Bangladesh Bank v Rizal Commercial Banking Corp.
2022 NY Slip Op 31167(U)
April 8, 2022
Supreme Court, New York County
Docket Number: Index No. 652051/2020
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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BANGLADESH BANK,

Plaintiff,

- v -

RIZAL COMMERCIAL BANKING CORPORATION, MAIA DEGUITO, ANGELA TORRES, LORENZO TAN, RAUL VICTOR TAN, ISMAEL REYES, BRIGITTE CAPINA, NESTOR PINEDA, ROMUALDO AGARRADO, PHILREM SERVICE CORP., SALUD BAUTISTA, MICHAEL BAUTISTA, CENTURYTEX TRADING, WILLIAM GO, BLOOMBERRY RESORTS AND HOTELS, INC.,EASTERN HAWAII LEISURE COMPANY, LTD., KAM WONG, WEIKANG XU, DING ZHIZE, GAO SHUHUA, and JOHN DOES,

Defendants.

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INDEX NO. 652051/2020

MOTION DATE

MOTION SEQ. NO. 002 006 007

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 57, 58, 148, 149, 184, 193, 230

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 120, 123, 124, 125, 126, 127, 128, 129, 130, 139, 140, 141, 142

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 114, 115, 116, 117, 118, 121, 131, 132, 133, 134, 135, 136, 137, 138, 143, 144, 145, 146, 147

were read on this motion to/for DISMISS.

This action arises from an international money laundering scheme where the participants stole more than $101 million from an account plaintiff Bangladesh Bank maintains at the Federal Reserve Bank of New York (New York Fed). Unknown North Korean hackers allegedly infiltrated plaintiff's computer network in Bangladesh and issued multiple unauthorized payment orders to transfer funds from plaintiff's New York Fed account to various bank accounts in the Philippines and elsewhere. (NYSCEF

Doc. No. [NYSCEF] 1, Complaint ¶ 3.) The stolen funds were then laundered through two gambling casinos in the Philippines operated by two of the defendants herein, defendants Bloomberry Resorts and Hotels, Inc. (BRHI) d/b/a Solaire Resort & Casino and Eastern Hawaii Leisure Company, Ltd. (EHL) d/b/a Midas Hotel & Casino. (*Id.* ¶¶ 25, 25, 262, 271.)

In motion sequence number 002, BRHI moves, pursuant to CPLR 3211 (a) (7) and (8), to dismiss the complaint for lack of personal jurisdiction and for failing to state a cause of action. BRHI also moves under CPLR 327 (a) for dismissal for forum non conveniens.[1]

In motion sequence number 006, EHL moves, pursuant to CPLR 306-b and CPLR 3211 (a) (8), to dismiss the complaint for lack of personal jurisdiction. EHL also moves for dismissal under CPLR 327 (a) for forum non conveniens.

In motion sequence number 007, defendant Kam Sin Wong a/k/a Kim Wong (Wong) moves, pursuant to CPLR 306-b and CPLR 3211 (a) (8), to dismiss on the ground he was not properly served.

BACKGROUND

The following facts are drawn primarily from the complaint and are assumed to be true for purposes of this motion. (*See Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 92 [1993].)

A. The Parties

Plaintiff is the central bank of the People's Republic of Bangladesh. (NYSCEF 1, Complaint ¶ 43.) Plaintiff uses "SWIFT" messages to create and confirm cross-border

[1] BRHI's Notice of Motion does not specifically reference CPLR 327 although its moving brief does.

financial transactions on the "SWIFTLIVE" system via the SWIFT Alliance Access application. (*Id.* ¶¶ 75 and 131-132.) Since 1972, plaintiff has held its international reserves in a custodial account at the New York Fed and conducts most of its international transactions in United States dollars (USD) through that account. (*Id.* ¶¶ 45-46.)

Defendant Rizal Commercial Banking Corporation (RCBC) is one of the largest banks in the Philippines. (*Id.* ¶ 11.) RCBC maintains correspondent U.S. bank accounts at Wells Fargo Bank, N.A. (Wells Fargo), Bank of New York Mellon (BNY) and Citibank, N.A. (Citibank) at branches in New York and Pennsylvania. (*Id.* ¶¶ 84 and 145.) Defendants Maia Santos Deguito (Deguito), Angela Ruth Torres (Torres), Lorenzo V. Tan (Lorenzo), Raul Victor B. Tan (Raul), Ismael S. Reyes (Reyes), Brigitte R. Capiña (Capiña), Nestor O. Pineda (Pineda), and Romualdo S. Agarrado (Agarrado) are all Philippine nationals and are all current or former RCBC employees (collectively with RCBC, the Bank Defendants). (*Id.* ¶¶ 12-19.) Deguito is the former branch manager and Torres is a former senior customer relations officer at RCBC's Jupiter branch. (*Id.* ¶¶ 12-13.)

Defendant Philrem Service Corp. (Philrem) is a Philippine corporation with a principal place of business in Makati City, Manila, Philippines. (*Id.* ¶ 20.) Philrem held a money transmittal license from the Central Bank of the Philippines. (*Id.*) Defendants Salud Bautista (Salud) and Michael Bautista (Michael) (together, the Bautistas), both Philippine nationals, co-own Philrem. (*Id.* ¶¶ 21-22.)

Defendant Centurytex Trading (Centurytex) is a Philippine corporation with a principal place of business in Manila. (*Id.* ¶ 23.) Defendant William So Go (Go), a Philippine national, owns Centurytex. (*Id.* ¶ 24.)

BRHI is a corporation organized under Philippine law and maintains its principal place of business in Manila. (*Id.* ¶ 25.) BRHI operates the Solaire Resort & Casino (the Solaire) in Manila. (*Id.* ¶¶ 25 and 262.)

EHL is part of a Chinese corporation registered to do business in the Cayagan Special Economic Zone and Freeport Enterprise and maintains a principal place of business in Manila. (*Id.* ¶ 26.) EHL operates the Midas Hotel & Casino (the Midas). (*Id.*) Wong, a Philippine national, owns EHL and is a signatory on one of its bank accounts at nonparty Philippine National Bank (PNB). (*Id.* ¶¶ 27 and 271.) Wong is a close friend of Lorenzo, RCBC's President and CEO. (*Id.* ¶¶ 14 and 155.) EHL and Wong operate a gambling junket at the Midas. (*Id.* ¶¶ 107 and 310.) A "junket" is a "highly profitable VIP business in casinos … sometimes with their own dedicated playing rooms at casinos or chips that are unique to that junket." (*Id.* ¶ 266.)

Defendants Weikang Xu (Xu), Ding Zhize (Ding) and Gao Shuhua (Gao) are Chinese nationals residing in China. (*Id.* ¶¶ 28-30.) Gao has experience running gambling operations and foreign gaming junkets; he convicted previously in China for running illegal gambling operations. (*Id.* ¶ 122.) Ding operates junkets including the "Sun City" junket, the "Gold Moon" junket and the "Lau Ka Wai" junket. (*Id.* ¶ 266.). Gao is a co-investor in EHL. (*Id.* ¶ 271.)

B. The Bank Accounts at RCBC

Plaintiff alleges because North Koreans cannot engage in international banking, the hackers and defendants selected the Philippines, with its lax anti-money laundering laws, as the location to launder the stolen funds. (*Id.* ¶¶ 117-120.) In advance of the theft, the Bank Defendants opened several accounts at RCBC including a Philippine peso account under Go's name in July 2014 and a USD account under Go's name for

Centurytex (the Centurytex Account) on February 5, 2016. (*Id.* ¶¶ 85-86, 88 and 110.) On May 15, 2015, RCBC opened five USD accounts each with $500 deposits under the names of Michael Francisco Cruz (Cruz), Jessie Christopher M. Lagrosas (Lagrosas), Alfred Santos Vergara (Vergara), Enrico Teodoro Vasquez (Vasquez) and Ralph Campo Picache (Picache). (*Id.* ¶¶ 90-94.) The five accounts (collectively, the Fictitious Accounts) were created at the request of Wong and the John Doe defendants and sat dormant until February 5, 2016. (*Id.* ¶¶ 89-90.) On December 8, 2015, RCBC opened five Philippine peso accounts under Cruz, Lagrosas, Vergara, Vasquez and Picache, but these accounts were not used. (*Id.* ¶¶ 108-109.)

RCBC allegedly failed to follow internal procedures and basic anti-money laundering procedures in opening these accounts. (*Id.* ¶¶ 97 and 113.) For instance, RCBC admitted that Go's signature on the account opening forms for the peso account and the Centurytex Account did not match, and that a fake address had been used to open the peso account. (*Id.* ¶ 86.) Plaintiff alleges that similar red flags should have alerted RCBC to issues with the Fictitious Accounts. (*Id.*) The opening paperwork was executed at a casino, and casinos were exempt from the reporting requirements under Philippine anti-money laundering laws.[2] (*Id.* ¶ 107.) Each fictitious account holder's driver's license was fake, and RCBC admitted that the signatures on the account opening forms did not match the signatures on the fake licenses. (*Id.* ¶¶ 98-99.) The contact information for the fictitious account holders was false, with four of the five form "Thank You" letters returned to RCBC as undeliverable. (*Id.* ¶ 102.) RCBC's policy

[2] Deguito testified before the Philippine Senate's Blue Ribbon Committee that she met with Wong at the Solaire to execute the paperwork, but Wong testified that he and Gao met her at the Midas. (*Id.* ¶ 107.)

required it to act if such form letters were returned, but no action was taken. (*Id.* ¶ 103.) The fictitious account holders had similar employment backgrounds, and RCBC admitted that it did not conduct any employment verification reviews. (*Id.* ¶ 101.) Nevertheless, Deguito, Torres, Agarrado and others approved opening the accounts. (*Id.* ¶ 104.)

C. The Theft from Plaintiff's New York Fed Account

In January 2015, the North Korean hackers began infiltrating plaintiff's computer network by sending "spear-phishing" emails to plaintiff's employees. (*Id.* ¶¶ 124 and 126.) Links in each email contained malware which allowed the hackers access to plaintiff's network onto which they installed other forms of malware. (*Id.* ¶¶ 125 and 128.) By January 29, 2016, the North Korean hackers were able to access the SWIFTLIVE system using plaintiff's login credentials. (*Id.* ¶¶ 131-132.)

After the close of business in Bangladesh on February 4, 2016, the hackers accessed the SWIFTLIVE system from plaintiff's network and sent 36 payment orders directing the transfer of nearly $1 billion from plaintiff's New York Fed account to various recipients. (*Id.* ¶ 137.) The New York Fed rejected 35 orders because of missing routing information for correspondent U.S. bank accounts through which the funds could be transferred out of the country. (*Id.* ¶¶ 138-139.) The New York Fed processed one $20 million order which a bank in Sri Lanka, the Pan Asia Banking Corporation, later flagged as problematic. (*Id.* ¶ 138.) The Sri Lankan bank returned the funds. (*Id.*)

In response to the New York Fed's SWIFT messages to plaintiff about the faulty payment orders, the hackers updated 34 of them with RCBC's correspondent U.S. bank account information and resent the 34 orders to New York Fed between 11:30 p.m. on February 4, 2016 and 1 a.m. on February 5, 2016 Bangladesh time. (*Id.* ¶ 140.) The

New York Fed processed four orders totaling $81,001,662.12 and, using Fedwire[3], transferred the funds to four of RCBC's correspondent U.S. accounts. (*Id.* ¶¶ 150-153.) The amounts on the payment orders to these intermediary banks were: $6,000,039.12 to Wells Fargo; $30,000,039.12 to BNY; $20 million to Wells Fargo; and $25,001,583.88 to Citibank. (*Id.*) Once the transfers were accomplished, the funds were then deposited into the Fictitious Accounts as follows: $6,000,029.12 to the Cruz account; $30,000,028.79 to the Lagrosas account; $19,999,990.00 to the Vergara account; and $25,001,573.88 to the Vasquez account.[4] (*Id.* ¶¶ 161, 163, 165 and 167.) RCBC collected $50,646.01 in fees. (*Id.*)

D. Movement of the Stolen Funds

Between 11:30 a.m. and 12 p.m. on February 5, Wong called Deguito to ask whether a deposit had been made into the Cruz account. (*Id.* ¶ 154). When she checked the account, Deguito discovered that approximately $6 million had been deposited. (*Id.*). Asked how he knew funds were incoming, Wong told Deguito, "I told you, Lorenzo [Tan] knows this." (*Id.*, ¶ 155). Wong called Deguito multiple times that day to arrange for the use of Philrem's accounts at RCBC to launder the stolen funds. (*Id.* ¶ 156).

On February 5, 2016, Deguito processed, and Torres approved, the opening of the Centurytex Account as a "middle-man account." (*Id.* ¶¶ 170-171.) Minutes after the account was created, it received $22,735,000 from the fictitious Lagrosas account. (*Id.*

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[3] Fedwire," a system used to facilitate the transfer of large dollar payments within the Federal Reserve system. (*Id.* ¶ 59.)

[4] These amounts total $81,001,621.79. Plaintiff, though, alleges that $81,001,617.12 had been deposited into the Fictitious Accounts (*id.* ¶ 251) and that $81,001,662.12 had been stolen. (*Id.* ¶ 261.)

¶ 171.) Deguito and Torres masked the transfer as a cash withdrawal by Lagrosas and an immediate deposit into the Centurytex Account. (*Id.* ¶ 172.) Shortly thereafter, Philrem's USD account at RCBC's Unimart branch received two transfers of $14.2 million and $500,000 from the Centurytex Account. (*Id.* ¶ 173.) Philrem traded $13.5 million and $500,000 from its USD account for 644,220,000 and 23,810,000 pesos credited to its peso account at the Unimart branch. (*Id.* ¶ 175.) RCBC collected fees and commissions on these transactions. (*Id.* ¶¶ 174-177.) The Bank Defendants and Philrem then moved 655,005,000 pesos, or $12.46 million, between the Centurytex Account, Philrem's USD account, and Philrem's peso account, which they used to purchase 5 manager's checks worth 635 million pesos. (*Id.* ¶ 176.) Salud deposited the checks listing Philrem as the payee into Philrem's accounts at nonparties Banco De Oro Unibank, Inc. (BDO) and Metropolitan Bank and Trust Company (Metrobank). (*Id.*)

The Bank Defendants also engineered a cash delivery of 20 million pesos, or $380,000, from RCBC's Makati Cash Center to its Jupiter branch. (*Id.* ¶ 180.) To accomplish this, RCBC credited Go's peso account with a bogus credit of 635 million pesos, or $12.5 million. (*Id.* ¶ 181.) Deguito and Torres handed the 20 million pesos in a cardboard box to Go in the parking lot at RCBC's Jupiter branch. (*Id.* ¶¶ 183-185.) Others have claimed the box was placed in Deguito's vehicle. (*Id.* ¶ 186.) An investigation disclosed that the surveillance video system at the Jupiter branch had been tampered with and was not in operation between February 4 and 9, 2016. (*Id.* ¶ 187.)

Due to these suspicious transactions, RCBC placed a hold on the Fictitious Accounts and the Centurytex Account on the evening of February 5, 2016. (*Id.* ¶ 192.)

However, Raul, RCBC's former Head of Retail Banking, caused the hold to be removed after 45 minutes. (*Id.* ¶¶ 195-200.)

On Monday, February 8, 2016, plaintiff sent RCBC three SWIFT messages requesting that it stop payment to and freeze the Vazquez, Vergara and Lagrosas accounts if payments had been made. (*Id.* ¶¶ 205-207.) An unknown person, though, had signed RCBC out of the SWIFT server on Sunday, February 7, 2016, and thus, RCBC did not receive the messages until 9:11 a.m. on Tuesday, February 9, 2016. (*Id.* ¶ 210.) Shortly thereafter, RCBC's Settlements Department forwarded the stop payment messages to its Jupiter branch, thereby alerting branch employees to shift more of the stolen funds out of the Fictitious Accounts. (*Id.* ¶ 214.) RCBC staff transferred $5,985,883.47 from the Cruz account, $7,236,154.62 from the Lagrosas account and $19,951,502.13 from the Vergara account to the Centurytex Account. (*Id.* ¶¶ 218 and 220-221.) RCBC moved $15,215,977.26 from the Vazquez account to a Philrem account, then to the Centurytex Account, and back to the Philrem account. (*Id.* ¶ 217.) RCBC shifted $9,769,124 from the Vazquez account to the Centurytex Account, then to Philrem's account at RCBC's Unimart branch. (*Id.* ¶ 219.) The transfers left a total of $68,335.63 in the Fictitious Accounts, inclusive of their initial $500 deposits. (*Id.* ¶¶ 216, 223 and 238.) The Jupiter branch did not enforce the hold on the Fictitious Accounts until 3:31 p.m., after nearly all the funds had been moved. (*Id.* ¶ 239.) RCBC then sent plaintiff a SWIFT message advising that holds had been placed on the three accounts and sent similar messages to RCBC's correspondent banks in the U.S. (*Id.* ¶¶ 227-228.)

On February 9, 2016, Michael converted $15 million and $17 million from Philrem's USD account into 811,410,000 and 716,100,000 pesos credited to its peso

account at RCBC's Unimart branch. (*Id.* ¶¶ 232 and 234-235.) Deguito and Torres withdrew $13 million from the Centurytex Account and deposited the funds into an account for nonparty Abba Currency Exchange (the Abba Account). (*Id.* ¶ 237.) An account for nonparty Beacon Currency Exchange (the Beacon Account) received $3 million from the Abba Account. (*Id.* ¶ 241.) Deguito and Torres withdrew $20 million from the Centurytex Account and deposited those funds into Philrem's USD account. (*Id.* ¶ 237.)

On February 10, 2016, plaintiff sent a stop payment request via SWIFT message related to the Cruz Account. (*Id.* ¶ 244.) That same day, Raul allowed Michael to convert $15 million from Philrem's USD account into pesos, which allowed RCBC to earn significant fees. (*Id.* ¶¶ 246-247.)

With RCBC's knowledge, additional transactions occurred on February 11, 2016. Philrem's USD account at RCBC received $3 million from the Beacon Account and $10 million from the Abba Account. (*Id.* ¶ 250.) Approximately $80.88 million made its way into Philrem's USD account. (*Id.* ¶ 251.)

A portion of the stolen funds was allegedly laundered through the Solaire. In a series of transactions between February 5 and February 11, 2016, Philrem transferred a total of 2.9 million pesos from its peso account at RCBC's Unimart branch to the Centurytex Account, EHL's account at PNB, and Philrem's accounts at RCBC, BDO, Metrobank and nonparty Security Bank and Trust Company. (*Id.* ¶ 263.) In nine separate transactions, Philrem moved 1.365 billion pesos, or $29 million, from its BDO account to BRHI's BDO account; BRHI used the funds to purchase non-negotiable Solaire chips for Ding, Xu, Gao and 17 others. (*Id.* ¶¶ 262-265.) Ding and his associates exchanged Solaire chips worth 903,730,000 pesos for an equal amount of

non-negotiable Sun City junket chips; Solaire chips worth 100 million pesos for an equal amount of non-negotiable Gold Moon junket chips; and Solaire chips worth 30,195,000 pesos for an equal amount of non-negotiable Lau Ka Wai junket chips. (*Id.* ¶ 267.) Converting the funds into playing chips allowed the players to exchange the chips at the end of each night for "clean, untraceable cash." (*Id.* ¶ 325.)

Ding and his associates played the junket chips and the remaining Solaire chips through March 10, 2016, when Solaire ended their gaming sessions (*id.* ¶¶ 268-269), more than a week after the Philippine press had reported that plaintiff's funds were "used either to buy chips or pay for casino losses incurred at the Solaire." (*Id.* ¶ 330.) Solaire confiscated 107,250,602 pesos worth of Solaire and junket chips and 1,347,069 pesos in cash. (*Id.* ¶ 269.) Between February 5 and 13, 2016, Philrem also made multiple cash deliveries in pesos and dollars totaling $30,639,141.63 to Xu and "likely" to Wong at the Solaire or at Michael's home. (*Id.* ¶¶ 280-281, 299 and 301-302.)

EHL and Wong allegedly laundered approximately 1 billion pesos of the stolen funds. (*Id.* ¶ 311.) On February 10, 2016, Philrem moved 499,999,748.50 pesos to EHL's PNB account; Wong then made two withdrawals of 400 million pesos and 100 million pesos. (*Id.* ¶ 273.) He deposited 400 million pesos into his personal account at PNB on February 10, 2016, withdrew the same amount in cash, and redeposited it into EHL's account the next day. (*Id.* ¶¶ 274-275.) Philrem transferred another 499,999,748.50 pesos to EHL's PNB account on February 11, 2016. (*Id.* ¶ 276.) Over the next two weeks, Wong withdrew more funds from that account (*id.* ¶ 277), including 550 million pesos transferred to a junket he operated at the Midas and converted into playing chips. (*Id.* ¶ 311.) The chips were played at the junket through March 2, 2016; by then, only 40 million pesos worth of chips remained. (*Id.*) Of the 400 million pesos

and $5 million in cash given to EHL, Wong claims to have brought 10 million pesos to a junket at the Solaire on February 5 and deposited the remaining 300 million pesos in his junket at the Midas. (*Id.* ¶ 313.) Wong also deposited $5 million at a junket at the Solaire from which Gao and Ding allegedly took $370,000 in cash. (*Id.*). With help from the Solaire, EHL and Wong returned $15 million to the Philippines' Anti-Money Laundering Council (AMLC). (*Id.* ¶¶ 317-319.)

Deguito was criminally convicted and Torres, Raul, Reyes, Capiña, Agarrado, Philrem, Salud and Michael were criminally indicted for their roles in the scheme. (*Id.* ¶¶ 12-17 and 19-22.) The Monetary Board of the Philippine's central bank fined RCBC 1 billion pesos. (*Id.* ¶ 339.) The Philippine Senate's Blue Ribbon Committee has conducted an investigation. (*Id.* ¶ 107.) The United States Department of Justice and the FBI also launched an investigation which resulted in a criminal action brought against a North Korean hacker captioned *United States v Park Jin Hyok*, CD Ca, No. 18-MJ-1479. (*Id.* ¶¶ 69 and 345.)

PROCEDURAL HISTORY

On January 31, 2019, plaintiff commenced an action against defendants in the United States District Court for the Southern District of New York, *Bangladesh Bank v RCBC Commercial Banking Corp.*, No. 19-cv-00983 (LGS) (the Federal Action), alleging violations of New York law and the Racketeer Influenced and Corrupt Organizations Act (RICO), (18 USC § 1961 et seq.). (*Id.* ¶ 34.) In a decision dated March 20, 2020, the Court (Schofield, J.) dismissed the RICO cause of action, declined to exercise jurisdiction over the state law claims, and denied the motions brought by RCBC, BRHI, EHL and Wong to dismiss the action for lack of subject matter jurisdiction and for forum non conveniens. (*Bangladesh Bank v Rizal Commercial Banking Corp.*,

2020 WL 1322275, 2020 US Dist LEXIS 49246 [SDNY, Mar. 20, 2020, No. 19 Civ. 983 (LGS)], *appeal withdrawn* 2020 WL 6145040, 2020 US App LEXIS 33294 [2d Cir, Aug. 3, 2020].) RCBC and Reyes filed a complaint for defamation against plaintiff in the Philippines in response to the Federal Action. (*Id.* ¶ 40.) Reyes also brought a petition captioned *Matter of Reyes*, SDNY, No. 19 Civ. 7219, in federal court for discovery under 28 USC § 1782 from BNY. (*Id.* ¶ 41.)

Plaintiff commenced this action on May 27, 2020 by filing a summons and complaint pleading nine causes of action for: (1) conversion/theft/misappropriation against all defendants; (2) aiding and abetting conversion/theft/misappropriation against all defendants; (3) conspiracy to commit conversion/theft/misappropriation against all defendants; (4) fraud against the Bank Defendants; (5) aiding and abetting fraud against all defendants; (6) conspiracy to commit fraud against all defendants; (7) conspiracy to commit trespass against chattels against all defendants; (8) unjust enrichment against all defendants; and, (9) money had and received against all defendants. Since commencing this action, plaintiff has obtained three court orders extending its time to serve defendants. (NYSCEF 28, 119, and 211-212.)

BRHI, EHL and Wong move separately for dismissal of the complaint.

DISCUSSION

A. Dismissal under CPLR 306-b

EHL and Wong contend that plaintiff failed to effectuate service within 120 days as set forth in CPLR 306-b and failed to serve them at a proper address in the Philippines in accordance with Philippine law. EHL's attorney in the Philippines, Cherrie Belmonte-Lim (Belmonte-Lim), affirms that Rule 14, Section 14, of the Philippines' 2019

Amended Rules of Civil Procedure governs service upon a foreign corporation. (NYSCEF 101, Belmonte-Lim aff ¶ 6.) The rule provides:

> "Service upon foreign private juridical entities. When the defendant is a foreign private juridical entity which has transacted or is doing business in the Philippines, as defined by law, service may be made on its resident agent designated in accordance with law for that purpose, or, if there be no such agent, on the government official designated by law to that effect, or on any of its officers, agents, directors or trustees within the Philippines."

(*Id.*) Publicly available "General Information Sheets" filed with the Philippine Securities and Exchange Commission (SEC) list EHL's office address as Cagayan Economic Freeport Zone (CEZA) Complex Brgy. Centro, Sta. Ana, Cagayan and the address of its registered agent, Kathryn Krizelle K. Wong (Kathryn), as No. 22 Mindoro Street, Marina East Village, Tambo, Parañaque City. (NYSCEF 102, EHL SEC Filings.) Kathryn has been listed as EHL's resident agent in every SEC filing since 2015. (*Id.*) Wong's attorney in the Philippines, Eduardo C. Escaño (Escaño), affirms that Rule 14 of the Philippines' 2019 Amended Rules of Civil Procedure also governs service of process upon individuals. (NYSCEF 115, Escaño aff ¶¶ 6-7.) Rule 14, Section 5 provides, in part, that service upon should be made in person whenever practicable. (*Id.* ¶ 7.) Rule 14, Section 62 allows for substituted service when personal service cannot be made. (*Id.* ¶ 8.) The rule states:

> "If, for justifiable causes, the defendant cannot be served personally after at least three (3) attempts on two (2) different dates, service may be effected:
> a) By leaving copies of the summons at the defendant's residence to a person at least eighteen (18) years of age and of sufficient discretion residing therein;
> b) By leaving copies of the summons at the defendant's office or regular place of business with some competent person in charge thereof. A competent person includes,

> but is not limited to, one who customarily receives correspondences for the defendant;
> c) By leaving copies of the summons, if refused entry upon making his or her authority and purpose known, with any of the officers of the homeowners' association or condominium corporation, or its chief security officer in charge of the community or the building where the defendant may be found; and
> d) By sending an electronic mail to the defendant's electronic mail address, if allowed by the court."

(*Id.*)

Plaintiff had the Philippine Central Authority serve EHL and Wong at 3595 Padre Sanchez St., Sta. Mesa, Manila.[5] (NYSCEF 87, Hague Service Packet [Wong]; NYSCEF 88, Hague Service Packet [EHL]). The sheriff tasked by the Central Authority to serve process left the summons and complaint with a security guard who refused to acknowledge receipt. (NYSCEF 89, Certificate of Service [Wong]; NYSCEF 90, Certificate of Service [EHL].)

EHL and Wong contend that such service is defective. EHL argues that Philippine law does not allow for service upon a corporation by leaving the summons and complaint with a security guard at an address where no one associated with the company may be found. Wong argues that the papers were not left at his residence, his office, or his regular place of business with someone who customarily receives correspondence for him, and they were not left with a person of the type described in Rule 14, Section 62.

[5] The Philippines is a signatory to the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Convention) (20 UST 361, TIAS No. 6638). (Hague Conference on Private International Law – Conférence de La Haye de droit international privé at https://www.hcch.net/en/states/hcch-members/details1/?sid=121 [last accessed on April 6, 2022].)

Plaintiff maintains that it properly served EHL and Wong. It asserts that the Certificates returned by the Central Authority and the accompanying affidavits evidence compliance with the Hague Convention and Philippine law. Plaintiff also contends that the Padre Sanchez address is valid. A "Petition for Civil Forfeiture" brought by the AMLC lists the Padre Sanchez address as one of Wong's known addresses "where he may be served with notices and other judicial processes" (NYSCEF 104, Petition for Civil Forfeiture at 2), and Wong does not deny that he and EHL are located or conduct business there. Plaintiff also asserts that EHL and Wong engaged in similar tactics in the Federal Action by arguing that plaintiff should have served them at the CEZA Complex and Mindoro Street addresses. However, prior attempts at service at those addresses, though, failed. (*See* NYSCEF Doc No. 128, Affidavit of Service [March 28, 2019] ¶ 13; NYSCEF 126, Burwa aff ¶ 11[e]), as have more recent attempts this past summer. (NYSCEF 196, 10/7/2021 Central Authority E-mail at 1.)

Meanwhile, a service package sent to Wong at the Padre Sanchez address was accepted. (*Id.* ¶ 8[f].) In addition, a messenger for plaintiff's local Philippine counsel averred while attempting to serve Kathryn at the Padre Sanchez address on March 25, 2019, he earned that the building was owned by Kathryn's mother, and was told that Kathryn "was not currently inside the UII building, but … regularly comes to UII." (NYSCEF 129, Dumanacal aff ¶¶ 8, 14, 15.) On March 26, 2019, the messenger returned to the address and delivered the papers to Kathryn's mother, who directed him to "leave the Service Packet with her." (*Id.* ¶ 39.) EHL and Wong appeared in the Federal Action less than a week later.

CPLR 306-b requires that service of the summons and complaint be made within 120 days after the action is commenced, and if service is not made within that period,

"the court, upon motion, shall dismiss the action without prejudice as to that defendant." The plaintiff bears the burden of demonstrating that service of process upon a defendant is proper. (*See Voulkoudis v Frantzeskakis*, 184 AD3d 516, 517 [1st Dept 2020].) The failure to timely serve process warrants dismissal of the complaint. (*See Garcia v City of New York*, 115 AD3d 447, 448 [1st Dept 2014].)

"[T]he return of a completed certificate of service by a Central Authority establishes prima facie evidence that the Central Authority's service on Defendants was made in compliance with the convention." (*Unite Natl. Retirement Fund v Ariela, Inc.*, 643 F Supp 2d 328, 334 [SDNY 2008] [citation omitted].) In *Unite National Retirement Fund*, the SDNY found that "[b]y not objecting to the documents and by certifying service, the Central Authority indicated that the documents complied with the Convention and that it had served them in compliance with the Convention, i.e., that it had made service as Mexican law required." (*Id.* at 335.)

Here, the Central Authority's "Certificates-Attestation" indicate that EHL and Wong were served with the summons and complaint on February 2, 2021 "in accordance with the provisions of sub-paragraph a) of the first paragraph of Article 5 of the Hague Convention." (NYSCEF 89, Certificate of Service [Wong]; NYSCEF 90, Certificate of Service [EHL].) According to the accompanying "Sheriff's Return," a sheriff visited the Padre Sanchez Street address on January 29 and February 1, 2021 to personally serve Wong and Kathryn with process but a security guard, indicated that Wong, Kathryn and EHL's officers were "not around." (*Id.* at 2.) When the sheriff returned on February 2, 2021, he was informed again that Wong, Kathryn and EHL's officers were "not around." (*Id.*) The sheriff delivered the summons and complaint to the guard as a person of suitable age and discretion. (*Id.*) The Central Authority signed

and returned the "Certificates-Attestation." Thus, plaintiff has demonstrated that service upon EHL and Wong comports with the Hague Convention. (*See Voelker v Bodum USA, Inc.*, 149 AD3d 587, 587-588 [1st Dept 2017].)

To rebut the presumption of valid service, the defendant must swear to specific facts contradicting the averments contained in the affidavit of service. (*See HMC Assets, LLC v Trick*, 199 AD3d 454, 455 [1st Dept 2021].) Conclusory denials of receipt are insufficient to rebut the presumption of service. (*Lantern Endowment Partners, LP v Bluefin Servicing Ltd.*, 200 AD3d 577, 578 [1st Dept 2021] [citation omitted].) Here, EHL and Wong both fail to meet their burden, relying solely upon affirmations from their attorneys in the Philippines who rely on EHL's SEC filings which show that EHL maintains an office at the CEZA Complex and that Kathryn resides at No. 22 Mindoro Street. Absent from the motions, though, are affidavits from Wong or Kathryn personally attesting that neither lives, works and is not otherwise associated with the Padre Sanchez address or UII, the company at the Padre Sanchez address. (*See e.g. Fallman v Hotel Insider, Ltd.*, 2016 WL 5875031, *4, 2016 US Dist LEXIS 140158, *9 [SDNY, Oct. 7, 2016, No. 14cv10140 (DLC)] [concluding that the plaintiff failed to demonstrate proper service where the defendant submitted a declaration stating that he had not been served with the summons and complaint at his London, U.K. address and that no papers were delivered to him there; rather, they were delivered to a wrong address].) Moreover, the sheriff indicates that he was told that Wong and Kathryn were "not around" when he attempted to serve them on January 29, February 1 and February 2, 2021, not that Wong and Kathryn did not maintain an office there. (NYSCEF 89, Certificate of Service [Wong]; NYSCEF 90, Certificate of Service [EHL] at 2.) Because

EHL and Wong have not rebutted the presumption of proper service under the Hague Convention, a discussion on whether plaintiff complied with Philippine law is irrelevant.

The court also notes that the cases cited by EHL and Wong are distinguishable. In *Labelle v Martin* (2012 WL 3704717, *1-2, 2012 US Dist LEXIS 121016, *4-6 [WD NC, Aug. 27, 2012, No 3:12-CV-239-GCM]), the defendant furnished the court with an affidavit in which he specifically rebutted three statements made in the affidavit of service, and that service had not been made at the defendant's address in accordance with Canadian law. Similarly, *in Winston v Walsh* (2020 WL 1493659, *8-9, 2020 US Dist LEXIS 54377, *19-24 [MD Ga, Mar. 27, 2020, No. 5:19-cv-00070-TES], *affd* 829 Fed Appx 448 [11th Cir 2020], *cert denied* 141 S Ct 2520 [2021]), the defendant submitted an affidavit stating that he never resided at the address where he was served under U.K. law. By contrast, neither EHL nor Wong have submitted an affidavit refuting such facts. The affirmations from Belmonte-Lim and Escaño only set forth the registered addresses for EHL and Kathryn with the SEC. Accordingly, the motions brought by EHL and Wong to dismiss the complaint against them pursuant to CPLR 306-b are denied.

B. Dismissal under CPLR 3211 (a) (8)

CPLR 3211 (a) (8) allows a party to "move for judgment dismissing one or more causes of action asserted against him on the ground that … the court has not jurisdiction of the person of the defendant." "On a motion pursuant to CPLR 3211 (a) (8) to dismiss for lack of personal jurisdiction, the party asserting jurisdiction has the burden of demonstrating 'satisfaction of statutory and due process prerequisites.'" (*Matter of James v iFinex Inc.*, 185 AD3d 22, 28-29 [1st Dept 2020] [citation omitted].)

A plaintiff meets this burden by presenting affidavits and relevant documents. (*See Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017].)

Whether the court has personal jurisdiction over a non-domiciliary involves a two-part inquiry: (1) the exercise of jurisdiction must be permissible under New York's long-arm statute and (2) the exercise of jurisdiction must comport with due process. (*Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019].) "Due process requires that a nondomiciliary have 'certain minimum contacts' with the forum and 'that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" (*Id.* [citation omitted].) The minimum contacts test requires an examination of "whether a defendant's 'conduct and connection with the forum State' are such that it 'should reasonably anticipate being haled into court there.'" (*LaMarca v Pak-More Mfg. Co.*, 95 NY2d 210, 216 [2000] [citations omitted].) When analyzing whether "[t]he prospect of defending a suit in the forum State … comport[s] with traditional notions of 'fair play and substantial justice,'" the court must ask what is reasonable. (*Id.* at 217 [internal quotation marks and citation omitted].) Specifically, the court must consider "'the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.'" (*Rushaid v Pictet & Cie*, 28 NY3d 316, 331 [2016] [citation omitted].) "If either the statutory or constitutional prerequisite is lacking, the action may not proceed." (*Williams*, 33 NY3d at 528.)

There is a dispute as to whether this court has personal jurisdiction over BRHI and EHL under CPLR 302 (a) (2) and (a) (3) (ii).[6]

CPLR 302 (a) (2) provides for personal jurisdiction over a non-domiciliary who "in person or through an agent … commits a tortious act within the state." Plaintiff seeks to obtain jurisdiction over these defendants based on allegations that they are co-conspirators. For the purposes of conspiracy jurisdiction, "[u]sing a New York bank account for a fraudulent scheme constitutes a tort within New York." (*FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492, 495 [1st Dept 2017] [citation omitted].) A co-conspirator's actions in New York as the agent for an out-of-state co-conspirator can provide a basis for CPLR 302 (a) (2) jurisdiction. (*See Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC*, 160 AD3d 596, 596 [1st Dept 2018].)

To establish jurisdiction predicated upon a civil conspiracy theory, the plaintiff must establish a prima facie case of conspiracy and that the defendant was a member. (*See Small v Lorillard Tobacco Co.*, 252 AD2d 1, 17 [1st Dept 1998], *affd* 94 NY2d 43 [1999].) The plaintiff must also "demonstrate the commission of an overt act in New

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[6] CPLR 302 (a) (1) provides that a court may exercise personal jurisdiction over any non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state." In the complaint, plaintiff alleges that "certain Defendants regularly transact business or contract in the state of New York." (NYSCEF 1, Complaint ¶ 32.) However, there are no specific allegations that the moving defendants here transact business in or contract within New York. Post-argument, plaintiff submitted U.S. District Judge Schofield's decision in Global Gaming Philippines v Razon, et al. (NYSCEF 230), where Judge Schofield found the allegation in that complaint sufficient to exercise personal jurisdiction under CPLR 302 (a) (1) over BRHI because of an agreement that defendant Razon negotiated on behalf of BRHI partly while in New York. The court found that the plaintiff sufficiently alleged that BRHI was an alter ego of Razon and stated that the court had "tag jurisdiction." These facts are distinguishable here. First, plaintiff is not seeking to exercise jurisdiction pursuant to CPLR 302 (a) (1) against BRHI, and second, plaintiff has not alleged an alter ego theory.

York during, and pursuant to, the conspiracy." (*Best Cellars, Inc. v Grape Finds at Dupont, Inc.*, 90 F Supp 2d 431, 446 [SDNY 2000] [citations omitted].)

A prima facie case of civil conspiracy requires the plaintiff to "demonstrate the primary tort, plus the following four elements: an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury." (*Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401, 404 [1st Dept 2020] [citation omitted].) The plaintiff must plead factual allegations sufficient to infer that a corrupt agreement exists. (*FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492, 495 [1st Dept 2017]), citing *Abrahami v UPC Constr. Co.*, 176 AD2d 180, 180 [1st Dept 1991].) The facts alleged must "support[ ] a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end'" (*Chen Gang v Zhao Zhizhen*, 799 Fed Appx 16, 19 [2d Cir 2020], quoting *Webb v Goord*, 340 F 3d 105, 110-111 [2d Cir 2003]), or show that the defendant "took 'common action for a common purpose by common agreement or understanding ... from which common responsibility derives.'" (*IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 571 [1st Dept 2011], *affd* 19 NY3d 850 [2012], quoting *Goldstein v Siegel*, 19 AD2d 489, 493 [1st Dept 1963].) Intentional participation may be inferred from the overt acts a defendant takes in furtherance of a conspiracy. (*See Cleft of the Rock Found. v Wilson*, 992 F Supp 574, 582 [EDNY 1998].) "Bare, conclusory allegations of conspiracy are insufficient." (*Kovkov v Law Firm of Dayrel Sewell, PLLC*, 182 AD3d 418, 418 [1st Dept 2020].)

Membership in a conspiracy is established by demonstrating that "'(a) the [out-of-state] defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state

conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control, or at the request of or on behalf of the out-of-state defendant.'" (*Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 [1st Dept 2013], quoting *Best Cellars, Inc.*, 90 F Supp 2d at 446].)

CPLR 302 (a) (3) (ii) provides for jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state … if he … expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." A plaintiff relying on CPLR 302 (a) (3) (ii) for jurisdiction must establish:

> "First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce."

(*LaMarca v Pak-More Mfg. Co.*, 95 NY2d 210, 214 [2000].)

1. Jurisdiction under CPLR 302 (a) (2) over BRHI

BRHI argues that plaintiff fails to plead the elements of a civil conspiracy. In addition, BRHI contends that plaintiff cannot show BRHI's membership in a conspiracy because plaintiff has not alleged that BRHI was aware of the effect in New York of its actions, that the New York co-conspirators' activity was for BRHI's benefit, or that the New York co-conspirators' acted at BRHI's request, direction or control.

Since the funds were transferred out of the New York Fed account without authorization, plaintiff has established that the tort occurred within this state. (*See AMP Servs. Ltd. v Walanpatrias Found.*, 34 AD3d 231, 232 [1st Dept 2006] [reasoning that "[t]he actions of defendants through their agent in New York to move the subject

property from this state, if proved, would be sufficient to subject them to personal jurisdiction pursuant to CPLR 302 (a) (2)"] [citation omitted].)

Plaintiff, though, fails to sufficiently allege BRHI's membership in a conspiracy. First, plaintiff fails to set forth specific facts in the complaint sufficient to plausibly infer a common agreement. (*See First Keystone Consultants, Inc. v DDR Constr. Servs.*, 74 AD3d 1135, 1138 [2d Dept 2010] [stating that the second third-party complaint failed to plead facts from which an agreement could be inferred]; *Abrahami*, 176 AD2d at 180 [stating that the complaint contained no factual allegations to infer that the defendant had agreed or entered into an understanding to participate in a fraudulent scheme].) The allegation that BRHI, "based upon information and belief, entered into an agreement to participate in a scheme to convert and launder the Bank's funds taken through illicit means from the United States" is conclusory. (NYSCEF 1, Complaint ¶ 374.) Further, there are no allegations to even infer that BRHI was a knowing participant in a conspiracy.

While a plaintiff may rely on circumstantial evidence to establish the existence of a conspiracy (*see Best Cellars, Inc.*, 90 F Supp 2d at 446), the allegations on which plaintiff relies, as BRHI, are insufficient. Plaintiff alleges that BRHI teamed with Wong, who, like other junket operators, lacked "probity and integrity" (NYSCEF 1, Complaint ¶ 324) and that BRHI continues to work with Wong because he "brings business" to the Solaire. (*Id.* ¶ 333.) The fact that BRHI and Wong enjoyed a professional relationship is insufficient to conclude that BRHI agreed to participate in the scheme (*see Singer v Bell*, 585 F Supp 300, 303 [SD NY 1984]), as "financial self-interest is not the same as furthering a conspiracy." (*Charles Schwab Corp. v Bank of Am.*, 883 F3d 68, 87 [2d Cir 2018]; *see also BHC Interim Funding, L.P. v Bracewell & Patterson, LLP*, 2003 WL

21467544, *6, 2003 US Dist LEXIS 10739, *17 [SDNY, June 25, 2003, No. 02 Civ. 4695 (LTS)(HBP)] [finding that a law firm's interest in earning fees and in its continuing client relationship was "consistent with the normal professional and economic motives of legal counsel and therefore are insufficient to support an inference of membership in a business conspiracy, operation of the alleged conspiracy for the law firm's benefit or on its behalf, or of the law firm's control of actions taken by the alleged co-conspirators"].)

Plaintiff fails to adequately plead "independent culpable behavior" linking BRHI to the conspiracy (*Schwartz v Society of the N.Y. Hosp.*, 199 AD2d 129, 130 [1st Dept 1993]), or that BRHI "'planned and perpetrated' the acts in concert" with the other defendants. (*Reo*, 144 AD2d at 795, quoting *Callahan v Gutowski*, 111 AD2d 464, 465 [3d Dept 1985].) Plaintiff alleges that Wong met with Deguito at the Solaire to create the Fictitious Accounts (NYSCEF 1, Complaint ¶ 107), that BRHI allowed Xu or Wong to receive multiple cash deliveries at the Solaire (*id.* ¶ 297), and that BRHI enabled Gao to work with Wong. (*Id.* ¶ 122.) These allegations, though, do not state that BRHI was aware of or facilitated the meeting between Wong and Deguito or that BRHI was aware of or facilitated the cash deliveries to Xu or Wong at the casino.[7] Even if cash deliveries in U.S. currency were made to Xu or Wong at the Solaire, there is no allegation that Xu or Wong attempted to purchase junket chips in U.S. dollars. The claim that BRHI "enabled" Gao to work with Wong is conclusory and unsupported by additional facts. That BRHI helped Wong raise $15 million, which he returned to the AMLC (NYSCEF 1, Complaint ¶¶ 318-319), is also not sufficient to establish an agreement.

[7] Plaintiff's contention that Wong is a BRHI employee is unsupported, as a 2019 annual report for BRHI's parent, Bloomberry Resorts Corporation (BRC), states that junket promoters are "independent" of the casino. (NYSCEF 44, Plaintiff's Memo of Law at 14 n 3 [link to BRC 2019 annual report].)

Plaintiff alleges that BRHI "knew or should have known that the junkets were being used to launder stolen funds" because there were numerous "irregularities" with BRHI's receipt of funds, and the amounts transferred to BRHI for play in the junkets was "extremely high" and exceeded the typical junket player's stake of $1 to $2 million. (*Id.* ¶¶ 326 -327.) However, as plaintiff effectively alleges by reference in the complaint to a contemporaneous article, when divided among nearly 20 players, the amount appears reasonable given that it was "still high season for Asian casinos, thanks to the Lunar New Year holiday." (Bloomberg, *How the World's Biggest Cyberheist Was Laundered by a Baccarat Binge*, available at https://fortune.com/2017/08/03/how-the-worlds-biggest-cyberheist-was-laundered-by-a-baccarat-binge/] [last accessed April 6, 2022].)[8] Plaintiff also alleges that it was unusual for a money remittance company like Philrem to deposit funds into BRHI's account. (NYSCEF 1, Complaint ¶ 326.) Critically, though, plaintiff does not plead that anyone at BRHI knew the funds had been stolen from plaintiff's New York Fed account. Further, the allegation that BRHI furnished Ding, Xu, Gao and others with the opportunity to exchange gambling chips for "clean, untraceable cash" is inadequate to plausibly infer that BRHI shared their common goal.

As explained above, intentional participation may be inferred from a defendant's overt acts in furtherance of the conspiracy. An "overt act typically must be an affirmative act; mere inaction is insufficient." (*Kirschner v JPMorgan Chase Bank, N.A.*, 2021 WL 4499084, *24, 2021 US Dist LEXIS 189919, *70 [SDNY, Sept. 30, 2021, 17 Civ. 6334 (PGG)] [internal quotation marks and citation omitted].) As applied here, plaintiff fails to adequately allege that BRHI knowingly or intentionally participated in the

[8] A link to the article appears in paragraphs 118 and 321 of the complaint.

scheme by way of an overt act or acts. The Solaire is a casino where gambling occurs. The allegation that BRHI allowed Gao and others to gamble there does not necessarily equate to its intentional participation in an illicit scheme. Similarly, plaintiff does not allege that anyone at BRHI was present or arranged for Wong's meeting with Deguito at the Solaire. Given the absence of facts alleging that anyone employed by BRHI was aware that plaintiff's stolen funds were being laundered through its casino, and BRHI's failure to stop Ding, Gao and others from gambling after the press reports on February 29, does alone not constitute intentional participation. (*See Arlinghaus v Ritenour*, 622 F 2d 629, 640 [2d Cir 1980], *cert denied* 449 US 1013 [1980] [stating that even if the defendant had acquiesced to a co-defendant's bad conduct, "such behavior, even if badly motivated, hardly establishes a conspiracy absent 'intentional participation with a view to furtherance of the common design'"].)

Plaintiff's argument that BRHI ratified the conspiracy through subsequent participation is unpersuasive. A defendant may join a conspiracy after the earlier, overt acts have been committed by adopting its goals and acting in furtherance of the conspiracy. (*See Dixon v Mack*, 507 F Supp 345, 350 [SDNY 1980] [reasoning that the defendant "knowingly ratified" the conspiracy by his "joining of the conspiracy, adoption of its goal, and action in furtherance of it"].). Ratification, though, requires knowledge of the prior overt act and an affirmative act by the co-conspirator. (*Id.* at 350). In *Cleft of the Rock Foundation*, cited by plaintiff, the defendant communicated with the plaintiffs to "vouch for Defendants' bona fides, to assuage Plaintiffs' concerns about being repaid, to convince them to continue to 'play ball' with Defendants and not to interfere with Defendants' activities by, for example, complaining to criminal authorities." (992 F Supp at 584 [internal quotation marks and citations omitted].) Plaintiff, here, does not alleged

similar conduct, specifically prior knowledge of the theft in New York on the part of BRHI, or the allegations are too conclusory. Plaintiff alleges, only upon information and belief, that BRHI "knew or should have known that the junkets were being used to launder stolen funds." (NYSCEF 1, Complaint ¶ 326.) Thus, by failing to "allege at least some of the facts of agreement or separate acts, if any, of the alleged co-conspirators in order to support the responsibility of each for the acts of all the others …, the allegation remains the barest of legal conclusions." (*Goldstein*, 19 AD2d at 493.)

Plaintiff relies on the same factual allegations to establish BRHI's membership in the conspiracy. However, these allegations are insufficient as none "expressly connect[ ] [BRHI] … to the New York activities of the [alleged co-conspirators]." (*City of Almaty v Ablyazov*, 278 F Supp 3d 776, 808 [SDNY 2017] [concluding that the plaintiff failed to make a prima facie showing of personal jurisdiction over the defendant where the complaint failed to cite the defendant's individual involvement in relation to the money laundering activities in New York].) The complaint does not contain a specific allegation that BRHI knew of the theft of plaintiff's funds in New York. (*See Lawati*, 102 AD3d at 429 [reasoning that "jurisdiction is nonetheless established since the complaint alleges that Rigby was aware of the torts being committed … in New York"].) As stated above, plaintiff only alleges, upon information and belief, that BRHI "knew or should have known that the junkets were being used to launder stolen funds." (NYSCEF 1, Complaint ¶ 326.)

Plaintiff also argues that, as additional evidence of its membership, BRHI has refused to return $2 million from an account the AMLC had frozen in 2016 and moved to lift the freeze. (*Id.* ¶ 335.) On February 26, 2021, the Supreme Court of Manila in the Philippines denied a "Petition for Review on *Certiorari* With Prayer for Issuance of a

Temporary Restraining Order or Status *Quo Ante* Order" brought by AMLC to review an order from the Court of Appeals lifting the order temporarily freezing BRHI's account at BDO UniBank. (NYSCEF 149, Notice of Judgment.) The account held "part of [BRHI's] corporate funds, inclusive of payments and deposits of other junket and premium clients and not the money purportedly taken from Bangladesh Bank." (*Id.* at 9/16 NYSEF pages.) The Supreme Court determined that the petition was "moot and academic," in part, because BDO lifted the freeze order on BRHI's account in accordance with a resolution from the Court of Appeals. (*Id.* at 12/16 and 14/16 NYSCEF pages.) In addition, the Supreme Court determined that the issuance of a freeze order cannot exceed six months, and in this instance, six months from the date of the freeze order had already elapsed. (*Id.*). BRHI's act of enforcing its legal rights by moving to lift the freeze order does not constitute evidence of a conspiracy because the Supreme Court had determined that "a Freeze Order may not be issued indefinitely." (*Id.*)

Nor does the complaint contain an allegation that BRHI was aware its conduct would have an effect in New York. (*See Marie v Altschuler*, 30 AD3d 271, 272 [1st Dept 2006] [granting dismissal where the complaint "fails to set forth that the out-of-state alleged conspirators were aware that their conduct would have an effect in New York"].) An agent for purposes of CPLR 302 must have acted with the "knowledge and consent" of the out-of-state defendant, and the out-of-state defendant must have exercised some control over the agent. (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988].) Here, plaintiff does not plead specific facts suggesting that the North Korean hackers or anyone else acted "at the behest of or on behalf of, or under the control" of BRHI. (*Xue v Jensen*, 2020 WL 6825676, *7, 2020 US Dist LEXIS 217878, *19 [SDNY, Nov. 19, 2020, No. 19-cv-1761 (VSB)] [internal quotation marks omitted]; *First Capital Asset Mgt.*

v Brickellbush, Inc., 218 F Supp 2d 369, 395 [SD NY 2002], *affd* 385 F 3d 159 [2d Cir 2004] [finding that the plaintiff had pled only conclusory allegations of the out-of-state co-conspirator's control]; *Bluewaters Communications Holdings, LLC v Ecclestone*, 122 AD3d 426, 427 [1st Dept 2014] [stating that "the complaint does not allege that CVC bought those shares at the direction, under the control, at the request, or on behalf of the personal jurisdiction defendants"].) Because the complaint offers "absolutely no facts suggesting" that BRHI conspired with any actor (*Martinez v Queens County Dist. Attorney*, 2014 WL 1011054, *7, 2014 US Dist LEXIS 34778, * 24 [EDNY, Mar. 17, 2014, No. 12-CV-06262 (RRM) (RER)], *affd* 596 Fed Appx 10 [2d Cir 2015], *cert denied* 575 US 968 [2015]), plaintiff has not sustained its burden of demonstrating that CPLR 302 (a) (2) confers jurisdiction over BRHI.

2. Jurisdiction under CPLR 302 (a) (3) (ii) over BRHI

Plaintiff argues that BRHI should have reasonably expected its tortious conduct to have consequences in New York because of its involvement in the conspiracy. Plaintiff also submits that BRHI derives substantial revenue from international commerce because it has a large international marketing presence, allows gambling in a foreign currency, is developing a cruise terminal at the Solaire, owns one casino in Korea and is developing a casino in Japan. In addition, BRHI's 2019 Annual Report shows that the Solaire competes with tourist resorts or casinos in Asia, Australia and Las Vegas and with junket promoters for Asian customers.

BRHI argues that plaintiff does not plead any facts raising a reasonable inference that it expected or should have expected its actions in the Philippines would have consequences in New York. BRHI also contends that it does not derive substantial revenue from international commerce. On this point, BRHI proffers on an affirmation

from Arcan Lat (Lat), its Senior Vice President-Property Chief Financial Officer at the Solaire. (NYSCEF 40, Lat aff.) Lat affirms that BRHI is a Philippine corporation organized in the Philippines with its principal place of business in Parañaque City, Metro Manila. (*Id.* ¶ 6.) BRHI is a subsidiary of Sureste Properties, Inc., which is owned by BRC; BRC is a Philippine corporation listed on the Philippine Stock Exchange as "BLOOM." (*Id.* ¶ 7.) BRHI is the license holder of and owns, manages, and operates the "Solaire Resort & Casino" in Parañaque City. (*Id.* ¶¶ 1 and 7.) BRHI receives all its revenue from its operation of the Solaire. (*Id.* ¶ 6.) BRHI maintains a marketing presence in Korea, Macau, Hong Kong, Singapore, Malaysia, Indonesia, Thailand, Taiwan, and Japan but not in New York, where it does not own any property, maintain an office, bank account, or telephone line or employ anyone who permanently works or resides here. (*Id.* ¶¶ 6 and 8.) Lat clarifies in a supplemental affirmation that no BRHI employee works or resides in New York. (NYSCEF 58, Lat supp aff ¶ 5.) BRHI additionally argues that the annual report plaintiff cites relates to its parent corporation, BRC, and that other BRC subsidiaries operate the cruise terminal and the casinos in Korea and Japan.

Assuming, without deciding, that plaintiff has met the first, second and third prongs of the test described in *LaMarca* (95 NY2d at 214), plaintiff has failed to allege facts sufficient to satisfy the fourth prong. (*See Berdeaux v OneCoin Ltd.*, 2021 WL 4267693, *16-17, 2021 US Dist LEXIS 178816, *39-42 [SDNY, Sept. 20, 2021, No. 19-CV-4074 (VEC)] [stating that "absent allegations of concrete facts known to the defendant that would have led him to foresee being sued in New York or tangible manifestations of his intent to target New York, a court may not exercise personal jurisdiction over a nondomiciliary under 302 (a) (3)"].) Regarding the fourth prong, there

must be "some link between a defendant and New York State to make it reasonable to require a defendant to come to New York to answer for tortious conduct committed elsewhere." (*Ingraham v Carroll*, 90 NY2d 592, 598 [1997].) This is an objective test of foreseeability and requires a showing that the defendant had a purposeful affiliation with New York (*see Murdock v Arenson Intl. USA*, 157 AD2d 110, 114 [1st Dept 1990]), or that the defendant purposefully availed itself of the benefits of New York's laws such that it may reasonably anticipated being haled into court here. (*See Kernan v Kurz-Hastings, Inc.*, 175 F 3d 236, 241 [2d Cir 1999].) A defendant's purposeful affiliation with the state occurs when there is "some 'discernible effort [by the non-domiciliary] to directly or indirectly serve … New York." (*Williams*, 33 NY3d at 539, quoting *Schaadt v T.W. Kutter, Inc.*, 169 AD2d 969, 970 [3d Dept 1991].) This fourth element is satisfied "when '[t]he nonresident tortfeasor … expect[s], or ha[s] reason to expect, that his or her tortious activity in another State will have direct consequences in New York.'" (*LaMarca*, 95 NY2d at 214 [citation omitted].)

Plaintiff complains that BRHI allowed Ding, Xu, Gao, and others to launder its funds through the Solaire, but again plaintiff has not pled any facts showing that anyone employed by BRHI was aware the money had been stolen from an account in New York. The money transferred to Ding's junkets passed through multiple bank accounts in the Philippines held by real or fictitious persons or entities before ever reaching BRHI. Plaintiff also does not plead any facts demonstrating that BRHI aimed its actions towards this state or that it purposefully availed itself of New York law to satisfy the purposeful affiliation requirement. (*See Murdock*, 157 AD2d at 114 [concluding that the foreseeability requirement in CPLR 302 (a) (3) (ii) was not met]; *Convergen Energy LLC v Brooks*, 2020 WL 5549039, *11, 2020 US Dist LEXIS 169256, *32 [SDNY, Sept. 16,

2020, No. 20-cv-3746 (LJL)] [finding that the plaintiff failed to plead facts demonstrating that the defendants targeted New York such that they should have reasonably expected their actions would have consequences here].) BRHI conducts no business in New York, and none of the allegations in the complaint indicate that BRHI purposefully engaged in activities in the state. (*Cooperstein v Pan-Oceanic Mar.*, 124 AD2d 632, 634 [2d Dept 1986], *lv denied* 69 NY2d 611 [1987] [granting dismissal where the defendant "did not purposefully avail itself of the privilege of conducting activities within the forum State, thereby invoking the benefits and protection of its laws"].)

Similarly, plaintiff has failed to satisfy the fifth prong in *LaMarca*. The fifth prong, which requires that the defendant derive substantial revenue from interstate or international commerce, precludes the exercise of jurisdiction over "non-domiciliaries whose business operations are of a local character." (*Williams*, 33 NY3d at 539.) CPLR 302 (a) (3) does not define what constitutes "substantial revenue," but "[t]he phrase should be construed to require comparison between a defendant's gross sales revenue from interstate or international business with total gross sales revenue, and between a defendant's net profit from interstate or international business with total net profit." (*Allen v Auto Specialties Mfg. Co.*, 45 AD2d 331, 333 [3d Dept 1974].) In *Allen*, the Court construed the phrase "substantial revenue" to mean a "comparison between a defendant's gross sales revenue from interstate or international business with total gross sales revenue, and between a defendant's net profit from interstate or international business with total net profit." (*Id.*) Plaintiff fails to allege such. (*See Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 495 [1st Dept 2015] [finding that conclusory allegations that the defendant derives substantial revenue from interstate or international commerce does not suffice].) Additionally, that international residents may

gamble at the Solaire does not establish that BRHI receives substantial revenue from international commerce. (*See Petra Fund REIT Corp. v Belfonti*, 2008 NY Slip Op 30804[U], *19 [Sup Ct, NY County 2008] [concluding that the fifth prong for CPLR 302 (a) (3) (ii) jurisdiction was not met because the plaintiff "cannot convert Diamond Gaming into a business that receives substantial revenue from international commerce by asserting that a significant number of international residents travel to Aruba seeking to gamble at Diamond Gaming"].) Furthermore, the 2019 annual report discusses the activities of BRC's subsidiaries in the Philippines, Korea and Japan, not BRHI. Accordingly, plaintiff has not carried its burden of demonstrating that CPLR 302 (a) (3) (ii) confers jurisdiction over BRHI. In view of the foregoing, the court need not address the due process arguments advanced by plaintiff or BRHI.

3. Jurisdictional Discovery from BRHI

Plaintiff argues that jurisdictional discovery, not dismissal, is appropriate. The court may order jurisdictional discovery once the plaintiff has made a "sufficient start." (*Peterson v Spartan Industries, Inc.*, 33 NY2d 643, 467 [1974].) Plaintiff seeks to depose Lat given that his affidavit appears to contradict BRHI's public disclosures. The public disclosures plaintiff refers to were made by BRC, BRHI's parent company, not BRHI. Thus, plaintiff has failed to tender "some tangible evidence which would constitute a 'sufficient start' in showing that jurisdiction could exist." (*SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004].) Accordingly, the complaint against BRHI is dismissed. The court need to reach the arguments addressing forum non conveniens raised by BRHI.

4. Jurisdiction under CPLR 302 (a) (2) over EHL

EHL maintains plaintiff cannot establish EHL's membership in a conspiracy because plaintiff has not alleged that EHL was aware of the effect in New York of its actions, that the New York co-conspirators' activity was for EHL's benefit, or that the New York co-conspirators' acted under EHL's direction or control.

Plaintiff contends that EHL has waived any argument as to whether it has pled the existence of a conspiracy because EHL focuses solely on the membership element of conspiracy jurisdiction. On this point, plaintiff posits that EHL, acting through its sole operator, Wong, was aware of the effects in New York of its activities. Wong facilitated the money laundering in the Philippines by (1) opening the Fictitious Accounts into which the stolen funds were transferred and knew that funds were being transferred (NYSCEF 1, Complaint ¶¶ 107, 115, 143, 154-156) and (2) coordinating the transfer of $20 million into EHL's PNB account and his personal account. (*Id.* ¶¶ 271-275.) Despite the February 29, 2016 press reports that the "stolen funds were being 'used either to buy chips or pay for casino losses incurred at … Midas Hotel and Casino,'" EHL allowed play to continue through March 2. (*Id.* ¶ 312). Wong admitted that he took 450,000,000 pesos "as payment for an antecedent debt that Defendant Gao allegedly owed him," and returned only $15 million. (*Id.* ¶¶ 321 and 359.) Plaintiff further argues that EHL benefited from the scheme because Wong and EHL received more money than the $15 million they have returned.

Plaintiff is correct that EHL does not challenge the existence of a conspiracy, and thus, for the purposes of this motion, the court will assume plaintiff has sufficiently pled such.

Plaintiff pleads enough facts to implicate EHL's membership in a conspiracy. While the complaint does not expressly plead that EHL was aware that the stolen funds

came from New York, the complaint alleges that "on February 5, the day that the stolen funds arrived in the Philippines, defendants were actively monitoring the Fictitious Accounts—waiting for them to arrive. Between 11:30 a.m. and 12:00 p.m., Wong – clearly knowing that the stolen funds were coming – called Defendant Deguito … and asked whether a large deposit had been transferred into the Fictitious Cruz Account." (NYSCEF 1, Complaint ¶ 154.) Plaintiff also pleads that Wong, EHL's owner, knew the funds had been stolen from plaintiff (*id.* ¶ 321), and is replete with numerous references to plaintiff's account at New York Fed. In the complaint, plaintiff also alleges that the hackers were provided with the Fictitious Account numbers set up by Wong to which the moneys were wired, implying that Wong provided them this information and knew exactly where the money was coming from. (*Id.* ¶ 115.) Thus, plaintiff adequately alleges that EHL was aware of the New York effects of its actions. (See Lawati, 102 AD3d at 429). Plaintiff also adequately pleads that EHL received a benefit when it accepted $21 million in stolen funds. (*Id.* ¶ 317.)

Additionally, plaintiff pleads sufficient facts from which the court may infer that the activities in New York were taken at the request of, on the behalf of or at the direction and control of EHL. Although there is no specific claim that EHL or Wong had communicated with the unknown North Korean hackers, it is evident that Wong was aware the funds were coming into the Fictitious Accounts. (*Id.* ¶¶ 155 and 272.) Wong spoke with Deguito immediately prior to the Cruz account's receipt of $6 million, and he spoke with Deguito to orchestrate the use of Philrem's accounts. (*Id.* ¶ 272.)

Furthermore, the complaint describes the overt actions taken in New York in furtherance of the conspiracy. Specifically, the North Korean hackers invaded plaintiff's New York Fed account to transfer $81 million to four Fictitious Accounts. EHL received

nearly 1 million pesos in stolen funds. (Id. ¶ 277.) A portion of these funds was converted into playing chips at Wong's junket at the Midas. (*Id.* ¶ 311.) After the Philippine press reported that plaintiff's funds were being used to buy chips or to pay for losses at the Midas, EHL, through Wong, allowed play to continue even though EHL "was well aware that the Bank's stolen money was being laundered at Midas Casino while it was happening." (*Id.* ¶ 312.) Accordingly, plaintiff has sustained its burden of demonstrating that CPLR 302 (a) (2) confers jurisdiction over EHL. (*See* Best Cellars, Inc., 90 F Supp 2d at 447 [stating that the defendants, "through the actions and knowledge of their principals, were aware of the effect in New York of the conspiracies, and the acts committed in New York were for, and were done for, the actors own benefit and for" the defendants' benefit].)

The court turns next to whether the exercise of jurisdiction comports with federal due process. As discussed earlier, a defendant's contacts with the forum state must be "'such that it should reasonably anticipate being haled into court there." (*Rushaid*, 28 NY3d at 331, quoting *LaMarca*, 95 NY2d at 216.) "[M]inimum contacts exist where a defendant 'purposefully avails itself of the privilege of conducting activities within the forum State."' (*Id.* [citation omitted].)

EHL maintains that its alleged conduct took place in the Philippines and that it has no contacts in or transacted business in the United States, thereby implying that it lacks minimum contacts with New York. Generally, "[t]he contacts must be created by the 'defendant *[it]self*,' rather than from the 'unilateral activity of another party or a third person.'" (*Schwab Short-Term Bond Mkt. Fund v Lloyds Banking Group PLC*, 2021 WL 6143556, *12, 2021 US App LEXIS 38618, *34 [2d Cir, Dec. 30, 2021] [citations omitted].) However, a defendant may purposefully avail itself of a forum state through

the actions of co-conspirator in that state. (*Id.*; *see also Cleft of the Rock Found.*, 992 F Supp at 585 ["'By joining the conspiracy with the knowledge that overt acts in furtherance of the conspiracy had taken place in New York, [the defendant] purposely [availed himself] of the privilege of conducting activities within the forum state'"] [citation omitted].) Plaintiff has pled facts sufficient to support its theory that EHL was a co-conspirator in a scheme to invade plaintiff's New York Fed account and steal $81 million. Given that Wong knew stolen funds were coming into at least one of the Fictitious Accounts and that he engineered the use of Philrem's accounts at RCBC launder to the stolen funds, a portion of which landed in EHL's bank accounts, EHL could have reasonably foreseen that it would be haled into court in New York. As to the issue of reasonableness, neither EHL nor plaintiff advance any arguments discussing the factors detailed in *Rushaid*. Thus, EHL concedes that the exercise of jurisdiction is reasonable. Because jurisdiction comports with federal due process, plaintiff has demonstrated that CPLR 302 (a) (2) confers jurisdiction over EHL, and EHL's motion to dismiss the complaint for lack of personal jurisdiction is denied. The court need not address the jurisdictional arguments raised under CPLR 302 (a) (3) (ii).

C. Dismissal under CPLR 327 (a)

EHL also moves for dismissal pursuant to CPLR 327 (a) for forum non conveniens and argues that this action should be adjudicated in the Philippines. Plaintiff contends that EHL is collaterally estopped from relitigating the motion to dismiss for forum non conveniens because it raised the same arguments in an identical motion in the Federal Action, which was denied. (*Bangladesh Bank*, 2020 WL 1322275, *11, 2020 US Dist LEXIS 49246, *35.) Even if collateral estoppel does not apply, plaintiff submits that the motion fails on the merits. EHL responds that the federal court's

dismissal of the Federal Action for lack of subject matter jurisdiction did not depend on a forum non conveniens analysis, and any analysis was merely dicta.

1. Collateral Estoppel

"Collateral estoppel, or issue preclusion … prevents a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party … whether or not the … causes of action are the same." (*Simmons v Trans Express, Inc.*, 37 NY3d 107, 112 [2021] [internal quotation marks and citations omitted].) The identical issue must have been "necessarily decided and material in the first action," and the party against whom collateral estoppel is invoked must have "had a full and fair opportunity to litigate the issue in the earlier action." (*Id.* [internal quotation marks and citation omitted].)

Plaintiff's argument is unpersuasive. As explained in *Norex Petroleum, Ltd. v Blavatnik* (48 Misc 3d 1226[A], 2015 NY Slip Op 51280[U], *20 [Sup Ct, NY County 2015]), "collateral estoppel does not apply to the forum conveniens analysis as a whole." Furthermore, the discussion on forum non conveniens was not necessary to the court's determination. The court had already declined to exercise supplemental jurisdiction on the state law claims before discussing the forum non conveniens motions. (*Bangladesh Bank*, 2020 WL 1322275, *5, 2020 US Dist LEXIS 49246, *15.) Consequently, the court will determine this motion on the merits.

2. Forum Non Conveniens

"The doctrine of forum non conveniens [codified in CPLR 327] permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that 'in the interest of substantial justice the action should be heard in another forum.'" (*National Bank & Trust Co. of N. Am. v Banco de Vizcaya*, 72 NY2d

1005, 1007 [1988], *cert denied* 489 US 1067 [1989] [citation omitted].) A motion brought under CPLR 327 is addressed to the court's discretion. (*Estate of Kainer v UBS AG*, 37 NY3d 460, 467 [2021].) The court must weigh several factors such as the parties' residence, the burden on New York courts, the potential hardship to the defendant of litigating here, the unavailability of an alternative forum to the plaintiff, the location where the transaction or events underlying the action occurred. (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985].) Other factors to consider include the location of witnesses and documentary evidence, the applicability of foreign law and whether another forum has a substantial interest in adjudicating the dispute. (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 208-209 [1st Dept 2013].) "No one factor is controlling." (*Pahlavi*, 62 NY2d at 479.) "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." (*Elmaliach*, 110 AD3d at 208 [internal quotation marks and citation omitted].) The burden rests with the defendant to show that "plaintiff's selection of New York is not in the interest of substantial justice." (*Wilson v Dantas*, 128 AD3d 176, 187 [1st Dept 2015], *affd* 29 NY3d 1051 [2017] [internal quotation marks and citation omitted].) Stated another way, "[a]lthough a New York court may have jurisdiction over a claim, it is not, of course, compelled to retain jurisdiction if the claim has no substantial nexus with New York." (*Banco Ambrosiano v Artoc Bank & Trust*, 62 NY2d 65, 73 [1984].).

In balancing these factors, the court finds that EHL has met its heavy burden of demonstrating that New York does not have a substantial nexus to this action. (*See BSR Fund, S.A. v Jagannath*, 200 AD3d 554 [1st Dept 2021].)

a. The Parties' Residence

This factor weighs in favor of dismissal. The plaintiff's residence "has been held to generally be the most significant factor in the equation." (*Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 131 AD3d 431, 432 [1st Dept 2015] [internal quotation marks and citation omitted]), and "a plaintiff's choice of forum should rarely be disturbed even when the plaintiff is not a New York resident." (*Swissgem S.A. v M&B Ltd.*, 193 AD3d 472, 472 [1st Dept 2021].) Nonetheless, a foreign plaintiff's choice of a New York forum is entitled to less deference. (*See Dragon Capital Partners L.P. v Merrill Lynch Capital Services Inc.*, 949 F Supp 1123, 1131 [SDNY 1997], citing *Piper Aircraft Co. v Reyno*, 454 US 235, 256 [1981].) In this instance, plaintiff resides in Bangladesh, and the other parties reside in the Philippines or China. None of the corporate defendants have a place of business in New York.

b. The Location of the Events Giving Rise to the Action

This factor weighs in favor of dismissal. Plaintiff maintains that "New York's interest is amplified here because this Action involves perhaps the most critical bank in Manhattan, the New York Fed, a key component of our Federal Reserve System that maintains accounts in which foreign national banks hold their dollar reserves." (NYSCEF Doc No. 123, plaintiff's mem of law at 19.) However, New York Fed's statement on the incident undermines this argument. On March 9, 2016, New York Fed released the following:

> "To date, there is no evidence of any attempt to penetrate Federal Reserve systems in connection with the payments in question, and there is no evidence that any Fed systems were compromised.
>
> The payment instructions in question were fully authenticated by the SWIFT messaging system in accordance with standard

> authentication protocols. The Fed has been working with the central bank since the incident occurred, and will continue to provide assistance as appropriate."[9]

(New York Fed, Statement on Media Reports about Bangladesh, available at https://www.newyorkfed.org/newsevents/statements/2016/0311-2016 [last accessed April 6, 2022]). Thus, New York Fed merely executed the fully authenticated SWIFT messages.

In *Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.* (23 NY3d 129, 137 [2014]), the Court of Appeals explained that "[o]ur state's interest in the integrity of its banks is indeed compelling, but it is not significantly threatened every time one foreign national, effecting what is alleged to be a fraudulent transaction, moves dollars through a bank in New York." Here, as in *Mashreqbank PSC*, the bulk of the events took place elsewhere. (*Id.* at 134 [granting dismissal for where "the use of New York banks to facilitate dollar transfers … is of minor importance here"]; *Rodionov v Redfern*, 173 AD3d 410, 410 [1st Dept 2019] [granting dismissal for forum non conveniens, in part, where the fraudulent transactions took place in Cyprus].) *Banco Nacional Ultramarino, S.A.* (169 Misc 2d 182 [Sup Ct, NY County 1996], *affd* 240 AD2d 253 [1st Dept 1997]), cited by plaintiff, is distinguishable. In that action, 19 wire transfers moved funds from a bank in Macau to the co-defendants' bank accounts in New York, making "New York … the hub of defendant's activities, and New York banking institutions the means of disbursement"].) Here, the hacking of plaintiff's computer network took place in Bangladesh, and the laundering of plaintiff's funds took place in the Philippines. The

[9] EHL furnished a link to the statement in its memorandum of law. (NYSCEF 113, EHL's mem of law at 16.)

only event that took place in New York was the transfer of funds from plaintiff's New York Fed account out of New York.

c. The Location of Witnesses and Documentary Evidence

This factor also weighs in favor of dismissal. Apart from the witnesses at the New York Fed who can describe its receipt of the SWIFT messages from the North Korean hackers, the witnesses and the relevant documentary evidence are in Bangladesh or the Philippines. The stolen funds were transferred and moved multiple times between bank accounts at several banks in the Philippines before they were laundered at two casinos there. In the event the parties wish to depose nonparties to this action in the Philippines, those witnesses would be beyond New York's subpoena power. (*See Al Rushaid Parker Drilling Ltd. v Byrne Modular Bldgs. L.L.C.*, 180 AD3d 577, 579 [1st Dept 2020], *lv denied* 36 NY3d 904 [2021]; *Matter of OxyContin II*, 76 AD3d 1019, 1021 [2d Dept 2010] [reasoning that those witnesses with "critical information" would be beyond New York's subpoena power].) Furthermore, while virtual proceedings are now more common, there is a significant 13-hour time difference between New York and the Philippines. (NYSCEF 1, Complaint ¶ 133.) This time difference must be taken into account.

d. The Potential Hardship to EHL

This factor weighs in favor of dismissal. As noted above, EHL and many of the key witnesses to this action are located in the Philippines. (*Metz v Davis Polk & Wardell*, 133 AD3d 501, 501 [1st Dept 2015], *lv denied* 26 NY3d 919 [2016] [granting a motion to dismiss on forum non conveniens grounds, in part, because the "[p]laintiff further ignores the hardship to defendants whose key witnesses are located in Hong Kong"].) Litigating this action in New York would undoubtedly cause EHL "a hardship in

terms of time, expense, and inconvenience." (*Brinson v Chrysler Fin.*, 43 AD3d 846, 847 [2d Dept 2007]), since its witnesses would have to travel to New York from the Philippines for trial.

e. The Burden on New York Courts

The burden on New York courts if the action remains here is minimal. The action involves the application of New York law and does not implicate foreign law. That said, testimony before the Philippine Senate was given in Filipino and English. (NYSCEF 48.) While some documents and witness testimony may need to be translated into English (*see Epk Brand v Leret*, 194 AD3d 644, 645 [1st Dept 2021] [dismissing the complaint, in part, because of the need to translate documents into English]), this factor alone is not dispositive. (*See OrthoTec, LLC v Healthpoint Capital, LLC*, 84 AD3d 702, 703 [1st Dept 2011].)

f. A New York Nexus

This factor weighs in favor of dismissal as the Philippines has a substantial interest in adjudicating this action. (*Shin-Etsu Chem. Co., Ltd. v ICIC Bank Ltd.*, 9 AD3d 171, 178 [1st Dept 2004] [stating that "where a foreign forum has a substantial interest in adjudicating an action, such interest is a factor weighing in favor of dismissal"].) The money laundering took place in the Philippines. While the FBI has conducted an investigation, the Philippines' Senate Blue Ribbon Committee and the AMLC have investigated the incident, and several defendants have been criminally investigated, indicted or convicted in the Philippines.

g. The Availability of An Alternative Forum

This factor also weighs in favor of dismissal, as none of the parties address whether the Philippines is unavailable to plaintiff as an adequate alternative forum.

(*See Millicom Intl. Cellular S.A. v Simon*, 247 AD2d 223, 223 [1st Dept 1998] [reasoning that the Philippines was a "viable and far more convenient forum"].) The court observes that plaintiff and EHL appear to have retained local Philippine counsel.

Accordingly, it is

ORDERED that the defendant Bloomberry Resorts and Hotels, Inc.'s (d/b/a Solaire Resort & Casino) motion to dismiss the complaint (motion sequence no. 002) is granted, and the complaint is dismissed in its entirety as against the defendant, with costs and disbursements to defendant Bloomberry Resorts and Hotels, Inc. d/b/a Solaire Resort & Casino as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant Bloomberry Resorts and Hotels, Inc. d/b/a Solaire Resort & Casino; and it is further

ORDERED defendant Eastern Hawaii Leisure Company, Ltd.'s (d/b/a Midas Hotel & Casino) motion to dismiss the complaint (motion sequence no. 006) is granted on condition that defendant Eastern Hawaii Leisure Company, Ltd. d/b/a Midas Hotel & Casino stipulates to consent to jurisdiction in the courts of the Philippines and agrees to toll any statute of limitations while this action was pending in New York within 20 days of from the service of a copy of this order with notice of entry; and it is further

ORDERED that in the event of non-compliance, defendant Eastern Hawaii Leisure Company, Ltd. d/b/a Midas Hotel & Casino is directed to serve an answer to this complaint within 40 days from service of a copy of this order with notice of entry; and it is further

ORDERED that the caption be amended to reflect the dismissal as against defendants Bloomberry Resorts and Hotels, Inc. d/b/a Solaire Resort & Casino and

Eastern Hawaii Leisure Company, Ltd. d/b/a Midas Hotel & Casino and that all future papers filed with the court bear the amended caption; and it is further

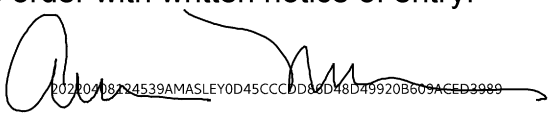
ORDERED that counsel for either defendant Bloomberry Resorts and Hotels, Inc. d/b/a Solaire Resort & Casino or Eastern Hawaii Leisure Company, Ltd. d/b/a Midas Hotel & Casino shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the motion brought by defendant Kam Sin Wong a/k/a Kim Wong to dismiss the complaint against him (motion sequence no. 007) is denied; and it is further

ORDERED that defendant Kam Sin Wong a/k/a Kim Wong shall serve an answer to the complaint within 20 days from service of this order with written notice of entry.



4/8/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE