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

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NATIONAL BANK TRUST and PJSC BANK OTKRITIE FINANCIAL CORPORATION,	:	Index No. 156903/2020 Hon. Joel M. Cohen
Plaintiffs,	:	
	:	Motion Seq. No. 1
v.	:	
VADIM BELYAEV a/k/a, VADIM WOLFSON,	:	
Defendant.	:	

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PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs National Bank TRUST ("NBT") and PJSC Bank Otkritie Financial Corporation ("Bank Otkritie" and, together with NBT, "Plaintiffs") filed this action to recover hundreds of millions of dollars in financial losses incurred as a result of a scheme masterminded by Defendant Vadim Belyaev.

As the founder and largest shareholder of Otkritie Holding JSC ("Otkritie Holding"), Belyaev controlled a vast network of commercial banks, financial services companies and other entities, including Plaintiffs NBT and Bank Otkritie, which were, at one time, two of the largest financial institutions in Russia. During his tenure at Otkritie Holding, Belyaev used his control over those entities to siphon off assets for his personal use and to engage in other misconduct that caused NBT and Bank Otkritie to suffer enormous financial losses. Contrary to Belyaev's assertions, this action does not represent a "desperate campaign" to blame "anyone" for the banks' liquidity issues, "regardless of facts." Instead, the Amended Complaint contains 62 pages of detailed allegations demonstrating that Belyaev was the sole mastermind of the scheme.

After Belyaev's misconduct began to come to light, he fled Russia and eventually came to New York. He is currently facing liability to the Central Bank of Russia (acting on behalf of Bank Otkritie) for a separate cause of action in the Russian commercial court. As Belyaev's motion to dismiss demonstrates, Belyaev claims that the Central Bank somehow "manufactured" a multibillion dollar liquidity crisis as a pretext to steal Bank Otkritie from him, asserts that the Russian state is improperly trying to "pin" the liquidity issues on him, and suggests that a recent ruling against him in Russia was not rendered by an impartial tribunal. Belyaev is also facing potential liability to Plaintiffs in the UK and has claimed in that action that he cannot be sued there because he lives in the United States.

Now, Belyaev has been sued in the United States in a courthouse ten minutes from his home and claims that he cannot be sued here either because it would be inconvenient for him. Ironically, the core of Belyaev's argument is that Russia—the jurisdiction from which he fled—is a better forum. Of course, Belyaev is not making that argument because he actually has faith in the Russian court system or because it is more convenient for him to litigate in a forum that is more than 4,000 miles away from the one in his own backyard. Instead, Belyaev's motion is part of a legal strategy designed to evade liability ***anywhere***, *i.e.,* he claims he (1) cannot be sued in England because he lives in New York; (2) cannot be sued in New York because Russia is the more convenient jurisdiction; and (3) to be sure, will argue that any judgment issued by a Russian court should not be enforced because it was rendered by the same government that "manufactured" the liquidity crisis and "pin[ned]" it on him. That type of gamesmanship should not be countenanced by this Court.

Contrary to Belyaev's arguments, the *forum non conveniens* factors support the conclusion that Belyaev's current place of residence—New York—is an appropriate and convenient forum for this dispute to be heard. The primary witness and mastermind of the alleged scheme—Belyaev—resides here, many other witnesses are available to testify here, Belyaev's own counsel made statements to the Russian press expressing confidence that Belyaev could defend the case here, and Belyaev's court filings and online posts suggest that he is perfectly capable of communicating in English. This Court has held that a defendant bears a "heavy burden" on a *forum non conveniens* motion, and that burden has not been met here.

Belyaev's claim-splitting argument fares no better. Contrary to Belyaev's assertions, no part of this action "duplicates" Bank Otkritie's proceedings in Russia (the "Russian Insolvency Proceedings"). NBT is not a party to those proceedings, and that fact alone is fatal to Belyaev's

claim-splitting argument. Further, the claims in the New York and Russian proceedings are asserted by different entities under different statutory provisions, arise out of different factual allegations, and seek different damages.

Accordingly, Belyaev's motion should be denied.

STATEMENT OF THE CASE

I. The Parties

Belyaev is a Russian national of substantial wealth who currently resides in New York.[1] *See* Affidavit of Vadim Wolfson, dated November 6, 2020, (Dkt. 30) ("Wolfson Aff.") ¶¶ 2, 3; Affirmation of Gretchen King, dated January 12, 2021 ("King Aff.") Aff. ¶ 7. Belyaev is the founder of Otkritie Holding, which, at one time, was the parent company of several commercial banks, including Plaintiffs, as well as a number of financial services companies and other entities.[2] *See* Amended Complaint dated November 27, 2020 (Dkt. 32) ("AC") ¶ 2. Within the time period relevant to these claims, Belyaev served as the President of Otkritie Holding and the Chairman of its Board of Directors. AC ¶ 15. During that time, Belyaev also was the single largest shareholder of Otkritie Holding. *Id.*

Plaintiff NBT is a Russian banking institution which, at one time, was one of the largest commercial banks in Russia. AC ¶ 9. In 2014, after experiencing financial difficulties, NBT was acquired by Otkritie Holding as part of a financial rehabilitation program sponsored by the Russian government. AC ¶ 17. In its current form, NBT operates as a bank charged by the Central Bank of Russia (which is a 98% shareholder of NBT) with pursuing recovery of non-performing loans

[1] According to Belyaev's profile on Forbes, his estimated net worth is around US $400 million. *See* Affirmation of Jonathan D. Cogan, dated January 13, 2021 ("Cogan Aff.") Ex. F. (https://www.forbes.ru/profile/vadim-belyaev).

[2] As used herein, the term "Otkritie Group" refers to Otkritie Holding and all of its direct and indirect subsidiaries, including NBT and Bank Otkritie.

and other troubled assets held by NBT, as well as those of certain other Russian banks. AC ¶¶ 9, 245.

Plaintiff Bank Otkritie is a Russian banking institution, which, like NBT, became subject to state-sponsored financial rehabilitation after suffering a financial crisis in 2017. AC ¶¶ 232-35. As part of its efforts to rehabilitate Bank Otkritie, the Central Bank of Russia presently holds the controlling ownership stake in Bank Otkritie. *Id.* ¶ 232.

II. Nature of the Claims Against Belyaev

Plaintiffs filed this action to recover hundreds of millions of dollars in financial losses incurred as a result of a large-scale fraud and misconduct masterminded by Belyaev. As Otkritie Holding's largest shareholder, Belyaev exercised close control over Otkritie Holding and its subsidiaries, and repeatedly used his control to siphon off assets for personal use and to perpetrate misconduct that caused losses to Plaintiffs. AC ¶¶ 27-246.[3]

During his tenure as the head of the Otkritie entities, Belyaev masterminded several types of schemes, each with a specific *modus operandi*, which he used repeatedly to divert funds out of various Otkritie institutions. AC ¶ 4. These funds frequently ended up in the bank accounts of shell entities solely owned by Belyaev or other entities owned or controlled by Belyaev and his associates. AC ¶¶ 34-69, 72-80. To execute these schemes, multiple separate financial institutions

[3] Belyaev mischaracterizes Plaintiffs' allegations in the English Proceedings (as defined below) to claim that in that action, and contrary to the allegations here, Plaintiffs alleged Belyaev was a minority shareholder of Otkritie Holding. In reality, as Plaintiffs' English submission plainly shows, Plaintiffs consistently have argued in those proceedings that Belyaev "was the single largest shareholder of [Otkritie Holding]" and, as such, was the "*de facto* controller of [Otkritie Holding] and Bank Otkritie." Affirmation of Duane L. Loft, Ex. 2 (Dkt. 19) ("Loft Aff., Ex. 2") at ¶ 7A.

and other entities owned or controlled by Belyaev had to work in seamless coordination, frequently executing a choreographed series of dozens of transactions over only a few days. AC ¶ 29.

III. Belyaev's Presence In, And Connections To, New York

After an investigation commenced into Bank Otkritie's financial position and Belyaev's misconduct began to come to light, Belyaev left Russia and moved between locations before ultimately relocating to New York with his wife. King Aff. ¶ 7; Cogan Aff. Ex. B. Indeed, according to Russian press reports, following Bank Otkritie's placement into temporary administration, Belyaev joined several other former executives of the Otkritie Group in fleeing Russia with no intention of coming back. *See* Cogan Aff. Ex. A; Ex. B (noting that as of December 2017, Belyaev was "hiding in London and does not intend to return to Russia").

Contrary to Belyaev's assertions, his decision to come to New York did not occur by "happenstance." Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss (Dkt. 31) ("Def.'s Mem.") at 11. Indeed, prior to his arrival to New York, Belyaev obtained a U.S. Social Security number. King Aff. ¶ 12. Moreover, since September 2014, Belyaev's ex-wife and his three children have lived in a multi-million dollar house in Westchester County, New York that is owned by Belyaev. King Aff. ¶ 10; Wolfson Aff. ¶ 4; Affirmation of Vadim Belyaev, *Yurov v. Otkritie Holding JSC.*, Index. No. 656788/2016 (N.Y. Sup. Ct. Sept. 22, 2017) ("Belyaev Aff.") ¶ 13; Cogan Aff. Ex. C ¶ 13 (discussing beneficial ownership of the Westchester property through a trust).

Presently, Belyaev and his wife reside in a multistory townhouse located at 74 Wooster Street in Manhattan, which Belyaev rents for US $80,000 a month. King Aff. ¶ 7. Between April 2018 and March 2020, Belyaev appears to have resided in a penthouse apartment of a high-rise building located at 50 West Street in Manhattan. *Id.* ¶ 8. That apartment currently is listed for rent

at $25,000 a month. *Id.* ¶ 8.[4] Since arriving to New York, Belyaev and his wife both obtained local wireless phone numbers. *Id.* ¶ 13.

At least since March 2020, Belyaev joined a number of social media and professional networking websites, such as Twitter and LinkedIn, on which Belyaev identified his primary location as New York. King Aff. ¶ 16, Ex. A. Additionally, Belyaev has maintained an active website, www.vadim-belyaev.com, on which he regularly posts English-language content, much of which is aimed specifically at a U.S.-based audience. *Id.* ¶ 17, Ex. B.

IV. Other Proceedings

A. Russian Insolvency Proceedings

In June 2019, the Central Bank of Russia commenced insolvency proceedings on behalf of Bank Otkritie before the Moscow Arbitrazh (Commercial) Court. Affirmation of Olesya Petrol, dated January 13, 2021 ("Petrol Aff.") ¶ 28. NBT is not a party to the Russian Insolvency Proceedings. Petrol Aff. ¶ 30. Moreover, the damages being sought in the Russian Insolvency Proceedings are limited to expenses that the Central Bank of Russia incurred as a result of having to finance Bank Otkritie's rehabilitation and prevent its liquidation. Petrol Aff. ¶ 29; Affidavit of Stanislav Tarasov, dated November 6, 2020 (Dkt. 25) ("Tarasov Aff.") ¶ 15. (admitting that the sole damages being alleged in the Russian Insolvency Proceedings are the "expenses incurred by the CBR in connection with [rehabilitation of Bank Otkritie]").

B. English Proceedings

In 2019, Plaintiffs filed a lawsuit against certain former shareholders of Otkritie Group in the High Court of Justice, Business and Property Courts of England and Wales, Commercial

[4] Belyaev also previously owned a luxury property in Aspen, Colorado, which he recently sold for $12,500,000. King. Aff. ¶ 11.

Courts (the "English Proceedings"). In July 2020, Plaintiffs added Belyaev as a defendant in those proceedings. That case centers on damages that Plaintiffs suffered from certain transactions involving a group of Russian companies known as the O1 Group. Loft. Aff. Ex. 2. None of those transactions are at issue in these proceedings.

Since being joined in the English Proceedings, Belyaev moved to have that case against him dismissed on personal jurisdictional grounds. Cogan Aff. Ex. D. Notably, in support of his claim that the English court should dismiss the case against him, Belyaev represented to that court that he currently "lives in the United States." *Id.* at ¶ 34.

C. Prior New York Proceedings

In December 2016, a former shareholder of NBT, Ilya Yurov, filed a civil suit in New York State Court, New York County, against Belyaev, Otkritie Holding and another defendant. *See Yurov v. Otkritie Holding JSC, et al.*, Index. No. 656788/2016 (N.Y. Sup. Ct.). In February 2017, Belyaev and other defendants moved to dismiss that case on multiple grounds, including *forum non conveniens*. In that litigation, Belyaev argued that because, at that time, he did not reside in the United States, it "would be a substantial hardship to travel back and forth to the United States to attend court proceedings and otherwise to defend this lawsuit." Belyaev Aff. ¶ 13.

ARGUMENT

I. Belyaev's Home Jurisdiction of New York is the Proper Forum for this Dispute

When a defendant challenges plaintiffs' choice of forum, he "must bear the *heavy* burden of demonstrating that [the] plaintiff's selection of New York was not in the interest of substantial justice." *J.G. Jewlry Pte. Ltd. v. TJC Jewelry, Inc.*, No. 651469/2018, 2020 WL 3578454, at *9 (N.Y. Sup. Ct. July 01, 2020) (Cohen, J.) (emphasis added) (internal citations and quotation marks omitted). It is not enough that some factors relevant to the *forum non conveniens* analysis weigh

in the defendant's favor. The rule is that unless, on balance, the factors weigh "*strongly*" in the defendant's favor, "plaintiff's choice of forum should *rarely* be disturbed." *J.G. Jewlry Pte. Ltd.*, 2020 WL 3578454 at *9 (emphases added) (citing *Waterways Ltd. v. Barclays Bank PLC*, 174 A.D.2d 324, 327 (1st Dep't 1991)). Moreover, contrary to Belyaev's arguments (*see* Def.'s Mem. at 11) Plaintiffs' status as foreign parties does not lessen Belyaev's heavy burden of demonstrating why he is entitled to *forum non conveniens* dismissal. The First Department has held expressly and repeatedly that "a defendant's 'heavy burden' remains despite the plaintiff's status as a nonresident." *Am. BankNote Corp. v. Daniele*, 45 A.D.3d 338, 340 (1st Dep't 2007) (citations omitted); *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dep't 2013) ("plaintiff's choice of forum should rarely be disturbed, *even where the plaintiff is not a resident of New York*.") (emphasis added) (citing *OrthoTec, LLC v. Healthpoint Capital, LLC*, 84 A.D.3d 702, 702–03 (1st Dep't 2011)). As explained below, a balancing of the relevant factors demonstrates that Belyaev has not met his heavy burden of showing that this action should be dismissed on *forum non conveniens* grounds.

A. Belyaev's Status as a New York Resident Weighs Strongly in Favor of a New York Forum

In arguing for dismissal, Belyaev finds himself in what courts describe as the "unusual" position of arguing that the forum in which he resides is inconvenient for him. *E.g. Manela v. Garantia Banking Ltd.*, 940 F. Supp. 584, 592 (S.D.N.Y. 1996). New York courts generally recognize that a defendant who resides in New York, "cannot reasonably argue that he is inconvenienced by having the case heard in New York." *Wittich v. Wittich*, 210 A.D.2d 138, 139 (1st Dep't 1994). Accordingly, the First Department has held repeatedly that a defendant's New York residency "weighs against *forum non conveniens* dismissal." *OrthoTec, LLC*, 84 A.D.3d at 703; *Anagnostou v. Stifel*, 204 A.D.2d 61, 62 (1st Dep't 1994). Similarly, this Court has recognized

that defendants who knowingly establish a presence in New York cannot be heard to claim that litigating here would be difficult for them. *High Street Capital Partners, LLC v. ICC Holdings, LLC*, No. 652592/2018, 2019 WL 2106093, at *6 (N.Y. Sup. Ct. May 14, 2019) (Cohen, J.) (holding that "litigating this case in New York imposes no undue hardship on Defendants, who chose to direct their business efforts towards this state").

Here, there is no serious dispute that Belyeav is a New York resident and, otherwise, has substantial connections to New York. Although in his papers Belyaev attempts to downplay his presence in New York as "happenstance" (Def.'s Mem. at 11), the record shows that Belyaev's move to New York is more permanent than he cares to admit. Indeed, as explained above, not only did Belyaev move to New York with his current wife, but his ex-wife and three children have lived in New York since at least 2014. Upon moving to New York, Belyaev and his wife both obtained local wireless numbers, and Belyaev previously had already obtained a Social Security Number for himself. *See supra* at 5.

As for Belyaev's representation that, apart from his Manhattan rental, he "ha[s] no other residential property in the United States," that appears to be contradicted by the affirmation that Belyaev previously submitted in a case before Justice Ramos, to which Belyaev refers in his papers. Def.'s Mem. at 17-18. In that affirmation, Belyaev stated that his "ex-wife and children live in a house in Westchester County [New York], and through a trust, *I am the beneficial owner of the house*." Belyaev Aff. ¶ 13 (emphasis added). Accordingly, there is evidence that Belyaev owns residential property and possibly other assets in New York.[5]

[5] That Belyaev intends to remain in the U.S. is also evidenced by his active online presence. As noted above, Belyaev regularly posts articles and other content in English that is aimed at an audience based in the U.S. *See* King Aff. ¶ 17, Ex. B.

As further evidence that New York is Belyaev's primary residence, Belyaev represented to the court in the English Proceedings that he currently "lives in the United States." Cogan Aff. Ex. D ¶ 34. Belyaev advanced that representation as a basis for challenging the English court's personal jurisdiction over him.

B. Location of Witnesses and Evidence Does Not Favor Dismissal in This Case

Belyaev's claim that litigating in New York would cause him inconvenience and hardship rests primarily on his speculation that he "will *likely* be unable to gather critical documentary evidence or witness testimony." Def.'s Mem at 12 (emphasis added). That argument fails for at least five separate reasons.

First, in complaining about alleged witness unavailability, Belyaev conveniently ignores one of the primary reasons that Plaintiffs brought this suit in New York: the principal witness in this case will be Belyaev himself. That Belyaev is present here and is subject to this Court's jurisdiction thus strongly weighs in favor of keeping this case in New York. *See*, *e.g.*, *Andros Compania Maritima S.A. v. Intertanker Ltd.*, 714 F. Supp. 669, 677 (S.D.N.Y. 1989) (finding it "apparent that New York [was] a convenient forum for the witnesses" where the principal witness was the individual defendant who resided in New York).[6]

Second, contrary to Belyaev's conclusory claims of witness unavailability, numerous witnesses with relevant information who are located in Russia are, in fact, available to testify in

[6] Belyaev's presence in New York also demonstrates why this case is different from the earlier and now-dismissed suit that Ilya Yurov had brought against Belyaev in 2017. *See supra* at 7; Def.'s Mem. at 17-18. At the time of that suit, Belyaev did not live in the United States. Accordingly, in his affirmation, Belyaev argued that because he did not live in the United States, it would have been "a substantial hardship" for him "to travel back and forth to the United States to attend court proceedings . . . ." *See* Belyaev Aff. ¶ 13. Curiously, now that Belyaev lives in New York, he argues it is a "great hardship" to litigate here and that somehow it would be easier for him to litigate thousands of miles away in Russia. Def.'s Mem. at 11.

this case. As set forth in the Affirmation of Andrey Tseshinskiy, at least nine employees at NBT and Bank Otkritie with personal knowledge of information relevant to this case have already confirmed their ability and willingness to appear as witnesses in this litigation. Affirmation of Andrey Tseshinskiy, dated January 13, 2021 ("Tseshinskiy Aff.") ¶ 7. Plaintiffs will make those witnesses available at Plaintiffs' expense. *Id.* ¶ 7. Additionally, proof of wrongdoing in this case arises, in large part, through a forensic analysis of the flow of funds, and Plaintiffs will make the evidence of this flow of funds along with a forensic expert available to testify on that subject. Plaintiffs' ability to produce witnesses in this case at no cost to Belyaev weighs against *forum non conveniens* dismissal. *See*, *e.g.*, *Pac. All. Asia Opportunity Fund L.P. v. Kwok Ho Wan*, 160 A.D.3d 452, 453 (1st Dep't 2018) (denying *forum non conveniens* dismissal where plaintiff demonstrated that its employees with relevant information were willing to travel to New York at no expense to defendant).

Third, on this motion, Belyaev bears the burden of establishing any alleged difficulty in gathering evidence. Yet, Belyaev fails to identify any evidence or witnesses supposedly critical to his defense, much less demonstrate why they would be unavailable in this forum. New York courts routinely require movants seeking *forum non conveniens* relief to identify the potential witnesses alleged to be unavailable and to substantiate those claims of unavailability. *E.g.*, *Humitech Dev. Corp. v. Comu*, 16 Misc. 3d 1109(A), 2007 N.Y. Slip Op. 51354(U), *10 (Sup. Ct., N.Y. County 2007) (holding that defendant's "conclusory assertions that certain unidentified witnesses and documents are located [outside New York] [do] not suffice to establish that New York is an inconvenient forum for this action"); *Krentsel v. Loews Miami Beach Hotel Operating Co., Inc.*, No. 103823/08, 2009 WL 2128427, at *2 (Sup. Ct. N.Y. Cty. June 25, 2009) ("Inconvenience of the defense's witnesses does not automatically prevent an action in the New

York courts, *especially when the defense has provided no evidence that its witnesses would be unwilling or unable to testify here*.") (emphasis added).

Where, as here, defendant only "alleges broadly that his [witnesses] and relevant documents are located [abroad]" and otherwise fails to identify "any specific witnesses or documents that will be necessary," courts find that such failure weighs against *forum non conveniens* dismissal. *Kwok Ho Wan*, 160 A.D.3d at 453; *Zainal v. Am.-Europe-Asia Int'l Trade & Mgmt. Consultants*, 248 A.D.2d 279, 279 (1st Dep't 1998) (holding that "convenience of witnesses" factor did not warrant dismissal where "defendants failed to name any witnesses or demonstrate how their testimony would be material"); *Anagnostou*, 204 A.D.2d at 62 (1st Dep't 1994) (location of witnesses in Greece "[d]id not automatically override plaintiffs' choice of forum, particularly where defendants have failed to come forward with the names or potential testimony of such witnesses or any basis, other than sheer speculation, to believe that any such testimony will be unobtainable in New York"); *O'Connor v. Bonanza Int'l, Inc.*, 129 A.D.2d 569, 570 (2d Dep't 1987) (failure to identify foreign nonparty witnesses who would be inconvenienced by a trial in New York weighed against dismissal).

Fourth, even if there are other witnesses in Russia who cannot be compelled to testify and will not appear voluntarily, Belyaev offers no evidence that he could compel those witnesses to testify in Russia, which he claims is the more appropriate forum. In fact, as explained by Plaintiffs' expert on Russian law, Russian procedure lacks effective mechanisms by which a nonparty witness could be compelled to testify in a civil proceeding in Russia. Petrol Aff. ¶¶ 45–59. Thus, contrary to Belyaev's arguments, moving this case to Russia would not improve his ability to compel testimony from unwilling witnesses.

Fifth, Belyaev's claims of hardship from having to bring willing witnesses to New York are disingenuous and should be rejected. Def.'s Mem. at 12, n. 3. As someone who (1) is estimated by Forbes to be worth hundreds of millions of dollars, (2) rents a SoHo townhouse for US $80,000 per month; and (3) recently sold a house in Aspen for $12.5 million, Belyaev plainly has access to significant financial resources. *See supra* at 6. Thus, Belyaev cannot seriously claim that he would suffer any meaningful hardship from having to pay the costs of arranging for witness testimony here, especially if some or all of such testimony could be provided by remote means, such as videoconference. *Mionis v. Bank Julius Baer & Co.*, 9 A.D.3d 280, 282 (1st Dep't 2004) (holding that "any hardship in bringing witnesses or documents to New York [is] minimal," where both parties have access to "ample resources"); *Intertec Contracting A/S v. Turner Steiner Int'l, S.A.*, 6 A.D.3d 1, 6 (1st Dep't 2004) (same); *Bacon v. Nygard*, 160 A.D.3d 565, 566 (1st Dep't 2018) (where defendant has "substantial presence in New York, as well as 'ample resources,' it would not be a hardship for [defendant] to litigate here"); *K.T. v. Dash*, 37 A.D.3d 107, 110 (1st Dep't 2006) (reversing dismissal where it "appear[ed] likely that defendant ha[d] the financial resources necessary to locate any voluntary witnesses and arrange to transport them to New York from Brazil"); *see also* *Eclaire Advisor Ltd. v. Daewoo Eng'g & Constr. Co.*, 375 F. Supp. 2d 257, 265 (S.D.N.Y. 2005) ("In this day and age of rapid transportation and instant communications, the convenience of immediate physical proximity to documents, testimony, and other proof has become of less consequence to a *forum non conveniens* analysis, *especially when, as here, two large and sophisticated parties are involved*.") (emphasis added).

Moreover, statements concerning these proceedings by Belyaev's counsel in the Russian press further evidence that Belyaev's concerns about access to evidence are not genuine. In fact, one of Russia's main news services recently quoted Belyaev's counsel in this case stating that, in

the event this motion is denied, Belyaev "will prove that the claims about the transactions are baseless." Cogan Aff. Ex. E at 4. Such statements expressing Belyaev's confidence in his ability to defend against the claims in this case on the merits plainly contradict his claims that litigating in New York would deprive him of evidence critical to his defense.

C. Need to Apply Foreign Law and Potential Translation Costs Do Not Warrant Dismissal Here

Belyaev argues that litigating in New York will be burdensome because foreign law applies and because documents will have to be translated into English and witnesses might have to testify through an interpreter. Def.'s Mem. at 11, 16. However, "[the] First Department, has routinely rejected the notion that the necessity of applying foreign law should result in a *forum non conveniens* dismissal, and has repeatedly held that New York Courts are capable of interpreting and applying the law of other states, and even foreign countries." *Aon Risk Servs. v. Cusack*, 34 Misc. 3d 1234(A), 2012 N.Y. Slip Op. 50366(U), *7 (Sup. Ct., N.Y. County 2012) (citations omitted); *Kwok Ho Wan*, 160 A.D.3d at 453 ("[New York] courts are frequently called upon to apply the laws of foreign jurisdictions") (citation omitted).

Likewise, New York courts typically find that the need to translate into English documents or witness testimony is insufficient to tip the balance in favor of dismissal, especially where, as here, the defendant is a New York resident who failed to present other compelling reasons for disturbing the chosen forum. *See Yoshida Printing Co. v. Aiba*, 213 A.D.2d 275, 275 (1st Dep't 1995) (where defendant resided in New York "[n]either the fact that plaintiff is a Japanese corporation, whose witnesses may speak Japanese, nor the potential necessity of applying Japanese law, render[ed] New York an inconvenient forum" and that "[a]ny need to translate documents into English does not warrant a contrary result"); *Mionis*, 9 A.D.3d at 282 ("[T]hat some documentary and testimonial evidence will have to be translated from Greek into English does not

render it more difficult for defendants to proceed in New York, and the courts of this State are fully capable of applying Greek law…"). Moreover, it is evident that Belyaev himself is sufficiently proficient in English to participate in these proceedings without assistance from an interpreter. Not only has Belyaev filed multiple affidavits in English in proceedings before this Court and the English court, but he also regularly posts English-language articles and other content online. *See supra* at 6.

D. The Situs of the Relevant Transactions Does Not Cause Belyaev Any Hardship to Justify Dismissal Here

Belyaev argues that he will suffer "great hardship if [he] must defend himself in a forum with no connection to any of the relevant allegations." Def.'s Mem. at 11. However, apart from complaining about the location of witnesses, application of Russian law and translation of evidence—none of which justifies dismissal here for reasons stated above—Belyaev fails to explain what other hardships he would suffer because the underlying transactions occurred in Russia.

While the situs of the relevant transactions is a factor in the *forum non conveniens* analysis, Belyaev overstates the weight of that factor in this case. Indeed, in cases like this one, the First Department has instructed trial courts to refrain from "plac[ing] too much emphasis on the fact that the majority of the circumstances surrounding the alleged torts occurred [abroad]." *Mionis*, 9 A.D.3d 280 at 282. Where, as here, the defendant resides in New York and possesses substantial resources to litigate the case, New York courts repeatedly defer to plaintiffs' choice of forum, notwithstanding that the transactions at issue occurred outside New York. *See*, *e.g.*, *Amlon Metals, Inc. v. Liu*, 292 A.D.2d 163, 164 (1st Dep't 2002) (affirming denial of *forum non conveniens* motion even though "defendant's alleged conversion and other torts were committed in China");

Mionis, 9 A.D.3d 280 at 282 (reversing *forum non conveniens* dismissal where underlying transactions took place in Greece).

In arguing that the situs of events is dispositive here, Belyaev relies on two decisions in which this Court dismissed on *forum non conveniens* grounds various fraud claims arising from transactions that took place abroad. *See* Def.'s Mem. at 11, 13-14 (citing *BSR Fund, S.A. v. Jagannath*, No. 650832/2019, 2020 WL 1274236 (Sup. Ct. Mar. 17, 2020) and *Filho v. Borges*, No. 651935/2018, 2019 WL 1877212 (Sup. Ct. Apr. 26, 2019)). However, those cases are distinguishable. First, in each of those cases, this Court noted, as the first reason for dismissal, the fact that the "alleged mastermind" behind the fraudulent transactions at issue resided *outside* New York at the time of the action. *BSR Fund*, 2020 WL 1274236, at *3 ("*First*, many of the parties to this action, *including the alleged masterminds* behind the [fraud] as well as its alleged victims, are located outside New York.") (emphasis added); *Filho*, 2019 WL 1877212 at *1, *3 (noting that "the alleged mastermind behind the scheme, is a Brazilian citizen and resident"). In stark contrast to those cases, here, the central figure behind the alleged fraud and misconduct, *i.e.* Belyaev, is at home in New York. Second, plaintiffs in *Filho* and *BSR Fund* did not provide any evidence that the various witnesses located abroad would be made available. By contrast, here, there is evidence that witnesses located in Russia will be made available in these proceedings. *See supra* at 10-11; *Grizzle v. Hertz Corp.*, 305 A.D.2d 311, 312 (1st Dep't 2003) (finding *forum non conveniens* dismissal was improper where Jamaican residents confirmed willingness to appear in New York for litigation based on events that occurred solely in Jamaica).

Thus, in balancing the relevant factors, the fact that many of the substantive events may have taken place in Russia should not outweigh the fact that the sole defendant and mastermind in this case lives in New York.

E. Belyaev's Claim That This Case Should be Heard in Russia is a Tactical Ploy That Is Not Based on Any Genuine Concern with Convenience

Belyaev's claim that this case should be moved to Russia is not based on any real concerns about convenience but, instead, is part of a strategy to evade liability and to frustrate Plaintiffs' ability to collect any eventual judgment.

As demonstrated above, when Plaintiffs sued Belyaev in the English courts, he moved to dismiss that case on the grounds that he lives in the United States. *See supra* at 7. Now, when Plaintiffs have come to the United States and sued Belyaev in his home forum of New York, he argues that New York is inconvenient for him and that he should be sued in Russia. While Belyaev tactically argues that Russia provides an adequate alternative forum, he simultaneously claims that he is being treated unfairly in Russia.

Indeed, in his motion, Belyaev argues at the outset that he is a victim of the Russian government's efforts to nationalize Bank Otkritie and NBT under the pretext of a financial crisis at those banks. Def.'s Mem. at 1. Elsewhere in his papers, Belyaev claims that the Central Bank of Russia "manufactured" Plaintiffs' financial troubles so that it could nationalize them, and that the Russian state is now trying to "pin [Plaintiffs'] alleged liquidity issues on [Belyaev]." *Id.* at 1, 3. Belyaev then goes on to suggest that a recent ruling against him in the Russian Insolvency Proceedings was not rendered by an impartial tribunal. Specifically, Belyaev's Russian counsel points out in his affidavit that at the conclusion of a two-day hearing in the Russian Insolvency Proceedings, "the judge unexpectedly and abruptly issued an oral judgment, announcing that the defendants [including Belyaev] were jointly and severally liable for the full amount of the claim." Tarasov Aff. ¶ 27. Belyaev's Russian counsel then further notes that "[t]he [Russian] court did not provide any reasons for its decision, which is unusual." *Id.*

Belyaev's argument that this litigation is a product of the Russian government's improper nationalization efforts raises substantial concerns that, if this action were to be moved to and litigated in Russia, then Belyaev would raise that same argument to challenge recognition and enforcement of any Russian judgment against him in jurisdictions where he has assets, such as the United States. Indeed, the likelihood that Plaintiffs may find themselves litigating against Belyaev to enforce a Russian judgment here in New York—where Belyaev appears to have assets (*see supra* at 5)—is heightened by the fact that Belyaev already is attempting to impugn before this Court the legitimacy of the judgment in the Russian Insolvency Proceedings.

Courts recognize that there are cases in which defendants "move for dismissal under the doctrine of *forum non conveniens* not because of genuine concern with convenience" but for improper tactical reasons. *Flame-Spray Indus. Inc. v. GTV Auto. GmbH*, 266 F.Supp.3d 608, 620 (E.D.N.Y. 2017) (citing *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 75 (2d Cir. 2001)). This is such a case. Here, for reasons explained above, dismissing this case in favor of Russian proceedings would not promote justice and convenience. Instead, it would only delay the resolution of Plaintiffs' claims and arm Belyaev with the ability to frustrate Plaintiffs' future judgment enforcement efforts by attacking the validity of any judgment that Plaintiffs might obtain against Belyaev in Russia.

II. The Doctrine of Claim-Splitting is Inapplicable Here

This case does not trigger the claim-splitting doctrine because, contrary to Belayev's claims (Def.'s Mem. at 18-20), the Russian Insolvency Proceedings are not duplicative of this action. Plaintiffs' claims here do not overlap with those in the Russian proceedings and NBT is not even a party to those proceedings. Moreover, the damages sought and the entities seeking relief are completely different. Thus, the rule prohibiting claim-splitting has no bearing on this action.

Melcher v. Greenberg Traurig LLP, 135 A.D.3d 547, 553 (1st Dep't 2016) (plaintiff is not claim splitting when the remedy sought in the first action "is entirely distinct" from the remedy sought in the second action); *Caracaus v. Conifer Cent. Square Assocs.*, 158 A.D.3d 63, 69 (4th Dep't 2017) ("A party must have asserted a claim in one action before he or she can be charged with splitting that claim in a subsequent action.")

A. NBT Is Not a Party to the Russian Insolvency Proceedings, So Claim-Splitting Does Not Apply

NBT is not a party to the Russian Insolvency Proceedings. Petrol Aff. ¶ 30. While Belyaev acknowledges that the Central Bank of Russia commenced those proceedings on behalf of Bank Otkritie, he conveniently ignores the critical fact that NBT is not involved in those proceedings at all. That undisputed fact alone is fatal to Belyaev's claim-splitting argument. *In re E. 51st St. Crane Collapse Litig.*, 103 A.D.3d 401, 403 (1st Dep't 2013) ("since East 51st Street never filed any claims against Interstate in the related federal action brought by Reliance's excess liability carrier, and filed all its claims against Interstate in this state action, it did not engage in 'claims splitting'"); *see also Rojas v. Romanoff*, 186 A.D.3d 103, 109 (1st Dep't 2020) ("Claim preclusion cannot apply here, because plaintiff and defendants are litigating a claim against each other *for the first time*.") (emphasis added).

B. The Central Bank of Russia's Claim for Bailout Expenses Does Not Duplicate Bank Otkritie's Claims for Misappropriation

The doctrine of claim-splitting also does not apply to Bank Otkritie because the claims and damages in the two lawsuits at issue are completely different. *Melcher*, 135 A.D.3d at 552–53 ("A party invoking the narrow doctrine against splitting a cause of action must show that the challenged claim raised in the second action is based upon the same liability in the prior action").

As an initial matter, even Belyaev appears to admit that three of the four New York claims do not overlap with the Russian Insolvency Proceedings. *See* Def.'s Mem. at 9 (arguing that there is "at least one" overlapping claim); Affirmation of Dr. Ilia Rachkov, dated November 6, 2020 (Dkt. 23) ¶ 42 (noting that three of Plaintiffs' four claims "do not facially require Plaintiffs to prove" the same elements as the claims in the Russian Insolvency Proceedings). Accordingly, even if the Court were to adopt Belyaev's argument wholesale (which it should not), it would at most require dismissal of only *one* of the claims asserted by *one* of the Plaintiffs.

Putting that aside, however, Belyaev's argument that there is even one duplicative claim is incorrect. In this case, Bank Otkritie and NBT have brought claims under Article 189.23(5)(1) of the Russian Bankruptcy Law ("Subsection 1"), which provides that a distressed financial institution that is rescued from insolvency by the Central Bank of Russia may recover the losses that it suffered due to specific acts of misappropriation, misconduct, and fraud. Petrol Aff. ¶ 23. In the Russian Insolvency Proceedings, by contrast, the Central Bank of Russia has asserted a claim under Article 189.23(5)(2) ("Subsection 2"), which provides a statutory formula for calculating the expenses incurred by the Central Bank in bailing out a Russian financial institution. *Id.* ¶¶ 28-29. When the Central Bank rescues a failing bank, it provides the bank with funds for a period of time at an interest rate that is at or close to zero. *Id.* ¶ 25. Subsection 2 provides that the Central Bank can assert a claim for the amount of interest lost by not investing those funds at the prevailing interest rate. *Id.* ¶¶ 19, 26.

Russian courts have made clear that the two Subsections provide for different bases for recovery and that—unlike liability under Subsection 1—liability under Subsection 2 is not tied to any underlying transactions. Petrol Aff. ¶ 27 (liability under Subsection 2 "does not depend on examination of particular transactions . . . . Such transactions are an independent basis for recovery

of losses." (quoting Moscow arbitrazh court ruling)). Thus, although both the New York and Russian claims fall under Article 189.23(5), the claims themselves are asserted by different entities under different subsections of Article 189.23(5), arise out of different factual allegations, and seek different damages.

Belyaev also argues that at least one of the claims in this action and the Russian Insolvency Proceeding share a common element: the allegation that Belyaev had control over Bank Otkritie. Again, while it is true that both courts would consider whether Belyaev had power over Bank Otkritie (Petrol Aff. ¶ 21), that one unremarkable proposition does not make the cases "duplicative," especially where every other aspect of the litigations is different and the Russian proceedings have nothing to do with NBT.[7] Importantly, Russian Insolvency Proceedings do not address whether Belyaev controlled NBT (because NBT is not a party to Russian Insolvency Proceedings)—one of central issues in this case.

C. Russian Courts Do Not Have Exclusive Jurisdiction Over Claims Under Article 189.23(5)

Belyaev also erroneously claims that Russian courts have exclusive jurisdiction over Article 189.23(5) claims. Def.'s Mem. at 6. *First*, even if that were true (which it is not), that argument applies, at most, to only a single cause of action. *Second*, in any event, there is no provision of Russian law that purports to divest courts *outside* of Russia of jurisdiction to hear claims under Article 189.23(5) of the Russian Bankruptcy Law. *See* Petrol Aff. ¶¶ 31-44. Rather, the Russian law provisions on which Belyaev relies concern allocation of jurisdiction among courts *within* Russia. *Id.* And although a different provision of the Russian code specifies claims that

[7] Belyaev incorrectly asserts that "Plaintiffs have brought overlapping claims against Mr. Wolfson in the United Kingdom." Def.'s Mem. at 18 n.5. In reality, the proceedings in the United Kingdom differ from this action in terms of the transactions that form the basis for the English claims, as explained above. Loft Aff., Ex. 2.

fall under the exclusive jurisdiction of the Russian court (as opposed to non-Russian courts), that statutory list of claims is exhaustive and it does not include claims under Article 189.23(5). Petrol Aff. ¶ 33. *Finally*, foreign laws generally do not limit the subject-matter jurisdiction of U.S. courts unless there is a treaty or other international agreement that dictates otherwise. *See*, *e.g.*, *Randall v. Arabian Am. Oil Co.*, 778 F.2d 1146, 1150 (5th Cir. 1985) (holding that foreign country cannot unilaterally limit U.S. courts' jurisdiction over a dispute "even though the dispute involves rights fixed by the laws of another nation"). Belyav does not point to, and Plaintiffs are not aware of, any treaty or U.S. law that would require this Court to decline jurisdiction over Article 189.23(5) claims.

CONCLUSION

For the reasons set forth above, Belyaev's motion to dismiss should be denied in its entirety.

Dated: January 13, 2021
New York, New York

Respectfully submitted,
KOBRE & KIM LLP

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ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, Jonathan D. Cogan, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this memorandum of law complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because it contains 6,966 words, excluding the parts of the memorandum exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affirmation.

Dated: New York, New York
January 13, 2021

/s/ Jonathan D. Cogan
Jonathan D. Cogan