant and the plaintiff after the plaintiff moved to New York "did not amount to the transaction of business within the state." *Id.* at 6.

Similarly, in *Smith v. Morris & Manning* (on which the *Pell* court relied), the defendant continued to communicate with a plaintiff after the plaintiff moved to New York. 647 F. Supp. 101, 103 (S.D.N.Y. 1986) (applying New York law). The Court rejected the exercise of long-arm jurisdiction because the defendant performed all its services outside of New York, and—as here—the relevant agreement was entered into *before* the plaintiff moved to New York. *Smith v. Morris & Manning*, 647 F. Supp. 101, 103 (S.D.N.Y. 1986).

Employing these cases as guideposts, and considering the totality of the circumstances surrounding the Investment, this Court determines that UBS's communications to New York are not enough to exercise long-arm jurisdiction with respect to claims arising out of an entirely foreign transaction.

Finally, Plaintiff cannot manufacture jurisdiction from bald allegations that UBS executives globally, "including from the United States," participated in the deal. (Compl. ¶ 30.) Although the Complaint alleges that Mr. Wong would "be acting under the instructions of senior executives from UBS offices in the United States, Switzerland, England, and Hong Kong," there is no specific allegation that any of these executives were

in *New York*. (Compl. ¶ 30.) The Complaint is also devoid of allegations that Ace Decade received any misrepresentations from any UBS executive other than Mr. Wong—who was based out of Hong Kong.⁴

For the foregoing reasons, the Court determines that UBS is not subject to jurisdiction pursuant to CPLR § 302(a)(1).

b. CPLR § 302(a)(2)—Tortious Acts Within the State

UBS is also not subject to jurisdiction pursuant to CPLR § 302(a)(2), because it did not commit a tortious act within New York. Plaintiff argues that UBS committed a tortious act within New York through its “ongoing misrepresentations regarding the Investment and the loan to Ace Decade and its representatives while they were in New York.” (Pl. Opp’n Br. at 14.) Plaintiff contends that under CPLR § 302(a)(2), the misrepresentations “occurred” in New York for jurisdictional purposes even if the speaker was outside New York. *Id.* at 15.

First, the Court agrees with Defendant that the Amended Complaint is contradicted by Statements made in Plaintiff’s Original Complaint and in Mr. Kwok’s Affidavit in Opposition to Defendant’s Motion to Dismiss. While the Amended Complaint alleges that

⁴ Plaintiff requests jurisdictional discovery to show that “facts may exist to exercise personal jurisdiction over” UBS. (Pl. Opp’n Letter at 2.) But Plaintiff’s pleadings and supporting documentation have failed to make a “sufficient start” to warrant further discovery on the issue of personal jurisdiction. *Henkel v. Masiero*, 2013 WL 1127727, at *5 (Sup. Ct. N.Y. Cnty. 2013) (citing *People ex rel. Cuomo v. H & R Block, Inc.*, 58 A.D.3d 415, 416 (1st Dep’t 2009)).

UBS continued to discuss the terms of the margin call and represent to Ace Decade that their shares would not be sold, (Dkt. No. 37, Am. Compl. ¶¶ 65-66), the original Complaint states explicitly that “Mr. Kwok did not again directly discuss with UBS the margin call provisions in the final Facility Agreement and other associated collateral documents.” (Dkt. No. 1, Original Compl. ¶ 39). Mr. Kwok’s Affidavit confirms that after moving to New York, he “did not raise with Mr. Wong again [his] concerns about repayment triggers conditioned on short term price fluctuations of the Shares because Mr. Wong had previously told [him] that there were no such triggers.” (Dkt. No. 27, Kwok Aff. ¶ 42.) While the Amended Complaint supersedes all prior pleadings in the case, Plaintiff’s statements constitute a judicial admission that all of the alleged misrepresentations were directed at Plaintiff’s agents *before* they moved to New York. *Tullett Prebon Fin. Services v. BGC Fin., L.P.*, 111 A.D.3d 480, 482 (1st Dep’t 2013).

In any event, if the Court ignored Plaintiff’s admissions and assumed that UBS continued to direct misrepresentations to New York throughout 2015, CPLR § 302(a)(2) would still not apply. First, Defendant correctly notes that CPLR § 302(a)(2) permits the exercise of jurisdiction only where the defendant “commits a tortious act within the state,” for which “our courts have traditionally required the defendant’s presence here at the time of the tort.” *Pramer S.C.A. v. Abaplus Int’l Corp.*, 76 A.D.3d 89, 97 (1st Dep’t 2010). Plaintiff argues that some courts have recognized that where a defendant sends a false statement intending that it injure a resident of New York, he has acted within New York for jurisdictional purposes. *See Travelers Indem. Co. v. Inoue*, 111 A.D.2d 686, 687 (1st

Dep't 1985); *see also* *N. Valley Partners, LLC v. Jenkins*, 2009 WL 1058162, at *5 (Sup. Ct. N.Y. Cnty. Apr. 14, 2009). But both cases upon which Plaintiff relies were decided before the First Department's decision in *Pramer*, which recognized that a "fraudulent misrepresentation[] received in New York [is] insufficient" to exercise jurisdiction over the defendant. *Pramer S.C.A.*, 76 A.D.3d at 97 (citing *Bauer Indus., Inc. v. Shannon Luminous Materials Co.*, 52 A.D.2d 897, 898 (2d Dep't 1976)).⁵ Thus, it is not enough that Ace Decade merely received fraudulent misrepresentations in New York.

Accordingly, the Court determines that it would be inappropriate to exercise long-arm jurisdiction pursuant to CPLR § 302(a)(2).

c. CPLR § 302(a)(3)–Tortious Acts Causing Injury in N.Y.

Finally, Ace Decade argues that this Court has jurisdiction over UBS pursuant to CPLR § 302(a)(3), because Ace Decade has alleged a tortious act by UBS outside New York that caused injury within the State. Ace Decade claims that its injury occurred in New

⁵ Significantly, the *Travelers* court actually exercised jurisdiction based on the defendant's agent's *physical presence* in New York, and the language plaintiff relies upon was mere dicta. *Travelers Indem. Co.*, 111 A.D.2d at 687. Additionally, *Travelers* itself relied on a 1972 New York County case which, in turn, relied on a First Circuit case that applied the Massachusetts long-arm statute. *See Polish v. Threshold Tech. Inc.*, 72 Misc. 2d 610, 612 (Sup. Ct. N.Y. Cnty 1972) (citing *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972)). Indeed, *Threshold Tech. Inc.* itself acknowledges (with a "but see" citation) that New York courts traditionally give more restrictive meaning to the requirement that the tortious act be committed in this State. *See Threshold Tech. Inc.*, 72 Misc. at 612 (citing *Gluck v. Fasig Tipton Co.*, 63 Misc. 2d 82, 84 (Sup. Ct. N.Y. Cnty. 1970)).

York because it agreed to fund the Investment from New York in May 2015, and because it lost potential New York investors when UBS sold all of its Shares. The Court concludes that, for jurisdictional purposes, Ace Decade's injury did not occur in New York.

Long-arm jurisdiction is appropriate where a defendant "commits a tortious act without the state causing injury to person or property within the state." CPLR § 302(a)(3). To avail itself of this clause, a plaintiff must also allege that the defendant "regularly does or solicits business" in New York, or "expects or should reasonably expect the act to have consequences" in New York and "derives substantial revenue from interstate or international commerce." CPLR § 302(a)(3)(i)-(ii).

Plaintiff must allege that its injury occurred within New York. For purposes of CPLR § 302(a)(3), it has "long been held that the residence or domicile of the injured party within a State is not a sufficient predicate for jurisdiction, which must be based upon a more direct injury within the State and a closer expectation of consequences within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there." *Fantis Foods, Inc. v. Std. Importing Co., Inc.*, 49 N.Y.2d 317, 326 (1980). For long-arm purposes, the situs of the injury is where the events giving rise to the injury occurred, not where the resultant damages occurred. *Marie v. Altshuler*, 30 A.D.3d 271, 273 (1st Dep't 2006). "In the context of a commercial tort, where the damage is only economic, the situs of injury is where the original critical events associated with the action or dispute took place." *CRT Investments, Ltd. v. BDO Seidman, LLP*, 85 A.D.3d 470, 472 (1st Dep't 2011); see also *McBride v. KPMG Int'l*, 135 AD3d 576, 577 (1st Dep't 2016).

First, Ace Decade cannot establish that the harm it suffered by funding the Investment occurred in New York solely because its agents were here. Ace Decade does not allege that the funds used for the Investment were ever held in New York accounts.⁶ Instead, Ace Decade asserts that Mr. Kwok exchanged the funds used for the Investment from U.S. Dollars to Hong Kong Dollars in his UBS Account in Hong Kong. (Compl. ¶ 75.) Ace Decade claims that “all of UBS’s dollar-denominated wire transfers and exchanges travel through New York.” *Id.* But UBS provided evidence that the funds actually cleared through Hong Kong, indicating that the funds never entered New York. (Dkt. No. 55, Def. Supp. Letter Ex. A.) Even if the funds had been wired through New York, such wire transfer would be insufficient to establish long-arm jurisdiction over UBS. *Daewoo Int’l (Am.) Corp. v. Orion Eng’g and Serv., Inc.*, 2003 WL 22400198, at *2 (S.D.N.Y. 2003).

Ace Decade also contends that it lost potential “New York-based investors, who had met with Mr. Kwok in 2015 to discuss their potential investments in Ace Decade.” (Compl. ¶ 114.) Ace Decade argues that “loss of business inside the state [is] sufficient to establish personal jurisdiction.” *Penguin Group (USA) Inc. v. Am. Buddha*, 16 N.Y.3d 295, 306 (2011). However, the Complaint makes clear that Golden Spring—not Ace Decade—was attempting to find investors. (Compl. ¶ 58.) Significantly, in explaining why it has not

⁶ Ace Decade does claim that UBS assisted Mr. Kwok in transferring *separate* funds from his UBS account to a separate entity’s New York account and to Mr. Kwok’s personal New York account at JPMorgan Chase. (Compl. ¶ 61.) But none of these funds are alleged to have ever been transferred to or from Ace Decade, or actually used for the Investment. *Id.*

registered to do business in New York, Ace Decade actually admits that its “only activity in New York has been to enter into the Investment”—not to seek investors. (Pl. Opp’n Br. at 19 n. 7.) Moreover, Plaintiff does not cite any authorities that have exercised jurisdiction based on allegations of lost unnamed potential investors. Plaintiff here “makes no mention of any New-York based companies,” and does not allege that it lost specific “New York sales or New York customers.” *Darby Trading Inc. v. Shell Intern. Trading and Shipping Co. Ltd.*, 568 F. Supp. 2d 329, 338 (S.D.N.Y. 2008) (declining to exercise personal jurisdiction under CPLR § 302(a)(3)). Plaintiff’s otherwise “conclusory allegations are not enough to establish there was injury in New York.” *Indelible Media Corp. v. Meat and Potatoes, Inc.*, 2012 WL 3893523, at *5 (S.D.N.Y. 2012) (no jurisdiction under CPLR § 302(a)(3) based on vague allegations of lost business).

In sum, the record makes clear that the “original critical events” associated with the Investment occurred in Hong Kong. *CRT Investments, Ltd. v. BDO Seidman, LLP*, 85 A.D.3d 470, 472 (1st Dep’t 2011). Plaintiff’s funds were disbursed to a Chinese company in Hong Kong to purchase shares traded on the Hong Kong Stock Exchange. The only connection to New York is that Plaintiff moved here after entering into all relevant agreements and committing to make the Investment. But “the occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under § 302(a)(3) where the underlying events took place outside New York.” *Darby Trading Inc.*, 568 F. Supp. 2d at 338 (citing *Fantis Foods, Inc. v. Standard Importing Co.*, 49 N.Y.2d 317, 326 (1980)).

For the foregoing reasons, the Court determines that it lacks jurisdiction over UBS under CPLR 302(a)(3).

3. Conclusion

As noted above, the Court may not exercise general jurisdiction over UBS. Additionally, Plaintiff has failed to establish that long-arm jurisdiction may be exercised under any subsection of CPLR § 302(a). The Court therefore concludes that it lacks personal jurisdiction over UBS, and this action must accordingly be dismissed.

B. Forum Non Conveniens

Even if this Court could properly exercise jurisdiction, this case should be heard in another forum.

New York courts “need not entertain causes of action lacking a substantial nexus with New York.” *Martin v. Mieth*, 35 N.Y.2d 414, 418 (1974). The doctrine of *forum non conveniens* provides that the court may dismiss an action “[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum.” CPLR § 327(a). “The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation.” *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984). Although no one factor is controlling, collectively, the courts consider and balance the following factors in determining an application for dismissal based on *forum non conveniens*: existence of an

adequate alternative forum; situs of the underlying transaction; residency of the parties; potential hardship to the defendant; location of documents; location of a majority of the witnesses; existence of a forum selection clause; need to apply the law of a foreign jurisdiction; and burden on New York courts. *Id.*; *Peters v. Peters*, 101 A.D.3d 403, 403 (1st Dep't 2012); *Fox v. Fusco*, 4 A.D.3d 313, 313-314 (1st Dep't 2004); *World Point Trading PTE v. Credito Italiano*, 225 A.D.2d 153, 158-159 (1st Dep't 1996). Although the plaintiff's choice of forum should rarely be disturbed, dismissal based upon *forum non conveniens* is warranted where there is "no substantial connection to this State." *Blueye Nav., Inc. v. Den Norske Bank*, 239 A.D.2d 192, 192 (1st Dep't 1997).

Here, the only connection to New York is that Plaintiff and its agents moved here in 2015—after entering into the relevant agreements that structured the Investment. This case should be dismissed because "[t]he transaction out of which the cause[s] of action arose occurred primarily in a foreign jurisdiction." *Kinder Morgan Energy Partners, L.P. v. Ace Am. Ins. Co.*, 55 A.D.3d 482 (1st Dep't 2008); *see also Viking Glob. Equities, LP v. Porsche Automobil Holding SE*, 101 A.D.3d 640, 641 (1st Dep't 2012). In *Viking Glob. Equities*, the Court noted that "the only alleged connections between the action and New York are the phone calls between plaintiffs in New York and a representative of defendant in Germany ... which allegedly contained misrepresentations." *Viking Glob. Equities, LP*, 101 A.D.3d at 641. By itself, the plaintiff's location in New York "failed to create a substantial nexus" with this State. *Id.* Here, likewise, that Plaintiff moved to New York in January 2015 fails to establish the requisite nexus.

Moreover, Hong Kong and China's interests in this lawsuit are far greater than New York's interest, since it involves investment advisors operating within their borders. *See, e.g., Garmendia v. O'Neill*, 46 A.D.3d 361, 362 (1st Dep't 2007) ("Uruguay has an interest in adjudicating claims involving its own banking institutions..."). Additionally, Ace Decade does not dispute that nearly all relevant documents and all witness—except Mr. Kwok and Ms. Yu—are located in Hong Kong. In light of all the factors, the Court determines that Plaintiff's residence in New York is insufficient to establish that New York is a convenient forum for this action. *See Peters v. Peters*, 101 A.D.3d 403, 403 (1st Dep't 2012) ("[P]laintiff's residence in New York is outweighed by the remaining factors...").

Thus, even if the Court had jurisdiction over this dispute, the case would be dismissed on *forum non conveniens* grounds pursuant to CPLR 327.

IV. Conclusion

For the foregoing reasons, the Court grants Defendant UBS's motion to dismiss the Complaint pursuant to CPLR § 327 and § 3211(a)(8), for lack of personal jurisdiction and *forum non conveniens*.

Accordingly, it is hereby


ORDERED that Defendant's motion to dismiss is GRANTED; and it is further

ORDERED that Plaintiff's Amended Complaint is dismissed, with prejudice; and it is further

ORDERED that the Clerk of the Court enter judgment dismissing this action.

Dated: New York, New York
December 7, 2016

ENTER:


Hon. Eileen Bransten, J.S.C.