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| Goel v Ramachandran |
| 2012 NY Slip Op 33791(U) |
| April 4, 2012 |
| Supreme Court, Westchester County |
| Docket Number: 50017/10 |
| Judge: Alan D. Scheinkman |
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION**

**Present: HON. ALAN D. SCHEINKMAN,
Justice.**

-----X
VIKAS GOEL and RAINFOREST TRADING LTD.,

Plaintiffs,

-against-

ANUSH RAMACHANDRAN, BUNGE LTD., and
BUNGE S.A.,

Defendants,
-----X

Index No. 50017/10
Motion Date: 1/27/12
SEQ # 002

DECISION & ORDER

Scheinkman, J:

Defendants Bunge Ltd. and Bunge S.A. (the "Bunge Defendants") move to dismiss the Amended Complaint pursuant to CPLR 3211(a)(7) (failure to state a cause of action) and CPLR 3211 (a)(8) (lack of personal jurisdiction). Plaintiffs Vikas Goel ("Goel") and Rainforest Trading Ltd. ("Rainforest") ("Plaintiffs") oppose the motion.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs claim that they were defrauded into entering into a Share Subscription Agreement dated November 29, 2006 under which Goel, the then owner of 99.99% of the shares of eSys Technologies Pte Ltd. ("eSys"), agreed to sell approximately 51% of his shares to Teledata Informatics, Ltd. ("Teledata")¹ for approximately \$105 million² (the "Stock Purchase Agreement") (Affirmation of Wendy H. Schwartz, Esq. dated October 4, 2011 ["Schwartz Aff."], Ex 1 [hereinafter "Amended Complaint"] at ¶ 42). The fraud is alleged to have been perpetrated by Teledata, Anush Ramachandran ("Ramachandran") (the principal of numerous Teledata-related entities described, *infra*) and the Bunge Defendants.

¹Teledata is an Indian company.

² It is alleged the agreed upon sum was thereafter increased to \$120 million, \$105 million of which was to be equity (Amended Complaint at ¶ 42).

It is Plaintiffs' contention that Ramachandran/Teledata and the Bunge Defendants engaged in a fraud consisting of "the '*churning*' of debts and other obligations owed by Teledata to the State Bank of India ["SBI"]. The total amount of bank guarantees issued by [SBI] on behalf of Teledata to Bunge S.A. was in excess of US\$200,000,000" (Affidavit of Vikas Goel affirmed April 26, 2011 at ¶ 68, attached as Ex. 16 to Sentner Aff.). Goel explains in an affidavit he submitted in connection with an action now pending in Singapore concerning this dispute:

Teledata appointed Bunge Limited/Bunge S.A. as a distributor and/or agent for the sales of its software products; ... Teledata and Bunge Limited/Bunge S.A. would between them enter into fictitious contracts for the sale of software by Teledata to Bunge Limited/Bunge S.A.; Bunge Limited/Bunge S.A. thereafter in turn would enter into similar fictitious contracts for the sale of the said software with entities related to Teledata and/or its officers; ... Teledata would then liaise with officers of the Plaintiff/SBI India to get the Plaintiff/SBI India to issue bank guarantees in favour of Bunge Limited/Bunge S.A. for the full value of the orders placed by Bunge Limited/Bunge S.A. with Teledata. These bank guarantees are furnished by Teledata to Bunge Limited/Bunge S.A. purportedly to guarantee the performance of the contract and/or that the software products ordered by Bunge S.A. are not defective; ... Bunge Limited/Bunge S.A. would effect advance payment of approximately 93% of the value of these purchase orders to Teledata. After a brief period, Bunge Limited/Bunge S.A. would make a claim on Teledata for the full payment of the purchase order on the pretext of non-performance of the contract or that the software products sold by Teledata are defective. When Bunge Limited/Bunge S.A. makes the said claim, one of two things would happen:- i. Teledata and/or its officers would, if it had the necessary funds available through prior sham transactions, arrange for the necessary funds to be remitted to Bunge Limited/Bunge S.A. in settlement of these claims; or ii. In the event Teledata did not have the necessary funds, Bunge Limited/Bunge S.A. would call on bank guarantees issued by ... SBI India on the pretext of non-performance or breach of the fictitious contract, and would receive 100% of the value of the said defective software from ... SBI India; ... In effect, Bunge Limited/Bunge S.A., having paid in advance only 93% of the value of the purchase order, would benefit from this arrangement as it would receive the said 93% of the value of the purchase order as well as the remaining 7% of the value of the same (i.e., the full value of the purchase order). The 7% of the purchase order is retained by Bunge Limited/Bunge S.A. as their

commission for facilitating the fraudulent transaction ... With the 93% of the sale proceeds that Teledata had received in advance from Bunge Limited/Bunge S.A., Teledata would place the said sum or part thereof with ... SBI India to procure further guarantees. This sum would constitute approximately 50% of the value of the fresh guarantee issued; and ... In this manner, through repeated cycles of fictitious orders, Teledata would procure ... SBI India to issue bank guarantees for substantial sums which were eventually called upon by Bunge Limited/Bunge S.A. when the fraudulent scheme could not be sustained ... The above cycle was repeated until the liabilities of Bunge Limited/Bunge S.A. for the said bank guarantees amounted to hundreds of millions of dollars. This happened despite the fact that ... SBI India knew or ought to have known at all times that there was no underlying product sold to Bunge Limited/Bunge S.A., and that Bunge Limited/Bunge S.A. was an agribusiness and food company (Affidavit of Vikas Goel affirmed April 26, 2011 at ¶ 66, attached as Ex. 16 to Affirmation of Robert C. Sentner, Esq. dated January 27, 2012 ["Sentner Aff."]).³

This action was initially filed in this Court on September 24, 2010. On October 28, 2010, the Bunge Defendants filed a motion to dismiss based on the same grounds as those asserted herein. On November 5, 2010, the Court held a Commercial Division Rule 24 conference because the Bunge Defendants first motion was filed without a pre-motion conference required by Rule 24. At the conference, the Court asked Plaintiffs' counsel if he wished to amend the Complaint to allege additional jurisdictional facts to support the assertion of jurisdiction over Bunge S.A. based on the presence of its parent, Bunge Ltd. in New York. Plaintiffs' counsel requested time to consider the Court's question and the Court adjourned the conference until November 19, 2010. At the November 19, 2010 conference, Plaintiffs' counsel advised the Court that Plaintiffs had amended their Complaint, thereby mooting the Bunge Defendants' initial motion. Counsel for the Bunge Defendants then sought to pursue dismissal as against the Amended Complaint.

In the meantime, based on an arbitration clause set forth in the Stock Purchase Agreement, on November 12, 2010, Plaintiffs initiated an arbitration in Singapore against Teledata and two of its subsidiaries. As a result of that arbitration, on November 29, 2010, Ramachandran removed this action to the United States District Court, Southern District of New York, Case No. 10-CV-8916 (Judge Kenneth M. Karas) pursuant to section 205 of the New York Convention on the grounds that, *inter alia*, the claims in this action arose out of and in connection with the Stock Purchase Agreement and the claims were intertwined such that

³According to Goel, this led to the blacklisting of Bunge Ltd. and Bunge S.A. in India and SBI India could no longer issue bank guarantees in favor of Bunge Limited/Bunge S.A. (*id.* at ¶ 69).

the matters in the federal action would be impacted by the Singapore Arbitration. Ramachandran also requested that the case be stayed pending the resolution of the Singapore Arbitration. On January 21, 2011, Plaintiffs moved to remand the action to this Court, which was granted by Judge Karas in an Opinion and Order dated September 26, 2011 (the "Remand Order"). On October 24, 2011, after being notified that the action had been remanded, this Court held a Preliminary Conference and a pre-motion conference at which the Bunge Defendants' counsel requested leave to renew their prior motion to dismiss. The Court authorized the motion by the Bunge Defendants, but denied a stay of discovery and suggested to the Bunge Defendants that they voluntarily submit to jurisdictional discovery given the likelihood that this Court would grant Plaintiffs the opportunity to have such discovery (CPLR 3211[d]) in its determination on the Bunge Defendants' renewed motion. The Court signed a Preliminary Conference Order setting forth a discovery cut-off date of January 20, 2012 and a trial readiness conference for January 20, 2012.⁴ The parties ultimately engaged in some limited jurisdictional discovery and the parties other than the Bunge Defendants engaged in substantive discovery. This motion ensued.

Because this is a motion to dismiss, the Court must construe the allegations of the Amended Complaint as true for purposes of this determination. As such, a brief overview of these allegations follows.

THE ALLEGATIONS OF THE AMENDED COMPLAINT

The Amended Complaint alleges that eSys is a company incorporated under the laws of Singapore with its headquarters located in Singapore and "was the largest computer hard drive distributor in the world" distributing computer drives for manufacturers such as Seagate, Western Digital, Samsung, Toshiba and Fujitsu with annual revenues totaling approximately \$2 billion (Amended Complaint at ¶ 34). According to Plaintiffs, in 2006, eSys and Seagate had a dispute, causing a need for eSys to raise capital in the amount of \$100 million (Amended Complaint at ¶ 35). Plaintiffs contend that in 2006, a number of companies, including Credit Suisse⁵ proposed to invest tens of millions of dollars in eSys (*id.* at ¶ 36).

The transaction conducted pursuant to the Stock Purchase Agreement took the form of the establishment of a holding company, Plaintiff Rainforest (an entity organized under the laws of the British Virgin Islands), to which Goel would transfer all of his eSys shares, and

⁴Bunge Ltd. submitted to some jurisdictional discovery, but because Bunge S.A. did not submit to any discovery and because the Bunge Defendants did not submit to discovery on the merits, the Court adjourned the discovery cut-off and trial readiness dates and advised that new dates would be set forth in its determination on the Bunge Defendants' motion.

⁵Plaintiffs claim that Credit Suisse valued eSys at \$500 million (Amended Complaint at ¶ 36).

then Rainforest would be owned by Teledata (51% interest) and Goel (49% interest). Teledata's interest was subsequently decreased such that it was to hold less than a 50% interest.⁶ "Ramachandran and Teledata represented that Teledata would invest \$25 million of its own funds, and that once it had done so, it would have access to an \$80 million loan from the ... [SBI] to fund the rest of its contribution and loan" (*id.* at ¶46).

According to Plaintiffs, a Rainforest bank account was established to enable Teledata to wire the funds required by the Stock Purchase Agreement but because Teledata was to have the controlling interest in Rainforest, Teledata had control over the disbursement of the funds placed in the Rainforest account. Plaintiffs contend that Teledata did not have the authority to use the funds deposited to "pay its own expenses or for its own uses. Specifically, Teledata did not have authority to transfer funds to Bunge in connection with any business dealings they may have had" (*id.* at ¶ 47). Plaintiffs contend that very little, if any of this money was received by Rainforest and Goel based on a wrongful scheme whereby Ramachandran converted the funds deposited in connection with the sale to, among others Bunge Ltd. and Bunge S.A. as well as other Ramachandran-controlled entities (*id.* at ¶ 57). Plaintiffs allege that the Bunge Defendants assisted Ramachandran in his fraudulent scheme.

As an example, Plaintiffs allege that on February 6, 2007, Ramachandran and Teledata caused \$3.75 million to be transferred into the Rainforest Account, but that the same amount was transferred out the next day to Bunge S.A. Bunge S.A. then transferred the \$3.75 million back to Teledata and "Teledata then 'invested' another \$3.75 million into the Rainforest Account on February 9, 2007. That \$3.75 [million] was immediately transferred again, to Bunge, that same day" (*id.* at ¶¶ 60-62). According to Plaintiffs, "Rainforest's bank records show that Bunge received directly \$7.5 million from Rainforest's bank accounts on February 6 and February 9, 2007" (*id.* at ¶ 64). In addition to the unlawful transfers to Bunge S.A., Plaintiffs assert that on February 10, 2007, Teledata wired \$3.5 million into Rainforest and on February 12, 2007, that same sum was wired to a Ramachandran-controlled entity (*id.* at ¶ 63). Plaintiffs allege that by letter dated January 13, 2010 (the "January 2010 letter"), Bunge acknowledged that it received the \$7.5 million but refused to return these funds. It is Plaintiffs' contention that because "Bunge had no contractual relationship with Rainforest or eSys," it had no basis to retain these funds (*id.* at ¶ 65).

Plaintiffs claim they were defrauded into entering into the Stock Purchase Agreement. Specifically, Plaintiffs contend that during the course of Plaintiffs' negotiations with Ramachandran and Teledata, Ramachandran and other Teledata representatives "represented that Teledata was a very large company with hundreds of millions in sales, and had cash reserves in excess of \$100 million that were available to pay for its investment in eSys. Plaintiffs reasonably relied on the truth of these statements in determining to proceed with Teledata rather than Credit Suisse ... Upon information and belief, Ramachandran made

⁶Goel received 65 million shares in Rainforest and Teledata received 55 million shares (a 45.8%) interest, but those shares were pledged to the State Bank of India as collateral for the \$80 million loan received (Amended Complaint at ¶ 48).

these representations and omissions with an intent to deceive eSys and Goel, and took advantage of his superior knowledge in the transaction concealing information about the fraudulent scheme” (*id.* at ¶ 39-40). Plaintiffs contend that Ramachandran set up Teledata as a sham corporation through which he accomplished his fraudulent and wrongful ends and that had Goel known the truth, he would not have entered into the Stock Purchase Agreement (*id.* at ¶ 51).

The basis for liability against Bunge Ltd. appears to be largely grounded in its relationship with Bunge S.A. – *i.e.*, to the extent funds were transferred to Bunge S.A. accounts, they were done so for the benefit of Bunge Ltd. This theory of liability is based on (1) Bunge Ltd.’s by-laws, which state that “Bunge Ltd. controls the management and policies of all Bunge Group companies, which means it controlled the transfer of the funds here” (*id.* at ¶ 68); (2) the Bunge Group documents, which show that Bunge Group companies’ banking and financing are centralized and pooled and “[u]pon information and belief, the funds wired to Bunge were controlled and centralized by Bunge Ltd., and Bunge Ltd. reported those funds as assets of its own” (*id.* at ¶ 67); and (3) Bunge S.A. being the alter ego of Bunge Ltd. such that the corporate veil between Bunge S.A. and Bunge Ltd. should be pierced and Bunge Ltd. be held liable for Bunge S.A.’s obligations (*id.* at ¶ 76).

Based on Bunge S.A.’s receipt and alleged wrongful retention of the funds belonging to Rainforest, Plaintiffs assert causes of action for money had and received, unjust enrichment, and tortious interference with contract⁷ against the Bunge Defendants.

Plaintiffs assert a cause of action for fraud against Ramachandran based on his misrepresentation in November 2006 that “Teledata was a substantial bona fide company with over \$100 million in cash available to invest in eSys. In substantial part based on those representations, Goel agreed to enter into the agreement with Teledata” (*id.* at ¶ 92). Plaintiffs allege

Upon information and belief, Ramachandran was fully aware at all times that the transaction was a sham, designed to defraud State Bank of India, Goel and eSys, and Teledata’s investors. Specifically, the transaction was for the purpose of wrongfully

⁷The tortious interference with contract cause of action is based on Plaintiffs’ claim that “[u]pon information and belief, Bunge was at relevant times aware of the agreement between Teledata and Goel, and the agreement in which Teledata committed to investing sum[s] in Rainforest” and that “Bunge intentionally received and kept funds that it knew were due to Plaintiffs pursuant to the agreement between Teledata and Goel and Teledata and Rainforest” (Amended Complaint at ¶¶ 85-86). Plaintiffs contend that this material breach caused by the Bunge Defendants has deprived Plaintiffs not only of the sums due, but has “substantially destroyed the value of eSys and eSys California, thus destroying the value of Goel’s shares in those entities, and the value of Rainforest’s holding in those entities” causing damages exceeding \$500 million (*id.* at ¶ 88).

obtaining approximately \$80 million in loan proceeds from the [SBI], of artificially inflating Teledata's share price, and using the phony Teledata acquisition to accomplish those ends ... Upon information and belief, Ramachandran personally benefitted by the fraudulent transaction ... [and] communicated with Bunge and participated in orchestrating Bunge's involvement in the wrongful scheme ... Because of his position and circumstances, Ramachandran had an obligation to disclose to Goel the foregoing facts. Goel justifiably relied on Ramachandran's honesty and justifiably believed that he would disclose facts such as those set forth above had he known them. Had Goel been informed by Ramachandran of those facts, he would not have entered into the transaction with Teledata ... However, Ramachandran intentionally concealed those facts from Goel (*id.* at ¶ 76).

Plaintiffs assert a claim of aiding and abetting a fraud against the Bunge Defendants on the grounds that "Defendants Bunge knowingly received funds that it knew were a part of that fraudulent conduct, and participated in kiting those funds in order to further the fraudulent pattern of activity set forth above ... [and] Bunge's conduct provided substantial assistance ... to enable the fraudulent conduct to occur" (*id.* at ¶¶ 102- 103).

The jurisdictional allegations of the Amended Complaint can be summarized as follows:

- (1) eSys California, Corp. ("eSys California") is a wholly owned subsidiary of eSys that derived revenue in New York and "Defendants' wrongful conduct damaged eSys California's value" (*id.* at ¶ 7).
- (2) Ramachandran is a resident of Westchester County and is an officer of Teledata (*id.* at ¶ 10).
- (3) The scheme was orchestrated and Bunge's participation in the scheme was formulated in White Plains, New York, since Ramachandran's office and Bunge's corporate headquarters are both located there (*id.* at ¶ 70).
- (4) "Bunge Ltd. is a publicly traded limited liability company, organized under the laws of Bermuda. Its headquarters is located in White Plains, New York. Bunge Ltd. is the sole shareholder of, and controls, Bunge S.A." (*id.* at ¶ 10).
- (5) "Bunge SA is a wholly-owned subsidiary and agent of Bunge Ltd. It is incorporated and headquartered in Switzerland. Bunge SA is a part of the Bunge Group, and is controlled by Bunge Ltd.

Bunge Ltd. presents Bunge SA as a department of Bunge Ltd. As set forth in paragraphs 12-33 below, Bunge SA is subject to the jurisdiction of this Court, and is the alter-ego of Bunge, Ltd. (*id.* at ¶ 11).

The allegations found in paragraphs 12-33 consist of the following:

(1) There are at least 20 companies in the Bunge Group registered to do business in White Plains, New York. Bunge S.A. is reported to perform various services for the Bunge Group companies based on arms-length transactions which Plaintiffs contend means that there are "numerous contracts between Bunge SA and other Bunge Group companies in New York" (*id.* at ¶ 15);

(2) Bunge S.A. maintains one bank account in New York at the Bank of New York, which was attached in a New York litigation in which Bunge S.A. was a party (*id.* at ¶ 17);

(3) "Bunge SA's contractual relationship with Teledata was publicly announced in White Plains by Daniel Rudolph. Daniel Rudolph resides in White Plains, works from Bunge's White Plains, headquarters, and is elsewhere identified as Director, Financial Services, Bunge Agribusiness, White Plains. Mr. Rudolph is also identified as a director of Bunge S.A." (*id.* at ¶ 19).

(4) "Bunge SA regularly and continuously engages in business in New York by engaging counsel and invoking the jurisdiction of New York Courts to pursue its business interests. On no fewer than ten occasions in past years, Bunge SA has commenced lawsuits in New York Courts against businesses with which it did business. On each of these occasions, Bunge SA sought injunctive relief from New York Courts, seeking, and often obtaining, orders freezing assets and bank accounts. In many or all of those cases, Bunge SA then entered into settlements through New York counsel, with the companies it had sued, having used the New York Courts to achieve its business ends" (*id.* at ¶ 20).

(5) "In other cases, Bunge SA was sued as a defendant in New York courts. On at least one such occasion, a Court in New York exercised its jurisdiction and ordered that Bunge SA bank account in New York be attached. Again, Bunge SA, through its New York counsel, negotiated and settled the case" (*id.* at ¶ 21).

(6) Bunge Ltd.'s By-laws provide that Bunge Ltd. has the power to direct the management and policies of Bunge S.A. (*id.* at ¶ 22).

(7) Bunge S.A.'s bank accounts are controlled by Bunge Ltd. and its financing is carried out through loans from other Bunge Group companies that are controlled by Bunge Ltd. "This means, among other things, that Bunge SA itself is undercapitalized, and that its funds are intermingled with other Bunge Group entities" (*id.* at ¶ 23).

(8) The financing activities of Bunge Group companies "are performed through 'a centralized financing structure,' which includes a 'master trust facility, the primary assets of which consist of intercompany loans made to Bunge Ltd. and its subsidiaries'" (*id.* at ¶ 24).

(9) Bunge Ltd. guarantees loans provided by third parties to the Bunge Group subsidiaries so when Bunge S.A. borrows money, either Bunge Ltd. loans the money or guarantees Bunge SA's obligations under the loan (*id.* at ¶ 25).

(10) Plaintiffs allege "[i]n its public documents, Bunge Ltd. presents Bunge SA to the public as a mere department, or 'operating arm' of Bunge Ltd." (*id.* at ¶ 26) and "Bunge SA's address and office space in Geneva, Switzerland, is presented by Bunge Ltd. as its address for 'Bunge Europe'" (Amended Complaint at ¶ 31).

(11) Plaintiffs allege "[t]here are common officers and employees between Bunge SA, Bunge Ltd., and other Bunge Group companies" (*id.* at ¶ 27). Plaintiffs provide the following examples – Mr. Jean-Louis Gourbin (Administrative President of Bunge SA) is reported by Bunge Ltd. to be its Chief Executive Officer "Bunge Europe" (reported as Bunge Ltd.'s European Operating arm⁸); Frans Mol, the author of the January 2010 letter from Bunge S.A. is represented by Bunge Ltd. to be General Counsel of Bunge Europe; and Henri Rieux, a Bunge S.A. employee is represented by Bunge Ltd. as Vice President, Corporate Affairs, Bunge Europe (*id.* at ¶¶ 28-29).⁹

(12) "Bunge Ltd. reports Bunge SA financial results as if they were Bunge Ltd.'s own meaning that the funds at issue in this case were

⁸See Affirmation of Amanda L. Devereux, Esq. in Support of Plaintiffs' Opposition to the Bunge Defendants' Motion to Dismiss dated November 8, 2011 ["Devereux Opp. Aff."], Ex. 5).

⁹Devereux Opp. Aff., Ex. 24.

reported by Bunge Ltd. in White Plains as Bunge Ltd.'s funds" (*id.* at ¶ 32).

A. The Bunge Defendants' Contentions in Support of Motion

In support of their motion, the Bunge Defendants submit an affirmation from their counsel, Wendy H. Schwartz, Esq. and a memorandum of law. In her affirmation, Ms. Schwartz attaches (1) the Amended Complaint; (2) copies of the verified complaints filed against Bunge S.A. in the Southern District of New York seeking relief pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims referenced in the Amended Complaint; and (3) documents evidencing the removal and remand proceedings in this case as well as stipulations and scheduling orders showing that the Bunge Defendants have preserved their right to move to dismiss (Affirmation of Wendy H. Schwartz, Esq. dated October 4, 2011 [Schwartz Aff., Exs. 1-8]).

The essence of the Bunge Defendants' motion is that not only have Plaintiffs failed to allege any basis for personal jurisdiction over Bunge S.A., Plaintiffs have also failed to allege a cause of action as against Bunge Ltd. or Bunge S.A. since they have shown "nothing more than Bunge S.A. receiving two contract payments" from Teledata in February 2007 which were paid through Rainforest's account (Defs' Mem. of Law at 1-2). It is the Bunge Defendants' position they have been sued because the real defendant – Teledata – may not be sued given the arbitration clause in the Stock Purchase Agreement and, in any event, is without assets. Thus, Plaintiffs are "improperly looking elsewhere for redress" (*id.* at 2).

The Bunge Defendants contend that Plaintiffs have not established jurisdiction pursuant to CPLR 301 because all that Plaintiffs have alleged is that Bunge S.A. does business on a regular basis with the Bunge Ltd. and Bunge Group companies in New York and "it is well established that 'the "doing business" test does not subject a subsidiary corporation to personal jurisdiction simply because a state has jurisdiction over the parent, even if the parent is the sole shareholder of the subsidiary'" (Defs' Mem. of Law at 5, *quoting Northrop Grumman Overseas Serv. Corp. v Banco Wiese Sudameris*, 2004 WL 2199547 [SD NY 2004]). The Bunge Defendants contend that having a bank account in New York is insufficient to confer jurisdiction absent extraordinary circumstances.

Responding to Plaintiffs' assertions concerning the lawsuits either brought by Bunge S.A. or brought against Bunge S.A. in New York, the Bunge Defendants explain that those were maritime actions wherein the district court, sitting in admiralty

did not exercise personal jurisdiction over Bunge S.A. Rather, the plaintiffs in those cases sought orders of attachment pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims, which provides in rem jurisdiction for the limited purpose of attaching property of a defendant not 'found within the district' ... Plaintiffs' reference to those cases simply proves that Bunge S.A. is not subject to jurisdiction in New York, as the use of

Supplemental Rule B specifically requires that a defendant *not* be subject to personal jurisdiction. See Fed. R. Civ. P. Supp. R. B(1)(a) (Defs' Mem. of Law at 6).

It is the Bunge Defendants' position that Plaintiffs' attempts to assert jurisdiction over Bunge S.A. based on Bunge Ltd.'s doing business in New York are misplaced because neither the mere department nor agency theories for conferring jurisdiction over a subsidiary based on the acts of a parent apply in this case. They claim that there is no basis for finding Bunge S.A. is a mere department of Bunge Ltd. since (1) "the manner in which Bunge Limited allegedly refers to Bunge S.A. is irrelevant to this Court's jurisdictional analysis" (Defs' Mem. of Law at 8); (2) the fact that Bunge Ltd. and Bunge S.A. "have overlapping officers, directors, or employees is insufficient to establish that the subsidiary is a mere department of its parent" (*id.* at 9); and (3) "[a]llegations of consolidated financial reporting and common ownership [without any allegations that Bunge S.A. is wholly financially dependent on Bunge Ltd.] are not enough to allege that a subsidiary is a 'mere department' of its parent for the purposes of personal jurisdiction" (*id.* at 10).

The Bunge Defendants further assert that Plaintiffs have not alleged any facts to support an agency theory of jurisdiction because there are no allegations that Bunge Ltd. "performs work in New York on behalf of Bunge S.A." (*id.* at 12).

With regard to jurisdiction under CPLR 302, the Bunge Defendants distill Plaintiffs 302 allegations to (1) that the "damages occurred, amongst other places, in New York"; (2) that "Bunge's participation in the scheme was formulated in White Plains, New York, between Ramachandran, among others, and Bunge Limited" and (3) Bunge's contractual relationship with Teledata was publicly announced in White Plains, New York by Daniel Rudolph, Director, Financial Services, Bunge Agribusiness (*id.* at 12-13). On the issue of New York damages, the Bunge Defendants assert that the Amended Complaint fails to allege any facts showing New York-based harm since (1) Rainforest and Goel do not reside in New York as they are respectively a British Virgin Islands corporation and a resident of Dubai, and (2) the transactions involving Bunge S.A. involve electronic transfers between foreign bank accounts, which also occurred outside New York (*id.*).

The Bunge Defendants contend that Plaintiffs' allegations concerning the formulation of the scheme in White Plains, N.Y. are insufficient because (1) they lack the specificity required under CPLR 3016(b), and (2) in any event, they are insufficient as against Bunge S.A. because Plaintiffs do not allege Bunge Ltd. was acting as Bunge S.A.'s agent which would require that Plaintiffs allege that Bunge Ltd. took actions in New York for the benefit of Bunge S.A. (*id.* at 13).

According to the Bunge Defendants, the announcement of a contract in New York without allegations that it was negotiated or executed or to be performed in New York is insufficient to confer CPLR 302 jurisdiction (*id.*).

The Bunge Defendants argue that even if CPLR 301 or 302 jurisdiction had been established, it is clear that it would be a violation of due process to exercise jurisdiction over

Bunge S.A. as it does not have minimum contacts with New York “[b]ecause Bunge S.A. has engaged in no activities ‘purposefully directed’ towards New York and Plaintiffs have alleged nothing more than a transfer of funds from one foreign corporation to another foreign corporation ...” (*id.* at 14). Furthermore, these Defendants contend, “Plaintiffs offer no facts, other than the facially deficient and wholly conclusory ‘mere department’ allegations already addressed above, to suggest why it would be reasonable to litigate a matter in a New York court that involves only foreign parties, and where no relevant transaction or harm occurred in New York” (*id.* at 15).

With regard to the branch of its motion seeking to dismiss the Amended Complaint for failure to state a claim, the Bunge Defendants first assert that the claims as against Bunge Ltd. are wholly based on a piercing of the corporate veil theory and the Amended Complaint is devoid of any allegations showing Bunge Ltd.’s complete domination of Bunge S.A. with regard to the subject matter of this action (*id.* at 16). The Bunge Defendants contend that the allegation that the transfer of funds to Bunge S.A. accounts was made for the benefit of Bunge Ltd. is unsupported and lacks the key domination characteristic. The Bunge Defendants point out that Plaintiffs’ claim that “Bunge S.A. must be ‘undercapitalized’ because its funds are pooled with those of other Bunge entities is conclusory and inconsistent with Plaintiffs’ other allegation that Bunge S.A. maintains an ‘arms length’ business relationship with other Bunge entities” (*id.* at 17). According to the Bunge Defendants, other than the derivative liability as the parent of Bunge S.A., the sum total of allegations concerning Bunge Ltd.’s involvement is the allegation that Bunge Ltd. must have orchestrated the scheme as its offices are a mile away from Ramachandran (*id.*). The Bunge Defendants contend that such speculation as to Bunge Ltd.’s participation is wholly insufficient to support the continuation of this action against Bunge Ltd. (*id.*).

The Bunge Defendants argue that the claims for money had and received and unjust enrichment are insufficient because Plaintiffs admit that (1) there were contracts between Teledata and Bunge S.A.,¹⁰ and (2) at the time of the transfers, Rainforest had given Teledata control over the Rainforest’s account, and Plaintiffs have not alleged that Bunge Defendants knew that Teledata lacked authority to make payments from Rainforest’s account (*id.* at 18). “Accordingly, it is not against equity and good conscience to let Bunge S.A. keep money it was owed and which it received in good faith pursuant to valid contracts with Teledata” (*id.*).

Regarding Plaintiffs’ tortious interference with contract claim, the Bunge Defendants contend that this claim fails because (1) it is barred by the three year statute of

¹⁰As discussed *infra*, based on the discovery produced, the \$7.5 million transfer was not based on contracts between Bunge S.A. and Teledata, but instead, was based on contracts between Teledata and another Bunge Ltd. subsidiary, Grains and Industrial Products Trading PTE Ltd. (“GRIPT”). Accordingly, there has been no showing that there were ever any contracts between Bunge S.A. and Teledata justifying some \$50 -\$100 million dollars worth of transfers over a period of less than one year. This lends credence to Plaintiffs’ contentions that Bunge S.A. was involved in sham transactions with Teledata to assist it in its alleged fraudulent dealings with Plaintiffs and the SBI.

limitations that accrued on February 7 and 9, 2007 “when Bunge received the funds that Plaintiffs allege were due to them under their contracts with Teledata” (*id.* at 19); ¹¹ and (2) Plaintiffs have failed to allege how the Bunge Defendants receipt of the funds induced Teledata to breach its agreements with Plaintiffs (*id.* at 20).

The Bunge Defendants argue that the fraud claim must be dismissed because Plaintiffs have not pleaded the fraud claim with the requisite particularity and the allegations are (1) made on information and belief, (2) fail to distinguish between the two Bunge Defendants, and (3) simply state that “Ramachandran communicated with Bunge and participated in orchestrating Bunge’s involvement in the wrongful scheme” and “Bunge’s participation in the wrongful scheme was formulated in White Plains, New York, between Ramachandran, among others, and Bunge Ltd.” (*id.* at 22). According to the Bunge Defendants, Plaintiffs’ failure to assert any misrepresentation by the Bunge Defendants to Plaintiffs renders the claim fatally defective. The Bunge Defendants further assert that Plaintiffs have failed to plead aiding and abetting a fraud against the Bunge Defendants because the allegations¹² fail to meet the specificity requirements of CPLR 3016 and are simply conclusory in that they fail to set “forth how or why Bunge even knew about the alleged fraud, much less what actions the Bunge Defendants purportedly took to ‘substantially assist’ the alleged fraud” (*id.*).

The Bunge Defendants request that the Court stay discovery as to Bunge S.A. and Bunge Ltd. pending this Court’s determination on this motion. This request has largely been mooted by the Court’s directives given at the October 24, 2011 conference.

B. Plaintiffs’ Contentions in Opposition

There were two phases to Plaintiffs’ opposition to the Bunge Defendants’ motion. Their original opposition, which was submitted pre-jurisdictional discovery, relied on all publicly-filed documents to support Plaintiffs’ assertions of jurisdiction over Bunge S.A.

The crux of Plaintiffs’ initial opposition was to point out the fraud associated with the wiring of \$7.5 million to Bunge S.A. Thus, Plaintiffs assert that Bunge’s response to Plaintiffs’ demand that it return the \$7.5 million by asserting that the money was “in respect of certain contracts for the sale and purchase of goods between Teledata and Bunge, S.A.” (Amended Complaint, Ex. B) was a lie since “there would be no plausible reason for Teledata to wire \$7.5 million to Bunge S.A.” since it was Teledata, not Bunge S.A., that was supposedly the supplier of goods to Bunge, S.A. (Pltfs’ Opp. Mem. at 3) and further, there was no plausible circumstance for Teledata to legitimately purchase \$7.5 million worth of goods from Bunge S.A., which sells agricultural products (*id.* at 4).

¹¹The Bunge Defendants further argue that it is well settled that a tortious interference with contract claim is not a continuing tort (Defs’ Mem. of Law at 20).

¹²The Bunge Defendants assert that the aiding and abetting allegations are found at paragraphs 99-103 of the Amended Complaint.

Plaintiffs contend that when Bunge came under scrutiny by the Indian government, it “called upon bank guarantees from the SBI for the dummy purchase transactions from Teledata. Bunge’s actions sucked all the liquidity out of Teledata and Teledata, in turn, fraudulently sucked out liquidity from Rainforest and eSys ... Teledata used the money it converted from Rainforest and eSys to pay banks for margin calls on dummy Bunge bank guarantees, causing the business of Rainforest and eSys to collapse” (Pltfs’ Opp. Mem. at 4).

According to Plaintiffs, the Bunge Defendants were well aware that Teledata was manipulating fictitious sales and profit figures by using these “dummy transactions so that the banks would issue loans to Teledata and Teledata could artificially increase its share price in the stock market” and therefore, acted as a willing conduit in these money laundering activities (Pltfs’ Opp. Mem. at 4). Plaintiffs contend that it was Ramachandran who “coordinated Teledata’s dealing with Bunge and assisted with setting up the scheme of dummy billing and money laundering” and in September 2007, Ramachandran confirmed to Plaintiffs that “Bunge was a knowing participant in the scheme ...” (Pltfs’ Opp. Mem. at 5, *citing* Pltfs’ Responses to Demand for a Verified Bill of Particulars, Affirmation of Amanda L. Devereux in Support of Plaintiffs’ Opposition to the Bunge Defendants’ Motion to Dismiss dated September 8, 2011 [“Devereux Opp. Aff.”], Ex. 38 at ¶16a).

In support of their argument that Bunge Ltd.’s activities in New York may be asserted against Bunge S.A. for purposes of jurisdiction since Bunge S.A. is a mere department or agent of Bunge Ltd., Plaintiffs point out that New York courts “regard one fact as essential to the assertion of jurisdiction over a foreign related corporation and three others as important. The essential fact is common ownership” (Pltfs’ Opp. at 7, *quoting Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp.*, 751 F2d 117 [2d Cir 1984]) (hereinafter “*Beech*”), which is met here because Bunge S.A. is the wholly owned subsidiary of Bunge Ltd. (Pltfs’ Opp. Mem. at 7). The three important facts are (1) financial dependency of the subsidiary on the parent, (2) the degree to which the parent interferes in the selection and assignment of the subsidiary’s executive personnel and fails to observe corporate formalities, and (3) the degree of control over the marketing and operational policies of the subsidiary exercised by the parent. “[N]ot every factor need weigh entirely in the plaintiff’s favor” (Pltfs’ Opp. Mem. at 7, *quoting ESI, Inc. v Coastal Corp.*, 61 F Supp 2d 35, 51 [SD NY 1999]).

Financial dependency, argue Plaintiffs, is determined by looking at “whether the two companies’ accounts have been intermingled, the parent has paid the subsidiary’s expenses, the parent has loaned money to the subsidiary without interest, or the parent has guaranteed the subsidiary’s obligations” (Pltfs’ Opp. Mem. at 8, *quoting Dorfman v Marriott Intl. Hotels, Inc.*, 2002 WL 14363 at * 8, n.12 [SD NY 2002]). Plaintiffs argue that they have shown that Bunge S.A. is financially dependent on Bunge Ltd. based on (1) Bunge S.A.’s bank accounts being controlled by Bunge Ltd. and the funds being intermingled with the funds of other Bunge Group entities leaving Bunge S.A. undercapitalized, (2) Bunge S.A.’s “financing activities are performed through a ‘centralized financing structure’ including ‘a master trust facility, the primary assets of which consist of intercompany loans made to Bunge Ltd. and its subsidiaries”, (3) Bunge Ltd. guarantees Bunge S.A.’s loans from the third parties, and (4) Bunge Ltd. reports Bunge S.A.’s financial results as a part of Bunge Ltd’s financial statements (Pltfs’ Opp. Mem. at 7, *citing* Amended Complaint and Bunge 2009 Annual Report at 34-35,

Deveruex Opp. Aff., Ex. 1).

With regard to the second factor, Plaintiffs argue that they have established it as well based on the public records produced showing (1) an overlap of key executive personnel, (2) the fact that Bunge Ltd.'s European Operating Arm shares the same address in Geneva as Bunge S.A. – “[t]he only plausible inference is that Bunge, S.A. and Bunge Europe are one and the same” (Pltfs’ Opp. Mem. at 9); (3) Bunge Ltd’s Annual Report indicates that Bunge Ltd. controls all of the Bunge Group entities so Bunge has the power to direct the management and executive personnel of Bunge S.A. (*id.*, citing 2009 Annual Report at 10, 27, Deveruex Aff., Ex. 1); and (4) the contractual relationship between Teledata and Bunge S.A. “was announced from White Plains, New York by a Bunge Ltd. employee who is also listed as a director of Bunge S.A.” (*id.*).

Turning to the third factor, Plaintiffs assert that they have provided evidence showing this as well since (1) “in its public documents Bunge Ltd. consistently presents Bunge, S.A. as a mere office or operating arm of Bunge Ltd.”; (2) while Bunge Ltd.’s website lists the Geneva address as the address of one of its locations, Bunge S.A. maintains no independent website (Pltfs’ Opp. Mem. at 10); and (3) Bunge S.A. is not listed on Bunge Ltd.’s website as providing any particular products of its own.

To support jurisdiction under an agency theory, Plaintiffs argue that it is found “where ‘the [parent corporation] does all the business in [New York] which [the subsidiary] could do were it here by its own officials’” (Pltfs’ Opp. Mem. at 12, quoting *Frummer v Hilton Hotels Intl., Inc.*, 19 NY2d 533, 537 [1967]) and here, based on various statements made in publicly-filed documents, Plaintiffs contend that Bunge Ltd., headquartered in White Plains, *inter alia*, controls Bunge S.A.’s finances and prepares its consolidated financial statements that include Bunge S.A.’s financial results, so it performs acts that Bunge S.A. would have performed if it had employees in New York (Pltfs’ Opp. Mem. at 13).

Alternatively, Plaintiffs argue that jurisdiction against Bunge S.A. may be established against it in its own right as it “has been consistently doing business in New York and taking advantage of the forum’s laws and protections” by (1) servicing other Bunge divisions located in New York (*citing* Deveruex Opp. Aff., Ex. 31 at 21); (2) possessing a New York bank account; (3) prosecuting and defending litigations in New York, the latest being filed in September 2011 in which Bunge S.A. is plaintiff;¹³ (4) contracting with and performing services for New York entities; (5) announcing the contract between Bunge S.A. and Teledata in New York; and (6) using its New York bank account to receive the \$7.5 million in payments from Rainforest (although Plaintiffs concede in their supplemental opposition that the money was deposited in Bunge S.A.’s bank account in Rotterdam).

Plaintiffs contend that jurisdiction may also be established pursuant to CPLR 302(a)(2) based on a co-conspiracy theory. According to Plaintiffs “where an act in

¹³The complaints in those actions are attached as Exs. 6-19 to the Deveruex Opp. Aff. Most involve claims of breaches of maritime contracts of charter parties and breaches of forward freight agreements.

furtherance of fraud is committed by a co-conspirator or agent of a defendants within New York, the act is sufficient to obtain jurisdiction over a non-New York defendants ... even if the foreign defendant never stepped foot in New York” (Pltfs’ Opp. Mem. at 13, quoting *Exclaim Assoc., Ltd. v Nygate*, 2005 NY Slip Op 52106[U], 10 Misc 3d 1063[A] at *5 [Sup Ct NY County 2005]).

In opposition to the branch of the Bunge Defendants’ motion seeking to dismiss the claims as against Bunge Ltd. on the grounds that there are no allegations that Bunge Ltd. had anything to do with this action, Plaintiffs argue that the “complaint plainly and plausibly alleges that Bunge Ltd. used its subsidiary Bunge S.A. to accept millions of dollars as part of a conspiracy with Ramachandran to defraud and steal from Plaintiffs. See Am. Comp., ¶¶ 66-67. Bunge Ltd. cannot avoid liability in this case merely because it arranged for the wrongfully diverted funds to be wired to its subsidiary in Switzerland” (Pltfs’ Opp. Mem. at 15).

It is Plaintiffs’ contention that they have sufficiently alleged a theory of alter ego liability against Bunge Ltd. based on their assertions that (1) Bunge Ltd. controls the management and policies of all Bunge Group companies, including the transfer of funds to and from Bunge S.A. (Amended Complaint at ¶¶ 22-24, 68); (2) Bunge Ltd. treats and reports the funds of Bunge S.A. as its own (*id.* at 24, 67-68); (3) Bunge S.A. is undercapitalized; (4) there are common officers between Bunge Ltd. and its subsidiaries; (5) Bunge S.A. is described as a mere department or operating arm; (6) the address for Bunge S.A. is the same address as Bunge Ltd.’s department “Bunge Europe”; (7) Bunge S.A. and Bunge Ltd. share the same in-house counsel and also their outside counsel for this litigation; and (8) Bunge Ltd. guarantees third party loans to Bunge S.A. (Pltfs’ Opp. Mem. at 15, citing Amended Complaint at ¶¶ 22-32).

In support of the sufficiency of its claim of money had and received, Plaintiffs contend that they have sufficiently alleged all three elements and the case cited by the Bunge Defendants (*Collision Plan Unlimited, Inc. v Bankers Trust Co.*, 185 AD2d 264 [2d Dept 1992]) is *inapposite*. Further, Plaintiffs argue that the Bunge Defendants cannot rely on an agency theory (*i.e.*, that Teledata was the actual or apparent agent of Rainforest) because Teledata had no authority to disburse funds from Rainforest’s account for its own expenses and uses. Further, the Bunge Defendants cannot rely on apparent agency since “Bunge S.A. had no prior dealings with Rainforest, [and therefore] it is implausible that Bunge S.A. believed Teledata to be an agent of Rainforest, much less authorized to disburse Rainforest funds. Having no prior dealings with Rainforest, Defendants will certainly not be able to point to any behavior of Rainforest that would give rise to a belief that Teledata was authorized to wire Rainforest’s funds for Teledata’s own expenses” (Pltfs’ Opp. Mem. at 17).

Plaintiffs likewise argue that they have sufficiently pleaded the elements for a claim of unjust enrichment and they contend that it is unnecessary for them to “establish a wrongful act by the person enriched” (*id.* at 18, quoting *Stern v H. DiMarzo, Inc.*, 2008 NY Slip Op 51163[U], 19 Misc 3d 1444[A] at *14 [Sup Ct Westchester County 2008]).

In support of the sufficiency of their tortious interference with contract claim, Plaintiffs argue that it is sufficiently pleaded since they have alleged (1) that there were contracts between Plaintiffs and Teledata, (2) that the Bunge Defendants were aware of those

contracts, (3) that the Bunge Defendants unjustifiably caused Teledata to breached those contracts, and (4) that Teledata breached those contracts causing considerable damage to Plaintiffs (Pltfs' Opp. Mem. at 19).

In opposition to the Bunge Defendants' alternative ground for dismissal – that the claim is barred by the statute of limitations – Plaintiffs dispute the Bunge Defendants' contention that the claim accrued when the \$7.5 million was transferred in 2007 and argue that the claim accrued “when all the elements of the tort can be truthfully alleged in the complaint,” which occurred when the Bunge Defendants refused to return the funds in January 2010. Alternatively, Plaintiffs argue that even if the claim accrued in February 2007, the Bunge Defendants should be equitably estopped from asserting a statute of limitations' defense because they “actively concealed their misdeeds from Plaintiffs, preventing Plaintiffs from bringing a tortious interference claim against Defendants within three years of February 2007 ... Once Plaintiffs discovered Defendants' wrongdoing, Plaintiffs promptly commenced this action” (Pltfs' Opp. Mem. at 20). Because the issue over equitable estoppel is a fact intensive question, Plaintiffs argue that it cannot be resolved at the pleading stage.

In support of the sufficiency of its aiding and abetting a fraud claim, Plaintiffs point out that their direct fraud claim is directed against Ramachandran based on his misrepresentations that Teledata was a substantial *bona fide* company with over \$100 million to invest in eSys and that Plaintiffs detrimentally and justifiably relied on these misrepresentations in entering into the agreement with Teledata which caused Plaintiffs to suffer millions of dollars in damages (*id.* at 21). The Bunge Defendants' liability is predicated on their aiding and abetting the fraud which Plaintiffs contend that they have sufficiently alleged by alleging the fraud, the Bunge Defendants' knowledge of the fraud, and the Bunge Defendants' substantial assistance through their affirmative assistance by accepting the Rainforest funds and then wiring them back to Teledata – *i.e.*, the Bunge Defendants helped to conceal the fraud by kiting those funds to create the appearance that Teledata had invested equity in Rainforest. Plaintiffs assert that they have also alleged proximate causation since it was the Bunge Defendants' acceptance of funds and then their transfer back of the same funds that enabled Teledata and Ramachandran to perpetrate the fraud (*id.* at 22).

To provide the nexus of this fraud to New York, Plaintiffs contend that “a substantial part of the conduct here took place in New York, through Ramachandran and his New York companies” (*id.* at 5).

Ramachandran is a Westchester resident, and represents himself as “CEO, Teledata Informatics, Ltd., 245 Main Street, White Plains, New York,” and CEO, “Teledata Group” ... Ramachandran controls New York companies known as Teledata Informatics, Inc., Teledata Marine, LLC, and American Digital University ... According to Bunge's records, those companies paid Bunge S.A. a total of \$17,500,000 ... Ramachandran testified that he received instructions to make those payments from Teledata, and that he did so from New York bank accounts ... Incredibly, he claims to have no knowledge why he was making the payments, other than that Teledata directed him to pay Bunge S.A., so he did so ...

Bunge has provided no explanation for why it received tens of millions of dollars of payments from Ramachandran and other Teledata-controlled companies, with which it had no contractual relationship (*id.* at 2).

At this juncture, the Court notes, that after some limited jurisdictional discovery was taken from Bunge Ltd., the Court granted the parties leave to file limited supplemental papers. In their supplemental papers, Plaintiffs provide evidence that the amount of monies Bunge S.A. actually received from Rainforest (either directly or through other Teledata controlled entities that received monies from Rainforest and then transferred those funds to Teledata) totaled \$54,185,000 (Sentner Supp. Aff., Ex. 9). According to Plaintiffs, it was Bunge S.A.'s sham transactions with Teledata, which were portrayed as sales contracts but pursuant to which, no products were ever sold, which permitted Teledata to misrepresent its revenue, thereby causing Plaintiffs to enter into the agreement with Teledata. In support, Plaintiffs rely on certain documents produced by Ramachandran and the Bunge Defendants, an affidavit Mr. Goel provided in the Singapore litigation, and deposition testimony from Bunge Financial Services Group controller Walter Tabaschek, Bunge Ltd. Controller Karen Roebuck, Ramachandran and Plaintiff Goel. Based on the documents provided and deposition testimony of Tabaschek, Roebuck and Ramachandran, it is evident that Bunge S.A. and Teledata/Ramachandran worked together to mask the real nature of this transaction (which was a loan) in order to obtain bank guarantees of performance against fictitious sales transactions that never occurred.

In further support of their argument that jurisdiction exists because Bunge S.A. is doing business in New York, Plaintiffs rely on an stipulation concerning various agreements between Bunge S.A. and other Bunge affiliates, which provides:

(1) An Intra-Group Loan Agreement dated September 1, 2011 in the amount of \$50,000.00 between Bunge S.A. and Bunge Global Markets, Inc. (50 Main Street, White Plains, NY) - which provided that the agreement was governed by New York law and any dispute would be submitted to the jurisdiction of federal or state courts in New York;

(2) Bunge Management Services Inc. ("BMSI") and Bunge Global Markets, Inc. ("BGMI") entered into a Shared Service Agreement dated January 1, 2008 and BGMI entered into a Master Service Agreement dated January 1, 2008, with various Bunge entities including Bunge Limited and Bunge S.A., whereby BMSI and BGMI agreed to provide these Bunge affiliates certain non-core and core services. Notices to BMSI and BGMI were to be sent to 50 Main Street, White Plains, New York. The Agreement provided that it was entered into in New York, was to be governed in accordance with New York law and the parties submitted to jurisdiction in New York;

(3) Bunge Ltd. and Bunge S.A. entered into a Bunge Limited

Affiliates Intercompany Equity Award Agreement dated October 1, 2004 which also contained a New York choice of law clause and a consent to jurisdiction in New York clause (see Stipulation dated January 27, 2012 attached as Ex. 8 to Affirmation of Robert Sentner, Esq. dated January 27, 2012 ["Sentner Opp. Aff."], Ex. 8).

The Stipulation also provides that

Bunge Ltd. has a written policy about the use of trade flows to support intercompany loans. The policy acknowledges that emerging market countries generally have restrictions in the free flow of foreign exchange, their currencies may not be freely convertible, and local monetary authorities may impose restrictions or limitations on the free flow of funds. The policy states that lending to these countries when linked to trade tends to minimize the risk of repayment because trade-linked debt tends to have a more favorable treatment from the Central Bank (regulations on capital flows) than pure financial debt, and that structuring trade linked financing as prepayments for future product deliveries vs. financial loans (loans repaid with the proceeds from exports) minimizes the exposure to mandatory loan restructuring when emerging countries have balance of payment problems. The policy states that to the extent possible, when Bunge lends to subsidiaries in emerging market countries, the loans – whether short or long term in nature – are to be linked to trade flows so as to minimize the risk of blockage in the repayment of principal and/or interest (Sentner Aff., Ex. 8).

Plaintiffs contend that jurisdiction is proper over Bunge S.A. based on the department and agency theories (as well as Bunge Ltd's liability under an alter ego theory) and argue:

The transactions were conducted exclusively by members of Bunge's Trade & Structured Finance Group, which is a unit of Bunge that reports to Bunge management in New York, and is not a separate subsidiary ... It appears that Bunge S.A. was used by the Trade & Structured Finance Group as an instrumentality simply to receive transfers of funds. Indeed, there is no evidence that Bunge S.A. has any contract with Teledata, yet it received over \$100 million in funds from it ...¹⁴

Bunge's Financial Services Group's president and controller were located in White Plains ... Those involved in the transaction appear to have primarily been Kevin Chew – (Head of Bunge Trade &

¹⁴(Pltfs' Supp. Opp. Mem. at 4, *citing* Tabaschek Tr. at 32, 44, Roebuck Tr. at 53).

Structured Finance) (Exh. 14, p.196), David Rigby (Trader, Trade & Structured Finance) (Exh. 4, p. 20); Vidya Ramani (Controller, Trade & Structured Finance) (Exh. 14, p. 72). While they all appear to be employed by different Bunge subsidiaries, the group reports to New York management, who determines their compensation, and supervises their business (Exh. 4, p. 13, 14, 15). The Trade & Structured Finance Group used different Bunge subsidiaries for different purposes to effect their overall plan. They used GRIPT to enter into the two sham purchase and sale contracts (Exhs. 6 and 7). They appear to have just used Bunge S.A. to receive the funds. In fact, documents produced by Bunge show that Bunge S.A. management had no control over or knowledge of the transactions, and no knowledge of why it even received Plaintiffs' funds (Exh. 14, pp. 195). Contrary to Bunge's initial assertions, the contracts were not even with Bunge S.A., but were with another subsidiary, GRIPT. Bunge's Trade & Structured Finance group appears to have used these subsidiaries interchangeably, to suit whatever purpose they may have had at the moment. Clearly, Bunge S.A. was used as a mere department, instrumentality, or alter ego of Bunge Ltd. Moreover, as stated by Bunge Ltd's controller, funds are typically swept from Bunge subsidiaries' bank accounts to the extent they exceed their day to day operational needs. This means that Bunge SA is not financially independent (*id.* at 4-5).

Plaintiffs contend that Bunge Ltd. is responsible for the Trade & Structured Finance Group's acts since Bunge Ltd. has no employees, its officers are employed by a different Bunge subsidiary and it uses its business units and subsidiaries to conduct its business (Pltfs' Supp. Opp. Mem. at 4, n.2, *citing* Roebuck Tr. at 10-11).

To support their assertion of jurisdiction over Bunge S.A. based on it being a mere department of Bunge Ltd., Plaintiffs argue as Bunge Ltd.'s wholly owned subsidiary, the first factor of common ownership is met. The relevant considerations for financial dependency include (1) whether the companies' accounts have been intermingled, (2) whether the parent pays the subsidiary's expenses, (3) whether the parent loans money to the subsidiary without interest, or (4) whether the parent had guaranteed the subsidiary's obligations.

In support of their argument that they have established a claim of money had and received, Plaintiffs rely on the deposition testimony from Walter Tabaschek, Bunge Financial Services Group controller, to the effect that while it was typical for Bunge to receive repayment from other companies separate and apart from the counterparty, Bunge and its affiliated companies nevertheless had the practice of verifying that the payment from the other entity was being appropriately made by "verify[ing] that the payment is related to the transaction in question and that it is a valid payment" (Tabaschek Tr. at 72). Plaintiffs also state that an e-mail chain among Bunge representatives shows that Bunge failed to follow this practice in this instance since although, in response to Rainforest' letter demand that Bunge return the \$7.5 million, they were able to get KYC ("Know your client") documents from Teledata, they were unable to get such KYC documents from any of these companies and

were also unable to obtain from Teledata any letters that they were in control of these companies (*i.e.*, Rainforest) such that the transfer of the \$7.5 million was proper (Sentner Opp. Aff., Ex. 14).

Plaintiffs assert they have set out a cause of action for money had and received since they have shown that (1) the Bunge Defendants received money belonging to Plaintiffs; (2) the Bunge Defendants benefitted from the receipt of this money, and (3) under principles of equity and good conscience they should not be permitted to retain the money. Further, according to Plaintiffs, the fact that "Plaintiffs may have been negligent, or misled, with respect to the transfers, does not prevent Plaintiffs' claim" (Pltfs' Supp. Opp. Mem. at 3).

Addressing the Bunge Defendants' argument that Plaintiffs' claim fails as a matter of law since Goel was aware of the transfers and approved of the transfers based on, *inter alia*, an e-mail on which Goel was copied referencing the first transfer, Plaintiffs contend that Goel was duped by Teledata into believing that these were short term loans that would be quickly repaid.¹⁵

In further support of their claim of aiding and abetting a fraud, Plaintiffs assert that all of the elements for the claim have been met since Bunge "intentionally entered into 'sales' contracts that neither party intended to be actual sales contracts. Those contracts enabled Teledata to conduct the fraud, and Bunge then benefitted thereby by receiving Plaintiff's money" (*id.*).

Plaintiffs also assert that their claim of aiding and abetting a fraud is sufficiently

¹⁵In an affidavit Goel prepared for the Singapore litigation, Mr. Goel explained that

Between December 2006 and February 2007, a sum of US\$55,000,000 was paid into [Rainforest's] bank account in 10 separate deposits and a sum of US\$54,800,000 was withdrawn during the same time period in 10 separate withdrawals. The amount withdrawn was paid to Teledata and its various affiliates ... Each withdrawal took place a short time after the corresponding deposit and usually for an identical sum ... For all the payments made to Teledata and its affiliates, Mr Padmanabhan/Mr Ram would orally instruct [eSys's] Mr Baskar over the telephone to prepare for the transfer of funds via [Rainforest's] internet banking account ... Ms Chay, Mr Baskar and I were initially hesitant to effect the transfer of funds. However, Mr Padmanabhan/Mr Ram represented to Ms Chay and me that these funds were for short-term loans to Teledata's suppliers, and assured us that the loans would be repaid promptly. They also stated that [Rainforest] would be paid 12% interest per annum for the said loans ... Further, at the time, we considered Teledata the majority shareholder of [Rainforest], and had no reason to doubt the intentions of Teledata and/or its representatives. As such, the transfer of funds was effected as instructed by Mr Padmanabhan/Mr Ram (Affidavit of Vikas Goel affirmed April 26, 2011 at ¶¶ 43-48, Sentner Opp. Aff., Ex. 16).

pleaded since Bunge “intentionally entered into ‘sales’ contracts that neither party intended to be actual sales contracts. Those contracts enabled Teledata to conduct the fraud, and Bunge then benefited thereby by receiving Plaintiff’s money” (*id.*).

C. The Bunge Defendants’ Reply and Supplemental Reply

In reply, the Bunge Defendants provide a reply memorandum of law and a reply affirmation from their counsel Jennifer L. Achilles, Esq., the sole purpose of which is to attach the wire transfer between Rainforest’s Singapore bank account¹⁶ and Bunge S.A.’s Netherlands’ bank account, and Plaintiffs’ objections and responses to the Bunge Defendants’ interrogatories.

The Bunge Defendants dispute that Plaintiffs have provided any evidence establishing a mere department theory of jurisdiction and, instead, the evidence produced shows that Bunge S.A. was not a mere department of Bunge Ltd. For example, while the 2009 Annual Report states that Bunge S.A. and Bunge Ltd. can obtain financing from a master trust facility that makes loans to all Bunge entities, it also states that “Bunge’s European subsidiaries have established accounts receivable securitization” and that they “retain collection and administrative responsibilities for the accounts receivable sold” thus refuting Plaintiffs’ assertions that Bunge S.A. was undercapitalized and that Bunge Ltd. controls Bunge S.A.’s bank accounts (Defs’ Reply Mem. at 3).

The Bunge Defendants argue that based on the case law, consolidated financial reporting is indicative of nothing and does not support the required financial dependence (*id.*).

The Bunge Defendants refute that there is an overlap of executives between Bunge S.A. and Bunge Ltd. because the documents upon which Plaintiffs rely merely show that two Bunge S.A. executives have internal titles with Bunge Europe and that the current General Counsel of Bunge Asia was the former General Counsel of Bunge Europe.

Further, according to the Bunge Defendants, the mere fact that Bunge has “integrated operations worldwide, along with an integrated web presence, does not subject subsidiaries to general jurisdiction where the parent corporation of group holding company is conducting business” and “[o]nly day to day control by the parent so complete that the subsidiary is, in fact, merely a department of the parent, will constitute the requisite control” (Defs’ Reply Mem. at 4, quoting *Bellomo v Penn. Life Co.*, 488 F Supp 744, 745 [SD NY 1980]).

In opposition to Plaintiffs’ agency theory, the Bunge Defendants first point out that Plaintiffs have alleged the reverse of what is required. Thus, Plaintiffs have alleged that Bunge S.A. is a wholly owned subsidiary of Bunge Ltd. rather than that Bunge Ltd. is the agent of Bunge S.A. And the marketing documents upon which Plaintiffs rely showing that Bunge Ltd. is headquartered in New York with integrated global operations also show that the

¹⁶It does not appear that counsel is in a position to authenticate the document; at least, counsel does not claim to have personal knowledge of the facts.

“operations are ‘decentralized’ and function independently in each region” demonstrating “the opposite of an agency relationship ...” (*id.* at 5-6).

The Bunge Defendants refute that Plaintiffs have presented evidence of Bunge S.A.’s doing business in New York because (1) that although payments paid in U.S. dollars from one foreign bank to another require that the funds pass through a correspondent U.S. bank, this pass through “cannot be used to vest a court with personal jurisdiction over the beneficiary of the transaction where it is otherwise unconnected with New York” (Defs’ Reply Mem. at 7); (2) Bunge S.A.’s status as a defendant in a Maritime B action shows the opposite of what Plaintiffs are trying to show because “[a] court can only attach assets under Rule B where there is no personal jurisdiction over the holder of those assets. See Fed. R. Civ. P. Supp. R. B(1)(a)” and the actions in which Bunge S.A. is the Plaintiff show that the verification is signed by Bunge S.A.’s counsel because “Plaintiff is a foreign entity, none of whose officers are presently within this Judicial District” (*id.* at 7-8); (3) the assignment of claim annexed to the Devereux affirmation is likewise insufficient because “the law is clear that Bunge S.A.’s assignment of rights to an entity having offices in New York does not qualify as ‘a continuous and systematic course of “doing business” here that a finding of its “presence” in this jurisdiction is warranted”” (*id.* at 8, quoting *Landoil Resources Corp. v Alexander & Alexander Serv., Inc.*, 77 NY2d 28, 33-34 [1990]).

It is the Bunge Defendants’ position that Plaintiffs’ assertion of jurisdiction under CPLR 302(a)(2) based on the tortious acts committed by Bunge Ltd. and Ramachandran is unsupported by any facts. For example, in their interrogatory responses, Plaintiffs list no one from Bunge Ltd. having knowledge of the subject matter of this action (Reply Affirmation of Jennifer Achilles dated November 17, 2011 [“Achilles Reply Aff.”], Ex. 2). And the two facts purporting to establish a connection in New York (*i.e.*, the participation in the scheme was formulated in New York and Bunge S.A.’s contractual relationship with Teledata was announced in New York) which Defendants dispute but which must be accepted as true for purposes of the motion – can’t confer personal jurisdiction because “Plaintiffs have not alleged any actual activities in New York in connection with the Teledata transactions, or that Bunge S.A. ‘directed, controlled, or benefited from the activities of conspirators in New York”” (*id.* at 9).

On the issue of liability against Bunge Ltd. based on a piercing of the corporate veil, Defendants argue that Bunge Ltd. has nothing to do with the factual allegations in this action and Plaintiffs have not alleged what is required which is that Bunge Ltd. “exercised complete domination with respect to the transaction at issue” and that it was used to “commit a ‘fraud or wrong’ against them, which resulted in plaintiffs’ injury” (Defs’ Reply Mem. at 10). Thus, Plaintiffs allegations that the transfer of funds to Bunge S.A.’s accounts was made for the benefit of Bunge Ltd. does not “spell out some evidence of fraud” (Defs’ Reply Mem. at 11).

In further support of the dismissal of the claim of money had and received, the Bunge Defendants argue that the predicate for this claim – *i.e.*, that Teledata did not have the authority to transfer these funds – is entirely refuted by an e-mail attached to Plaintiffs’ opposition which shows that Goel knew of the transfer of funds to Bunge S.A.’s account before it was made. Accordingly, “[i]f Teledata (or its subsidiary) did not have authority to

effect such payment, or if Plaintiffs did not understand the business reason for it, presumably Plaintiff Goel would have objected” (Defs’ Reply Mem. at 12). In addition, the Bunge Defendants argue that the claim is deficient because Plaintiffs do not allege that Bunge S.A. received an unjust benefit.

The Bunge Defendants argue that Goel’s knowledge of the transfer also refutes Plaintiffs’ tortious interference with contract claim because: (1) “[i]f Plaintiff Goel thought such funds were ‘due to Plaintiffs,’ as he has alleged, it is impossible to understand why he did not stop the payment, and implausible to infer that such an oversight could give rise to liability on the part of the Bunge Defendants” (*id.*); and (2) there is no basis to estop Defendants from asserting a statute of limitations defense to this claim since there is no basis for finding that they actively concealed their misdeeds (*id.*).

In further support of the dismissal of the fraud claim, Defendants point out that Plaintiffs admit the fraud claim is against only Ramachandran. And as to the aiding and abetting claim, Defendants argue that Plaintiffs have not alleged that the Bunge Defendants became aware of or knew of Ramachandran’s alleged misrepresentation to Plaintiffs that Teledata was a substantial company with \$100 million to invest in eSys or that they knew of Teledata’s fraud in obtaining \$80 million from the SBI based on its misrepresenting that the money it received from Bunge S.A. was actual revenue from sales. The Bunge Defendants further point out that Plaintiffs have alleged no motive for why they would participate in such conduct. Further, the allegation that Bunge S.A. knowingly received funds from Rainforest is simply not enough.

According to the Bunge Defendants, Plaintiffs’ aiding and abetting allegations are also deficient in that there is no allegation that the Bunge Defendants proximately caused the harm since “an alleged aider and abettor will be liable only where the plaintiffs’ injury is a direct or reasonably foreseeable result of the defendants’ conduct” (Defs’ Reply Mem. at 14, quoting *Rosner v Bank of China*, 2008 WL 5416380 at *5 [SD NY 2008]).

In their supplemental reply, the Bunge Defendants attach a ruling from the High Court in Singapore which dismissed Goel’s fraud claim against the SBI for its failing to monitor the use of SBI loans to Teledata and argue by extension that the fraud claims against the Bunge Defendants are likewise without merit.¹⁷ They reiterate that Plaintiffs’ Complaint is

¹⁷Because this motion is directed at the pleadings rather than a motion after discovery has been completed and because the allegations against the SBI are different from the allegations of fraud directed against the Bunge Defendants, the fact that the High Court of Singapore dismissed fraud claims against SBI has no relevance to whether Plaintiffs have sufficiently alleged claims of money had and received, unjust enrichment, tortious interference with contract and aiding and abetting a fraud as against the Bunge Defendants. Thus, here, rather than asserting that the Bunge Defendants failed to monitor the use of loans made to Teledata, Plaintiffs are alleging that the Bunge Defendants and their affiliates (*e.g.*, GRIPT) provided substantial assistance to Teledata in the fraud it was perpetrating on Plaintiffs by allowing Teledata to churn its debt and to mask the loans made to it by the Bunge Defendants as purchase and sale agreements so Teledata could

devoid of any allegations of misrepresentations made by any Bunge entity “and make **no substantive allegations at all** against Bunge Limited” (Defs’ Supp. Mem. at 1 [emphasis in original]). Thus, according to the Bunge Defendants, there was nothing nefarious about the two purchase contracts entered into between Teledata and GRIPT (a Singapore affiliate of the Bunge group of companies) in February 2006 and Plaintiffs’ attempts at conflating the Bunge Defendants’ internal policy with regard to these trade structured finance contracts are misplaced as there is nothing improper about this “prudent risk management policy” (*id.* at 2, n.5). The Bunge Defendants explain that a year later, at the purchase contracts’ maturity date, “GRIPT elected to be repaid in cash, and asked to have Bunge S.A., its Swiss affiliate, receive the two \$3.75MM wire transfers as an administrative convenience ... Upon receiving the two contract payments, Bunge S.A. forwarded them to Anglo Irish Bank, the contract assignee” (*id.* at 2). The Bunge Defendants also attempt to rebut the fraud allegations of the Amended Complaint as against them by pointing to admissions from Goel in his affidavit submitted in the Singapore action and his deposition testimony in this action showing that (1) Goel authorized the payments to Bunge S.A. at Teledata’s request (Affirmation of Jennifer L. Achilles, Esq. dated January 27, 2012 [“Achilles Supp. Aff.”], Ex. 2 at ¶ 47), (2) in granting his approval, he relied solely on Teledata and did not seek to communicate with Bunge S.A. to confirm his understanding of these transfers as short term loans based on the information provided to him by Teledata – not Bunge, (3) at his deposition, Goel presented no evidence that anyone from Bunge authorized Teledata’s statement that Bunge S.A. was a 55% customer of Teledata’s products, and (4) in any event, based on an e-mail chain dated June 16 and 17, 2007 in which Goel and other eSys employees are advised of the financial structure of the Teledata/Bunge S.A. contracts, the Bunge Defendants argue that “Goel had enough information in 2007 to understand the financing nature of the GRIPT/Bunge S.A. transactions with Teledata” (Defs’ Supp. Mem. at 3).

In further support of their position that Bunge S.A. is neither the alter ego nor mere department of Bunge Ltd., the Bunge Defendants rely on an e-mail chain submitted as part of Plaintiffs’ supplemental submission, which shows that Bunge Ltd. “was not made specifically aware of the business relationship between Bunge S.A. ... and Teledata India until December of 2009 when Rainforest contacted Bunge Limited about the 2007 contract payments” which disproves that Bunge Ltd. had any hand in these activities. Further, the Bunge Defendants contend that the mere department theory has been entirely disproved by the discovery – (1) based on the deposition testimony of Roebuck, “Bunge S.A. is not financially dependent on Bunge Limited; rather Bunge S.A. receives most of its funding from Bunge Europe’s primary treasury center in Rotterdam” (Defs’ Supp. Mem. at 4, *citing* Roebuck Tr. at 25-26, 35-36, 58, Achilles Supp. Aff., Ex. 6); and (2) when money is loaned, Bunge S.A. and Bunge Ltd. “observe strict corporate formalities by entering into inter-company agreements when funds pass between them” (Defs’ Supp. Mem. at 4, *citing* Stipulation of Undisputed Facts, Sentner Supp. Opp. Aff., Ex. 8). The Bunge Defendants also attempt to diffuse Plaintiffs’ reliance on the fact “that many of the employees of Bunge S.A. or Bunge Agribusiness Singapore who were involved with Teledata are members of Bunge’s Trade & Structured Finance business grouping (‘TSF group’)” by pointing out that (1) it is very normal

not only secure the bank guarantees which became the ultimate downfall of Teledata, but also misrepresent its revenues, which is what Plaintiffs contend caused them to enter into the Stock Purchase Agreement.

for a holding company such as Bunge Ltd. to have no employees and, indeed, Rainforest itself, has no employees (*id.*, citing Deposition Transcript of Sanju Laroia [Rainforest Director] at 33-34, 105-106); and (2) Plaintiffs are incorrect when they state that the TSF group reports to New York management since “the TSF group is managed by Kevin Chew of Bunge Agribusiness Singapore, located in Singapore ... The fact that Chew has a business reporting line to Daniel Rudolph through the TSF business grouping, and that Rudolph was at one point an employee of Bunge Global Markets, Inc. (located in White Plains), does not evidence or support Plaintiffs’ allegation that Bunge S.A. is a mere department of Bunge Limited” (Defs’ Supp. Mem. at 4, citing Tabaschek Tr. at 13-14).

Disputing that the transactions underlying this lawsuit have any connection to New York, the Bunge Defendants point out that Plaintiffs have abandoned their initial argument that the \$7.5 million was deposited in Bunge S.A.’s New York bank account¹⁸ since Goel admitted at his deposition that the money was actually deposited in Bunge S.A.’s bank account in the Netherlands (Defs’ Supp. Mem. at 4, citing Goel Tr. at 316, Achilles Supp. Aff., Ex. 1). The Bunge Defendants contend that Plaintiffs’ attempts to create a New York connection by arguing that Teledata India’s New York affiliates made other payments to Bunge S.A. from their New York bank accounts and that the product at issue in the Teledata/GRIPT contract was owned by a New York affiliate are insufficient to permit a foreign company to be haled into a New York court.

The Bunge Defendants argue that the contracts Bunge S.A. entered into with its affiliates which are made a part of the parties’ Stipulation of Undisputed Facts, are simply routine inter-company agreements that are insufficient to support a finding that Bunge S.A. does business in New York (Defs’ Supp. Mem. at 5).

BUNGE S.A.’S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

It is Plaintiffs’ burden to establish jurisdiction exists as against Bunge S.A. (*Brandt v Toraby*, 273 AD2d 429 [2d Dept 2000]; see also *Hoffritz for Cutlery, Inc. v Amajac, Ltd.*, 763 F2d 55, 57 [2d Cir 1985]). The Court concludes that in the context of this motion, where some discovery concerning Bunge S.A. contacts with the New York and the relationship between Bunge S.A. and Bunge Ltd. has occurred, but no evidentiary hearing has taken place, Plaintiffs’ “*prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by [the ultimate trier of fact], would suffice to establish jurisdiction over the defendant” (*Metropolitan Life Ins. Co. v Robertson-Ceco Corp.*, 84 F3d 560, 567 [2d Cir 1996], *cert denied* 519 US 1006 [1996], quoting *Ball v Metallurgie Hoboken-Oerpelt, S.A.*, 902 F2d 194, 197 [2d Cir 1990], *cert denied* 498 US 854 [1990]).

¹⁸In their responses to Bunge Ltd.’s Demand for a Verified Bill of Particulars, Plaintiffs did state that the monies Bunge S.A. wrongfully received were deposited into Bunge S.A.’s New York bank account. However, the wire instruction clearly indicates that the money was to be wired to Bunge S.A.’s account at the Fortis Bank (Nederland) N.V., Rotterdam (Affirmation of Amanda L. Devereux in Support of Plaintiffs’ Opposition to the Bunge Defendants’ Motion to Dismiss dated September 8, 2011 [“Devereux Opp. Aff.”], Ex. 20).

Thus, the fact that the Bunge Defendants have asserted contradictory facts does not negate whether Plaintiffs have sustained their required burden (*Metropolitan Life Ins. Co.*, 84 F3d at 567).

Plaintiffs contend that there is jurisdiction over Bunge S.A. based on its doing business in New York, both in its individual capacity and in its capacity as Bunge Ltd.'s wholly owned subsidiary (a corporation that is indisputably doing business in New York for purposes of this motion). Plaintiffs assert that jurisdiction may be conferred over Bunge S.A. based on the parent subsidiary relationship under either the department or agency theories – *i.e.*, that Bunge S.A. is a mere department of Bunge Ltd. or that Bunge Ltd. acts as Bunge S.A.'s agent in that it does all the business that Bunge S.A. “could do were it here by its own officials” (*Frummer v Hilton Hotels Intl., Inc.*, 19 NY2d 533, 537 [1967]). Plaintiffs also rely on CPLR 302(a)(2) – *i.e.*, that the fraudulent acts of Bunge Ltd. and/or Ramachandran in New York as Bunge S.A. co-conspirator confer jurisdiction over Bunge S.A.

The Court will first address whether Plaintiffs have established jurisdiction over Bunge S.A. based on its doing business in New York in its own right.

CPLR 301, the “doing business” statute, provides that New York courts may exercise jurisdiction over a foreign corporation where it solicits business in New York and is engaged in some other continuous activity here (*Laufer v Ostrow*, 55 NY2d 305, 309-310 [1982]). A defendant is doing business in New York, for purposes of the personal jurisdiction statute, if it has engaged in such a continuous and systematic course of activities in New York that it can be deemed present in the state. (*Id.*).

The “doing business test” is simple and pragmatic, and depends on the specific facts of each case (*Landoil Resources Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28 [1990]). The “salient issue in determining jurisdiction” is whether “the aggregate of the corporation's activities in the State” are enough to amount to defendant's presence in the State “not occasionally or casually, but with a fair measure of permanence and continuity” (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 2006 NY Slip Op 50527[U], 11 Misc 3d 1072[A] at *5 [Sup Ct Kings County 2006]).

“The ‘doing business’ standard is ‘stringent, because a defendant who is found to be doing business in New York in a permanent and continuous manner may be sued in New York on causes of action wholly unrelated to acts done in New York” (*Holey Soles Holdings, Ltd. v Foam Creations, Inc.*, 2006 WL 1147963 at * 3 [SD NY 2006], quoting *Overseas Media, Inc. v Skvortsov*, 407 F Supp 2d 563, 568 [SD NY 2006], *affd* 277 Fed Appx 92 [2d Cir 2008]).

Factors that New York courts have found especially relevant to establish jurisdiction under CPLR 301 include whether the corporation has employees, offices or property within the state, whether the corporation is authorized to conduct business within the state, whether the corporation has a bank account within the state, and the volume of business that the corporation conducts with New York residents (*Laufer, supra*; *Atlantic Veal & Lamb, Inc., supra*).

The Court concludes that Plaintiffs have not shown sufficient facts that would support a conclusion that Bunge S.A. is doing business in New York in its own right. It is undisputed that Bunge S.A. is a corporation organized under the laws of Switzerland and that it is not authorized to conduct business in New York. It has no employees or offices here and Plaintiffs make no allegations that it systematically solicits business here. The only facts Plaintiffs have asserted for a finding that Bunge S.A. is doing business in New York in its own right are: (1) Bunge S.A. has a bank account in New York, although the extent of the funds in that account is not clearly shown nor have Plaintiffs shown that Bunge S.A. conducts the majority of its business through that account; (2) Bunge S.A. and its related entities entered into contracts in which the entities agreed to perform services for each other and, in exchange, Bunge S.A. agreed to submit itself to the jurisdiction to New York for any dispute arising out of those contracts, and (3) Bunge S.A. is involved in lawsuits in New York.¹⁹

The Court agrees that these facts, even if true, do not support a finding that Bunge S.A. is doing business in New York so as to confer general jurisdiction (CPLR 301) over Bunge S.A. in New York since the maintenance of a bank account²⁰ (*Nemetsky v Banque De Developpement De La Republique Du Niger*, 48 NY2d 962 [1979]; *Neewra, Inc. v Manakh Al Khaleej General Trading and Contr. Co.*, 2004 WL 1620874 at *8 [SD NY 2004]; *Semi Conductor Materials, Inc. v Citibank Intl PLC*, 969 F Supp 234 [SD NY 1997]; *Faravelli v Bankers Trust Co.*, 85 AD2d 335 [1st Dept 1982], *affd* 59 NY2d 615 [1983]; Business Corporation Law § 1301[b][3]), the engaging in litigation (*Uzan v Telsim Mobil Telekomunikasyon Hizmetleri A.S.*, 51 AD3d 476 [1st Dept 2008]; *Andros Compania Maritima S.A. v Intertanker, Ltd.*, 714 F Supp 669 [SD NY 1989]; *see also* Business Corporation Law § 1301[b][1]), and the entering into isolated contracts in New York to which jurisdiction in New York is consented (*Klinghoffer v. S.N.C. Achille Lauro*, 937 F2d 44, 50 n.5 [2d Cir 1991] ["a party's consent to jurisdiction in one court ... extends to that case alone. It in no way opens that party up to other lawsuits in the same jurisdiction in which the consent was given, where the party does not consent and no other jurisdictional basis is available"]; *Niagara Mohawk Energy Marketing, Inc. v Entergy Power Marketing Corp.*, 270 AD2d 872 [4th Dept 2000]) are insufficient to show the doing of business with a fair level of permanence and continuity (*see Tauza v Susquehanna Coal. Co.*, 220 NY 259, 267 [1917]).

The next question to be addressed is whether Bunge S.A. may be found to be doing business in New York based on the activities of its parent, Bunge Ltd. based on either the mere department or agency theory since "[c]ourts will extend ... [doing business] jurisdiction over a foreign parent corporation of the jurisdictional acts of its subsidiary in New York can be

¹⁹ According to the Bunge Defendants, in these actions, the plaintiffs seek to attach Bunge S.A.'s bank account in New York as permitted under Rule B (Fed. R. Civ. P. Supp. R. B[1][a]) for the very reason that Bunge S.A. is not subject to jurisdiction in New York.

²⁰ "The creation of a bank account does not, as a general rule constitute 'doing business' in the State so as to subject a defendant to personal jurisdiction ..." (*Georgia Pacific v Multimark's Intl. Ltd.*, 265 AD2d 109 [1st Dept 2000]). In order to show that a bank account establishes a presence of the foreign corporation in the state, a party must show that the New York bank account was used to conduct a majority, if not almost all of its business (*id.*).

imputed to the foreign parent corporation” but “[j]urisdiction over the foreign subsidiary will be found only when ‘the activities of the parent show a disregard for the separate corporate existence of the subsidiary’” (*ESI, Inc., supra*, 61 F Supp 2d at 51 [SD NY 1999], quoting *Beech, supra*, 752 F2d at 120). For example, when the defendant contends that it is just “a holding company, which does not conduct business directly, but only through its subsidiary ... [t]he parent-subsidiary relationship is enough to give rise to a strong inference of a broad agency relationship ... ‘Where ... the subsidiaries are created by the parent, for tax or corporate finance purposes, to carry on business on its behalf, there is no basis for distinguishing between the business of the parent and the business of the subsidiaries.’ In such circumstances, ‘[t]here is a presumption, in effect, that the parent is sufficiently involved in the operation of the subsidiaries to become subject to jurisdiction’” (*Airtran N.Y., LLC v Midwest Air Group, Inc.*, 46 AD3d 208, 219 [1st Dept 2007], quoting *Bellomo, supra*, 488 F Supp at 746).

With regard to the mere department test, courts in New York rely on the four factors delineated in *Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp.* (751 F2d 117, 120-122 [2d Cir 1984] (the “*Beech* test”). The first essential factor is common ownership, which is established through the parent subsidiary relationship. The other three factors are important but all do not need to be present for jurisdiction under a mere department theory. Rather, courts weigh these factors in rendering their determinations (*see King County, Washington v IKB Deutsche Industriebank AG*, 712 F Supp 2d 104, 110 [SD NY 2010]; *Reers v Deutsche Bahn AG*, 320 F Supp 2d 140, 156 [SD NY 2004]). Those factors are (1) financial dependency of the subsidiary on the parent, (2) degree to which the parent interferes with the selection and assignment of the subsidiary’s executive personnel and fails to observe corporate formalities, and (3) the degree of the parent’s control over the subsidiary’s marketing and operational policies (*Beech*, 751 F2d at 120-122). While the greater number of cases involve the acts of a New York subsidiary conferring jurisdiction over a foreign parent, courts have uniformly held that the same analysis applies in the converse situation and “it makes no difference for jurisdictional purposes if the local entity is the parent and the foreign entity is the subsidiary” (*Palmieri v Estefan*, 793 F Supp 1182, 1188, n. 9 [SD NY 1992]; *see also Public Administrator of N.Y. County v Royal Bank of Canada*, 19 NY2d 127 [1967]; *ESI, Inc., supra*, 61 F Supp 2d at 51). Nevertheless, “[w]hen applying the *Beech* test, ‘[e]stablishing the exercise of personal jurisdiction over an alleged alter ego requires application of a less stringent standard than that necessary to pierce the corporate veil for purposes of liability’” (*King County, Washington, supra*, 712 F Supp 2d at 110, quoting *GEM Advisors, Inc. v Corporacion Sidenor, S.A.*, 667 F Supp 2d 308, 319 [SD NY 2009]).

The agency test will be satisfied where the “one corporation ‘does all the business which [the other corporation] could do were it here by its own officials’” (*Frummer, supra*). The U.S. Court of Appeals for the Second Circuit has interpreted this test

to mean that a foreign corporation is doing business in New York ‘in the traditional sense’ when its New York representative provides services beyond “mere solicitation” and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation’s own officials would undertake to perform substantially similar services (*Gelfand*

v Tanner Motor Tours, Ltd., 385 F2d 116, 121 [2d Cir 1967], *cert denied* 390 US 996 [1968]).

Courts find that when the mere department or agency test is met, the constitutional requirements of due process are met as the defendant has continuous and systematic general business contacts with the forum such that the assertion of jurisdiction is reasonable²¹ under the circumstances (see *Welinsky v Resort of the World, D.N.V.*, 839 F2d 928 [2d Cir 1988]; *Gelfand, supra*, 385 F2d at 121).

On this issue of whether Bunge S.A. is a mere department of Bunge, Ltd., the first element under the *Beech* test is satisfied because it is undisputed that Bunge S.A. is the wholly owned subsidiary of Bunge Ltd.

In assessing the second factor – financial dependency – courts look to see if the parent provides no or low interest loans, guarantees the subsidiary's obligations, or provides and pays for insurance coverage or other necessities for the subsidiary (*ESI, supra*, 61 F Supp 2d at 53). While the reporting of a subsidiary's finances on the parent's financial statement is suggestive of financial dependency,²² it is not conclusive and the mere consolidation²³ of financial reports for accounting purposes is insufficient to show financial dependency (*Druckner Cornell v Assicurazioni Generali S.p.A. Consolidated*, 2000 WL 284222 [SD NY 2000]; *King County, Washington, supra* 712 F Supp 2d at 112, *comparing ESI*, 61 F Supp 2d at 53 ["[When reviewing the financial dependency factor,] [c]ourts also inquire whether the subsidiary retains its own profits or whether they are received by and reported on the financial

²¹In determining reasonableness, courts review

(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies (*Metropolitan Life Ins. Co., supra*, 84 F3d at 568).

²²The transfer of revenue from the subsidiary to the parent is indicative of financial dependency as is the reporting of such assets and liabilities of the subsidiary on the parent's books and records (see *DCA Food Indus. v Hawthorn Melody, Inc.*, 470 F Supp 575, 585 [SD NY 1979]; *Public Administrator of N.Y., supra*, 19 NY2d at 131; *Taca Intl Airlines, S.A. v Rolls Royce of England, Ltd.*, 15 NY2d 97, 101 [1965]).

²³As noted by the Second Circuit in *Beech, supra*:

The rules regarding consolidation of subsidiaries are controlled by generally accepted accounting principles, which require parent corporations to consolidate subsidiaries if the parent owns more than 50 percent of the subsidiary's stock ... consolidation, therefore, does not distinguish between independence and controlled subsidiaries under New York law (*Beech, supra*, 751 F2d 117, n.3).

statements of the parent”] with *Gallelli v Crown Imports, LLC*, 701 F Supp 2d 263, 273-74 [ED NY 2010] [“Courts considering [the second Beech factor] have held that a finding of financial dependency requires a showing that the subsidiary would be unable to function without the financial support of the parent”).

“In examining the third factor ... courts look to, *inter alia*, whether the parent ... shifts executives along its subsidiaries [and] whether the parent pays the executives’ salaries” (*ESI*, 61 F Supp 2d at 54; see also *Beech*, 751 F2d at 121-122 [finding interference where some directors and officers of the parent and subsidiary overlapped, the parent paid the salaries of those directors and officers and the executives were transferred between the two companies as needed]; *Public Administrator*, 19 NY2d at 132, *Taca Intl.*, 15 NY2d at 331).

The fourth factor is met “where the parent’s promotional materials or public documents hold out the subsidiary as a branch or division of the parent, or the parent determines the subsidiary’s operational policies and strategy” (*ESI*, 61 F Supp 2d at 55, citing *Boryk v deHavilland Aircraft Co.*, 341 F2d 666, 668 [2d Cir 1965]; *Public Administrator*, 19 NY2d at 131-32 [subsidiary referred to as branch of parent and used documents and forms standardized and prescribed by parent]).

The Court concludes that Plaintiffs have shown the existence of sufficient facts which, if credited at trial, provide a sufficient basis for the exercise of jurisdiction over Bunge S.A. based on the mere department test. As noted above, the essential factor has been met. The Court finds that there is sufficient evidence to show financial dependency because not only does Bunge Ltd. include Bunge S.A.’s financial results on its consolidated financial statements, there is evidence that Bunge S.A. is fully funded by Bunge Ltd. through the Rotterdam bank account and that Bunge Ltd. also guarantees Bunge S.A.’s loans and provides its own loans to Bunge S.A. (even though they are fully documented). Indeed, the transaction underlying this action smacks of failure to follow corporate formalities and financial dependency as Bunge S.A. received \$7.5 funds of funds belonging to an affiliate GRIPT based on what the Bunge Defendants refer to as “administrative convenience.”

The testimony of Bunge Ltd.’s controller, Karen Roebuck, also reflects the mere department nature of Bunge S.A. When asked the nature of Bunge S.A.’s business, she stated that it engages in “[p]rimarily trading and merchandising activities,²⁴ and it also houses the corporate team for Bunge Europe, the name is the leadership team” (Roebuck Tr. at 13). She also testified that the controller for Bunge Europe (which she defines as a business region and not a legal entity in and of itself, so that there are a number of legal entities that make up the operations of Bunge Europe) was employed by Bunge S.A. (*id.*). Roebuck made clear that the subsidiaries were treated as Bunge Ltd. “operating businesses” and “Bunge’s operations are managed by the executive committee” (*id.*). The executive committee is made up the

²⁴She further explained that “a number of **our commodity trading managers** are located in Geneva. Geneva is obviously central to the world of the global trade flows. I also have headquarters there for our freight operations, ocean vessels, freight trading, some of the energy activities, various other product lines including grains and overseas” and she specified that the commodity trading involved agricultural products (Roebuck Tr. at 13-14 [emphasis added]).

heads of all of the operating units. In response to how Bunge's subsidiaries receive loans from the Master Trust, she stated that

All of Bunge's operating businesses are funded primarily through the central structure of the Master Trust to leverage Bunge's global business, global activities and access capital markets. So the structures are loan agreements between each of the appropriate operating subsidiaries and legal entities' subsidiaries, and various financing agencies that are part of this Master Trust structure. The borrowers from third parties are generally the entities who are included in that Master Trust structure (*id.* at 23).

The testimony of Walter Tabaschek, Controller of the Financial Services Group (FSG), Bunge Ltd. (Geneva, 2007), is also supportive of a finding of Bunge S.A. as a mere department of Bunge Ltd. Tabaschek testified that the Director of FSG, was Daniel Rudolph, and he was located in White Plains, New York in 2007 (Tabaschek Tr. at 12). He explained that one of the business units under FSG is the Trade & Structured Finance Group ("TSFG") (*id.* at 13). The head of TSFG was Kevin Chew (located in Singapore) and he reported to Daniel Rudolph (*id.*). Rudolph dictated Chew's compensation (*id.* at 15).²⁵ Tabaschek stated that all of the accountants in TSFG reported to him and that he dictated compensation, objectives, and evaluations. Tabaschek identified Mr. Rigby as a TSF trader in Geneva (*id.* at 20) and Vidya Ramani as TSF's controller in India. The identification of these individuals is important to put into context a critical e-mail chain discussed, *infra*.

Based on the foregoing testimony, and the e-mail chain discussed *infra*, there is sufficient evidence, which if credited at trial, will show that the third factor also weighs in favor of a finding of Bunge S.A. as a mere department. First, Plaintiffs have provided documentary proof of an overlap of some Bunge Ltd. officers and Bunge S.A. officers. However, Ms. Roebuck made clear, and the e-mail chain confirms, that Bunge Europe's Chief Financial Officer acted as Bunge S.A.'s Chief Financial Officer, thereby confirming Roebuck's testimony that the heads of the subsidiaries or operating units were a part of Bunge Ltd.'s executive committee. Thus, there is evidence suggesting Bunge Ltd.'s dictating the selection and assignment of the subsidiary's executive personnel. Moreover, based on the e-mail chains discussed below, it is clear that Bunge Ltd.'s TSFG were the individuals integrally involved in these loans to Teledata and that they misused the corporate forms of both GRIPT and Bunge S.A. to further their purposes and disregarded corporate formalities (*i.e.*, the loans were purportedly made by GRIPT, though it is clear that TSFG staff actually negotiated the deals, and the TSFG staff thereafter directed Teledata to pay the amounts owed to GRIPT to Bunge S.A. for "administrative convenience" even though it is undisputed that Bunge S.A. had no contractual relationship with Teledata.

Finally, the last factor also weighs in Plaintiffs' favor as Plaintiffs have provided evidence that suggests that Bunge Ltd. describes Bunge S.A. as Bunge Europe given their same address, overlapping officers, and description of Bunge Europe as its operating arm.

²⁵By contrast, Ms. Roebuck testified that Bunge Ltd. does not set any individual compensation in the operating units (Roebuck Tr. at 60).

There is further evidence that Bunge S.A. was viewed as interchangeable with Bunge Europe based on e-mails provided in opposition to the motion.

A critical piece is the documentary evidence annexed to Plaintiffs' supplemental papers. Thus, an e-mail chain arising from the Bunge Defendants' internal investigation in response to the Rainforest letter demanding repayment of the \$7.5 million shows that the entity responsible for the Teledata loans was not Bunge S.A. but TSFG (and therefore FSG since TSFG is a business unit under Bunge Ltd.'s FSG - Tabaschek Tr. 13 - Sentner Opp. Aff., Ex. 4) (Sentner Opp. Aff., Ex. 14, BL00000132). Further, an e-mail from Maurizio Terazzi, Chief Financial Officer, Bunge Europe and Bunge S.A., in response to e-mails from other TSFG individuals as to how they should respond to the Rainforest letter, states that "Bunge SA management IS NOT Comfortable [sic] and has not all documents, and you should not do any actions on behalf of BUNGE SA (*id.* at BL00000195). Other e-mails within this chain evidence that this transaction was outside the normal course of Bunge's business since in one e-mail, the TSFG person apparently in charge of the transaction (Vidya Ramani - controller FSG India) was asked if he had anything to verify that Teledata was in control of the companies used to make these payments and Ramani responds that although TSFG had requested KYC (know your client documents) at the time of the transaction, apart from Teledata, they had not received any KYC documents from these other companies (presumably Rainforest and the other Teledata related entities). He further states that they had "wanted to get letters from teledata that they were in control of the companies, but, at that point, we were unable to obtain that as well" (*id.* at BL00000072).

In another e-mail from Walter Tabaschek to Faith Tan (lawyer for FSG), Siraj Chabrabati, Vidya Ramani, Candido DosSantos, and cc'd to David Rigby (TSFG Trader in Geneva), Daniel Rudolph (Director, FSG -White Plains until 2011 and currently in Geneva), Eric Alsebach (COO, FSG-Geneva), Kevin Chew (Manager of TSFG in Singapore during 2007-2009 time frame) and Matthew Carter (Chief Commercial Officer, FSG-White Plains), Tabaschek writes that "Bunge Ltd Controller wants to know the commodity involved in this trade and the main business of the this company [sic] and Teledata as they want to document that, basically they want to see the trade and why we did it in case that this is not a normal flow used or generated by Bunge" (*id.*, BL00000134). He gets a response from Kevin Chew that

[t]his customer core business is into IT, Server and system. They're listed in MSE. The contract flow is GRIP will enter into a 1 year forward supply contract with the supplier. Against the contract GRIP provide advance payment to them. The contract has a provision at GRIP's option for taking delivery. The exact product, spec, model etc are left to be mutually agreed between the parties. Failing which the supplier must refund the advance at PAR to us. The condition of performance at delivery date is a back-to-back sale to the supplier subsidiary in HK/Spore, GRIP will discharge the supplier of its bankers guarantee liability guarantee the refund of the advance. The contract has provision that indemnify GRIP of product risk. The payment is guaranteed by a bank. This is non Bunge flow because the client is a non Agri client and furthermore

is a Predelivery advance. The supplier if delivery SB to us would structurally look odd” (*id.*, BL00000134).

Turning to Plaintiffs’ alternative theory for jurisdiction – CPLR 302(a)(2) based on a co-conspiracy theory – *i.e.*, “where an act in furtherance of fraud is committed by a co-conspirator or agent of a defendants within New York, the act is sufficient to obtain jurisdiction over a non-New York defendants ... even if the foreign defendant never stepped foot in New York” (Pltfs’ Opp. Mem. at 13, quoting *Exclaim Assoc., Ltd. v Nygate*, 2005 NY Slip Op 52106[U], [Sup Ct NY County 2005]) – the Court finds that there has been not enough of a showing of a connection of this fraud to New York to support a finding of jurisdiction under CPLR 302(a)(2).²⁶

Under 302(a) “[t]he acts of a co-conspirator may ... be attributed to a defendant for the purposes of obtaining personal jurisdiction over that defendant” (*Drucker Cornell v Assicurazioni Generali S.p.A., Consolidated*, 2000 WL 284222 [SD NY 2000]). However, “the bland assertion of conspiracy ... is insufficient to establish jurisdiction for the purposes of section 302(a)(2).’ Thus the plaintiff must allege both a prima facie case of conspiracy and allege specific facts warranting the inference that the defendants were members of the conspiracy. This is especially so when there does not appear to be a rational motive for engaging in concerted action – guilt by association is insufficient (*id.*). Where the complaint alleges fraud and misrepresentation against each of several defendants, plaintiff must allege facts that identify each defendant’s alleged connection to the alleged fraud (*New York Transp., Inc. v Naples Transp., Inc.*, 116 F Supp 2d 382, 386 [ED NY 2000]).

CPLR 302(a)(2) requires that the tortious act itself be performed within New York State (*Northrop Grumman Overseas Serv. Corp. v Banco Wiese Sudameris*, 2004 WL 2199547 at *12 [SD NY 2004]). In *Exclaim*, *supra*, the court held that “for jurisdictional purposes, the alleged tortious act committed in New York need not be committed upon the plaintiff. All that is required is that the plaintiff suffer damage or injury as a result of the tortious act committed in New York” (*Exclaim*, 2005 NY Slip Op 52106[U] at *5).

The Court finds Plaintiffs’ allegations supporting a fraud having occurred in New York insufficient. Plaintiffs do not allege that the original misrepresentations concerning Teledata’s revenues based on the false sales to Bunge S.A. were made to Plaintiffs in New York or even that the Stock Purchase Agreement was entered into in New York. Nor do

²⁶While the Court finds the evidence sufficient to support jurisdiction on the mere department test, the evidence does not sustain the application of the *Frummer* agency test. Plaintiffs have not provided any evidence or allegations that Bunge Ltd. does all the business which Bunge S.A. could do were it in New York by its own officials. In this regard, the Court disagrees with Plaintiffs’ contention that because Bunge Ltd. controls Bunge S.A.’s finances and prepares the consolidated financial statements it performs acts on behalf of Bunge S.A. in New York that Bunge S.A. would have to perform if it had employees here. These acts are not New York-centric and are not sufficiently important that they be provided in New York such that if Bunge Ltd. did not perform them, Bunge S.A. would be required to send employees to New York to perform them for Bunge S.A.

Plaintiffs allege that Teledata's alleged wrongful withdrawals of Rainforest's money occurred in New York and it is now confirmed that the money transferred to Bunge S.A. was not deposited in Bunge S.A.'s New York bank account, but rather in a bank account it holds in the Netherlands. Plaintiffs' conclusory allegations concerning Ramachandran being in New York, Rudolph being in New York, and that contract between Bunge S.A. and Teledata was announced in New York cannot support a finding that the fraud occurred here. Further, the fact that Teledata transferred funds from Rainforest's account to accounts of its affiliated entities with New York bank accounts is not sufficient enough of a nexus to find that the fraud occurred here. Likewise, the fact that the product underlying the GRIPT purchase agreement involved the products manufactured by a Teledata New York entity is also far too thin a thread to place the fraud having occurred in New York. Accordingly, the Court rejects a finding of jurisdiction against the Bunge Defendants based on the fraud having occurred here.

However, because the evidence is sufficient to support the exercise of jurisdiction on the mere department theory, the Court will deny the Bunge Defendants' motion to dismiss on jurisdictional grounds, without prejudice to the assertion of such a jurisdictional defense at trial, should these Defendants be so advised as to present it.

THE BUNGE DEFENDANTS' MOTION TO DISMISS PURSUANT TO CPLR 3211(a)(7)

The legal standards to be applied in evaluating a motion to dismiss are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Prop. Assoc.*, 242 AD2d 359 [2d Dept 1997], citing *Weiss v Cuddy & Feder*, 200 AD2d 665 [2d Dept 1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Cooper, supra*, 242 AD2d at 360). The court's function is to "accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts" (*id.*, quoting *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp.*, *supra*).

A plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint (*Kempf v Magida*, 37 AD3d 763 [2d Dept 2007]; see also *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

Where the plaintiff submits evidentiary material, the Court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Leorn v Martinez*, 84 NY2d 83 [1994]; *Simmons v Edelstein*, 32 AD3d 464 [2d Dept 2006]; *Hartman v Morganstern*, 28 AD3d 423 [2d Dept 2006]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept

1999)]. Affidavits may be used to preserve inartfully pleaded, but potentially meritorious claims; however, absent conversion of the motion to a motion for summary judgment, affidavits are not to be examined in order to determine whether there is evidentiary support for the pleading (*Rovello, supra*; *Pace v Perk*, 81 AD2d 444, 449-450 [2d Dept 1981]; see *Kempf, supra*; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). Affidavits may be properly considered where they conclusively establish that the plaintiff has no cause of action (*Taylor v Pulvers, Pulvers, Thompson & Kuttner, P.C.*, 1 AD3d 128 [1st Dept 2003]; *M & L Provisions, Inc. v Dominick's Italian Delights, Inc.*, 141 AD2d 616 [2d Dept 1988]; *Fields v Leeponis*, 95 AD2d 822 [2d Dept 1983]).

A. Plaintiffs Have Sufficiently Alleged Causes of Action for Unjust Enrichment and Money Had and Received

The elements of a claim for unjust enrichment are that “(1) the defendant was enriched (2) at the plaintiff’s expense, and (3) that it is against equity and good conscience to permit [the defendant] to retain what is sought to be recovered (*Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004]; *Cruz v McAneney*, 31 AD3d 54, 59 [2d Dept 2006]). “A cause of action for unjust enrichment is stated where [plaintiff has] properly asserted that a benefit was bestowed ... by [plaintiff] and that [defendant] will obtain such benefit without adequately compensating [plaintiff] therefor” (*Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107, 111 [1st Dept 2005] [citations omitted]; *MT Property, Inc. v Ira Weinstein and Larry Weinstein, LLC*, 50 AD3d 751 [2d Dept 2008]). The essence of unjust enrichment is that one party has received money or a benefit at the expense of another (*Wolf v National Council of Young Israel*, 264 AD2d 416 [2d Dept 1999]). “The doctrine of unjust enrichment does not require wrongful conduct by the one enriched” (*State v Park*, 204 AD2d 531, 533 [2d Dept 1994]; *Stern v H. DiMarzo, Inc.*, 2008 NY Slip Op 51163[U], 19 Misc 3d 1444[A] at *14 [Sup Ct Westchester County 2008]).

The pleading requirements for a claim of money had and received are ““(1) the defendant received money belonging to [the] plaintiff; (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money”” (*Matter of Estate of Witbeck*, 245 AD2d 848, 850 [3d Dept 1997], quoting 22 NY Jur 2d, Contracts § 520).

The Court finds that Plaintiffs have adequately pleaded causes of action for money had and received and unjust enrichment since Plaintiffs have alleged facts showing that the Bunge Defendants were enriched by the receipt of monies transferred by Teledata from Rainforest’s account, which was at Plaintiffs’ expense since these funds were part of the monies paid into Rainforest in connection with the Stock Purchase Agreement, and that it is against equity and good conscience to allow the Bunge Defendants to retain the monies received (see *Balance Return Fund Ltd. v Royal Bank of Canada*, 83 AD3d 429, 431 [1st Dept 2011]). Further, although not required in order to sufficiently allege these causes of action, Plaintiffs have also alleged that this money was received in furtherance of a churning of debt scheme between Teledata (Ramachandran) and Bunge S.A. As set forth, *infra*, Bunge Ltd.’s liability on these claims based on a piercing of the corporate veil is sufficiently alleged such that the branch of the motion seeking to dismiss as to Bunge Ltd., shall also be denied.

The Bunge Defendants' reliance on Teledata's authority to transfer the money goes to the merits and cannot be addressed in the context of a motion to dismiss the pleadings (see, e.g., *Hallock v State of N.Y.*, 64 NY2d 224 [1984]; *Collision Plan Unlimited, Inc. v Bankers Trust Co.*, 185 AD2d 264 [2d Dept 1992]). In this regard, whether Bunge S.A. was justified in relying on Teledata's apparent authority is a question of fact since Rainforest never had any prior dealings with Bunge S.A. such that Bunge S.A. would have grounds to believe that Teledata was authorized to release Rainforest funds to it. Indeed, Plaintiffs have provided evidence that Bunge failed to follow its usual procedure by obtaining KYC documents for Rainforest and the other Teledata-related entities with which Bunge S.A. engaged in money transfers involving Rainforest funds.

The Bunge Defendants' arguments that the claims are without merit as Goel approved these transfers back in 2007 at the time they were made and then never questioned these transfers until 2010 is again a question of fact that cannot be resolved on a motion to dismiss. Because the Court must accept the allegations of the complaint as true and because Goel has provided a reason for why he approved the transfers in 2007 – *i.e.*, he was duped by Ramachandran and Teledata into believing that the transfers were simply loans being made to Teledata affiliates to assist them in paying off their debt to suppliers and that Rainforest would receive 12% interest on these loans – there is no basis for the Court to dismiss these claims at the pleading stage. Accordingly, this branch of the Bunge Defendants' motion shall be denied.

B. Plaintiffs Have Sufficiently Alleged a Cause of Action for Aiding and Abetting a Fraud

In order to plead a cause of action “for fraudulent misrepresentation, a plaintiff must allege ‘a misrepresentation or a material omission of fact which was false and known to be false by defendant ...[and] made for the purpose of inducing the other party to rely upon it [scienter], justifiable reliance of the other party on the misrepresentation or material omission, and injury’” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *Small v Lorillard Tobacco Co.*, 94 NY2d 43 [1999]; 60A NY Jur 2d Fraud and Deceit § 232). Furthermore, a cause of action for fraud and aiding and abetting a fraud must satisfy the particularity requirements of CPLR 3016(b) “which requires ... that the circumstances constituting the wrong be stated in detail, [but] is not construed so strictly so as to prevent an otherwise valid cause of action where it would be impossible for the plaintiff to state in detail all of the circumstances of the fraud because the knowledge of those details is in the exclusive possession of the defendants” (*Auguston v Spry*, 282 AD2d 489, 490 [2d Dept 2001]). The complaint must make factual allegations sufficient to support each element of a cause of action for fraud (see *Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]) and bare allegations of fraud without allegations of the details constituting the wrong are insufficient (*Gervasio v DiNapoli*, 126 AD2d 515 [2d Dept 1987]). Moreover, the plaintiff is required to set forth the time and place of the alleged misrepresentations and who made them (see, e.g., *Daly v Kochanowicz*, 2009 WL 2516932 [2d Dept 2009]; *Eastman Kodak Co. v Roopak Enter., Ltd.*, 202 AD2d 220 [1st Dept 1994]).

To plead a claim of aiding and abetting a fraud, a plaintiff must allege: “(1) the existence of a fraud; (2) a defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission” (*JP Morgan Chase Bank v*

Winnick, 406 F Supp 2d 247, 252 [SD NY 2005]). Allegations of mere inaction or silence are insufficient to sustain a claim for aiding and abetting unless the defendant owes an independent duty to the plaintiff (*Jebran v LaSalle Bus. Credit, LLC*, 33 AD3d 424, 424 [1st Dept 2006]; *Sterling Natl. Bank v Ernst & Young, LLP*, 2005 NY Slip Op 51850[U], 9 Misc 3d 1129[A] [Sup Ct NY County 2005]). The aider and abettor must be alleged to have had actual knowledge of the fraud (*Brasseur v Speranza*, 21 AD3d 297, 299 [1st Dept 2005]; *Renner v Chase Manhattan Bank, N.A.*, 85 Fed Appx 782, 784 [2d Cir 2004]). However, actual knowledge may be pleaded generally because “at the pre-discovery stage ... a plaintiff lacks access to the very discovery materials which would illuminate a defendant’s state of mind. Participants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud. The Court of Appeals has stated that an intent to commit fraud is to be divined from surrounding circumstances” (*Oster v Kirschner*, 77 AD3d 51, 55-56 [1st Dept 2010], citing *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]; see also *DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442 [1st Dept 2010]). Nevertheless, the actual knowledge element should be supported “with allegations of ‘specific facts that give rise to a strong inference of actual knowledge regarding the underlying fraud’” (*Rosner v Bank of China*, 2008 WL 5416380 *5 [SD NY 2008], *affd* 349 Fed Appx 637 [2d Cir 2009], quoting *JP Morgan Chase Bank*, 406 F Supp 2d at 253). Actual knowledge may be implied from a strong inference of fraudulent intent through allegations of a motive for committing a fraud (*i.e.*, that a benefit was conferred *Caprer v Nussbaum*, 36 AD3d 176 [2d Dept 2006]), and a clear opportunity for doing so.

Substantial assistance is found to exist where (1) a defendant “affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed; and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated” (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 489 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]; *Cromer Fin. Ltd. v Berger*, 137 F Supp 2d 452, 470 [SD NY 2001]).

Here, the fraud alleged in the Complaint involves two items. First, it is contended that Ramachandran fraudulently induced Plaintiffs to enter into the Stock Purchase Agreement through misrepresentations that Teledata was a substantial company with over \$200 million in sales a year. Plaintiffs contend that Teledata’s materials provided to Plaintiffs prior to the entering into of the Stock Purchase Agreement evidenced these sales and further represented Bunge S.A. as a purchaser of approximately 50% of Teledata’s products. Plaintiffs allege that these revenues were grossly inflated as a result of the fictitious “Purchase and Sales” contracts entered into with Bunge entities, which were not sales contracts at all and, instead, were short term loans that would never involve the transfer of any goods from Teledata to Bunge S.A. These claims are supported by the testimony of Walter Tabaschek, Controller of Bunge Ltd.’s Financial Services Group in Geneva and Bunge Ltd.’s controller Karen Roebuck as they explained in their depositions – *i.e.*, there is no reason for a business engaged in the selling and purchasing of agricultural products to be purchasing \$7.5 million worth of K-12 educational software products.²⁷ The other aspect to Plaintiffs’ fraud claim is churning of Teledata’s debt,

²⁷Goel’s assertions have been supported by the discovery had in this action. Thus, Plaintiffs provide evidence that although Teledata represented to Goel that Teledata had revenue of \$238 million (Sentner Aff., Ex. 1 at 3), 55% of which represented sales to

which was facilitated by the Bunge Defendants through the “purchase and sales contracts” and the money that was flowing in and out of Rainforest through the Teledata related entities and Bunge S.A. to make it appear as though Teledata was meeting its obligations with regard to the \$105 million Teledata was to deposit in Rainforest in accordance with the Stock Purchase Agreement.

The Court is satisfied that Plaintiffs have sufficiently alleged a fraud perpetrated on them by Teledata (Ramachandran) and the Court now turns to whether Plaintiffs have sufficiently alleged the Bunge Defendants having aided and abetted Ramachandran/Teledata in this fraud.

It is the Bunge Defendants’ position that Plaintiffs have not sufficiently alleged the Bunge Defendants’ actual knowledge of the fraud, the Bunge Defendants’ substantial assistance or proximate causation. The Court disagrees.

Here, although Plaintiffs have not alleged any specific facts or provided any specific evidence showing that the Bunge Defendants²⁸ conspired to defraud Plaintiffs, they have provided facts showing the Bunge Defendants’ fraudulent intent based on the Bunge Defendants’ motive in committing the fraud. This motive is found in the financial gains the Bunge Defendants received in providing short terms loans to Teledata in amounts approximating \$100 million but portraying such loans as purchase and sale agreements so that

Bunge S.A. (Sentner Aff., Ex. 2 at PL0014245), no sales to Bunge S.A. actually occurred. Thus, the lack of any product sales between Teledata and Bunge was confirmed by Tabaschek. At his deposition, Mr. Tabaschek testified that the business of the TSFG was to provide financing to counterparties and that they did not buy and sell products (Tabaschek Tr. at 33-34, Sentner Aff., Ex.4). In this regard, he testified that prior to this deposition, he was unaware of any contract for the purchase and sale of goods between Teledata and Bunge S.A. until he saw a reference to contracts between Teledata and GRIPT in an e-mail provided to him at the deposition (Tabaschek Tr. at 44). He further testified that the only products that Bunge S.A. buys and sells are agricultural products and when asked if Bunge S.A. ventures into any other types of products, he stated that agricultural products were basically the only products he could think of that Bunge S.A. trades (Tabaschek Tr. at 45). He further testified that to his knowledge, Teledata never sold any products to GRIPT and that GRIPT is a trading and merchandise company that trades in commodities and agricultural products (*id.* at 66). This testimony is relevant since it is undisputed that the contracts purportedly representing the obligation underlying the transfer of the \$7.5 million to Bunge S.A. in February 2007 involved WebEIM software – a grade K through 12 educational software (Sentner Aff., Exs. 6 and 7). In particular, each contract involved Teledata’s sale to GRIPT of 125 WEB EIM Software licenses (or such other goods acceptable to Buyer- GRIPT) at \$40,000 per license totaling \$5 million per contract.

²⁸As noted *supra*, both Bunge S.A. and Bunge Ltd. are implicated based on Bunge S.A. receipt of the funds from Teledata and based on the fact that these transactions were orchestrated by members of Bunge Ltd.’s TSFG, a unit of FSG. Further, Bunge Ltd.’s liability is also sufficiently alleged based on a piercing of the corporate veil theory.

Teledata could obtain the bank guarantees. With the bank guarantees, the Bunge Defendants were without risk on these loans since if Teledata did not pay them back, the bank would pay and the Bunge Defendants would never have to take the product referenced as repayment on these loans. The Bunge Defendants' actual knowledge of Teledata's (Ramachandran's) fraud "may be fairly inferred from the allegations that [the Bunge Defendants] participated in" the debt churning (*People ex rel. Cuomo v Coventry First LLC*, 52 AD3d 345, 346 [1st Dept 2008]).²⁹ They have also alleged the Bunge Defendants' substantial assistance in (1) the Bunge Defendants' and Teledata's masking of these loans as purchase and sale contracts so that Teledata was able to fictitiously inflate its revenues and obtain bank guarantees on purported trade debt as well as the \$80 million loan from SBI, (2) engaging in the churning of debt by transferring millions of dollars to and from Teledata entities so that Teledata could then transfer these same monies to Rainforest to make it look as though it was complying with its financial obligations under the Stock Purchase Agreement (see Sentner Aff. Exs. 9 and 10).³⁰ These allegations are "sufficient to plead the requisite knowledge and substantial assistance necessary to state a cause of action for aiding and abetting" a fraud (*Balance Return Fund Ltd.*, *supra*, 83 AD3d at 431 ["allegations that ... defendants helped develop the structure of the subject fund in connection with a nonparty investment entity, conducted due diligence, and approved certain transactions designed to mask the fund's financial problems, were sufficient to plead the requisite knowledge and substantial assistance necessary to state a cause of action for aiding and abetting" a breach of fiduciary duty and a fraud]).

The Court cannot accept the Bunge Defendants' position that Plaintiffs have not adequately pleaded proximate causation. The basis for the Bunge Defendants' position is that it was not reasonably foreseeable that their entering into of the purchase and sale agreements would cause the collapse of both Teledata and Rainforest. However, the Court finds that Plaintiffs have adequately pleaded proximate causation based on their allegations concerning the Bunge Defendants substantial assistance in facilitating the fraud (*i.e.*, Teledata's ability to make misrepresentations to Plaintiffs and SBI concerning fictitious sales to Bunge S.A. and Bunge Defendants' acceptance of funds and then their transfer back of the same funds that enabled Teledata and Ramachandran to perpetrate the fraud). The Court finds that there is

²⁹Thus, unlike the case cited by the Bunge Defendants – *National Westminster Bank USA v Weksel* (124 AD2d 144 [1st Dept 1987], *lv denied* 70 NY2d 604 [1987]) – the Bunge Defendants were fully versed in how these Purchase Sale contracts were carried out.

³⁰Exhibit 9 was a chart produced by Bunge Ltd. that outlines transactions between Teledata and Bunge S.A. and shows that Bunge S.A. advanced \$116 million to Teledata during a two-year period - 2005-2006 – and that Rainforest and various Ramachandran-controlled (Teledata-related entities) paid back Bunge S.A. a total of \$17.45 million. Exhibit 10 is a chart prepared by Plaintiffs which was derived from Ex. 9 and Ex. A to the Amended Complaint which Plaintiffs contend "demonstrates that \$55 million was transferred from the Rainforest account in February 2007 to Bunge S.A. and Teledata affiliates (Intersoft and Teledata Marine Ltd.). It shows that \$54 million was then transferred back to Bunge S.A., through Rainforest and various Teledata and Ramachandran-controlled entities" (Sentner Aff. at ¶ 10). Plaintiffs assert that although they have sought the bank records of Teledata and the Ramachandran-controlled companies for the relevant time period, they had not received them as of the time of the submission (*id.*).

proximate causation alleged since it was reasonably foreseeable that this churning and extension of loans that were guaranteed by banks based on misrepresentations concerning the nature of the transactions could result in the consequences that allegedly occurred here – the collapse of Teledata and Rainforest based on the SBI's defaulting Teledata on its \$80 million loan and draining these entities of their assets.

The Bunge Defendants cannot necessarily rely on Ramachandran's/ Teledata's fraud to absolve them of liability since "when the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs" (*Kush v City of Buffalo*, 59 NY2d, 26, 33 [1983]). Based on the foregoing, the Court finds that Plaintiffs have sufficiently alleged proximate causation.

Accordingly, the branch of the Bunge Defendants' motion seeking to dismiss Plaintiffs' cause of action against the Bunge Defendants for aiding and abetting a fraud shall be denied.

C. *The Claims Against Bunge Ltd. Are Sufficiently Alleged Based on a Piercing of the Corporate Veil Theory*

To begin with, based on the evidence presented in opposition to this motion, it would appear that because Bunge TSFG group was integrally involve in these transactions and because of the banking structure among the Bunge entities, it would appear that alter ego liability is not the only basis upon which Bunge Ltd.'s liability may be predicated.

Nevertheless, because the allegations of the Amended Complaint asserts liability against Bunge Ltd. pursuant to a piercing of the corporate veil theory based on Bunge S.A.'s alleged bad acts, the Court will address whether the allegations of the Amended Complaint are sufficient in this regard. Liability based on a piercing of the corporate veil theory involves an assertion of facts and circumstances offered in an effort to persuade the court to impose the corporate obligation on others (see, e.g., *Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]; *Fiber Consultants, Inc. v Fiber Optek Interconnect Corp.*, 15 AD3d 528 [2d Dept 2005], *lv dismissed* 4 NY3d 882 [2005]; *Intracoastal Abstract Co. v Farmarz Sadighpour & Minifar, Inc.*, 2006 NY Slip Op 51328[U], 12 Misc 3d 139[A] [App Term 9 & 10th Jud Dists 2006]).

To adequately allege a basis for piercing the corporate veil, a plaintiff must assert that (1) the corporate form was abused to achieve fraud, or that the corporation has been so dominated by an individual or another corporation that the corporation has become the alter ego of the individual or another corporation whose business it primarily transacted, and (2) that such abuse or domination was used to commit fraud or inequity to the plaintiff which resulted in an injury to the plaintiff (*Matter of Morris*, 82 NY2d at 141-142; *Weinstein v Willow Lake Corp.*, 262 AD2d 634 [2d Dept 1999]; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122 [2d Dept 2009]). Allegations such as failure to observe corporate formalities, undercapitalization of the corporation, intermingling of corporate and personal funds, use of corporate funds for personal purposes, overlap in ownership and directorship, and common use of office space and equipment are often used to support such a basis of liability (*East Hampton Union Free School Dist. v Sandpebble Bldg., Inc.*, *supra*; *Forum Ins. Co. v*

Texarkoma Transp. Co., 229 AD2d 341 [1st Dept 1996]). “The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene” (*Matter of Morris*, 82 NY2d at 142).

There is no requirement that there be a complete domination (failure to follow corporate formalities) coupled with a fraud in order to obtain a piercing of the corporate veil (*Wm. Passalacqua Bldrs., Inc. v Resnick Dev. South, Inc.*, 933 F2d 131, 138 [2d Cir 1991] [“Liability ... may be predicated either upon a showing of fraud or upon complete control by the dominating corporation that leads to a wrong against third parties”]). Thus, fraudulent acts undertaken by controlling shareholders or affiliated companies are often found sufficient (see *Old Republic Natl. Title Ins. Co. v Moskowitz*, 297 AD2d 724 [2d Dept 2002]; *Winchester Global Trust Co. v Donovan*, 2009 NY Slip Op 50190[U], 22 Misc 3d 1119[A] [Sup Ct Nassau County 2009]; *Godwin Realty Assoc. v CATV Enter., Inc.*, 275 AD2d 269 [1st Dept 2000]). Because a determination over piercing of the corporate veil is fact laden, it is generally inappropriate for resolution at the pleadings stage unless the allegations of the complaint are completely devoid of any facts supporting such a theory of liability (*Giarguaro, S.p.A. v Amko Intl. Trading, Inc.*, 300 AD2d 349 [2d Dept 2002]; *Forum Ins. Co. v Taxarkoma Tr. Co.*, 229 AD2d 341 [1st Dept 1996]).

Here, Plaintiffs have alleged that Bunge Ltd., in accordance with its by-laws, controls the management and policies of all Bunge Group companies, including the transfer of funds to and from Bunge, S.A. (Amended Complaint at ¶¶ 22-24,68). Bunge Ltd. treats and reports the funds of Bunge S.A. as its own. Also that Bunge S.A. is undercapitalized, there are common employees and officers between Bunge S.A, Bunge, Ltd. and the other Bunge Group companies, Bunge, S.A. is described by Bunge Ltd. as a mere department or operating arm in public documents, the address for Bunge S.A. is the same as the address for Bunge Ltd.’s department Bunge Europe, Bunge S.A. is represented by in-house counsel for Bunge Ltd. and Bunge Ltd., and Bunge Ltd. guarantees loans provided to Bunge S.A. by third parties (Amended Complaint at ¶¶ 22-32, Devereux Opp. Aff. Ex. 1 at 42).

In addition to the sufficient allegations of the Amended Complaint, there has been evidence provided in connection with this motion that the individuals who orchestrated this transaction were actually officers of Bunge Ltd.’s TSFG and simply used Bunge S.A. as the corporation to receive the funds obtained from these Purchase and Sale Contracts and then to engage in transfers of funds with Teledata and its related entities which enabled Teledata to make fictitious deposits in Rainforest’s account to make it appear as though it was complying with its obligations under the Stock Purchase Agreement, when in reality, those funds were being wrongfully transferred out of the Rainforest account almost as quickly as they were being deposited. Thus, there are facts supporting the notion that Bunge Ltd. exercised complete dominion with regard to the transactions at issue, which was used to commit a fraud resulting in Plaintiffs’ injury. Based on the foregoing, the Court finds that Plaintiffs have alleged sufficient facts against Bunge Ltd. that could satisfy a finding of liability under a piercing of the corporate veil theory (see *ABN AMRO Bank, N.V. v MBIA, Inc.*, 17 NY3d 208, 228 [2011]).

E. Plaintiffs' Cause of Action for Tortious Interference with Contract is Time Barred

In a contract interference case, the plaintiff must allege the existence of a valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach or otherwise rendering performance impossible, and damages (*White Plains Coat & Apron Co. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; *Fusco v Fusco*, 36 AD3d 589 [2d Dept 2007]; *M.J.&K. Co. v Matthew Bender and Co.*, 220 AD2d 488, 490 [2d Dept 1995]).

There is no dispute that Plaintiffs' tortious interference with contract claim is governed by a three-year statute of limitations. "The Statute of Limitations does not accrue until there is a legal right to relief. Stated another way, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). While Plaintiffs assert that the damages were not sustained until Plaintiffs demanded return of the \$7.5 million in 2010, the Court disagrees with Plaintiffs' assertion and finds that the Plaintiffs' claim for tortious interference with contract accrued in February 2007 when the money was transferred out of the Rainforest bank account to Bunge S.A.'s account (*see American Fed. Group, Ltd. v Edelman*, 282 AD2d 279 [1st Dept 2001] [cause of action for tortious interference with contract accrues when the injury is sustained, not when it is discovered and plaintiffs' conclusory allegations that it could not have discovered that the business that defendant diverted until the arbitration were conclusory in any event]). Because this action was originally filed on September 24, 2010, the action was not timely filed unless the Bunge Defendants are estopped from asserting the statute of limitations defense based on their fraudulent concealment of the facts underlying these claims.

It is well settled that the law will equitably toll a statute of limitations where a defendant induces a plaintiff to refrain from instituting an action, either by false statements of fact, or by active concealment of the true facts. Thus, "a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action" (*Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]; *see also Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175 [1982]). The doctrine requires proof that the defendant made an actual misrepresentation or, if a fiduciary, concealed facts which he was required to disclose, that the plaintiff relied on the misrepresentation and that the reliance caused plaintiff to delay bringing timely action (*Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 122 [1st Dept 1985], *affd* 67 NY2d 981 [1986]; *Jordan v Ford Motor Co.*, 73 AD2d 422, 424 [4th Dept 1980]). However, the misrepresentation or act of concealment underlying the estoppel claim cannot be the same act which forms the basis of plaintiff's underlying substantive cause of action (*Rizk v Cohen*, 73 NY2d 98, 105-106 [1989]).

Here, Plaintiffs merely allege that the Bunge Defendants actively concealed their misdeeds from Plaintiffs, preventing Plaintiffs from bringing their claim within three years of February 2007. However, Plaintiffs allege no facts supporting their claim of active concealment and the Court finds that there is no proper basis to invoke an equitable tolling because Goel admitted in an affidavit he submitted in the Singapore action that he was aware of the transfer of \$7.5 million to Bunge S.A. in February 2007 and Plaintiffs have not alleged that there were any conversations between Plaintiffs and the Bunge Defendants between February 2007 and

January 2010 wherein the Bunge Defendants misled Plaintiffs into inaction. Furthermore, there is no fiduciary duty between Plaintiffs and the Bunge Defendants such that a claim of concealment could sustain Plaintiffs' estoppel claim (*Zumpano v. Quinn*, 6 NY3d 666 [2006]; *Reiner v Jaeger*, 50 AD3d 761 [2d Dept 2008]).

Accordingly, Plaintiffs' claim for tortious interference with contract shall be dismissed.

CONCLUSION

The Court has considered the following papers in connection with the motion to dismiss:

- 1) Notice of Motion dated October 4, 2011; Affirmation of Wendy H. Schwartz, Esq. dated October 4, 2011 together with the exhibits annexed thereto;
- 2) Memorandum of Law in Support of Bunge Defendants' Motion to Dismiss For Lack of Personal Jurisdiction and Failure to State a Claim dated October 4, 2011;
- 3) Affirmation of Amanda L. Devereux in Support of Plaintiffs' Opposition to the Bunge Defendants' Motion to Dismiss dated November 8, 2011, together with the exhibits annexed thereto;
- 4) Memorandum of Law in Support of Plaintiffs' Opposition dated November 8, 2011;
- 5) Affirmation of Jennifer L. Achilles, Esq. in Further Support of the Bunge Defendants' Motion to Dismiss dated November 17, 2011 together with the exhibits annexed thereto;
- 6) Reply Memorandum of Law in Support of Bunge Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and Failure to State a Claim dated November 17, 2011;
- 7) Affirmation of Jennifer L. Achilles, Esq. In Support of the Bunge Defendants' Motion to Dismiss dated January 27, 2012 together with the exhibits annexed thereto;
- 8) Affirmation of Jennifer L. Achilles, Esq. in Support of Bunge Defendants' Motion to Dismiss dated January 27, 2012 together with the exhibits annexed thereto;
- 9) Supplemental Memorandum of Law in Support of Bunge Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and Failure to State a Claim dated January 27, 2012;

- 10) Affirmation of Robert C. Sentner, Esq. dated January 27, 2012 together with the exhibits annexed thereto; and
- 11) Plaintiffs' Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss dated January 27, 2012.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the branch of the motion by Bunge Ltd. and Bunge S.A. to dismiss for lack of personal jurisdiction as against Bunge S.A. is denied, without prejudice to the assertion of such a jurisdictional defense at trial, should these Defendants be so advised as to present it; and it is further

ORDERED that the branch of the motion by Defendants Bunge Ltd. and Bunge S.A. to dismiss for failure to state a cause of action is granted in part and denied in part; and it is further

ORDERED that the branch of the motion by Defendants Bunge Ltd. and Bunge S.A. seeking to dismiss Plaintiffs' Third Cause of Action is granted and the Third Cause of Action is hereby dismissed; and it is further

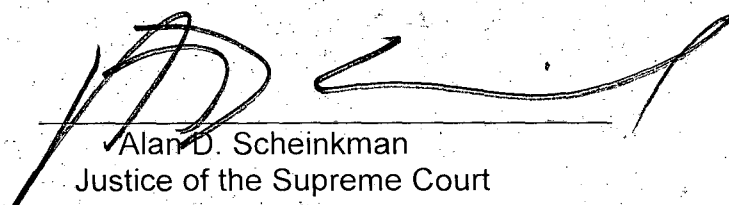
ORDERED that counsel appear before this Court on April 19, 2012 at 9:30 a.m. for a conference to re-set the schedule to finish discovery in this action; and it is further

ORDERED that the conference hereinabove ordered may not be adjourned without the prior written approval of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 4, 2012

ENTER:



Alan D. Scheinkman
Justice of the Supreme Court

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