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| Bangladesh Bank v Rizal Commercial Banking Corp. |
| 2023 NY Slip Op 30145(U) |
| January 13, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 652051/2020 |
| Judge: Andrea Masley |
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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 SANTOS DEGUITO, ANGELA RUTH TORRES, LORENZO V. TAN, RAUL VICTOR B. TAN, ISMAEL S. REYES, BRIGITTE R. CAPINA, NESTOR O. PINEDA, ROMUALDO S. AGARRADO, PHILREM SERVICE CORP., SALUD BAUTISTA, MICHAEL BAUTISTA, CENTURYTEX TRADING, WILLIAM SO GO, BLOOMBERRY RESORTS AND HOTELS, INC., EASTERN HAWAII LEISURE COMPANY, LTD., KAM SIN WONG, WEIKANG XU, DING ZHIZE, GAO SHUHUA, and JOHN DOES,

Defendants.

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INDEX NO. 652051/2020

MOTION DATE _____

MOTION SEQ. NO. 003 004 009
010 014

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 56, 59, 60, 61, 62, 63, 64, 70, 71, 72, 73, 74, 219, 291, 292, 293, 296

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 75, 99, 122, 220

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 009) 169, 170, 171, 172, 173, 174, 183, 185, 213, 221

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 010) 176, 177, 178, 179, 180, 181, 182, 186, 187, 188, 189, 190, 191, 192, 194, 195, 196, 214, 215, 216, 217, 222

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 014) 245, 246, 247, 248, 249, 250, 251, 252, 279, 280, 289, 290, 297, 304, 305

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is

While the prior motions were focused on the alleged money laundering aspect of the purported scheme to steal \$101 million (Funds) from plaintiff Bangladesh Bank's account at the Federal Reserve Bank of New York (Fed.), these motions focus on the theft itself in New York. Accordingly, the result is different: the court finds that it has jurisdiction and denies the motions under CPLR 327 for *forum non conveniens*.

In motion 003, defendant Rizal Commercial Banking Corporation (RCBC) moves pursuant to CPLR 3211 (a)(7) and (8) and CPLR 327(a) to dismiss the complaint.

In motion 004, defendants Lorenzo V. Tan and Raul Victor B. Tan move pursuant to CPLR 3211 (a)(7) and (8) and CPLR 327(a) to dismiss the complaint.

In motion 009, defendant Ismael S. Reyes moves pursuant to CPLR 3211 (a)(7) and (8) and CPLR 327(a) to dismiss the complaint.

In motion 010, defendants Nestor Pineda, Romualdo Agarrado, and Brigitte Capiña, (together the RCBC Individuals) move pursuant to CPLR 3211 (a)(7) and (8) and CPLR 327(a) to dismiss the complaint.

In motion 014, defendant Kam Sin Wong, moves pursuant to CPLR 327(a) on *forum non conveniens* grounds dismissing the complaint or, in the alternative, staying all proceedings in this action pursuant to CPLR 2201 pending resolution of plaintiff's claims in a Philippine forum; and awarding him the costs of this action.

The background of this case is set forth in this court's decision of April 8, 2022 and will not be repeated here except as needed. (NYSCEF 237, Decision and Order [mot. seq. nos. 002, 006, 007] [April 8, 2022 Order].)

RCBC

“RCBC is one of the oldest and largest banks in the Philippines, with over 400 branches and approximately 1,500 ATMs across the Philippines.” (NYSCEF 53, Affirmation of Paula Fritzie C. Zamora, RCBC’s Head of Financial Institution Management Segment, [Zamora aff.] ¶ 5.) RCBC argues pursuant to CPLR 3211(a)(8) that the court lacks personal jurisdiction over it pursuant to CPLR 302 (a)(1), (2) and (3)(ii) as well as that due process prevents the exercise of jurisdiction. CPLR 3211 (a) (8) allows for dismissal where “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].)

CPLR 302 (a)(1)

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.) Plaintiff seeks to obtain jurisdiction over these defendants based on allegations that they are co-conspirators.

RCBC argues that correspondent bank accounts cannot support jurisdiction unless their use is purposeful and repeated. RCBC admits:

“7. RCBC opened two correspondent banking accounts at commercial banks in New York City—one with Bank of New York Mellon and one with Citibank—in 1963 and 1980, respectively. RCBC also maintains a correspondent account with

Wells Fargo in Philadelphia and may at times communicate with the New York office of Wells Fargo regarding this account.

8. The correspondent banking accounts are used to facilitate commercial and trade payments (inward and outward remittances) in U.S. dollars. The Bank of New York Mellon and Citibank accounts are still maintained in New York, and the Wells Fargo account is still maintained in Philadelphia. The accounts are strictly used to route funds out of the United States.

9. RCBC does not market or advertise its correspondent accounts to customers, either on its website or otherwise. Details of the accounts are published in Bankers Almanac and on the SWIFT system but not for the purpose of attracting customers.”

(NYSCEF 53, Zamora aff. ¶¶ 7-9.)

However, plaintiff alleges that RCBC has four additional U.S. correspondent accounts at JP Morgan Chase Bank, N.A., Deutsch Bank Trust Co. Americas, Standard Chartered Bank, and Bank of America, N.A.. (NYSCEF 61, Affidavit of Sean O'Malley, Senior Vice President and Chief Investigator of the Financial Intelligence and Investigation Unit at the Federal Reserve Bank of New York, ¶ 13.) “In addition, [RCBC] Foreign Currency Deposit Unit, Gen. Gil. J. Puyat Avenue, Manila, Philippines, using SWIFT code [xxxxxxx], maintains a correspondent relationship with Wells Fargo Bank NY Intl.” (*Id.*) Plaintiff alleges the use of these accounts in the theft the Funds.

(NYSCEF 1, Complaint ¶ 150.) Plaintiff alleges that RCBC was actively involved in the theft, not just through its correspondent accounts. (*Id.* ¶¶ 4-7, 144-153.)

The court has personal jurisdiction over RCBC under CPLR 302 (a)(1) because RCBC conducts business in New York and this action is related to that business. (*Al Rushaid v Pictet & Cie*, 28 NY3d 316, 328 [2016] [wire of illicit funds to New York correspondent bank account], *rearg denied*, 28 NY3d 316 [2017]; *Averbach v Cairo Amman Bank*, 2020 WL 486860, *7 (SD NY Jan. 21, 2020) (“When a foreign bank

repeatedly approves deposits and the movement of funds through a correspondent account, it is transacting business; that the foreign bank did not initiate the transaction does not change the analysis.”); *Bartlett v Société Générale De Banque Au Liban Sal*, 2020 WL 7089448, *5 n2 (ED NY Nov. 25, 2020) (“single transaction is sufficient” if transferred through defendant’s New York correspondent accounts and related to the claims). Indeed, according to plaintiff, RCBC’s correspondent banking services were critical to the theft of the Funds. CPLR 302(a)(1) “‘is a single act statute’ and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.” (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988] [citation omitted].) Here RCBC’s contacts to New York were repeated and related. Therefore, plaintiff has established that the court has jurisdiction over RCBC under CPLR 302 (a)(1).

CPLR 302 (a)(2)

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 . . .” 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].) Plaintiff asserts jurisdiction over RCBC alleging that it is a co-conspirator. Conspiracy jurisdiction requires (1) a tortious act of any co-conspirator in New York, (2) a prima facie conspiracy involving a corrupt agreement, overt act, intentional participation, and damages, and (3)

membership in conspiracy. (*In re Sumitomo Copper Litigation*, 120 F Supp 2d 328, 338-39 [SD NY 2000].)

Since the Funds were transferred out of the New York Fed. account, without plaintiff's authorization, plaintiff has established that the tort occurred within New York. (*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].)

Here, plaintiff alleges a corrupt agreement. (NYSCEF 1, Complaint 12-19, 88-96, 110-115, 155, 171-176, 181-187, 189-202, 209-211, 212-223, 227-230, 234-236, 246-249, 254-260, 296, 339.) Clearly, plaintiff alleges more than "a lapse in protocols" in setting up fictitious accounts, as RCBC frames it. (NYSCEF 54, memorandum of law at 19.¹) Rather, plaintiff alleges that RCBC's correspondent accounts and RCBC's Fictitious Accounts² were used to steal the Funds, move the Funds among RCBC accounts after RCBC had notice, and then send the Funds to co-conspirators to be laundered, which entitles plaintiff to the inference that RCBC agreed with co-conspirators to steal the Funds. (*FIA Leveraged Fund*, 150 AD3d at 495 [allegations that defendants' knowingly transferred funds in violation of plaintiff's rights sufficient to create inference of agreement].) 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.

¹ References to page numbers are to the NYSCEF-generated page numbers.

² Abbreviated names have the same meaning as in the April 8, 2022 Order. (NYSCEF 237.)

(See *Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC*, 160 AD3d 596, 597 [1st Dept 2018]; *Weinberg v Mendelow*, 113 AD3d 485, 487 (1st Dept 2014) (attributing coconspirators' overt acts to defendant: "[i]t is not necessary that the complaint allege an overt act by Konigsberg.")

Plaintiff alleges damages of \$81 million stolen from the New York Fed. which was sent to the Fictitious Accounts through RCBC's correspondent accounts. (NYSCEF 1, Complaint ¶¶ 7, 32, 48, 79, 111, 184, 251, 261, 281, 308, 347, 351, 365, 384, 396, 397.) Therefore, plaintiff has sufficiently alleged damages against RCBC.

Plaintiff's allegations are sufficient to create an inference of RCBC's intentional participation in the conspiracy to steal plaintiff's Funds in New York. In addition to RCBC's allegedly intentionally setting up the fictitious accounts, the court highlights but a few examples of RCBC's alleged overt acts from plaintiff's 123-page complaint with 449 paragraphs:

"The Jupiter branch's closed circuit television system ("CCTV") was conveniently not working from February 4 to February 9, 2016—the very time period during which the stolen funds were laundered. A subsequent investigation determined that 'the timing of the damage to the CCTV [was] suspicious' and 'that it was tampered' with." (*Id.* ¶ 187.)

Angela Ruth Torres, Senior Customer Relations Officer of RCBC's Jupiter branch "gave [defendant So Go] the cardboard box full of cash. Torres had to override the bank's systems simply to hand over such a large amount of cash, which exceeded RCBC's teller limit." (*Id.* ¶¶ 13, 185)

"[O]n Friday, February 5, 2016, ... [w]hile a hold was placed on the Fictitious Accounts later that day in the early evening, RCBC senior management removed it about 45 minutes after it was put in place. This allowed tens of millions of dollars of the Bank's stolen funds remaining in the Fictitious Accounts to be completely looted and laundered when the bank opened for business on the Tuesday after the holiday weekend. (*Id.* ¶ 189.)

Plaintiff sent swift messages to stop payment to the fictitious accounts, "[b]ut RCBC was not logged onto its SWIFT server to receive these SWIFT messages

from the Bank. The day before, Sunday, February 7—a weekend day—someone signed-out RCBC’s SWIFT Server at 6:54 a.m. RCBC personnel only signed back onto the SWIFT Server at 9:11 a.m. on Tuesday, February 9.” (*Id.* ¶¶ 205-209.)

“Defendants Deguito and Torres, of RCBC, signed the withdrawal slips,” but “there is no video of the withdrawals” because the closed-circuit TV was turned off. (*Id.* ¶ 222.) “By 11:37 a.m., less than an hour after RCBC forwarded the SWIFT messages to the Jupiter branch *and sat idle doing nothing else*, RCBC had drained the Fictitious Accounts . . .” (*Id.* ¶223.) “In all, during this key time period, RCBC transferred approximately \$58.2 million of the Bank’s stolen funds out of the Fictitious Accounts.” (*Id.* ¶ 216.)

“At around 3:31 p.m., more than six hours after RCBC received the [plaintiff]’s stop payment instructions and well after RCBC had almost completely drained the Fictitious Accounts, RCBC senior management finally placed a hold on the Fictitious Accounts. RCBC then sent a misleading SWIFT message to the [plaintiff]: “WE ACKNOWLEDGE RECEIPT OF YOUR NOTICE. ACTING ON YOUR INSTRUCTIONS, WE HAVE PLACED ON HOLD THE REMAINING PROCEEDS FROM THE TRANSACTIONS WHICH IS WITHOUT PREJUDICE TO ADDITIONAL INFORMATION NOTICES OR INSTRUCTIONS THAT MAY BE RECEIVED BY THE BANK, AND WHICH MAY BE CONTRARY TO YOUR INSTRUCTIONS. THANK YOU. RCBC HEAD OFFICE.” (*Id.* ¶227.) RCBC sent a similar message to its correspondent banks. (*Id.* ¶ 228.)

Unlike BRHI in the prior decision, here plaintiff sufficiently alleges a conspiracy and RCBC’s participation. To show defendant’s membership in the conspiracy, plaintiff must allege that defendant knew of the conspiracy, the conspiracy could not operate without defendant, or defendant benefitted from the conspiracy. (*Wimbledon*, 160 AD3d at 596-97 [receipt of hush money allowed reasonable inference that co-conspirator exerted control.]) Plaintiff alleges that “[g]iven the fictitious nature of the accounts and their supposed beneficiaries, and based upon information and belief, only the Defendants—including RCBC and Wong—could have provided that information to the hackers, demonstrating that they were all a part of the same conspiracy.” (NYSCEF 1, Complaint ¶ 115.) The court rejects RCBC’s objection that this allegation is speculative. Rather, plaintiff is entitled to such inferences on a motion to dismiss where there is a

factual predicate. (See *Leon v Martinez*, 84 NY2d 83, 87 [1994].) Further, jurisdiction is not undermined by its allegation that the North Korean hackers had hacked the plaintiff before. (NYSCEF 1, Complaint ¶¶ 69-77.) While the hackers needed a bank and could have picked any bank, they found a favorable environment at RCBC.

The court rejects RCBC's arguments that it was a not member of the conspiracy, all of its acts were in the Philippines, and it had no relationship or control over alleged co-conspirators. This is a motion to dismiss; RCBC's arguments are more appropriate for an answer. "Although 'our courts have traditionally required the defendant's presence here at the time of the tort', the First Department has affirmed that 'a defendant with access to computers, fax machines etc., no longer has to physically enter New York to perform a financial transaction which may be criminal or tortious.'" (*Satterfield v Vstock Transfer, LLC*, 2019 NY Slip Op 33279[U], *12 [Sup Ct, NY County 2019] [citation omitted].) "For instance, '[u]sing a New York bank account for a fraudulent scheme constitutes a tort within New York.'" (*Id.* [citation omitted].)

Therefore, like EHL in the prior decision, plaintiff has established that the court has jurisdiction over RCBC under 302(a)(2).

302(a)(3)(ii)

As stated in this court's earlier decision, "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.'" (NYSCEF 237, April 8, 2022 Order at 23.) Moreover, "[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].)’” (*Id.*)

Defendant challenges the third element. In the context of a commercial tort where the damage is solely economic, “the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred.” (*CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 472 [1st Dept 2011] [citations omitted].) RCBC insists the Korean hack in Bangladesh was the initial critical event causing injury. RCBC relies on the complaint wherein plaintiff alleges: “The North Korean hackers were able to log into the SWIFT system at approximately 8:36 p.m. and began to create fraudulent payment orders to execute the heist. Starting at approximately 8:55 p.m. through approximately 10:30 p.m. (which was 9:55 a.m. to 11:30 a.m. in New York on Thursday, February 4), the hackers sent 36 fraudulent payment orders for nearly \$1 billion—intended to drain the bulk of the Bank’s account at the New York Fed.” (NYSCEF 1, Complaint ¶ 137.) However, the theft of the Funds did not begin with the hack, but with RCBC’s opening of the Fictitious Accounts. The court agrees with plaintiff that fulfilling the payment orders in New York caused the harm to plaintiff’s account which it has held since 1972 at the New York Fed. (*Id.* ¶¶ 45-46.) The Funds taken from the Fed. would have no place to go without RCBC’s New York accounts and alleged assistance in the Philippines. Therefore, plaintiff has established jurisdiction under CPLR 302 (a)(3)(ii).

CPLR 302 (a)(3)(i)

CPLR 302 (a)(3)(i) provides for jurisdiction over a non-domiciliary who “commits a tortious act without the state causing injury to person or property within the state, . . . regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state.” Plaintiff asserts jurisdiction under CPLR 302 (a)(3)(i), based on RCBC’s 60 years of providing its customers services using seven correspondent bank accounts which were also allegedly used in this case.³ Therefore, plaintiff has established jurisdiction under CPLR 302 (a)(3)(i).

Jurisdiction Comports with Due Process

RCBC insists that due process prevents the exercise of jurisdiction because RCBC has no purposeful contact with New York. The court rejects RCBC’s argument relying on *Al Rushaid v Pictet & Cie*, a nearly identical case, where the Court of Appeals held “that defendants’ intentional and repeated use of New York correspondent bank accounts to launder their customers’ illegally obtained funds constitutes purposeful transaction of business substantially related to plaintiffs’ claims . . .” (28 NY3d at 319.)

“The minimum contacts’ test ‘has come to rest on whether a defendant’s conduct and connection with the forum State are such that it should reasonably anticipate being haled into court there.’ Such minimum

³ RCBC asserts that maintenance of a correspondent bank account in New York is insufficient activity for the purposes of CPLR 302 (a)(3)(i). However, the court may not consider RCBC’s objection, stated for the first time in a footnote in its reply, since it deprives plaintiff of the opportunity to respond. The court would reject RCBC’s argument in any case. The cases are otherwise, and here we have 60 years of activity. (*Reynolds v Aircraft Leasing*, 2002 WL 31748824, *4 [Sup Ct Queens County, 2002] [“Although the clause does not require the quantity of contacts necessary to meet the ‘doing business’ test for jurisdiction under CPLR 301, it does require something more than the ‘one shot’ single business transaction described under CLR 301(a)(1).”] [citation omitted].)

contacts exist where a defendant purposefully avails itself of the privilege of conducting activities within the forum State. Here, defendants' maintenance and repeated use of a New York correspondent bank account 'to achieve the wrong complained of in this suit satisfies the minimum contacts component of the due process inquiry.' (*Id.* at 331 [citations omitted].)

Therefore, plaintiff has established this court has jurisdiction over RCBC.

Forum Non Conveniens

RCBC contends that the complaint should be dismissed on *forum non conveniens* grounds because the Philippines is the proper forum.

The following factors are determinative of a *forum non conveniens* motion: (1) burden on New York courts, (2) potential hardship to the parties, including the availability of evidence and witnesses, (3) existence of an alternative forum, (4) residency of the parties, and (5) situs of the underlying transaction out of which the cause of action arose. (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984), *cert denied*, 469 US 1108 [1985] [citations omitted].)

First, plaintiff asserts collateral estoppel based on Judge Schofield's decision rejecting RCBC's identical motion for *forum non conveniens* dismissal in the 2019 Federal Action. (*Bangladesh Bank v Rizal Com. Banking Corp.*, 2020 WL 1322275, at *10-11 (SD NY Mar. 20, 2020). While the court again rejects plaintiff's collateral estoppel argument for the reasons stated in the prior decision, Judge Schofield's analysis is still persuasive:

"The obvious bona fide connection to [New York] is that the theft took place here. The theft targeted a major U.S. institution located in New York City, the Federal Reserve." (*Id.*)

Burden on New York Courts

RCBC kindly asserts that the case would burden the New York Courts. While the court appreciates RCBC's concern, the Commercial Division of the New York State Supreme Court was created to host complex international cases.⁴ This case would be no more burdensome than any of the other cases on this court's docket from around the world. Indeed, the action is easier than many as it involves the application of New York law. Many of the documents are in English. Regardless of where this action is brought, some translation would be needed. This factor favors New York.

Potential Hardship to the Parties, Evidence, and Witnesses

RCBC asserts that the most critical evidence and witnesses are in the Philippines. Obviously, this court is well aware of the potential hardship on RCBC. (See NYSCEF 237, April 8, 2022 Order at 43-44.) However, Judge Schofield is again persuasive:

"With respect to the private interest factors, it is too simplistic to conclude that, since most Defendants are based in the Philippines, evidence is necessarily easier to access there. Much of the relevant evidence is in electronic form accessible from either forum. In addition, authorities in both the Philippines and the United States have investigated some of the events in this action. Their findings are accessible from anywhere on the internet, and in appropriate circumstances, this Court may take judicial notice of them."

(*Bangladesh Bank*, 2020 WL 1322275, *10-11.) Therefore, the court rejects RCBC's unsupported argument that most if not all the evidence is based in the Philippines.

⁴ "The Commercial Division has served as a model for many other jurisdictions interested in creating commercial courts and has even generated international interest. ... The enormous growth [of the Commercial Division] clearly reflects the commercial bar's and the business sector's confidence in the quality of the Commercial Division and its ability to handle complex commercial disputes with expertise and efficiency." (§ 1:7. The Commercial Division today and in the future, 2 NY Prac, Com Litig in New York State Courts § 1:7 [5th ed.].)

When the case is analyzed from the perspective of the theft,⁵ the location of the witnesses and documentary evidence favors New York. Indeed, Judge Schofield observed in this case when it was pending in the SDNY as a RICO case:

“Critical evidence of the fraudulent payment orders, the movement of the stolen funds into correspondent accounts and the movement out of those accounts abroad exists in or close to this district. Three of the four correspondent accounts are in New York City and one is located nearby in Philadelphia. Federal Reserve Senior Vice President Anne Baum attests in a declaration that the Federal Reserve and the Bank have entered into a formal agreement, whereby the Federal Reserve will ‘provide technical assistance to Bangladesh Bank in its litigation.’”

(*Id.* at *10-11.) Moreover, the factor is hardship to parties, not just RCBC. Plaintiff has no connection to the Philippines. This factor favors New York.

Existence of an Alternative Forum

RCBC argues that the availability of the Philippines as an alternate forum for two reasons. First, RCBC asserts its amenability to service in the Philippines, but this is a distraction not entitled to any weight since this court has jurisdiction over RCBC. Second, RCBC asserts that the Philippines permits litigation of plaintiff’s claims. (See *generally* NYSCEF 70, Affirmation of Jose Anselmo Imperial Cadiz⁶ dated March 26, 2021 [March 26, 2021 Cadiz aff].)

RCBC also relies on the 2019 defamation action filed by RCBC and Reyes against plaintiff after plaintiff filed the federal action. (NYSCEF 71, *Rizal Commercial Banking Corporation and Ismael S. Reyes vs. Bank of Bangladesh*, docketed as R-

⁵ In analyzing EHL’s motion 006 on the topic of *forum non conveniens*, the court was focused on the alleged laundering in the Philippines.

⁶ Cadiz is a former Solicitor General of the Philippines and National President of the Integrated Bar of the Philippines. (NYSCEF 177, Affirmation of Jose Anselmo Imperial Cadiz dated August 30, 2021 ¶ 2.)

MKT-19-01010-CV, pending before the Regional Trial Court of Makati City, Branch 142)⁷ for the proposition that since plaintiff must defend itself asserting truth as a defense to the alleged defamation arising from this case, the actions are duplicative (NYSCEF 70, March 26, 2021 Cadiz aff. ¶¶ 6-7), but that action was dismissed. (NYSCEF 291, Plaintiff's Rule 18 letter enclosing June 30, 2022 Order of Dismissal; NYSCEF 292, RCBC's Rule 18 Response; NYSCEF 293, Plaintiff's Reply.) Without that action, plaintiff seems to have no connection to the Philippines.

Accordingly, plaintiff would be compelled to initiate a new action in the Philippines where the filing fees can be significant; the filing fee for RCBC's now dismissed defamation action was \$51,000. (NYSCEF 70, March 26, 2021 Cadiz aff. ¶ 6; NYSCEF 63, Affirmation of Antonio Eduardo B. Nachura⁸ ¶ 23.) "Jury trials are not available for civil matters in the Philippines. All judicial disputes are resolved by a judge." (NYSCEF 63, Nachura aff. ¶ 7.) Cadiz opines that "[a]ny action for discovery in New York will have to contend with the stringent Philippine secrecy rules on financial documents, which are also unique in the Philippines. Unlike in other jurisdictions, in the Philippines, there are few exceptions to bank secrecy for Philippine Peso denominated accounts, such as when there is an order from a court of competent jurisdiction for a case involving the bank account (Republic Act No. 1405, otherwise known as the Secrecy of Bank Deposits Act)." (NYSCEF 70, March 26, 2021 Cadiz aff. ¶ 19.) These

⁷ Plaintiff was first to file the federal action in 2019. (*Bangladesh Bank v Rizal Com. Banking Corp.*, 2020 WL 1322275, at *10-11 (SDNY 2020).

⁸ Nachura is a former Associate Justice of the Supreme Court of the Philippines, former Solicitor General of the Philippines, and Dean of Arellano University College of Law. (NYSCEF 63, Antonio Eduardo B. Nachura aff. ¶ 2.)

stringent bank secrecy rules are present regardless of whether the case is heard in New York or the Philippines. (See *Id.* at ¶ 19 [“Bangladesh Bank was among the entities which refused to provide a waiver of bank secrecy.”]; NYSCEF 1, Complaint ¶¶ 284 [“RCBC officials have claimed that bank secrecy rules prohibit them from answering questions from government regulators and the Philippines Senate’s Blue Ribbon Committee as to their procedures and whether they followed them in connection with the theft.”])

However, Nachura opines,

“I understand that Defendants in this case have suggested that certain privacy laws would make discovery in this action extremely difficult. The privacy laws are minimally applicable here, where the funds at issue were stolen and deposited in accounts belonging to fictitious individuals and entities. Section 4 of the Data Privacy Act of 2012 (Republic Act No. 10173) explicitly excludes ‘information necessary in order to carry out the functions of public authority which includes the processing of personal data for the performance by the independent, central monetary authority . . . or Bangko Sentral ng Pilipinas to comply with Republic Act No. 9510, and Republic Act No. 9160, as amended, otherwise known as the Anti-Money Laundering Act and other applicable laws.’” (NYSCEF 63, Nachura aff. ¶ 37.) “Foreign judgments are recognized by Philippine courts.”

(*Id.* ¶ 12; see also *id.* ¶¶ 1314.) This factor favors New York.

Residency of the Parties

The parties’ residences are a neutral factor since RCBC is a resident of the Philippines and plaintiff is a resident of Bangladesh. However, plaintiff, the central bank of the People’s Republic of Bangladesh, has since 1972 held its international reserves in the New York Fed. (NYSCEF 1, Complaint ¶ 45.) Therefore, the court gives plaintiff’s selection of New York some deference.

Situs of the Underlying Transaction Out of Which the Cause of action Arose

The location of the events giving rise to the action is New York. Here, the court is focusing on the theft of the Funds, not the alleged laundering. While the court previously found the Federal Reserve systems were not compromised (NYSCEF 237, April 8, 2022 Order at 41-42.), that does not mean the New York Fed. was not harmed. “[T]he New York Fed itself was wronged” because of the perpetrator’s use of the Federal Reserve Bank’s Fedwire system. (NYSCEF 46, Affidavit of Anne Baum, Senior Vice President and Head of the Central Bank and International Account Services area at the Federal Reserve Bank of New York ¶ 29.) Specifically, plaintiff’s Funds, resident in New York, were harmed when stolen.

Focusing now on the theft from the New York Federal Reserve, the court finds there is a strong New York nexus to this case. “[W]here a foreign forum has a substantial interest in adjudicating an action, such interest is a factor weighing in favor of dismissal.” (*Shin-Etsu Chem. Co., Ltd. v ICIC Bank Ltd.*, 9 AD3d 171, 178 [1st Dept 2004] [citations omitted].) For example, in *Financial & Trading Ltd. v Rhodia S.A.*, an action for “fraudulent inducement to purchase shares of defendant’s stock” on the Paris stock exchange, France had a superior interest over New York in regulating the issuance of French stock. (28 AD3d 346 [1st Dept 2006], *lv to appeal denied*, 7 NY3d 306 [2006].) The court notes that the Blue-Ribbon Commission has issued its report (NYSCEF 1, Complaint ¶ 299) and criminal cases have ended or are on appeal. (NYSCEF 72, Resolution, December 26, 2019 Order in *People of the Philippines v. Raul Victor B. Tan, Ismael S. Reyes, Brigitte B. Capiña, Romualdo S. Agarrado, and Angela Ruth S. Torres*, No. R-MKT-19-02359-CR, Republic of the Philippines [the December

26, 2019 Order].) The Philippines has had an opportunity to investigate and regulate the conduct at issue here. (See NYSCEF 1, Complaint ¶¶ 107, 155, 157.) However, with the Philippines' investigatory interest satisfied, this case becomes a commercial litigation in which a bank in Bangladesh seeks damages from a bank in the Philippines. New York, on the other hand, has an interest in providing a forum for such a commercial action where New York was the target of "one of the largest bank heists in modern history" that reached into an account at the Federal Reserve in New York. (*Id.* 1, Complaint ¶ 1.)

In balancing these factors, the court finds that RCBC has failed to meet its heavy burden of demonstrating 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].)

CPLR 3211(a)(7)

RCBC challenges plaintiff's fraud and conspiracy claims.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court accepts the facts as alleged in the complaint as true, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory. (*Leon*, 84 NY2d at 87.) "At the same time, however, allegations consisting of bare legal conclusions ... are not entitled to any such consideration. Dismissal of the complaint is warranted under CPLR 3211 (a) (7) if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an

enforceable right of recovery.” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [internal quotation marks and citations omitted].)

Failure to State Fraud

In its fourth cause of action, plaintiff alleges fraudulent concealment. (NYSCEF 1, ¶¶ 382-391.) Specifically, plaintiff alleges that when RCBC informed plaintiff that a hold had been placed on the purportedly fictitious accounts, RCBC “omitted” that plaintiff’s “stolen funds had been moved to other RCBC accounts and that the Fictitious Account [sic] were now virtually empty.” (*Id.* ¶ 385.) To state a claim for fraudulent concealment, plaintiff must allege a duty to disclose imposed by (i) a fiduciary duty or (ii) one that arises if “(1) one party makes a partial or ambiguous statement that requires additional disclosure to avoid misleading the other party... or (2) one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge.” (*Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478, 1484 [2d Cir. 1995] [citations and internal quotations omitted].) RCBC objects that plaintiff fails to allege that RCBC has a duty to disclose to plaintiff because RCBC has no such duty. Further, RCBC complains that plaintiff fails to allege fraud with sufficient particularity because plaintiff failed to identify the sender of the message that the accounts were frozen.

RCBC’s motion is denied as to the fourth cause of action for fraud. Plaintiff sufficiently alleges that when RCBC told plaintiff that it froze the fictitious accounts but omitted that it still possessed and had just moved \$58 million of plaintiff’s Funds to another RCBC controlled fictitious account, its partial statement created a duty to disclose. Further, the court rejects RCBC’s argument that essentially, the parties had

no relationship and thus no duty to disclose. However, once plaintiff's Funds were in RCBC's accounts, and RCBC knew it and knew the Funds to be stolen, as demonstrated by RCBC freezing the Fictitious Accounts, the parties had a relationship such that RCBC was expected to return plaintiff's Funds. (See NYSCEF 1, Complaint ¶¶ 27, 47, 138, 165, 167, 224, 226, 278, 317, 319, 320, 333, 338.) Their relationship preexisted the theft from their participation in the SWIFT system in which from time-to-time banks communicate and resolve issues through banking transactions. (*Cf. Elghanian v Harvey*, 249 AD2d 206, 206 [1st Dept 1998].) Under that doctrine, a duty to disclose arises "where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." (*Chiarella v United States*, 445 US 222, 248 [1980] [dissenting, Blackmun, J.]) In any case, RCBC's duty to disclose was triggered by its partial disclosure of a freeze on the Fictitious Accounts after the Funds had been transferred to other RCBC accounts. (See *Junius Const. Co. v Cohen*, 257 NY 393, 399 [1931].) The court also rejects RCBC's insufficiency argument as plaintiff has identified who sent the alleged fraudulent message to plaintiff: "RCBC Head Office," which signed it. (NYSCEF 1, Complaint, ¶¶ 227-228.) Accordingly, plaintiff's fraud claim is sufficiently particular.

Failure to State Conspiracy

RCBC argues for dismissal of conspiracy to commit conversion/theft/misappropriation as duplicative. In its second cause of action, plaintiff alleges aiding and abetting conversion/theft/misappropriation while in the third cause of action, plaintiff alleges conspiracy to commit conversion/theft/misappropriation. (NYSCEF 1, Complaint ¶¶ 363-381.) While fraud and aiding and abetting fraud can be pled alternatively,

(*Weinberg v Mendelow*, 113 AD3d 485, 487 [1st Dept 2014]), plaintiff fails to address whether it is pleading aiding and abetting conversion/theft/misappropriation and conspiracy to commit conversion/theft/misappropriation alternatively. Nevertheless, RCBC's argument is rejected. The claims are different. The D.C. Circuit has explained the difference:

“The prime distinction between civil conspiracies and aiding-abetting is that a conspiracy involves an agreement to participate in a wrongful activity. Aiding-abetting focuses on whether a defendant knowingly gave ‘substantial assistance’ to someone who performed wrongful conduct, not on whether the defendant agreed to join in the wrongful conduct.

(*Halberstam v Welch*, 705 F2d 472, 478 [DC Cir 1983].)

The Second Circuit also recently examined the distinction:

“The *Halberstam* court noted that ‘[t]here is a qualitative difference between proving an agreement to participate in a tortious line of conduct [– in the case of conspiracy –] and proving knowing action that substantially aids tortious conduct [– in the case of aiding and abetting].’” (*Freeman v HSBC Holdings PLC*, 2023 WL 105568, *8 [2d Cir 2023].)

“The *Halberstam* court therefore found ‘it important to keep the distinctions [between conspiracy and aiding and abetting] clearly in mind’ because ‘the distinctions can make a difference.’ [W]e see no reason to inject the foreseeability requirement pertinent to aiding-and-abetting liability into the ‘in-furtherance-of’ requirement that exists for conspiracy.”

(*Id.* at *9 [citations omitted].)

Upon comparison of the second and third causes of action, the court rejects RCBC's contention that conspiracy to commit conversion in the third cause of action is redundant of aiding and abetting conversion in the second cause of action. (See *Loreley Fin. (Jersey) No. 3 Ltd. v Wells Fargo Sec., LLC*, 2016 WL 5719749, *7-*8 [SD

NY Sept. 29, 2016].) Rather, the second claim asserts RCBC's supportive role, while the third claim asserts that RCBC joined in the conspiracy.

RCBC challenges plaintiff's claims that RCBC participated in a conspiracy. "The essence of a conspiracy is a concert or combination to defraud or cause other injury actually resulting in damage." (*Hijos De Daniel Espuny, S.A. v Victor M. Calderon Co.*, 9 Misc 2d 983, 984 [Sup Ct, Kings County 1957] [citation omitted]., *aff.'d sub nom. Hijos De Daniel Espuny v Calderon Co.*, 6 AD2d 697 [2d Dept 1958].) Plaintiff's claims of conspiracy in the 123-page complaint with 449 paragraphs are far from bald and conclusory, as RCBC insists. (NYSCEF 54, RCBC memorandum of law at 12-13.)

RCBC moves to dismiss the seventh cause of action for conspiracy to commit trespass to chattel for failure to plead underlying tort. RCBC is simply wrong. For example, plaintiff alleges "[e]ach of these movements and infection of [plaintiff's] network and computers constituted a trespass upon [plaintiff's] property, and provided the North Korean hackers with unauthorized access to [plaintiff's] property in its computer systems and network." (NYSCEF 1, Complaint, ¶ 418; see also ¶¶ 124-143, 421.)

In a footnote, RCBC moves to dismiss the causes of action for conversion/theft/misappropriation; aiding and abetting fraud; unjust enrichment; and money had and received. While RCBC asks the court to dismiss the complaint in its entirety, RCBC fails to seek dismissal of the second cause of action for aiding and abetting conversion.

RCBC challenges plaintiff's claim for conversion/theft/misappropriation because plaintiff fails to allege that the Funds RCBC received were "specific, identifiable funds" belonging to plaintiff and thus that RCBC had "an obligation to return [the money] or

otherwise treat in a particular manner the specific fund in question.” However, the Funds on account at the Fed. are sufficiently identified. (See *Lenczycki v Shearson Lehman Hutton, Inc.*, 238 AD2d 248, 248 [1st Dept 1997] [“funds of a specific, named bank account, such as the one here, are sufficiently identifiable”], *appeal denied*, 91 NY2d 918 [1998]; *Chambers v Weinstein*, 44 Misc 3d 1224[A], *4 [Sup Ct, NY County 2014]), *aff’d*, 135 AD3d 450 [1st Dept 2016] [. . . “the specific bills need not be identified”] [citation omitted].)

RCBC challenges plaintiff’s claim for aiding and abetting fraud against RCBC because, like its fraud claim, the allegations are not pled with particularity as to RCBC, the entity. RCBC’s objection is rejected as unspecific. Moreover, plaintiff’s claim in its 123-page complaint with 449 paragraphs are particularized against RCBC. Finally, RCBC is mentioned over 500 times in the complaint while RCBC defendants are mentioned 40 times; plaintiff has particularized its claims against RCBC.

RCBC argues that plaintiff’s eighth and ninth causes of action, which allege that RCBC was unjustly enriched and benefited from the receipt of funds, fail because plaintiff’s allegations about RCBC making “potentially hundreds of thousands or millions of dollars” (NYSCEF 1, Complaint ¶ 430) from the alleged transfers is purely speculative. While the amount that RCBC was paid for foreign transfers – “potentially hundreds of thousands or millions of dollars” – is speculative, the assertion that RCBC was paid something for providing the service of foreign transfers is not.

RCBC Individuals

The RCBC individual defendants are Brigitte R. Capiña, who was the Regional Sales Director of RCBC’s Retail Banking Group (NYSCEF 1, Complaint ¶ 17); Nestor O.

Pineda who was RCBC's District Sales Director (*id.* ¶ 18); and Romualdo S. Agarrado, who was the Customer Service Head of RCBC's Jupiter branch. (*id.* ¶ 19.)

Plaintiff alleges defendant Raul Tan, who was RCBC's Head of the Retail Banking Group, consulted with Capiña and Pineda about the hold initially put on the Fictitious Accounts. (*id.* ¶ 194.) They, in turn, consulted with defendant Deguito, "who told them that the account holders were long-time, wealthy clients from the Solaire Casino whose account documents were 'in order' and that the transfers had been expected." (*id.* ¶ 194.) Capiña was informed that "Tan ordered it lifted," but RCBC would file a suspicious activity report. (*id.* ¶ 196.) Plaintiff alleges that "[t]he STR was finalized days later when the funds were long gone from the accounts." (*id.*) "Tan made the decision to release the hold even though he was no longer Head of RCBC's retail Bank Group and had no authority to do so. The decision should have been made by Defendant Reyes," according to plaintiff, who Tan had designated as the Officer-in-Charge of Retail Banking. (*id.* ¶ 199.) Plaintiff complains that "Tan made the decision, and Reyes, Capiña, Pineda, and other senior RCBC officials just let it happen." (*id.* ¶ 200.) Plaintiff also complains that "[w]ith the Fictitious Accounts already looted, the officers present at this meeting (including Defendants Capiña and Raul Tan) agreed to pointlessly place a hold on those Fictitious Accounts." (*id.* ¶ 239.) Plaintiff infers that "[t]hese otherwise inexplicable actions by senior RCBC personnel indicate that they had knowledge of the fraudulent source of the stolen funds." (*id.* ¶ 197.)

Capiña was Regional Sales director of RCBC's Retail Banking Group until November 15, 2020, when she was hired by RCBC as an independent contractor on November 16, 2020. (NYSCEF 178, Affirmation of Brigitte B. Capiña dated August 26,

2021 [August 26, 2021 Capiña aff.] ¶ 3.) The criminal complaint alleging that Capiña facilitated money laundering was dismissed. (NYSCEF 72, the December 26, 2019 Order.) Capiña denies that she received service of process of the complaint in this action “at RCBC Headquarters,” but never denies receipt otherwise. (NYSCEF 214, Affirmation of Brigitte B. Capiña dated October 5, 2021 ¶ 2.)

Plaintiff alleges that Pineda, was involved in RCBC’s failure to take action when the letters to the Fictitious Account holders were returned to RCBC. (NYSCEF 1, Complaint ¶¶ 86, 100, 102, 103.) When “a Thank You Letter is returned [to RCBC] as undeliverable...the business center involved must explain in a weekly report to the District Sales Director (in this case Defendant Pineda) the action taken in response to the returned Thank You Letter.” (*Id.* ¶ 103.) “[N]o report was ever created” in response to the returned Thank You Letters sent to the Fictitious Accounts holders. (*Id.*) Pineda was terminated by RCBC on March 31, 2016. (NYSCEF 180, Affirmation of Nestor O. Pineda dated August 26, 2021 [August 26, 2021 Pineda aff.] ¶ 3.) Pineda states that he “was named in a complaint brought by the Anti-Money Laundering Council, but was ultimately cleared before criminal charges were filed.” (*Id.* ¶ 6; NYSCEF 181, Resolution on Motion for Reconsideration, filed in *The Anti-Money Laundering Council v Raul Tan et. al*, NPS Docket No. XVI-INV-16K-00346 [Department of Justice, Manila].) Pineda denies that he received service of process of the complaint in this action “at RCBC Headquarters,” but never denies receipt otherwise. (NYSCEF 215, Affirmation of Nestor Pineda dated October 5, 2021 ¶ 2.)

Agarrado, signed off on the opening of these Fictitious Accounts, together with defendant Angela Ruth Torres, Erlinda Isaac, and defendant Maia Santos Deguito.

(NYSCEF 1, Complaint, ¶ 104.) Since the SWIFT Server was turned off on Sunday, February 7, 2016, “RCBC did not review the Bank’s stop payment and hold SWIFT messages until Tuesday, February 9, 2016 at 9:11 a.m... RCBC’s Settlement Department forwarded the Bank’s SWIFT messages to . . . officers at RCBC’s Jupiter branch, including Deguito, Torres, and the Head of Customer Service, Defendant Agarrado. (*Id.* ¶¶ 209, 212.) Agarrado states that he resigned from RCBC in July 2019. (NYSCEF 179, Affirmation of Romualdo Agarrado dated August 27, 2021 [August 27, 2021 Agarrado aff] ¶ 3.) Agarrado was acquitted of facilitating money laundering. (NYSCEF 72, the December 26, 2019 Order; NYSCEF 73, Judgment, March 8, 2021, *People of the Philippines v. Raul Victor B. Tan, Ismael S. Reyes, Brigitte B. Capiña, Romualdo S. Agarrado, and Angela Ruth S. Torres*, No. R-MKT-19-02359-CR Republic of the Philippines [the March 8, 2021 Judgment] at 28.) Like Pineda, Agarrado denies that he received service of process “at RCBC Headquarters,” but never denies receipt otherwise. (NYSCEF 216, Affirmation of Romualdo S. Agarrado dated October 6, 2021, aff. ¶ 2)

The RCBC Individuals challenge personal service on them under the Hague Convention.⁹ However, the RCBC Individuals were subsequently served on September 30, 2021. (NYSCEF 187, Affirmation of Jesse R. Loffler ¶¶ 9, 10.) Defendants do not challenge this subsequent service. (NYSCEF 222, tr at 21:16-23.)

⁹ The RCBC Individuals do not deny service of process. (*See generally* NYSCEF 178, August 26, 2021 Capiña aff.; NYSCEF 179, August 27, 2021 Agarrado aff; NYSCEF 180, August 26, 2021 Pineda aff.) Moreover, Capiña admits that she continues to work for RCBC. (NYSCEF 178, August 26, 2021 Capiña aff. ¶ 3.) Substitute service, where the process server is barred from entry, here due to COVID restrictions, is permissible. (*See F. I. duPont, Glore Forgan & Co. v Chen*, 41 NY2d 794, 797 [1977] [service on doorman].)

RCBC Individuals argue that the court lacks personal jurisdiction over them under CPLR 302 (a)(2) and (3)(ii) as well as that due process prevents the exercise of jurisdiction. As discussed above, with regard to RCBC, the court may exercise “conspiracy” jurisdiction over the RCBC Individuals because plaintiff sufficiently alleges (1) a conspiracy in which co-conspirators committed tortious acts in New York, (2) a prima facie conspiracy involving a corrupt agreement, overt acts, intentional participation, and damages, and (3) RCBC Individuals’ membership in the conspiracy. (See *In re Sumitomo Copper Litigation*, 120 F Supp 2d 328, 338-39 [SD NY Oct. 30, 2000] [citations omitted].) As discussed above, these defendants were allegedly involved in creating the Fictitious Accounts, removing an administrative hold on the accounts, and sending allegedly fraudulent SWIFT messages to New York. “[A] conspiracy can rarely be proved by direct evidence and is instead ‘usually established by circumstantial evidence based upon independent proof of each alleged co-conspirator’s acts, conduct and statements and the totality of conduct of all the participants and the reasonable inference to be drawn therefrom.’” (*Singer v Bell*, 585 F Supp 300, 303 (SD NY Apr. 20, 1984) [citation omitted].) Like RCBC, which as a corporation can only act through its individuals, the theft could not have been accomplished without the RCBC Individuals. (See *Wimbledon*, 160 AD3d at 597 [fact that fraud “could not have been accomplished without their acquiescence” is a red flag.] [citations omitted].) Rather, the RCBC Individuals’ “intentional participation in furtherance of the conspiracy [can] be inferred from the overt acts taken by them.” (*Cleft of the Rock Found v Wilson*, 992 F Supp 574, 582 [ED NY Jan. 31, 1998] [citation omitted].) The court rejects the RCBC Individuals’ argument that they lacked dominion

and control over other co-conspirators. (See *Lawati v Montague Morgan Slade*, 102 AD3d 427, 428-29 [1st Dept 2013] [co-conspirator had knowledge of tortious act in New York, without having actually directed that act].) Therefore, the court has jurisdiction under CPLR 302 (a)(2).

The court also has jurisdiction under CPLR 302 (a)(3)(ii). At the time of the theft, the RCBC Individuals worked for RCBC, “one of the Philippines’ largest banks” and RCBC worked through the RCBC Individuals. (NYSCEF 1, Complaint ¶ 4.) They were not just corporate employees but had decisioning making authority and influence over critical decisions for example, Tan called the RCBC Individuals regarding the hold. Together, the RCBC Individuals’ overt acts listed above were essential to preventing RCBC from returning the Funds to plaintiff in New York. (See *Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez*, 171 F3d 779, 792 [2d Cir 1999] [conduct outside New York caused injury in New York because the act caused disbursement of the Funds from New York]; *Gabriel Capital v CAIB Investmentbank Aktiengesellschaft*, 28 AD3d 376, 377 [1st Dept 2006] [CPLR 302 (a)(3)(a)(ii) jurisdiction based on out-of-state misconduct- misrepresentations by employees causing injury in New York], appeal dismissed, 7 NY3d 922 [2006].)

The RCBC Individuals object, in a footnote in their reply, to jurisdiction under 302(a)(1) arguing that RCBC does not conduct business in New York. As discussed above, the court found that RCBC conducts business in New York. They also argue they are not subject to personal jurisdiction under an agency theory, because plaintiff fails to allege its knowledge of or consent to the theft and they did not exercise control

over RCBC in connection with the theft. To establish personal jurisdiction under an agency theory:

“Plaintiff need not establish a formal agency relationship between defendants and [the corporation]. He need only convince the court that [the corporation] engaged in purposeful activities in this State in relation to [plaintiff's] transaction for the benefit of and with the knowledge and consent of the [individual] defendants and that they exercised some control over [the corporation] in the matter.”

(*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988] [internal citations omitted].)

“[T]he critical question is whether the out-of-state corporate officers were ‘primary actor[s] in the transaction in New York’ that is the source of th[e] litigation, and are not ‘some corporate employee[s] ... who played no part in’ the [transaction].” (*Murray Eng'g P.C. v Remke*, 2018 WL 3773991, *5 [SD NY Aug. 9, 2018] [internal quotation marks and citation omitted] [brackets in original].) Plaintiff’s allegations about the RCBC Individuals’ overt acts, outlined above, are sufficient to establish that the RCBC Individuals were primary actors without whom the theft could not have occurred. The court rejects their attempt to isolate the RCBC Individuals and their overt acts which, if true, together harmed plaintiff.

The RCBC Individuals argue that plaintiff has not established that they intentionally participated in the conspiracy. They deny knowledge of any common goal or purpose because the stop payment SWIFT messages did not reach RCBC as the SWIFT server had been turned off. Again, Tan contacted Capiña and Pineda about the hold, (on the accounts Agarrado set up), in response to the SWIFT messages. Plaintiff has established conspiracy jurisdiction because the co-conspirators were not just the North Korean Hackers, as the RCBC Individuals focus on, but all of the defendants in this action.

For the reasons stated above, jurisdiction over the RCBC Individuals comports with due process. Contrary to the RCBC Individuals' due process objection relying on *Deutsche Bank AG v Vik*, the situs of the injury is at the New York Fed., albeit not the New York Fed. itself, but plaintiff's account at the New York Fed. (163 AD3d 414 [1st Dept 2018].) Further, their due process objection relies on their rejection to conspiracy. However, as discussed above, plaintiff has established conspiracy jurisdiction which constitutes minimum contacts and comports with due process.

The court rejects the RCBC Individuals' *forum non conveniens* argument for the same reasons as stated above.

The RCBC Individuals challenge the fourth cause of action for fraud arguing plaintiff fails to allege that they were involved in the alleged fraudulent response to plaintiff's stop payment request which was sent to correspondent banks in New York as well. However, plaintiff alleges that Capiña and Pineda were involved in the hold process. Indeed, Tan conferred with them regarding the first hold. Agarrado's connection to these accounts is that he allegedly set them up.

Finally, the RCBC Individuals move to dismiss the other causes of action for the same reasons asserted by RCBC, and Lorenzo Tan, Raul Tan and Ismael Reyes. For the same reasons, the motion is denied.

Ismael Reyes

Defendant Ismael S. Reyes was the National Sales Director of RCBC's Retail Banking Group. (NYSCEF 1, Complaint ¶ 16.) As such, he "was responsible for achieving the Retail Banking Group's business targets and overall objectives through efficient supervision of the Regional and District Sales Directors of the Group."

(NYSCEF 170, Affirmation of Ismael S. Reyes [Reyes aff] ¶ 4.) “This includes ensuring that sales targets are achieved through efficient execution of sales strategies and ensuring proper implementation of [the] bank’s policies and procedures.” (*Id.*) RCBC continues to employ Reyes. (*Id.*) Reyes was “designated the Officer-in-Charge of Retail Banking after [Raul Tan] stepped down.” (NYSCEF 1, Complaint ¶ 199.) However, it was Tan who “made the decision to release the hold even though he was no longer Head of RCBC’s retail Bank Group and had no authority to do so.” (*Id.*) Reyes did not stop the removal of the hold. (*Id.*)

Plaintiff alleges that on February 10, 2016, Reyes was involved in the conversion of the Funds from dollars to pesos from the Philrem account. (*Id.* ¶ 248.) “This incident occurred five days after Reyes became aware of the suspicious nature of the funds and one day after he was informed of the Bank’s stop payment instructions.” (*Id.*) Plaintiff infers from Philrem’s agreement to an “off-market price¹⁰” established by Reyes and Tan, that Philrem, was “[d]esperate to launder the money.” (*Id.* ¶ 249.) Plaintiff objects that “RCBC made better than market rates for the foreign exchange.” (*Id.*)

Following an Anti-Money Laundering Council of the Philippines Government investigation, the Philippine Department of Justice charged Reyes with facilitating money laundering when it was alleged that he: “(a) failed to insist on maintaining a hold on the accounts; (b) failed to insist in performing EDD (due diligence); and (c) [] communicated with Philrem confirming a transaction knowing that a recall had been sent by the Bangladesh Bank on the accounts.” (NYSCEF 170, Reyes aff. ¶ 6;

¹⁰ An “off-market price” here means the price was higher than the market.

NYSCEF 72, the December 26, 2019 Order.) Reyes was acquitted. (NYSCEF 72, the December 26, 2019 Order at 9-13.)

Reyes argues that the court lacks personal jurisdiction over him under CPLR 302 (a)(2) and (3)(ii) as well as that due process prevents the exercise of jurisdiction. The court rejects Reyes' motion for the same reasons that the court rejects the RCBC Individuals' motion.

Reyes challenges plaintiff's claims for fraud and conspiracy as well as other claims for conversion/theft/misappropriation or aiding and abetting conversion/theft/misappropriation, aiding and abetting fraud and unjust enrichment and money had and received. The court denies Reyes' motion for the same reasons that it rejects the RCBC Individuals' motion to dismiss plaintiff's claims under CPLR 3211(a)(7) for failure to state a claim.

Reyes contends that the complaint should be dismissed on *forum non conveniens* grounds because the Philippines is the proper forum. The court denies this motion for the same reasons as stated above.

Lorenzo Tan and Raul Tan

Lorenzo V. Tan was the President and CEO of RCBC. (NYSCEF 1, Complaint ¶ 14.) Plaintiff alleges Lorenzo Tan was a close friend of defendant Wong and directed defendant Maia Santos Deguito to “take care of Wong as a client of RCBC.” (*Id.* ¶ 155.) Lorenzo Tan “admitted to the Senate Blue Ribbon Committee that Defendant Wong had been a ‘social acquaintance’ since 2002.” (*Id.*) “Before the Philippine Senate’s Blue-Ribbon Committee, Deguito testified that Lorenzo Tan knew about the opening of the Fictitious Accounts but chose to do nothing.” (*Id.* ¶ 157.)

Raul Victor B. Tan was the “Head of RCBC’s Retail Banking Group.” (*Id.* ¶ 15.) Raul Tan discussed whether the hold was appropriate with Pineda and Capiña. (*Id.* ¶ 194.) Plaintiff alleges that Raul Tan knew about the suspicious transactions from Sabino Maximiano Eco, Deputy Head of RCBC’s Operations Group, but ordered the hold to be lifted 45 minutes after it was put in place. (*Id.* ¶¶ 191, 195.) According to plaintiff “after Defendant Raul Tan was informed that the Bank had requested that the funds be recalled, he stated that it was ‘Bangladesh’s problem,’ not RCBC’s problem.” (*Id.* ¶ 198.) Raul Tan decided “to release the hold even though he was no longer Head of RCBC’s retail Bank Group and had no authority to do so.” (*Id.* ¶ 199.)

Plaintiff alleges that Raul Tan was involved with the after the fact hold on the Fictitious Accounts after the Funds were allegedly “looted,” and “while the Bank’s stolen funds were now in other RCBC accounts held by Defendants So Go and Philrem.” (*Id.* ¶ 239.)

Plaintiff alleges that Raul Tan was involved with Philrem’s conversion of the Funds to pesos. RCBC’s Treasury Department traded \$15 million of the Funds to pesos for Philrem. (*Id.* ¶ 246.) “The Treasury executed that trade, earning RCBC significant fees.” (*Id.*) “Defendant Tan allowed Philrem’s trades through RCBC’s Treasury Department despite knowing the suspicious nature of the funds and the Bank’s request to recall them.” (*Id.* ¶ 247.)

The Tans argue that the court lacks personal jurisdiction under CPLR 302 (a)(2) and (3)(ii) as well as that due process prevents the exercise of jurisdiction. As discussed above, the motions are denied for the same reasons.

The Tans argue that plaintiff fails to state a claim under CPLR 3211(a)(7) against the Tans for fraud, conspiracy, conversion/theft misappropriation, aiding and abetting conversion/theft misappropriation, aiding and abetting fraud, unjust enrichment, and money had and received. For the reasons discussed above, the motion to dismiss the claims is denied.

The Tans contend that the complaint should be dismissed on *forum non conveniens* grounds because the Philippines is the proper forum. As discussed above, the motion is denied for the same reasons.

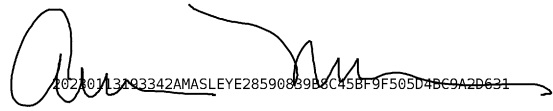
Kam Sin Wong

Wong moves to dismiss the complaint on *forum non conveniens* grounds because the Philippines is an adequate alternate forum.

Wong filed this, his second motion to dismiss, on May 2, 2022. (NYSCEF 245, Notice of Motion.) Wong's April 28, 2021 motion to dismiss pursuant to CPLR 306-b was denied. (NYSCEF 237, April 8, 2022 Order.) Accordingly, the court is compelled to deny the motion based on Wong's 13-month delay after the first motion to dismiss was filed. (*Creditanstalt Inv. Bank AG v Chadbourne & Parke LLP*, 14 AD3d 414, 415 [1st Dept 2005] ["Defendant's substantial delay of nearly 20 months in asserting *forum non conveniens* is itself a reason for denial of the defendant's motion to dismiss."].) This was a knowing waiver because in 2019 Wong filed a *forum non conveniens* motion in the federal court, but it was denied. (*Bangladesh Bank v Rizal Commercial Banking Corp.*, 2020 WL 1322275 [SD NY 2020].) Even if Wong had not waived his *forum non conveniens* argument, it would have been denied for the reasons stated above.

Accordingly, it is

ORDERED that motion sequence number 003 is denied; and it is further
 ORDERED that motion sequence number 004 is denied; and it is further
 ORDERED that motion sequence number 009 is denied; and it is further
 ORDERED that motion sequence number 010 is denied; and it is further
 ORDERED that motion sequence number 014 is denied; and it is further
 ORDERED that defendants are directed to file answers within 20 days of the
 date of this order; and it is further
 ORDERED that the parties are directed to mediation.



1/13/2023
 DATE

 ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: