UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORTHROP GRUMMAN OVERSEAS SERV. CORP. Plaintiff, -against- BANCO WIESE SUDAMERIS, Defendant.	03 Civ. 1681 (LAP) OPINION AND ORDER

LORETTA A. PRESKA, United States District Judge:

Plaintiff Northrop Grumman Overseas Service Corporation ("Northrop" or "Plaintiff"), filed the original complaint in this action on August 26, 2002 in the Supreme Court of the State of New York, County of New York, against defendant Banco Wiese Sudameris ("BWS" or "Defendant"). On the same date, Plaintiff filed an ex parte application for an order to show cause for a preliminary injunction with an application for a temporary restraining order ("TRO") which the state court, the Honorable Herman Cahn, granted, enjoining BWS "and all those acting for or on its behalf or in concert with it" from accepting, transferring, paying, or otherwise conveying funds in the amount representing the proceeds of the L/C.

On September 20, 2002, the return date of the order to show cause, the Honorable Karla Moskowitz held a hearing on Plaintiff's motion for a preliminary injunction. At the conclusion of the hearing, the court granted Plaintiff's motion

and issued an order continuing the TRO. On October 17, 2002, the state court entered a preliminary injunction order to the same effect as the TRO.

On February 17, 2003, the Summons and Complaint were served on BWS pursuant to the Inter-American Convention on Letters Rogatory, and, on March 11, 2003, BWS timely removed the action pursuant to this Court's diversity jurisdiction.[1] On July 10, 2003, Plaintiff filed an amended complaint ("Complaint"). By notice of motion dated August 1, 2003,[2] Defendant moved to dismiss the Complaint on the basis of failure to plead a prima facie showing of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) and the doctrine of forum non conveniens, and to vacate the preliminary injunction order issued

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[1] By notice of motion dated April 1, 2003, Plaintiff moved to remand this case back to the state court. This Court denied that motion in an endorsement dated May 30, 2003, finding that the removal was timely.

[2] By notice of motion dated June 16, 2003, Defendant moved to dismiss the original complaint pursuant to Fed. R. Civ. P. 12(b)(2), 12(b)(6), and 9(b) for lack of personal jurisdiction, failure to state a claim upon which relief may be granted, failure to plead fraud with particularity, pursuant to the doctrine of forum non conveniens, and pursuant to Fed. R. Civ. P. 60(b)(4) and 60(b)(6) for an order vacating the preliminary injunction order issued by the New York State Supreme Court. Because Plaintiff filed an Amended Complaint on July 10, 2003, Defendant withdrew its June 16, 2003 motion to dismiss and filed the instant motion to dismiss the Amended Complaint. By Memo-Endorsement dated July 24, 2003, this Court ordered the parties' agreement that Defendant would not include in the instant motion any arguments based on Fed. R. Civ. P. 9(b) or 12(b)(6) but reserved the right to move for dismissal on these grounds at a future date, as appropriate.

by the New York State Supreme Court pursuant to Rules 60(b)(4) and 60(b)(6).[3] For the reasons stated below, Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) is granted.

BACKGROUND

Except where noted, the facts stated are drawn from the Complaint, documents attached to affidavits submitted by both parties which are incorporated in the Complaint by reference, and documents filed by the parties in the state court. See Cortec Industries, Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991) ("[T]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference."); Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 75 (2d Cir. 1998) (matters of public record may be considered on motion to dismiss); Hirschfeld v. City of New York, No. 97 Civ. 6059, 1997 U.S. Dist. LEXIS 14942, at *2 (S.D.N.Y. Sept. 30, 1997) (documents on file with state court may be considered on motion to dismiss).

Northrop is a Delaware corporation with its principal place of business in Maryland. (Compl. ¶ 5.) BWS is a bank organized under the laws of Peru with its principal place of business in Peru. (Compl. ¶ 6.)

Northrop entered into a contract with the Ministry of

[3] By Order dated October 21, 2003, this Court denied Plaintiff's request to compel discovery on the pending motion finding that Plaintiff's discovery requests were irrelevant to Defendant's motion.

Transportation, Communications, Housing and Construction of Peru (the "MTC"), signed December 30, 1996, under which Northrop was to provide a radar system to the MTC for use in the Jorge Chavez International Airport in Lima, Peru (the "Contract"). (Compl. ¶ 2.) The Contract is governed by Peruvian law. (Compl. ¶ 21.)

The Completion Bond and the Corresponding Letter of Credit

The Contract required Northrop to provide a "completion bond" in the amount of the total value of the Contract to guarantee its full performance. (Compl. ¶ 25.) Northrop obtained the completion bond, governed by Peruvian law, from BWS, which issued the bond on behalf of Northrop for the benefit of the MTC. (Compl. ¶¶ 25, 85.) The completion bond, by its terms, is "solidary, unconditional, irrevocable, on demand and without waiver of excussio benefits[4] . . . with respect to faithful compliance with the contract." (Affidavit of Thomas H. Golden, sworn to June 18, 2003 ("Golden Aff."), Ex. D (completion bond); see also Compl. ¶ 27.) Under Peruvian law, the MTC could only exercise the completion bond if Northrop did not perform its obligations under the Contract. (Compl. ¶ 28.) BWS issued the completion bond at the request of the Bank of Nova Scotia, Canada

[4] "Under civil law, excussion is defined as a diligent prosecution of a remedy against a debtor or the exhaustion of a remedy against a principal debtor prior to resorting to his sureties. The literal translation of excussio is discussion." Federal Desposit Ins. Corp. v. Consolidated Mortg. & Finance Corp., 691 F. Supp. 557, 565 (D.P.R. 1988) (citing Black's Law Dictionary 509 (5th ed. 1979)).

based on a telex which stated:

> On our behalf and full responsibility please issue your letter of guarantee in favor of [the MTC] for account of [Northrop]. . . . Your guarantee must be effective from December 30, 1996 and include the following wording in Spanish:
>
> "[Exact wording of the completion bond which BWS issued]."
>
> Our counter guarantee in your favor . . . under which we irrevocably and unconditionally undertake to reimburse you against your first demand by tested telex or swift message for any amount up to [the value of the completion bond] indicating that you have been required by beneficiaries to pay under your letter of guarantee.[5]

(Golden Aff., Ex. E.)

In or about June 2001, JP Morgan took the role of the Bank of Nova Scotia, and the JP Morgan L/C replaced the Bank of Nova Scotia's letter of credit. (See Golden Aff., Ex. F (JP Morgan L/C issuing document which expressly states that it is a condition of the L/C that it shall become operative upon the receipt of BWS' notification of the cancellation of the Bank of Nova Scotia's standby letter of credit).) The value of the L/C, like the counter guarantee originally issued by the Bank of Nova Scotia, mirrors the completion bond. (Compl. ¶ 29.) By its

[5] Northrop asserts in the Complaint that it was at BWS' request that Northrop obtained a counter-guarantee in the form of a letter of credit issued by JP Morgan in New York on June 13, 2001 (the "L/C"). (Compl. ¶¶ 29, 86.) However, it is clear from the documents provided that the original counter guarantee, issued at the same time as the completion bond, was issued by Bank of Nova Scotia, Canada at the request of Northrop for the benefit of BWS in the form of an irrevocable standby letter of credit. (Golden Aff., Ex. E.)

terms, all communications relating to the L/C, including any draw on the L/C, were to be directed to the Chase Manhattan Bank, standby letter of credit department, 4 Chase Metrotech Center, 8th Floor, Brooklyn, New York. (Compl. ¶ 31; see also Golden Aff., Ex. F.) The L/C, addressed to BWS, provides:

> We hereby issue our irrevocable standby letter of credit . . . in your favor for account of [Northrop], P.O. Box 451 Mail Stop A275, Baltimore, Maryland, USA 21203. . . .
>
> This standby letter of credit is issued as our counter guarantee to your letter of guarantee . . . in favor of [the MTC] . . . and replaces Bank of Nova Scotia Letter of Credit . . . presently issued in your favor as a counter guarantee to your letter of guarantee.
>
> The Chase Manhattan Bank hereby irrevocably and unconditionally undertake [sic] to reimburse you against your first demand by authenticated telex or swift message for any amount up to USD11,942,016.80 indicating that you have been required by beneficiaries to pay under your letter of guarantee.

(Golden Aff., Ex. F; see also Compl. ¶ 32.) The L/C is expressly governed by the Uniform Customs and Practice for Documentary Credits (1993) Revision International Chamber of Commerce Publication No. 500 ("UCP").[6] (Golden Aff., Ex. F.)

The Court of Appeals has noted that:

> Generally, letters of credit are designed to substitute for, and therefore support, an obligation to pay. They

[6] Under New York law, Article 5 of the U.C.C. is inapplicable to letters of credit which are subject to the UCP by the "terms [of the letter of credit] or by agreement . . . ." N.Y. U.C.C. § 5-102(4). However, New York courts have held that the defense of "fraud in the transaction" under the U.C.C. still applies to letters of credit subject to the UCP. See KMW Int'l v. Chase Manhattan Bank, N.A., 606 F.2d 10, 16 (2d Cir. 1979).

> involve three separate, but related, contracts - the underlying sales contract between a buyer and a seller; the agreement between an issuing bank and its customer, the buyer, by which the bank agrees to issue a letter of credit; and the letter of credit itself, which is the bank's commitment to pay the beneficiary, the seller, upon compliance with terms and conditions specified in the letter of credit.

All Service Exportacao, Importacao Comercio, S.A. v. Banco Bamerindus Do Brazil, S.A., 921 F.2d 32, 34 (2d Cir. 1990) (citing First Commercial Bank v. Gotham Originals, Inc., 64 N.Y.2d 287, 294 (N.Y. 1985)). Typically, the bank agrees to issue the letter of credit in return for its customer's promise to reimburse it for any payments made under the letter of credit plus a commission. See First Commercial, 64 N.Y.2d at 294. The New York Court of Appeals has further explained that:

> The fundamental principle governing these transactions is the doctrine of independent contracts. It provides that the issuing bank's obligation to honor drafts drawn on a letter of credit by the beneficiary is separate and independent from any obligation of its customer to the beneficiary under the sale of goods contract and separate as well from any obligation of the issuer to its customer under their agreement. Stated another way, this principle stands for "the fundamental proposition . . . that all parties [to a letter of credit transaction] deal in documents rather than with the facts the documents purport to reflect." Thus, the issuer's obligation to pay is fixed upon presentation of the drafts and the documents specified in the letter of credit. It is not required to resolve disputes or questions of fact concerning the underlying transaction.

Id. at 294-95.

While situation here varies slightly from the traditional circumstances, it is typical of international letter

of credit transactions, and the same principles apply. See, e.g., United Technologies Corp. v. Citibank, N.A., 469 F. Supp. 473, 477 (S.D.N.Y. 1979). Here, there are two letters of credit acting under the Contract--the first, the completion bond issued by BWS in favor of the MTC acting as a guarantee of Northrop's performance, and the second, issued by JP Morgan in favor of BWS, reimbursing BWS should BWS be required to pay out the completion bond to the MTC. As discussed, supra, if JP Morgan were required to pay out the L/C to BWS, it would debit from Northrop's account the amount paid to BWS plus any fee agreed to by Northrop and JP Morgan pursuant to which the L/C was issued.[7]

The Dispute between the MTC and Northrop

The subject of the Contract, the radar system, is primarily comprised of three parts: the control center, the radar station, and the simulator. (Compl. ¶ 22.) The Contract provided that the MTC would accept the radar system in two stages. (Compl. ¶ 35.) First, there would be a preliminary

[7] Neither party has provided any documentation regarding the agreement between Northrop and JP Morgan pursuant to which the L/C was issued. However, in response to an Order dated September 9, 2004, Plaintiff submitted an affidavit stating that if JP Morgan were required to pay BWS under the LC, JP Morgan would "immediately debit [the same amount] from Account No. 323-1-58390 held by [Northrop] . . . [which] is located at . . . JPMorgan Chase Bank, 270 Park Avenue, New York, New York 10017." (Affidavit of Lloyd A. Straits, sworn to September 14, 2004 ("Straits Aff.") ¶ 4.) The account address listed for Northrop on the L/C itself--the only address listed for Northrop--is "P.O. Box 451 Mail Stop A275, Baltimore, Maryland, USA 21203." (Golden Aff., Ex. F.)

technical acceptance when the system was installed and operations began, and second, there would be a "final" acceptance beginning thirty days after technical acceptance which would indicate that the system was in full compliance with the Contract's terms. (Compl. ¶ 35.) On November 30, 1998, Northrop and the MTC entered into an agreement that the MTC would grant partial acceptance of the system and specified terms under which the MTC would accept the remainder and issue the final acceptance. (Compl. ¶¶ 36-40.) On July 19, 2002, Northrop wrote to the MTC stating that all of the requirements for acceptance of the system had been met and requesting that the MTC issue the final acceptance under the Contract. (Compl. ¶ 45.) The MTC refused to issue the final acceptance. (Compl. ¶ 46.) By letter dated July 26, 2002, Northrop terminated the Contract due to the MTC's failure to grant final acceptance and sought to initiate dispute resolution procedures required under the Contract. (Compl. ¶ 47.)

BWS' Attempts to Draw Upon the L/C

On July 26, 2002, the MTC wrote to BWS requesting that the term of the completion bond be extended for three months and stated that if it was not extended by BWS within 48 hours, "it must be executed in favor of the [MTC]." (Prescott Aff., Ex. P (letter); see also Compl. ¶ 49.) On July 31, 2002, BWS sent a telex message to JP Morgan stating:

> Unless you extend maturity date of your stand by letter of credit . . . we have to execute your referenced stand by L/C and stating that we have been required by beneficiaries to pay under our letter of guarantee.
>
> Therefore, we are claiming payment . . . to be credited to our account . . . .
>
> Kindly advise extension or confirm payment.

(Prescott Aff., Ex. Q (letter); see also Compl. ¶ 50.) Plaintiff alleges "upon information and belief" that on July 31, 2002, the MTC had not attempted to draw upon the completion bond and BWS had not paid the proceeds of the completion bond to the MTC. (Compl. ¶ 51.) In early August 2002, representatives of Northrop and the MTC began negotiations. (Compl. ¶ 52.) However, on August 12, 2002, Northrop received a letter from the MTC dated August 9, 2002 purporting to terminate the Contract, an act which according to Plaintiff violated terms of the Contract. (Compl. ¶¶ 60-70.) By letter dated August 9, 2002, and apparently received by BWS on August 12, the MTC requested "by full right" execution of the completion bond. (Golden Aff., Ex. G (letter); see also Compl. ¶ 71.) According to Plaintiff, this exercise also violated provisions of the Contract. (Compl. ¶ 72.) On August 20, 2002, BWS contacted JP Morgan by telex stating that "we have been required by beneficiaries to pay under our letter guarantee" and therefore "are claiming payment of your stand by letter of credit." (Compl. ¶ 73; see also Golden Aff., Ex. H (telex).) BWS had not paid the proceeds of the completion bond

to the MTC on or before August 20, 2002. (Compl. ¶ 74.) According to Plaintiff, on August 20, 2002, representatives of the MTC advised Northrop that the MTC had verbally instructed BWS not proceed with the draw down of the completion bond and issued written instructions stating the same. (Compl. ¶ 75.) On August 21, 2002, JP Morgan sent a telex to BWS on behalf of Northrop advising that Northrop and the MTC were in negotiations and requesting that BWS await the outcome of those negotiations before demanding payment of the L/C. (Compl. ¶ 76; see also Golden Aff., Ex. I (telex).) On August 22, 2002, BWS responded by telex stating that "we acted according with the instruction received from beneficiary . . . [and] [t]hat instruction indicated the payment of our guarantee, so that we are sending our message again," claiming payment. (Golden Aff., Ex. J (telex); Compl. ¶ 77.) On August 22, 2002, BWS had not paid the proceeds of the completion bond to the MTC. (Compl. ¶ 78.) By letter dated August 23, 2002, the MTC advised BWS that the MTC and Northrop had initiated conciliatory negotiations in order to seek a resolution of the disputes arising from the Contract. (Compl. ¶ 79.) Also on August 23, representatives of Northrop held a teleconference with representatives of BWS, during which BWS informed Northrop that it was aware that negotiations were ongoing between BWS and the MTC and it was also aware that the MTC wished to suspend payment of the completion bond. (Compl. ¶

80.) As of the date of the Complaint, July 10, 2003, Northrop and the MTC remain in negotiations unable to reach a resolution. (Compl. ¶ 82.) Also as of the date of the Complaint, BWS still has not paid the proceeds of the completion bond to the MTC. (Compl. ¶ 83.)

The Instant Action

Plaintiff alleges three causes of action against BWS: (i) fraudulent exercise of a letter of credit under U.C.C. § 5-109; (ii) common law fraud; and (iii) conversion, as well as a claim for injunctive relief. Each cause of action is premised on the same alleged facts - that BWS fraudulently called upon the L/C by making a material misrepresentation that a condition precedent to payment had been satisfied, facilitating the MTC's fraud upon Northrop, and thereby depriving Northrop of its interest in the L/C funds.

DISCUSSION

I. Jurisdiction

In considering a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), the plaintiff bears the burden of establishing jurisdiction over a defendant. Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 240 (2d Cir. 1999). As no evidentiary hearing or discovery has taken place thus far, the plaintiff may defeat a motion to dismiss "by pleading in good faith, see Fed. R. Civ. P. 11, legally sufficient allegations of

jurisdiction." Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990). A Rule 12(b)(2) motion "assumes the truth of plaintiff's factual allegations for purposes of the motion and challenges their sufficiency." Id. In reviewing a defendant's motion to dismiss, it is proper for the court "to receive and weigh affidavits." Dauman v. Hallmark Card, Inc., No. 96 Civ. 3608, 1998 U.S. Dist. LEXIS 1452 (S.D.N.Y. Feb. 9, 1998); see also ESI, Inc. v. Coastal Corp., 61 F. Supp. 2d 35, 38 n.54 (S.D.N.Y. 1999) ("In considering a Rule 12(b)(2) motion, the court may consider affidavits and documents submitted by the parties without converting the motion into one for summary judgment under Rule 56.") (citations omitted). In doing so, "all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party." A.I. Trade Finance, Inc. v. Petra Bank, 989 F.2d 76, 79-80 (2d Cir. 1993). Ultimately, however, the plaintiff must establish personal jurisdiction by a preponderance of the evidence, either at an evidentiary hearing or at trial. Id. at 79.

Personal jurisdiction in a diversity case is determined first by the law of the state in which the district court sits. Id. at 240. If jurisdiction is found under state law, the court must examine whether exercise of that jurisdiction "comports with

the requisites of due process." Louros v. Cyr, 175 F. Supp. 2d 497, 519 (S.D.N.Y. 2001) (citing Bensusan Restaurant Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997)); see also ESI, 61 F. Supp. 2d at 38 ("In diversity actions, the extent of the court's personal jurisdiction is governed by New York law, as circumscribed by the Due Process Clause of the United States Constitution") (citations omitted). Plaintiff asserts that jurisdiction may be found under CPLR §§ 301, 302(a)(2), and/or 302(a)(3).[8]

A. Jurisdiction under CPLR § 301

A foreign corporation can be sued in New York under CPLR § 301 if it has engaged in a "continuous and systematic" course of doing business such that a finding of its "presence" in the jurisdiction is warranted. N.Y. CPLR § 301; Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 198 (2d Cir. 1990); J.L.B. Equities Inc. v. Ocwen Financial Corp., 131 F. Supp. 2d 544 (S.D.N.Y. 2001). The presence in the state must be "permanent and continuous" not just "merely occasional or casual." Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 U.S.

[8] The parties appear to agree that CPLR § 302(a)(1) does not apply. (See Pl's Opp. Br. at 10 n.4.) In any case, Faravelli v. Bankers Trust, 447 N.Y.S.2d 962 (1st Dep't 1982), aff'd, 59 N.Y.2d 615 (N.Y. 1983), appears to preclude application of § 302(a)(1). See id. at 338 (finding that the transmittal of documents to New York calling for payment on letter of credit and maintenance of correspondent accounts with three or four banks in New York City does not rise to the level of activity contemplated by § 302 as a basis for personal jurisdiction).

Dist. LEXIS 2065 (S.D.N.Y. Feb. 26, 1997) (citations omitted). New York courts will consider the "aggregate of the corporation's activities in the State," Laufer v. Ostrow, 55 N.Y.2d 305 (N.Y. 1982), and the "quality and nature of the corporation's contact with the State" to determine if it would "make it reasonable and just" to require a party to defend an action in New York, id. at 310. "In assessing whether jurisdiction lies against a foreign corporation, both [the Court of Appeals] and the New York courts have focused on a traditional set of indicia: for example, whether the company has an office in the state, whether it has any bank accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there, and whether it has individuals permanently located in the state to promote its interests." Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 98 (2d Cir. 2000); see also Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 58 (2d Cir. 1985) ("The New York courts . . . have focused upon factors including: the existence of an office in New York; the solicitation of business in the state; the presence of bank accounts and other property in the state; and the presence of employees of the foreign defendant in the state.") The standard "is a stringent one because a corporation which is amendable to the Court's general jurisdiction 'may be sued in New York on causes of action wholly unrelated to acts done in New York.'" In re Ski Train

Fire, 230 F. Supp. 2d 376, 382 (S.D.N.Y. 2002) (citations omitted).

1. BWS' New York Contacts

Plaintiff argues that BWS "continuously and systematically does business in New York" which provides a basis for general jurisdiction under § 301.

I note at the outset that Plaintiff has made no allegation that Defendant has solicited business in the state, has a phone listing in the state, owns property in the state (other than one bank account), does public relations work in the state or has any employees in the state. Further, BWS' banking activities are governed by Peruvian law, BWS does not have a license issued by the Superintendency of Banking and Insurance of Peru or by any other authority or power of the Peruvian government allowing it to conduct business in New York, and BWS is not licensed to do business in New York by any New York authority. (See Supplemental Affidavit of Thomas H. Golden, sworn to September 16, 2003, Ex. A (Declaration of Jose Roberto Arróspide Del Busto,[9] sworn to June 16, 2003 ("Del Busto Decl.") at ¶ 14-15).) Thus, most of the traditional indicia of "doing business" are wholly absent. Plaintiff instead points to other

[9] Mr. Del Busto has been the general counsel of BWS since April 2000. (Del Busto Decl. ¶ 2.)

alleged contacts. (See Pl's Opp. Br. at 10; Pl's Sur-Reply Br.[10] at 3.)

First, Plaintiff asserts that BWS' 2001 annual report places stars, representing "Branches," at New York and Miami on a map of the Americas. (Compl. ¶ 10; see also Affidavit of Darrell Prescott, sworn to August 29, 2003 ("Prescott Aff."), Ex. H (selected pages from the annual report).) Although a star is located on the map at New York, the listing of branches and associates in that same report lists only a BWS branch in Miami. (Compare Prescott Aff., Ex. H at p. 56 and id. at pp. 59-60.) Further the Del Busto Declaration states that "BWS does not have offices, employees or agents of any type in New York, other than those with whom it performs correspondent banking activities." (Del Busto Decl. ¶ 16.) Additionally, BWS is not licensed to do business in New York by any New York authority, BWS does not receive deposits or make loans in New York, BWS does not pay taxes in New York, BWS does not own real estate or other property in New York, except for the funds it maintains in correspondent accounts at several New York banks. (Del Busto Decl. ¶¶ 15-18, 20.) Plaintiff does not directly dispute these statements other than to reiterate that BWS purports to have a New York branch

[10] Reference is to Plaintiff's Supplemental Memorandum of Law in Opposition to Defendant's Motion to Dismiss, dated November 14, 2003. Plaintiff submitted this supplemental brief "to afford the Court the benefit of citations to the [Complaint] that related directly to this Court's jurisdiction over BWS." (Pl's Sur-Reply Br. at 4.)

based upon the map contained in the BWS 2001 Annual Report. In the face of contrary evidence disproving Plaintiff's allegation contained not only in the very annual report which Plaintiff has submitted as the basis for the allegation but also the Del Busto Declaration, Plaintiff's allegation is insufficient. This is particularly true in light of the fact that Defendant is not authorized to do business in New York. Although on a motion to dismiss I must resolve all doubts and construe all documents in favor of the plaintiff, Plaintiff has failed to present a prima facie case based upon this allegation. See Stewart v. Vista Point Verlag, No. 99 Civ. 4225, 2000 U.S. Dist. LEXIS 14236, at *8-12 (S.D.N.Y. Sept. 29, 2000), aff'd, 20 Fed. Appx. 91 (2d Cir. 2001). Thus, Plaintiff has failed to allege that Defendant has an office located in the state.

Second, Plaintiff alleges that BWS' interactive website is accessible in New York and allows all clients to bank on-line (Compl. ¶ 11; Prescott Aff., Exs. F, G). However, courts have routinely held that the fact that a foreign corporation has an interactive website accessible to New York, without more, is insufficient to confer jurisdiction under CPLR § 301. Spencer Trask Ventures, Inc. v. Archos S.A., No. 01 Civ. 1169, 2002 U.S. Dist. LEXIS 4396, at *22 (S.D.N.Y. Mar. 18, 2002) (citing Drucker Cornell v. Assicurazioni Generali S.p.A., No. 97 Civ. 2262, 2000 U.S. Dist. LEXIS 2922 (S.D.N.Y. Mar. 16, 2000)); Cornell v.

Assicurazioni Generali, S.p.A., Nos. 97 Civ. 2262, 98 Civ. 9186, 2000 U.S. Dist. LEXIS 2922 (S.D.N.Y. Mar. 16, 2000) (collecting cases and noting that "a firm does not 'do[] business' in New York simply because New York citizens can contact the firm via the worldwide web"); see also Ski Train, 230 F. Supp. 2d at 383 ("Were it otherwise, every entity or individual that ran a highly interactive website from anywhere in the world could be sued for any reason in New York.").

Third, Plaintiff alleges that BWS has offered ADRs that were listed on the NYSE until 2001 and BWS made filings with the U.S. Securities and Exchange Commission until 2001. (Compl. ¶ 12; Prescott Aff., Exs. I, J.) However, such allegations (irrespective of their sufficiency) are irrelevant because as Plaintiff concedes, BWS' ADRs were permanently delisted over one year before this action was commenced in August 2002. See Piraeus Bank, S.A. v. Bank of N.Y. Co., No. 02 Civ. 1285, 2002 U.S. Dist. LEXIS 17751, at *7 (S.D.N.Y. Sept. 19, 2002) ("a corporation's 'presence' under § 301 is determined relative to the time at which the action is commenced"). Similarly, Plaintiff's allegation that in 1997 investors with addresses in the United States held 30% of the total outstanding common shares of BWS (Compl. ¶ 13; Prescott Aff., Ex. K), is also irrelevant because, inter alia, Plaintiff makes no allegation as to what percentage of those investors, if any, is located in New York.

See Ski Train, 230 F. Supp. 2d at 408 (rejecting plaintiff's implied argument that contracts with the United States in general could form the basis of exercising general jurisdiction in New York). Likewise, the allegation that BWS holds approximately $50 million in letters of credit with U.S. banks, with approximately $26 million of those issued by JP Morgan, (Compl. ¶¶ 14-16; Prescott Aff., Ex. C at 75:25-76:2 (transcript of hearing)), fails to specify any percentage of that business (or BWS' overall business) as being in New York.

Fourth, Plaintiff alleges that BWS has correspondent banking relationships with at least six New York banks and maintains an account with the Bank of New York in New York City. (Compl. ¶¶ 15, 16; Prescott Aff., Ex. L.) "Correspondent banking relationships are used to facilitate international financial transactions and money transfers." International Housing, Ltd. v. Rafidain Bank Iraq, 712 F. Supp. 1112, 1118 (S.D.N.Y. 1989), rev'd on other grounds, 893 F.2d 8 (2d Cir.). It is "well settled that the existence of a correspondent banking relationship between a foreign bank and a New York correspondent bank does not subject the foreign bank to jurisdiction here." Celton Man Trade v. UTEX S.A., No. 84 Civ. 8179, 1986 U.S. Dist. LEXIS 24280, at *12 (S.D.N.Y. June 12, 1986) (citing Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1299 (S.D.N.Y. 1980), aff'd, 647 F.2d 320 (2d Cir. 1981), rev'd on

other grounds, 461 U.S. 480 (1983); Amigo Foods Corp. v. Marine Midland Bank, 384 N.Y.S.2d 124 (N.Y. 1976); Taub v. Colonial Coated Textile Corp., 387 N.Y.S.2d 869 (1st Dep't 1976)). Presumably, and Plaintiff does not allege otherwise, BWS' account with the Bank of New York is also a correspondent banking relationship account, which courts have consistently held not to confer personal jurisdiction. See Johnson Electric North America, Inc. v. Bank of Wales, PLC, No. 90 Civ. 6683, 1991 U.S. Dist. LEXIS 1596, at *5-6 (S.D.N.Y. Feb. 8, 1991) ("[C]ourts have consistently found personal jurisdiction to be lacking even where the foreign bank maintained an account with its New York correspondent") (citing Leema Enterprises, Inc. v. Willi, 575 F. Supp. 1533 (S.D.N.Y. 1983); National Am. Corp. v. Federal Republic of Nigeria, 425 F. Supp. 1365, 1369-71 (S.D.N.Y. 1977); Faravelli v. Bankers Trust Co., 447 N.Y.S.2d 962, 965 (1st Dep't 1982), aff'd, 463 N.Y.S.2d 194 (N.Y. 1983)); see also Realuyo v. Villa Abrille, No. 01 Civ. 10158, 2003 U.S. Dist. LEXIS 11529 (S.D.N.Y. July 8, 2003) ("maintaining a single bank account -- when it is not used to house 'substantially all' of a defendant's business funds -- will not support the exercise of general jurisdiction") (citations omitted).

Plaintiff's reliance on Ski Train as a case with comparable facts is inapposite. The court in Ski Train recited the standard proposition that while each alleged contact standing

alone may not be sufficient, it is the "totality of the circumstances" that the court must consider and in doing so found that the contacts viewed in their entirety conferred jurisdiction. However, in that action the defendant, inter alia, offered ADRs presently traded on the NYSE, employed an investor relations representative in New York, used a New York depository bank for its ADRs, used two New York law firms on a regular basis, brought a suit in New York, and maintained a website offering interactive sales features and stating that it is "building . . . presence in all fifty states." See Ski Train, 230 F. Supp. 2d at 383. Here, the only relevant allegations are that BWS maintains an interactive website accessible in New York with no allegations that would demonstrate any particular direction of activity in New York, that BWS has correspondent banking relationships in New York with no allegations that would demonstrate any substantial or consistent activity, and that BWS maintains a New York account with one of those correspondent banks with no allegations that would demonstrate substantial or consistent activity in relationship to this account. These allegations, in sum, simply fall far short of the kinds of allegations presented in Ski Train and required under § 301. Cf. Johnson Electric, 1991 U.S. Dist. LEXIS 1596, at *5-7 (permitting plaintiff to conduct discovery where defendant had a correspondent banking relationship in New York, maintained an

account with that New York bank, and borrowed on a daily basis funds from that account).

2. BWS as the "Mere Department" of Bank Intesa

Plaintiff also asserts that BWS is subject to general jurisdiction because it is "a mere department" of its parent company, Banca Intesa, which is generally present in New York. Courts in New York will pierce the corporate veil between parent and subsidiary for jurisdictional purposes "only when the subsidiary is acting as an agent for the parent, or the parent's control is so complete that the subsidiary is a 'mere department' of the parent." ESI, 61 F. Supp. 2d at 40-42 (citing Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 865 (2d Cir. 1996). In other words, "courts examine whether the control exercised by the corporate parent substantially exceeds the level of control inherent in the parent-subsidiary relationship. Dorfman v. Marriott Int'l Hotels, Inc., No. 99 Civ. 10496, 2002 U.S. Dist. LEXIS 72, at *19 (S.D.N.Y. Jan. 2, 2002). This "require[s] a fact-specific inquiry into the realities of the actual relationship between the parent and subsidiary." Id. (internal quotation marks and citations omitted). The Court of Appeals has specified four factors to aid in a court's determination of whether one entity is the "mere department" of another: (1) common ownership; (2) financial dependency of the subsidiary on the parent; (3) the degree to which the parent interferes in the

selection of the subsidiary's executive personnel and fails to observe corporate formality; and (4) the degree of the parent's control over the subsidiary's marketing and operational policies. Id. (citing Volkswagenwek Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120-22 (2d Cir. 1984). "The first factor, common ownership, is essential to the assertion of jurisdiction over a foreign related corporation, while the other three factors are important. The overall weighing of the various factors thus necessitates a balancing process, and not every factor need weigh entirely in the plaintiffs' favor." Id. (internal quotation marks and citations omitted). A finding of personal jurisdiction under this theory obviously "requires an initial finding that [the parent] itself is doing business in New York." Reers v. Deutsche Bahn AG, 320 F. Supp. 2d 140 (S.D.N.Y. 2004).[11]

The Complaint alleges, on information and belief, that Banca Intesa holds greater than a 95-percent interest in BWS, that the CEO of Banca Intesa and other directors are "intimately involved in the daily operations of BWS," and that BWS has been provided with "numerous cash infusions." (Compl. ¶ 18-19.)

Plaintiff's allegation that Intesa holds more than 95%

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[11] Plaintiff's sole allegation with respect to Banca Intesa's contacts with New York is that it is "a supervised foreign banking institution with a branch located at 1 William Street, New York, New York." (Compl. ¶ 19.) Assuming, without deciding at this stage, that this allegation would be sufficient to subject Banca Intesa to personal jurisdiction under § 301, the four factors will be examined.

interest in BWS is based upon a news article dated April 18, 2002, which states that "[a]s a result of the capital increases," Banca Intesa "controls 95% of [BWS]." (See Precott, Aff. Ex M.; see also Pl's Opp. Br. at 12.) A 95-percent interest is sufficient to establish common ownership. See, e.g., ESI, 61 F. Supp. 2d at 44 (90% ownership sufficient); Tsegaye v. Impol Aluminum Corp., No. 01 Civ. 5943, 2003 U.S. Dist. LEXIS 1397, at *16 (S.D.N.Y. Jan. 30, 2003) (90% ownership "clearly" meets common ownership factor). "It is well established, however, that 'the 'doing business' test does not subject a subsidiary corporation to personal jurisdiction simply because a state has jurisdiction over the parent, even if the parent is the sole shareholder of the subsidiary.'" Schenck v. Walt Disney Co., 742 F. Supp. 838, 842 (S.D.N.Y. 1990) (citing Saraceno v. S.C. Johnson & Son, Inc., 83 F.R.D. 65, 67 (S.D.N.Y. 1979)); see also Dorfman, 2002 U.S. Dist. LEXIS 72, at * 21 ("Where a plaintiff's allegations of corporate control are supported by evidence of common ownership and little else, courts refuse to treat a subsidiary as a 'mere department' for jurisdictional purposes.") (citing cases). Thus, the three "important" factors must be carefully examined.

With respect to the second factor, financial dependence, "plaintiff must show that the [subsidiary] could not be run without the financial backing of [the parent]." Meteoro

Amusement Corp. v. Six Flags, Inc., 267 F. Supp. 2d 263, 271 (N.D.N.Y. 2003). In this regard, courts have looked to whether the "parent provides no- or low-interest loans to the subsidiary or extends credit on terms not otherwise available, guarantees the subsidiary's obligations, or provides and pays for insurance coverage or other necessities on behalf of the subsidiary," ESI, 61 F. Supp. 2d at 53 (citing cases), and whether the "subsidiary retains its own profits or whether they are received by and reported on the financial statements of the parent," id. (citing cases). Plaintiff's allegation that BWS has been provided with "numerous cash infusions" is apparently also based on the same April 2002 news article which states that Banca Intesa "will carry out a US$150mn capital increase at its Peruvian subsidiary [BWS], to cover higher bad loan provisions" and that Banca Intesa "has injected some US$600mn into [BWS] in the last two years." (Prescott Aff., Ex. M; see also Pl's Opp. Br. at 12.) However, because BWS is not a wholly-owned subsidiary of Banca Intesa, these "cash infusions" appear to be further investments in Banca Intesa's ownership interest in BWS rather than being loans or extensions of credit lines. Cf. Beech Aircraft, 751 F.2d at 121 (fact that wholly owned subsidiary received financing from parent considered relevant to finding of financial independence). Indeed, the article that is the basis for this allegation itself states that "[a]s a result of the capital increases," Banca

Intesa now "controls 95% of [BWS]," which lends to the interpretation that these "capital increases" are an investment of Banca Intesa in ownership of BWS rather than loans or lines of credit. (Prescott Aff., Ex. M.) Noticeably absent as well are any allegations by Plaintiff that BWS' financial statements are consolidated in Banca Intesa's[12] or that Banca Intesa guarantees BWS' obligations, pays for other necessities, or receives BWS' profits. Therefore, while Plaintiff's allegation regarding "cash infusions" is not wholly conclusory, without more, it does not sufficiently allege that BWS "cannot run its business without the financial backing of its parent." Ski Train, 230 F. Supp. 2d at 410 (holding that parent funding stock option component of compensation plan for subsidiary managers, without more, insufficient to allege that subsidiary is financially dependant on its parent).

With respect to the third factor, the degree to which the parent corporation interferes with the subsidiary's management and operation, "courts look to, inter alia, whether the parent shares officers with the subsidiary and shifts executives among its subsidiaries, whether the parent pays the executives' salaries, and whether the subsidiary holds separate meetings of its Board of Directors." ESI, 61 F. Supp. 2d at 51 (citing cases). Plaintiff's allegation of "intimate[]

[12] Indeed, as offered by Plaintiff, BWS appears to publish its own Annual Report. (See Prescott Aff., Ex. H.)

involv[ment],” Compl. ¶ 18, is apparently based on a news article dated March 24, 2003 which discusses the March 21 board approval of the hiring of two Intesa executives who “obey the desire of [Corrado] Passera [CEO of Banca Intesa] to take a more direct role in the re-launching of the bank” and “are from his inner circle and will monitor progress.” (Prescott Aff., Ex. N; see also Pl’s Opp. Br. at 12 (“At least two [Banca] Intesa executives were named to BWS’ board in order to create ‘a new strategy for the bank.’”).) However, these management actions took place long after this action was commenced in August 2002 and therefore are irrelevant. See Piraeus Bank, 2002 U.S. Dist. LEXIS 17751, at *7 (“a corporation’s ‘presence’ under § 301 is determined relative to the time at which the action is commenced”). Left without this basis, the allegation of intimate involvement is merely a conclusory restatement of the factor, and, as such, is insufficient. See Ski Train, 230 F. Supp. 2d at 410-11 (“Legal conclusions couched as factual allegations are not fact[ual allegations] and cannot substitute for them.”) (internal quotation marks and citations omitted); see also Jazini v. Nissan Motor Co., 148 F.3d 181, 185 (“As the Supreme Court has pointed out, in a different context but in language equally appicable here, ‘we are not bound to accept as true a legal conclusion couched as a factual allegations.’”) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). Even if they were considered, “[i]t

has been established that overlapping officers and directors are 'intrinsic to the parent-subsidiary relationship,' and that they are not determinative as to whether the subsidiary is a 'mere department' of the parent." J.L.B. Equities, Inc. v. Iocwen Fin. Corp., 131 F. Supp. 2d 544, 550 (S.D.N.Y. 2001) (citations omitted); see also Schenck, 742 F. Supp. at 842 ("Although the two companies may share common directors, this alone is an insufficient basis for establishing personal jurisdiction") (citing Grill v. Walt Disney Co., 683 F. Supp. 66, 69 (S.D.N.Y. 1988); Rotoli v. Domtar, Inc., 637 N.Y.S.2d 894, 895 (4th Dep't 1996) ("[T]he fact that directors and officers of the two entities overlap to an extent is intrinsic to the parent-subsidiary relationship and, by itself not determinative.") (citations omitted). Further, Plaintiff has not made even conclusory allegations that Banca Intesa fails to observe the corporate formalities of BWS. Thus, Plaintiff has failed to allege sufficiently any facts supporting this factor.

Plaintiff makes no direct allegations with respect to the fourth factor, the degree of control over BWS' marketing and operational policies. Insofar as Plaintiff relies on the March 2003 news article, (Prescott Aff., Ex. N), which states that the "executive shuffle is part of a strategy to reposition [BWS]," this too must be disregarded for the reasons discussed infra. Even if this information were considered, "it is perfectly

appropriate for a parent corporation to urge companies it owns to achieve its strategic and financial goals: that is, in fact, the purpose behind owning a portfolio of companies." Ski Train, 230 F. Supp. 2d at 411. Accordingly, Plaintiff fails to allege sufficient facts to establish the fourth factor.

Considered in sum, Plaintiff's allegations, taken as true, fall far short of stating a prima facie case for the requisite degree of control a parent must exercise over a subsidiary in order for the subsidiary to be considered a "mere department" of the parent. I note, as the Court of Appeals did in Jazini v. Nissan Motor Co., 148 F.3d 181, 185 (2d Cir. 1998) that:

> [W]ithout discovery it may be extremely difficult for [a] plaintiff[] . . . to make a prima facie showing of jurisdiction over a foreign corporation that [it] seek[s] to sue in the federal courts in New York. That, however, is the consequence of the problems inherent in attempting to sue a foreign corporation . . . [which] carefully structure[s] its business . . . [as] separate . . . – as it may properly may do. The rules governing establishment of jurisdiction over such a foreign corporation are clear and settled, and it would be inappropriate . . . to deviate from them because of the problems [a] plaintiff[] may have in meeting their somewhat strict standards.

Id. at 186.

Because Plaintiff has failed to establish a prima facie case that BWS is subject to general jurisdiction under § 301 either through its own contacts or as the "mere department" of its parent, I must consider whether BWS is subject to long-arm

personal jurisdiction.

B. Jurisdiction under N.Y. C.P.L.R. § 302(a)(2)

Plaintiff next seeks to ground jurisdiction upon § 302(a)(2) of New York's long-arm statute, which states in relevant part:

> [A] court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . commits a tortious act within the state.

N.Y. C.P.L.R. § 302(a)(2). "The Second Circuit has interpreted § 302(a)(2) to 'require[] that the tortious act itself physically be performed within New York State." Seldon v. Direct Response Technologies, Inc., No. 03 Civ. 5381, 2004 U.S. Dist. LEXIS 5344 (S.D.N.Y. Mar. 31, 2004) (citations omitted); see also Bensusan Restaurant Corp. v. King, 125 F.3d 25, 29 (2d Cir. 1997) (holding that the defendant must commit the tort while physically present in New York State and stating that "[i]n the absence of some indication by the New York Court of Appeals that its decisions in Feathers and Platt . . . no longer represent the law of New York, we believe it would be impolitic for this Court to hold otherwise");[13] Stein v. Annenberg Research Institute, No. 90 Civ.

[13] Plaintiff relies on Banco Nacional Ultramarino, S.A. v. Chan, 169 N.Y.S.2d 1006, 1010 (N.Y. Sup. Ct. 1996), which held that since "[a] defendant with access to computers, fax machines, etc., no longer has to physically enter New York to perform a financial transaction which may be criminal or tortious," physical presence was not required under § 302(a)(2). Although persuasive reasoning, the Court of Appeals decided Bensusan Restaurant after the Banco Nacional case and nevertheless held that physical presence is required. Thus, following Second (continued...)

5224, 1991 U.S. Dist. LEXIS 9964, at *9 (S.D.N.Y. July 19, 1991) ("Federal cases construing § 302(a)(2), including a 1986 decision by the Second Circuit, have uniformly held that jurisdiction under [this] section cannot be predicated on telephone calls made or letters mailed into this State.") (citing Fox v. Boucher, 794 F.2d 34 (2d Cir. 1986)). Here, the Complaint is silent on where the telexes to JP Morgan originated. (See Compl. ¶¶ 50, 73, 77.) BWS asserts that any allegedly fraudulent demand for payment to JP Morgan Chase took place by telex from its offices in Lima, Peru. (See Golden Aff., Ex. G (copy of August 20, 2002 telex from BWS to JP Morgan Chase Bank listing sender location as "LIMA PE").) Therefore, Plaintiff fails to allege that Defendant was physically present in New York to commit the alleged tort, defeating personal jurisdiction under § 302(a)(2).

C. Jurisdiction under N.Y. C.P.L.R. § 302(a)(3)

Plaintiff also alleges that Defendant is subject to personal jurisdiction under § 302(a)(3), which provides in relevant part:

> A court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . 3. commits a tortious act without the state causing injury to person or property within the state, . . . if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or

[13](...continued)
Circuit precedent, I find that actual physical presence is required under § 302(a)(2).

> should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

N.Y. C.P.L.R. § 203.

Defendant first argues that Plaintiff fails to establish jurisdiction under this provision because Plaintiff fails to allege that it has been injured at all. (See Def's Reply Br.[14] at 8.) However, in Sybron Corp. v. Wetzel, 413 N.Y.S.2d 127 (N.Y. 1978), the court held that the "plaintiff [was] . . . entitled to invoke the jurisdictional statute to avert threatened harm" because "[i]f a tort must already have been committed for jurisdiction to be available under the statute, then that section would never be usable by a plaintiff seeking anticipatory injunctive relief." Id. at 129, 131. Therefore, the threat of injury suffices to satisfy the "injury" element of the statute. Nevertheless, plaintiff must demonstrate not just injury, but a sufficient injury caused in New York as well.

In the context of a non-physical pecuniary injury, courts "must generally apply a situs-of-injury test, which asks them to locate the 'original event which caused the injury.'" Bank Brussels Lambert v. Gonzalez, 171 F.3d 779, 791 (2d Cir. 1999) (citing Hermann v. Sharon Hosp., Inc., 522 N.Y.S.2d 581 (2d

[14] Reference is to Reply Memorandum of Law in Further Support of Defendant's Motion to Dismiss the Amended Complaint, dated September 16, 2003.)

Dep't 1987)); see also Whitaker v. American Telecasting, Inc., 261 F.3d 196, 209 (2d Cir. 2001) ("The situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are felt by the plaintiff") (internal quotation marks and citations omitted)). The "original event" is "generally distinguished not only from the initial tort but from the final economic injury and the felt consequences of the tort." Bank Brussels, 171 F.3d at 791 (citations omitted). For example, in Bank Brussels, the plaintiff bank brought suit against a Puerto Rican law firm for failure to disclose certain information in an opinion letter that was a prerequisite to a loan made by the plaintiff to a third party. The Court of Appeals held that the "original event" that caused the harm was the disbursement of funds to the third party. Id. at 792.

Here, each cause of action brought by Northrop is based upon allegations that BWS "made material misrepresentations of fact to JP Morgan by asserting that it had been required to pay the MTC the proceeds of the Completion Bond," (Compl. ¶ 97), "fraudulently called upon the JP Morgan L/C in furtherance of the MTC's fraudulent scheme to obtain the proceeds of the JP Morgan L/C and the Completion Bond," (Compl. ¶ 100), and has deprived Northrop "of its property interest in the funds at issue" by having demanded payment on the JP Morgan L/C, (Compl. ¶ 107). As discussed, supra, BWS allegedly performed these acts by telex

from its office in Peru to JP Morgan's office in New York. According to Plaintiff, if JP Morgan were required to pay BWS under the L/C, JP Morgan "would immediately debit" the same amount from Northrop's account with JP Morgan, located at 270 Park Avenue, New York, New York 10017.

While Plaintiff argues that the "first effects" of the alleged tortious behavior is the resulting debit from Northrop's account, unlike most actions where a plaintiff attempts to invoke this provision in the commercial tort context, Northrop is not a New York corporation--it is a Delaware corporation with its principal place of business in Maryland. Northrop has not even alleged that it does business in New York or that it has any connection to New York other than the bank account with JP Morgan.[15] New York courts have held that an injury cannot be presumed to have occurred in New York merely because a corporation is fortuitously located in New York and ultimately suffers economic harm there. See, e.g., Neewra, Inc. v. Manakh Al Khaleej Gen. Trading & Contr. Co., No. 03 Civ. 2936, 2004 U.S. Dist. LEXIS 13556, at *19-21 (S.D.N.Y. July 12, 2004). In other words, New York courts have required more than that the plaintiff is located in New York or has a New York bank account for there to be an injury in New York. See, e.g., Baptichon v. Nev. State

[15] Indeed, it is unclear at this time that Plaintiff, a non-New York corporation, even would have standing under New York law to bring this action against BWS, a foreign corporation, under the provisions of N.Y. Bus. Corp. § 1314.

Bank, 304 F. Supp. 2d 451, 460 (S.D.N.Y. 2004) ("The occurrence of financial consequences in New York due to the fortuitous location of plaintiff's bank in New York is not a sufficient basis for jurisdiction under § 302(a)(3) where the underlying events took place outside of New York.") (internal quotation marks and citations omitted). The underlying dispute and acts here primarily involve the performance of Northrop under a Peruvian contract with the MTC and the MTC's attempt to draw on the completion bond--none of which in any way has a connection to New York. BWS was brought into this contract between the MTC and Northrop at the request of the Bank of Nova Scotia to act as an intermediary or conduit through which it would pay out the completion bond to the MTC upon proper presentation of documentation and reimburse itself through the Bank of Nova Scotia. The Bank of Nova Scotia's role was then taken over by JP Morgan. Thus, the underlying events have little, if any, connection to New York. Courts have also required that the injury be "direct and not remote or consequential." Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87, 94 (2d Cir. 1975); see also E-Z Bowz, L.L.C. v. Prof'l Research Co., No. 00 Civ. 8670, 2003 U.S. Dist. LEXIS 15256, at *32 (S.D.N.Y. Sept. 5, 2003). Rather than demonstrating any direct injury, insofar as Northrop suffered any "injury" in New York, it was through either the MTC's demand for payment under the completion bond, an

integral part of the Contract entered into by Northrop and the MTC or through BWS' failure to exercise its role properly as contemplated under that Contract. These facts strongly cut against Northrop's argument that the injury somehow occurred in New York because they demonstrate a "purely fortuitous" connection to New York.

Furthermore, "confer[ring] jurisdiction according to where payment should be made" creates "an arbitrary result [that] cannot be countenanced by the courts." Whitaker v. Fresno Telsat, Inc., 87 F. Supp. 2d 227, 233 & n.5 (S.D.N.Y. 1999), aff'd, 261 F.3d 196 (2d Cir. 2001) ("To confer jurisdiction according to where payment should be made would be to base jurisdiction solely upon the fact that plaintiff resides in New York. However, such a holding would directly contravene Mareno v. Rowe, 910 F.2d 1043 (2d Cir. 1990) in which the Second Circuit stated that an injury "does not occur within the state simply because the plaintiff is a resident." 910 F.2d at 1046; "Here, the place of payment and plaintiff's residence coincided. Assume, however, that plaintiff designated a bank in Hawaii as the payee. Would this mean that [defendant] is amenable to suit in Hawaii? Such an arbitrary result cannot be countenanced by the courts."). The same reasoning is applicable in this case. If it were sufficient for the location of Plaintiff's bank account, without any other connections to the forum state, to

suffice as a basis for exercising jurisdiction in fraud claims, Defendant could potentially be subject to suit anywhere in the world merely by Plaintiff's choice of where to physically maintain the bank account from which a bank would debit its account in return for issuing a letter of credit. This would be particularly arbitrary in light of the fact that BWS' role in these circumstances was to act, at the request of the Bank of Nova Scotia, as the intermediary bank which issued the completion bond and merely was to reimburse itself through the Bank of Nova Scotia, as replaced then by JP Morgan.

It is further telling that during the preliminary injunction hearing before the Honorable Karla Moskowitz, the alleged "irreparable harm" testified to by the sole witness for Plaintiff that would be caused by BWS' draw on the L/C was the loss of current and future business in Latin America and around the world resulting from damage to the reputation of Northrop. See Addendum A to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss, Ex. 1 (Transcript of September 20, 2002 Preliminary Injunction Hearing ("Tr.")) at 61-63 (Testimony of James Cox, managing director of project international finance for Northrop). No mention was made of any injury, specific or general, in New York.

Therefore, I find that Plaintiff fails to allege sufficiently that "direct and not remote or consequential" injury

would occur in New York because the location of Plaintiff's bank account in New York is fortuitous under these circumstances. Accordingly, BWS is also not subject to personal jurisdiction under § 302(a)(3).[16]

II. Constitutional Due Process

Even if Plaintiff's allegations were sufficient, exercise of personal jurisdiction would not comport with federal due process.

The federal due process analysis "consist[s] of two components: the "minimum contacts" test and the "reasonableness" inquiry." Bank Brussels Lambert v. Gonzalez ("Bank Brussels II"), 305 F.3d 120, 127 (2d Cir. 2002) (citing Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996).

As the Court of Appeals has explained:

> The first of these tests asks whether the defendant has certain minimum contacts [with the forum] . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Where the claim arises out of, or relates to, the defendant's contacts with the forum--i.e., specific jurisdiction--minimum contacts exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there.

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[16] Because I find an injury sufficient to invoke the statute did not occur in New York, I need not consider whether Plaintiff has alleged sufficient facts demonstrating that BWS "regularly does or solicits business, engages in other persistent courses of conduct, or derives substantial revenue from goods used or consumed or services rendered" in New York or "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate commerce." See N.Y. CPLR § 302(a)(3)(i) and (ii).

Id. (internal quotation marks and citations omitted).

Here, Plaintiff alleges that BWS fraudulently demanded payment under the L/C in a telex communicated to JP Morgan in New York. However, "the routine acceptance and remittal of commercial instruments incidentally bound for the forum state" are insufficient to establish minimum contacts. Froning & Deppe, Inc. v. Continental Illinois Nat'l Bank & Trust Co., 695 F.2d 289, 292 (7th Cir. 1982). Because BWS' demand is alleged to be fraudulent, it may constitute "purposeful availment" of the privileges of conducting business in New York. However, the extent of BWS' "purposeful availment" is, at best, minimal because BWS' only purposeful contacts with New York are its demands for payment under the L/C and the maintenance of correspondent banking relationships in New York and the alleged fraud brought about by those demands was directed at Northrop, a non-resident corporation. See Paccar, 757 F.2d at 1065 ("[Defendant's] only purposeful interjection into California was the allegedly fraudulent demand for payment [from a California bank under a letter of credit established at the request of Plaintiff corporation]. Because that act was aimed at [the Plaintiff corporation, a] nonresident, we conclude that the extent of Defendant's purposeful interjection into California was negligible."). Additionally, "BWS did [not] choose to do

business with [JP Morgan] in New York."[17] (See Del Busto Aff. ¶ 23.) Therefore, the "minimum contacts" is minimally satisfied, and similarly, the resulting foreseeability of being haled into a court in New York is minimal. Accordingly, "reasonableness" must be considered in accordance with the finding that Defendant's "contacts" are minimal.

With respect to "reasonableness", the Court of Appeals has explained:

> The second part of the jurisdictional analysis asks whether the assertion of personal jurisdiction comports with traditional notions of fair play and substantial justice--that is, whether it is reasonable under the circumstances of the particular case. Courts are to consider five factors in evaluating reasonableness: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies. Where a plaintiff makes the threshold showing of minimum contacts required for the first test, a defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. The import of the "reasonableness" inquiry varies inversely with the strength of the "minimum contacts" showing--a strong (or weak) showing by the plaintiff on "minimum contacts" reduces (or increases) the weight given to "reasonableness."

Bank Brussels II, 305 F.3d at 129 (internal quotation marks and citations omitted). It is the "'exceptional situation' where

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[17] Indeed, as demonstrated by the documents, the L/C "originally was issued by the Bank of Nova Scotia in 1996. In 2001, [Northrop] selected JP Morgan Chase to replace the Bank of Nova Scotia as the issuer of the L/C." (Del Busto Aff. ¶ 23.)

exercise of jurisdiction is unreasonable even though minimum contacts are present." Id.

A. Burden on Defendant

There can be little doubt that BWS, a Peruvian bank, would bear a heavy burden if it were required to defend this action in New York. See Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 114 (noting that courts must give "significant weight" to the "unique burdens placed upon one who must defend oneself in a foreign legal system). However, the Court of Appeals has also noted that "'the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago.'" Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 244 (2d Cir. 1999) (quoting Metropolitan Life Ins. Co. v. Roberston Ceco-Corp., 84 F.3d 560, 574 (2d Cir. 1996)). While "this factor alone . . . cannot overcome [Plaintiff's] threshold showing of minimum contacts" it "weighs in [Defendant's] favor." Kernan, 185 F.3d at 244.

B. Interests of New York

Northrop is not a New York corporation, and JP Morgan would not be defrauded by the alleged actions of BWS. Accordingly, New York has little interest in adjudicating this dispute. See Asahi, 480 U.S. at 114 ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished"); Cf. Bank Brussels II,

305 F.3d at 130 ("New York, as the center of the loan transaction and home to the [Plaintiff Bank's] branch which disbursed the funds, had an unquestionable interest in adjudicating the claim"). Additionally, although Plaintiff's claims are brought under N.Y. U.C.C. § 5-109 and New York common law fraud and conversion, Peruvian law will primarily determine the validity of these claims. This is because in order for Plaintiff to prevail on its claims this Court would be required to interpret Peruvian law as it applied to the Contract between Northrop and the MTC to even determine whether the MTC's demand for payment was improper under the Contract (as construed under Peruvian law) and the obligations of BWS to the MTC and Northrop under the completion bond (as construed under Peruvian law).

C. Plaintiff's Interest in Convenient and Effective Relief

New York would surely be a more convenient forum for Northrop than Peru for the same reasons that New York would be an inconvenient forum for BWS. Northrop, however, "voluntarily elected to do business" in Peru by entering into the agreement with the MTC. Paccar, 757 F.2d at 1065. Northrop contends that it cannot obtain relief in Peru due to the current economic crisis in Peru and Peru's backlogged court system. (Pl's Opp. Br. at 20.) Northrop also contends that it is "questionable" whether it would be able to obtain due process in Peru "in light of the treatment received by other U.S. Companies." (Id.)

However, Northrop required almost six months to effect service of the Complaint in Peru pursuant to the Inter-American Convention on Letters Rogatory. Service by the Convention, and the attendant significant delay, will be required for almost all of the third party discovery necessary for this case. (See Declaration of Adrian Simons Pino, dated July 30, 2003.) "Moreover, such risks . . . were fully foreseeable by [Plaintiff] when it entered into its agreement with [the MTC] and effectively assumed these risks." Fluor Daniel Argentina, Inc. v. ANZ Bank, 13 F. Supp. 2d 562, 565 (S.D.N.Y. 1998) (citing KMW Int'l v. Chase Manhattan Bank, N.A., 606 F.2d 10, 15 (2d Cir. 1979).

D. Judicial Efficiency

The key issue in this case is whether BWS' demands constituted a material fraud upon Northrop in connection with the MTC's contract with Northrop. Most of the witnesses and evidence with regard to these issues are located in Peru. (See Del Busto Decl. ¶ 7 ("All BWS personnel with knowledge of the [L/C] and BWS [completion bond] are located in Peru. The MTC is a branch of the Peruvian government and all [MTC] personnel involved in these transactions are located in Peru, as are the records of the [MTC].").) Although some documents and witnesses may be located at JP Morgan in New York or with Northrop, the center of the controversy is Peru. Overall, therefore, New York is a poor forum to resolve this dispute.

E. Substantive Social Policies

"In the present case, this advice calls for a court to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction" by the court. Asahi, 480 U.S. at 115. As the Supreme Court in Asahi further explained:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by the minimal interests on the part of the plaintiff or the forum State.

Id. On the facts alleged here, a "careful inquiry" discloses that the interests of Peru in this controversy far outweigh those of New York.

In sum, the five factors strongly support a finding that the exercise of jurisdiction is unreasonable under these circumstances. Although Peru would be an inconvenient forum for Plaintiff, and some of the documents and witnesses are located in New York, New York is an inconvenient forum for the Defendant and New York has little interest in this dispute. Furthermore, this dispute primarily revolves around a Peruvian contract and actions in Peru.

Finally, I note that it appears that what Northrop

substantively seeks to do through this action is to litigate its contractual dispute with the MTC in this forum--without the MTC present--in order to avoid paying the value of the completion bond either by preventing the MTC from drawing on the completion bond indirectly or by forcing BWS to sustain the loss of the value of the completion bond. However, Northrop entered into the Contract with the MTC and expressly agreed to be governed by Peruvian law and to resolve disputes under the Contract through arbitration in Peru. Northrop admits that it "believe[s] the beneficiary [of the L/C] is the [MTC], because [the completion bond and the L/C] are back-to-back instruments." (Tr. at 16.) Permitting Northrop to put BWS in this position would be to make BWS the ultimate guarantor of Northrop's obligations under the Contract with the MTC--which under the circumstances does not appear to have been anyone's intention. See Banque Paribas v. Hamilton Indus. Int'l, 767 F.2d 380, 385 (7th Cir. 1985).

III. Forum Non Conveniens

Because I find that this Court lacks personal jurisdiction over BWS, I need not consider whether the action alternatively should be dismissed on the basis of forum non conveniens.

IV. Preliminary Injunction Order Vacated

Because this Court lacks personal jurisdiction over the Defendant, the preliminary injunction order dated October 17,

2002, issued by the New York State Supreme Court, must be vacated. However, in order to permit Plaintiff to seek a stay pending appeal, if appropriate, the preliminary injunction will be vacated ten business days from the date hereof.

CONCLUSION

For the above stated reasons, Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) (docket no. 25) is granted, and the preliminary injunction order, dated October 17, 2002, issued by the New York State Supreme Court is hereby vacated ten business days from the date hereof. The Clerk of the Court shall mark this action closed and all pending motions denied as moot.

SO ORDERED

September 29, 2004

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LORETTA A. PRESKA, U.S.D.J.