Fortinvest Invs. Holding S.A. SPF v Oblonsky
2021 NY Slip Op 32300(U)
November 11, 2021
Supreme Court, New York County
Docket Number: Index No. 655263/2020
Judge: Joel M. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

FORTINVEST INVESTMENTS HOLDING S.A. SPF, Plaintiff, - v - VLADIMIR OBLONSKY, OLGA OBLONSKY, FONTANELLE CAPITAL, INC.,OIM CAPITAL, LLC,MIKHAIL FILIMONOV, EDMOND DE ROTHSCHILD (EUROPE) S.A., Defendants.	
INDEX NO.	655263/2020
MOTION DATE	N/A, 09/10/2021, 08/16/2021
MOTION SEQ. NO.	007 010 011

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 158, 159, 160, 161, 162, 163, 165, 166, 168, 169, 170
were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 139, 140, 141, 142, 143, 144, 145, 164
were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 167
were read on this motion to DISMISS.

At its core, this is a dispute between two Luxembourg-based entities (Plaintiff Fortinvest Investments Holding S.A. SPF ("Fortinvest") and Defendant Edmond de Rothschild (Europe) S.A. ("Rothschild")) arising out of a commercial relationship initiated in Luxembourg and Switzerland. The principal claim is that Rothschild (through a wayward employee) defrauded Plaintiff of tens of millions of dollars, by purportedly mismanaging its $150 million in assets and engaging in a kickback scheme with various third parties. Plaintiff has a pending civil claim against Rothschild in Luxembourg, as well as a related criminal investigation pending in Luxembourg.

Faced with delays in its Luxembourg case, including a potential stay in view of the criminal action, Plaintiff filed the instant suit in this Court. The Complaint includes as defendants New York residents Vladimir and Olga Oblonsky and their firm Fontanelle Capital, Inc. ("Fontanelle") (the "Oblonsky Defendants"), who Plaintiff alleges were parties to the alleged Rothschild-initiated scheme. [1]

Defendants move to dismiss Plaintiff's claims on a number of grounds. For the reasons set forth below, the motions are granted as to all Defendants on the ground of forum non conveniens and separately as to Rothschild on the ground that an exclusive forum selection clause in the parties' agreements mandates resolution of the dispute in Luxembourg.

BACKGROUND

The Parties

Plaintiff Fortinvest is a Luxembourgish *société de gestion de patrimoine familial* (private family company), with a principal place of business in Luxembourg (Amended Complaint ("Am. Compl.") ¶39). Dr. Sergei Mikhailovich Bogdanchikev, former CEO of the Russian oil company Rosneft, is the sole beneficiary of Fortinvest (*id.* ¶¶3, 39–40).

Defendant Rothschild is an international banking association incorporated in Luxembourg with a principal place of business in Luxembourg (*id.* ¶41). Rothschild is owned and controlled by Edmond de Rothschild (Suisse) S.A., a Swiss corporation ("Rothschild Geneva") (*id.*).

[1] The action was discontinued as against former defendants OIM Capital, LLC and Mikhail Filimonov (the "Filimonov Defendants") on September 10, 2021 (*see* NYSCEF 171). Accordingly, the motion to dismiss filed by those defendants (Mot. Seq. 011) is denied without prejudice as moot.

Defendant Fontanelle is a domestic business corporation incorporated in the state of New York (*id.* ¶44). At all relevant times, Defendant Olga Oblonsky was President of Fontanelle, and Defendant Vladimir Oblonsky was the Chief Executive Officer of Fontanelle. The Oblonskys reside in New York (*id.* ¶45, 47).

Defendant OIM is a limited liability company incorporated under Delaware law with a principal place of business in New York (*id.* ¶49). Defendant Mikhail Filimonov was at all relevant times the President of OIM (*id.* ¶52). It is alleged that Mr. Filimonov resides in New York (*id.*). As noted above, all claims against OIM and Filimonov have been discontinued.

The Alleged Scheme

In 2001, Dr. Bogdanchikev entrusted $56.9 million in assets to Rothschild, which in turn set up a wealth management company, Fortinvest, in Luxembourg with Dr. Bogdanchikev as its sole beneficiary (*id.* ¶1). According to the Amended Complaint, Rothschild assured Dr. Bogdanchikov that: (i) he would be the sole beneficial owner of that entity; (ii) Rothschild would use the entity to manage his assets prudently, in a fiduciary capacity, pursuant to a "buy and hold" strategy; and (iii) Rothschild would make investments according to Dr. Bogdanchikov's explicit instructions (*id.* ¶ 69).

Based on these representations, Dr. Bogdanchikov entered into a "Principal Agreement" with LCF Rothschild Conseil SA,[2] authorizing Rothschild to "proceed with the setting up, domiciliation and administration of a Luxembourg company" now known as Fortinvest (*see* NYSCEF 36 [Ex. F Principal Agreement]). Rothschild employee Carlo Thewes ("Thewes") was put in charge of managing Fortinvest's account (*id.* ¶8). Thewes was presented to Dr.

---

[2] Plaintiff asserts that LCF Rothschild Conseil SA is a Rothschild subsidiary that Rothschild dissolved in 2016 (NYSCEF 158 [Plaintiff's br. in opp. at 21]).

Bogdanchikov as a high-ranking employee who was personally close to the wife of the then-Chairman of Rothschild Geneva's Board of Directors (the Baroness) (*id.* ¶8). Plaintiff alleges that Rothschild and Thewes used the lustrous 250-year-old Rothschild name to inspire trust in Dr. Bogdanchikov that Fortinvest's assets were in good hands by, among other things, inviting Dr. Bogdanchikov to the Baroness's ornate *Château de Rothschild* in Geneva (*id.* ¶9–10). Dr. Bogdanchikov deposited an additional $98.1 million in 2007 (*id.* ¶82).

According to the Complaint, Fortinvest's corporate structure was chosen by Rothschild to facilitate Rothschild's ability to bill its clients of millions of dollars in above-market fees and unlawful kickbacks (*id.* ¶71). The corporate governance structure included a board that was comprised entirely of Rothschild-appointed, Rothschild-controlled, and Rothschild-employed Directors, who were given "emergency discretion" where immediate action was necessary (*id.* ¶23, 72–73). The Rothschild-Fortinvest directors used this emergency discretion, as well as sham entities created by non-party Panama law firm Mossack Fonseca, S.A., to authorize transactions in furtherance of a kickback scheme (*id.* ¶23, 72–73).

Additionally, Plaintiff alleges that Rothschild provided Dr. Bogdanchikov with false or incorrect information regarding Fortinvests' investments by informing Dr. Bogdanchikov that investments were being made according to his instructions, that Fortinvest's performance was better than it was, and that Fortinvest's assets were being handled prudently when in fact they were being placed in risky investments, and by keeping two sets of books but only showing Dr. Bogdanchikov the falsified books and account statements (*id.* ¶20).

Thus, Plaintiff alleges, Rothschild designed a corporate governance structure for Fortinvest that had no independent oversight and that allowed Thewes to churn transactions to generate excessive commissions, make investments in highly speculative and exotic alternative

funds, and perpetrate a kickback scheme without the knowledge of Fortinvest's beneficial owner, Dr. Bogdanchikov (*id.* ¶22).

The Alleged Kickback Scheme

Plaintiff alleges that Rothschild and the Rothschild-Fortinvest Directors directed Fortinvest's assets to investment managers who would agree to pay Rothschild "kickbacks" through sham brokers such as the Oblonsky Defendants. These brokers found and worked with purportedly unscrupulous investment firms, including OIM and OIM's Founder and Chief Executive Officer, Mr. Filimonov, who were willing to pay inflated "subscription" and management fees to Thewes for investing Rothschild clients' money in their funds (*id.* ¶¶11,78, 87–88). The Defendants actively concealed their activities, by, among other things, using pseudonyms and code words in their communications (*id.* ¶13) and withholding information such as the name of the final client of a Feeder Fund managed by OIM from its administrator (*id.* ¶17).

This alleged scheme caused Fortinvest to lose tens of millions of dollars (*id.* ¶14). Rothschild managed Fortinvest until 2016 (*id.* ¶39), when Dr. Bogdanchikov learned that Rothschild was having problems and attempted to gain information regarding Fortinvest's assets (*id.* ¶111). Because Rothschild maintained possession of Fortinvest's accounts, Dr. Bogdanchikov was only able to access Fortinvest's account by obtaining a court order in 2019 compelling Rothschild to unfreeze Fortinvest's account and transfer its portfolio (*id.* ¶114). Plaintiff alleges that its accounts had suffered losses of approximately $81,342,049.64, in addition to lost interest and growth that it claims should have accrued had its accounts been prudently managed (*id.* ¶19).

After Fortinvest discovered its losses in 2016, Rothschild resisted its requests for information and cooperation (*id.* ¶118).

Proceedings in Luxembourg and Switzerland

According to the Amended Complaint, Rothschild fired Thewes and filed a criminal complaint against him in connection with or related to Thewes's investments of Fortinvest's funds with the Filimonov Defendants (*id.* ¶¶26, 31 n.9).

Fortinvest filed a criminal complaint against Thewes in Luxembourg (the "Thewes Criminal Action"), a criminal complaint against Rothschild Geneva in Switzerland (the "Rothschild Geneva Criminal Action"), and a civil complaint against Rothschild in Luxembourg (the "Luxembourg Civil Action") (*id.* ¶31, 121). The Rothschild Geneva Criminal Action was dismissed on procedural grounds. The investigation in the Thewes Criminal Action is continuing (*id.* ¶31). Fortinvest submits that in the three-plus years since Fortinvest filed the Luxembourg Civil Action, nothing substantive has transpired, and nothing likely will transpire as the Luxembourg Civil Action is likely to be stayed pending the criminal action against Thewes, which may last five years or more (*id.* ¶120).

Through the Luxembourg Civil Action, Fortinvest attempted to obtain information from Rothschild that Rothschild had declined to provide voluntarily (*id.* ¶119). Rothschild has refused to comply with discovery requests, and Fortinvest alleges that the Luxembourg District Court will not address this refusal until after rendering on decision on the application of the Stay Rule (*id.* ¶121).

Through a June 2019 Unfreeze Order, Fortinvest learned that Rothschild held legal title to Fortinvest's shares in illiquid investments, including in funds managed by OIM (*id.* ¶117). The Unfreeze Order required Rothschild to transfer beneficial ownership of the shares by July

2019, though Fortinvest's new bank did not confirm the transfer of ownership to Fortinvest until February 2020 (*id.* ¶117). During the time Fortinvest was not the listed shareholder in the funds holding its assets, Fortinvest tried to gain information in funds managed by OIM but faced resistance from OIM. Eventually, OIM produced some documents and emails communications (*id.* ¶124–25). According to Fortinvest, those emails revealed the New York-based fraudulent kickback scheme for the first time, including the identities and role of the Oblonsky Defendants and Rothschild's contacts with Oblonsky, Filimonov, and OIM in New York over many years (*id.* ¶125). At that point, Fortinvest attempted to obtain documents by agreement from the Oblonsky Defendants, but such efforts were not successful (*id.* ¶126).

The Instant Action

Plaintiffs initiated this action by filing a Summons and Complaint on October 14, 2020 (NYSCEF 1). On April 27, 2021, Plaintiffs filed a First Amended Complaint, asserting nine causes of action against various groupings of Defendants, including fraud, aiding and abetting fraud, conspiracy to commit fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, conspiracy to commit breach of fiduciary duty, conversion, aiding and abetting conversion, and conspiracy to commit conversion (NYSCEF 114).

DISCUSSION

Forum Selection Clause

The claims asserted against Rothschild must be dismissed because the parties' agreements mandate that such claims be litigated in Luxembourg. "[I]t is the well-settled 'policy of the courts of this State to enforce contractual provisions for . . . selection of a forum for litigation' " (*Sterling Natl. Bank v East Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept

2006] [citation omitted]; *see Du Quenoy v American Univ. of Beirut*, 2019 WL 4735371, *7 [SDNY 2019] ["'New York has a strong public policy of enforcing forum selection clauses so that parties are able to rely on the terms of the contracts they make'"] [citation omitted]). These provisions are "prima facie valid" "unless shown . . . to be unreasonable" (*Siroy v Jobson Healthcare Information LLC*, 51 Misc3d 1225[A], 2016 NY Slip Op 50818[U], *2 [Sup Ct, NY County 2016], citing *Brooke Grp. Ltd. v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). "New York courts regularly dismiss actions in the face of forum selections clauses designating other forums as the exclusive venue for the subject dispute" (*Malaeb v Bankmed S.A.L.*, 2021 NY Slip Op 31619[U], *28 [Sup Ct, NY County 2021], citing *New Greenwich Litig. Trustee, LLC v Citco Fund Servs. (Europe) B.V.*, 145 AD3d 16, 28 [1st Dept 2016]).

The General Conditions Agreement (NYSCEF 35 §29) between Rothschild and Fortinvest provides that "[a]ny disputes between the Client and the Bank will be exclusively heard by the Luxembourg court having jurisdiction over the location of the establishment of the Bank at which the account is opened." In addition, the Principal Agreement (NYSCEF 36 §17) between Rothschild and Dr. Bogdanchikov, which authorized the creation of Fortinvest and the investment relationship at issue in this matter, mandates that the parties "submit all litigation or disputes relating to this Agreement to a court of arbitration" which "will follow the Luxembourg civil procedure code," and that the arbitration "shall be held in Luxembourg and its decision shall be final."

Fortinvest argues that it is not bound by the forum clause in the General Conditions Agreement because the agreement was permeated with fraud. Even assuming that fraud in the *implementation* of an otherwise routine agreement can vitiate a forum clause, this argument is unavailing here. It rests mainly on the fact that the agreement is signed for both sides by

Rothschild employees and that Dr. Bogdanchikov purportedly did not know about or see the Agreement until years later. Even assuming that is true, the Principal Agreement (which Dr. Bogdanchikov signed) expressly gave Rothschild the authority to open and maintain such accounts on behalf of Fortinvest. Dr. Bogdanchikov was not a required signatory to the General Conditions Agreement. Moreover, having signed a Principal Agreement providing for exclusive dispute resolution in Luxembourg, Dr. Bogdanchikov could hardly be surprised that the implementing agreements contained similar forum provisions. And finally, the fact that Fortinvest in fact sued Rothschild, on these facts, *in the Luxembourg forum mandated by the agreement* belies the argument that it would be inequitable to hold Fortinvest to the terms of the forum clause in the General Conditions Agreement. The fact that the Luxembourg civil proceedings may be delayed because of the criminal investigation of Thewes does not render the forum selection clause unenforceable.

In sum, the Court finds that Luxembourg is the contractually-mandated forum for this dispute between Fortinvest (and Dr. Bogdanchikov) and Rothschild.

Forum Non Conveniens

Dismissal on the grounds of forum non conveniens is permitted where "the court determines that in the interest of substantial justice the action should be heard in another forum" (*Nat'l Bank & Tr. Co. of N. Am. v Banco De Vizcaya, S.A.*, 72 NY2d 1005, 1007 [1988]; CPLR § 327(a) ["When 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."]). This doctrine reflects the basic principle that

"our courts need not entertain causes of action lacking a substantial nexus with New York" (*Martin v Mieth*, 35 NY2d 414, 418 [1974]).

In determining "whether to retain jurisdiction or not," New York courts must consider an array of factors, including the residence of the parties, the situs of the underlying transaction, the existence of an adequate alternative forum, the location of potential witnesses and relevant documents, potential hardship to the defendant, and the burden on New York courts (*Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474, 478–79 [1984]; *see Bluewaters Communications Holdings, LLC, v Bernard Ecclestone*, 2014 NY Slip Op 30123[U] *12 [Sup Ct, NY County 2014]). No one factor is controlling, and "[a]t bottom, the analysis is about whether the action has a 'substantial connection to this State'" (*BSR Fund, S.A., v Jagannath,* 2020 NY Slip Op 30810[U], *6 [Sup Ct, NY County 2020], quoting *Blueye Navigation, Inc. v Den Norske Bank*, 239 AD2d 192, 192 [1st Dept 1997]).

Evaluating the relevant factors here, the Court concludes that plaintiff's claims should be dismissed.[3]

Residence of the Parties

Generally, Plaintiff's choice of forum is entitled to deference (*JTS Trading Ltd. v Asesores*, 178 AD3d 507, 507 [1st Dept 2019]); *see also Thor Gallery At S. DeKalb, LLC v*

---

[3] In view of this holding, the Court need not and does not address the merits of Defendants' personal jurisdiction defense. "[W]here personal jurisdiction is difficult to determine, and forum non conveniens considerations clearly militate in favor of dismissal, a court may dismiss on the latter ground (*Estate of Kainer v UBS AG*, 175 AD3d 403, 404 [1st Dept 2019], lv to appeal granted in part, dismissed in part, 35 NY3d 997 [2020], quoting *Sinochem Int'l Co. v Malaysia Int'l Shipping Corp.*, 549 US 422, 436 [2007]; *see Payne v Jumeirah Hosp. & Leisure (USA), Inc.*, 83 AD3d 518, 518 [1st Dept 2011] ["The motion court, presuming, without deciding jurisdiction, providently exercised its discretion in dismissing the action on forum non conveniens."]).

Reliance Mediaworks [USA], Inc., 131 AD3d 431, 432 [1st Dept 2015] [noting that the residence of the plaintiff in New York "has been held to generally be the most significant factor" militating against a forum non conveniens dismissal]). However, where, as here, "none of the plaintiffs is a New York resident," this deference is diminished and "dismissal on forum non conveniens grounds may be appropriate" (*Malaeb*, NY Slip Op 31619(U), *9 [dismissing action where the parties were Lebanese residents]; *see, e.g.*, *JTS Trading Ltd.*, 178 AD3d at 507 [affirming dismissal where "the parties are from Hong Kong and Mexico"]; *see also Piper Aircraft Co. v Reyno*, 454 US 235, 255–56 [1981] ["When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable"]).

Although there are New York residents named as defendants, this is a dispute primarily between a Luxembourg corporation and a Luxembourg bank. Plaintiff's central allegation relates to the conduct of the Rothschild in managing the Luxembourg corporation's assets, and the alleged kickback scheme purportedly was engineered by Rothschild in Luxembourg. While some portions of the alleged scheme may have been carried out by New York residents, it is clear that the center of gravity of this case is elsewhere.

The Situs of the Wrongdoing

The underlying transaction here exhibits a "strong foreign nexus" (*Wyser-Pratte Mgt. Co.*, 23 AD3d 269, 270 [1st Dept 2005]; *Pahlavi*, 62 NY2d at 479). The alleged scheme stems from Rothschild's alleged mismanagement of Fortinvest's assets, not only through the New York Defendants, but through various other non-New York "bad actors" (Am. Compl. ¶56–58). A court may consider for forum non conveniens purposes "that the transaction out of which the

cause of action arose occurred primarily in a foreign jurisdiction" (*Pahlavi*, 62 NY2d at 479, quoting *Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 [1972]).

That some of the purportedly fraudulent transactions may have been facilitated by New York residents does not foreclose dismissal on grounds of forum non conveniens. While Plaintiff cites emails and telephone communications between Rothschild and Oblonsky, a trip to New York by Thewes, and Rothschild bank accounts that may have been used to facilitate a portion of the kickback scheme, the clear center of gravity of this dispute is Luxembourg (with Switzerland a close second). Communicating with individuals in New York, or visiting New York does not transform this case into a New York-centric case (*see Fernie v Wincrest Capital, Ltd.*, 177 AD3d 531, 532 [1st Dept 2019] ["[A]lthough there are some witnesses and evidence in New York . . . the court properly determined that New York is an inconvenient forum for this action."]; *Rodionov v. Redfern*, 173 AD3d 410 [1st Dept 2019] ["finding New York to be an inconvenient forum for the dispute . . . [a]lthough defendants employed a New York limited liability company and a New York investment account in carrying out the alleged fraudulent scheme"]; *JTS Trading Limited*, 178 AD3d at 507 [holding that "despite some initial contacts with one defendant's New York representative, the action was properly dismissed" for forum non conveniens]). Simply put, New York is "not at the heart of this case" (*Vic for Garcia v Banco BCT S.A.*, 2018 NY Slip Op 32989[U], *16 [Sup Ct, NY County 2018]).

Availability of an Alternative Forum

Further, there is a strong showing that a suitable alternative forum exists (*see Pahlavi*, 62 NY2d at 483). Related criminal complaints and civil claims are already pending against

Rothschild, the Rothschild-Fortinvest Directors, and the Rothschild account manager, Thewes, in the courts of Luxembourg.

"The pendency of a foreign proceeding involving the same or similar issues is also properly considered in determining whether a forum non conveniens dismissal is warranted" (*Kainer v UBS AG*, 2017 NY Slip Op 32316[U], *20 [Sup Ct, NY County 2017], *affd sub nom. Estate of Kainer v UBS AG*, 2019 NY Slip Op 06053 [1st Dept 2019] citing *Prime Props. USA 2011, LLC v Richardson*, 145 AD3d 525, 526 [1st Dept 2016]; *see also World Point Trading PTE, Ltd. v Credito Italiano*, 225 AD2d 153, 161 [1st Dept 1996] ["The significance of the action pending before the [foreign] courts is not limited to the obvious availability of another forum. It presents the attendant risk that conflicting rulings might be issued by courts of two jurisdictions."]; *Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 139 [2014] ["Alternatives to a New York forum are available; indeed, the parties' briefs refer to a number of related investigations or litigations pending in several foreign countries."]; *Sidaoui v Aboumrad*, 104 AD3d 573, 574 [1st Dept 2013] [affirming dismissal where "there are presently multiple actions pending between the parties in Mexico that may affect the determination of the instant action"]; *see also Overseas Media, Inc. v Skvortsov*, 441 F Supp2d 610, 618 [SDNY 2006] [finding "any assertion that a Russian court is an inadequate forum is undercut by the fact that at least one plaintiff in this action is a Russian entity that is a party to a related infringement action . . . presently pending in Russia"], *affd* 277 FApp'x 92 [2d Cir 2008]).

There is no doubt that Luxembourg is an adequate forum for the resolution of disputes (*see New Media Holding Co. LLC v E. W. United Bank SA*, 67 Misc 3d 1204(A) [Sup Ct, NY County 2020] [finding Luxembourg was an alternative forum for the dispute]; *see generally Br. W. Indies Guar. Tr. Co., Ltd. v Banque Internationale a Luxembourg*, 172 AD2d 234, 234 [1st

Dept 1991] [granting defendants' motion to dismiss the complaint without prejudice to its recommencement in the proper forum of Luxembourg based on forum selection clause]; (*Kingstown Capital Management, L.P. v Vitek*, 2020 WL 5350492, *9 [SDNY 2020] ["[t]here can be no serious dispute that Luxembourg is an adequate forum . . . . Luxembourg is a modern, sophisticated financial center with an advanced legal system. Luxembourg allows suits based on, inter alia, complex financial fraud, conversion, breach of fiduciary duty, and other business torts"; plaintiffs' assertions that Luxembourg did not have same "robust discovery mechanisms" as American courts were insufficient to show Luxembourg was an inadequate forum]; *see also Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F3d 935, 952 [11th Cir 1997] [dismissing on forum non conveniens grounds where Luxembourg was an adequate forum for the adjudication of fraud, conversion, and breach of fiduciary duty in liquidation proceedings]; *In re Herald, Primeo, and Thema Sec. Litig.*, 2011 WL 5928952, at *14,16 [SDNY 2011] [finding Luxembourg to be an "obviously adequate alternative for[um]" and noting that Luxembourg has "an undeniably significant interest in policing conduct within their borders by [Defendants, which are mostly] investment funds and financial institutions organized and regulated under their laws."]). "It is noteworthy, that unlike this court, such federal courts were required to determine the availability of an alternative forum as a precondition for a non conveniens dismissal" (*Huani v Donziger*, 46 Misc 3d 534, 541 [Sup Ct, NY County 2014], *affd* 129 AD3d 523 [1st Dept 2015]).

Plaintiff's principal objection to litigating this particular action in Luxembourg is that the litigation has stalled and may be stayed pending resolution of the related criminal action. However, the fact that there are multiple proceedings that may need to proceed in different phases under Luxembourg law does not render Luxembourg an inadequate forum nor does it

justify starting over in New York (*see e.g.*, *Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd.*, 9 AD3d 171, 179 [1st Dept 2004] [reversing motion court's ruling that India is not an adequate forum because of the delays in its court system]; *Globalvest Mgt. Co. L.P. v Citibank, N.A.*, 7 Misc 3d 1023(A) [Sup Ct, NY County 2005] [rejecting plaintiff's claim that it had "little or no recourse to seek relief . . . in Brazil" because the Brazil Lawsuit had effectively been stayed; the alleged delay did not render New York a more convenient forum, nor did the fact that Brazil does not have "expansive U.S.-style discovery"]; *Hanwha Life Ins. v UBS AG*, 127 AD3d 618, 619 [1st Dept 2015] ["Korea is an adequate alternative forum, its limitations on discovery notwithstanding"]).

Further, "where a foreign forum has a substantial interest in adjudicating an action, such interest is a factor weighing in favor of dismissal" (*Shin-Etsu Chem.*, 9 AD3d at 178; *see e.g., Bluewaters Communications Holdings, LLC v Ecclestone*, 122 AD3d 426, 428 [1st Dept 2014] ["Germany has an interest in how BLB—a German bank—was run"]; *Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 295 [1st Dept 2005] ["France clearly has an interest in regulating its own banking institutions"]; *Union Homes Sav. & Loans Ltd. v Afri–Finance LLC,* 16 AD3d 291, 291 [1st Dept 2005] [CPLR 327 dismissal favored where "the Nigerian government has a compelling interest in resolving the matter pursuant to its laws" especially "in light of the allegations of illegal activity by a large Nigerian financial institution"]). Here, Fortinvest's allegations are against "one of the largest wealth management banks in Luxembourg" (Am. Compl. ¶41). Luxembourg plainly has a regulatory interest in this matter.

Further, by commencing its civil action in Luxembourg, Fortinvest has already indicated that it considers Luxembourg to be an adequate forum (*Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG.*, 7 Misc 3d 1012(A), *6 [Sup Ct, NY County 2004], *affd in part* 23 AD3d 269 [1st

Dept 2005] [finding Germany to be an adequate forum as plaintiff had already commenced a similar action there]).

This factor weighs heavily in favor of dismissal on grounds of forum non conveniens.

Location of Documents and Witnesses

Although some relevant documents and witnesses may rest with the New York Defendants, the core of the Complaint (and therefore the likely evidence) focuses on Rothschild and thus *key* documents and witnesses will be in Luxembourg (*see Bewers v Am. Home Prods. Corp.*, 99 AD2d 949, 950 [1st Dept 1984] [dismissing on forum non conveniens grounds because "[t]he vast majority of witnesses and documentation . . . are in England . . . ."], *affd* 64 NY2d 630 [1984]; *Shin-Etsu Chem.*, 9 AD3d at 178 ["Any witness with personal knowledge of the letter of credit [at issue] is located overseas"]).

Burden on Defendants and New York Courts

Finally, the fact that the relevant agreements are governed by Luxembourg law further supports dismissal on grounds of forum non conveniens. While application of foreign law is not new to New York courts, "'[t]he applicability of foreign law is an important consideration in determining a forum non conveniens motion and weighs in favor of dismissal.'" (*Flame S.A. v Worldlink Intl. (Holding) Ltd.*, 107 AD3d 436, 438 [1st Dept 2013], quoting *Shin-Etsu Chem.*, 9 AD3d at 178 [noting that the applicability of foreign law weighs in favor of dismissal "given that expert testimony is essential"]).

Additionally, the testimony of the individual parties, the communications between them, and Rothschild internal documents likely will require translation into English (*see Troni v Banca Popolare Di Milano*, 129 AD2d 502, 503–04 [1st Dept 1987] [affirming dismissal where court considered, among other things, "the need to translate documents from a foreign language"]).

While that by itself would not be sufficient to warrant dismissal, it will add to the time and expense of litigating this matter in New York and thus is a factor weighing in support of a finding of forum non conveniens (*Pahlavi*, 62 NY2d at 483).

Claims Against the Oblonsky Defendants

The final question is whether the dismissal of the action should extend to the Oblonsky Defendants, for whom New York is not an inherently inconvenient forum. The Court concludes that it should. CPLR § 327(a) permits the Court, "on the motion of *any* party," to find "*the action* should be heard in another forum" and "stay or dismiss the action in whole or in part on any conditions that may be just" (emphasis added).

Plaintiff's claims against the Oblonsky defendants are inherently intertwined with the claims against Rothschild. They include conspiracy to perpetuate Rothschild's fraud (Count III) and Rothschild's breach of fiduciary duty (Count VI), and complicity in Rothschild's fraud (Count II) and Rothschild's breach of fiduciary duty (Count V). Plaintiff also asserts a conversion claim against all defendants (Count VII), and the allegations against the Oblonsky defendants stem from them accepting millions of Fortinvest' s assets in unauthorized transactions, and by charging and retaining unauthorized fees and kickbacks. In addition, Plaintiff asserts a conspiracy to commit conversion claim (Count IX), and an aiding and abetting conversion claim (Count VIII).

In these circumstances, it would not be sensible or efficient to split the case in two to be litigated simultaneously on different continents. That would simply add to the inefficiencies noted above. Moreover, if the case were to continue in this Court with the Oblonsky Defendants, Rothschild "likely would be required to participate either as a central witness or simply to protect [its] interest against a factual determination that [it] was involved in an unlawful scheme, thus

rendering the grant of [its] motion to be largely ineffectual" (*BSR Fund, S.A.*, NY Slip Op 30810(U), *11).

The dismissal of the claims against the Oblonsky Defendants is conditioned on their stipulation to appear and waive jurisdictional defenses in Luxembourg (*Koop v Guskind*, 116 AD3d 672, 674 [2d Dept 2014]) and to "tolling of the limitations period during the pendency of the New York action" (*Sunoco, Inc. v Home Ins. Co.*, 300 AD2d 19, 20 [1st Dept 2002]) "insofar as it had not run before the institution of the action in New York" (*Adriana Dev. Corp. N.V. v Gaspar*, 81 AD2d 235, 242 [1st Dept 1981]). If they do not so stipulate by filing on NYSCEF within 14 days of the date of this decision and order, the case against them in this Court will be revived.

In view of the foregoing, it is unnecessary to reach defendants' other arguments in support of dismissal.

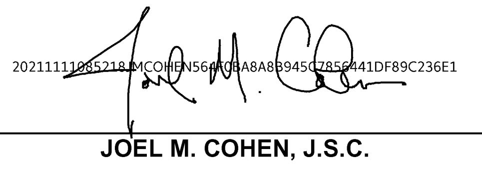
Accordingly, it is

ORDERED that defendant Rothschild's motion to dismiss the complaint (Mot. Seq. 007) is **granted**; it is further

ORDERED that the Oblonsky Defendants' motion to dismiss the complaint (Mot. Seq. 010) is **granted**, subject to filing the stipulation referenced above within 14 days of the date of this decision and order, at which point defendants shall submit a proposed judgment for the Court's review; and it is further

ORDERED that the Filimonov Defendant's motion to dismiss the complaint (Mot. Seq. 011) is **denied without prejudice as moot** due to the Stipulation of Discontinuance entered by the parties on September 10, 2021 (NYSCEF 171).

This constitutes the decision and order of the Court.



11/11/2021			JOEL M. COHEN, J.S.C.		
DATE					
CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION	
	X	GRANTED	DENIED	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	REFERENCE