Primus Pac. Partners I, LP v Goldman Sachs Group, Inc.
2017 NY Slip Op 32383(U)
November 9, 2017
Supreme Court, New York County
Docket Number: 653885/16
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 49

PRIMUS PACIFIC PARTNERS 1, LP,

Plaintiff,

- against -

GOLDMAN SACHS GROUP, INC., GOLDMAN SACHS (SINGAPORE) PTE, and TIM LEISSNER,

Defendants.

Index No.: 653885/16

DECISION/ORDER

O. PETER SHERWOOD, J.:

In this action, plaintiff Primus Pacific Partners 1, LP (Primus) sues defendants Goldman Sachs Group, Inc. (GS Group), Goldman Sachs (Singapore) PTE (GSS), and Tim Leissner (Leissner), for alleged fraud and breach of fiduciary duty in connection with financial advice given by GSS to a Malaysian company of which plaintiff was a shareholder. GS Group and GSS move (seq. no. 001) and Leissner, separately, moves (seq. no. 002), to dismiss the complaint, pursuant to CPLR 3211 (a) and CPLR 327 (a), based on lack of personal jurisdiction and forum non conveniens.[1] The two motions are consolidated for disposition.

Background

The following facts are taken from the Complaint and the parties' submissions. They are undisputed unless otherwise noted.

Primus is a private equity firm organized under the laws of the Cayman Islands and based

[1]Defendants also moved to dismiss on other grounds, but, pursuant to a so-ordered stipulation, agreed to limit their arguments, for now, to the grounds of personal jurisdiction and forum non conveniens.

in Hong Kong. GS Group is a global investment banking, securities and investment management firm incorporated in Delaware and headquartered in New York, with offices around the world. GSS is a wholly owned subsidiary of GS Group, organized under the laws of Singapore with its principal place of business in Singapore. Tim Leissner was co-President and Managing Director of GS Singapore from December 2009 through September 2011.

In or around December 2009, Hong Leong Bank (HLB), a Malaysian bank, made an unsolicited bid to acquire EON Capital (EON), which owned EON Bank Berhard (EON Bank), another large Malaysian bank. Primus was the largest shareholder of EON, controlling approximately 20 percent of the shares, and had a designee on EON's Board of Directors (Board).

In January 2010, GSS was retained, together with non-party Ethos & Company (Ethos), as a financial advisor to EON, to, among other things, evaluate and negotiate HLB's offer. *See* Engagement Letter dated January 4, 2010 (first engagement letter), Ex. 15 to Affirmation of John Quinn in Support of Defendants' Motion (Quinn Aff.). GSS and EON signed a second retainer agreement in May 2010, for GSS to provide financial advice and assistance in connection with the possible sale of EON. *See* Engagement Letter dated May 20, 2010 (second engagement letter), Ex. 17 to Quinn Aff. The second engagement letter stated that it superseded the first engagement letter, which was deemed null and void. *Id.* at 1. The second engagement letter also included a forum selection clause providing that it was governed by Singapore law and any disputes arising out of it would be resolved by arbitration in accordance with Singapore arbitration rules. *Id.* at 6.

Leissner was a member of the GSS team advising EON on the HLB offer. *See*

Affirmation of Frederick Towfigh (Towfigh Aff.), Ex. 6 to Quinn Aff., ¶ 10; Affirmation of James Ayerbe (Ayerbe Aff.), Ex. 7 to Quinn Aff., ¶¶ 5. In connection with the HLB transaction, Leissner attended and made presentations at EON Board meetings in Malaysia. HLB made its first offer in January 2010 to purchase all assets and liabilities of EON for approximately $1.6 billion, and Leissner then met with EON's Board to discuss the offer. Based on the advice of GSS, EON rejected HLB's first offer as too low. HLB made a second, slightly higher bid in April 2010, increasing the amount offered by about 2.8 per cent. Leissner met with the Board to discuss this offer, and, based on the advice of GSS, the Board accepted the offer and submitted it to the shareholders. EON's shareholders approved HLB's second offer in September 2010, and the cash proceeds of the sale subsequently were distributed to the shareholders.

In June 2010, Primus brought a petition in the High Court of Malaysia challenging and seeking to set aside the sale of EON's assets to HLB. The petition alleged that the submission of the offer to shareholders for approval was rushed at the behest of certain shareholders seeking to divest their shares, and the actions of certain shareholders and Board members were illegal or in breach of their fiduciary duties. *See* High Court Decision, Ex. 33 to Quinn Aff. The petition was dismissed by the High Court (*id.*), and the dismissal was upheld on appeal, in 2011. *See* Court of Appeal Decision, Ex. 35 to Quinn Aff.

Plaintiff commenced this action in July 2016, prompted by press reports in March 2016 that Leissner and GSS were being investigated for misconduct in connection with their dealings with the Malaysian Prime Minister and the Malaysian state investment fund, 1 Malaysia Development Bhd. (1MBD), established by the Malaysian Prime Minister. Plaintiff alleges that GSS, at the time it was retained by EON, was an adviser to 1MBD and had a close relationship

with the Malaysian Prime Minister, who had close family and business ties to HLB and an interest in the success of HLB's bid to acquire EON. Complaint, ¶¶ 34, 35, 36. Plaintiff claims that GSS, by concealing its relationship and dealings with the Prime Minister, fraudulently induced EON to retain it. Plaintiff also claims that GSS's advice to EON was influenced by its relationship with the Malaysian Prime Minister; that GSS used confidential information obtained from the EON Board to advantage HLB in its takeover bid; and that GSS sought to "curry favor" with the Malaysian Prime Minister by recommending that EON accept HLB's second offer, knowing it was not a fair offer. *Id.*, ¶¶ 45-46, 49, 76. Plaintiff further contends that EON would not have retained GSS if it had been aware of GSS's conflicts of interest, and that it would not have accepted HLB's second offer if GSS had not recommended that EON accept it. Plaintiff seeks compensatory damages of $170 million and at least $340 million in punitive damages.

Discussion

Personal Jurisdiction

On a motion to dismiss based on lack of personal jurisdiction and forum non conveniens, the First Department has held that, generally, "'[t]he court should . . . address[ ] the issue of personal jurisdiction before forum non conveniens because, if a court lacks jurisdiction over a defendant, it is without power to issue a binding forum non conveniens ruling as to that defendant.'" *Prime Props., USA 2011, LLC v Richardson*, 145 AD3d 525, 525 (1st Dept 2016), quoting *Flame S.A. v Worldlink Intl. [Holding] Ltd.*, 107 AD3d 436, 437 (1st Dept 2013); *see Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG.*, 23 AD3d 269 (1st Dept 2005); *but see Farahmand v Dalhousie Univ.*, 96 AD3d 618, 619 (1st Dept 2012) (affirming trial court's

dismissal on forum non conveniens grounds after finding no basis for personal jurisdiction); *Financial Guar. Ins. Co. v IKB Deutsche Industriebank AG*, 2008 WL 5478808, 2008 NY Misc LEXIS 7520, *9 n 3, 2008 NY Slip Op 33495(U) (Sup Ct, NY County 2008) (dismissing on forum non conveniens grounds where parties agreed to hold jurisdictional issues in abeyance); *see also Fertel v Resorts Intl., Inc.*, 35 NY2d 895, 896 (1974) (dismissing on forum non conveniens ground and finding jurisdictional issue of whether foreign subsidiary of New York-based corporation was alter ego need not be reached). Some courts also have followed the United States Supreme Court decision in *Sinochem Intl. Co. v Malaysia Intl. Shipping Corp.* (549 US 422 [2007]), holding that federal courts have discretion to dismiss an action based on forum non conveniens "before definitely ascertaining its own jurisdiction." *Id.* at 425, 434; *see American BankNote Corp. v Daniele*, 45 AD3d 338, (1st Dept 2007) (decided forum non conveniens issues prior to determining jurisdiction).

Moreover, because "on a motion to dismiss on the ground of forum non conveniens, jurisdiction over the defendant is presumed" (*Shin-Etsu Chem. Co. v ICICI Bank Ltd.*, 9 AD3d 171, 176 [1st Dept 2014] [citation omitted]), courts have decided forum non conveniens motions on that presumption. *See Payne v Jumeirah Hospitality & Leisure (USA) Inc.*, 83 AD3d 518, 518 (1st Dept 2011) ("presuming, without deciding jurisdiction," court properly dismissed action on forum non conveniens ground); *Foster Wheeler Iberia S.A. v Mapfre Empresas S.A.S.*, 15 Misc 3d 1112(A), *2 n 2, 839 NYS2d 433, 2007 NY Slip Op 50619(U) (Sup Ct, NY County 2007) (same); *see also Zisk v Sagar*, 2008 NY Misc LEXIS 5477, *3, 240 NYLJ 41 (Sup Ct, Bronx County 2008) (on forum non conveniens motion "[j]urisdiction over defendants is presumed and is not a relevant factor").

The plaintiff has the burden, on a motion to dismiss pursuant to CPLR 3211 (a) (8), "of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction." *Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 (1st Dept 2017), citing *Fischbarg v Doucet*, 9 NY3d 375, 381 (2007) and *Copp v Ramirez*, 62 AD3d 23, 28 (1st Dept 2009). If plaintiff, however, makes a "sufficient start" in demonstrating that jurisdictional facts "not presently known . . . 'may exist' in opposition to the motion to dismiss," the court may hold the motion in abeyance and permit the parties to conduct limited discovery on the jurisdictional issues. *Peterson v Spartan Indus.*, 33 NY2d 463, 466-467 (1974); *see Santiago v Highway Frgt. Carriers, Inc.*, 153 AD3d 750 (2d Dept 2017); *Venegas v Capric Clinic*, 147 AD3d 457, 458 (1st Dept 2017).

Defendants argue, notwithstanding that GS Group is a New York-based corporation subject to CPLR 301 jurisdiction, that GSS is not subject to personal jurisdiction in New York, because it is incorporated in Singapore with its principal place of business in Singapore, and is separate from and not controlled by GS Group. Leissner contends that he is not subject to jurisdiction in New York because he is not domiciled or residing in New York, and otherwise is not subject to CPLR 301 or CPLR 302 (a) jurisdiction.

"Under New York law, 'a parent corporation and its subsidiary are regarded as legally distinct entities'" (*Analect LLC v Fifth Third Bancorp*, 380 Fed Appx 54, 56 [2d Cir 2010] [citations omitted]), and a parent company doing business in New York "does not automatically give rise to personal jurisdiction over its foreign subsidiaries." *Finerty v Abex Corp.*, 2013 WL 2282188, 2013 NY Misc LEXIS 2119, *6, 2013 NY Slip Op 31077(U) (Sup Ct, NY County), citing *Delagi v Volkswagenwerk AG of Wolfsburg*, 29 NY2d 426, 432 (1972); *see also FIMBank*

P.L.C. v Woori Fin. Holdings Co. Ltd., 104 AD3d 602, 602-603 (1st Dept 2013); *Universal Trading & Inv. Co. v Credit Suisse (Guernsey) Ltd.*, 560 Fed Appx 52, 55 (2d Cir 2014). Parent and subsidiary corporations "are, as a rule, treated separately and independently . . . absent a demonstration that there was an exercise of complete dominion and control [by the parent]." *Sheridan Broadcasting Corp, v Small*, 19 AD3d 331, 332 (1st Dept 2005)(citation omitted).

"The control over the subsidiary's activities . . . must be so complete that the subsidiary is, in fact, merely a department of the parent." *Delagi*, 29 NY2d at 432 (citation omitted); *see also Amsellem v Host Marriott Corp.*, 280 AD2d 357, 359 (1st Dept 2001). "Generally, there are four factors used in determining whether a subsidiary is a mere department of the foreign parent: (1) common ownership and the presence of an interlocking directorate and executive staff; (2) financial dependency of the subsidiary on the parent; (3) the degree to which the parent interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of the parent's control of the subsidiary's marketing and operational policies." *Porter v LSB Indus.*, 192 AD2d 205, 213 (4th Dept 1993), citing *Volkswagenwerk AG. v Beech Aircraft Corp.*, 751 F2d 117, 120-122 (2d Cir 1984); *see FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492, 493 (1st Dept 2017); *FIMBank P.L.C.*, 104 AD3d at 603.

Plaintiff argues that GSS meets the "mere department" test because, as a wholly owned subsidiary of GS Group, there is common ownership, and documents show that the other factors exist. The documents on which plaintiff relies include a September 2016 "Resolution Plan" filed with the FDIC; items obtained from GS Group's website, such as a list of offices around the world and a list of job openings in various GS Group offices, including in Singapore; and a 2010

GS Group annual report. Plaintiff claims that the documents submitted show that GS Group provides financing to its subsidiaries and that GSS is financially dependent on GS Group; that GS Group interfered with the selection and assignment of GSS personnel; and that GS Group controls GSS's operational and marketing practices by using one website for all its subsidiaries and identifying GSS as one of GS Group's global offices. Plaintiff also asserts that, as GS Group has not addressed whether any GSS directors, officers or employees were employed by GS Group or whether GS Group employees worked on the EON transaction, it should be entitled to jurisdictional discovery. Defendants submit affidavits and other documents disputing that GS Group exercises more than "an appropriate parental role . . . in supervising its subsidiaries." *FIMBank P.L.C.*, 104 AD3d at 603.

As to Leissner, plaintiff argues that this court has jurisdiction over Leissner because he owns a residence in New York, based on a news article indicating that Leissner purchased a townhouse in Manhattan in July 2014, and a deed showing the property is owned by a corporation, which plaintiff claims may be connected to Leissner. Plaintiff asserts that this evidence at least warrants jurisdictional discovery as to Leissner's connections to New York. Leissner submits an affidavit attesting that he is a German national, resided in Hong Kong or Singapore from 1997 to 2016, and relocated temporarily to Los Angeles in 2016, intending to return to Hong Kong. Affidavit of Tim Leissner in Support of Motion to Dismiss, ¶¶ 3-5. He also attests that he does not own a residence in New York, and makes only infrequent trips to New York. *Id.*, ¶¶ 8, 9. *See Magdalena v Lins*, 123 AD3d 600 (1st Dept 2014) (no jurisdiction where defendant owned apartment in New York but was not domiciled there).

Even if, however, the material submitted by plaintiff made a "sufficient start" to warrant

jurisdictional discovery (*see e.g. Flame S.A.*, 107 AD3d at 437), and even assuming, without deciding, that there is a "colorable claim of personal jurisdiction over all defendants" (*Payne*, 2009 NY Misc LEXIS 5122, at *18), the court finds that the case should be dismissed on the ground of forum non conveniens.

Inconvenient Forum

The doctrine of forum non conveniens, codified in CPLR 327, permits a court, in its discretion, to dismiss an action "where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere." *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984), *cert denied* 469 US 1108 (1985). "Forum non conveniens is an equitable doctrine . . . [which rests] upon considerations of justice, fairness and convenience." *Martin v Mieth*, 35 NY2d 414, 417 (1974) (citations omitted); *see Pahlavi*, 62 NY2d at 479; *Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 (1972); *Nguyen v Banque Indosuez*, 19 AD3d 292, 294 (1st Dept 2005). As stated in CPLR 327 (a), "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just."

The defendant has the "heavy burden of demonstrating that the forum chosen by [plaintiff] is an inappropriate one" (*Banco Ambrosiano, S.p.A. v Artoc Bank & Trust Ltd.*, 62 NY2d 65, 74 [1984]; *see Pahlavi*, 62 NY2d at 479), and "'[g]enerally, 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 AD3d 702, 702-703 (1st Dept 2011) (citation omitted). New York courts, however, "need not entertain causes of action lacking a substantial nexus with New York." *Martin*, 35 NY2d at 418; *see Silver*, 29 NY2d at 361; *Norex Petroleum*

Ltd. v Blavatnik, 151 AD3d 647, 648 (1st Dept 2017); *Prime Props. USA 2011*, 145 AD3d at 526; *Nguyen*, 19 AD3d at 294.

The "decision to grant or deny a motion to dismiss on forum non conveniens grounds is addressed to a court's discretion." (*Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 137 [2014] citing *Pahlavi*, 62 NY2d at 484). "The doctrine is flexible, requiring the balancing of many factors in light of the facts and circumstances of the particular case." *National Bank & Trust Co. of N. Am., Ltd. v Banco de Vizcaya, S.A.*, 72 NY2d 1005, 1007 (1988), *cert denied* 489 US 1067 (1989); *see Rushaid v Pictet & Cie*, 28 NY3d 316, 332 (2016); *Pahlavi*, 62 NY2d at 479. The factors to be considered on a motion to dismiss on the ground of forum non conveniens "include the burden on New York courts, potential hardship to the defendant, the unavailability of an alternate forum, the residence of the parties, and the location of the events giving rise to the transaction at issue in the litigation." *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 208 (1st Dept 2013), citing *Pahlavi*, 62 NY2d at 479 (other citations omitted). "Other factors may include the location of potential witnesses and documents and the potential applicability of foreign law." *Elmaliach*, 110 AD3d at 208, citing *Shin-Etsu Chem. Co.*, 9 AD3d at 176-177. "No one factor is controlling." *Pahlavi*, 62 NY2d at 479 (citations omitted); *see Banco Ambrosiano*, 62 NY2d at 73; *Silver*, 29 NY2d at 361.

In this case, plaintiff is a Cayman Islands company based in Hong Kong, alleging that a Singapore company and its former co-president engaged in fraud and breach of fiduciary duty while providing financial advice to a Malaysian company in connection with the sale of one Malaysian bank to another. As alleged in the complaint, most, if not all, of the events giving rise to the alleged misconduct occurred in Malaysia.

The complaint alleges that GSS, through Leissner's presentations at EON Board meetings in Malaysia, and in its engagement letters, concealed its relationship with the Malaysian Prime Minister and misrepresented that it had no conflicts of interest, to induce EON to retain GSS as an adviser on HLB's offer to acquire EON. Complaint, ¶¶ 23-24, 27, 29, 33, 39. Plaintiff also alleges that GSS used confidential information to obtain favorable treatment and business opportunities in Malaysia from the Malaysian Prime Minister. The sale of EON to HLB was approved by EON's shareholders and completed in Malaysia, and was unsuccessfully challenged by plaintiff in the Malaysian courts. None of the events that allegedly gave rise to plaintiff's fraud and breach of fiduciary claims occurred in New York, and plaintiff does not allege that it, or EON, had any dealings with GS Group or its employees in New York in connection with the HLB transaction.

While plaintiff acknowledges that most of the underlying events occurred in Malaysia, it argues that New York is a proper forum because it has an interest in regulating defendants' conduct, whether at home or abroad, as any alleged misconduct by defendants "impugns the integrity of the New York financial system." Plaintiff's Omnibus Memorandum of Law in Opposition (Pl. Memo), at 33. Plaintiff alleges that the FBI and the U.S. Department of Justice started an investigation in New York in 2016 into GSS's dealings with the Malaysian Prime Minister and 1MBD dating back to 2009; and that GS Group also conducted an internal investigation in New York, which involved interviews with the GSS team members advising EON. Complaint, ¶¶ 56, 64, 65. Plaintiff asserts that these investigations underscore the interest New York has in regulating defendants' alleged fraud and show that there is a substantial nexus between this lawsuit and New York. Plaintiff also claims that the investigations into the

activities of GSS and Leissner suggest that employees in New York may have participated in the EON transaction and the alleged fraud. Pl. Memo, at 33-35.

Plaintiff presents no evidence that any of the activities surrounding the EON sale occurred in New York, and its claims that subsequent investigations occurred in New York do not demonstrate a substantial nexus. "The fact that the 'transaction[s] out of which the cause of action arose occurred primarily in a foreign jurisdiction' weighs strongly in favor of dismissal on the ground of forum non conveniens." *Foster Wheeler Iberia S.A.*, 15 Misc 3d 1112(A), *4, quoting *Pahlavi*, 62 NY2d at 479 (other citation omitted); *accord Industrias De Papel R. Remenzoni S.A. v Banco de Investimentos Credit Suisse (Brasil) S.A.*, 2014 WL 136502, *14, 2014 NY Misc LEXIS 142, 2014 NY Slip Op 30074(U) (Sup Ct, NY County 2014); *see Viking Global Equities, LP v Porsche Automobil Holding SE*, 101 AD3d 640, 641 (1st Dept 2012) (phone calls and emails not enough to create a substantial nexus where events of the underlying transaction otherwise occurred entirely in foreign jurisdiction); *Finance & Trading Ltd. v Rhodia, S.A.*, 28 AD3d 346, 347 (1st Dept 2006) (purported meetings in NY insufficient to create substantial nexus where underlying transaction occurred primarily in a foreign jurisdiction); *see also Norex Petroleum Ltd.*, 151 AD3d at 648 (no substantial nexus where key event underlying claim took place in foreign jurisdiction where bulk of witnesses and documents were located); *NWG Invs. Inc. v Fronteer Gold Inc.*, 40 Misc 3d 1230(A), *6, 975 NYS2d 710, 2013 NY Slip Op 51355(U) (Sup Ct, NY County 2013) ("primary location of the fraudulent scheme is what helps determine if the case has a 'substantial nexus' to New York").

It also appears likely that the majority of witnesses reside outside of New York. Defendants submit evidence that, at the time of the underlying events, all GSS team members

working on the EON transaction were based in Hong Kong or Singapore. Ayerbe Aff., Ex. 7 to Quinn Aff., ¶ 5; *see also* Working Group List, Ex. 24 to Quinn Aff.. Defendants also submit an affidavit of Beverly O'Toole (O'Toole), Assistant Secretary of GS Group, who states that none of the GSS team members, including Leissner, has been a director, officer, or employee of GS Group since December 2009. O'Toole Aff., Ex. 9 to Quinn Aff., ¶ 4. Other information presented by defendants, undisputed by plaintiff, indicates that most of the GSS team members who worked on the EON transaction are still based in Asia (*see* Exs. 25-30 to Quinn Aff.); and former EON Board members, EON's former CEO, and two co-owners of plaintiff's parent fund, also remain located in Asia. Quinn Aff., ¶¶ 40-65. Leissner attests that, since January 2016, he has resided in Los Angeles, and resided in Hong Kong and Singapore at times relevant to the complaint. Leissner Aff., ¶¶ 4-5.

While plaintiff identifies no material witnesses in New York, even a small number of witnesses in New York would not be sufficient to demonstrate that New York is a more convenient forum, especially when the unnamed witnesses to the investigations in New York would be peripheral to the alleged misconduct in Malaysia. *See Foster Wheeler Iberia S.A.*, 15 Misc 3d 1112(A) (unnamed witnesses in US peripheral to actual dispute between foreign parties and does not alter conclusion that foreign jurisdiction is most convenient forum); *see e.g. SMT Shipmanagement & Transport Ltd. v Maritima Ordaz C.A.*, 2001 WL 930837, *8, 2001 US Dist LEXIS 11928, *28-32 (SD NY 2001), *affd sub nom. David J. Joseph Co. v M/V Baltic*, 64 Fed Appx 259 (2d Cir 2003) (dismissal warranted where testimony of U.S. witnesses was "peripheral compared to the evidence located in Venezuela"); *Oil Basins Ltd. v Broken Hill Proprietary Co., Ltd.*, 613 F Supp 483, 489 (SD NY 1985) (witness who might testify on "at best, only

tangentially" related matters did not outweigh convenience of jurisdiction where most witnesses resided); *Globalvest Mgt. Co. L.P. v Citibank, N.A.*, 7 Misc 3d 1023(A), 801 NYS2d 234, 2005 NY Slip Op 50712(U) (Sup Ct, NY County 2005) (presence of two U.S. witnesses did not outweigh convenience of Brazil).

Malaysia also has a greater interest than New York in transactions involving the sale of its banks and in regulating its banking system; and it already has heard a case filed by plaintiff challenging the sale of EON to HLB. *See e.g. Nguyen*, 19 AD3d at 295 (France "clearly has an interest in regulating its own banking institutions"); *Hanwha Life Ins. v UBS AG*, 127 AD3d 618, 619 (1st Dept 2015) (Korea "has an interest in adjudicating a matter involving harm to a Korean corporation; New York has no such interest."). In comparison, New York's interest in the transaction at issue, involving only Malaysian banks, is minimal. That an investigation may be ongoing in New York regarding actions taken by GSS and Leissner in Malaysia does not diminish Malaysia's greater interest in this case.

While New York's "interest in the integrity of its banks is indeed compelling" (*Mashreqbank PSC*, 23 NY3d at 137), New York's interest is "in protecting the banking system as a whole, rather than individual investors" (*NWG Invs. Inc.*, 40 Misc 3d 1230[A], at *6), and in "regulating the conduct of New York-based banks operating in New York." *Licci v Lebanese Canadian Bank, SAL*, 672 F3d 155, 158 (2d Cir 2012). No "systematic 'compelling interest'" is triggered by the alleged fraud arising from a transaction between two foreign banks occurring outside of New York. *NWG Invs. Inc.*, 40 Misc 3d 1230(A), at *6; *see Mashreqbank PSC*, 23 NY3d at 137 (New York's "'compelling interest in the protection of [its] banking system'" not implicated where the matter involves an alleged fraudulent transaction involving a foreign bank).

It also is not contested that the law of Malaysia, or possibly Singapore, likely will apply. While "New York courts are commonly called upon to apply foreign law, and do not dismiss solely to avoid that burden" (*Gutstadt v National Fin. Partners Corp.*, 2013 WL 5859550, 2013 NY Misc LEXIS 5054, *18, 2013 NY Slip Op 32733[U] [Sup Ct, NY County 2013], citing *Intertec Contr. A/S v Turner Steiner Intl. S.A.*, 6 AD3d 1 [1st Dept 2004]), "[t]he applicability of foreign law is an important consideration in determining a forum non conveniens motion and weighs in favor of dismissal.'" *Flame S.A.*, 107 AD3d at 438, quoting *Shin-Etsu Chem. Co.*, 9 AD3d at 178; *see FIMBank P.L.C.*, 104 AD3d 602; *Gutstadt*, 2013 NY Misc LEXIS 5054, at *18.

As to the availability of an alternate jurisdiction, an important factor to consider, plaintiff claims that it cannot bring suit in Malaysia because, as a former shareholder of now dissolved EON, it has no standing under Malaysian law to assert direct claims arising out of HLB's acquisition of EON. Pl. Memo at 36. Plaintiff submits an affidavit of an attorney practicing in Malaysia, who states, without providing legal authority, that, under Malaysian law, based on English law, plaintiff would not have standing, and that there are procedural obstacles to litigating this case in Malaysia. *See* Affirmation of Dato' Low Siew Cheang, Ex. S to Affirmation of Sarmad Khojasteh in Opposition to Defendants' Motions (Khojasteh Aff.). Plaintiff also claims that Singapore is not an adequate alternative because its courts are unlikely to exercise jurisdiction and it lacks subpoena power over witnesses outside its jurisdiction. Pl. Memo at 38. It submits an affidavit of an attorney practicing in Singapore who states that Singapore is not the "natural forum" for this case because it appears that the EON transaction has no real or substantial connection to Singapore law, notwithstanding that GSS is incorporated

there. *See* Affirmation of Abraham Vergis, Ex. T to Khojasteh Aff.

Plaintiff's submissions do not demonstrate that, notwithstanding any procedural differences, neither Malaysia nor Singapore is an available alternate forum, or that the standing issue would be resolved differently in New York courts applying Malaysian law. *See Hanwha Life Ins.*, 127 AD3d at 619 (Korea was adequate forum notwithstanding limitations on discovery). Moreover, in view of no more than a tenuous connection between plaintiff's claims and New York, "New York does not require an alternate forum for a non conveniens dismissal." *Huani v Donziger*, 129 AD3d 523, 523-524 (1st Dept 2015), citing *Shin-Etsu Chem. Co.*, 9 AD3d at 178-179; *see Pahlavi*, 62 NY2d at 481; *Payne*, 83 AD3d at 519; *Finance & Trading Ltd.*, 28 AD3d at 347.

Considering all the circumstances here, the court concludes that, on balance, this litigation has no substantial nexus with New York, and, in the interest of justice, the action should be heard in another forum. All of the alleged wrongs emanate from conduct in Malaysia, most of the witnesses and documents are located there or in Singapore or Hong Kong, and it is likely that the resolution of certain issues will depend on the application of Malaysian, or possibly Singaporean, law. *See Patriot Exploration, LLC v Thompson & Knight LLP*, 16 NY3d 762, 763 (2011) (case dismissed where it involved alleged malpractice by Texas lawyers representing Alaskan clients, whose principal places of business are in Connecticut, in a transaction with Texas companies involving Texas land and most of potential witnesses are in Texas); *Bluewaters Communications Holdings, LLC v Ecclestone*, 122 AD3d 426, 428 (1st Dept 2014) (case dismissed where it arose from failure of Jersey bank to acquire shares of another Jersey company from a German bank, allegedly because Englishman bribed a German); *Matter of*

Alla v American Univ. of Antigua, 106 AD3d 570 (1st Dept 2013) (on balance, considering nonresidency of both parties and location of events and potential witnesses, case lacked substantial nexus to New York).

Accordingly, it is

ORDERED that defendants' motions to dismiss based on forum non conveniens are granted and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: November 9, 2017

ENTER:

O. PETER SHERWOOD, J.S.C.