SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NATIONAL BANK TRUST and PJSC BANK OTKRITIE FINANCIAL CORPORATION, Plaintiffs, v. VADIM BELYAEV, a/k/a/ VADIM WOLFSON, Defendant.	Index No. 156903/2020 Justice Joel M. Cohen Motion Seq. No. ____ ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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Defendant Vadim Wolfson (formerly Belyaev) submits this Memorandum of Law in support of his motion, pursuant to New York Civil Practice Law and Rule ("CPLR") Section 327(a), to dismiss the Complaint filed by Plaintiffs National Bank Trust and PJSC Bank Otkritie Financial Corporation (collectively, "Plaintiffs") on the grounds of *forum non conveniens* and impermissible claim-splitting.

PRELIMINARY STATEMENT

This meritless action, which does not belong in any court, certainly does not belong in this Court. It arises out of an alleged liquidity crisis at two Russian banks, National Bank Trust ("NBT") and PJSC Bank Otkritie Financial Corporation ("Bank Otkritie"), leading to their nationalization by the Central Bank of Russia (the "CBR") and the subsequent, increasingly desperate campaign of the CBR to pin the banks' alleged liquidity issues on anyone and everyone possibly connected to their ownership or management, regardless of the facts. Defendant Vadim Wolfson ("Mr. Wolfson") is one of many putative defendants across multiple actions in different foreign jurisdictions where Plaintiffs and the CBR have brought overlapping claims arising out of the banks' alleged liquidity crisis. Mr. Wolfson just happens to reside in New York.

But this case's connection to New York begins and ends there. The Complaint focuses on events alleged to have occurred in Russia, involving Russian companies and Russian individuals. All of the Complaint's legal claims are asserted under Russian law. There can be no reasonable dispute that this case could have been brought in Russia. Indeed, Bank Otkritie and the CBR have *already* pursued parallel claims against Mr. Wolfson in Russia arising from Bank Otkritie's nationalization. All of this precludes duplicative and harassing litigation in New York.

First, the doctrine of *forum non conveniens* requires dismissal. This case involves events and transactions that are alleged to have occurred entirely outside of New York, nearly all

witnesses and documents would be outside of New York, and the underlying claims are governed by foreign law. New York has no interest, let alone the requisite substantial interest, to adjudicate this dispute, and Plaintiffs cannot seriously dispute that Russia is available to them as an alternative forum given that they have already brought suit against Mr. Wolfson in the Russian courts on these issues. Accordingly, the Complaint should be dismissed with prejudice pursuant to CPLR 327(a).

Second, the Complaint should be dismissed in favor of the parallel Russian proceedings under the claim-splitting doctrine. The Russian action was filed before this one and arises out of the same nucleus of operative facts, *i.e.*, the alleged liquidity crisis at Bank Otkritie that the CBR used as an opportunity to nationalize the bank. The claims against Mr. Wolfson's in Russia and here in New York turn on the same legal and factual questions about whether he can be deemed a "control person" under Russian law. It would be wildly inefficient to entertain parallel litigation on opposite sides of the world involving the same core factual and legal issues, burden the parties and witnesses with duplicative testimony and evidence gathering, and risk inconsistent rulings on identical questions of law and fact. For these reasons, the claim-splitting doctrine requires dismissal of the Complaint in favor of the first-filed action in Russia.

RELEVANT BACKGROUND

I. The Parties

Defendant Wolfson is a citizen of the Russian Federation and Cyprus who currently rents an apartment in New York City. Complaint ("Compl.") ¶ 11; Affidavit of Vadim Wolfson, dated November 6, 2020 ("Wolfson Aff.") ¶ 3.[1] During the relevant period, from 2015 to 2017, Mr. Wolfson resided primarily in Russia, England, and Cyprus. *See* Wolfson Aff. ¶ 4.

[1] New York law permits courts to consider evidence outside the pleadings when ruling on a motion to dismiss based on *forum non conveniens*. *See, e.g.*, *Phat Tan Nguyen v. Banque Indosuez*, 797 N.Y.S.2d 89 (1st Dep't 2005) (considering evidence from foreign sources when determining whether to dismiss on *forum non conveniens* grounds); *Wyser-Pratte Mgmt. Co.* v. *Babcock Borsig AG*, No. 603364/02, 2004 WL

Plaintiff Bank Otkritie is a banking institution organized and existing under the laws of the Russian Federation, with its principal place of business in Moscow, Russia. Compl. ¶ 10. Bank Otkritie is currently under the temporary administration of the CBR. *Id.* ¶ 114.

Plaintiff NBT is a banking institution organized and existing under the laws of the Russian Federation, with its principal place of business in Moscow, Russia. Compl. ¶ 9. NBT was previously one of the largest commercial retail banks in Russia. *Id.* Like Bank Otkritie, NBT was placed under the temporary administration of the CBR. *Id.* ¶ 120. In its current form, NBT operates as a bank charged by the CBR with pursuing recovery of non-performing loans and other troubled assets that belonged to NBT, as well as those of certain other Russian banks. *Id.* According to the Complaint, this included claims belonging to Bank Otkritie, and Plaintiffs allege that certain "legal claims from a number of Russian banks were transferred and/or assigned to NBT, including the claims that are the subject of this action." *Id.* ¶ 121.

Neither Plaintiff alleges any presence in, or connection to, New York.

II. The Alleged Liquidity Crisis at Bank Otkritie and NBT

This action arises from alleged liquidity issues manufactured by the CBR to allow for the nationalization of Bank Otkritie and NBT in 2017. The Complaint alleges that, prior to the nationalization, the two banks, along with several other primarily Russian or Cypriot-based financial firms, participated in a number of complex financial transactions, including loan issuances, securities sales and purchases, margin calls, and reverse repurchase agreements. *See, e.g.*, Compl. ¶¶ 20, 30, 58, 110-11, 123, 145, 149. None of these transactions involves companies or individuals alleged to be based in New York, or anywhere else in the United States. Some of these transactions are alleged to have involved Otkritie Holding JSC ("Otkritie Holding"), a

3312835, at *6 (Sup. Ct. N.Y. Co. July 8, 2004) (unreported) (considering "expert evidence" submitted by defendants in connection with *forum non conveniens* motion).

holding firm founded by Mr. Wolfson that had an ownership stake in Bank Otkritie. *Id.* ¶ 2. The Complaint does not allege that Mr. Wolfson held any official role at either Bank Otkritie or NBT during the relevant period.

In July 2017, Russia's domestic rating agency, ACRA, downgraded Bank Otkritie's credit rating. *Id.* ¶ 106. The Complaint alleges that Bank Otkritie "went from being one of the top five private banks in Russia to having a deficit of US $8 billion." *Id.* ¶ 7. The Complaint attempts to pin this alleged liquidity crisis on a series of financial transactions involving alleged "Unofficial Perimeter Companies" somehow connected to Otkritie Holding, but makes no attempt to explain how those transactions add up to an "$8 billion" deficit or otherwise allege any causal connection between the alleged transactions and the Bank's alleged liquidity problems. *Id.* ¶¶ 7, 20.

On August 29, 2017, the CBR formally placed Bank Otkritie into temporary administration, removing its then-existing management—which is not alleged to have included Mr. Wolfson—and taking a controlling stake in the Bank. *Id.* ¶ 114. Thereafter, the CBR determined that NBT's liabilities exceeded its assets and implemented a rehabilitation program to recapitalize it. *Id.* ¶ 119. In March of 2018, the CBR adopted special measures under Russian bankruptcy law to place NBT into temporary administration, thereby becoming its legal owner. *Id.* ¶ 120. In so doing, the CBR directed NBT to try to recover its own non-performing loans, as well as those of several other failing banks, including Bank Otkritie. *Id.* ¶ 121.

Plaintiffs thereafter commenced a scattershot, global litigation campaign in an attempt to pin blame on anyone who may have had some involvement with either firm, alleging, "on information and belief," a diverse assortment of transactions—from Eurobond issuances to oil company margin calls, *see id.* at ¶¶ 143-149—all with the hope of tying these transactions, however tenuously, to Plaintiffs' alleged liquidity crisis. *See* Affirmation of Duane Loft, dated

November 6, 2020 ("Loft Aff.") Exhibit 2. In all of this, the Complaint neglects to mention the various macroeconomic and political factors widely acknowledged to have significantly harmed Russia's banking sector during the relevant period, including a sharp drop in oil prices and the impact of United States and European sanctions following Russia's annexation of Crimea from Ukraine in 2014.

III. The Complaint

Although the Complaint singles out Mr. Wolfson for his purported role in transactions involving Bank Otkritie and NBT, the Complaint can only allege, in the most vague and conclusory manner, that Mr. Wolfson "caused" or "authorized" those transactions. Compl. ¶ 59. The Complaint does not plead *facts* that might plausibly support this conclusion. The Complaint alleges that Mr. Wolfson had "*de facto*" control of NBT and Bank Otkritie, but fails to explain what facts would plausibly support such an inference. *See, e.g.*, *id.* ¶¶ 59-104, 159. The allegations of control are also contrary to allegations that Plaintiffs' lawyers have made in other international proceedings, where they have alleged that Mr. Wolfson was in the past a *minority* shareholder of Otkritie Holdings, which itself owned only "66.4% of the voting shares in Bank Otkritie." *See* Loft Aff. Ex. 2 at ¶ 7A. The threadbare allegations concerning Mr. Wolfson reveal that this is simply an opportunistic use of the New York courts to harass a defendant who just happens to rent an apartment in New York.

The claims raised in the Complaint, each brought solely under Russian law, allege: (1) tortious conduct, under Articles 1, 10, 15, 393, and 1064 of the Russian Civil Code, Compl. ¶¶ 151-156; (2) breach of duty of "Controlling Persons" under Articles 1, 15, 53.1, and 393 of the Russian Civil Code, *id.* ¶¶ 157-164; (3) liability for damages under Articles 1 and 15 of the Russian Civil Code and Article 189.23 of the Russian Bankruptcy Law, *id.* ¶¶ 165-170; and (4) unjust enrichment under Article 1102 of the Russian Civil Code, *id.* ¶¶ 171-174. Each of these claims requires a

showing that Mr. Wolfson was a "control person" with respect to Bank Otkritie and NBT, such that he "directed, authorized and/or otherwise caused" the banks to enter into certain alleged transactions. *See, e.g.*, *id.* ¶¶ 153, 158-59, 166, 172; *see also* Affirmation of Ilia Rachkov, dated November 6, 2020 ("Rachkov Aff.") ¶¶ 12(a), 34, 39-42.

IV. Russian Insolvency Proceedings

In June 2019, once NBT and Bank Otkritie had been placed under temporary administration, the CBR initiated insolvency proceedings on behalf of Bank Otkritie before the Moscow *Arbitrazh* court (effectively, the trial court of Moscow) (the "Russian Insolvency Proceedings"). *See* Affidavit of Stanislav Tarasov, dated November 6, 2020 ("Tarasov Aff.") ¶¶ 3, 12, 14. The Russian Insolvency Proceedings sought to cast a wide net, alleging claims against a number of individuals who might possibly have had some degree of "control"—however attenuated—over Bank Otkritie's various activities. Mr. Wolfson was swept up in these allegations along with many others. *See* Tarasov Aff. Ex. 4 at 21. Mr. Wolfson has attempted to defend himself in the Russian Insolvency Proceedings. *See* Tarasov Aff. ¶¶ 24, 26, 28-29.

The legal claim asserted in the Russian Insolvency Proceedings is the same as the third cause of action raised by Plaintiffs here, namely, liability under Article 189.23 of the Russian Bankruptcy Law for the control persons of credit organizations (such as NBT or Bank Otkritie) that require intervention by the CBR. *See* Compl. ¶¶ 165-170; Rachkov Aff. ¶ 32. Article 189.23 is a provision of the Russian Bankruptcy Law that permits finding individuals liable for damages based on the fact that they were in *de facto* control of a credit organization for which bankruptcy prevention measures involving the CBR had to be undertaken. *See* Rachkov Aff. ¶¶ 15, 33.

Notably, under Russian law, the Russian *Arbitrazh* courts have exclusive jurisdiction for the recovery of damages under Article 189.23(5). *Id*. ¶ 46. In other words, Russian law requires that such claims be litigated *in Russia*. *Id*. ¶¶ 47-51.

As in this action, the Russian Insolvency Proceedings center on allegations that Bank Otkritie's alleged liquidity issues resulted from actions and omissions of its "control persons." And just as in this action, the CBR must establish that Mr. Wolfson meets the legal definition of "control person." *See id.* ¶ 20(ii). As such, the two actions require *identical inquiries* into (1) whether Mr. Wolfson had "*de facto* control over the actions and/or operations of a legal entity, such as through practical ability to direct, instruct, or otherwise influence the actions of persons legally authorized to act on behalf of the legal entity," Compl. ¶ 158, and (2) whether he in fact exercised such control over NBT or Bank Otkritie, *see id.* ¶ 159; Rachkov Aff. ¶¶ 35-37, 42.

The approximate time period for which these factual and legal determinations must be made in both actions is 2015-2017. And, although the Russian Insolvency Proceedings focus on a broader set of transactions, both cases ultimately seek to prove that Bank Otkritie's control persons "conceal[ed] the poor quality of the Bank's assets through a failure to reflect and form the necessary reserves, which eventually led to the need for the bailout of the Bank." Tarasov Aff. Ex. 4 at 21.

V. Other Parallel Proceedings

As part of this strategy to launch litigation across the world and see what sticks, NBT and Bank Otkritie also commenced parallel proceedings in the United Kingdom. NBT and Bank Otkritie have brought claims against as many as seven individuals in the High Court of Justice, Business and Property Courts of England and Wales, Commercial Court (the "English Proceedings"). *See* Loft Aff. Ex. 2. The English Proceedings were commenced in 2019 against several members of the Mints Family alleged to have controlled a group of companies that transacted with Bank Otkritie shortly prior to its nationalization in August 2017. In July 2020, these proceedings were expanded to include Mr. Wolfson, Evgeny Dankevich (Bank Otkritie's

former CEO), and Mihail Shishkhanov (the former CEO of another failed Russian bank, Rost Bank). *Id.*

ARGUMENT

I. Dismissal Is Proper under the Doctrine of *Forum Non Conveniens*

CPLR 327(a) provides that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part." Trial courts have broad discretion to dismiss actions under the *forum non conveniens* doctrine. *See Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984) (holding that the doctrine permits a court to stay or dismiss such actions "where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere"); *see also Silver v. Great Am. Ins. Co*., 29 N.Y.2d 356, 360 (1972) (dismissal is justified if the court finds that, upon "balancing the interests and conveniences of the parties and the court, the action could be better adjudicated in another forum").

New York courts conduct a multifactor analysis to determine whether dismissal under *forum non conveniens* is appropriate. These factors include (i) the availability of an alternative forum; (ii) the residence of the plaintiffs bringing the action; (iii) the residence of the defendant; (iv) the situs of the relevant actions or transactions; (v) the location of evidence and nonparty witnesses; and (vi) the burden on the New York court. *See Islamic Republic of Iran,* 62 N.Y.2d at 479. No one factor is determinative. *Id.* At bottom, the analysis is about whether the action has a "substantial connection to this State." *Blueye Navigation, Inc. v. Den Norske Bank*, 658 N.Y.S.2d 9, 10 (1st Dep't 1997). Here, each of the relevant factors plainly supports dismissal.

A. Plaintiffs Cannot Contest That Russia Is an Alternative Forum for This Dispute

An alternative forum exists "if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute." *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 75 (2d Cir. 2003) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981)).[2] As one court has observed, "any assertion that a Russian court is an inadequate forum is undercut by the fact that at least one plaintiff in this action is a Russian entity that is a party to a related infringement action . . . presently pending in Russia." *Overseas Media, Inc. v. Skvortsov*, 441 F. Supp. 2d 610, 618 (S.D.N.Y. 2006), *aff'd*, 277 F. App'x 92 (2d Cir. 2008); *see also Pollux*, 329 F.3d at 75 (finding alternative forum available in part because the defendant agreed to submit to jurisdiction there).

That is the case here: Plaintiffs themselves have conceded the availability of the Russian courts to adjudicate this dispute. As set forth above, there is an ongoing Russian Insolvency Proceeding against Mr. Wolfson, the defendant in this action, asserting claims on behalf of Bank Otkritie, the plaintiff in this action. The claims in both actions arise from the same nucleus of operative facts, include at least one identical legal claim, and all depend on the same legal and factual inquiry into whether Mr. Wolfson can be deemed a "control person." Rachkov Aff. ¶¶ 12, 23-24, 34-37, 42. As here, dismissal is favored where "alternative fora for this dispute not only exist, but are currently in use." *BSR Fund, S.A. v. Jagannath*, No. 650832/2019, 2020 WL 1274236, at *4 (N.Y. Sup. Ct. Mar. 17, 2020) (unreported) (Cohen, J.).

[2] "Although the availability of an alternative forum is not a prerequisite to a *forum non conveniens* dismissal, New York courts consider it a "most important factor." *Foster Wheeler Iberia S.A. v. Mapfre Empresas S.A.S.*, 839 N.Y.S.2d 433, at *6 (N.Y. Sup. Ct. Mar. 29, 2007) (unreported) (citing *Pahlavi*, 62 N.Y.2d at 481), *judgment entered*, 2007 WL 9619685 (May 7, 2007).

Russia also has a substantial and far greater interest in adjudicating this dispute. New York courts have recognized that "where 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. v. 3033 ICICI Bank Ltd.*, 777 N.Y.S.2d 69, 75 (1st Dep't 2004) (in reversing trial court's failure to dismiss on *forum non conveniens* grounds, recognizing that "Indian courts are keenly interested in governing the affairs of [India's] financial institutions to insure uniformity and consistency in the processing of financial transactions and in the interpretation of Indian banking statutes and laws").

Here, all of the claims in the Complaint are asserted under Russian law. All of those claims obviously can be heard in a Russian court. Indeed, at least one of them *must be* litigated in Russia. *See* Rachkov Aff. ¶ 51 ("Russian courts—Russian *arbitrazh* courts in particular—have exclusive jurisdiction for the recovery of damages under Article 189.23(5) of the Russian Bankruptcy Law."). And the entire case follows from a nationalization strategy for two of Russia's largest commercial banks. *See* Compl. ¶¶ 7-10; Tarasov Aff. ¶¶ 11-14. Russia—certainly more than New York—would have a strong national interest in adjudicating disputes relating to that process. *See Phat Tan Nguyen v. Banque Indosuez*, 797 N.Y.S.2d 89, 92 (1st Dep't 2005) (affirming *forum non conveniens* dismissal of action against French banks because, *inter alia*, France "clearly has an interest in regulating its own banking institutions").

B. As Russian Companies, Plaintiffs' Choice of Forum Is Not Entitled to Deference

Both Plaintiffs in this case are Russian companies, headquartered in Russia. *See* Compl. ¶¶ 9-10. While a plaintiff's choice of forum is entitled to some deference, it "is not dispositive," and "where none of the plaintiffs is a New York resident, . . . dismissal on *forum non conveniens* grounds may be appropriate." *BSR Fund*, 2020 WL 1274236, at *3 (internal citations and quotation marks omitted); *see also Piper*, 454 U.S. at 255-56 ("When the home forum has been

chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable."); *Kainer v. UBS AG*, No. 650026/13, 2017 WL 4922057, at *9 (N.Y. Sup. Ct. Oct. 31, 2017) (unreported) (dismissing claim under *forum non conveniens* where "none of the plaintiffs is a New York resident"); *JTS Trading Limited v. Asesores*, 114 N.Y.S.3d 73, 74 (1st Dep't 2019) (affirming dismissal where "the parties are from Hong Kong and Mexico"). Here, because both Plaintiffs are Russian companies with no connection to New York, their choice of forum is not entitled to any weight in the analysis.

C. Mr. Wolfson Will Suffer Hardship from Litigating This Action in New York

Mr. Wolfson is a Russian and Cypriot citizen. During the time period relevant to this action, he occasionally travelled to New York to visit his ex-wife and children, and now rents an apartment in New York. *See* Wolfson Aff. ¶¶ 2-4. Those contacts to the forum are not relevant to the allegations in the Complaint, which relate entirely to events that allegedly occurred outside of New York. Accordingly, the happenstance of Mr. Wolfson's New York apartment has little if any weight in the *forum non conveniens* analysis. *See Becker v. Fed. Home Loan Mortg. Corp*., 981 N.Y.S.2d 370, 379 (1st Dep't 2014) ("Although defendant has an office in New York and plaintiffs' note was eventually securitized by a New York trust, these facts are insufficient to create a factual connection between New York and the dispute . . . .").

The law is clear that "the *forum non conveniens* analysis calls for more than just a tally of the parties' respective residences," *Filho v. Borges*, No. 651935/2018, 2019 WL 1877212, at *3 (N.Y. Sup. Ct. Apr. 26, 2019) (unreported) (Cohen, J.). Here, that analysis, in conjunction with the situs of the relevant transactions (Russia), the location of the evidence and witnesses (Russia), and the law governing this case (Russia), amounts to great hardship if Mr. Wolfson must defend himself in a forum with no connection to any of the relevant allegations. *See id*. at *6; *see also*

BSR Fund, 2020 WL 1274236, at *3-4. That is particularly true given that Mr. Wolfson has already been forced to litigate parallel claims in Russia.

Moreover, because the United States and Russia are not treaty partners pursuant to the Hague Evidence Convention, which governs the obtaining of evidence abroad in civil matters, Mr. Wolfson will likely be unable to gather critical documentary evidence or witness testimony necessary to mount his defense. *See generally SEC v. Collector's Coffee Inc*., No. 19 Civ. 4355 (LGS) (GWG), 2020 WL 4034733, at *3 (S.D.N.Y. July 17, 2020) (finding that the Hague Convention's procedures were unavailable to a plaintiff wishing to subpoena an individual residing in Russia). The "likely inability of [defendant] to compel these critical witnesses to testify in New York . . . will unfairly prejudice [defendant's] ability to defend against [plaintiffs'] charges, strongly militating in favor of having this case heard [abroad]." *Globalvest Mgmt. Co. v. Citibank, N.A*., No. 603386/04, 2005 WL 1148687, at *7 (N.Y. Sup. Ct. May 12, 2005) (unreported) (Fried, J.); *see also Nicholson v. Pfizer, Inc*., 717 N.Y.S.2d 593, 594 (1st Dep't 2000) (dismissing case on *forum non conveniens* grounds where key witnesses were "beyond the reach of New York's subpoena power"); *Braspetro Oil Serv. Co. v. UK Guaranty & Bonding Corp.*, 796 N.Y.S.2d 337, 338 (1st Dep't 2005) (affirming *forum non conveniens* dismissal because, *inter alia*, "most of the witnesses and documentary evidence are located abroad").[3]

D. The Complaint Is Based on Alleged Events and Transactions That Occurred in Russia, Not in New York

"The fact that the transaction[s] out of which the cause of action arose occurred primarily in a foreign jurisdiction weighs strongly in favor of dismissal on grounds of *forum non*

[3] Even if some relevant witnesses somehow agree to testify in New York, the cost of bringing even those witnesses to New York to testify can cause the hardship factor to "weigh[] heavily in favor of dismissal." *Norex Petroleum Ltd. v. Blavatnik*, 22 N.Y.S.3d 138, at *32 (N.Y. Sup. Ct. Aug. 25, 2015), *aff'd*, 59 N.Y.S.3d 11 (1st Dep't 2017).

conveniens." *Citigroup Glob. Mkts., Inc. v. Metals Holding Corp*., No. 604205/05, 2006 WL 1594442, at *6 (N.Y. Sup. Ct. Jun. 9, 2006) (unreported) (dismissing action where "virtually all of the relevant underlying events occurred outside of New York" (internal quotation marks omitted)), *aff'd*, 845 N.Y.S.2d 282 (1st Dep't 2007). For example, in *National Bank & Trust Co. of North America, Ltd. v. Banco De Vizcaya, S.A*., 72 N.Y.2d 1005 (1988), the Court of Appeals affirmed a *forum non conveniens* dismissal of an action concerning acts and representations that took place in Spain, involved transactions between the Spanish offices of two banks, and where the principal non-Spanish element was a series of transactions involving sales of cement to Nigeria. *Id.* at 1006.

Likewise, in *BSR Fund*, this Court held that Greek plaintiffs' dispute concerning a foreign-exchange trading fund created by Greek defendants while "perpetuated through a network of individuals, entities, and accounts all over the world," did not center in New York. *BSR Fund*, 2020 WL 1274236, at *1. "Even where some portion of the dispute—or the evidence—can be found in New York, dismissal on *forum non conveniens* grounds is still appropriate if the underlying transaction occurred primarily abroad." *Id.* at *5; *see also Phat Tan Nguyen*, 797 N.Y.S.2d at 92 (affirming dismissal under CPLR 327 where plaintiffs "claim(ed) entitlement to benefits from French banks while employed in Vietnam" and "New York's nexus to this matter not only fail[ed] to rise to the level of 'substantial,' but [was], in fact, barely discernable"); *Serano Ltd. v. Canadian Imperial Bank of Commerce*, 731 N.Y.S.2d 25, 25 (1st Dep't 2001) (*forum non conveniens* dismissal appropriate where "the action (was) virtually devoid of New York connections").

None of the events or transactions alleged in the Complaint has any discernable connection to—let alone is "centered in"—New York. Plaintiffs allege that the ownership structure of the

firms responsible for the transactions at issue was "designed and/or approved by [Wolfson] with an intent to, among other things, (i) evade *Russian* banking regulations that imposed limits on the amount of lending transactions that *Russian* banks legally are permitted to conduct." Compl. ¶ 22 (emphasis added). To the extent any such events occurred, none is alleged to have taken place in New York, and none has any connection to New York. To the contrary, all of them involve foreign parties, foreign firms, and communications among foreign individuals concerning foreign banking systems. Indeed, the two plaintiffs are "a major *Russian* retail bank" and the other formerly "*Russia's* largest privately-owned commercial bank." *Id.* ¶ 2. (emphasis added). The Otkritie Holding company at the center of the Complaint's allegations is alleged to be "a *Russian* holding company." *Id.* (emphasis added).

The facts relevant to the adjudication of this action thus have an entirely "foreign nexus . . . attributable to [alleged] business dealings abroad." *BSR Fund*, 2020 WL 1274236, at *4 (citation omitted). New York courts routinely dismiss actions where "the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction," *Kinder Morgan Energy Partners, L.P. v. Ace Am. Ins. Co.*, 866 N.Y.S.2d 191, 191 (1st Dep't 2008) (internal quotation marks and citation omitted); *see also, e.g.*, *Viking Global Equities, LP v. Porsche Automobil Holding SE*, 958 N.Y.S.2d 35, 36 (1st Dep't 2012) (dismissing claim where, aside from international phone calls, "the events of the underlying transaction otherwise occurred entirely in a foreign jurisdiction"), and the same disposition is appropriate here.[4]

[4] Even if monies in some of the transactions at issue here transited through the New York banking system at some point, courts do not find the transfer of funds through bank accounts in New York to be a compelling factor in a *forum non conveniens* analysis. *See Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 138 (2014) ("Our state's interest in the integrity of its banks is indeed compelling, but it is not significantly threatened every time one foreign national, effecting what is alleged to be a fraudulent transaction, moves dollars through a bank in New York."). If this were not the case, nearly every dollar-denominated transaction anywhere in the world would have a New York nexus.

The fact that the situs of all of the alleged events and transactions is outside New York weighs heavily in favor of dismissal.

E. The Relevant Evidence and Witnesses Are Located in Russia, Not New York

The location of witnesses is an important consideration when analyzing whether to dismiss a case under the doctrine of *forum non conveniens*. *See Irrigation & Indus. Dev. Corp. v. Indag S. A.*, 37 N.Y.2d 522, 526 (1975). Given that none of the events or transactions alleged in the Complaint occurred in New York, it is safe to assume that none of the evidence or witnesses (except Mr. Wolfson) would be located here.

This Court's ruling in *Filho v. Borges* is particularly instructive. There, after observing that "the critical events at issue here are not alleged to have taken place in New York," and that "many of Plaintiffs' substantive claims could hinge on the interpersonal relationships—the words exchanged, the agreements made, the authority implied—between [parties residing abroad]," the Court concluded that "many of the key witnesses and documents are likely located outside of New York," which weighed against permitting claims to proceed in New York. 2019 WL 1877212, at *4-5. The same analysis applies here. All of the alleged loans, sales, bond issuances, margin calls, and other financial transactions alleged in the Complaint are said to involve foreign entities and individuals, and there is no allegation that any of these foreign entities and individuals has a presence in New York.

Given the situs of the alleged transactions, any possible relevant evidence or witnesses will be in Russia. For example, the Complaint alleges communications among a senior manager at Bank Otkritie, the Director of the Economics Department of Otkritie Holding, and the First Deputy General Director of Otkritie Holding, concerning loan issuances and debt obligations among Otkritie Group entities. *See* Compl. ¶¶ 35-37. The nature of the allegations indicates that these communications occurred in Russia, concern Russian entities, and took place among Russian

individuals located in Russia. In addition, any relevant correspondence and documentation is written in Russian and would require translation. Similarly, the native language of most, if not all, relevant witnesses is Russian, such that interpretation of their testimony would be necessary.

F. The Burden on This Court of Adjudicating a Foreign Dispute Is Not Justified

New York courts, among the busiest in the country, "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." *Silver*, 29 N.Y.2d at 361. Indeed, New York courts routinely dismiss actions where "the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction." *See Kinder Morgan Energy Partners*, 866 N.Y.S.2d at 192 (citing *Pahlavi*, 62 N.Y.2d at 479).

The claims in the Complaint are asserted entirely under Russian law, and therefore, only Russian law is relevant to the disposition of this action. New York courts have frequently held that it is "an unnecessary burden" for them to have "to apply foreign law," *Bewers v. Am. Home Prods. Corp.*, 472 N.Y.S.2d 637, 639 (1st Dep't 1984), and they "commonly dismiss actions that may require interpretation of foreign law." *Citigroup Glob.*, 2006 WL 1594442, at *10; *see also Hanwha Life Ins. v. UBS AG*, 127 A.D.3d 618, 619 (1st Dep't 2015) (affirming dismissal where "Korean law applie[d]" to the claim); *Flame S.A. v. Worldlink Int'l (Holding) Ltd.*, 967 N.Y.S.2d 328, 331 (1st Dep't 2013) ("The applicability of foreign law is an important consideration in determining a *forum non conveniens motion* and weighs in favor of dismissal" (quoting *Shin-Etsu*, 777 N.Y.S.2d at 74).); *Datwani v. Datwani*, No. 112937/2011, 2013 WL 6997243, at *5 (N.Y. Sup. Ct. Dec. 18, 2013) (unreported) ("Where the resolution of the dispute involves consideration of foreign laws, dismissal for *forum non conveniens* is a proper exercise of judicial discretion."), *aff'd*, 994 N.Y.S.2d 88 (1st Dep't 2014); *Shin-Etsu*, 777 N.Y.S.2d at 74 (reversing the lower

court's denial of motion to dismiss where lower court "failed to consider the burden of having to interpret" foreign law).

There is no countervailing factor that would justify this burden. As this Court stated in *Filho*, "New York is an inconvenient forum because the testimony of the individual parties . . . as well as the communications between them will all require translation of documents and testimony." 2019 WL 1877212, at *6 (citing *Troni v. Banca Popolare Di Milano*, 514 N.Y.S. 246, 247-48 (1st Dep't 1987) (affirming dismissal where court considered, among other things, "the need to translate documents from a foreign language")). Interpreting key documents and testimony "would likely add substantial time and expense to the litigation, and 'the taxpayers of this State should not be compelled to assume the heavy financial burden . . . when their interest in the suit and the connection of its subject matter to the State of New York is so ephemeral." *Id*. (quoting *Pahlavi*, 62 N.Y.2d at 483).

In sum, this Court has previously made clear that there must be "some factual connection between New York and the dispute" in order for New York to be a proper forum for an action. *BSR Fund*, 2020 WL 1274236 at *4 (citation omitted). Where, as here, the "tenuous connection to New York is outweighed by the location of the parties, events, and likely evidence, the burden on Defendants and the courts, and the fact that a more convenient forum appears to be available," *Filho*, 2019 WL 1877212, at *6, the action should be dismissed under a straightforward application of the *forum non conveniens* doctrine.

Notably, Steptoe & Johnson, counsel for NBT and Bank Otkritie in the English Proceedings against Mr. Wolfson, previously argued—as counsel *defending* Mr. Wolfson—that New York was not a convenient forum to hear a claim raised against him where, as here, "[t]here is barely any connection to New York." Loft Aff. Ex. 3 at 21. As Steptoe correctly explained

then: "this case . . . depends entirely on events said to have taken place in Russia. This case does not belong in New York and should be dismissed." Loft Aff. Ex. 4 at 1. When confronted with a case against Mr. Wolfson based on events that, as here, occurred in Russia, Justice Ramos's reaction was: "Holy moly. I mean, really, why should I bother myself with this case?" Loft Aff. Ex. 5 at 3. On September 22, 2017, Justice Ramos dismissed the earlier case against Mr. Wolfson.

II. This Action Should Be Dismissed Because It Constitutes Impermissible Claim-Splitting

The Complaint should also be dismissed for the additional reason that it constitutes impermissible claim-splitting. Given the Russian Insolvency Proceedings, where Mr. Wolfson is already defending against similar allegations relating to the CBR's nationalization of Bank Otkritie, Plaintiffs should not be permitted to harass Mr. Wolfson through their meritless pursuit of duplicative litigation.[5]

The rule against claim-splitting is a foundational principle of the U.S. legal system. *See Stark v. Starr*, 94 U.S. 477, 485 (1876) ("It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal . . . ."). In essence, the rule "prohibits two actions on the same claim or parts thereof," *Caracaus v. Conifer Cent. Square Assocs.*, 68 N.Y.S.3d 225, 228 (4th Dep't 2017) (citation omitted), thereby "prevent[ing] a *plaintiff* from harassing a defendant with multiple suits where one suit would have sufficed to afford the plaintiff full relief,"

[5] As noted above, as part of their unending vendetta, Plaintiffs have also brought overlapping claims against Mr. Wolfson in the United Kingdom. *See* Loft Aff. Ex. 2. However, because Russia was the first forum in which Plaintiffs brought claims against Mr. Wolfson, the claim-splitting analysis focuses on the Russian Insolvency Proceedings. Regardless, the ongoing English Proceedings further support the conclusion that Plaintiffs are harassing Mr. Wolfson by filing multiple suits where one suit, *filed in Russia*, would suffice.

Id. The rule "derives its conceptual force from 'the principle that the public interest demands that a party not be heard a second time on a cause of action or an issue which he has already had an opportunity to litigate.'" *Id.* (quoting *Kromberg v. Kromberg*, 392 N.Y.S.2d 907, 912 (2d Dep't 1977), *aff'd*, 44 N.Y.2d 718 (1978)).

New York courts treat "the claim splitting rule . . . as a species of the genus *res judicata*." *Caracaus*, 68 N.Y.S.3d at 228; *see also Sannon Stamm Assocs., Inc. v. Keefe, Bruyette & Woods, Inc.*, 890 N.Y.S.2d 828, 828 (2009) ("The doctrine of res judicata may be invoked in instances of claim splitting to prohibit a plaintiff from bringing an action for only part of his claim."). "[T]o assess whether a set of facts constitute a single transaction for determining the applicability of *res judicata*, courts typically look to see if the alleged facts are closely related in time, space, motivation, or origin, such that treating them as a unity would be convenient for trial and would conform to the parties' expectations." *SMD Capital Grp. LLC v. Reichenbaum*, No. 600409/07, 2008 WL 2310944, at *4 (N.Y. Sup. Ct. May 30, 2008) (unreported) (citation and internal quotation marks omitted). The Second Department opinion in *In re Forst v. Wohl*, 412 N.Y.S.2d 663 (2nd Dep't 1979), is instructive. There, in barring a second action by a petitioner, the court reasoned that "[t]he factual foundation in both proceedings is the same . . . . Moreover, the issue petitioner raises in this proceeding could have been raised in the prior proceeding. The mere presentation of different legal theories does not create separate claims." *Id.*

Here, all of the Complaint's causes of action are brought under the Russian Civil Code or Bankruptcy Law, and these causes of action arise from the same nucleus of operative facts and same legal theory of liability as the Russian Insolvency Proceedings. *See supra*, p. 9 (citing the Rachkov Aff.). The Complaint's causes of action therefore could have been brought in the Russian Insolvency Proceedings. *See* Rachkov Aff. ¶¶ 43-45; *see also Ecker v. Lerner*, 507 N.Y.S.2d 31,

32-33 (1986) (holding that a prior action, brought by the plaintiffs, "premised upon the same wrongful conduct and the same series of transactions during the same period of time, involv[ing] the same chief participants, and [seeking] the same amount of damages" precluded the subsequent action); *see also Guarino v. Stone*, No. 10-4167, 2011 WL 1782106, at *2 (City Ct. May 10, 2011) (unreported) (noting that the plaintiff "impermissibly split his claim against defendant into two actions and said action [sic] are subject to dismissal" where both actions were based on a "single breach of an agreement").

It would be burdensome and inefficient for this court to permit this duplicative litigation in violation of the claim-splitting doctrine. It would risk inconsistent rulings, duplicative discovery, and needless burden and expense. Therefore, even if New York were a proper forum for this action, which it is not, Plaintiffs' claims violate the well-established doctrine against claim-splitting, and the Complaint should be dismissed on that basis alone.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests dismissal of the Complaint in its entirety and with prejudice.

Dated: November 6, 2020
New York, NY

Respectfully Submitted,

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ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, Duane L. Loft, 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 6,588 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 memorandum of law.

Dated: November 6, 2020
New York, New York

/s/ *Duane L. Loft*
Duane L. Loft