

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

-----X

RASHEED AL RUSHAID, AL RUSHAID PETROLEUM
INVESTMENT CORP., AL RUSHAID PARKER DRILLING, LTD.,

INDEX NO. 652375/2011

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 003

PICTET & CIE, PHILLIPE BERTHERAT, REMY BEST, RENAUD
DE PLANTA, JACQUES DE SASSURE, BERTRAND DEMOLE,
JEAN-FRANCOIS DEMOLE, MARC PICTET, NICOLAS PICTET,
PIERRE-ALAIN CHAMBAZ

DECISION AND ORDER

Defendant.

-----X

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 68, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 107

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In this action for civil conspiracy and aiding and abetting breach of fiduciary duty, defendants Pictet & CIE (“Pictet”), Pierre-Alain Chambaz (“Chambaz”), Philippe Bertherat, Remy Antoine Best, Renaud Fernand de Planta, Jacques Joseph de Saussure, Bertrand Francois Lambert Demole, Jean-Francois Demole, Marc Phillippe Pictet, and Nicolas Lucien Pictet (collectively, “Defendants”) move to dismiss the amended complaint of plaintiffs Rasheed Al Rushaid (“Rushaid”), Al Rushaid Petroleum Investment Corp. (“ARPIC”), and Al Rushaid Parker Drilling, Ltd.’s (“ARPD”) (collectively, “Plaintiffs”) pursuant to CPLR §327(a) on the ground of forum non conveniens.

In 2012, Defendants first moved to dismiss the amended complaint for, *inter alia*, lack of personal jurisdiction and forum non conveniens. In 2014, I granted Defendants' motion to dismiss the amended complaint for lack of personal jurisdiction, 2014 N.Y. Slip Op. 32286[U] (Sup Ct, NY County 2014), which the Appellate Division, First Department affirmed. 127 AD3d 610, 611 (1st Dept 2015). Plaintiffs were granted leave to appeal, and in November 2016, the Court of Appeals reversed the Appellate Division's order and remitted the action back for a determination of the other grounds initially raised by Defendants in their motion to dismiss. 28 NY3d 316 (2016).

Defendants now move to dismiss the complaint pursuant to CPLR § 327(a) for forum non conveniens. For the purposes of this motion, familiarity with the facts of the underlying dispute are assumed.

Discussion

A court, in its discretion, may grant forum non conveniens dismissal “on any conditions that may be just” when it “finds that in the interest of substantial justice the action should be heard in another forum” CPLR §327(a). On a motion to dismiss for forum non conveniens, “[t]he burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation.” *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984).

In deciding whether to retain jurisdiction, the court balances various factors, none of which are controlling. *Id.* These factors include the residency of the parties, where the conduct underlying the claims occurred, the availability of an alternative forum, any

hardships the defendant would face litigating in New York, the burden on New York courts, *id.*, the location of witnesses and evidence, *id.* at 482, “the applicability of foreign law,” and “whether a foreign forum has a substantial interest in adjudicating an action.” *Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd.*, 9 AD3d 171, 178 (1st Dept 2004).

Here, consideration of these factors weighs heavily in favor of dismissing this action for forum non conveniens. First, not a single party resides or has its principal place of business in New York. Rushaid resides in Saudi Arabia, and ARPD and ARPIC are Saudi Arabian companies. Pictet is a private Swiss bank, and its principal place of business is in Geneva, Switzerland.¹ Eight of the individual defendants reside in Switzerland, and the remaining individual defendant resides in the United Kingdom.

Second, the alleged conduct underlying Plaintiffs’ causes of action primarily occurred in Switzerland. Plaintiffs allege that Chambaz and Pictet aided the ARPD employees by helping create a sham British Virgin Islands company, TSJ Engineering Consulting Co. Ltd. (“TSJ”), to receive bribes, and by creating and maintaining Pictet accounts for TSJ and the ARPD employees. During this time, Chambaz was mainly located in Switzerland. *See Salamolard Aff.* ¶8. This action’s only connection to New York is that alleged bribery funds were wired from non-party vendors – through Pictet’s New York correspondent bank accounts – into TSJ’s Pictet account in Switzerland and later into the ARPD’s employees individual Pictet accounts in Switzerland.

¹ Although Plaintiffs cite to the unrelated New York activity of one of Pictet’s non-party corporate affiliates to show Pictet’s connection to New York, the pleadings are devoid of any allegations regarding Pictet’s relationship with or control over that affiliate.

While the Court of Appeals has found that this activity is sufficient to confer personal jurisdiction over Defendants, *Al Rushaid*, 28 NY3d at 328-331, that fact alone does not require the denial of Defendants' forum non conveniens motion, *Natl. Bank and Tr. Co. of N. Am., Ltd. v Banco De Vizcaya, S.A.*, 72 NY2d 1005, 1007 (1988) ("forum non conveniens permits a court to dismiss an action . . . although it may have jurisdiction over a claim"), nor does it make New York a convenient forum. See, e.g., *Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 138 (2014); *Bluewaters Communications Holdings, LLC v Ecclestone*, 122 AD3d 426, 428 (1st Dept 2014); *Citigroup Glob. Markets, Inc. v Metals Holding Corp.*, 12 Misc 3d 1168(A) (Sup Ct, NY County 2006), *affd*, 45 AD3d 361 (1st Dept 2014); *P.T. Delami Garment Indus. v Cassa di Risparmio di Torino*, 164 Misc 2d 38, 40-41 (Sup Ct, NY County 1994), *affd sub nom. World Point Trading PTE, Ltd. v Credito Italiano*, 225 AD2d 153 (1st Dept 1996).²

Third, there is an available and adequate alternate forum, which has a much greater nexus to this action than New York. Switzerland is an available and adequate alternative forum, and Switzerland has already been chosen by Plaintiffs to litigate two closely related actions against the ARPD employees.

Plaintiffs initiated a criminal proceeding against the ARPD employees in Switzerland, resulting in their conviction, as well as a proceeding to collect on a civil judgment entered against the ARPD employees by a court in the United Kingdom.

² *But see Banco Nacional Ultramarino, S.A. v Chan*, 169 Misc 2d 182, 192 (Sup Ct, NY County 1996), *affd sub nom. Banco Nacional Ultramarino, S.A. v Moneycenter Tr. Co. Ltd.*, 240 AD2d 253 (1st Dept 1997).

Defendants also represented that they would stipulate, for purposes of statute of limitations, to treat a case filed in Switzerland within 60 days of the final dismissal of this action as though the Swiss case were filed when this action was filed.

Despite Plaintiffs' contentions and reliance on caselaw with significantly greater New York connections than here, the differences in New York and Swiss pre-trial and trial procedures do not render Switzerland an inadequate alternative forum. *See Hanwha Life Ins. v UBS AG*, 127 AD3d 618, 619 (1st Dept 2015).³ Moreover, because the allegedly underlying tortious conduct occurred in Switzerland, Swiss law would likely apply to Plaintiffs' claims, which "weighs in favor of dismissal." *Shin-Etsu Chem. Co., Ltd.*, 9 AD3d at 178 (citations omitted).

Fifth, most of the relevant evidence and witnesses related to this case are in Switzerland, where Defendants' conduct underlying the claims and the Swiss legal proceedings against the ARPD employees occurred. This factor also weighs in favor of dismissal. *Id.* at 177. To the extent that Plaintiffs seek discovery from Pictet's New York correspondent accounts, Defendants contend that Pictet maintains its records for these accounts in Switzerland. In any event, 28 USC §1782 provides procedural mechanisms for obtaining documents or witnesses located in New York for production abroad.

³ *Cf. Republic of Lebanon v Sotheby's*, 167 AD2d 142, 145 (1st Dept 1990) (in dispute between nations over ownership and discovery of antique treasure, New York more appropriate forum than Switzerland, in part, because it "permits more liberal discovery, which may be essential given the mystery surrounding the discovery of the [t]reasure").

While Plaintiffs indicate that two of their fact witnesses have residences in New York (with offices in New York, Saudi Arabia, and London), that Rushaid maintains a New York office, and that two of their experts retained for a related Texas arbitration reside in New York, it is undisputed that all parties reside outside of New York. It is further undisputed that the ARPD employees are not located in New York; the fact that these crucial, non-party fact witnesses are “beyond the reach of New York’s subpoena power,” *Nicholson v Pfizer, Inc.*, 278 AD2d 143, 143 (1st Dept 2000), favors dismissal for forum non conveniens. See, e.g., *NWG Investments Inc. v Fronteer Gold Inc.*, 40 Misc 3d 1230(A) (Sup Ct, NY County 2013); *Gutstadt v Nat. Fin. Partners Corp.*, 2013 N.Y. Slip Op. 32733[U] (Sup Ct, NY County 2013) (citing *Globalvest Mgt. Co. L.P. v Citibank, N.A.*, 7 Misc 3d 1023(A) (Sup Ct, NY County 2005)).

Sixth, as explained in a letter to this court from the Swiss Embassy, Switzerland has an “extremely strong interest in regulating banking activities within” the country and “has established substantial regulatory oversight of its banks to deter and investigate alleged money laundering and other financial crimes.” Bartlett Reply Aff., Ex. D.

Although, as Plaintiffs argue, “the complaint implicates the fraudulent use of New York's banking system, an issue of great importance to the State,” *Al Rushaid*, 28 NY3d at 331, this interest “pales in comparison with that of Switzerland. Switzerland possesses a strong interest in regulating the conduct of banks within its borders.” *LaSala v UBS, AG*, 510 F Supp 2d 213, 229 (SDNY 2007); see also *Bluewaters Communications*

Holdings, LLC v Ecclestone, 122 AD3d 426, 428 (1st Dept 2014); *Garmendia v O'Neill*, 46 AD3d 361, 362 (1st Dept 2007); *Shin-Etsu Chem. Co., Ltd.*, 9 AD3d at 178.

Finally, based on the above considerations – and the fact that French is the Individual Defendants’ native and primary language – Defendants would face significant hardship if forced to litigate here, *see, e.g., Garmendia*, 46 AD3d at 362, and the retention of this matter would “result[] in the imposition of an inordinate burden upon New York’s courts.” *Tilleke & Gibbins Intern., Ltd. v Baker & McKenzie*, 302 AD2d 328, 329 (1st Dept 2003) (*citing Pahlavi*, 62 NY2d at 479). “[O]ur courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York.” *Shin-Etsu Chem. Co., Ltd.*, 9 AD3d at 176 (*quoting Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 (1972)).

Considering all the foregoing, Defendants have met their burden of proving that this action should be dismissed for forum non conveniens. I have reviewed Plaintiffs’ remaining arguments and find them to be without merit.

In accordance with the foregoing, it is

ORDERED that the motion of Defendants to dismiss this action because New York is an inconvenient forum is granted on condition that Defendants stipulate in writing to waive the defense of the statute of limitations if this action is commenced in Switzerland; and it is further

ORDERED that, within 60 days from service of a copy of this order with notice of entry, Defendants shall file proof of compliance with the above condition with the Clerk

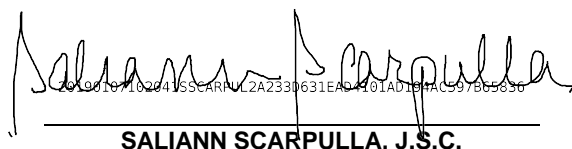
of the Part and with the Clerk of the Court (60 Centre Street, Room 141B), together with a copy of this order with notice of entry and proof of service of the foregoing on counsel for Plaintiffs; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the Part 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, upon the timely filing of the stipulation, the Clerk of the Court shall enter judgment dismissing the action; and it is further

ORDERED that in the event of non-compliance, counsel are directed to appear for a status conference in Room 208, 60 Centre Street, New York, New York, on April 24, 2019, at 2:15 PM.

This constitute the decision and order of the Court.



SALIANN SCARPULLA, J.S.C.

DATE

| | | | | |
|-----------------------|-------------------------------------|----------------------------|---------------------------------|--|
| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | NON-FINAL DISPOSITION |
| | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> DENIED | <input type="checkbox"/> GRANTED IN PART |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | <input type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> | REFERENCE |