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

ILYA YUROV, Plaintiff, *—against—* OTKRITIE HOLDING JSC, VADIM BELYAEV and RUBEN AGANBEGYAN, Defendants.	Index No.: 656788/2016 Motion Seq.: 001 Part 53 Justice Ramos

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS AND IN OPPOSITION TO THE PLAINTIFF'S CROSS MOTION FOR ADDITIONAL SERVICE TIME, ALTERNATIVE SERVICE, AND JURISDICTIONAL DISCOVERY

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INTRODUCTION

Nothing in plaintiff Ilya Yurov's opposition papers changes the fact that this case involves exclusively foreign parties and depends entirely on events said to have taken place in Russia. This case does not belong in New York and should be dismissed.

Mr. Yurov's jurisdictional arguments largely depend on collapsing Otkritie Holding JSC ("Otkritie Russia") and Otkritie Capital U.S., Inc. ("Otkritie USA") into one, but he has not met the stringent standards for piercing the corporate veil. The commonplace evidence Mr. Yurov presents, such as unified website branding, does not suffice. Further, the lone fact connecting his claims to New York is a meeting that took place here after the alleged wrongdoing in Russia was complete. Yet what took place at the meeting will make no difference as to whether the defendants are liable, and is not type of "substantial" connection necessary for jurisdiction.

The Court should not grant Mr. Yurov's request for jurisdictional discovery because it is improperly premised on speculation that the individual defendants' sworn testimony about their ties to New York is false, and, in any event, discovery cannot change the fact that Mr. Yurov's claims have nothing to do with New York. Nor should the Court grant Mr. Yurov's requests to allow for delayed or alternative forms of service, as they are made in only a perfunctory manner.

The Court should grant the defendants' motion, and deny Mr. Yurov's cross-motion.

DISCUSSION

I. THE COURT LACKS GENERAL JURISDICTION OVER THE DEFENDANTS

A. Otkritie USA Is Not Otkritie Russia's Alter Ego

1. The Standard for Piercing the Corporate Veil

Mr. Yurov does not dispute that the Supreme Court's ruling in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), invalidated the earlier doctrine that a subsidiary could subject its parent to jurisdiction if the subsidiary is an "agent" or "mere department" of the parent. (Def. Br. 12-14.)

His fallback argument is to allege instead — and for the first time — that Otkritie USA is Otkritie Russia's "alter ego." (Opp. 14-15.) But "jurisdiction based on an alter ego theory applies in a far narrower set of circumstances." *NYKCool A.B. v. Pac. Int'l Servs., Inc*., 66 F. Supp. 3d 385, 393 (S.D.N.Y. 2014). The plaintiff must show "the complete domination of one entity by the other with respect to the transaction being challenged" and "that such domination was used to perpetrate a wrong against the plaintiff." *Shaltiel v. Wildenstein*, 288 A.D.2d 136, 137 (1st Dep't 2001) (applying this test regarding jurisdiction); *see also Gliklad v. Deripaska*, 55 Misc. 3d 1213(A), 2017 WL 1482164, at *7 (N.Y. Sup. Ct. Apr. 25, 2017) (same).

2. Mr. Yurov's Allegations of Domination And Control Are Insufficient

To establish the first, "control" prong of an alter ego theory, the plaintiff must show that the dominated company was so controlled as to have "no existence of [its] own." *Klockner Stadler Hurter Ltd. v. Ins. Co.*, 785 F. Supp. 1130, 1136 (S.D.N.Y. 1990) (citation omitted); *see also Portnoy v. Am. Tobacco Co*., No. 96/16323, 1997 WL 638800, at *4 (N.Y. Sup. Ct. Sept. 26, 1997). Nothing offered here comes close to meeting this exacting standard (nor would it even meet the lesser "mere department" standard that has been invalidated (*see* Def. Br. 14)).

First, Mr. Yurov points out that Otkritie Russia indirectly "owns more than 75%" of Otkritie USA (Opp. 13), but even a "parent corporation's complete ownership of a subsidiary's stock is . . . insufficient." *Oxbow Calcining USA Inc. v. Am. Indus. Partners*, 96 A.D.3d 646, 649 (1st Dep't 2012). Were the rule otherwise, veil-piercing would occur routinely.

Second, Mr. Yurov states that the individual defendants hold (or held) positions with Otkritie USA (Opp. 13), but "overlapping officers and directors are intrinsic to the parent-subsidiary relationship" and cannot justify ignoring the corporate form. *J.L.B. Equities, Inc. v. Ocwen Fin. Corp.*, 131 F. Supp. 2d 544, 550 (S.D.N.Y. 2001) (quoting *Porter v. LSB Indus.*,

Inc., 192 A.D.2d 205, 214 (4th Dep't 1993)).[1]

Third, that Otkritie's website refers to Otkritie USA as the firm's "business in the USA" and its "investment banking arm" (Opp. 2-3) is irrelevant. Courts consistently conclude that "[s]tatements projecting unity, whether in public filings, in press releases, or on corporate websites" are "insufficient" to disregard the separateness of companies. *Goldsmith v. Sotheby's, Inc*., 836 N.Y.S.2d 485, 2007 WL 258287, at *10 (N.Y. Sup. Ct. Jan. 2, 2007).[2]

Fourth, Mr. Yurov highlights that, according a FINRA "Broker Check" document, Otkritie Russia and Mr. Belyaev "direct[] the management or policies" of Otkritie USA. (Opp. 3 (citing Dewey Aff. Ex. 8, at 5-6).) But that statement merely reflects the fact that people or entities owning 25% of a broker-dealer are *presumed* under the applicable FINRA rules to have that type of "control" over the broker dealer. (Weichsel Aff. ¶¶ 5-8 & Exs. 1-2.) It does not reflect the improper blurring of corporate lines necessary to pierce the corporate veil.

Finally, while Mr. Yurov argues that Otkritie Russia has "fil[ed] many actions" in New York (Opp. 3), the cases were in fact filed by other Otkritie entities — *not* Otkritie Russia. (Dewey Aff. Exs. 10-15.) And the cases were actions under 28 U.S.C. § 1782 seeking discovery for use in *foreign* proceedings. By definition, the litigation on the merits was outside New York.

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[1] *See also Jazini v. Nissan Motor Co*., 148 F.3d 181, 185 (2d Cir. 1998) (subsidiary was not a "mere department" even though its chairman was a managing executive director of the parent); *Sass v. TMT Restoration Consultants Ltd*., 100 A.D.3d 443, 443 (1st Dep't 2012) (common officer was insufficient).

[2] *See also, e.g*., *Jazini*, 148 F.3d at 185 (references in an annual report to a "global company" were insufficient to conflate legally separate entities); *In re MTBE Prods. Liab. Litig.*, 959 F. Supp. 2d 476, 493 (S.D.N.Y. 2013) (parent's "directive to change [subsidiary's] signage to [parent's] trademarked logo and colors neither rises to the level of control 'greater than that normally associated with common ownership and directorship'" nor was it "sufficient to establishing . . . jurisdiction"); *La Piel, Inc. v. Richina Leather Indus. Co*., No. 10-CV-1050, 2013 WL 1315125, at *9 n.14 (E.D.N.Y. Mar. 29, 2013) (the "mere fact that one calls a subsidiary a 'division,' or even a 'department,' of a larger parent corporation" is insufficient); *Reers v. Deutsche Bahn AG*, 320 F. Supp. 2d 140, 157 (S.D.N.Y. 2004) (the "fact that subsidiaries share a logo, or that the parent decides to present several corporations on a website in a unified fashion," is insufficient); *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 230 F. Supp. 2d 403, 411 (S.D.N.Y. 2002) (website's "unified presentation" was insufficient); *Aerotel, Ltd. v. Sprint Corp*., 100 F. Supp. 2d 189, 193 (S.D.N.Y. 2000) (public statements under a "common trade name," Sprint, were insufficient, "given the sophistication and complexity of today's corporate world").

Regardless, even if Otkritie Russia had sued on the merits here, that fact is "immaterial to the question of whether it can be haled into [the forum] court as a defendant." *Blackwell v. Marina Assocs*., No. CIV.A. 05-5418, 2006 WL 573793, at *5 (E.D. Pa. Mar. 9, 2006).

3. There Are No Allegations of Otkritie Russia Using the Corporate Form to Harm or Defraud Mr. Yurov

Separately, Mr. Yurov has not alleged *anything* as to the second element: that Otkritie Russia used the corporate form to harm or defraud him. *Gliklad*, 2017 WL 1482164, at *7 (no jurisdictional veil-piercing without second element). Nor could he possibly do so. Where (as here) the plaintiff has chosen to contract with a specific corporate defendant, the second element of an alter ego claim must consist of misrepresentations about the corporate structure. *Southeast Texas Inns, Inc. v. Prime Hosp. Corp*., 462 F.3d 666, 680-81 (6th Cir. 2006). That is because plaintiffs in contract cases have "chose[n] to deal with" a particular corporation," and "to allow them access to shareholders or parent corporations when the deal goes sour is to give them more than the benefit of their bargain." *Secon Serv. Sys., Inc. v. St. Joseph Bank & Trust Co*., 855 F.2d 406, 416 (7th Cir. 1988).[3] Here, Mr. Yurov allegedly contracted with Otkritie Russia only, and does not suggest that he was misled about his counterparty. (Michael Aff. Ex. A ¶ 34.) If he wanted to be able to seek recourse via Otkritie USA (or to be able to sue in the forum of Otkritie USA), he should have demanded that Otkritie USA be part of the bargain. He chose not to.

B. <u>Otkritie Russia Did Not Consent to Jurisdiction</u>

Mr. Yurov next alleges that Otkritie Russia, by virtue of the alleged ties to New York,

[3] *See also, e.g., U.S. for use of Tower Masonry, Inc. v. J. Kokolakis Contracting, Inc*., 93 Civ. 6369, 1995 WL 539742, at *7 (S.D.N.Y. Sept. 8, 1995) (dismissing alter ego claim where the plaintiff "was fully aware of the fact that it was contracting with another corporate entity sufficiently distinct from" the defendant); *Matter of Tax Indebtedness of Coppola*, 91 Civ. 919, 1994 WL 159525, at *4 (E.D.N.Y. Jan. 10, 1994) (noting "tendency not to pierce the corporate veil . . . in contract cases" because "the complaining party has chosen to deal with the protected party and has had the opportunity to negotiate the terms of liability").

has "consented" to suit here. (Opp. 15-16.) But that argument conflates two distinct grounds for general jurisdiction. Under a "consent" theory, "it is not the 'doing business' that is the basis of jurisdiction"; rather, it "is the act of designating the Secretary of State as the agent for service of process." 2 Weinstein, Korn & Miller, New York Civil Practice ¶ 3.04. Mr. Yurov has not pointed to any case suggesting that ties to New York can create "consent" nor has he pointed to any act by Otkritie Russia by which it has agreed to generally being sued in New York.[4]

II. THE COURT LACKS SPECIFIC JURISDICTION OVER THE DEFENDANTS

A. The Defendants Did Not Transact Business in New York For Purposes of CPLR 302(a)(1)

Specific jurisdiction under CPLR 302(a)(1) requires a "substantial relationship" between "a defendant's transactions in New York and a plaintiff's cause of action," *Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005), and there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within" New York. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007). Here, the *only* alleged connection to New York is a single meeting between Mr. Yurov and Mr. Belyaev in New York in which Mr. Belyaev allegedly gave Mr. Yurov assurances that the defendants would pay the allegedly overdue fee. (Michael Aff. Ex. A ¶ 54.) This cannot possibly meet the "substantial connection" standard because the isolated meeting occurred after the alleged wrongdoing was complete. Mr. Yurov alleges that Otkritie Russia was named NBT's takeover partner in December 2014 — triggering the obligation to pay — and describes his performance under the Agreement as having been completed by December 26, 2014, a month before the New York meeting. (*Id.* ¶¶ 38-45, 54.) Given the timing, it is difficult to see what possible relevance the meeting could have to Mr. Yurov's claimed fee, or

[4] Mr. Yurov has not disputed, and thus has conceded, that there is no basis for general jurisdiction over the individual defendants. (*Compare* Def. Br. 14-15 (explaining lack of jurisdiction under CPLR 301 over the individuals) *with* Opp. 12-16 (invoking CPLR 301 only with respect to Otkritie Russia).)

even whether details about this meeting would be admissible at trial. If the defendants owed Mr. Yurov money, it was due before the meeting took place, and nothing about the meeting is relevant to the question of liability. That Mr. Yurov allegedly obtained assurance of payment makes no difference because a "subsequent assurance of performance" does not constitute a new tort, but is instead "redundant" of a contract claim. *Metro. Transp. Auth. v. Triumph Advert. Prods., Inc.*, 116 A.D.2d 526, 527-28 (1st Dep't 1986).[5] (Mr. Yurov also ignores that Mr. Aganbegyan was not at the meeting, and so there is no possible basis for jurisdiction as to him.)

As detailed in the defendants' moving papers, the Court of Appeals in highly analogous cases has rejected attempts by litigants to invoke specific jurisdiction based on isolated meetings in New York. (Def. Br. 17-18.) In *McKee Electric Co. v. Rauland-Borg Corp*., 20 N.Y.2d 377 (1967), it was not enough that "a 'high level' employee of the defendant . . . came to New York to look into the difficulties between plaintiff and plaintiff's customers" — difficulties that ultimately led to the defendant terminating the distributorship contract at issue in the case. *Id*. at 382. The Court observed that "[o]nly in a rare case should [defendants] be compelled to answer a suit in a jurisdiction with which they have the barest of contact." *Id*. at 383. And in *Presidential Realty Corp. v. Michael Square W., Ltd*., 44 N.Y.2d 672 (1978), the parties actually signed a contract in New York, but, because the material negotiations occurred elsewhere, that lone meeting was "not sufficient to confer jurisdiction." *Id*. at 674.

Mr. Yurov buries these cases in a footnote, and tries to distinguish them on the ground that they did not involve (as Mr. Yurov alleges is the case here) defendants who have "offices

[5] Mr. Yurov's lawyers argue in their brief that the meeting "furthered the Agreement," and suggest the deal "was not yet finalized." (Opp. 17.) These are bare statements of counsel that are contradicted by the complaint and that, accordingly, should be ignored (or, if taken seriously, should confirm that there was no agreement in the first place and no basis for Mr. Yurov to have even sued).

and residential property in New York," who "travel to New York" or who "repeatedly file actions in New York." (Opp. 18-19 n.23.) But that argument confuses general and specific jurisdiction. These alleged connections have no relation to the claims, which is the relevant inquiry for specific jurisdiction. Specific jurisdiction does not become more or less appropriate depending on the defendants' unrelated connections to the forum.[6] The cases Mr. Yurov cites (Opp. 17) involved substantial New York connections tied to the underlying claims.[7]

We have found no case, and Mr. Yurov cites none, authorizing jurisdiction under CPLR 302(a)(1) based on New York connections that are as meager as they are here.

C. The Defendants Did Not Commit a Tortious Act in New York For Purposes of CPLR 301(a)(2)

Jurisdiction under CPLR 301(a)(2) requires that the defendants commit a tortious act within the state (Def. 18), and Mr. Yurov argues that he has done so insofar as he alleges Mr. Belyaev "falsely stated" during the New York meeting that the promised funds were forthcoming. (Opp. 19.) But, as Judge Weinfeld has observed, where the "essence" of a tort claim is the defendant's misrepresentation that it "would satisfactorily perform the contract," the plaintiff may not "transform a breach of contract into a tort for jurisdictional purposes." *Trafalgar Capital Corp. v. Oil Producers Equip. Corp*., 555 F. Supp. 305, 310 (S.D.N.Y. 1983). Mr. Yurov ignores *Trafalgar* and similar cases the defendants cited. (Def. Br. 18-19.)

[6] Mr. Yurov's argument also gets the facts substantially wrong: neither individual defendant has an office in New York, has filed lawsuits in New York (*see* Dewey Aff. Exs. 10-15), and neither travels to New York on business with any regularity. (Belyaev Aff. ¶ 3; Aganbegyan ¶ 2.)

[7] *See Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 15 (1970) (in an auction house's suit to enforce a bid, finding jurisdiction where the defendant dialed by phone into a live auction occurring in New York); *NW Direct Design & Mfg., Inc. v. Glob. Brand Mktg., Inc*., No. 98 CIV. 4756, 1999 WL 493348, at *2 (S.D.N.Y. July 12, 1999) (finding jurisdiction in a contract dispute because "the parties engaged in the preliminary negotiation of essential terms, executed a contract, and conducted subsequent negotiations while present at meetings in New York City"); *In Am. Contract Designers, Inc. v. Cliffside, Inc*., 458 F. Supp. 735, 739 (S.D.N.Y. 1978) (finding jurisdiction because the defendants, the owners of a West Virginia inn, visited a New York interior design firm three times in conjunction with forming a contract for the firm to design an addition to the inn, including one visit that "facilitate[d] [the firm's] completion of the design plans for the addition to the Inn").

Mr. Yurov's complaint leaves no doubt that the alleged misrepresentations amounted to nothing more than false assurances of performance. In the only two counts referencing the meeting (fraud and tortious interference), he alleges that the Mr. Belyaev "knowingly misrepresented to Plaintiff that [the defendants] remained committed to their promise to pay $50 million." (Michael Aff. Ex. A ¶¶ 104, 115.) By basing these claims on the existence of a "promise" (*i.e.*, a contract), he has confirmed that no separate tort occurred in New York.

III. THE DEFENDANTS WERE NOT PROPERLY SERVED

A. Otkritie Russia Was Not Properly Served Under CPLR 311(a)(1)

Mr. Yurov argues that serving Otkritie Russia at the address of Otkritie USA in New York was appropriate because the Otkritie website "proudly invokes its New York business." (Opp. 9.) But nothing on the website states that the two companies are the same legal entity. And while Mr. Yurov claims that it is appropriate to effectuate service at an address "publicly held out by a party as its own" (*id.*), Mr. Yurov has pointed to no evidence that Otkritie Russia holds itself out as being located at the same address as Otkritie USA. In the only case Mr. Yurov cites on this point, *Fashion Page, Ltd. v. Zurich Ins. Co.*, 406 N.E.2d 747 (1980) (cited Opp. 9), the Court upheld service on a person who the defendant company had identified "as a person authorized to accept service for the corporation." *Id.* at 749. Nothing like that occurred here.

Mr. Yurov next contends that Otkritie USA is the "agent" of Otkritie Russia for purposes of service because of the "branding" effect of the companies being allegedly held out as part of the same overall firm. (Opp. 9.) But the Supreme Court has squarely rejected the "agency" theory underlying the cases he cites for this point, *Daimler*, 134 S. Ct. at 759, and neither the website nor any other facts offered by Mr. Yurov allow for the corporate distinction between

Otkritie Russia and Otkritie USA to be set aside.[8]

B. Mr. Yurov Did Not Properly Serve the Individual Defendants Under CPLR 308(2)

For service on the individual defendants at Otkritie USA to be proper, he must show that Otkritie USA is their "actual place of business," meaning where they are "physically present with regularity" and "regularly transact business" (Def. Br. 10) — exactly what the defendants have testified under oath and without rebuttal is *not* the case. (Belyaev Aff. ¶ 13; Aganbegyan ¶ 2.) In fact, in the past four years, Mr. Belyaev has been to Otkritie USA only once, and Mr. Aganbegyan not at all. (Belyaev Reply Aff. ¶ 3; Aganbegyan Reply Aff. ¶ 3; Weichsel Aff. ¶¶ 2-4.) Mr. Yurov responds that a person can have more than one "actual place of business" (Opp. 10), but that is beside the point, given the lack of evidence to contradict the defendants' sworn statements that they do not regularly appear or do business at Otkritie USA's offices. In the cases Mr. Yurov cites, the defendant was regularly doing business at the location at issue, even if the defendant worked elsewhere, too. *Columbus Realty Inv. Corp. v. Weng-Heng Tsiang*, 226 A.D.2d 259, 259 (1st Dep't 1996) (defendant's office was an actual place of business even though she "worked mainly from her house"); *King v. Galluzzo Equip. & Excavating, Inc*., No. 00 CV 6247, 2001 WL 1402996, at *4 (E.D.N.Y. Nov. 8, 2001) (defendant worked at a storage yard "on a daily basis").

IV. THE COURT SHOULD NOT AUTHORIZE ADDITIONAL TIME FOR SERVICE

Mr. Yurov argues in passing that the Court should authorize additional time to serve the defendants (Opp. 10), but he has not bothered to even set forth the standards for that relief or

[8] Mr. Yurov does not defend his attempted service under BCL § 307, except to baldly state that "service was valid under BCL §307." (*Compare* Def. Br. 7-9 *with* Opp. 10.) His brief then immediately turns to requesting additional time and leave to serve by alternate means, effectively conceding that what he has done so far was, in fact, lacking. (*Id*.) The Court should not grant additional time or alternative service, for the reasons discussed in §§ IV-V, below.

explain why it would be appropriate here. A court may extend the time to serve a complaint for "[1] good cause shown or in [2] the interest of justice." CPLR § 306-b. Good cause exists when the delay is the "result of circumstances beyond the plaintiff's control." *Bumpus v. New York City Transit Auth*., 66 A.D.3d 26, 32 (2d Dep't 2009). The "interest of justice" standard is "designed 'to accommodate late service that might be due to mistake, confusion or oversight.'" *de Vries v. Metro. Transit Auth*., 11 A.D.3d 312, 313 (1st Dep't 2004) (citation omitted). Absent even an attempt to satisfy these standards, no extension should be granted. *See, e.g., Johnson v. Concourse Vill., Inc.*, 69 A.D.3d 410, 410-11 (1st Dep't 2010) (denying extension where plaintiff "failed to show diligence" and did not raise the issue "until after defendants moved to dismiss").

V. THE COURT SHOULD NOT DIRECT SERVICE BY ALTERNATE MEANS

CPLR 308(5) authorizes service upon a defendant "in such manner as the court . . . . directs, if service is impracticable" by other means. CPLR § 308(5). The Court lacks "power to direct service of process pursuant to CPLR 308(5) absent a showing by the moving party that service is impracticable under the other subdivisions." *Corbo v. Stephens*, 272 A.D.2d 502, 503 (2d Dep't 2000). Mr. Yurov does not even attempt to make that showing here. His only discussion of this issue is to state, in a conclusory fashion, that the "Court may permissibly direct alternate means of service." (Opp. 10.) That bare statement does not meet his burden.

VI. THE COURT SHOULD NOT AUTHORIZE JURISDICTIONAL DISCOVERY

Jurisdictional discovery is not appropriate based on the "mere hope" that it will unearth evidence supporting jurisdiction. *Cracolici v. Shah*, 127 A.D.3d 413, 413 (1st Dep't 2015). In other words, the plaintiff cannot obtain discovery based on "speculation that the evidence submitted by the defendants is false," *Safonova v. United States*, 15 Civ. 5580, 2017 WL 1030708, at *4 (E.D.N.Y. Mar. 15, 2017), but, instead, must make a showing that the discovery "would likely yield evidence sufficient to support" jurisdiction. *Dale v. Banque All. S.A.*, 02 Civ.

3592, 2004 WL 2389894, at *7 (S.D.N.Y. Oct. 22, 2004). The critical jurisdictional facts here are either plainly undisputed, or the only "dispute" rests on Mr. Yurov's rank speculation.

First, there is no dispute that none of the defendants is a New York resident or "at home" here, for purposes of the traditional ground of general jurisdiction.

Second, there is not even an allegation that the defendants abused the corporate form to defraud or mislead Mr. Yurov, as would be necessary to collapse Otkritie Russia and Otkritie USA into one for purposes of general jurisdiction.

Third, for purposes of specific jurisdiction, there is no dispute that the only event touching on New York that is even conceivably related to the underlying claims is the January 2015 meeting, which indisputably took place after the alleged agreement was, by Mr. Yurov's telling, already made and broken. The meeting therefore has no significance in determining whether the defendants are liable. No amount of jurisdictional discovery will change this fact.

Finally, the individual defendants have testified under oath that they are not physically present at Otkritie USA with any regularity, nor do they regularly transact business there. (Belyaev Aff. ¶ 13; Aganbegyan ¶ 2; Belyaev Reply Aff. ¶ 3; Aganbegyan Reply Aff. ¶ 3.) Their testimony is corroborated by the person in charge of the offices of Otkritie USA. (Weichsel Aff. ¶¶ 2-4.) Mr. Yurov does not offer evidence to the contrary and should not be afforded discovery on the speculation that they are all lying.

VII. EVEN ASSUMING PROPER SERVICE AND JURISDICTION, THE CASE SHOULD BE DISMISSED ON *FORUM NON CONVENIENS* GROUNDS

Mr. Yurov's various arguments cannot change the fact that *all* of the relevant factors favor dismissal on *forum non conveniens* grounds. (Def. Br. 19-21.)

First, Mr. Yurov urges the Court to respect his "choice of forum" (Opp. 21), but, "[b]ecause the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is

convenient, a foreign plaintiff's choice deserves less deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981); *see also NWG Investments Inc. v. Fronteer Gold Inc.*, 40 Misc. 3d 1230(A), 2013 WL 4482713, at *5 (N.Y. Sup. Ct. Aug. 21, 2013) (same).

Second, he argues that litigating in New York would not be inconvenient because "Otkritie has repeatedly litigated in New York" and "has a New York office." (Opp. 21.) But the prior suits were brought by different Otkritie entities. (Dewey Aff. Exs. 10-15.) The cases were 28 U.S.C. § 1782 actions seeking discovery for *foreign* proceedings, and so can hardly be indicative of the defendants' ties to New York. Discovery actions are brought before the court that has the power to order the discovery. That Otkritie USA has a New York office employing four people does not somehow make it convenient for the defendants to litigate halfway around the world from home. While Mr. Yurov claims that *Mionis v. Bank Julius Baer & Co.*, 9 A.D.3d 280 (1st Dep't 2004), is "strikingly similar" insofar as that case was allowed to proceed against a foreign defendant with a "New York branch" (Opp. 22), he fails to tell the Court that all of the individual defendants in that case — *i.e.*, the people who actually carried out the alleged wrongdoing attributable to the foreign defendant — were New York residents who had even previously attempted to have the dispute arbitrated in New York. *Id.* at 281-82.[9]

Third, Mr. Yurov argues that the defendants have sued him "outside of Russia" (Opp. 22), but that is simply untrue. The suit he refers to is brought by NBT (*see* Belyaev Aff. Ex. 1)

[9] The other cases he cites are easily distinguishable, too. *See Van Deventer v. CS SCF Mgmt. Ltd.*, 37 A.D.3d 280, 281 (1st Dep't 2007) (refusing to dismiss two counts of a 15-count complaint on grounds of inconvenience, where defendants did not allege hardship); *Handelsman v. Seymour Braun*, No. 603389/99, 2000 WL 35928690 (Sup. Ct. N.Y. Cty. 2000) (Ramos, J.) (declining to dismiss on *forum non conveniens grounds* where New York had substantial nexus to the action but the alternative forum did not, New York law applied, and defendant was a New York lawyer); *Silverman v. Minify, LLC*, No. 157691/2014, 2016 WL 108268, at *10 (N.Y. Sup. Ct. Jan. 7, 2016) (declining to dismiss where the alleged misrepresentations were made to plaintiff while he worked in New York); *Elmaliach v. Bank of China Ltd.*, No. 102026/09, 2011 WL 10997479, at *7 (N.Y. Sup. Ct. 2011) (noting defendant was defending another lawsuit in New York and had not sought dismissal on *forum non conveniens grounds*, and two of defendant's three U.S. branches were in New York).

— the bank that he defrauded — and NBT chose to sue Mr. Yurov in England because *he lives there*. That NBT chose to sue Mr. Yurov where he is located is the exact *opposite* of his strategy here: to opportunistically sue defendants as far away as possible, and presumably with the intent to foist onto them the disproportionate expense and *inconvenience* of U.S. litigation.

Fourth, that the defendants have a relationship with "a New York law firm" (Opp. 22) cannot be meaningful here, as the firm's prior engagements — none of which were carried out for Otkritie Russia — involved, as discussed, seeking discovery located in New York for use in *foreign* proceedings.

Fifth, Mr. Yurov is wrong to argue that the evidence and documents will largely be in English, and easily transferred to New York via "technology." (Opp. 22-23 & n.27.) By way of example, Mr. Yurov explains in his complaint how he "performed" under the alleged agreement by ensuring that Russian government officials would appoint Otkritie to be NBT's takeover partner. (Michael Aff. Ex. A ¶¶ 38-45.) The details of this "performance" will necessarily involve Russian witnesses and documents — documents that, to the extent they reside with the Russian government or other third parties, will not be within the subpoena power of the Court. Further, Mr. Yurov accuses the defendants of causing a smear campaign "in the Russian media" causing "Russian prosecutors" to bring "baseless charges." (*Id.* ¶¶ 46, 70.) It is apparent these allegations will involve Russian witnesses and documents, too.

Finally, Mr. Yurov does not dispute having sued in New York because he is fleeing charges in Russia and adverse rulings in the English litigation. (Def. Br. 20.) Russia does not cease to be an adequate forum because he is seeking to evade justice there, *see Mercier v. Sheraton Int'l, Inc*., 935 F.2d 419, 427 (1st Cir. 1991) (cited without rebuttal at Def. Br. 20), nor does England cease to be an adequate forum because he is losing a separate case on the merits. It

is evident that Mr. Yurov is engaging in forum shopping so as to exploit the high costs of U.S. litigation. The Court should not encourage this conduct.

VIII. IF THE COURT REACHES THE SUFFICIENCY OF THE PLEADINGS, IT SHOULD DISMISS ALL OF MR. YUROV'S CLAIMS EXCEPT THE BREACH OF CONTRACT CLAIM

If the Court reaches the merits, all of Mr. Yurov's claims except his breach of contract claim should be dismissed, for the reasons discussed in the defendants' moving brief. (Def. Br. 21-23.) Mr. Yurov argues that it is "premature" to dismiss the claims because he is allowed to plead his non-contract claims in the "alternative," just in case the Court finds the parties did not form a contract. (Opp. 24 & n.29.) That argument might be persuasive if Mr. Yurov had set forth different facts establishing how he might prevail in absence of an agreement, but he has not. Claims "are not 'in the alternative' when they are based on the exact same allegations." *Gray v. Toyota Motor Sales, U.S.A., Inc*., 806 F. Supp. 2d 619, 624 (E.D.N.Y. 2011). Here, all of Mr. Yurov's claims are rooted in the same basic allegation that the defendants promised payment but did not follow through.[10] Courts routinely reject attempts to maintain duplicative claims simply by arguing they were intended as "alternatives" to a contract claim.[11]

[10] Michael Aff. Ex. A ¶¶ 81-82 (implied covenant claim alleging that "Defendants promised Plaintiff that they would pay $50 million" but breached the implied covenant by "failing to pay Plaintiff"); ¶¶ 85, 87 (promissory estoppel claim alleging that the defendants are liable because they "promised Plaintiff that they would make" the payments at issue and seeking damages of $21 million for Mr. Yurov's share of those payments); ¶ 89 (alleging unjust enrichment "caused by Defendants' failure to make payments owed"); ¶¶ 85-86 (alleging promissory estoppel because the defendants "promised Plaintiff that they would" pay, and "Plaintiff reasonably relied on that promise"); ¶¶ 93, 98 (for fraudulent inducement claim, alleging that the defendants "misrepresented to Plaintiff that they would make" the payments at issue and seeking damages of $21 million for Mr. Yurov's share of those payments); ¶¶ 101, 106 (same for fraud claim); ¶ 109 (alleging conspiracy based on the defendants falsely stating they "would honor" the alleged agreement); ¶¶ 114-15 (alleging tortious interference because the defendants "knowingly misrepresented that they would" pay and "that they remained committed to their promise" to pay).

[11] *See, e.g.*, *Alpena Prototype Biorefinery, LLC v. DPI SPV, LLC*, 2016 WL 4701415 (N.Y. Sup. Ct. Sept. 6, 2016) (concluding that "an unjust enrichment and/or implied covenant claim will not survive as an 'alternative' pleading when it is directly duplicative" of a contract claim) (quotations omitted*); Rivas v. Amerimed USA, Inc*., Index No. 0600484/2003, 2004 WL 5540087 (N.Y. Sup. Ct. Aug. 12, 2004) (Ramos, J.) (rejecting argument that plaintiffs "are entitled to plead breach of contract and fraud in the alternative" and noting that the First Department has dismissed fraud claims "as redundant even in cases where the contract claim did not stand"); *Miramax Film Corp. v. Abraham*, 01 Civ. 5202, 2003 WL 22832384, at *14 (S.D.N.Y. Nov. 25, 2003) (concluding that the "alternative pleading rule

Mr. Yurov has also overlooked that fraudulent inducement cannot be based on the allegation that the defendant had no intention to perform, and that fraud claims cannot be based on false assurances of performance — which is exactly what he attempts to do here. (Def. Br. 21-22.) He cites this Court's ruling in *125 West 22nd Street Holding, LLC v. Calabrese Assoc., Inc*., No. 0602315/2007, 2008 WL 3832285 (N.Y. Sup. Ct. Aug. 1, 2008) (cited Opp. 24 n.29), but that case actually offers a useful contrast to show why the fraud claims here are duplicative. In *Calabrese*, a contractor lied about the progress of construction work so that the plaintiff would make an interim payment "far in excess of what was due," and this Court found that the misrepresentations could be a separate fraud because they were "extraneous" and "collateral" to the contract terms. *Id*. No extraneous or collateral misrepresentations are alleged here.

CONCLUSION

For the stated reasons, and those in the defendants' moving papers, the Court should grant the defendants' motion to dismiss and deny the plaintiff's cross-motion.

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Respectfully submitted,

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does not permit a plaintiff to treat fraud and contract as interchangeable claims"); *Aramony v. United Way of Am*., 949 F. Supp. 1080, 1084 n.2 (S.D.N.Y. 1996) ("Duplicative claims, which are not permitted, must be distinguished from alternative claims, which are permitted. Claim Seven is duplicative of Claim Two because it relies on identical allegations of fact and law. Thus if Claim Two fails, Claim Seven must fail as well, and *vice versa*.").