NYSCEF DOC. NO.

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

INDEX NO. 600456/2004

RECEIVED NYSCEF: 07/12/2011

SUPREME COURT OF THE STATE OF NEW YO	ORK - NEW YORK COUNTY
PRESENT: BARBARA R. KAPNICK  Justice	PART 39
Peters, Frances C.	INDEX NO. 60045664  MOTION DATE  MOTION SEQ. NO. 0004
POTERS, GEORGE CHRISTY	MOTION CAL. NO.
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits  Answering Affidavits — Exhibits  Replying Affidavits  Cross-Motion: Yes No  Upon the foregoing papers, it is ordered that this motion  MOTION IS DECIDED IN ACCORDANCE ACCOMPANYING MEMORANDUM DECIDED.	PAPERS NUMBERED
Dated: 7/11/11	

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39
-----x
FRANCES C. PETERS,

Plaintiff,

-against-

GEORGE CHRISTY PETERS, ANNA C. PETERS, UBS AG a/k/a UBA SA, a global banking entity incorporated in Switzerland, and UBS TRUSTEES (BAHAMAS) LTD.,

Defend	an	ıt	s.		

#### BARBARA R. KAPNICK, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

Defendant UBS Trustees (Bahamas) Ltd. ("UBS Bahamas") moves to dismiss the First Amended Complaint for lack of jurisdiction (CPLR 3211[a][1] and [8]). Defendant UBS AG a/k/a UBA SA ("UBS AG") moves to dismiss under the doctrine of forum non conveniens (CPLR 327). Plaintiff Frances C. Peters ("Frances") opposes both motions and seeks jurisdictional discovery as against UBS Bahamas.

DECISION/ORDER

Index No. 600456/04 Motions Seq. Nos. 004 and 005

UBS AG also purports to move to dismiss for failure to state a claim, but does not meaningfully address the issue in its motion papers, and states rather that if this motion is denied on *forum non conveniens* grounds, it will then move to dismiss for failure to state a cause of action.

### BACKGROUND/THE FIRST AMENDED COMPLAINT

The background of this case has been set forth in prior orders of the Court, familiarity with which is presumed. Plaintiff originally commenced this case in 2004 against her mother, defendant Anna C. Peters ("Anna") and her brother, defendant George Christy Peters ("George") (together, the "Individual Defendants") alleging that they had misappropriated millions of dollars of assets held by off-shore trusts established by her aunt (Anna's sister), Athena Eliades ("Athena"). By order dated September 14, 2005 (the "Prior Order"), the Court (Freedman, J.) dismissed claims for fraud, constructive trust, conspiracy and prima facie tort, but directed discovery regarding the alleged trusts, their trustees and beneficiaries.

Following discovery, plaintiff filed the First Amended Complaint (the "Amended Complaint") ("AC ¶ \_\_") in September 2009. The new pleading added two defendants, UBS Bahamas and UBS AG (collectively, the "UBS Defendants"). The Amended Complaint asserts that the UBS Defendants were part of a conspiracy to wrongfully distribute funds to Anna and George, in contravention of Athena's wishes that plaintiff receive a substantial share of her assets.

As is relevant to the jurisdictional and forum non conveniens issues raised by the UBS Defendants' motions, plaintiff and the two individual defendants are residents of New York as well as citizens of Greece (AC ¶¶ 17-20). UBS AG is a Swiss banking and financial services corporation with offices throughout the world, including two offices in New York (AC ¶¶ 21-24). UBS Bahamas is a Bahamian corporation with its principal place of business in Nassau, The Bahamas, and is a global trust company wholly owned by the UBS Group ("UBS Group"), which includes any branch, subsidiary or affiliate of UBS AG ((AC ¶¶ 25, 27). UBS Bahamas does business in the United States and throughout the world (AC ¶ 26).

Plaintiff's aunt Athena was a wealthy Greek national who died in January 2003, leaving no children (AC  $\P\P$  1, 35-36). Plaintiff and Athena allegedly had a very close, mother-daughter-like relationship (AC  $\P$  39). On many occasions, Athena assured plaintiff that she would receive a substantial portion of Athena's assets through various trusts, entities and accounts that had been created (AC  $\P\P$  40-41).

Athena maintained accounts at UBS AG (AC  $\P$  42). In the Autumn of 2000, Jorge Ibarrola ("Ibarrola"), an attorney and

financial planner employed by the Trust and Fiduciary Services of UBS AG in Lausanne, Switzerland, counseled Athena about changing Ibarrola obtained for Athena a legal her trust (AC  $\P$  55). opinion from a Swiss attorney, Yves Bonnard ("Bonnard") regarding the possible U.S. tax consequences for the beneficiaries (AC  $\P$ 56). On November 18, 2000, Athena signed a Trust Deed and Letter of Wishes for a trust called the Mimosa Trust, witnessed by UBS AG employee Pascal Dessingy ("Dessingy") (AC ¶ 59). Trust Deed was later dated, signed, witnessed and stamped by UBS Bahamas in Nassau, Bahamas on December 5, 2000 (AC  $\P$  60). Mimosa Trust listed plaintiff as a beneficiary, and the Letter of Wishes instructed the UBS Defendants how to distribute Athena's assets upon her death (AC  $\P$  62). Two of Athena's accounts intended to fund the Mimosa Trusts were account numbers 883110 and 59930, respectively designated "Mimosa 1" and "Mimosa 2" (AC ¶ 61).

The Individual Defendants own substantial offshore accounts at or through the UBS Defendants (AC  $\P$  81). Anna has been a client of UBS in Switzerland for over 30 years. Between Autumn 2001 and Spring 2004 (before and after Athena's death), Anna telephoned or faxed the UBS Defendants at least 57 times from her home in New York City (AC  $\P$  77). At least 25 of the

communications were directed to Nicolas Hogg ("Hogg"), who Anna identified as the UBS representative of the trust (AC  $\P\P$  75, 77). Anna also placed at least two calls from New York to the home number of Roger Schrammeck ("Schrammeck"), identified as the UBS AG banker used by Athena (AC  $\P$  77).

In late March or early April 2003, Anna and her brother Stylianos L. Coutsodontis ("Coutsodontis") had several meetings with UBS AG employees in Lausanne to discuss the trust and various other financial vehicles established by Athena (AC ¶ 91). As a result of these meetings, UBS AG agreed to follow Anna's instructions regarding the distribution of Athena's assets, in contravention of the wishes set forth in Athena's Mimosa Letter of Trust (AC ¶¶ 91, 95, 277). UBS AG suggested that Anna and her brother retain Athena's former counsel, Bonnard, to represent them in connection with the trust and they signed a document authorizing him to do so (AC ¶ 96). Bonnard's fees were paid by UBS out of Mimosa Trust funds, and his bills were submitted, to UBS Bahamas "as trustees of the Mimosa Trust." (AC ¶ 97).

In late March 2003, Bonnard sent letters to the UBS Defendants aimed at nullifying Athena's wishes, in favor of Anna

instead of Frances (AC ¶ 101). The correspondence suggested "amending the trust deed or the . . . letter of wishes," and advised how best to conceal from the United States taxing authorities that his clients would be exercising control over and instructing the Mimosa trustees with respect to distributions (AC ¶ 101). On or about May 7, 2003, Bonnard faxed to Anna in New York a letter he had received a few days earlier from UBS AG Products and Services which stated that the trustees were "unable to restructure the trust as you have suggested . . . since the deed does not allow same" (AC ¶ 105). The letter then suggested that UBS AG could nevertheless pursue restructuring if provided with a specifically worded opinion from licensed U.S. counsel with sufficient professional liability insurance coverage (AC ¶ 105).

On May 16, 2003, Bonnard faxed to Anna in New York a copy of an interim bill he had submitted to UBS Bahamas as trustee of the Mimosa Trust (AC  $\P$  107). In June and July, Anna and George's former counsel spoke with Bonnard and Hogg about trust distributions (AC  $\P\P$  109, 115).

Between May and July 2003, the UBS Defendants and Bonnard drafted and forwarded to Anna in New York various release

documents calling for plaintiff's signature (AC  $\P\P$  108, 111, 116). One set of the documents, sent on or about May 26, 2003, sought to have plaintiff waive all the claims she might have, but failed to identify the entities released or the amount plaintiff would receive in consideration (AC  $\P$  108). Anna tried to induce plaintiff to sign the documents by promising to instruct the trustees to transfer \$1.1 million to her, and threatened that plaintiff would receive nothing if she failed to sign the releases (AC  $\P$  112). Plaintiff refused to sign  $\mathcal{L}$  (AC  $\P$  113).

Another set of release documents was faxed to plaintiff in New York by Mr. Hogg of UBS AG on or about July 14, 2003 (AC ¶¶ 116-18). The documents consisted of a one-page form letter addressed to UBS Bahamas, referring to the Mimosa Trust and requesting a distribution in an unspecified amount, and a release referencing "The Carla Trust" dated December 5, 2000 which identified UBS Bahamas as trustee, and which was purportedly created by Athena and governed by the laws of Singapore (AC ¶ 118). The Carla Trust is believed to have been set up through the UBS Defendants and controlled by the Individual Defendants (AC ¶ 119). Anna again advised plaintiff that she would receive nothing if she declined to sign, and plaintiff again refused to do so (AC ¶¶ 121-22).

Between May and September 2003, UBS AG sent a total of approximately \$20 million, in seven separate wire transfers, from the Mimosa Trust to the New York bank accounts of Anna, George and Coutsodontis (AC  $\P\P$  106, 110, 114 123, 125-27). In early September 2003, Anna advised plaintiff that the assets of "the trusts" had been fully distributed (AC  $\P$  128). Plaintiff believes that all of the Mimosa Trust assets have, in fact, been distributed, except for possibly \$100,000 (AC  $\P$  129).

During the period in 2003 when the Individual Defendants were communicating with the UBS Defendants about the Mimosa Trust, plaintiff made a number of unsuccessful attempts to obtain information. When she spoke to Hogg in February or March, 2003, he refused to provide her with information about the Mimosa Trust and suggested she visit UBS in Switzerland (AC ¶ 84). When she went there in early March 2003, Hogg provided her with a redacted, incomplete purported copy of the Mimosa Trust Deed that he said had been given to him by UBS Bahamas; refused to show plaintiff the documents upon which he based his assertion that it was a "fixed interest" trust; informed plaintiff that UBS AG made all investment decisions regarding the trust even though UBS Bahamas was purportedly the trustee; refused to provide plaintiff with the name and contact information for UBS Bahamas, and told

her she was not permitted to have direct communications with the trustee (AC  $\P$  86). Hogg subsequently asserted that the trust was "discretionary" rather than fixed and said that it was accompanied by a Mimosa Letter of Wishes, but refused to provide a copy of it to plaintiff (AC  $\P$  86). He also advised plaintiff that she should direct all future requests for information about the trust or other of Athena's entities to Anna (AC  $\P$  86).

As noted above, plaintiff originally commenced this action in 2004. The Amended Complaint asserts that in the course of discovery following the original motion to dismiss, plaintiff discovered that the Mimosa Trust deed supplied by the Individual Defendants to the Court on the motion was not genuine, and that there were multiple versions of the deed that had been provided by the UBS Defendants as part of a scheme to contravene Athena's wishes and deprive plaintiff of her inheritance (AC  $\P\P$  135-39). Plaintiff alleges that the UBS Defendants provided the Individual Defendants with an outdated, unexecuted copy of a draft letter of wishes for a "Mimosa-Soya Trust" to assist them in concealing Athena's actual intentions (AC ¶¶ 143, 193). That letter was supplied even though the UBS Defendants and Bonnard, who was paid by UBS Bahamas with Mimosa Trust funds, had the updated Letter of Wishes drafted for the Mimosa Trust in their files (AC  $\P\P$  144,

147-48). The Individual Defendants used the outdated letter of wishes to support their litigation position that it was controlling and applied to both the Mimosa Trust and a non-existent "Soya Trust" (AC ¶¶ 150-51, 156, 160-63, 165, 193). They also misrepresented in depositions the source of distributions made to them, claiming to have received funds from the "Soya Trust" that actually came from the Mimosa Trust (AC ¶¶ 158-63).

As recited in the Amended Complaint, in March 2008 plaintiff moved to compel the testimony of the Individual Defendants' former trusts and estates attorneys (AC  $\P$  170). contends that counsels' testimony demonstrates that the Individual Defendants gave their attorneys false and misleading information, based on documents supplied by the UBS Defendants, to conceal the wrongful distributions made to them of Athena's assets (AC  $\P\P$  174-176, 178, 180, 183-186, 190-193). Anna caused her former counsel to draft letters for her signature instructing the UBS Defendants to make the distributions (AC  $\P$  185), and the UBS Defendants complied with those instructions even though they fraudulent documents had supplied the in the first place (AC 136. 143, 185-87). Those letters also contained misrepresentations regarding the financial circumstances

interests of plaintiff, which the UBS Defendants accepted in making the distributions (AC ¶¶ 186-87). The Amended Complaint asserts five causes of action against the UBS Defendants, for conversion, unjust enrichment, fraud, breach of fiduciary duty, and constructive trust/accounting.

#### Subsequent Proceedings

In connection with its motion, defendant UBS submitted copies of what it contends is the true Mimosa Trust Deed, dated December 5, 2000, and the true Letter of Wishes, dated November 18, 2000. In or about November 2009, UBS Bahamas brought an action in the Supreme Court of the Bahamas (Equity Side) seeking a declaration concerning the validity of those documents and the construction of their terms. Plaintiff did not appear in that proceeding, and on January 29, 2010, UBS Bahamas' local counsel in The Bahamas submitted an order (the "Bahamian Order"), which was apparently accepted and filed by the court on default on February 4, 2010. The Bahamian Order declares that the instruments in question are "the sole and proper Trust Deed and Letter of Wishes executed between the Trustee and Ms. Athena Eliades"; that "pursuant to clause 2.2 of the Trust Deed the Proper Law of the Trust is the laws of The Bahamas"; and that "pursuant to clause 5.1 of the Trust Deed, the Trust is a fully

discretionary trust with the Trustees having absolute discretion over the income and corpus of the Trust."

After the UBS Defendants' motions to dismiss were briefed and argued, new counsel for plaintiff moved to compel defendants to accept a Second Amended Complaint or, in the alternative, to amend the complaint. By order dated September 21, 2010, the Court resolved the motion by granting the parties permission to file additional papers addressing the jurisdictional and other issues raised by the original motion papers.

#### DISCUSSION

<u>Defendant UBS Bahamas' Motion to Dismiss (mot. seq. no. 004)</u>

In moving to dismiss, UBS Bahamas argues that this Court lacks general and/or long-arm jurisdiction under the applicable provisions of CPLR 301 and 302. UBS Bahamas has submitted an affirmation of its Chief Executive Officer, Andreas Rentschler ("Rentschler"), who attests that his company has no offices, places of business, telephone listings, officers or directors, or agents for the service of process in the United States; that it is not authorized to do business anywhere in the U.S. and does not pay taxes here; and that it has never administered a trust governed by U.S. law. UBS Bahamas also relies on the choice of

law provision in the copy of the Mimosa Trust it has submitted and contends that Bahamian law gives The Bahamas exclusive jurisdiction to adjudicate disputes arising under trusts containing such clauses.

In opposing the motion, plaintiff invokes CPLR 302(a)(2) and (in her supplemental papers) 302(a)(3)(ii), and contends that UBS Bahamas conspired to commit tortious acts, within and without New York, that injured her as a New York resident. Τn supplemental papers, plaintiff additionally argues that UBS is a "mere department" of UBS AG, which is concededly subject to jurisdiction York. Plaintiff in New also disputes authenticity of the trust instruments and the effect of their language, and asserts that the proceedings in The Bahamas should be disregarded.

CPLR 302(a)(2) permits the exercise of personal jurisdiction over a non-domiciliary defendant "who in person or through an agent: . . . commits a tortious act within the state." In the usual case, the defendant's actual physical presence in New York is a prerequisite under this section. Feathers v McLucas, 15 NY2d 443, 460 (1965); National Union Fire Ins. Co. of Pittsburgh v Davis, Wright, Todd, Reise and Jones, 157 AD2d 571 (1st Dep't

1990); DirecTV Latin America, LLC v Park 610, LLC, 691 F Supp 2d 405 (SD NY 2010). Plaintiff does not allege an in-state tort by UBS Bahamas directly, but contends that the Individual Defendants, as the company's agents, did so in furtherance of a conspiracy to defraud. This theory fails for several reasons.

It is true that for purposes of section 302(a)(2), "[t]he acts of a co-conspirator may . . . be attributed to a defendant for the purpose of obtaining personal jurisdiction over that defendant." Reeves v Phillips, 54 AD2d 854, 855 (1st Dept 1976); Travelers Indem. Co. v Inoue, 111 AD2d 686 (1st Dept 1985); Blissworld, LLC v Kovack, 2001 WL 940210 (Sup Ct, NY Co 2001). However, conclusory allegations of conspiring through an agent will not suffice. Wyser-Pratte Management Co., Inc. v Babcock Borsig AG, 23 AD3d 269 (1st Dept 2005). The plaintiff must allege facts sufficient "(1) to establish a prima facie case of conspiracy, (2) to warrant the inference that the ... defendants were members of that conspiracy, (3) to demonstrate that a putative co-conspirator committed a tort . . . within New York within the meaning of [CPLR  $\S$  302(a)(2)], and (4) to justify the finding of an agency relationship between the putative coconspirator acting in New York and the ... defendants." Daventree Ltd. v Republic of Azerbaijan, 349 F Supp 2d 736, 759

(SD NY 2004); DirecTV, supra at 424-25; Dixon v Mack, 507 F Supp 345, 349-350 (SDNY 1980). Furthermore, to establish a prima facie case of conspiracy, the plaintiff must allege "(a) a corrupt agreement between two or more persons, (b) an overt act in furtherance of the agreement, (c) the parties' intentional participation in furtherance of a plan or purpose, and (d) the resulting damage or injury." Chrysler Capital Corp. v Century Power Corp., 778 F Supp 1260, 1267 (SD NY 1991). Contrary to plaintiff's assertion, it is not sufficient to allege merely "participation in a tortious act along with other defendants in this action . . . [that causes] injury to Plaintiff in New York"; injury within the state alone is not enough, if no tort within the state attributable to the foreign defendant is alleged. Windsor United Indus, LLC v Healey, 2010 WL 2574053, \*3 (Sup Ct Broome Co 2010)(fraudulent misrepresentations made in Georgia insufficient to confer jurisdiction, even if defendants intended plaintiffs to rely upon them in New York and plaintiffs suffered financial injury in New York).

In the final analysis, plaintiff's core complaint is that the trustee breached its fiduciary duties by failing to effect the terms of a trust agreement in accordance with Athena's wishes. The conduct constituting that alleged wrong was,

primarily, the disbursement of approximately \$20 million to Anna, George and Coutsodontis between May and September 2003. However, that conduct did not involve tortious acts in New York. Rather, it involved a decision by a trustee in The Bahamas to authorize the release of funds from bank accounts in Switzerland. The fact that plaintiff, a New York resident, was injured by not receiving a distribution in this State from the accounts is irrelevant to the jurisdictional analysis.

Likewise, the allegation UBS Bahamas authorized that transfer of the funds in response to letters drafted by the Individual Defendants' former New York counsel does not confer jurisdiction upon New York. The authorization still occurred in The Bahamas, and the transfers still originated from Switzerland. It appears that plaintiff has misconstrued the nature of the agency relationship and agreement between the parties necessary to support jurisdiction under a conspiracy theory. Plaintiff has not anywhere alleged that UBS Bahamas committed acts through an agent located in New York. Instead, most of her allegations suggest that UBS Bahamas was following directions Individual Defendants' agent outside of New York. And in those instances where it is alleged that the Individual Defendants were engaging in tortious conduct in New York, such as employing the

various draft documents, no inference can be drawn that they were acting at the behest of, for the benefit of, or pursuant to an express agreement with UBS Bahamas.

None of the remaining allegations identified by plaintiff in her brief regarding UBS Bahamas' "participation in a scheme to defraud" implicate a tortious act in New York or are meaningfully connected with plaintiff's injury. Thus, while plaintiff notes that UBS Bahamas discussed with Anna a restructuring of the trust in contravention to Athena's wishes, the Complaint makes clear that the proposal was rejected. Moreover, even had the trust been restructured, that conduct would have occurred in The Bahamas or Switzerland. Similarly, plaintiff's claim that UBS Bahamas paid Bonnard to draft releases as part of a wrongful but unsuccessful "attempt" to persuade plaintiff to relinquish her claims does not describe any conduct that led to plaintiff's loss, or conduct that occurred in New York.

Plaintiff's "fraud upon the Court" theory also falls short.

Once again, the conduct identified by plaintiff -- the submission of unexecuted draft trust documents in this litigation -- occurred well after the funds had been disbursed to the Individual Defendants, so the nexus between the alleged wrongful

conduct and plaintiff's loss is absent. Furthermore, plaintiff did not suffer any loss due to reliance on the representations made to the Court or an improperly procured order, compare Exclaim Associates Ltd. v Nygate, 2005 WL 3501559, \*5 (Sup Ct NY Co 2005) (plaintiffs induced to enter into an agreement and pay defendants money in reliance on false statements made at bankruptcy proceeding). Rather, on the prior motion plaintiff pointed out deficiencies in the various instruments provided to her and submitted to the Court, and the Court, in the Prior Order, found the documentation to be inconclusive and incomplete and directed further discovery.

Plaintiff's reliance, in her supplemental papers, on CPLR 302(a)(3)(ii) as an alternative basis for long-arm jurisdiction also fails. That section permits the exercise of personal jurisdiction over a non-domiciliary who:

commits a tortious act without the state causing injury to person or property within the state . . . if he

\* \* \*

(ii) expects or should reasonably
expect the act to have consequences
in the state and derives

# substantial revenue from interstate or international commerce . . .

In invoking this section, plaintiff relies on a new "fraud on the Court" theory, asserting that UBS Bahamas "created false evidence specifically for use within the State of New York." This time, plaintiff asserts that UBS Bahamas' tortious act was fabricating the copies of the Mimosa Trust Deed and Letter of Wishes which were first made available to plaintiff in May 2009, and which were annexed to UBS Bahamas' motion papers in support of the instant motion to dismiss when it was first filed in November 2009. Plaintiff contends that the documents may not be authentic because (1) the two UBS account numbers identified in the Letter are handwritten and differ from those recited in the Complaint; (2) a version of the Letter provided to Coutsodontis in September 2005 redacts the account numbers and a paragraph concerning beneficiaries, omissions which are inconsistent with the precise redactions specified in the accompanying cover letter; (3) the Deed permits restructuring despite the May 2003 letter from UBS AG Products and Services indicating otherwise and (4) the Deed and the Letter contain unusually large blank spaces.

Assuming, arguendo, that plaintiff's objections significant or meaningful, the argument fails for a number of the same reasons which rendered CPLR 302(a)(2) unavailing. As noted above, the funds were disbursed in 2003, so UBS Bahamas' conduct in this litigation has no bearing on plaintiff's injury or detrimental reliance. Furthermore, under section 302(a)(3), "the situs of the injury for long-arm purposes is where the event giving rise to the injury occurred, not where the resultant damages occurred." Marie v Altshuler, 30 AD3d 271, 272 (1st Dept 2006); see McGowan v Smith, 52 NY2d 268, 273-274 (1981). Consequently, "[t]he occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under § 302(a)(3) where the underlying events took place outside New York," United Bank of Kuwait, PLC v James M Bridges, Ltd., 766 F Supp 113, 116 (SD NY 1991); see Stair v Calhoun, 2009 WL 792189 (ED NY 2009). Once again, plaintiff's "injury" -- the non-receipt of trust proceeds -- was a result of acts occurring in The Bahamas and Switzerland.

Plaintiff's argument that UBS Bahamas is a "mere department" of UBS AG must also be rejected. The four factors used in making the determination of whether a subsidiary is a "mere department" of the foreign parent are: (1) common ownership; (2) the

financial dependency of the subsidiary on the parent; (3) the degree to which the parent interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of the parent's control of the subsidiary's marketing and operational policies. Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp., 751 F2d 117, 120-122 (2d Cir 1984); Porter v LSB Indus., 192 AD2d 205, 213 (4th Dept 1993). Through Mr. Rentschler's Supplemental Affidavit and its accompanying documentation, UBS Bahamas has through competent evidence that UBS AG's demonstrated jurisdictional contacts should not be attributed to it.

First, contrary to plaintiff's assertion, UBS Bahamas is not a wholly-owned subsidiary of UBS AG, and UBS AG does not own 100% of its stock. Rather, UBS Bahamas is a wholly-owned subsidiary of a different entity, UBS (Bahamas) Ltd. ("UBS Ltd."), a bank that operates in the Bahamas. See Rentschler Supp. Aff. (November 2, 2010) ¶ 6. This fact significantly undermines plaintiff's theory, for even if she could show that UBS Bahamas is a "mere department" of UBS Ltd., she has not attempted to show that UBS Ltd. is subject to jurisdiction in New York, or that UBS Ltd. is a "mere department" of UBS AG.

Moreover, while UBS Ltd. is owned by UBS AG, UBS AG's consequent

indirect ownership of UBS Bahamas is not by itself sufficient to confer jurisdiction. *Porter v USB Indus.*, supra at 213-14.

Second, plaintiff has not established UBS Bahamas' financial dependency on UBS AG. Contrary to plaintiff's speculation, UBS Bahamas files separate, audited financial statements which are published in a local newspaper. See Rentschler Supp. Aff.  $\P$  30, Exh. F. The fact that UBS Bahamas' finances are consolidated in the statements of UBS AG is not significant, independent evidence of dependency. See Marantis v Dolphin Aviation, Inc., 453 F Supp 803 (SD NY 1978); Linde v Arab Bank, PLC, 262 FRD 136, 143 fn4 (ED NY 2009). Moreover, plaintiff does not allege that UBS Bahamas receives financial support from UBS AG, and Rentschler asserts that UBS Bahamas is profitable and sends its profits up to its immediate parent. See Rentschler Supp. Aff.  $\P$  11. fact refutes any inference of financial dependency of the subsidiary upon the parent corporation. Gallelli v Crown Imports, LLC, 701 F Supp 2d 263 (ED NY 2010); J.L.B. Equities, Inc. v Ocwen Fin. Corp., 131 F Supp 2d 544 (SD NY 2001). Rentschler further affirms that UBS Bahamas has no outstanding from UBS AG, receives no financial support from it, does not intermingle bank accounts with it, and

maintains a separate capital and shareholder structure. See Rentschler Supp. Aff.  $\P$  11.

Third, UBS Bahamas has also refuted plaintiff's contention that the company is dominated or controlled by UBS AG's employees, and that it fails to observe corporate formalities. Although plaintiff has identified one former UBS AG employee who now works for UBS Bahamas (and has misidentified the actual employer of other individuals), Rentschler has provided the UBS Bahamas organizational chart and other documents confirming that it is managed by its own independent personnel. See Rentschler Supp. Aff. ¶¶ 24, 25, 40, Exhs. A, C and D). Moreover, UBS Bahamas has only two shared directors with its immediate parent (out of five), and none with UBS AG (Rentschler Supp. Aff.  $\P\P$  38, 39, Exh. H). UBS has thus been structured "to operate in what is facially a completely independent manner, with its own officers, board of directors, books, financial statements, annual reports, tax returns, property, debts, etc." Marantis v Dolphin Aviation, Inc. supra at 804.

Plaintiff's allegation that UBS Ltd. provides legal and other support services to UBS Bahamas is irrelevant as the subsidiary pays for them pursuant to an express agreement,

Rentschler Supp. Aff. ¶ 42, see Porter v LSB Indus., supra at 214. Likewise, plaintiff's allegations that UBS AG and UBS Bahamas both performed various functions with respect to the Mimosa Trust in their differing roles as banker and trustee have no bearing on the more general question of whether one was operationally a "mere department" of the other.

Fourth, plaintiff has not demonstrated that UBS AG'controls the marketing or operational policies of UBS Bahamas. Her reliance on advertising and internet materials to suggest otherwise is misplaced, as such sources "do not trump the reality of documents evidencing adherence to corporate formalities."

Gallelli v Crown Imports, LLC, supra at 274. Advertising strategies which imprecisely describe or disregard a parent-subsidiary relationship are not evidence of the parent's marketing or operational control of the subsidiary. Reers v Deutsche Bahn AG, 320 F Supp 2d 140, 158 (SD NY 2004); Linde, 262 FRD 136, 144.

In view of the determination above regarding the lack of a statutory basis for jurisdiction over UBS Bahamas, the Court is not required to resolve the additional issues raised by UBS Bahamas' alternative arguments regarding the effect of the choice

of law provision contained in the Mimosa Trust or the Bahamian default declaratory judgment.

Moreover, plaintiff's questions regarding the authenticity or completeness of the trust documents have no bearing on the jurisdictional issue. As noted, plaintiff does not contend that the trust documents were made or executed in New York. Plaintiff's speculation (in its original moving papers) that the trustees may have invoked their power under section 16.2 of the Trust Deed to change the choice of law clause was expressly refuted by UBS Bahamas in its original reply, Rentschler Supp. Aff. ¶ 7, and plaintiff has abandoned that contention in her supplemental papers.

Finally, plaintiff's request for additional jurisdictional discovery under 3211(d) is denied. The record has been sufficiently developed for the Court to conclude that plaintiff has not demonstrated "the possible existence of essential jurisdictional facts that are not yet known," Copp v Ramirez, 62 AD3d 23, 31 (1st Dept 2009), lv denied 12 NY3d 711 (2009); Peterson v. Spartan Indus., 33 NY2d 463 (1974). The First Amended Complaint is therefore dismissed as against UBS Bahamas, without prejudice to further proceedings regarding the trust in

the Bahamas. Defendant's request for sanctions is denied in the Court's discretion.

## Defendant UBS AG's Motion to Dismiss (mot. seq. no. 005)

UBS AG moves to dismiss the First Amended Complaint against it on *forum non conveniens* grounds, pursuant to CPLR 327 and 3211(a)(2). As the Court of Appeals has held,

Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor is controlling. The great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case. The rule rests upon justice, fairness and convenience . . .

Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479 (1984), cert den 469 US 1108 (1985) (citations omitted). As plaintiff notes, a plaintiff's New York residence is generally the most significant factor in the equation, Sweeney v Hertz Corp., 250 AD2d 385, 386 (1st Dept 1998), and a New York plaintiff's choice of its home forum should be respected unless "it plainly appears that New York is an inconvenient forum and that another is

available which will best serve the ends of justice and the convenience of the parties." Silver v Great Am. Ins. Co., 29 NY2d 356, 361 (1972).

In this case, the New York residence of plaintiff (and her mother and brother as defendants) does weigh in favor of retaining the claims against UBS AG. However, this convenience to plaintiff is outweighed by the remaining factors. As noted in connection with UBS Bahamas' motion to dismiss, the actual dispute has only a fortuitous connection to New York. The lawsuit arises out of the administration of a Bahamian trust established by plaintiff's Greek aunt, based on advice from Swiss advisors and funded with assets in Swiss bank accounts, and the key events are alleged to have occurred in Switzerland. Jurisdiction over UBS AG is not based upon any tortious conduct or transactions in New York, but only upon the New York presence of its general business operations having no connection to this case. Apart from her residence here, the only link to New York between plaintiff and this action is her alleged economic injury in the State. Under the circumstances, a forum non conveniens dismissal is appropriate. Tegra S.A. v Bombardier, Inc., 80 AD3d 443 (1st Dept 2011); Neuter, Ltd. v Citibank, N.A., 239 AD2d 213 (1st Dept 1997).

In considering the hardship to defendant, it is significant that virtually all of the non-party witnesses are in Switzerland. Tegra S.A., 80 AD3d 443, 444. All seven of the UBS AG witnesses, most of whom no longer work for UBS AG, are alleged to have worked in Switzerland, and no UBS AG employee is alleged to have worked in or come to New York. Additionally, it is significant that nearly all of the documentary evidence, including Athena's banking and other transactional records, are in Switzerland. Georgakis v Excel Mar. Carriers Ltd., 72 AD3d 494 (1st Dept 2010); Ilusorio v Ilusorio-Bildner, 103 F Supp 2d 672 (SD NY 2000); Blanco v Banco Indus. De Venezuela, S.A., 997 F2d 974 (2d Cir 1993); Fustok v Banque Populaire Suisse, 546 Fsupp 506 (SD NY 1982).

Most importantly, as plaintiff concedes, six of the seven Swiss witnesses are non-parties who cannot be compelled to testify in New York, but only in Swiss proceedings. See Moritz Näf Aff.,  $\P\P$  3-6, 8. Although their testimony might be obtained through more complicated and time-consuming procedures such as letters rogatory or the Hague Convention, the prejudice to UBS AG in not being able to obtain their live testimony at trial constitutes a significant consideration which weighs against

retaining this case. ACLI Int'l. Commodity Services, Inc. v

Banque Populaire Suisse, 652 F Supp. 1289, 1296 (SD NY 1987).

Notwithstanding the cases cited by plaintiff regarding the cost of procuring testimony, the overriding concern is the ability to compel such testimony.

Moreover, given that the tortious conduct occurred in Switzerland, Swiss law would apply to the claims against UBS AG. See Lionel Halpérin Aff. ¶ 13; Schultz v Boy Scouts of Am., 65 NY2d 189 (1985); Sussman v Bank of Israel, 801 F Supp 1068 (SD NY "The applicability of foreign law is an important consideration in determining a forum non conveniens motion." Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd., 9 AD3d 171, 178 (1st Dept 2004), although certainly this is not an unusual occurrence in the Commercial Division. Another difficulty is the conflict between New York discovery practices and Swiss bank secrecy laws, which could involve litigation in the Swiss courts anyway and subject the witnesses to criminal penalties if they responded without authorization by a Swiss court. Isabelle Romy Aff. ¶ 25-27; Minepeco, S.A. v Conticommodity Servs, Inc., 116 FRD 517 (SD NY 1987). Switzerland's interest in regulating its own bank's activities is another consideration. LaSala v UBS, AG, 510 F Supp 2d 213 (SD NY 2007).

Finally, Switzerland is an available forum. Plaintiff's concern that claims for breach of fiduciary duty against Swiss banks are not recognized in that country is not particularly relevant. "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry." Piper Aircraft Co. v Reyno, 454 US 235, 247 (1981). A forum is adequate so long as it "permits litigation of the subject matter of the dispute." Gryphon Dom. VI, LLC v APP Intl Fin. Co., B.V., 41 AD3d 25, 37 (1st Dept 2007). Even the unavailability of a jury trial in Switzerland does not render it clearly unsatisfactory. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 809 F2d 195 (2d Cir 1987); Emslie v Recreative Indus, Inc., 2010 WL 1840311 (WD NY 2010).

Accordingly, the motions of UBS Trustees (Bahamas) Ltd. and UBS AG a/k/a UBS SA to dismiss the First Amended Complaint are granted, without prejudice to recommencement in the appropriate jurisdictions.

The First Amended Complaint is dismissed as against those defendants, without costs or disbursements.

The Clerk is directed to enter judgment accordingly.

The action is severed and continued as against the Peters defendants. Counsel for the remaining parties are directed to appear for a status conference in IA Part 39, 60 Centre Street, Room 208 on August 10, 2011 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: July // , 2011

BARBARA R. KAPNICK

J.S.C.

BARBARA R. KAPNICH