SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** 58
Justice

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POST INVESTMENTS, LTD.,

Plaintiff,

- v -

TD TRADING, LLC, TRADESTREAM ANALYTICS, LTD., TRADEDESK FINANCIAL GROUP, INC., DAVID SCHAMENS, PILANA SCHAMENS

Defendant.

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INDEX NO. 655539/2017

MOTION DATE 10/6/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this application to/for Dismiss

Upon the foregoing documents, it is

Motion to dismiss is granted to the extent set forth below and the cross-motion to amend is denied. Plaintiff brought this action against defendants for alleged fraud (and other causes of action) relating to an investment made by plaintiff. Paragraph 1 of the Complaint states "Plaintiff is, at all times herein mentioned, a limited company organized under the laws of Belize that conducts business in the State of New York." Paragraph 6 of the Complaint states "Plaintiff is a company engaged in asset management and securities trading with a principal place of business located in the State of New York, County of New York." Defendant moved to dismiss pursuant to Business Corporation Law 1312(a) which provides:

> A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has

> paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation.

Plaintiff opposed the motion and argued that despite the language contained in BCL 1312, it was permitted to bring this action under BCL 1314. Alternatively, plaintiff argued that it did not fall under BCL 1312 because it was not doing business in New York. Nowhere in the opposition to does plaintiff argue that there was an error in the Complaint. After defendant filed its Reply, pursuant to stipulation, plaintiff filed a cross-motion seeking leave of the Court to file an amended Complaint that "remedies a mistake" by correcting plaintiff's connection to New York.

Although CPLR 3025 provides that leave to amend a pleading should be "freely" granted, the motion must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment (*Nab-Tern Constructors v City of New York (Yankee Stadium)*, 123 AD2d 571 [1st Dept 1986]; *see 247 E. 32nd LLC v Gasparich*, 95 AD3d 790 [1st Dept 2012]; *Walden v. Nowinski,* 63 AD2d 586 [1st Dept., 1978]). Specious amendments should not be allowed (*id. citing Krupp v. Aetna Life & Casualty Co.,* 104 AD2d 85 [2d Dept., 1984]. Here, the proposed amendment seeks to change a key fact that is in direct contradiction to the verified statements made in the Complaint and argued in the opposition. The amendment is not accompanied with any affidavit of merit or documents nor is it accompanied with an affidavit of someone with personal knowledge as to the facts. Rather, the motion to amend is solely accompanied by a memorandum of law. Without any support as to the amendment, this Court cannot permit it. To the extent that in reply plaintiff argues that the Court would be depriving it of its day in Court due to the misstep of Counsel, the Court disagrees as plaintiff remedy is to cure its deficiency as discussed below. Alternatively, plaintiff can withdraw this matter and refile with a Complaint that accurately reflects its current position of

plaintiff's business dealings in New York. For these reasons, the motion seeking leave to amend the Complaint is denied.

Left with the initial Complaint, plaintiff is a foreign corporation; organized under the laws of Belize; that conducts business in the State of New York; with a principal place of business located in the State of New York, County of New York. Given the admission that plaintiff's principal place of business in New York and given the admission by plaintiff in its opposition to the motion to dismiss that "the center of gravity of this case solidly in New York" and that plaintiff "conducts some of its business in the State of New York" the Court finds that BCL 1312(a) is implicated in this matter.

Accordingly, since the Court finds that plaintiff was "doing business" in New York within the meaning of BCL 1312, until it registers with the state of New York and pays all applicable fees, taxes, and penalties, it may not maintain this action. However, outright dismissal of the action is not appropriate (*Tri-Term. Corp. v CITC Indus., Inc.*, 78 AD2d 609 [1st Dept 1980]). Rather, the Court shall grant this motion conditionally but provide plaintiff with a reasonable time period of 90 days to cure its deficiency under BCL 1320 (*see Showcase Limousine, Inc. v Carey*, 269 AD2d 133, 134 [1st Dept 2000], mod in part, 273 AD2d 20 [1st Dept 2000]). Should plaintiff provide the Court and respondents with proof of cure of its deficiency within the 90-day time period, upon letter application to the Court or motion, the Court shall restore this action to the calendar. As the Court is conditionally dismissing this matter, it makes no rulings as to defendants' other arguments for dismissal. It is therefore

ORDERED, that this matter is conditionally dismissed in accordance with this decision and order.

This constitutes the decision and order of the Court.

1/24/2018
DATE

DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	DO NOT POST			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE