Industrias De Papel R. Remenzoni S.A. v Banco De Investimentos Credit Suisse (Brasil) S.A.
2014 NY Slip Op 30074(U)
January 14, 2014
Sup Ct, New York County
Docket Number: 650932/12
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK PART 39
Justice

INDUSTRIAS DE PAPEL

- v -

BANCO DE INVESTIMENTOS

INDEX NO. 650932/12
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

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

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/14/14

BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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INDUSTRIAS DE PAPEL R. RAMENZONI S.A.,

Plaintiff,

v.

BANCO DE INVESTIMENTOS CREDIT SUISSE (BRASIL) S.A., f/k/a Banco de Investimentos Garantia S.A., BANCO CREDIT SUISSE BRASIL S.A., f/k/a Banco Garantia S.A., CREDIT SUISSE (BRASIL) S.A. CORRETORA DE TITULOS E VALORES MOBILIARIOS, f/k/a Garantia S.A. CORRETORA DE TITULOS E VALORES MOBILIARIOS, GARANTIA HOLDINGS INC., GARANTIA, INC.,GARANTIA BANKING, LTD., CREDIT SUISSE HOLDINGS (USA), INC., f/k/a Credit Suisse First Boston, Inc., and CREDIT SUISSE FIRST BOSTON (INTERNATIONAL) HOLDING LIMITED, f/k/a Credit Suisse First Boston International Limited,

Defendants.

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DECISION/ORDER
Index No. 650932/12
Motion Seq. Nos.
001 and 003

BARBARA R. KAPNICK, J.:

Motion seq. nos. 001 and 003 are consolidated for disposition herein.

Background[1]

Plaintiff Industrias de Papel R. Ramenzoni S.A. ("Ramenzoni") is a family-owned Brazilian paper company located in the State of São Paulo in Brazil. This action involves certain Argentinian

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[1] All facts are taken from the Complaint, unless otherwise indicated.

Global Bonds (the "Bonds") with a face value of approximately $500 million which were purchased by plaintiff in a series of transactions taking place in Brazil between 1997 and 1999. Ramenzoni purchased the Bonds in approximately 131 separate transactions which were allegedly "conceived and executed" by Banco de Investimentos Garantia S.A. ("Garantia"), which at the time was one of Brazil's premier investment banks.

In or about June 1997, Ramenzoni retained an outside consulting company, Brasilmec Participação Empreendimentos e Cobranças S/C Ltda. ("Brasilmec") to manage its banking and investments. Brasilmec's engagement was necessitated by the serious illness at that time of Ramenzoni's President, Roberto Antonio Augusto Ramenzoni ("Mr. Ramenzoni"). Brasilmec had power of attorney over Ramenzoni's bank accounts for a period of about two years and it was during this time that the Bond purchases took place.

While it seems that the purchase agreements, entitled "Private Investment For the Purchase And Sale of Assets," in each of the Bond transactions (the "Purchase Agreements") may have been signed by Mr. Ramenzoni, plaintiff alleges that in light of his illness they were entered into without his "full appreciation." (Compl. ¶ 21). The counterparties to the Purchase Agreements were 44

different sellers, 42 of which were from Brazil, and none of which were from the United States.[2] (See Compl., Ex. A). The Purchase Agreements each refer to an unidentified "custodian bank abroad." Plaintiff alleges that this term "was understood by all parties to be a reference to one of the Overseas Garantia Entities," which plaintiff identifies in the Complaint as defendants Garantia Holdings Inc. ("Garantia Holdings"), Garantia Inc. ("Garantia Inc.") and Garantia Banking Ltd. ("Garantia Banking" and, collectively, the "Garantia Entities").[3]

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[2] The two non-Brazilian counterparties are located in Nassau, the Bahamas and Montevideo, Uruguay.

[3] Garantia Holdings and Garantia Inc. were Delaware corporations which were dissolved in March 2006 prior to the acquisition of Garantia by Credit Suisse (the "Acquisition"), discussed *infra*. (Affidavit of Peter J. Kozlowski ["Kozlowski"], Director and Counsel of Credit Suisse Securities [USA] LLC, Exs. B and C [Garantia Holdings Certificate of Dissolution], [Garantia Inc. Certificate of Dissolution]). Garantia Banking was a Bahamian entity that was liquidated in December 2008, shortly after the Acquisition. (Affidavit of Teodoro Z.B. de Lima ["Lima"], Managing Director and Counsel of the Brazilian Credit Suisse defendants, Ex. A [12/29/08 Confirmation of Liquidation]). The remaining defendants in this action are Banco de Investimentos Credit Suisse (Brasil) S.A., f/k/a Banco de Investimentos Garantia S.A. ("Credit Suisse Brazil"), Banco Credit Suisse Brasil S.A., f/k/a Banco Garantia S.A. ("CSB"), and Credit Suisse (Brasil) S.A. Corretora de Titulos e Valores Mobiliarios, f/k/a Garantia S.A. Corretora de Titulos e Valores Mobiliarios ("CSBCTVM" and, collectively, the "Brazilian Defendants"), which are all corporations organized and existing under the laws of Brazil. CSB and CSBCTVM are wholly-owned subsidiaries of Credit Suisse Brazil. (Compl. ¶¶ 5-6). Finally, there are Credit Suisse Holding (USA), Inc., f/k/a Credit Suisse First Boston, Inc. ("CS Holdings"), and Credit Suisse First Boston (International) Holding Limited, f/k/a Credit Suisse First Boston International Limited ("CSFB Holdings" and together with "CS Holdings," "Credit Suisse New York"), both of which are Delaware corporations with their principal places of business in New York. (Hereinafter, all of the Credit Suisse defendants shall be referred to as "Credit Suisse").

In or about 1998, during the time period that plaintiff was purchasing the Bonds, Credit Suisse acquired Garantia. Plaintiff alleges that the Garantia Entities were wholly-owned subsidiaries of Credit Suisse and that after the Acquisition, Credit Suisse merged the Garantia Entities into Credit Suisse's New York operations and ran its Latin American operations from New York. (Memo in Opp., mot. seq. no. 001, p. 9). However, as noted above, Garantia Holdings and Garantia Inc. were dissolved prior to the Acquisition, and Garantia Banking was dissolved only a few months thereafter. Thus, none of the Garantia Entities were actually acquired by Credit Suisse.[4]

Plaintiff alleges that Mr. Ramenzoni, upon recovering from his illness at an unspecified time, regained control of the Ramenzoni business and learned what had transpired in the Bond transactions. Mr. Ramenzoni purportedly first discussed the matter with Roger Ian Wright ("Wright"),[5] Garantia's principal, who plaintiff claims assured Mr. Ramenzoni that the transactions were legitimate and that the Bonds were being safely held in custody by Garantia. Mr. Ramenzoni also decided to self-report the Bond transactions to the

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[4] The Court notes that while plaintiff purports to have served Garantia Banking with a copy of the Summons and Complaint, none of the Garantia defendants have made an appearance in this action and plaintiff has neither addressed this fact nor moved with respect to those defendants.

[5] Wright died tragically in an airplane crash in May 2009.

[* 6]

Brazilian tax authorities on February 12, 2001 and the Ramenzoni company was then assessed "ruinous tax penalties."

Plaintiff purportedly did not seek custody of the Bonds until, by letter of its Brazilian counsel dated August 19, 2010, it contacted Antonio Quintella ("Quintella") and José Olympio Pereira ("Pereira"), President and Co-President respectively of Credit Suisse Brazil, and demanded return of the Bonds. (Kozlowski Aff., Ex. D [8/19/10 Demand Letter]). By letter dated August 30, 2010 signed by Lima and Anibal Cardoso Joaquim ("Joaquim"), Credit Suisse Brazil informed plaintiff that it did not have records of the Bond purchase transactions. (Kozlowski Aff., Ex. E [8/30/10 Response to Demand Letter]).

White Martins Suit

At a certain point, plaintiff filed suit in Brazil against one of the Bond sellers located in Brazil, White Martins Gases Industrias Ltda. ("White Martins"), a Brazilian gas supplier, in order to complete the transfer of ownership to Ramenzoni, if the Bonds existed, or else to obtain indemnity for Ramenzoni for its resulting tax liability, if they did not.[6] The Brazilian court, in

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[6] Plaintiff asserts that it lacked the resources to bring suits against all 44 Bond sellers in order to establish its ownership of the Bonds, so it brought a "test case" against White Martins, which was one of the bigger sellers.

dismissing the White Martins action, concluded in its August 16, 2011 decision that the Bonds sold by White Martins did in fact exist and that the duty to ensure the physical delivery of the securities belonged to plaintiff, not White Martins.[7] (Bak Aff., Ex. C [Certified English Translation of 8/6/11 White Martins Decision]).

Defendants contend that the files in the White Martins suit indicate that plaintiff does not own some or all of the Bonds implicated in this action. A 2004 audit by the Brazilian Ministry of the Treasury, Department of Federal Revenue (the "Tax Audit Report") submitted as evidence in the White Martins case but not

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[7] The White Martins court further noted that:

> although this court does not have jurisdiction to investigate the occurrence of crimes against the financial systems and the national revenue authority and, more specifically, whether the plaintiff was involved in frauds for "money laundering," there is evidence in the record indicating that the funds utilized by it to acquire the securities did not belong to it. Beyond the lack of documentary proof of the accounting for the funds that were utilized in the acquisition of the "Argentine Global Bonds," in the suite of proceedings instituted by the Department of Federal Revenue there are documents and statements by the plaintiff company that its bank accounts...were used by third parties without its knowledge to perform several financial transactions that it does not recognize and that those transactions were incompatible with its size and capital, which even places into doubt the validity of the powers of attorney granted by its legal representatives to the people who signed the instruments...in its name. (Certified English translation).

submitted to this Court, purportedly states that plaintiff was in the business of buying and selling Argentine bonds as part of an extensive securities fraud. Defendants claim that the Tax Audit Report demonstrates that in several instances the Bonds that plaintiff lists in Exhibit A to the instant Complaint were actually sold by plaintiff to another party on the same day that it bought those Bonds (Memo in Opp., mot. seq. no. 001, p.3).[8]

Plaintiff has appealed the White Martins decision and, as of the submission date of the instant motions, that appeal was still pending in Brazil. (*Id*).

Litigation in New York Federal Court

On or about August 5, 2011, plaintiff brought suit in the United States District Court for the Southern District of New York (the "First Federal Litigation") against two Swiss-based Credit Suisse entities alleging that Garantia had fraudulently brokered the sale of the Bonds. By Order dated August 29, 2011, the Hon. John G. Koeltl dismissed that complaint for lack of subject-matter jurisdiction because there was no diversity between the foreign plaintiff and the foreign defendants. *See Industrias de Papel R.*

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[8] Plaintiff's interpretation of the Tax Audit Report differs substantially from that of defendants. Plaintiff claims that that Report found many of the Bonds did not even exist. (Bak Aff., Ex. F [5/4/12 Letter from plaintiff's counsel]).

[* 9]

Ramenzoni, S.A. v Credit Suisse First Boston, 2011 US Dist. LEXIS 97548 (SDNY Aug. 29, 2011).

On November 7, 2011, plaintiff filed a second suit in federal court in New York (the "Second Federal Litigation") against the Credit Suisse New York defendants. After those defendants moved to dismiss on the basis of, *inter alia*, *forum non conveniens* and the expiration of the statute of limitations, plaintiff voluntarily dismissed that suit. (Memo in Support, mot. seq. no. 001, p. 4).

Plaintiff's Brazilian Lawsuits

On or about March 16, 2013, about ten days prior to commencing the instant litigation, plaintiff filed eight separate related actions in the Civil Court in São Paulo (the "Brazilian Actions"). The Brazilian Actions are asserted against some of the Bond sellers and arise out of the same Bond transactions involved in the litigation before this Court. (See 8/16/12 Letter to the Court from defendants' counsel). Plaintiff, however, explains that these Brazilian Actions relate to the ownership of the Bonds, and not to the custody of the Bonds which is at issue here. Plaintiff further explains that the Brazilian Actions were filed in Brazil in part because of the binding forum selection clauses in each of the Purchase Agreements. (Potere Aff., ¶ 18).

Plaintiff filed a Complaint in this litigation dated March 26, 2012, asserting causes of action for (1) delivery of Bonds; (2) breach of bailment; (3) negligence in the conduct of bailment; (4) negligence in the conduct of brokerage; and (5) an accounting.

The two Credit Suisse New York defendants now move under motion seq. no. 001 to dismiss the Complaint pursuant to CPLR 327, 3211(a)(5) and (a)(7).

The three Credit Suisse Brazil defendants move separately under motion seq. no. 003 to dismiss the Complaint pursuant to CPLR 327, 3211(a)(5), (a)(7) and (a)(8).

Personal Jurisdiction[9]

Plaintiff asserts jurisdiction over the New York and Brazilian defendants pursuant to CPLR 301, and over the Brazilian defendants

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[9] The Court notes that during oral argument, counsel focused their arguments primarily on the issue of *forum non conveniens*. However, the Court must first address jurisdiction because if it "lacks jurisdiction over a defendant, [the Court] is 'without power to issue a binding forum non conveniens ruling as to' that defendant." *Flame S.A. v Worldlink Intern. (Holding) Ltd.*, 107 AD3d 436, 437 (1st Dep't 2013), *lv denied* ___ NE2d ___(2013). Moreover, while in the Complaint plaintiff alleges that Garantia Banking was doing business in New York, as indicated *supra*, that entity was based in the Bahamas prior to its dissolution, and the parties do not specifically discuss it in their arguments as to personal jurisdiction.

pursuant to CPLR 302 as well.[10]

CPLR 301

> Under CPLR 301 the authority of the New York courts [to exercise jurisdiction over a foreign corporation] is based solely upon the fact that the defendant is engaged in such a continuous and systematic course of "doing business" here as to warrant a finding of its "presence" in this jurisdiction. The test, though not precise, is a simple pragmatic one: is the aggregate of the corporation's activities in the State such that it may be said to be "present" in the State not occasionally or casually, but with a fair measure of permanence and continuity and is the quality and nature of the corporation's contacts with the State sufficient to make it reasonable and just according to traditional notions of fair play and substantial justice that it be required to defend the action here.

Laufer v Ostrow, 55 NY2d 305, 309-310 (1982)(internal quotation marks and citations omitted). In order to be subject to CPLR 301, a corporation must be doing business in New York at the time the action is commenced. *See Uzan v Telsim Mobil Telekomunikasyon Hizmetleri A.S.,* 51 AD3d 476, 477 (1st Dep't 2008).

Plaintiff bears the burden of proving jurisdiction. *Arroyo v Mountain School,* 68 AD3d 603, 604 (1st Dep't 2009)(*citing Copp v Ramirez,* 62 AD3d 23, 28 [1st Dep't 2009], *lv denied* 12 NY3d 711

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[10] While defendants do not dispute that the New York defendants are subject to CPLR 301 jurisdiction, for the reasons discussed *infra*, they argue that the claims asserted against these defendants must nevertheless be dismissed on *forum non conveniens* grounds.

[2009]). "On a motion to dismiss, however, plaintiff must only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant." *Deer Consumer Prods., Inc. v Little*, 2012 WL 5983641, at *8 (Sup Ct, NY Co Nov. 29, 2012)(*citing American BankNote Corp. v Daniele*, 45 AD3d 338, 340 [1st Dep't 2007]); *Cerchia v V.A. Mesa, Inc.*, 191 AD2d 377, 378 (1st Dep't 1993)(*citing Peterson v Spartan Indus.*, 33 NY2d 463, 466 [1974]).

With respect to the Brazilian defendants, plaintiff asserts jurisdiction based on its allegations that at the time this litigation was commenced, Quintella resided in New York and from here had direct control and supervision of Credit Suisse Brazil; Credit Suisse Brazil maintains multiple bank and brokerage accounts in New York; and Credit Suisse actively solicits business in New York through multiple interactive web sites accessible in New York. (Memo in Opp., mot. seq. no. 003, pp. 7-10). Plaintiff further asserts that Credit Suisse New York serves as the agent for Credit Suisse Brazil, as evidenced by the fact that the CEO of Credit Suisse Brazil operates out of Credit Suisse New York's headquarters and Credit Suisse New York pitches to clients regarding investment opportunities from Credit Suisse's foreign affiliates, including Brazil. (*Id.*, pp. 10-11).

As to the issue of Quintella residing in and controlling

Credit Suisse Brazil from New York, plaintiff argues that "[a] corporation's continuous and systematic exercise of supervisory powers within New York may be a basis for exerting personal jurisdiction over that corporation under CPLR § 301," *see Jesselson v Lasertechnics, Inc.*, 1997 WL 317355, *2 (SDNY June 12, 1997)(finding CPLR 301 satisfied where the foreign corporate defendant's CEO and Chairman regularly and systematically controlled the corporation from New York). The finding in *Jesselson, however,* has been subsequently narrowed:

> [t]he mere fact that some business is conducted within New York...even on the part of a company's CEO, is not sufficient in and of itself to warrant a finding that the defendant company is doing business within the state. [Citing *Jesselson* at *2-*3]. The relevant inquiry is "not so much a question of where the officers and representatives of the foreign corporation resided but of what they did [there], of the acts they performed [there] for the corporation and in connection with its business."

Sears Petroleum & Transport Corp. v Archer Daniels Midland Co., 2005 WL 1593902, *4 (NDNY June 30, 2005)(*citing Stark v Howe Sound Co., Inc.*, 141 Misc. 148, 151 [Sup Ct, Chemung Co 1931]).

Here, there exist significant questions regarding the nature and extent of Quintella's purported supervisory activities performed in New York on behalf of the Brazilian defendants. For instance, plaintiff alleges that while residing and working in New York at the time this action was commenced, Quintella served as the Chief Executive Officer of Credit Suisse Americas, and had direct

control and supervision of Credit Suisse Brazil. (Compl. ¶¶ 9, 39). Defendants, however, assert that on September 30, 2010, Quintella resigned his position as President of Credit Suisse Brazil and became the CEO of Credit Suisse Americas in New York. Yet, defendants do concede that Quintella kept the 'internal administrative title of "CEO Brazil" until May 2012,' at which time Brazil-based Pereira assumed it. (Lima Reply Aff., mot. seq. no. 003, ¶¶ 2, 4). Even accepting plaintiff's factual assertions as true, it is unclear at this stage whether, as a matter of law, Quintella's acts in New York were sufficient to support CPLR 301 jurisdiction over the Brazilian defendants.

Plaintiff also looks to certain bank and brokerage accounts purportedly maintained in New York by Credit Suisse Brazil. However, it is well settled that, as a general rule, the "maintenance of a bank account in New York by a nondomiciliary does not subject the nondomiciliary to the jurisdiction of New York courts." *Krepps v Reiner*, 414 FSupp2d 403, 407 (SDNY 2006); *see also Fremay, Inc. v Modern Plastic Mach. Corp.*, 15 AD2d 235, 241 (1st Dep't 1961); *Donetto v S.A.R.L. De Gestion Pierre Cardin*, 3 Misc.3d 1106(A), *2 (Sup Ct., NY Co. May 4, 2004). By contrast, "the use of a bank account 'for the receipt of substantially all of the income of a foreign corporation and for the payment of substantially all of its business expenses' does." *Georgia-Pacific*

Corp. v Multimark's Intl., 265 AD2d 109, 111 (1st Dep't 2000). Plaintiff relies on Lima's affidavit dated August 20, 2012, in which he states that "[d]efendant Credit Suisse Brazil maintains a brokerage account with Credit Suisse LLC, and bank accounts at the Bank of New York and Standard Chartered Bank for the limited purpose of settling certain contracts payable in US dollar amounts." (Lima Aff. ¶ 11). Lima does not indicate, and plaintiff does not allege, that Credit Suisse Brazil uses its New York bank accounts "for the receipt of substantially all of the income of [Credit Suisse Brazil] and for the payment of substantially all of its business expenses." As such, these accounts cannot subject the Brazilian defendants to CPLR 301 jurisdiction.

Plaintiff further asserts jurisdiction over the Brazilian defendants based on the fact that Credit Suisse actively solicits business in New York through multiple interactive web sites accessible in New York. It has been held that "the fact that a foreign corporation has a website accessible to New York is insufficient to confer jurisdiction under CPLR § 301." *Haber v Studium, Inc.*, 22 Misc3d 1129(A), *4 (Sup Ct, NY Co Feb. 23, 2009)(*citing Spencer Trask Ventures, Inc. v Archos, S.A.*, 2002 WL 417192, *6 (SDNY 2002). Specifically at issue here are certain webpages maintained by Credit Suisse for recruiting purposes (the "Recruiting Websites"). Defendants explain that the Recruiting

Websites allow an applicant to apply to work for any Credit Suisse entity anywhere in the world, are viewable in five languages, and are not specifically targeted to New York. Also at issue is a webpage which allows Credit Suisse's clients to access (subject to prior request) their bank accounts from anywhere in the world (the "Customer Account Log-In Webpage"), and one which allows foreign investors to download and print application forms to open an account (the "Foreign Investor Form Webpage"). Defendants explain that the Customer Account Log-In Webpage, and most of the website on which it is found, is in Portuguese. Further, the Foreign Investor Form Webpage allows prospective investors located anywhere in the world to download account application forms and is not specifically targeted to New York.

The Court disagrees that the foregoing websites and webpages justify the exercise of jurisdiction over the Brazilian defendants. First, the Court is not persuaded that defendants' recruiting activities as conducted through the Recruiting Websites constitute "doing business" for CPLR 301 purposes. *See In re Ski Train Fire in Kaprun, Austria on November 11, 2000,* 343 FSupp2d 208, 215-216 (SDNY 2004). In addition, with respect to the Customer Account Log-In Webpage, courts have rejected the argument that a bank's website providing customers with worldwide access to online banking is sufficient to confer personal jurisdiction over that bank. *See*

In re Terrorist Attacks on September 11, 2001, 718 FSupp2d 456, 477 (SDNY 2010), *aff'd* 714 F3d 109 (2d Cir 2013)("A foreign bank will not be subject to the general jurisdiction of American courts based solely on its operation of an interactive website that is accessible to its customers worldwide."); *Northrop Grumman Overseas Serv. Corp. v Banco Wiese Sudameris*, 2004 WL 2199547, *7, *9 (SDNY Sept. 29, 2004). Moreover, the Foreign Investor Form Webpage does not appear to be targeted specifically to New York. *See Holey Soles Holdings, Ltd. v Foam Creations, Inc.*, 2006 WL 1147963, *4 (SDNY May 1, 2006)("The fact that a foreign corporation has a website accessible to New York is insufficient to confer jurisdiction under CPLR § 301 unless that website is purposefully directed towards New York." [internal quotation marks and citations omitted]).

Plaintiff asserts a final basis for asserting CPLR 301 jurisdiction over the Brazilian defendants: that Credit Suisse New York serves as the agent for Credit Suisse Brazil. In support of this position, plaintiff relies on Quintella's purported operation of Credit Suisse Brazil out of Credit Suisse New York's headquarters. It also relies on a September 24, 1998 article from "The American Banker" which states that "Credit Suisse Asset Management has merged the U.S. investment management operations of Banco de Investimentos Garantia into its own New York office,"

(Potere Aff., mot. seq. no. 003, Ex. P), and which plaintiff claims establishes that Credit Suisse New York pitches to clients regarding investment opportunities from Credit Suisse's foreign affiliates, including Brazil. For the reasons discussed below, plaintiff's agency arguments fall short.

First, contrary to plaintiff's assertions, nothing on the face of "The American Banker" article indicates that Credit Suisse New York "pitches to clients regarding investment opportunities from Credit Suisse's foreign affiliates." Moreover, none of the cases cited by plaintiff establish that Credit Suisse New York leasing space and maintaining a phone line which Credit Suisse Brazil, through Quintella, may have used, is sufficient without more to satisfy 301. *See Frummer v Hilton Hotels Intl.*, 19 NY2d 533, 537 (1967)(citing public relations and publicity work in addition to the provision of a New York office and telephone number as a basis for CPLR 301 jurisdiction); *Brenner v Sheraton Waikiki Hotel and Resort*, 33 Misc3d 1210(A), *3-4 (Sup Ct, Nassau Co Sept. 23, 2011)(finding an agency relationship due to the existence of a written management agreement, and one party performing reservation, marketing, public relations, advertising and promotional services on behalf of another); *Freeman v Gordon & Breach, Science Publishers, Inc.*, 398 FSupp 519, 522 (SDNY 1975)(focusing on common

directors and officers, as well as common production, sales and advertising between a foreign subsidiary and its New York parent).

In light of all of the foregoing, it is clear that the only possible bases asserted by plaintiff for subjecting the Brazilian defendants to jurisdiction under CPLR 301 might be those that flow from Quintella's activities in New York. Despite the parties' conflicting contentions about Quintella's role here, the Court finds that plaintiff has made a "substantial start" in establishing general jurisdiction over the Brazilian defendants pursuant to CPLR 301. *Peterson v Spartan Indus., Inc., supra*. This is particularly so given the fact that defendants have not submitted an affidavit from Quintella, but only one from Kozlowski who lacks personal knowledge of many of the facts alleged therein. As such, the Court finds it appropriate to grant plaintiff's request for jurisdictional discovery pursuant to CPLR 3211(d) only with respect to the nature and extent of Quintella's activities in New York as relevant to the Court's jurisdictional analysis under CPLR 301.

CPLR 302(a)(1)

Plaintiff also asserts personal jurisdiction over the Brazilian defendants based on CPLR 302(a)(1) and (a)(4). Specifically, plaintiff alleges that during the relevant period, each such defendant transacted business in New York,

contracted to supply services in New York, and/or owned, used or possessed real property in New York in a continuous and systematic matter. (Compl. ¶ 11.)

It is well settled under New York law that

> [u]nder CPLR 302(a)(1), . . . long-arm jurisdiction over a non-domiciliary exists where a defendant transacted business within the state, and the cause of action arose from that transaction. "If either prong of the statute is not met, jurisdiction cannot be conferred." Under the statute, "proof of one transaction in New York is sufficient to invoke jurisdiction . . . so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." "[J]urisdiction is not justified where the relationship between the claim and transaction is too attenuated" (internal citations omitted).

Copp v Ramirez, 62 AD3d at 28. "Purposeful activities are those with which a defendant, through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Fischbarg v Doucet*, 9 NY3d 375, 380 (2007)(internal citations omitted).

Moreover, even if the out-of-state defendant's contacts with New York fall within the long-arm statute, the exercise of jurisdiction must also comply with due process. *Copp v Ramirez, supra* at 30.

> Due process is satisfied if (1) defendants had "minimum contacts" with New York State so they could reasonably foresee defending a suit here, and (2) the prospect of defending a suit in New York State comports with "traditional notions of fair play and substantial justice." In determining the second prong of the test, "[a] court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief," as well as "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" (internal citations omitted).

Id. at 30-31.

Plaintiff bears the burden of establishing that the Court has jurisdiction over the Brazilian Defendants under CPLR 302. *See O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 (1st Dep't 2003). Moreover, vague, conclusory and unsubstantiated assertions are insufficient to establish personal jurisdiction. *Brown v Blum*, 1999 WL 1042904, *2 (Sup Ct, NY Co 1999).

Plaintiff's allegation of CPLR 302(a)(1) personal jurisdiction over the Brazilian defendants has essentially two bases: the location of the Bonds and the location of individuals involved in the Bond transactions. With respect to the location of the Bonds, plaintiff alleges in the Complaint that the Purchase Agreements provide that delivery of the Bonds was to take place "by means of transfer of ownership with **the custodian bank abroad.**" (Compl. ¶ 19)(emphasis added). While plaintiff concedes that "custodian bank

abroad" is not expressly defined in any of the Purchase Agreements, it alleges that this term was understood by all parties to the transactions to be a reference to either Garantia Holdings, Garantia Inc. or Garantia Banking.[11] (*Id.*).

The Court finds this allegation to be deficient as a basis of long-arm jurisdiction over the Brazilian Defendants for several reasons. First, plaintiff provides absolutely no explanation or evidence to support its vague and conclusory assertion that the parties understood the "custodian bank abroad" to be any of the now-defunct Garantia entities.

Second, Lima states in his affidavit that Credit Suisse never even acquired Garantia Holdings or Garantia Inc. as part of the Acquisition. (Lima Aff., ¶ 12). Indeed, based on their certificates of dissolution, those entities were dissolved before the Acquisition took place. Thus, plaintiff's argument that Garantia's operations were folded into Credit Suisse New York after the Acquisition are undermined.

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[11] While in the Complaint plaintiff alleges that Garantia Banking was doing business in New York, as indicated *supra*, that entity was based in the Bahamas prior to its dissolution, and the parties do not specifically discuss it in their arguments as to personal jurisdiction.

In addition, defendants explain that prior to the Acquisition, Garantia Holdings and Garantia Inc. served as Garantia's U.S. broker-dealer and, as such, their activities did not even include foreign bond transactions of the type alleged in the Complaint. (*Id.*, ¶ 13). Thus, even if these entities had been acquired by Credit Suisse, they could not have any connection to the Bonds.

Moreover, plaintiff's allegation that he spoke to Mr. Wright about the Bonds, as discussed *supra*, is also an insufficient basis for plaintiff's assertion of long-arm jurisdiction over the Brazilian Defendants, since it in no way indicates that the Bonds were being held by any Garantia entity in New York.

Indeed, plaintiff equivocates in its motion papers about whether the New York defendants were even the custodian of the Bonds. It asserts that "the New York Garantia Entities were most likely the 'custodian bank abroad' referenced in the Agreements for the sale of the Bonds. (The only other option would have been Garantia's Bahamian entity.)" (Memo in Opp., mot. seq. no. 003, pp. 11-12)(emphasis added). Further, plaintiff fails to mention in the Complaint that there is evidence that another bank was custodian of at least some of the Bonds. In an affidavit filed in the White Martins litigation, Flàvio Ognibene Guimarães ("Guimarães"), a Brazilian former Director of Bahamas-based Socimer

International Bank ("Socimer") who now resides in São Paulo, states that Socimer was the custodian of the White Martins bonds, which are some of the Bonds implicated in this litigation. (Bak Aff., Ex. D [Guimarães Aff.]). Thus, plaintiff has failed to meet its burden of establishing long-arm jurisdiction over the Brazilian Defendants based on the location of the Bonds.

Plaintiff's arguments based on the location of individuals purported to be involved in the Bond transactions also fall short. Plaintiff alleges that after Credit Suisse's acquisition of Garantia in 1998, "almost the entire Garantia Board of Directors and senior management team responsible for the Bond sales...continued on with Credit Suisse." (Compl. ¶ 9). Yet, by plaintiff's own assertion, these individuals did not relocate to New York until after the Bond transactions were complete. For instance, in paragraph 39 of the Complaint, plaintiff states that "shortly after the Bond transactions at issue, Garantia's senior management decamped to 11 Madison Avenue." Plaintiff further alleges that Quintella, who it claims was the Garantia executive at the time of the Bond transactions who "would have had supervisory responsibility for those Bond sales," did not relocate to New York

until 2010, more than ten years after the Bond transactions were complete.[12] (*Id.* ¶ 9).

Further, defendants contend that plaintiff's allegations regarding Quintella are factually wrong. They claim that contrary to plaintiff's assertions, Quintella did not work for Garantia in 1998 when it was acquired by Credit Suisse, or at any other time prior to the Acquisition. Defendants assert that Quintella joined Credit Suisse in 1997, from ING Barings, as a senior relationship banker in the Investment Banking department. In 2003, he was named CEO of Credit Suisse's Brazil-based operations and President of Credit Suisse Brazil in São Paolo. Defendants further maintain that Quintella never had any supervisory responsibility over any sales of the Bonds involving Ramenzoni. (Kozlowski Aff., ¶¶ 5-7).[13] In any event, since plaintiff does not dispute that Quintella did not relocate to New York until 2010, any facts which plaintiff might discover indicating that Quintella did work on the Bond

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[12] The Court notes that Quintella, one of plaintiff's primary "New York" witnesses, has for reasons unrelated to this lawsuit moved back to Brazil. (See Lima Reply Aff., mot. seq. no. 003, ¶ 2).

[13] The sole basis for plaintiff's allegation that Quintella worked for Garantia is a March 25, 2011 article in the Brazilian financial journal Valor Econômico which states that as "[a]n employee of Banco Garantia since 1997, Quintella was part of the team of young executives that remained in charge of the bank when the institution was sold to the Swiss. . ." (Memo in Opp., mot. seq. no. 001, p. 8).

transactions in Brazil will not change the fact that there would be no nexus between that Bond-related work and this State. Thus, plaintiff has failed to meet its burden of establishing personal jurisdiction over the Brazilian Defendants based on any involvement in the Bond transactions by Quintella.

Plaintiff further alleges that "[o]ther members of the Garantia brain trust" continued on with Credit Suisse after the Acquisition. (Compl. ¶ 10). Plaintiff identifies Wright, discussed *supra*; George Ehrensperger ("Ehrensperger"), "the head of Garantia's New York office"; Alain de Coster ("Coster"); Laurence Russian ("Russian"); and Guilherme Ribeiro do Valle ("Valle"). (*Id.*). Plaintiff asserts that prior to the Acquisition, Coster, Russian and Valle worked for Garantia, Inc., the investment bank's New York-based subsidiary, managing the Fund of Funds operation which was later integrated into Credit Suisse's U.S. operation. (*Id.*). Yet, as discussed *supra*, Garantia Inc. was not involved in foreign bond transactions and was never acquired by Credit Suisse, and plaintiff fails to offer more than a vague and conclusory allegation of how any of these individuals is connected to the Bond transactions at issue.

As discussed *supra*, plaintiff has not met its burden of establishing that the Bonds were held in New York, that the Bond

transactions were conducted in New York, or that its claims are in any other way connected to New York so as to support the exercise of long-arm jurisdiction over the Brazilian Defendants. Plaintiff has thus failed to establish that its claims arise from, or that there exists a "substantial relationship" between, its claims and any New York transaction by the defendants. *See Copp v Ramirez, supra* at 28. Accordingly, because the relationship between plaintiff's claims and the Bond transactions is too attenuated, personal jurisdiction over the Brazilian defendants pursuant to CPLR 302(a)(1) is not justified. *Id.*

In addition, to require the Brazilian Defendants to defend plaintiff's claims in New York under these circumstances would not comport with "traditional notions of fair play and substantial justice," and would thus violate due process considerations. *Copp v Ramirez, supra* at 31; *see also La Marca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 (2000) *quoting International Shoe Co. v Washington*, 326 US 310, 316 (1945).

CPLR 302(a)(4)

Plaintiff alleges in the Complaint that CPLR 302(a)(4) provides an additional basis for personal jurisdiction over the Brazilian Defendants. CPLR 302(a)(4) allows the Court to exercise personal jurisdiction over a defendant who "owns, uses or possesses

any real property situated within the state" where plaintiff can demonstrate a relationship between the defendant's real property and the cause of action. *See Marie v Althshuler*, 30 AD3d 271, 272 (1st Dep't 2006); *Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152, 159 (1st Dep't 1992). Here, plaintiff does not even attempt to establish such a relationship between its claims and any New York real property that the Brazilian Defendants may own. Thus, plaintiff cannot rely on CPLR 302(a)(4) as a basis for personal jurisdiction over the Brazilian Defendants.

Forum Non Conveniens

Since personal jurisdiction over the New York defendants is not in dispute, the Court will consider defendants' *forum non conveniens* arguments only as to those defendants (mot. seq. no. 001).

A defendant has a "heavy burden of demonstrating that the forum chosen by [plaintiff] is an inappropriate one." *Banco Ambrosianco, S.p.A. v Artoc Bank & Trust Ltd.*, 62 NY2d 65 (1984). The Court of Appeals has held that among the factors to be considered by the Court in determining a motion to dismiss based on *forum non conveniens* are

> the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action

> are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor is controlling. The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case. The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by this court.

Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479 (1984), *cert. denied*, 469 US 1108 (1985)(internal citations omitted).

Defendants argue that the Complaint should be dismissed on *forum non conveniens* grounds for the following reasons: plaintiff is a Brazilian company with no alleged presence in or connection to New York; the Purchase Agreements were entered into through a Brazilian consulting firm Brasilmec, and the parties thereto were almost exclusively Brazilian; the Purchase Agreements were allegedly "conceived and totally carried out by" Garantia, a Brazilian entity; the Purchase Agreements contain a Brazilian forum selection clause; plaintiff has filed numerous lawsuits in Brazil arising out of the Purchase Agreements, several of which are currently pending; Brazilian tax and governmental authorities have been investigating plaintiff in connection with the Bond transactions; plaintiff is currently appealing the determination of the Brazilian Federal Revenue Office in Brazil; the witnesses and documentary evidence are overwhelmingly located in Brazil;

Brazilian law will apply; Brazil is an adequate forum; and some of the allegations at issue in the instant litigation have already been tried in Brazil.

Further, in support of their motion to dismiss on the basis of *forum non conveniens*, defendants submit the affidavit of Keith S. Rosenn ("Rosenn"), a tenured full Professor of Law at the University of Miami School of Law and a scholar of Brazilian law. Therein, Rosenn opines that litigating this case outside of Brazil poses the problem of obtaining evidence from Brazil since there is no bilateral treaty in force between the United States and Brazil permitting the taking of evidence within each other's territory. While as a matter of comity Brazilian courts may execute letters rogatory issued by United States courts, Rosenn states that the process is slow and cumbersome. (Rosenn Aff., ¶¶ 36-39).

Rosenn further states that, on the other hand, if this case were to be litigated in Brazil, a much faster alternative for obtaining evidence would be available under 28 USC 1782, which would allow plaintiff's attorney to obtain documents or to take the testimony of any witnesses located in the United States in accordance with the Federal Rules of Civil Procedure. Rosenn cites to several cases in which Brazilians have relied on 28 USC 1782 to obtain discovery in the United States for use in Brazilian judicial

proceedings. *See, e.g., Lopes v Lopes,* 180 Fed.Appx. 874 (11th Cir 2006); *Xavier v Gontier,* 2006 US App LEXIS 8132 (11th Cir Apr. 4, 2006); *In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil,* 466 F.Supp.2d 1020 (ND Ill 2006). (Rosenn Aff., ¶¶ 40-43).

Conversely, plaintiff argues that this case should remain in New York because Credit Suisse maintains its headquarters "just a few miles from" this Court; New York is the location of key witnesses and records concerning the Bonds; documents and witnesses located in Brazil can be brought to the United States, especially given the resources of a large multinational bank such as Credit Suisse; since the parties are spread out across "multiple locations," no forum is ideal and, thus, plaintiff's choice of forum should not be disturbed; Credit Suisse can claim no hardship since it gets sued in New York all the time; any hardship would be borne solely by plaintiff, which agrees to produce its corporate witnesses for deposition, and its documents for inspection, in New York at no cost to Credit Suisse; and plaintiff will be prejudiced because Brazil has no civil jury trials.

In addition, plaintiff submits the rebuttal affidavit of Professor Luis Olavo Baptista ("Baptista") in which Baptista explains that discovery is generally more limited in Brazil than in

the United States since, *inter alia*, only a judge may question witnesses directly or order a party to produce any document in its possession. (Baptista Aff., ¶¶ 20-41). Baptista further states that there exist "severe delays in judicial proceedings in Brazil," particularly in the State of São Paulo. (*Id.*, ¶¶ 42-54).

For the following reasons, this Court finds it appropriate to dismiss the claims asserted against the Credit Suisse New York defendants on the basis of *forum non conveniens*. First, the circumstances underlying plaintiff's claims are centered almost entirely in Brazil. This is a dispute arising from a transaction brokered by a Brazilian entity to sell Bonds to the Brazilian plaintiff, which took place in Brazil. The counterparties in 126 of 131 of the transactions listed in Exhibit A to the Complaint are Brazilian entities. The witnesses and documents are overwhelmingly located in Brazil. Moreover, there has been extensive litigation and government investigations in Brazil involving the same transactions, some of which are still pending. Thus, the fact that the "transaction[s] out of which the cause of action arose occurred primarily in a foreign jurisdiction" weighs heavily in favor of dismissal on grounds of *forum non conveniens*. *Islamic Republic of Iran v Pahlavi*, 62 NY2d at 479; *see also Viking Global Equities, LP v Porsche Automobil Holding SE*, 101 AD3d 640 (1st Dep't 2012); *Peters v Peters*, 101 AD3d 403 (1st Dep't 2012); *World Point Trading*

PTE, Ltd. v Credito Italiano, 225 AD2d 153 (1st Dep't 1996); *Bewers v American Home Prods. Corp.,* 99 AD2d 949 (1st Dep't 1984), *aff'd,* 64 NY2d 630 (1984).

Moreover, Brazil is an adequate forum for plaintiff to litigate its claims. *See, Globalvest Mgt. Co. L.P. v Citibank, N.A.,* 7 Misc.3d 1023(A), *9 (Sup Ct, NY Co May 12, 2005)(finding Brazil to be an adequate alternative forum despite plaintiff's arguments regarding delays and limited discovery in the Brazilian legal system). Plaintiff's arguments that it would be prejudiced by having to litigate in Brazil, are completely belied by the fact that plaintiff has commenced numerous related lawsuits in Brazil, some mere days before the commencement of this suit.

In addition, it seems that the Brazilian courts will have subject matter jurisdiction over this dispute, (*see* Rosenn Aff. ¶ 27), particularly given the fact that they have jurisdiction over plaintiff's related lawsuits. Moreover, the New York defendants have indicated that they will consent to the jurisdiction of the Brazilian courts.

Further, since many, if not most, of the documentary evidence is in Portuguese, and the witnesses appear largely to be Portuguese speakers, maintaining plaintiff's claims asserted against the New

York defendants in New York would impose a considerable burden on this Court and on the financial resources of the defendants. Indeed, the Court notes that plaintiff, in its motion papers, takes issue with the quality of defendants' translation of a document from Portuguese into English. (Bak Aff., Ex. F [5/4/12 Letter from plaintiff's counsel]). If, at this very early stage of litigation, the translation of documents already presents an issue, it concerns this Court to think of the further burden upon it in an action relying so heavily on foreign language documents and witness testimony. *Tilleke & Gibbins Intl. v Baker & McKenzie,* 302 AD2d 328, 329 (1st Dep't 2003)(finding that an action involving numerous Thai witnesses and documents would have resulted in the imposition of an inordinate burden on New York's courts).

Next, as discussed *supra*, procedural mechanisms exist pursuant to 28 USC 1782 for obtaining documents or testimony of witnesses located in New York for production in Brazil. Thus, the Court is not persuaded by plaintiff's arguments that the discovery available to it in Brazil would be insufficient.

Finally, New York courts routinely dismiss actions on *forum non conveniens* grounds arising out of circumstances similar to those herein. *See Gonzalez v Victoria Lebensversicherung AG,* 304 AD2d 427 (1st Dep't 2003), *lv. denied,* 1 NY3d 506 (2004); *Tilleke*

& Gibbins Intl., supra; Banco de Estado de Sao Paolo v Mendes Jr. Intl. Co., 249 AD2d 137, 138 (1st Dep't 1998); *Globalvest Mgt. Co. L.P. v Citibank, N.A., supra*.

Accordingly, motion sequence number 003 by the three Credit Suisse Brazil defendants is granted only to the extent of granting plaintiff's request for jurisdictional discovery as to the nature and extent of Quintella's activities in New York as those activities are relevant under CPLR 301.

Motion sequence number 001 is granted and the claims asserted against the two New York Credit Suisse defendants are dismissed pursuant to CPLR 327.

The Clerk may enter judgment dismissing this case only as to defendants Credit Suisse Holdings (USA), Inc. and Credit Suisse First Boston (International) Holding Limited without prejudice and without costs or disbursements. The action against the remaining defendants is severed and continued.

Counsel are directed to appear for a conference in IA Part 39, 60 Centre St., Rm. 208 on February 5, 2014 at 10:00 am to schedule jurisdictional discovery in accordance herewith.

This constitutes the decision and order of this Court.

Date: January 14, 2014

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.