

**Bluewaters Communications Holding, LLC v
Ecclestone**

2014 NY Slip Op 30123(U)

January 16, 2014

Supreme Court, New York County

Docket Number: 653965/2012

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY
HON. EILEEN BRANSTEN
J.S.C.

PRESENT: _____
Justice

PART 3

Index Number : 653965/2012
BLUEWATER COMMUNICATIONS
vs.
ECCLESTONE, BERNARD
SEQUENCE NUMBER : 001
EXTEND TIME

INDEX NO. 653965/2012
MOTION DATE 8/13/2013
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1
Answering Affidavits — Exhibits No(s) 2
Replying Affidavits No(s) 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1-16-14

Eileen Bransten
HON. EILEEN BRANSTEN
J.S.C.

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COM. DIV. PART 3

-----X

BLUEWATERS COMMUNICATIONS
HOLDINGS, LLC,

Plaintiff,

-against-

Index No. 653965/2012
Motion Date: 8/21/2013
Motion Seq. Nos.: 001,
002, 003 & 004

BERNARD ECCLESTONE; BAMBINO
HOLDINGS, LTD.; CVC CAPITAL PARTNERS
LTD.; ALPHA PREMA UK LTD.;
ALPHA TOPCO LTD.; DELTA TOPCO LTD.;
GERHARD GRIBKOWSKY; AND BAYERISCHE
LANDESBANK ANSTALT DES
ÖFFENTLICHEN RECHTS,

Defendants.

-----X

BRANSTEN, J.:

In motion sequence numbers 001, 002, 003 and 004, which are consolidated for disposition herein, all defendants, with the exception of defendant Gerhard Gribkowsky,, move to dismiss the amended complaint on two grounds: (1) pursuant to CPLR 327(a), on the ground that New York is an inconvenient forum for this legal dispute; and, (2) in the alternative, for failure to state a cause of action pursuant to CPLR 3211(a)(7). In addition, defendants Bernard Ecclestone, Bambino Holdings, Ltd. (“Bambino”), CVC Capital Partners Ltd. (“CVC”), Alpha Prema UK Ltd. (“Alpha Prema”), Alpha Topco Ltd. (“Alpha Topco”), and Delta Topco Ltd. (“Delta Topco”) argue that the court lacks personal jurisdiction over them and seek dismissal pursuant to CPLR 3211(a)(8). Finally, defendant Ecclestone asserts standing and statute of limitations arguments to support pre-answer dismissal of the amended

complaint. For the reasons that follow, Defendants' motions to dismiss are granted in their entirety on forum non conveniens grounds. Further, the Court notes that dismissal is also warranted on personal jurisdiction grounds as to defendants Ecclestone, Bambino, Alpha Prema, Alpha Topco, and Delta Topco.

I. Background

This case arises from the 2005 sale of the "Formula One" automobile racing business. Plaintiff Bluewaters Communications Holdings, LLC ("Bluewaters")¹ claims it was the highest bidder for the purchase of the shares of Formula One held by defendant Bayerische Landesbank Anstalt Des Öffentlichen Rechts ("BayernLB"), but that its bid was ignored in favor of a lesser offer made by defendant CVC. Bluewaters alleges that Ecclestone – the head of Formula One – paid a \$44 million bribe to Gribkowsky, an officer of BayernLB, to steer the sale of Formula One to CVC so that Ecclestone could retain control of his automobile racing empire. Bluewaters seeks over \$650 million in damages based on claims of fraudulent concealment, tortious interference, unjust enrichment and aiding and abetting tortious interference and fraudulent concealment.

¹ As discussed more fully below, the entity that existed in 2005 and was involved in the transaction at issue herein was Bluewaters Communications Holdings Ltd. For ease of reference, the court uses the term "Bluewaters" to describe this entity, unless the context requires otherwise.

More specifically, the amended complaint alleges that, in December 2004, Ecclestone lost legal control of Formula One to three banks after a legal battle in England and Switzerland. (Am. Compl. ¶¶ 3, 28.) The three banks were BayernLB, J.P. Morgan Chase Bank (“J.P. Morgan”), and Lehman Commercial Paper (“Lehman”) (the “Bank Group”). (Am. Compl. ¶¶ 3, 26.) BayernLB is a government-owned German bank, while J.P. Morgan and Lehman are or were American banks.² Although Lehman was located in New York, it was J.P. Morgan’s London office that was involved in this deal, and defendant CVC alleges that it was a London-based subsidiary called “J.P. Morgan Whitefriars Limited” that actually owned the Formula One shares. *See* Affirmation of Michael Lacovara (“Lacovara Affirm.”) Ex. 6; Reply Affidavit of Sacha Woodward Hill (“Hill Reply Aff.”) ¶ 3.

Through an entity named Speed Investments Ltd. (“Speed Investments”), the Bank Group acquired 75% of the shares of SLEC Holdings Ltd. (“SLEC Holdings”), the holding company that controlled Formula One. This transaction was effectuated by foreclosing on shares that had been posted as collateral for a loan the Bank Group had made to Leo Kirch, a German investor who had acquired 75% of the shares of Speed Investments in late 2001. (Am. Compl. ¶¶ 3, 26.) Defendant Bambino, which is a trust fund established for the benefit of Ecclestone’s family, retained the remaining 25% of SLEC Holdings. *Id.* ¶¶ 3, 17. Speed Investments, SLEC Holdings, and Bambino are all private limited companies organized

² Lehman is now operating under the supervision of the Hon. James Peck, United States Bankruptcy Judge for the Southern District of New York.

under the Bailiwick of Jersey, one of the Channel Islands, located off the coast of England. *See id.* ¶ 17; Affidavit of Frederique Flournoy (“Flournoy Aff.”) ¶ 2; Lacovara Affirm., Ex. A; Affirmation of Thomas E. Butler (“Butler Affirm.”), Ex. E at 4.

A. *Bluewaters’ Offers to Purchase Formula One*

Bluewaters alleges that its representative, John Gregg, was approached by J.P. Morgan and Lehman and encouraged to buy the Bank Group’s shares of Speed Investments. (Am. Compl. ¶¶ 4, 29.) Bluewaters claims that it secured \$1 billion worth of financing from two New York private equity firms, Apollo Global Management (“Apollo”) and King Street Capital Management (“King Street”). *Id.* ¶¶ 4, 31. Bluewaters then claims it negotiated extensively with BayernLB, and its senior representative, Gribkowsky, to acquire control of Formula One. *Id.* ¶ 5.

On April 13, 2005, Bluewaters sent BayernLB a letter conditionally offering to purchase BayernLB’s 46.65% equity interest in Formula One for \$500 million in cash. *See* Am. Compl. ¶ 34; Affidavit of Harald Glöckl (“Glöckl Aff.”), Ex. A. BayernLB responded in writing on April 21, 2005, stating that it had “carefully considered” Bluewaters’ offer. (Glöckl Aff., Ex. B.) The letter was written by Harold Glöckl, a First Vice President in the Credit Consult department of BayernLB. (Glöckl Aff. ¶ 1 & Ex. B.) In this letter, Glöckl stated that Bluewaters was required to meet eleven specified conditions in order for the bank

to further consider Bluewaters' offer, including evidence of available funds, payment of the purchase price into escrow upon signature of a purchase agreement, waiver by J.P. Morgan and Lehman of "their rights of first refusal," regulatory consents, a no-post-closing due diligence condition, and a representation that Bluewaters "is purchasing on its own account, and is not . . . connected with, among others, Ecclestone . . . or any person or trust connected with [him]." (Glöckl Aff., Ex. B.) The April 21st letter made clear that the transaction would be subject to the approval of BayernLB's management and supervisory boards and that the proposed "terms and conditions" were "subject to contract and not legally binding." *Id.* at 2. This letter was sent from BayernLB in Germany to Bluewaters in London, England. *Id.*

Also, on April 21, 2005, Bluewaters and BayernLB entered into a "Confidentiality Agreement." (Am. Compl. ¶ 30; Glöckl Aff. ¶ 12 & Ex. C.) The parties agreed that the Confidentiality Agreement would be governed by English law, and that any disputes arising thereunder would be submitted to the exclusive jurisdiction of the courts of England. (Glöckl Aff., Ex. C at § 16.) Thereafter, Bluewaters alleges that lengthy discussions and exchanges ensued, including subsequent offers by Bluewaters. (Am. Compl. ¶ 6.)

Bluewaters alleges that, on October 4, 2005, Gregg emailed Gribkowsky proposing to pay an "unbeatable" purchase price of \$1 billion for the Bank Group's shares of Formula One. (Am. Compl. ¶ 39.) Gregg also allegedly stated in this email that Bluewaters was prepared to pay 10% more in cash consideration or other forms of equally-valued securities

above any genuine bona-fide offer put forward by any other competing buyer to acquire Formula One. *Id.* ¶ 39. Bluewaters received no response to this email. *Id.*

Although not mentioned in the amended complaint, Gregg also apparently sent a second email on October 4, 2005 to Gribkowsky and another unidentified person. In this email, Gregg outlined his offer to purchase “all of the shares of Speed and the associated claims” for \$560 million. (Glöck Aff. ¶ 17 & Ex. H.) This email was sent from Bluewaters’ office in London to Gribkowsky in Germany. BayernLB alleges that Glöckl responded to this email by letter dated October 11, 2005. In that letter, Glöckl told Gregg that his proposal “does not form a basis for discussion.” *Id.*, Ex. I. The October 11th letter was sent from Germany to Gregg in London. *Id.* ¶ 18 & Ex. I.

Bluewaters claims that, on November 15, 2005, it submitted a written offer to BayernLB, J.P. Morgan and Lehman in the form of a proposed “Purchase and Sale Letter Agreement,” offering to purchase the Bank Group’s shares of Speed Investments for one billion dollars. (Am. Compl. ¶ 7.) This proposed agreement was sent from Bluewaters’ Jersey office to BayernLB in Germany, Lehman in New York, and J.P. Morgan in London. (Lacovara Aff. Ex. 6.) The proposed agreement itself, however, does not contain any figure and merely refers to “an aggregate cash purchase price that has been agreed between the parties.” (Glöckl Aff., Ex. M at 2). Section 15 of this proposed agreement provides that it is governed by the laws of England, and that all claims and matters arising out of it would

exclusively in English courts. *Id.* at 11. The amended complaint further alleges that Bluewaters' offer was submitted under cover of a letter to Gribkowsky, which represented that Bluewaters "is prepared to pay 10 percent more in cash consideration or other forms of equally valued securities above any genuine bona-fide offer put forward by any other accredited buyer." (Am. Compl. ¶ 7.) No party has submitted a copy of this alleged cover letter.

B. *Sale of Formula One to CVC*

Ten days later—on November 25, 2005—Bluewaters claims that defendant CVC announced both its purchase of BayernLB's shares of Speed Investments for a reported \$831 million and that it was keeping Ecclestone on to run Formula One. (Am. Compl. ¶¶ 8, 41.) CVC is a large private equity and investment advisory firm that is a private limited company organized under the laws of England and headquartered in London. (Am. Compl. ¶ 18; Affidavit of Fred Watt ("Watt Aff.") ¶¶ 2-3.) And indeed, on November 8, 2005, BayernLB, Alpha Topco, Alpha Prema, five CVC-related limited partnerships,³ Bambino, and Ecclestone entered into an agreement for the sale of BayernLB's shares of Speed Investments

³ Defendant CVC alleges that Alpha Prema was, at the time, indirectly owned and controlled by a series of five Cayman Islands registered limited partnerships, collectively referred to as the private equity investment fund called "CVC European Equity Partners IV." (Watt Aff. ¶ 13). The Cayman Island limited partnerships were, in turn, managed by two general partners, both of which were Jersey corporations. *Id.* ¶ 14.

and SLEC Holdings to CVC's affiliate, Alpha Prema. (Glöck Aff. ¶ 21 & Ex. K.) This agreement provides that it is to be governed by the laws of England, and that the courts of England were to have exclusive jurisdiction to settle any disputes arising in connection with the sale. *Id.* ¶¶ 6.1, 6.2. On November 15, 2005, the Board of Management and the Supervisory Board of BayernLB approved and ratified the sale to Alpha Prema. *Id.* ¶ 22.

Also on November 15, 2005, BayernLB, Bambino and Ecclestone executed a written "Consultancy Agreement" whereby BayernLB and Bambino agreed to pay Ecclestone a fee equal to 5% of the proceeds of the sale to CVC. (Glöck Aff., Ex. L). The Consultancy Agreement is also governed by English law, and the parties agreed to submit any disputes to arbitration in Geneva, Switzerland. *Id.* at ¶ 11. Bluewaters alleges that "it is not possible to understand what legitimate services Ecclestone could have provided to justify this huge 'finder's fee,'" and that "Ecclestone manipulated the sale by using cash given to him by BayernLB and CVC to bribe Gribkowsky." (Am. Compl. ¶ 9.) In exchange for the \$44 million bribe, Gribkowsky made sure that BayernLB (which owned the largest block of the Bank Group's stock) sold Formula One for a lesser amount to CVC. *Id.* Bluewaters contends that Ecclestone did this, because CVC would allow him to continue to run Formula One. *Id.* ¶¶ 1, 8. Bluewaters alleges that the bribe did not come to light until after

Gribkowsky was arrested in January 2011 in Germany and prosecuted for bribery in connection with the sale of Formula One.⁴ *Id.* ¶¶ 12, 70.

The amended complaint alleges that, on December 2, 2005, J.P. Morgan agreed to sell its shares of Speed Investments for \$210 million; and that Lehman sold its shares on December 16, 2005 for \$209,250,000. (Am. Compl. ¶¶ 44-45.) Bluewaters further alleges that CVC also paid \$445 million to acquire the shares owned by Bambino. *Id.* ¶ 45. Thus, Bluewaters' alleges that CVC paid at least \$1,495,250,000 to acquire Formula One.

Bluewaters alleges that the Bank Group had a shareholders agreement, under which the sale of shares of Speed Investments by any member would trigger the others' right of first refusal. (Am. Compl. ¶ 10.) Gregg allegedly told J.P. Morgan and Lehman that Bluewaters was willing to buy their shares of Speed Investments. *Id.* If that had happened, Bluewaters then would have exercised a right of first refusal over the BayernLB ownership shares in Speed Investments, and Bluewaters alleges that this could have triggered a bidding contest for the shares. *Id.* However, Bluewaters alleges, "on information and belief," that CVC, Ecclestone, and Gribkowsky had already planned to thwart that possibility "by forming defendant Alpha Prema as a holding company for Speed Investments and having BayernLB 'contribute' its shares to Alpha Prema and then 'redeem' them for cash." *Id.* Gribkowsky

⁴ Gribkowsky was convicted in June 2012 and is currently incarcerated in Munich, Germany, serving an eight-and-a-half year prison term. (Am. Compl. ¶¶ 19, 53.)

allegedly told J.P. Morgan and Lehman that if they sold their shares to Bluewaters, BayernLB would sue them for interfering with its deal with CVC. *Id.*

After the announcement of the sale to CVC, Gregg allegedly telephoned members of BayernLB's board of directors in an effort to reiterate Bluewaters' alleged written offer to beat any accredited buyer's price by ten percent. (Am. Compl. ¶ 11.) BayernLB's board members did not return Gregg's calls, and Bluewaters contends that BayernLB has now sued those board members for breach of their fiduciary duties. *Id.*

The amended complaint alleges that the defendants took extensive steps to hide the bribe, creating sham contracts, dummy corporations, and a fake charitable foundation in order to channel the money to Gribkowsky. (Am. Compl. ¶ 68.) Ecclestone and Bambino allegedly paid at least \$21.2 million to a corporation called "First Bridge Holding Limited" in Mauritius and at least \$27.5 million to "Lewington Invest Limited" in the British Virgin Islands. *Id.* Both of these dummy corporations then paid "GG Consulting," an Austrian business that Gribkowsky set up on the same day that CVC announced its purchase of BayernLB's Formula One shares. *Id.* From there, Gribkowsky moved this money into a private Austrian foundation, "Sonnenschein," set up for his personal benefit. *Id.* Bluewaters then alleges that:

[e]ach of these payments was made in U.S. dollars. In order to consummate each of these transactions (and thus to pay the bribe) in U.S. dollars, defendants had to use bank accounts in New York at banks located in New York, thereby purposefully availing themselves of the New York banking system in furtherance of their conspiracy.

Id.

In the intervening years, Bluewaters alleges that Formula One has been a very successful venture for CVC. (Am. Compl. ¶¶ 13, 72.) For its initial investment of approximately \$1.6 billion, Bluewaters alleges that CVC has withdrawn over \$2 billion in dividends, sold a portion of the Formula One business for an additional \$2.1 billion, and is now planning an IPO reportedly worth another \$2.5 billion. *Id.* ¶¶ 13, 76. In September 2012, CVC allegedly valued its remaining stake in Formula One at 4.7 times its initial investment; and Formula One is currently valued at \$10 billion. *Id.* ¶ 13. The amended complaint alleges that these returns “rightfully belong to Bluewaters and its financial backers.” *Id.* ¶ 72.

II. Discussion

A. *Personal Jurisdiction*

Defendants CVC, Alpha Prema, Alpha Topco, and Delta Topco maintain that the complaint fails to state a basis for the court’s exercise of personal jurisdiction over them, since the complaint itself acknowledges that these entities are incorporated in England or

Jersey, *see* Am. Compl. ¶¶ 18, 20-22, and allegedly have no substantial contacts with New York.

Defendant Ecclestone is British citizen domiciled in England, who argues that he has visited New York only three times since 2005 for reasons totally unrelated to the sale of Formula One to CVC. (Affidavit of Bernard Ecclestone, ¶¶ 3, 4.) He owns no real property in New York, maintains no bank or brokerage accounts here, and has no employees or agents in this jurisdiction. *Id.* ¶¶ 5, 7, 10. Ecclestone avers that all of the discussions regarding the sale of BayernLB's shares in Formula One to CVC in which he participated took place in England or elsewhere in Europe. *Id.* ¶ 19. He admits that certain payments were made to Gribkowsky, but avers that the payments were made eighteen months after the sale was concluded and made "in response to Dr. Gribkowsky's insinuations that we would create difficulties for me with the UK taxing authorities relating to the Bambino trust arrangements." *Id.* ¶ 22. Ecclestone maintains that the funds he sent to Gribkowsky were dispatched from accounts he maintains in Switzerland and that the particulars of the transaction were handled by a financial advisor based in Switzerland. *Id.* ¶ 23.

As stated earlier, defendant Bambino is a Jersey corporation. Bambino has various subsidiaries, but is "ultimately owned by a trust established by the former wife of defendant Bernard Ecclestone." (Flournoy Aff. ¶ 3.) Like Ecclestone, none of the Bambino companies

owns any real property or investments in New York, has any presence here, and they claim not to have ever transacted business in New York. *Id.* ¶¶ 5, 6.

In opposition to the motion, Bluewaters argues that the court has general “doing business” jurisdiction pursuant to CPLR 301 over CVC because it has an office in New York, and that general jurisdiction exists over Alpha Prema, Alpha Topco, Delta Topco, because they are dominated and controlled by CVC. Bluewaters also maintains that long-arm jurisdiction over all defendants exists pursuant to CPLR 302(a) because: (1) these defendants transacted business in New York and Bluewaters’ claims arise out of that business; (2) defendants committed torts outside New York that caused injury in this state; and (3) defendants committed a tort in New York.

1. Doing Business Jurisdiction

Personal jurisdiction exists where a 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.” *Laufer v. Ostrow*, 55 N.Y.2d 305, 309-310 (1982) (internal quotations and citations omitted). “[A] corporation is doing business and is therefore present in New York and subject to personal jurisdiction with respect to any cause of action, related or unrelated to the New York contacts, if it does business in New York not occasionally or casually, but

with a fair measure of permanence and continuity.” *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (internal quotations and citations omitted).

Personal jurisdiction over a foreign corporation can, in certain instances, be based on the activities of a subsidiary or separate, but commonly-owned company, with offices in New York. In *Frummer v. Hilton Hotels International, Inc.*, 19 N.Y.2d 533 (1967), the Court of Appeals found that Hilton Hotels (U.K.) Ltd., a British corporation, was doing business in New York, because the activities of the Hilton Reservation Service, a separate but commonly-owned company with offices in New York, made the latter an agent for the former. Although the common ownership of the two companies was found to give rise to an inference of an agency relationship, “the significant and pivotal factor” was that the New York company did all the business which the British company could do, were it in New York, by its own employees. *Id.* at 537-38; *see also Amsellem v. Host Marriott Corp.*, 280 A.D.2d 357, 359 (1st Dep’t 2001). In other words, “[w]hen a subsidiary provides services sufficiently important to a foreign corporation that, but for the subsidiary’s actions, the parent company’s employees and officers would have to enter the state to provide those services themselves, it becomes the agent of the parent.” *AirTran N.Y., LLC v. Midwest Air Grp., Inc.*, 46 A.D.3d 208, 218-219 (1st Dep’t 2007).

Defendant CVC maintains that it is an English corporation; that it is headquartered and maintains its only office in London; and that it is an investment advisor, whose primary

business involves the evaluation of business opportunities in the United Kingdom and Europe. *See* Watt Aff. ¶¶ 2, 3. However, Bluewaters alleges that CVC is part of the “CVC Capital Partners” global network, and that this global company is operating in New York City at 712 Fifth Avenue by and through CVC Capital Partners Advisory (U.S.), Inc. (“CVC-U.S.”) and that at least four other “CVC” entities are also located at that same address and registered to do business in New York. *See* Affirmation of Kent A. Yalowitz (“Yalowitz Affirm.”) ¶ 12 & Exs. 3, 9.

Bluewaters also submits evidence that CVC-U.S. was created and designed to expand CVC’s core business into the United States, and not to create a separate one. A February 2007 private equity news article reported that CVC, identified as “a megaplayer in private equity in Asia and Europe,” had “launched a U.S. operation and hired Christopher Stadler to run it.” *Id.*, Ex. 7 at 2. Stadler is the “Managing Partner” of CVC-U.S. *Id.*, Ex. 5. According to the website “www.cvc.com,” owned by defendant CVC *see id.*, Ex. 1, CVC issued a press release on January 25, 2007 announcing that the company had formed “its New York office” for the purpose of expanding into the U.S. and giving the company “a significant presence” in the U.S. economic markets. *See id.*, Ex. 8. “The New York office enables CVC to pursue companies with global operations while maintaining a local presence in the regions in which the firm invests.” *Id.* Finally, it appears that CVC-U.S. is owned by the same parent company that owns CVC. *See id.*, Ex. 11. On reply, CVC submits an

affidavit from Fred Watt, a director of CVC. Mr. Watt makes absolutely no attempt to explain any of the foregoing evidence, and merely avers, very summarily, that none of the five U.S.-based CVC entities engage in activities on behalf of, solicit business, or otherwise act as agents of CVC. *See* Watt Reply Aff. ¶ 3.

Although Bluewaters bears the ultimate burden of proof as to whether CVC is doing business in New York through its affiliate, CVC-U.S., Bluewaters need only make a prima facie showing that such jurisdiction exists to defeat this CPLR 3211(a)(8) motion. *Goel v. Ramachandran*, 111 A.D.3d 783, 788 (2d Dep't 2013); *Aramid Entm't Fund Ltd. v. Wimbledon Fin. Master Fund, Ltd.*, 105 A.D.3d 682, 683 (1st Dep't 2013). Bluewaters has made that prima facie showing.

Whether general jurisdiction also exists over defendants Alpha Prema, Alpha Topco and Delta Topco (collectively, the "F1 Defendants") is not so apparent. It is undisputed that the F1 Defendants are all foreign corporations organized pursuant to the laws of England or Jersey, *see* Am. Compl. ¶¶ 20-22, and maintain no presence in New York. Bluewaters' only basis for jurisdiction is the claim that the F1 Defendants are dominated and controlled by CVC. Notably, this claim does not appear in the amended complaint, and the only factual support for the claim allegedly comes from the moving affidavit of Sasha Woodward Hill, submitted by the F1 Defendants. Mr. Hill merely avers the following: that Delta Topco is a holding company and the indirect sole parent of Alpha Topco and Alpha Prema (Aff. of

Sacha Woodward Hill ¶¶ 5, 6); that Alpha Topco is also a holding company, and the indirect sole parent of Alpha Prema, *id.* ¶¶ 15, 17; and that “Alpha Prema [] “is a vehicle created for the purpose of purchasing and holding equity interests” in Formula One, *id.*, ¶¶ 4, 25. Nowhere is defendant CVC mentioned. These are clearly insufficient facts to support piercing the corporate veil between CVC and the F1 Defendants. *See, e.g., Miramax Film Corp. v. Abraham*, 2003 WL 22832384, at *7 (S.D.N.Y. Nov. 25, 2003) (although the standard for piercing a corporate veil for jurisdictional purposes is “less stringent,” plaintiff must still show a disregard for the separate corporate existence of the dominated corporation).

For these reasons, the court finds that “doing business” jurisdiction exists over defendant CVC, but not the F1 Defendants.

2. Long-Arm Jurisdiction – CPLR 302

CPLR 302(a)(3) furnishes long-arm jurisdiction over a defendant who commit torts outside of New York causing injury in New York, where the defendant “expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.”

First, Bluewaters was not a New York plaintiff back in 2005 and did not suffer any injury in New York. It is alleged that Bluewaters is a New York limited liability company

(Am. Compl. ¶ 15), with two members, Gregg and BWB Limited, the latter which is a corporation organized under the laws of Jersey. (Yalowitz Affirm. ¶ 18.) However, the named plaintiff, Bluewaters Communications Holdings LLC, was formed on November 6, 2012, only ten days prior to the filing of this action. (Lacovara Affirm., Ex. 3.) It has no office or even registered agent in New York. *Id.* Bluewaters Communications Holdings LLC claims that it is the successor by operation of law to Bluewaters Communications Holdings Ltd. (Am. Compl. ¶ 15.) Bluewaters Communications Holdings Ltd. was organized in Jersey on May 20, 2003 and maintained offices in London and Jersey. (Glöckl Aff., Exs. A; B, C, D, E, H, I, J, & M; Lacovara Affirm., Ex. 6). On May 5, 2006, the name was changed to Bluewater Ventures Limited. (Affidavit of David Edward Voisin and Paul Howard Glazier (Voisin/Glazier 3/11/13 Aff.)) ¶ 3.). That entity was formally dissolved in Jersey on November 15, 2012. *Id.* ¶ 4; Butler Affirm., Ex. D. Bluewaters Communications Holdings LLC was allegedly the sole shareholder of Bluewater Ventures Limited at the time of the dissolution, and thus was the recipient of all of the latter's assets. (Voisin/Glazier 3/11/13 Aff. ¶¶ 5, 6.) However, in a supplemental affidavit, the court has been informed that Bluewater Ventures Limited was reinstated by Act of Court in Jersey on May 31, 2013, and then merged into Bluewaters Communications Holdings LLC. (Voisin/Glazier 7/15/13 Supp. Aff. ¶¶ 4, 5.)

Even if Bluewaters can be said to be a New York plaintiff based on its recent corporate transformations, “[i]n the context of a commercial tort, where the damage is solely economic, the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred.” *CRT Inv., Ltd. v. BDO Seidman, LLP*, 85 A.D.3d 470, 471-472 (1st Dep’t 2011).

The “critical events” underlying the claims in this lawsuit took place in Germany, England and elsewhere in Europe. While Bluewaters contends that it lined up financing from two New York firms, Apollo and King Street, the manner in which Bluewaters was going to finance its planned acquisition of Speed Investments has nothing to do with this lawsuit. Notably, neither of these firms is a plaintiff in this lawsuit; it is Bluewaters who is claiming to have suffered an economic injury as a result of the alleged conspiracy. This action is not about a lost business venture in New York, but rather on allegations that an English citizen bribed a German citizen to compel a German bank to sell its interest in a Jersey company to an English company rather than another Jersey company.

Bluewaters also attempts to establish a New York connection by claiming that “two of the three sellers were in New York.” (Pls.’ Opp. Br. at 27.) However, only Lehman was located in New York and it appears that two of the three individuals representing Lehman were or are located in London and Paris. *See Yalowitz Affirm.* ¶3. It was J.P. Morgan's London office and/or London subsidiary that was involved in this deal. *See Lacovara*

Affirm., Ex. 6; Hill Reply Aff., ¶ 3. In addition, it was the sale of BayernLB's controlling stake in Formula One to CVC, allegedly as a result of the bribery of Gribkowsky, and BayernLB's rejection of Bluewaters' allegedly unbeatable offer, that forms the nucleus of the plaintiff's tort and conspiracy claims, and none of this activity occurred in New York. In addition, there is no basis to conclude that any of the defendants should have reasonably expected to defend its actions regarding the sale of Formula One in a New York forum. *See LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214 (2000) (must be a reasonable likelihood of "direct consequences in New York"); *Lawati v. Montague Morgan Slade Ltd.*, 102 A.D.3d 427, 428 (1st Dep't 2013) (alleged co-conspirators must have an awareness that their acts would have an effect in New York).

Bluewaters' alternative argument, that all of the defendants are subject to personal jurisdiction under CPLR 302(a)(1), because they transacted business here, is also unavailing. With the possible exception of CVC, who, in December 2005, purchased the shares of Speed Investments held by Lehman, *see* Am. Compl. ¶ 44, none of the other defendants transacted any business with anyone in New York in connection with the sale of Formula One. None of the principals involved in the proposed transaction between Bluewaters and BayernLB and the actual sale between BayernLB and CVC ever came to New York. Although BayernLB admittedly has an office in New York, and does not contest the court's jurisdiction over it, there is no claim that BayernLB's New York branch had any involvement in this transaction.

The only communications between anyone in New York regarding the sale of BayernLB's shares appears to be Bluewaters' November 15, 2005 offer to all three banks, which was sent to Lehman in New York, *see* Lacovara Affirm. Ex. 6, to which "Gregg received no response," Am. Compl. ¶ 40, and the fact that two brief "let's meet and confer" emails were exchanged between London counsel for BayernLB and a New York law firm representing Bluewaters in May 2005. *See* Yalowitz Affirm., Exs. 18 and 19. This activity does not constitute the transaction of business in New York.

Counsel for Bluewaters argues that "Ecclestone and Gribkowsky, both of whom act as agents of BayernLB, transacted business in New York by negotiating with J.P. Morgan and Lehman in New York." (Pls' Opp. Br. at 29). Notably, no factual support for this statement is offered, and there is nothing in the record to suggest that Ecclestone had any authority to act for BayernLB or that either gentleman was involved in the sale of Lehman's shares to CVC.

Likewise, the allegation that since the purported bribe to Gribkowsky was paid with U.S. dollars, the parties "had to use bank accounts in New York at banks located in New York" is completely speculative. *See* Am. Compl. ¶ 68. Even if the funds for these two payments cleared through a bank in New York, they did not end up here, and the clearing process alone for two fund transfers would not be enough to support the exercise of in personam jurisdiction over any of the defendants.

[T]he mere payment into a New York account does not alone provide a basis for New York jurisdiction, especially when all aspects of the transaction occur out of state, absent more extensive New York banking relating to the transaction in issue.

Pramer S.C.A. v. Abaplus Int'l Corp., 76 A.D.3d 89, 96 (1st Dep't 2010) (internal citations omitted). Even the maintenance of a "nostro" account in New York by a foreign bank to effect foreign currency transfers, a much more regular and purposeful connection to New York than the two transfers at issue in this case, is not sufficient to create personal jurisdiction. See *Universal Trading & Inv. Co. v. Credit Suisse (Guernsey) Ltd.*, 2013 WL 1404805, at *3 (S.D.N.Y. Apr. 5, 2013). It is not plausible for the court to conclude that when Ecclestone and Bambino authorized their bankers in Europe to make the million dollar payments to companies located in Mauritius and the British Virgin Islands intending the money to benefit a German banker in order to influence a German bank, see Am. Compl. ¶ 68, that this was a "purposeful" and not "coincidental" act intended to have consequences in New York. *Licci v. Lebanese Canadian Bank SAL*, 20 N.Y.3d 327, 338-339 (2012). Notably, in the *Licci* case, it was the bank itself who was the defendant, not a bank customer in London effecting a U.S. dollar-denominated wire transfer from a Swiss bank account.

Bluewaters' jurisdictional theory would vest a New York court with jurisdiction over any party anywhere in the world who does a dollar-denominated transaction even though the transaction has no connection to New York. The exercise of personal jurisdiction in such a case lacks the constitutionally mandated "minimum contacts" with New York and does not

comport with “traditional notions of fair play and substantial justice.” *LaMarca v. Pak–Mor Mfg. Co.*, 95 N.Y.2d at 216 (citing *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945)).

Finally, Bluewaters attempts to rely on CPLR 302(a)(2), which authorizes the exercise of personal jurisdiction over a defendant who, in person or through an agent, commits a tort in New York, by arguing that “Defendants’ agents – their banks – transferred the bribe in New York at defendants’ direction.” (Pls.’ Opp. Br. at 31.) For the reasons stated above, this argument is rejected.

In conclusion, the court finds that, although personal jurisdiction exists over CVC pursuant to CPLR 301, Bluewaters has failed to establish a basis for the exercise of long-arm jurisdiction over defendants Ecclestone, Bambino, and the FI Defendants.

B. *Forum Non Conveniens*

New York courts “need not entertain causes of action lacking a substantial nexus with New York.” *Martin v. Mieth*, 35 N.Y.2d 414, 418 (1974). The doctrine of forum non conveniens, codified in CPLR 327(a), provides that the court may dismiss an action “[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum.”

“The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation.” *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984). Although no one factor is controlling, collectively, the courts consider and balance the following factors in determining an application for dismissal based on forum non conveniens: existence of an adequate alternative forum; situs of the underlying transaction; residency of the parties; potential hardship to the defendant; location of documents; location of a majority of the witnesses; existence of a forum selection clause; need to apply the law of a foreign jurisdiction; and burden on New York courts. *See Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d at 479; *Peters v. Peters*, 101 A.D.3d 403, 403 (1st Dep’t 2012); *Fox v. Fusco*, 4 A.D.3d 313, 313-314 (1st Dep’t 2004); *World Point Trading PTE v. Credito Italiano*, 225 A.D.2d 153, 158-159 (1st Dep’t 1996). Where there is “no substantial connection to this State,” dismissal based upon forum non conveniens is warranted. *Blueye Navigation v. Den Norske Bank*, 239 A.D.2d 192, 192 (1st Dep’t 1997). However, “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed” *OrthoTec, LLC v. Healthpoint Capital, LLC*, 84 A.D.3d 702, 702 (1st Dep’t 2011), “even where the plaintiff is not a resident of New York.” *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dep’t 2013).

Turning first to the residency of the parties, this factor weighs heavily in favor of dismissal. None of the individual or corporate defendants are United States citizens, and only CVC and BayernLB have a presence in New York. *See Wyser-Pratte Mgmt. Co., Inc. v. Babcock Borsig AG*, 23 A.D.3d 269, 270 (1st Dep't 2005) (fact that five of the nine defendants are German residents is entitled to substantial weight). Defendant Gribkowsky is currently incarcerated in Munich and has filed a letter with the court indicating that he has insufficient financial resources to hire an attorney in New York to defend this action. (ECF Doc. No. 179.) While it may be true that the other defendants have the financial resources to defend this lawsuit here in New York, *see* Am. Compl. ¶ 16, defendant Gribkowsky apparently does not.

The plaintiff's creation of a New York entity merely days before this action was commenced is a blatant attempt at forum shopping, and the court considers Bluewaters to be a Jersey entity operating out of London or the Channel Islands, with no presence in New York except for its legal counsel. *See San Francisco Tech., Inc. v. The Glad Prod. Co.*, 2010 WL 2943537, at *9 (N.D. Cal. 2010) (plaintiff's contact with the district entitled to little weight, because it was created for the sole purpose of litigating a qui tam action).

Second, most, if not all, of the key fact witnesses are located in Europe. Every witness for, or representative of, Bluewaters, BayernLB, J.P. Morgan, CVC, Bambino, Speed Investments, SLEC Holdings, and the F1 Defendants would have to incur the inconvenience

of traveling from Europe to New York for trial. Although Gregg is a United States citizen and Bluewaters' counsel alleges that he "has residences in Florida, Massachusetts, and elsewhere" (Yalowitz Affirm. ¶ 18), "elsewhere" must include London or Jersey, since that is where Gregg was located at the time of the events of which he complains. Bluewaters maintains that it has identified eighteen "potential" non-party witnesses, and that ten of these witnesses are located in New York. *Id.* ¶ 3. However, the New Yorkers on Bluewaters' list are, for the most part, Bluewaters' two New York-based financiers and their New York legal counsel, but the relevance of their testimony is not explained. *See Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 101 A.D.3d 1, 13 (1st Dep't 2012) (merely listing a series of witnesses without linking their proposed testimony to the allegations of the complaint is not sufficient for a forum non conveniens analysis). Most if not all of the relevant documents are located in England, Germany (at BayernLB's offices and in the Munich Public Prosecutor's files), Jersey, Switzerland, and Austria. Bluewaters fails to identify any relevant documentation that might be found in New York.

While the availability of another suitable forum is a very important factor to be considered in deciding a forum non conveniens motion, *Pahlavi*, 62 N.Y.2d at 481, the existence of an alternative forum is not necessary for dismissal under CPLR 327(a) "where the New York connection to the litigation is minimal." *Fin. & Trading Ltd. v. Rhodia S.A.*, 28 A.D.3d 346, 347 (1st Dep't 2006); *Wyser-Pratte Mfg. Co., Inc. v. Babcock Borsig AG*, 23

A.D.3d at 270; *Shin-Etsu Chem. Co., Ltd. v. ICICI Bank Ltd.*, 9 A.D.3d 171, 179 (1st Dep't 2004).

Defendant BayernLB maintains that the courts of Germany and the United Kingdom are both acceptable alternative forums. At oral argument of the motion, the court was informed that German prosecutors are now pursuing criminal charges against Ecclestone in connection with Gribkowsky's management of BayernLB's stake in Formula One. See July 17, 2013 Tr. at 6-7. Defendant Ecclestone contends that England has a far superior interest in adjudicating this dispute and would be a far more convenient forum for all of the party and nonparty witnesses. Ecclestone also contends that England is currently adjudicating an action involving similar allegations, entitled *Constantin Medien AG v. Ecclestone, et al.*, Claim No. HC11C02586, filed in the High Court of Justice, Chancery Division. (Glöckl Aff. ¶ 33). According to Mr. Glöckl, in this English proceeding, the plaintiff seeks \$171 million in damages alleging a fraudulent conspiracy and unlawful conduct resulting from the sale of the BayernLB holding in Speed Investments. *Id.* CVC and the F1 Defendants contend that England, Jersey and Germany are all adequate alternative forums for Bluewaters' claims, and that the court should take note that in Bluewaters' November 15, 2005 "offer," Bluewaters had taken the position that any dispute arising out of its offer for the Bank Group's shares must "in the first instance, be brought in the courts of England," and had sought the Bank

Group's agreement "not to bring any such suit, action, or proceeding in any other venue."

See Lacovara Affirm., Ex. 6 at § 15.

This is not, as Bluewaters argues, "a multijurisdictional action with no single convenient forum available to all of the parties." (Pls.' Opp. Br. at 15-16, n.1).. However, while it might be the case that the moving defendants differ on whether Germany, England or Jersey are better forums, each of these countries appear to be suitable alternative forums for this dispute where Bluewaters can be afforded appropriate due process. Indeed, Germany would have the most substantial interest in adjudicating this action as it regards the affairs of one of its owns financial institution. *See Shin-Etsu Chem. Co., Ltd. v. ICICI Bank Ltd.*, 9 A.D.3d at 178, a German court has already heard the criminal case against Gribkowsky, and criminal charges are now pending against Ecclestone.

Upon balancing the appropriate factors, the moving defendants have sustained their burden of showing that New York is not a convenient forum for this dispute. Forum non conveniens dismissal is appropriate here, since the action is virtually devoid of any New York connections. *See Adamowicz v. Besnainou*, 58 A.D.3d 546, 547 (1st Dep't 2009); *Serano Ltd. v. Canadian Imperial Bank of Commerce*, 287 A.D.2d 309, 309 (1st Dep't 2001). Bluewaters' forum non conveniens analysis focuses on the connection to New York of a tangential group of nonparty witnesses. What it ignores is that this case involves a foreign plaintiff and that all eight defendants are foreign; the critical events happened in Europe; the

bulk of the discovery will happen abroad; the dispute is governed by either English or German law; and at least three more convenient forums are available – England, Germany and Jersey.

In light of the court's determination that it lacks personal jurisdiction over defendants CVC, Bambino, Alpha Prema, Alpha Topco, and Delta Topco, and that New York is an inconvenient forum for this dispute, the court does not reach the substantive aspects of the defendants' motions which seek dismissal of the amended complaint based on failure to state a cause of action, the statute of limitations or standing.

(Order follows on next page.)

III. Conclusion and Order

For the foregoing reasons, it is hereby

ORDERED that the defendants' motions to dismiss the complaint are granted, and the complaint is dismissed, pursuant to CPLR 3211(a)(8), against defendants Bernard Ecclestone, Bambino Holdings, Ltd., Alpha Prema UK Ltd., Alpha Topco Ltd., and Delta Topco Ltd. for lack of personal jurisdiction, and the entire complaint is dismissed, pursuant to CPLR 327(a), based on forum non conveniens, with costs and disbursements to the moving defendants, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: January 16, 2014

ENTER:


J.S.C.