SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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CRAGNOTTI AND PARTNERS CAPITAL INVESTMENT - BRAZIL S.A.,

Plaintiff,

DECISION/ORDER
Index No. 650075/2015

-against-

ANTONIO QUINTELLA, CREDIT SUISSE AG, CREDIT SUISSE GROUP A.G., BANCO DE INVESTIMENTOS CREDIT SUISSE (BRASIL) S.A., BANCO CREDIT SUISSE BRASIL S.A., CREDIT SUISSE (BRASIL) S.A. CORRETORA DE TITULOS E VALORES MOBILIARIOS, GARANTIA INC., GARANTIA BANKING, LTD., CREDIT SUISSE HOLDINGS (USA), INC., CREDIT SUISSE FIRST BOSTON (INTERNATIONAL) HOLDING LIMITED

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action to compel delivery of bonds, defendants Credit Suisse A.G., Credit Suisse Group A.G. (together, the "Swiss Defendants"); Credit Suisse Holdings (USA), Inc., Credit Suisse First Boston (International) Holding Limited (together, the "New York Defendants"); Banco de Investimentos Credit Suisse (Brasil) S.A. ("Credit Suisse Brazil"), Banco Credit Suisse Brasil S.A., and Credit Suisse (Brasil) S.A. Corretora de Titulos e Valores Mobiliarios (together, the "Brazilian Defendants"); and Mr. Antonio Quintella (collectively, with the Swiss, New York, and Brazilian Defendants, "Defendants") move (in motion sequence number 001) to dismiss the complaint on a variety of grounds. Defendant Credit Suisse Holdings (USA) also moves (in motion sequence 002) for sanctions. Motion sequence numbers 001 and 002 are consolidated for disposition.

Plaintiff Cragnotti and Partners Capital Investment – Brazil S.A. ("C&P Brazil") is a Brazilian investment company that is authorized to do business in New York. C&P Brazil bought approximately US $193 million of Argentinian Global Bonds (the "Bonds") in 1998 from defendant

Banco Investments Garantia S.A. ("Garantia S.A.") following discussions with the latter's "principal staff." The Bonds purchase was part of a Garantia S.A. finance scheme known as the "Blue Chip Swaps." According to C&P Brazil, Garantia S.A. marketed the Bonds, with maturity dates ranging from 2016-2027, as tax-free financing arrangements for South American businesses.

The complicated financing transactions began with Garantia S.A. advancing to its South American business clients the amount of financing requested. In exchange, the South American business clients issued "zero coupon notes" to Garantia S.A. in the same amount. Next, Garantia S.A. sold these notes in the international marketplace and retained the sale proceeds. The South American business clients then made principal and interest payments to the new noteholders. Garantia S.A.'s clients immediately used the funds they received from Garantia S.A. to purchase the Bonds. These businesses then sold the same Bonds to "a pre-arranged buyer lined up by Garantia S.A., pursuant to a standard form contract prepared by Garantia S.A." thereby completing the financing. C&P Brazil alleges that the trading parties never received physical possession of the Bonds but that the transactions were recorded via signed contracts entitled, "Private Instrument and Sale of Assets" (collectively the "Agreements"). The Agreements provided that the Bonds' delivery was to occur "by means of transfer of ownership with the custodian bank abroad." The "custodian bank abroad" is unidentified in the Agreements.

When C&P Brazil partook in the afore-described Blue Chip Swaps, it was assured by Garantia S.A. that the transactions were legitimate and tax-free and that Garantia S.A. was the custodian of the bonds. C&P Brazil contends that it did not seek delivery of the bonds at the time of purchase because they did not immediately mature and the bonds were being bought and sometimes sold on the same day.

On or around June 1998, Garantia S.A. was acquired by Credit Suisse First Boston and Garantia S.A.'s business was continued by defendants Credit Suisse Holdings (USA), Inc. and Credit Suisse First Boston (International) Holding Limited, which are both Delaware Corporations with their principal places of business in New York. C&P Brazil asserts (inconsistently) that Garantia S.A.'s conduct "took place before the acquisition by Credit Suisse" and that "the Bond sales continued unabated after the acquisition." The only purchase time alleged in the complaint is "in 1998."[1]

Following an investigation of the Blue Chip Swaps, the Brazilian Federal Revenue Office assessed tax penalties and sanctions of $600 million against C&P Brazil.[2] Thereafter, C&P Brazil sought to take delivery of the Bonds to liquidate them as payment to the Brazilian government and as proof to the taxing authority of the Bonds' existence. Thus, C&P Brazil wrote to Credit Suisse First Boston, Inc. seeking an explanation as to why the transactions were not tax-free, as it was led to believe, and requesting delivery of the Bonds. In response to C&P Brazil's request for the Bonds, in 2012, Garantia S.A. stated that it did not have them and offered no explanation as to their whereabouts. Further, as per C&P Brazil, "Cragnotti has never received a response that supports the position that the [Bonds] do exist or that they were tax free."

C&P Brazil avers that it was the victim of a fraud in that the Bonds never existed. Yet, C&P Brazil contends that in 2010, in an unrelated case brought by another of Garantia S.A.'s South

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[1] C&P Brazil alleges in the complaint that the Bonds purchase transpired in 1998. However, during oral argument, C&P Brazil claimed that the purchases took place "[f]rom 1998 through, probably, 2000 and change." I asked C&P Brazil to clarify and in response, counsel stated that the purchases continued until "around 2001, 2002."

[2] C&P Brazil does not elucidate any further about either the specific conduct that led to the fine or the precise reason for the fine except to say that it was "due to the non-existence of the Bonds."

American business clients, Ramenzoni, in the Federal District Court for the Southern District of New York (the "SDNY action") involving strikingly similar allegations, two of Garantia S.A.'s Credit Suisse successor entities filed a brief stating that the Bonds did exist.[3] On January 8, 2015, C&P Brazil commenced this action based upon the alleged assertion in the SDNY Action that the Bonds' exist "to compel delivery of the [Bonds] which will defeat the Brazilian tax sanctions and penalties filed against Cragnotti and/or to obtain money damages arising from Garantia S.A.'s representation that these transactions were loans and not income."

In this action C&P Brazil names one individual defendant, Antonio Quintella ("Quintella"), whom C&P Brazil posits was a Garantia S.A. senior executive with supervisory responsibility for the sale of the Bonds.[4] C&P Brazil claims that Quintella remained with the Credit Suisse Brazilian operations post-acquisition and became president in 2003. The complaint also states that Quintella "continued and/or perpetuated the fraudulent Argentinian Global Bond trading faux market which resulted in the sanctions and penalties from the Brazilian Government taxing authority against the [C&P Brazil]." In 2010, Quintella moved to Credit Suisse headquarters in New York.

Defendants move to dismiss C&P's complaint on the following grounds: (1) New York is an inconvenient forum; (2) the complaint fails to state a claim; and (3) the C&P Brazil's claims are time- barred. The Brazilian Defendants, Swiss Defendants and Defendant Antonio Quintella further argue that they are not subject to personal jurisdiction in New York.

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[3] On August 29, 2011, Judge Koeltl dismissed the SDNY action for lack of subject-matter jurisdiction. *See Industrias de Pape/ R. Ramenzoni, S.A. v. Credit Suisse Holdings (USA), Inc. et al.*, No. 11-CV-07940 (S.D.N.Y. August 29, 2011). The SDNY action concerned the same causes of action as alleged in this case but rather than the Defendants named in this action, two Swiss-based Credit Suisse entities were named as defendants therein.

[4] This fact appears to be demonstrably erroneous as Quintella, in his affidavit in this case, states that he was not a Garantia, S.A. employee when that company was acquired by CSFB in 1998, and C&P Brazil cites no factual basis for its claim.

Discussion

On a motion to dismiss pursuant to CPLR § 3211 (a), the court is required to accept the facts alleged in the complaint as true and grant the plaintiff every favorable inference, deciding only "whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001); *See also Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Additionally, although plaintiff bears the ultimate burden of proof concerning personal jurisdiction, "'to defeat a CPLR 3211(a)(8) motion to dismiss a complaint, the plaintiff need only make a prima facie showing that the defendant is subject to the personal jurisdiction of the court.'" *Shatara v. Ephraim*, 137 A.D.3d 1248, 1249 (2d Dept. 2016) (citation omitted).

I. Dissolved Corporate Defendants

A number of the named defendants were dissolved prior to this litigation. In his affidavit in support of Defendants' Motion to Dismiss, Peter J. Kozlowski ("Kozlowski"), a Managing Director and Counsel for Credit Suisse Securities (USA) LLC, states that Defendant Credit Suisse First Boston International Holding Limited was incorporated in Delaware and, on October 7, 2013, was "dissolved/liquidated."

Teodoro Z. B. Lima ("Lima"), a Managing Director and Counsel for the Brazilian Defendants, also submitted an affidavit in support of Defendants' Motion to Dismiss, in which he asserts that: 1) Garantia S.A. was acquired by Credit Suisse A.G., which is headquartered in Switzerland; 2) the successor to Garantia S.A. is Credit Suisse (Brazil), located in Sao Paulo; 3) Garantia S.A.'s subsidiaries Garantia Holdings, Inc. and Garantia Inc. were not acquired by Credit Suissse A.G.; 4) both Garantia Holdings, Inc. and Garantia Inc. were dissolved in March 2006; and 5) Garantia S.A. subsidiary Garantia Banking, Ltd., a Bahamian bank, although acquired by Credit Suisse A.G. was liquidated in 2008.

C&P Brazil does not dispute the Kozlowski or Lima affidavits. Therefore, based on the uncontradicted evidence submitted, I dismiss this action as to the following dissolved entities: Credit Suisse First Boston International Holding Limited, Garantia Holdings, Inc., Garantia Inc., and Garantia Banking, Ltd.

II. The Related State Court Action

The allegations in this Complaint are virtually identical to the allegations made in a 2012 action before this court, entitled *Industrias de Papel R. Ramenzoni S.A. v. Banco de Investimentos Credit Suisse (Brasil) S.A. et al.*, No. 650932/2012, 2014 WL 136502 (N.Y. Sup. Ct. Jan. 14, 2014) (the "Ramenzoni Action"). The Ramenzoni Action involved some of the same bond transactions that are at issue in this action. Moreover, the Defendants in this action are identical to those in the Ramenzoni Action with the addition of three defendants here – the Swiss Defendants and Quintella. The Ramenzoni Action was dismissed against the New York Defendants on the basis of *forum non conveniens* by Judge Kapnick and voluntarily discontinued with prejudice against the New York and Brazilian Defendants.

III. Personal Jurisdiction

I first address whether a New York Court may assert personal jurisdiction over the Defendants, because if the Court does not have jurisdiction over a defendant, then "it is 'without power to issue a binding forum non conveniens ruling as to' that defendant." *Flame S.A. v. Worldlink Intern. (Holding) Ltd.*, 107 A.D.3d 436, 437 (1st Dept. 2013) (citation omitted).

C&P Brazil states that personal jurisdiction is based on CPLR § 301 for the defendants who are New York domiciliaries. Having already dismissed this action as to the dissolved defendants, the only New York Defendant that remains is Credit Suisse Holdings (USA), Inc., f/k/a Credit Suisse First Boston, Inc. Credit Suisse Holdings (USA), Inc., f/k/a Credit Suisse First Boston, Inc. is a Delaware corporation with its principal place of business in New York, New York.

Accordingly, pursuant to CPLR 301, the New York courts have personal jurisdiction over Credit Suisse Holdings (USA), Inc., f/k/a Credit Suisse First Boston, Inc.

C&P Brazil, in a supplemental affirmation, makes the argument that personal jurisdiction under CPLR 301 is proper for all of the Defendants in light of *In re Hellas Telecommunications (Luxembourg) II SCA*, 524 B.R. 488, 508 (Bankr. S.D.N.Y. Oct. 20, 2015). In that case, the bankruptcy court held that because Deutsche Bank's U.S. assets and operations were substantial and long-term it was "at home" in the U.S. pursuant to *Daimler*. *Id.* at 507-508. C&P Brazil argues that *In re Hellas* requires the Court to exercise personal jurisdiction over all of the Defendants based on Credit Suisse's status as a large foreign bank with New York contacts.

Federal and state courts subsequent to *In re Hellas*, however, have found the *In re Hellas* decision erroneous and have declined to follow it, as do I. *See In re LIBOR-Based Fin. Instruments Antitrust Litigation*, 2015 WL 6243526, at *27 n.43 (S.D.N.Y. Oct. 20, 2015) (finding that "[i]n light of the recent leading Supreme Court and Second Circuit cases, we cannot agree with [In re Hellas's] conclusion that even very substantial corporate operations (regardless of whether measured in money, personnel, space, or time) in a given forum suffice to make a defendant at home in the forum."); *Ace Decade Holdings Limited v. UBS AG*, 2016 WL 7158077, No. 653316/2015, at *5 (N.Y. Sup. Ct. Dec. 7, 2016) (stating that *In re Hellas* has been disregarded as incorrect and that "no other court has followed it.").

According to C&P Brazil, there is personal jurisdiction over the non-New York domiciliary defendants based on CPLR § 302 (a)(1) and (4) because these defendants "transacted business within the State, contracted to supply services within the State, and/or owned, used or possessed real property within the State in a continuous and systematic manner." C&P Brazil further states that personal jurisdiction is based on the fact that Garantia S.A. conducted operations in New York through Credit Suisse New York-based subsidiaries.

In their motion to dismiss, Defendants argue that the court does not have personal jurisdiction over the non-New York domiciliary defendants because C&P Brazil fails to: 1) show that jurisdiction exists over each of the non-domiciliaries but rather alleges jurisdiction over the group as a whole; 2) allege any nexus between the claims and New York; and 3) demonstrate a relationship between any real property and the causes of action.

CPLR 302(a)(1) provides that a court may exercise personal jurisdiction over a non-domiciliary who transacts any business in the state. Two elements must be satisfied for long-arm jurisdiction pursuant to CPLR 302(a)(1) – the defendant transacted business in New York and the plaintiff's cause of action arose from that transaction. *Wilson v. Dantas*, 128 A.D.3d 176, 181 (1st Dept. 2015). Further, "'the arise-from' prong limits the broader 'transaction-of-business' prong to confer jurisdiction only over those claims in some way arguably connected to the transaction." *Id.* at 182 (citations omitted). And, "jurisdiction is not met where the relationship between the claim and transaction is too attenuated." *Johnson v. Ward*, 4 N.Y.3d 516, 529 (2005). Lastly, the "assertion of personal jurisdiction must also be predicated on a defendant's 'minimal contacts' with New York to comport with due process." *Wilson,* 128 A.D.3d at 181; *see also International Shoe Co. v. Wash.*, 326 U.S. 310 (1945).

C&P Brazil states that all of the Credit Suisse entities are actually one corporation and that this corporation maintains a website. I am unpersuaded by C&P Brazil's argument that Credit Suisse's website, which advertises generally to consumers, including New Yorkers, and allows consumers to apply for Credit Suisse services, render the Brazilian and Swiss Defendants subject to jurisdiction pursuant to CPLR 302(a)(1).

The "mere solicitation [by defendant] of business within the state does not constitute the transaction of business within the state unless the solicitation in New York is supplemented by business transactions occurring in the state." *O'Brien v. Hackensack Univ. Med. Ctr.*, 305 A.D.2d

199, 201 (1st Dept. 2003). Additionally, the "publication of information on a globally-accessible website does not constitute the 'transaction of business' in New York unless the website specifically targets its activities at New York." *Kejriwal v. UCO Bank*, No. 12-CV-7507, 2014 WL 116218 (S.D.N.Y. Jan. 10, 2014) (holding that personal jurisdiction under CPLR 302(a)(1) was unavailable where plaintiff's only allegation linking defendant's conduct to New York was that defendant published a statement in an Indian newspaper whose website was accessible to readers world-wide, including in New York). In fact, "[p]assive websites… which merely impart information without permitting a business transaction, are generally insufficient to establish personal jurisdiction." *Paterno v. Laser Spine Institute*, 24 N.Y.3d 370, 377 (2014).

C&P Brazil alleges that Defendants' website is interactive and therefore personal jurisdiction exists. However, the fact that a website is interactive does not, in and of itself, support jurisdiction under CPLR 301(a)(1) because the "constitutional underpinnings of the New York long-arm statute and the precedents of courts in this Circuit require something more." *Capitol Records, LLC v. VideoEgg, Inc.*, 611 F.Supp.2d 349, 358 (S.D.N.Y. 2009). Indeed, the meaning of "transacting business" is stretched too far if a defendant is subjected "to personal jurisdiction in any state merely for operating a website, however commercial in nature, that is capable of reaching customers in that state, without some evidence or allegation that commercial activity in that state actually occurred or was actively sought." *Freeplay Music, Inc. v. Cox Radio, Inc.*, No. 04 Civ. 5238(GEL), 2005 WL 1500896, *6–7 (S.D.N.Y. June 23, 2005).

A prior attempt to use the Credit Suisse website to assert personal jurisdiction over the Brazilian Defendants was previously rejected by this court in the Ramenzoni Action. Here, C&P Brazil's attempt to use the same information, albeit now asserting personal jurisdiction under CPLR 302 (a)(1), fares no better. There is no allegation that C&P Brazil specifically used the Credit Suisse website to purchase the Bonds (nor could there be as the Complaint clearly states that the

purchases were from Garantia, S.A. in Brazil). Therefore, the mere existence of Credit Suisse's website, absent additional allegations, does not confer personal jurisdiction upon the New York courts over the Swiss Defendants or the Brazilian Defendants under the long-arm statute. *See Freeplay Music,* 2005 WL 1500896 at *6–7.

C&P Brazil's argument that CPLR 302(a)(4) allows the court to exercise jurisdiction over the Swiss Defendants and the Brazilian Defendants also fails. This argument was rejected in the Ramenzoni Action as well. *Industrias de Papel R. Ramenzoni S.A.*, 2014 WL 136502 at *12. CPLR 302(a)(4) provides a basis for long-arm jurisdiction where a cause of action arises from the defendant's ownership, use or possession of real property in New York. *See Marie v. Altshuler*, 30 A.D.3d 271, 272 (1st Dept. 2006). Other than conclusorily alleging that Credit Suisse, A.G. maintains control over unspecified real property in New York, C&P Brazil does not establish any relationship between its' causes of action and any New York property. *See CDR Creances S.A.S. v. First Hotels & Resorts Investments, Inc.*, 140 A.D.3d 558, 563 (1st Dept. 2016) (holding that "ownership of the condominium unit does not, in this case, confer jurisdiction under CPLR 302(a)(4), as the ownership is not relevant to the claims asserted in this proceeding."). Thus, C&P Brazil may not rely on CPLR 302(a)(4) as a basis for personal jurisdiction over either the Brazilian Defendants or the Swiss Defendants.

C&P Brazil asserts that jurisdiction over Defendant Antonio Quintella is proper because he, "as an individual, has specific and intense ties with New York."[5] In support of this argument, C&P

[5] In the Ramenzoni Action, in which Quintella was not a defendant, the court granted a request for jurisdictional discovery "only with respect to the nature and extent of Quintella's activities in New York as relevant to the Court's jurisdictional analysis under CPLR 301" at the time that complaint was filed in 2012. Because he was not a party therein, Quintella had not submitted an affidavit in the Ramenzoni Action. Here, Quintella has submitted an affidavit. Also, there is no open question here meriting jurisdictional discovery (nor has Plaintiff requested it). Moreover, whereas Quintella still resided in New York when the Ramenzoni complaint was filed, Quintella returned to Brazil two years prior to the filing of the complaint in this action in 2015.

Brazil points to the fact that Quintella moved to New York in 2010 and is a director of the New York Philharmonic.

In opposition Quintella avers that: 1) he resides in Sao Paulo, Brazil; 2) he worked for Credit Suisse in Brazil beginning in 1997; 3) he was not a Garantia, S.A. employee when it was acquired by CSFB in 1998, contrary to the Complaint's allegations; 4) in 2010, he became CEO of Credit Suisse Americas in New York; 5) he returned to Brazil in January 2013 as Chairman of Credit Suisse Hedging-Griffo; 6) his responsibilities while at Credit Suisse "did not include supervising bond transactions of the type alleged in the Complaint;" 7) he retired from Credit Suisse in 2014; and 8) he currently works as the CEO of Canvas Capital, a Brazilian investment management firm, in Sao Paulo.

The Quintella affidavit completely refutes C&P Brazil's allegation that Quintella was part of the Bonds sale in that, as Quintella was not an employee of Garantia, S.A., he could not have been one of the unnamed "principal staff" that C&P Brazil dealt with at Garantia, S.A. regarding the Bonds purchase.

Since his return to Brazil in 2013, Quintella has continued to live and work there. His presence in New York from 2010 to 2013 does not confer personal jurisdiction over him in this action. C&P Brazil fails to show any relationship whatsoever between Quintella's activities in New York and the subject matter of this action. Indeed, the Bonds purchases transpired in 1998 – long before Quintella resided in New York. *See Fernandez v. DaimlerChrysler, A.G.*, 143 A.D.3d 765, 767 (2d Dept. 2016) (finding that the lower court properly determined that it could not exercise personal jurisdiction over non-domiciliary where plaintiff failed to establish that the non-domiciliary "conducted purposeful activities in New York which bore a 'substantial relationship' or an 'articulable nexus' to the subject matter of [the] action."). The court in the Ramenzoni Action reached the same conclusion, finding that, "since plaintiff does not dispute that Quintella did not

relocate to New York until 2010, any facts which plaintiff might discover indicating that Quintella did work on the Bond transactions in Brazil will not change the fact that there would be no nexus between that Bond-related work and this State." *Industrias de Papel R. Ramenzoni S.A.*, 2014 WL 136502 at *11. Similarly, there is no relationship between Quintella's association with the New York Philharmonic and the Bonds purchase.

In sum, I find that neither CPLR 302(a)(1) nor CPLR 302(a)(4) serves as a basis for the New York courts to assert personal jurisdiction over the Brazilian Defendants, the Swiss Defendants or Quintella. I therefore grant these Defendants' motion to dismiss the complaint for lack of personal jurisdiction against them.

IV. *Forum Non Conveniens*

Defendants also argue that the complaint should be dismissed on *forum non conveniens* grounds because: the transaction at issue occurred in a foreign jurisdiction; all of the parties are foreign corporations or individuals except for Credit Suisse Holdings (USA), Inc.; the complaint requires the application of Brazilian law; witnesses and documents related to this action are located in Brazil; and Brazil is an adequate alternate forum.

In opposition, C&P Brazil repeats its allegation that the New York and Swiss Defendants are the successor entities to Garantia S.A. and that Quintella is located in New York. C&P Brazil further argues that the fact that documentary and testimonial evidence will need to be translated does not make it more difficult for the action to proceed in New York. C&P Brazil asserts that New York has an interest in regulating companies like Credit Suisse because of its presence in this State and its "close ties to New York consumers." C&P Brazil claims that Brazil is an inadequate and unavailable forum due to the Brazilian courts' large caseloads.

CPLR 327 states that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss

the action in whole or in part on any conditions that may be just." And, the "domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action." The applicability of the *forum non conveniens* doctrine "is a matter of discretion to be exercised by the trial court and the Appellate Division." *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478 (1984).

In making a *forum non conveniens* determination, courts should consider several factors including the burden on New York courts, any potential hardship to the defendant, the unavailability of an alternative forum for the plaintiff's suit, if both parties are nonresidents and whether the transaction that gave rise to the cause of action primarily took place in a foreign jurisdiction. *Id.* at 479; *Ghose v. CNA Reins. Co. Ltd.*, 43 A.D.3d 656, 660 (1st Dept. 2007).

As stated above, I dismiss this action for lack of personal jurisdiction over the Swiss Defendants, the Brazilian Defendants and Quintella, and dismiss the action against most of the remaining defendants because they no longer exist. I therefore address the *forum non conveniens* argument as to the only defendant over which the New York courts have personal jurisdiction, Credit Suisse Holdings (USA), Inc., f/k/a Credit Suisse First Boston, Inc.

In the Ramenzoni Action, this court dismissed the action against the New York Defendants based on *forum non conveniens*. Justice Kapnick found that dismissal was warranted because: 1) plaintiff's claims were "centered almost entirely in Brazil"; 2) Brazil is the location of most witnesses and documents; 3) Brazil is an adequate forum; 4) the majority of the documentary evidence is in Portuguese and the witnesses are largely Portuguese speakers which would "impose a considerable burden on this Court and on the financial resources of the defendants; 5) pursuant to 28 USC 1782, there are procedural mechanisms for obtaining any documents or witnesses located in New York for production in Brazil; and 6) courts in New York "routinely dismiss actions on

forum non conveniens grounds arising out of circumstances similar to those herein." *Industrias de Papel R. Ramenzoni S.A.*, 2014 WL 136502 at *14-15.

Those same relevant factors weigh in favor of dismissal of this action on *forum non conveniens* grounds. First, the parties are all foreign, except for Credit Suisse Holdings (USA), Inc., f/k/a Credit Suisse First Boston, Inc. Second, it is undisputed that C&P Brazil's Bonds purchase took place in Brazil from a Brazilian company and that C&P Brazil suffered its losses in Brazil. As Justice Kapnick aptly observed in the Ramenzoni Action, "[t]his is a dispute arising from a transaction brokered by a Brazilian entity to sell Bonds to the Brazilian plaintiff, which took place in Brazil." Third, most, if not all, of the documentary and testimonial evidence will have to be translated from Portuguese to English placing a considerable burden on this Court and on defendants. Fourth, contrary to C&P Brazil's argument, New York courts have previously found Brazil to be an adequate forum. *See, e.g., Braspetro Oil Servs. Co. v. UK Guar. & Bonding Corp.*, 18 A.D.3d 291, 291-292 (1st Dept. 2005) (dismissing based on *forum non conveniens* where "the balance of relevant factors, in addition to and apart from the potential hardship on defendant, weigh so strongly in favor of Brazil."); *Union Bancaire Privee v. Nasser*, 300 A.D.2d 49, 50 (1st Dept. 2002) (holding that "the [trial] court weighed the appropriate factors and properly exercised its discretion in dismissing this action pursuant to the doctrine of *forum non conveniens*, the lack of any substantial nexus between this action and New York having been demonstrated, the witnesses, records and transactions at issue being predominately situated in Brazil."). Further, in support of their motion to dismiss, Defendants submit an affidavit of Keith S. Roseann, a tenured Professor of Law at the University of Miami School of Law and a Brazilian law scholar, in which he opines that "Brazil is an adequate and suitable alternative forum" for this case.

In recognition of the difficulty it faces in escaping the conclusion regarding *forum non conveniens* reached in the Ramenzoni Action, C&P Brazil claims that this case is distinguishable in

that here C&P Brazil purchased the bonds directly from Garantia, S.A. while Ramenzoni purchased companies that purchased the bonds from Garantia, S.A. C&P Brazil states that this case is also distinguishable from the Ramenzoni Action because C&P Brazil here is registered to do business in New York. These are distinctions without difference with respect to the *forum non conveniens* analysis. Privity is not a *forum non conveniens* factor. And, as discussed during oral argument, C&P Brazil, a Brazilian company, did not register to do business in New York until its decision to sue in this action.[6] C&P Brazil's authorization to do business in New York also does not affect the *forum non conveniens* analysis. *Johnson v. Syntex Labs., Inc.*, 36 A.D.2d 919, 919 (1st Dept. 1971) (dismissing on *forum non conveniens* grounds and noting that "[t]he mere fact that defendant is authorized to do business here, standing alone, does not warrant adding to the responsibilities of our already overburdened courts").

C&P Brazil's contentions that New York is the appropriate forum because the New York and Swiss Defendants are the successor entities to Garantia S.A. and that Quintella is located in New York are unavailing. Defendants' have shown that the New York Defendants are the successor entities to Garantia, S.A. and shown that Quintella is not located in New York. Even if C&P Brazil's allegations were true, "these connections failed to create a substantial nexus with New York, given that the events of the underlying transaction otherwise occurred entirely in a foreign jurisdiction." *Viking Global Equities, LP v. Porsche Automobil Holding SE*, 101 A.D.3d 640, 641 (1st Dept. 2012).

In balancing the factors discussed above, I find that Defendants have met their burden of demonstrating that New York is an inconvenient forum. I therefore grant the motion to dismiss

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[6] Plaintiff's application with the New York Secretary of State indicates that Plaintiff: a "foreign corporation has not since its incorporation or since the date its authority to do business in New York was last surrendered, engaged in any activity in this state."

based on *forum non conveniens* as to defendant Credit Suisse Holdings (USA), Inc., f/k/a Credit Suisse First Boston, Inc. Further, if the New York courts could properly exercise personal jurisdiction over the Brazilian Defendants, Swiss Defendants, and Quintella, I would also dismiss the action as to them on *forum non conveniens* grounds.

V. Sanctions

Lastly, Defendant Credit Suisse Holdings (USA), Inc. ("CS Holdings USA") moves for monetary costs and sanctions against C&P Brazil's counsel David M. Goldstein ("Goldstein") pursuant to Section 130-1.1 of the Codes, Rules and Regulations of New York ("NYCRR 130-1.1"). CS Holdings USA contends that: 1) this is the third action that Goldstein has filed against them in relation to the Bonds transactions; 2) the Ramenzoni Action found that the Brazilian Defendants were not subject to specific personal jurisdiction in New York yet the same arguments are advanced by C&P Brazil here; 3) Goldstein filed this action despite knowing that the Complaint includes many material facts that are false and/or without merit; and 4) the primary purpose of this litigation was to harass them.

In opposition, C&P Brazil's counsel repeats the same facts contained in the complaint that CS Holdings USA has shown lack a factual basis, including that the New York and Swiss Defendants are successor entities to Garantia S.A. Counsel further argues that he need not "adhere to the findings in *Ramenzoni* because it is distinguishable from the instant case" because here C&P Brazil purchased the Bonds directly from Garantia S.A. and C&P Brazil is registered to do business in New York.

NYCRR 130-1.1 states, in relevant part, that the court "may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Conduct is deemed frivolous if it is entirely without merit or undertaken to primarily harass another party.

In determining whether the assertion of false material factual statements amounts to frivolous conduct, NYCRR 130-1.1 states that courts must consider the:

> (1) circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

Contrary to C&P Brazil's assertion, the Ramenzoni Action involved the same Bonds and is virtually indistinguishable from this case with respect to the *forum non conveniens* finding. Even so, I decline to award sanctions inasmuch as I do not find that C&P Brazil's attempt to distinguish this action from the Ramenzoni Action is completely frivolous as a matter of law.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendants Credit Suisse A.G., Credit Suisse Group A.G., Banco de Investimentos Credit Suisse (Brasil) S.A. ("Credit Suisse Brazil"), Banco Credit Suisse Brasil S.A., Credit Suisse (Brasil) S.A. Corretora de Titulos e Valores Mobiliarios and Antonio Quintella to dismiss the complaint based on lack of personal jurisdiction is granted; and it is further

ORDERED that the action is dismissed against defendants Credit Suisse First Boston International Holding Limited, Garantia Holdings, Inc., Garantia Inc., and Garantia Banking, Ltd., as these entities no longer exist; and it is further

ORDERED that defendant Credit Suisse Holdings (USA), Inc.'s motion to dismiss the complaint based on *forum non conveniens* is granted, and is further

ORDERED that the Clerk is directed to enter judgment in favor of all defendants dismissing this action.

This constitutes the decision and order of this Court.

DATE: 2/23/17

SALIANN SCARPULLA, JSC