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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

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INTERNATIONAL STRATEGIES GROUP LTD., on its own behalf, as a Federal Court Ordered Assignee of the Rights of Henry Pearlberg, Individually and as Trustee of Swan Trust, and James F. Pomeroy, II, assignors,

Plaintiff,

-against-

ABN AMRO BANK N.V. and FIRST MERCHANT BANK OSH LTD.,

Defendants.

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INDEX NO. 601604/2004
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision & Order.

Dated: January ~~1~~ February 08, 2005

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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INTERNATIONAL STRATEGIES GROUP LTD., on its own behalf, as a Federal Court Ordered Assignee of the Rights of Henry Pearlberg, Individually and as Trustee of Swan Trust, and James F. Pomeroy, II, assignors,

Index No. 601604/2004

DECISION and ORDER

Plaintiff,

-against-

ABN AMRO BANK N.V. and FIRST MERCHANT BANK OSH LTD.,

Defendants.

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MOSKOWITZ, J.:

This case requires the court to analyze whether a bank has any duty to a non-signatory to an account. Based on the current law in New York State and plaintiff's pleading, the court is constrained to dismiss the complaint against the movant bank because it had no duty despite the egregious fraud to which plaintiff fell victim and the bank's lack of monitoring that furthered that fraud.

By this motion, defendant ABN AMRO Bank N.V. (ABN AMRO) seeks dismissal of the claims against it pled in two complaints. On May 27, 2004, plaintiff International Strategies Group Ltd. (ISG) commenced this action by filing a complaint against defendant ABN AMRO and purchasing Index Number 601604/2004 (May Complaint). On June 7, 2004, plaintiff filed a separate complaint against defendants ABN AMRO and First Merchant Bank OSH

Ltd. (FMB), purchasing Index Number 601731/2004 (June Complaint) (together with May Complaint, "Complaints"). On July 22, 2004, the parties consolidated both actions under Index Number 601604/2004.[4] The relevant factual allegations of the Complaints overlap and are almost identical except the June Complaint contains six additional factual allegations. (May Complaint, ¶¶ 3-181; June Complaint, ¶¶ 5-189).

Taken together, the Complaints allege four causes of action: the first against FMB for fraud; the second against ABN AMRO for aiding and abetting that fraud; the third against ABN AMRO for aiding and abetting the fraud of non-party Corporation of the BankHouse (COB) and the fourth against ABN AMRO for negligence. Plaintiff states the negligence claim in both Complaints identically and on behalf of Henry Perlberg, individually and as Trustee of Swan Trust, and James F. Pomeroy. ISG asserts its aiding and abetting the fraud of COB claim on behalf of itself and on behalf of Danstruplund Holdings A/S and its alleged parent company and successor in interest, St. Fredericks lund Holdings ("Danstruplund") and Royal Phillips Electronics N.V., by its nominee, PRCS Ltd. (PRCS). Although it is unclear, plaintiff appears to assert aiding and abetting FMB's fraud on behalf of itself and all assignees. ISG seeks recovery of $24 million from ABN AMRO for aiding and abetting COB's fraud, $16.7 million on each of the remaining claims and $60 million in punitive damages.

ABN AMRO now moves to dismiss ISG's claims on the grounds that ISG lacks standing, that ISG fails to state a cause of action, that ISG failed to join necessary and indispensable parties, that New York is an inconvenient forum and that the claims are time-barred.

Facts

The court takes the following relevant factual allegations from the June Complaint. ISG is a British Virgin Islands corporation. ABN AMRO is a Netherlands banking corporation that maintains branch offices in New York City, Brussels, Belgium and the Netherlands. Co-defendant FMB is allegedly a foreign banking corporation licensed under the laws of the Turkish Republic of Northern Cypress. COB is a Delaware corporation with its principal place of business in Massachusetts.

The Complaints allege that, on January 13, 1998, FMB, apparently a bank that did not have a license to operate in the United States, applied to open several accounts at ABN AMRO's New York City branch as a correspondent bank. ABN AMRO granted FMB full United States correspondent banking privileges. On February 3, 1998, the Central Bank of Cyprus sent a warning letter to ABN AMRO's New York branch, stating that FMB and Unibank OSH Ltd. were among several entities holding themselves out as "so-called 'offshore' and 'authorised banks' and that 'entering into any

transactions with them involves dangers of financial, reputational and other nature.'" (June Complaint, ¶ 131). On February 18, 1998, The Popular Bank of Cyprus, a Cyprus bank with a New York City office, sent out a warning letter to ABN AMRO's New York branch, advising it that FMB and Unibank OSH Ltd. were among several entities holding themselves out as authorized banks that were operating illegally as banking entities in Northern Cyprus. ABN AMRO placed a copy of the February 18, 1998 warning letter in a file that it maintained for FMB, but allowed FMB to continue operating accounts in its New York branch office. According to the Complaints, these warning letters were follow-ups to two earlier warning letters, dated June 1995 and April 1997, from the Central Bank of Cypress, also naming FMB.

During early 1998, an ISG representative also met with Albert Pans (Pans), a vice president of COB. Pans invited ISG to participate in a so-called "Federal Reserve Guaranteed Program" (Investment Program), that was allegedly a highly confidential investment vehicle the United States government sponsored to control the circulation of U.S. dollars. (*Id.*, ¶ 9). Under the Investment Program, as Pans presented it, investors agreed to take their money out of circulation for specified periods of time in exchange for substantial profits. Pans guaranteed that the money invested would be held in a "non-depletion" account, meaning that the bank holding the money would ensure that ISG's

investment would not be at risk, as the money was merely to be out of circulation for a fixed period of time. (*Id.*, ¶ 14). The Investment Program required a minimum investment of $100 million, but Pans claimed that he could pool funds together with other COB clients into a syndicate investment. COB, together with its associate entity, non-party Societe Bank House (Societe), would manage that investment. (*Id.*, ¶ 12).

On April 15, 1998, Pans allegedly informed ISG that Danstrupland and PRCS had already joined the Investment Program syndicate and had entity had allegedly already invested $10 million each, by depositing those funds into separate syndicate accounts. Based on Pans' representations, ISG agreed to invest $4 million in the Investment Program through COB and Societe.

In April 1998, ISG executed COB's Funds Management Agreement and learned that Danstruplund and PRCS had executed similar agreements. In May 1998, the parties updated the Funds Management Agreement with a "Syndicate Agreement." The agreements provided that: (1) ISG would transfer $4 million to COB to be held in a bank sub-account that required the signatures of ISG and COB; (2) the bank would execute an undertaking of non-depletion; (3) the sub-account would be at ABN AMRO's Brussels branch; (4) ISG and COB would share in revenues derived from COB's management of ISG's money; and (5) the initial term of the agreement was approximately 90 days.

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On May 6, 1998, representatives from ISG met with Pans in Brussels and opened an account at ABN AMRO in Brussels. Pans allegedly escorted ISG's representatives to a private parking garage and elevator and then to the boardroom level, where they met with Sabine Smets (Smets), an ABN AMRO account manager. Smets allegedly showed ISG documentation that PRCS and Danstruplund each had $10 million available for purported transfer to separate COB sub-accounts. Smets also showed ISG correspondence among ABN AMRO, PRCS, Danstruplund and COB and told ISG that ABN AMRO had a long and valued relationship with COB. At this meeting, COB opened a bank account at ABN AMRO on behalf of ISG, that required joint signatures from ISG and COB for any account activity (ISG Sub-Account). COB and ABN AMRO set up this account as a sub-account to a COB master account that COB had opened one to two weeks earlier (COB Master Account). Pans, James F. Pomeroy II (Pomeroy), the president and chief executive officer of both COB and Societe, and Stephen Heffernan, COB's chief financial officer, controlled the COB Master Account.

On May 12, 1998, ABN AMRO approved the ISG Sub-Account. On May twelfth, Smets also asked Pans what COB's intentions were for the funds in the ISG sub-account and Danstruplund's and PRCS' sub-account funds. Pans told Smets that the funds were for property investments. On May 18, 1998, ISG wired $4 million to the ISG Sub-Account.

On May 26, 1998, Pans allegedly informed ISG that ABN AMRO's "investment manager" was ready to issue the bank's guaranty of non-depletion, but that the bank would not divide the guaranty among ISG, PRCS and Danstruplund, the three syndicate members. Pans requested that ISG transfer its funds to the COB Master Account, where Pans claimed that PRCS and Danstruplund had already transferred their funds (although ISG later learned that PRCS and Danstruplund had not transferred their funds). Pomeroy reiterated Pans' request two days later, and, in a letter dated May 29, 1998, COB assured ISG that the transfer of its funds into the COB Master Account would not affect the terms of the Funds Management or Syndicate Agreements. On the same day, ISG transferred its $4 million from the ISG Sub-Account to the COB Master Account, that, at the time of the transfer, had a zero balance.

Then began a series of money transfers without ISG's knowledge or consent. The Complaints allege that, on May 29, 1998, COB transferred $821,500 from the COB Master Account to a Pennsylvania law firm to pay COB's legal bills and other creditors. COB transferred $328,500 to a Boston bank account belonging to Pomeroy.

On June 15, 1998, COB then transferred $400,000 to an ABN AMRO account in Hulst, Netherlands. There is no indication that ABN AMRO filed an "Unusual Transaction Report" in Belgium or the

Netherlands in connection with this transfer, that ISG claims is a requirement for substantial money transfers. The ABN AMRO account in Hulst, designated "COB Syndicate No. 152," named F. van den Berge (Berge), an ABN AMRO bank officer, as transferee (Hulst Account). (*Id.*, ¶ 47). A Belgian criminal inquiry allegedly revealed that Pans solely controlled this account.

On June 21, 1998, COB confirmed that, in compliance with the Investment Program, ISG's money would be out of circulation for 15 days beginning July 1, 1998. In response, ISG asked for assurances regarding the bank's guaranty of non-depletion, to which COB stated that the funds did not need to leave the COB Master Account, but would merely be identified and "blocked" in that account. (*Id.*, ¶ 53).

In July 1998, COB transferred the $400,000 in the Hulst Account without ISG's knowledge. COB transferred $200,000 to a Delaware corporation Pomeroy and Pans controlled. COB converted $200,000 into a foreign currency and withdrew it, anonymously, in cash, leaving approximately $800 in the Hulst Account. The Hulst Account closed in November 1999.

On July 22, 1998, COB informed ISG that it had made the investment for the Investment Program, even though there was no bank guaranty of non-depletion. On July 29, 1998, ISG allegedly expressed concern to Pans regarding COB's failure to produce the non-depletion guaranty. COB responded that ISG had already

earned $2 million in profits that it would pay immediately upon ISG's request. ISG requested written assurances of the profits, requested $1 million of the profits and instructed COB to leave the remaining $1 million profit in the COB Master Account for reinvestment. On the same day, ISG telephoned Smets and asked whether ISG's funds remained in the COB Master Account. Smets refused to provide any information to ISG. In addition, Smets told Pans about ISG's request for information, presumably because the account was not ISG's.

On July 31, 1998, Pans instructed ABN AMRO to transfer $22 million (including Danstruplund and PRCS's combined $20 million), to Chase Manhattan Bank in New York. However, because Danstruplund and PRCS had never transferred funds out of their sub-accounts, their signatures were necessary. ABN AMRO therefore rejected Pans' request and reported it to the Belgian authorities. The report included Pans' previous statement that the funds in the sub-accounts were for property investments.

On August 5, 1998, Pans wrote to a senior account manager of ABN AMRO, complaining about ABN AMRO's failure to transfer the $22 million, copying the letter to Smets and the bank's branch manager. At this time, the Complaints allege, ABN AMRO suspected that COB was a fraudulent operation and sought to terminate its relationship with COB.

On August 10, 1998, ISG asked Smets to confirm that ISG's

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funds in the COB Master Account remained intact. Smets did not respond. At this time, ISG's funds were the only funds of the three syndicate members in the COB Master Account.

On August 11, 1998, ABN AMRO allegedly notified COB that it was closing COB'S accounts and suggested that COB return the funds in the sub-accounts and the COB Master Account to the bank accounts of the individual syndicate members. ABN AMRO allegedly reiterated its intention to terminate its relationship with COB on August 25, 1998.

ISG allegedly continued to request that Pomeroy provide bank statements or proof that its funds were not depleted. Pomeroy continued to assure ISG that its funds were intact and that ISG had already earned $2 million in profits. On August 19, 1998, COB transferred $1 million, purportedly representing a portion of ISG's profits, to three entities ISG designated to fulfill some of ISG's business obligations. However, the $1 million funds were not profits, but rather were part of ISG's dwindling principal investment with COB.

On September 17, 1998, COB transferred approximately $1,049,000 of ISG's principal investment from the COB Master Account to Fleet Bank in Boston, Massachusetts, for the account of COB, that Pomeroy controlled, leaving the COB Master Account nearly empty. On September 30, 1998, COB transferred approximately $10 million of Danstruplund's funds from its

syndicate COB sub-account at ABN AMRO to an account at Fleet Bank. However, the Complaint does not state whether that transfer was with or without Danstruplund's knowledge or permission or give any particulars as to how defendants managed to transfer Danstruplund's funds from its sub-account.

According to the Complaints, on October 2, 1998, a director and legal advisor of ISG met with six of COB's officers, including Pomeroy. Pomeroy assured ISG that its principal investment was intact and promised to provide bank statements for the COB Master Account and the ISG Sub-Account. Subsequently, Pomeroy informed ISG that ABN AMRO refused to provide COB with bank statements, thereby preventing COB from verifying the status of ISG's funds. Pomeroy told ISG that ABN AMRO required Pans' signature and suggested that ISG agree to allow COB to transfer its funds from the COB Master Account to an account that COB and ISG would jointly hold at Fleet Bank in Boston. Unbeknownst to ISG, the COB Master Account was empty.

ISG signed a series of transfer instructions to implement the transfer of its funds from the COB Master Account at ABN AMRO to Fleet Bank where ISG was to be a signatory. ISG claims that ABN AMRO demanded that ISG execute transfer instructions, signing off on the transfer of funds from the COB Master Account, even though ISG was not a signatory on that account, because ABN AMRO knew that ISG had been defrauded and that the funds in the COB

Master Account had been depleted. ISG claims that, subsequently, it learned that COB was communicating with ABN AMRO concerning the wording of the transfer, so that the depletion of funds from the COB Master Account would remain concealed from ISG; to that end, on three occasions, COB allegedly requested that ISG modify the wording of the transfer instructions.

On October 27, 1998, COB transferred approximately $5 million of PRCS's funds from its syndicate member sub-account at ABN AMRO to a COB account at Fleet Bank in Boston. The Complaint is silent about whether the transfer was with or without PRCS' knowledge or permission. ISG, in contact with PRCS, became encouraged because PRCS's investment funds appeared to be intact. On November 4, 1998, COB received a transfer of $4 million into a COB account at Fleet Bank from an unnamed account and an undisclosed account number and informed ISG that the $4 million was ISG's money from the COB Master Account at ABN AMRO.

On November 4, 1998, COB also transferred $5 million of PRCS's funds from the Fleet Bank account to an account at Bank of New York in the name of "May Davis/S.G. Cowen Securities Corp. for final credit to the account of the Iain Jones Trustee, Swan Trust (IOM)" (BONY Account). (*Id.*, ¶ 108). The signatory of the BONY Account was "Henry Pearlberg, Head Trustee" (Pearlberg). (*Id.*, ¶ 110). On November 4, COB also transferred $10 million of Danstruplund's funds, and the $4 million that it claimed

represented ISG's principal investment, from COB's account at Fleet Bank to the BONY Account. COB allegedly sent these transfers, totaling $19 million, to Pearlberg as part of a joint venture between COB and Pearlberg, without the knowledge or consent of any of the three syndicate members.

On November 11, 1998, ISG informed COB that ISG had not received acknowledgment from ABN AMRO, or confirmation from Fleet Bank, of COB's $4 million transfer from the COB Master Account on November 4, 1998. COB responded that it would provide the information ISG requested, but ISG never received the acknowledgment or confirmation.

On November 12, 1998, Ben Beaumont, a 50% owner of ISG, contacted Sir Gerrard Neale, the individual who introduced PRCS to COB, to try to obtain information about ISG and PRCS's investments with COB. On November 20, 1998, Pomeroy demanded that ISG cease contacting COB clients. Pomeroy allegedly took responsibility for ISG's funds, stated that all correspondence with COB should be through him directly and promised to prepare an updated corporate note and undertaking for ISG's review.

Later that month, ISG confronted Pomeroy and COB's counsel concerning COB and Pomeroy's misrepresentations regarding ISG's funds and profits. COB assured ISG that its principal remained intact and executed a promissory note in the amount of $9 million in favor of ISG. A "New Proposal Letter" allegedly accompanied

the note, that provided, among other things, that COB would transfer ISG's funds to a Fleet Bank account that required ISG's written consent for transfers; that that account would at all times contain $6 million, and a guaranty; and that, if the new transaction did not occur by January 31, 1999, ISG would promptly receive its funds back from COB. (*Id.*, ¶ 120). Believing that its principal remained intact and that it had earned $2 million in profits ($1 million of which ISG believed it had already received), ISG agreed to the issuance of the promissory note and the New Proposal Letter.

Shortly after COB transferred the syndicate members' $19 million funds into the BONY Account, Pearlberg, without ISG's knowledge or consent, transferred those funds to other banks, including a transfer of $16,752,000 to Chase Manhattan Bank in New York, for the final credit of "The Reserve Fund." (*Id.*, ¶ 123). On January 30, 1999, Pearlberg transferred $16,828,000 from Chase Manhattan Bank back to the BONY Account.

At some point, Pearlberg allegedly agreed to invest funds under his control with C. Joan Patrick (Patrick), an independent broker working with the May Davis Group, an investment banking and brokerage firm in New York. Patrick introduced Pearlberg to defendant FMB as the entity into which Pearlberg was to deposit investment funds. On February 2, 1999, Pearlberg executed signature cards for the opening of a new bank account in the name

of defendant FMB, with himself as the sole signatory, at ABN AMRO's New York City branch. On February second, Patrick also instructed Pearlberg to transfer funds to FMB, annotating the transfer instructions, "final credit to: Swan Trust. Account number: (To be issued Feb. 2, 1999)." *(Id.*, ¶ 128).

On February 4, 1999, Pearlberg transferred $16.7 million from the BONY Account to an FMB sub-account, without designating a sub-account number, "for the final credit Swan Trust (IOM)." *(Id.*, ¶ 143). However, the Complaints allege that FMB did not actually maintain sub-accounts, but rather, maintained a "master," or "concentration," account (Concentration Account), and issued sub-account numbers to its clients whose funds were at all times pooled into the Concentration Account. *(Id.*, ¶¶ 135-36, 143-44). Thus, while Pearlberg believed that he controlled an account at ABN AMRO, according to the Complaints, FMB exclusively controlled his FMB sub-account through the Concentration Account. ABN AMRO allegedly knew that there were no sub-accounts, and, therefore, it transferred the $16.7 million into the Concentration Account without making any inquiry concerning the missing sub-account number. These funds were deposited on February 5, 1999, and, from February 5 through May 17, 1999, FMB withdrew approximately $4.5 million from this account.

ABN AMRO also allegedly established a "sweep" account for

FMB, whereby FMB could transfer funds in the Concentration Account into a separate, high interest bearing, overnight account and return the funds to the Concentration Account the following morning, accruing interest on a monthly basis. FMB then deposited the accrued interest into offshore accounts. ABN AMRO initially denied this Sweep Account existed and providing this service to its clients. Subsequently, however, ABN AMRO allegedly admitted that it had provided this service to FMB and produced statements showing sweep account activity.

On February 12, 1999, Patrick allegedly agreed to participate in a $100 million Revolving Underwriting Facility (RUF)that FMB presented, claiming that Turkish government bonds in FMB's possession secured the RUF. Under the RUF, Patrick could draw upon the funds to engage in extreme leveraged trading transactions. In return, Patrick agreed that FMB would receive a $5 million fee, that FMB would deduct from the syndicate members' funds that they had transferred to an FMB sub-account on behalf of Lipalsc, Ltd., that FMB presented as another sub-account of the Concentration Account (the Lipalsc sub-account). In reality, however, FMB allegedly withdrew the $5 million from the Concentration Account.

On the same day, Pearlberg, through Patrick, agreed to transfer $15 million from his purported FMB sub-account to FMB's Lipalsc sub-account. FMB confirmed that the transfer took place,

but the funds remained at all times in the Concentration Account. At around this time, ABN AMRO facilitated 16 separate transfers from the FMB Concentration Account to Asbank Ltd., that was on the list of illegal, unlicensed banks that the Central Bank of Cyprus and The Popular Bank of Cyprus provided to ABN AMRO.

On April 29, 1999, Pearlberg executed a Deed of Assignment, assigning to Pomeroy all of his interests in: (1) his bank accounts at ABN AMRO in FMB's name; and (2) an investment contract. The Deed of Assignment represented that the total balance of the FMB accounts was approximately $10,850,000, plus a $100 million credit line. On May 6, 1999, Pearlberg instructed ABN AMRO to transfer funds to Pomeroy, as part of the Deed of Assignment. On July 16, 1999, Pomeroy informed ISG that he was the assignee of Pearlberg's interest in FMB sub-accounts. On July 26, 1999, Pomeroy received approximately $1.2 million from FMB's Concentration Account, pursuant to the Deed of Assignment. At some point around this time, FMB unilaterally informed Patrick that it was providing a second RUF and that it would debit another $5 million from the Lipalsc sub-account.

On May 27, 1999, FMB sent Patrick a bank statement showing the deduction of the second $5 million. However, the money was not withdrawn, as this fee was allegedly a method FMB used to disguise previous, unknown and unauthorized withdrawals of the syndicate members' money from the Concentration Account. Patrick

demanded that FMB return the second $5 million fee, but FMB never did so.

As of July 16, 1999, ISG allegedly had no knowledge that its funds were in an FMB account at ABN AMRO. On July 28, 1999, ISG requested that Pomeroy and COB clarify ISG's interest in the FMB Concentration Account.[1] (*Id.*, ¶¶ 160, 162). Pomeroy allegedly refused to commit to a distribution formula and ISG never received any part of the $1.2 million that Pomeroy obtained from the Concentration Account.

The Complaints allege that, between June and October 1999, ABN AMRO received complaints from other entities about dubious transactions. On August 12, 1999, the U.S. Attorney for the Northern District of Illinois served ABN AMRO with a Grand Jury subpoena concerning the FMB Concentration Account. On October 25, 1999, ABN AMRO's corporate security department in the Netherlands notified ABN AMRO's New York branch office that FMB's Concentration Account and other FMB accounts at ABN AMRO in New York, were possible money laundering accounts.

The Complaints aver that, on October 27, 1999, ABN AMRO requested information about FMB from five other banks that FMB had listed as correspondents. One of the banks allegedly responded that it maintained no account relationship with FMB and

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[1] It is not clear from the Complaints how ISG discovered its alleged interest in the FMB Concentration Account.

that the Banker's Almanac listed ABN AMRO as the only bank in New York with a correspondent banking relationship with FMB.

On February 25, 2000, ABN AMRO was served with an Order to Show Cause and Temporary Restraining Order. Subsequently, it issued an internal memorandum to halt activity in FMB's accounts to close FMB'S accounts within three days. However, FMB's accounts remained open for another three months, allegedly allowing FMB to transfer over $1.3 million out of the Concentration Account.

On May 22, 2002, ISG commenced an action against COB, Pomeroy, Societe, and SB Global, Inc. (an entity Pomeroy controlled) (COB Defendants) in the United States District Court for the District of Massachusetts, alleging causes of action for fraud, breach of fiduciary duty, intentional misrepresentation, and federal and state securities violations (Massachusetts Action). That action allegedly resulted in a judgment in favor of ISG against the COB Defendants, jointly and severally, on all causes of action, in the sum of $10,468,106. The district court also assigned "all rights, title and interest" in the Deed of Assignment to ISG. (*Id.*, ¶ 172).

On January 6, 2003, a Grand Jury indicted Dr. Hakki Yaman Namli (Yaman), FMB's chairman and its managing director, Ralph Jarson (Jarson) and others in the United States District Court for the Southern District of New York for wire fraud, commercial

bribery conspiracy and wire fraud conspiracy, over the illegal selling of RUFs, the same financial product FMB sold to Patrick. Jarson was convicted on October 30, 2003 and sentenced to 37 months in prison. Jarson received approximately $4.1 million from FMB's Concentration Account, a portion of which allegedly belonged to the syndicate members. Jarson also participated in the sale of the two RUFs to Patrick. Yaman evaded arrest and is currently a fugitive.

Discussion

Standing

ABN AMRO argues that ISG lacks standing to bring this action on behalf of PRCS, Danstruplund or Swan Trust. In opposition, ISG argues that it has standing to assert its claims pursuant to valid assignments.

"Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria." *(Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 769). "[A] litigant must establish its standing in order to seek judicial review." (*Id.* at 769). There is "a general prohibition on one litigant raising the legal rights of another ... ." *(Id.* at 773).

ISG submits an Amended Order Under Motion For Sanctions, that the district court in the Massachusetts Action issued (Sanctions Order). The Sanctions Order assigns to ISG "all rights, title and interest" in a contract between Lipalsc Ltd. and Swan Trust, in FMB's bank accounts held at ABN AMRO, and in certain rights Pearlberg assigned to Pomeroy. (Bortnick Aff., Ex. B, ¶¶ 2-3). The Sanctions Order also assigns to ISG "[a]ll funds, cash, and instruments" described in the Deed of Assignment, to be held in escrow "until reasonable notice is given to the other parties whose investment funds were amalgamated with ISG's and transferred by [the COB Defendants] to Swan Trust ... ." *(Id.*, ¶¶ 4-6).

ISG also submits an "Assignment of Rights," Pearlberg issued individually and in his capacity as head trustee and chief executive officer of the Swan Trust. (Bortnick Aff., Ex. C). The Assignment of Rights, dated May 19, 2003, expressly assigns to ISG, Pearlberg and Swan Trust's "rights, title, interest in, and to, any and all claims, causes of action, rights and rights of action, pertaining to the Syndicate Funds and to any recovery thereof ... ." *(Id.*, ¶ 6). Taken together, the Sanctions Order and Pearlberg and Swan Trust's Assignment of Rights, clearly "'show an intention of transferring the chose in action to the assignee ... .'" *(Banque Arabe Et Internationale D'Investissement v Maryland Nat. Bank*, 819 F Supp 1282, 1289 [SD NY 1993]

[citation omitted], *affd* 57 F3d 146 [2d Cir 1995]). In its reply papers, ABN AMRO does not refute this showing. Therefore, ISG has established standing to bring this action on its own behalf, as assignee of the rights of Pearlberg, individually and as trustee of Swan Trust, and Pomeroy.

The court heard oral arguments on this motion on October 21, 2004, at which time ISG's counsel submitted a copy of a document titled "RELEASE AND ASSIGNMENT OF RIGHTS AND AGREEMENT TO ACT AS FIDUCIARY." Plaintiff argues that the terms of this document assign to ISG all of Danstruplund's interests in this action, thereby establishing that ISG also has standing to proceed in this action on behalf of Danstruplund. The court notes that the assignment is from Danstrupland's alleged parent company and successor in interest, St. Fredericksland Holdings. Because plaintiff handed this assignment up at oral argument, ABN AMRO has not had an opportunity to argue about its import. However, the court assumes, for the purposes of this motion, that the assignment from St. Fredericksland Holdings supports plaintiff's standing on behalf of Danstrupland.

ISG is not, however, entitled to bring claims on behalf of PRCS. ISG fails to submit any evidence establishing an assignment from PRCS, and nothing contained in the Sanctions Order transfers the legal rights to ISG of PRCS, including its right to assert causes of action against ABN AMRO or FMB.

Accordingly, the court grants that part of ABN AMRO's motion to dismiss for ISG's lack of standing to assert claims on behalf of PRCS.

Necessary and Indispensable Parties

ABN AMRO also argues that this action cannot proceed without non-parties Danstruplund and PRCS, who ABN AMRO claims are necessary and indispensable parties.

CPLR 1001 provides:

> (a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.
>
> (b) When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:
>
> 1. Whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
>
> 2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
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> 3. whether and by whom prejudice might have been avoided or may in the future be avoided;

> 4. the feasibility of a protective provision by order of the court or in the judgment; and
>
> 5. whether an effective judgment may be rendered in the absence of the person who is not joined.

There are two main policies concerning dismissal for failure to join indispensable parties. "First, mandatory joinder prevents multiple, inconsistent judgments relating to the same controversy. Second, joinder protects the otherwise absent parties who would be 'embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard.'" (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 820 [citations omitted]). However,

> [t]o command a party to be brought in where there is no process to bring him in and no jurisdiction over him lacks sense. ... Where any of such parties are without the State, and cannot be served or brought into the action effectually, they need not be parties, and an order would be improperly granted which directed that they be made parties.

(*Keene v Chambers*, 271 NY 326, 330).

The court is not convinced that Danstruplund (or its alleged successor in interest, St. Fredericks lund Holdings) and PRCS are necessary parties. The Complaints allege that these entities are entities of Denmark and the Netherlands, respectively. Thus, based upon the Court's decision in *Keene*, Danstruplund and PRCS "need not be parties," because they are beyond the jurisdiction of this court. (*Id*).

Further, an analysis of whether to allow the action to proceed, pursuant to CPLR 1001 (b) (1) - (5), weighs in favor of ISG. ISG does not appear to have "another effective remedy" if this action were dismissed. CPLR 1001 (b) (1). That ISG, Danstruplund and PRCS may all have claims to part of the $16.7 million does not prevent ISG from seeking its share of those funds or from proceeding on behalf of Danstruplund pursuant to a valid assignment. Moreover, there is no prejudice to PRCS (CPLR 1001 [b] [2]), because there is nothing preventing it from seeking to join this action. Nor is there any indication that anything prevents PRCS from suing in its individual capacity.

Finally, as a safeguard, this court has the authority to issue an order requiring ISG to hold any recovery in escrow until any party whom a judgement would affect receives reasonable notice. Such a protective provision is feasible (CPLR 1001 [b] [4]), and would avoid future prejudice (CPLR 1001 [b] [3]), permitting the court to render an effective judgment in the absence of the joinder of Danstruplund and PRCS (CPLR 1001 [b] [5]).

Failure To State A Cause of Action - Negligence

ISG asserts this cause of action only as assignee of Henry Pearlberg, individually, and as trustee of Swan Trust. To establish a claim for negligence under New York law, a plaintiff must show: "(1) the existence of a duty on defendant's part as to

plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof." (*P.W.B. Enter., Inc. v Moklam Enter., Inc.*, 221 AD2d 184, 185). However, a bank owes no duty of care to a non-customer. (*Century Bus. Credit Corp. v North Fork Bank*, 246 AD2d 395, 396; *Tzaras v Evergreen Intl. Spot Trading*, 2003 WL 470611, *6 [SD NY, Feb. 25, 2003]; *Renner v Chase Manhattan Bank*, 1999 WL 47239, *14 [SD NY, Feb. 25, 1999]).

The June Complaint alleges that ABN AMRO was negligent, because it: (1) opened FMB's accounts notwithstanding several "red flags" about FMB; (2) failed to investigate and act on information about FMB; (3) failed to alert Swan Trust about the suspicious activities of FMB; and (4) failed to freeze FMB's accounts until it resolved all its questions and suspicions. (June Complaint, ¶¶ 213-216).

However, ISG does not dispute that Swan Trust and Pearlberg were customers of FMB and that FMB had exclusive control over the funds in the account. ISG does not argue that FMB's correspondent banking relationship with ABN AMRO made Swan Trust and Pearlberg de facto customers of ABN AMRO. Rather, ISG argues that ISG was an ABN AMRO customer in Brussels. ISG also argues that a duty of care exists because of the involvement of fiduciary funds of Swan Trust.

That ISG may have been an ABN AMRO customer in Brussels is irrelevant. The negligence claim ISG asserts is on behalf of

Swan Trust or Pearlberg. ISG, as an assignee, "receives no more and can do no more than [its] assignor." *(International Ribbon Mills, Ltd. v Arjan Ribbons, Inc.*, 36 NY2d 121, 126).

ISG argues that the funds in the FMB account were fiduciary funds and therefore ABN AMRO owed a duty of care to Swan Trust and Pearlberg as non-customers. "As a general rule, a bank has no duty to monitor even a fiduciary account under New York law." *(Renner*, 1999 WL 47239, *14). However, "This rule is altered where 'there are facts ... indicating misappropriation.'" *(Id)*. (citation omitted). "In order for a bank to be liable for the diversion of fiduciary funds, plaintiff must show that the bank either itself benefitted from the transaction or that it had notice or knowledge that a diversion was intended or was in progress." *(Id)*. "In those instances in which the New York courts have found that a bank has received adequate notice of a fraud, either the bank has accepted money from a fiduciary account in order to satisfy the fiduciary's personal debt to the bank, [citations omitted], or there is a history of overdrafts in the fiduciary account." *(Id)*.

The Complaints allege that ABN AMRO received and processed transfers that included Pearlberg's written transfer instruction: "for the final credit Swan Trust (IOM)." (June Complaint, ¶ 143). This designation does not establish the existence of a fiduciary relationship or that the transfers in question involved

fiduciary funds. *(Zaz-Huff Inc. v Chase Manhattan Bank*, 277 AD2d 59, 61) [bank accounts denominated as "Pension and Profit Sharing" and "Retirement Trust" accounts insufficient to notify bank that accounts were fiduciary in nature]; *Tzaras*, 2003 WL 470611, *6 [language "for further credit" insufficient to create fiduciary duty, and, even if a fiduciary account existed, "a bank has no duty to monitor even a fiduciary account"]). Moreover, ISG has not shown that any payment was made to ABN AMRO or that FMB's account was ever overdrawn. Thus, ISG fails to provide a legal basis for its conclusion that ABN AMRO owed a duty to Swan Trust or Pearlberg in connection with its funds as fiduciary funds.

ISG also claims that ABN AMRO was negligent, because, "under United States banking laws," it allegedly failed to learn about FMB as a correspondent bank, failed to monitor FMB's activity and failed to prevent its wrongdoing. (ISG Opp. Mem. of Law, at 32). However, this allegation is conclusory, because it fails to explain how any of these laws are applicable to ISG's negligence claim. It is the court's understanding that there is no private right of action under these laws. *(See Martinez Colon v. Santander National Bank*, 4 FSupp2d 53, 77 [D. Pr. 1998] [no private right of action under Bank Secrecy Act]). And, the government has not been inactive. According to plaintiff, ABN AMRO has been the subject of a United States Federal Reserve Bank

investigation that resulted in a settlement requiring a "massive overhaul of ABN AMRO's anti-money laundering procedures and relationships with correspondent banks such as FMB." (*See* e-mail letter from Blaine Bortnick, Esq. on behalf of plaintiff dated December 8, 2004 at page 6). Plaintiff is "virtually certain" that the settlement resulted from ISG's efforts to recover its funds that FMB stole through ABN AMRO. (*Id.*)

For the foregoing reasons, ISG fails to state a cause of action for negligence. Accordingly, ABN AMRO's motion to dismiss ISG's negligence cause of action is granted.

Failure To State A Cause of Action - Aiding & Abetting

ABN AMRO argues that it had no knowledge of the alleged frauds of either COB or FMB and that ISG fails to satisfy the particularity requirements of CPLR 3016 (b). In opposition, ISG argues that pleading knowledge is not a requirement for aiding and abetting claims and that the particularity requirements of CPLR 3016 (b) do not bar its claims.

To establish a claim for aiding and abetting, ISG must plead: "(1) the existence of a violation by the primary wrongdoer; (2) knowledge of this violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in the achievement of the primary violation." (*Renner*, 1999 WL 47239, at *11).

> The nexus between the aider and abettor and the primary fraud is made out by allegations

> as to the proposed aider's knowledge of the fraud, and what he, therefore, can be said to have done with the intention of advancing the fraud's commission. It is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud.

(*National Westminster Bank USA v Weksel*, 124 AD2d 144, 149) In situations where the circumstances of the fraud are peculiarly within the knowledge of the party aiding the fraud, it is sufficient that plaintiff plead facts "from which it could be inferred that the . . .defendants had actual knowledge." (*Kaufman v. Cohen*, 307 AD2d 113, 125; *see also First Nationwide Bank v. 965 Amsterdam, Inc.*, 212 AD2d 469, 472).

A. Aiding COB's Fraud

1. PRCS and Danstrupland

ISG asserts this cause of action on behalf of itself and presumably on behalf of Danstrupland and PRCS. However, as stated earlier, ISG's does not yet have standing to assert claims on behalf of PRCS. However, even if ISG could assert PRCS' claims, the Complaint lacks sufficient particulars as to how defendants defrauded Danstrupland and PRCS. Unlike ISG, apparently neither Danstrupland nor PRCS transferred their funds from their respective sub-accounts to the Master Account. The court is therefore at a loss to understand how defendants managed to transfer funds of these entities to the Fleet account in Boston and ultimately to FMB and whether this was with or without

Danstrupland's and PRCS' permission. Accordingly, the allegations in the Complaint are insufficient to put defendants on notice as to the particulars of ISG's claims on behalf of Danstrupland and PRCS. The court therefore dismisses this part of ISG's claim, with leave to replead Danstrupland's claims only, because, as discussed *supra*, there is no assignment from PRCS.

2. ISG's Direct Claim

Because plaintiff's pleading is insufficient as to how ABN AMRO assisted in the defrauding of PRCS and Danstrupland, the following discussion only concerns ISG's own claims.

a. Knowledge

The May Complaint alleges that ABN AMRO aided and abetted COB's scheme to defraud ISG under the Investment Program. ISG alleges that Berge, an ABN AMRO employee, was listed as transferee on the $400,000 transfer into the Hulst Account. Berge was allegedly "fully knowledgeable as to how the transfer was completed from Brussels to Hulst, whether the transfer instruction was altered, and how the currency transactions were recorded." (June Complaint, ¶ 62). Berge also allegedly "knowingly or negligently provid[ed] access for Pans to ABN AMRO account facilities in Hulst, and ... facilitated the transfer of ISG's funds to an account controlled by Pans." (*Id.*, ¶ 63). None of these allegations describe facts from which to infer that Berge had knowledge of COB's fraud. Rather, according to the

June Complaint, the beneficiary account of the transfer to the Hulst Account was "COB Syndicate No. 152," and was "controlled solely by Pans." (June Complaint, ¶¶ 47, 48). These allegations show that Berge was an ABN AMRO employee working on COB's accounts, not that he had knowledge of fraud.[2]

The Complaints also allege that, because of COB's representation that ABN AMRO would not divide its guaranty of non-depletion among the three separate syndicate members, ISG willingly transferred its funds from the ISG Sub-Account to the COB Master Account over which COB had exclusive control and transfer authorization. ISG also alleges that, on May 29, 1998, COB transferred from the COB Master Account: (1) $821,500 to COB's lawyers to pay legal bills, (2) $328,500 to an account of Pomeroy; and (3) $1 million on August 19, 1998, to entities ISG had designated, purportedly representing profits from the Investment Program. On September 17, 1998, COB allegedly transferred approximately $1,049,000 to COB's Fleet Bank account in Boston. However, these transfers, that COB made from the COB Master Account, are insufficient to infer that ABN AMRO knew that

[2] The court reviewed ISG's post-argument submission, dated October 25, 2004. This submission purports to correct an allegation of the June Complaint concerning Berge's alleged participation in COB's fraud. As a preliminary matter, ISG did not obtain the court's permission to submit additional papers, and ABN AMRO has had no opportunity to respond to ISG's submission. In any event, ISG's submission fails to show that ABN AMRO had knowledge of the alleged fraud.

COB was perpetrating a fraud. Rather, according to the Complaints, COB would have appeared to have rightfully controlled the COB Master Account.

There is also the allegation that, when ABN AMBRO sought to close the Master Account, it allegedly suggested that COB return the remaining funds to the individual syndicate members, including ISG. This is an allegation from which the court can infer that ABN AMBRO knew all along who was the true owner of the funds in the Master Account and therefore this allegation comes the closest to pleading actual knowledge. However, it is insufficient because it fails to identify who at ABN AMBRO made this suggestion and when it was made.

Nor do the Complaints allege that ABN AMRO knew about the purported "non-depletion" arrangement between ISG and COB, or that ABN AMRO received any documents COB and ISG executed concerning ISG's investment. Moreover, even assuming that ABN AMRO refused to respond to ISG's inquiries concerning the level of funds in the COB Master Account, as ISG alleges, these inquiries fail to show that ABN AMRO had knowledge of COB's alleged fraud. (June Complaint, ¶¶ 72, 82-83).

As discussed *supra*, ISG placed its funds in the COB Master Account, of which ISG was not a signatory and over which it had no control. As such, ISG was not entitled to information concerning the level of funds in the COB Master Account. Thus,

ISG's argument that ABN AMRO knew that COB had fraudulently attempted to transfer ISG's funds out of the COB Master Account "without [ISG's] required signatures" is without merit.

Nor do the complaints describe ABN AMRO's awareness of COB's alleged fraud concerning the Investment Program. To the contrary, the May Complaint alleges that Smets, an account officer at ABN AMRO, "asked Pans[, COB's vice president,] what COB's intentions were with respect to the funds received into the ISG Syndicate Sub-Account, as well as the funds belonging to PRCS and Danstruplund ... ." (May Complaint, ¶ 36). Pans allegedly replied that the funds were intended for property investments (*id.*), thereby implicitly conceding that, because of Pans' misrepresentation, ABN AMRO had no knowledge of COB's alleged fraud. Smets' alleged lack of "comfort" with Pans' response does not constitute knowledge of COB's alleged fraud, because even "highly suspicious" conduct "cannot be equated with actual knowledge ... ." *(Albion Alliance Mezzanine Fund, L.P. v State St. Bank and Trust Co.*, 2003 NY Misc LEXIS 1557 [Sup Ct, NY County, April 14, 2003], *affd* 2 AD3d 162; *see also Renner*, 1999 WL 47239, at *12 [bank officer's discussion with customer as to how customer would use invested funds might "raise the possibility of constructive knowledge" of the bank employee that wrongdoer might not be dealing with plaintiff in a wholly forthright manner, but these allegations "fall well short of

imparting ... actual knowledge"]).

However, with respect to the September 17, 1998 transfer to COB's Fleet Bank account, plaintiff has successfully raised the inference of actual knowledge to support an aiding and abetting claim. (*See Houbigant v. Deloitte & Touche, LLP* 303 AD2d 92, 100) ISG claims that, "[u]pon information and belief, ABN AMRO demanded that ISG execute a transfer instruction because it knew that ISG was unaware of the depletion of its funds from the Master Account and had been defrauded." (May Complaint, ¶ 101; June Complaint, ¶ 103). The Complaints also allege that COB and ABN AMRO had communicated about modifying the transfer instructions "in order that the depletion of funds from the Master Account would be concealed from ISG," (May Complaint ¶ 103 June Complaint ¶ 105). That ABN AMRO required ISG's signature for final transfers from an account to which ISG was not even a signatory is highly suspicious, particularly when ABN AMBRO had not required ISG's signatures on the initial transfers to Hulst.

b. Substantial Assistance

However, the Complaint remains insufficient because ISG has failed to plead substantial assistance. Plaintiff argues that ABN AMRO's failure to act constituted substantial assistance. However, mere inaction or silence in the absence of a fiduciary relationship cannot support aider and abettor liability. (*See*

Kaufman v. Cohen, 307 AD2d 113, 126; *National Westminister Bank v. Weksel*, 124 AD2d 144, 148 ["[w]e know of no case where mere inaction by a defendant has been held sufficient to support aider and abettor liability for fraud"]; *See also In re Liquidation of Union Indemnity Ins. Co. Of New York*, 289 AD2d 173, 174; *King v. George Schinberg & Co.*, 233 AD2d 242, 243; *Cacutti v. SBU, Inc.*, 273 FSupp2d 488, 496 [SDNY 2003]). As plaintiff does not assert a fiduciary relationship between ISG and ABN AMRO, ISG cannot support an aiding and abetting claim by alleging ABN AMRO's failure to act. Accordingly, ISG's direct claim against ABN AMRO for aiding and abetting the fraud of COB is dismissed.

B. Aiding FMB's Fraud

ISG asserts this claim on behalf of itself and presumably on behalf of all other plaintiffs it represents through assignment. As stated earlier, the Complaint is insufficient as to the claims of Danstrupland (and PRCS for that matter).

With respect to the Swan Trust, ISG argues that knowledge of the fraud is not necessary for an aiding and abetting claim because that account involved fiduciary funds. Citing *Zaz-Huff, Inc.*, 277 AD2d 59, ISG argues that where the bank has notice of a potential future wrongdoing involving fiduciary funds and has received a benefit, knowledge of the fraud is not a necessary element. However, as discussed *supra*, ISG has not shown that the funds of Swan Trust were fiduciary funds or that Swan Trust held

a fiduciary account.

To the extent ISG has asserted a direct claim against ABN AMRO for aiding and abetting FMB's fraud, the court dismisses it. First, the complaint is not even clear that ISG is asserting such a claim. Also, ISG has pled no facts from which the court could infer actual knowledge of FMB's fraud.

For the foregoing reasons, the Complaints fail to state a cause of action for aiding and abetting fraud. Accordingly, the court grants ABN AMRO's motion to dismiss ISG's causes of action for aiding and abetting the frauds of COB and FMB. However, the court finds it appropriate to grant leave to plaintiff to replead this portion of its complaint, if it chooses, upon an appropriate showing of merit. (*D'Agrosa v Newsday*, 158 AD2d 229). Because the court is dismissing the complaint as to ABN AMRO, it is unnecessary to address its other arguments for dismissal: statute of limitations and forum non conveniens.

Accordingly, it is hereby

ORDERED that ABN AMRO BANK N.V.'s motion to dismiss is granted as follows: the court dismisses the complaint dated May 27, 2004 in its entirety and dismisses the second and third causes of action of the complaint dated June 7, 2004 with leave to replead the claims of ISG and the claims that ISG purports to assert on behalf of Danstrupland and it is further

ORDERED that the remainder of the complaint dated June 7, 2004 is severed and continues with respect to defendant FIRST MERCHANT BANK OSH LTD.

Dated: February 04, 2005

ENTER:

J.S.C.